CONTINUITY OF CONGRESS: AN EXAMINATION OF THE EXISTING QUORUM REQUIREMENT AND THE MASS INCAPACITATION OF MEMBERS

HEARING

BEFORE THE

COMMITTEE ON RULES
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

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WITNESSES

Panel 1

The Honorable Charles W. Johnson, Parliamentarian of the House, United States House of Representatives.

Mr. John Sullivan, Deputy Parliamentarian of the House, United States House of Representatives.

Mr. Tom Duncan, Deputy Parliamentarian of the House, United States House of Representatives.

Panel 2

The Honorable Walter Dellinger, Douglas B. Maggs Professor of Law, Duke University, and Former Acting Solicitor General of the United States.

Panel 3

Dr. John Eisold, M.D., The Attending Physician to Congress & Rear Admiral, Medical Corps, United States Navy.

OVERVIEW

On April 1, 2004, Committee on Rules Chairman David Dreier and Ranking Member Martin Frost announced a bipartisan inquiry into issues associated with the incapacitation of Members. As Chairman Dreier said, "It's possible that a terrorist attack could result in not just deaths, but incapacitation as well. How does this affect our quorum? What is the standard for incapacitation? Can adjustments to deal with these possibilities be made within our own rules?" Ranking Member Frost concurred in the need for a full inquiry when he said, "The issues surrounding the incapacitation of large numbers of Members in the House of Representatives present some of the thorniest questions the Congress must address. This is an issue never contemplated by the Framers, but it is an issue that is very relevant to the House today." The Committee on Rules held an original jurisdiction hearing on these issues on April 29, 2004, at 10:00 a.m. in Room H–313 of the Capitol.

This hearing continues the in-depth review by the Committee on Rules of how to ensure the functioning of our representative government in the event of a catastrophe.

The U.S. Constitution requires that each body of the Congress have a quorum in order to conduct most business. Under House rules and House precedents, a quorum is defined as a majority of Members who are "chosen, sworn, and living." With a full membership of 435 Members in the House, a quorum is 218. Current House rules allow the Speaker of the House to adjust the quorum downward if Members die or resign while in office. However, if a terrorist attack or other form of catastrophe left a large number of Members incapacitated, the number required for a forum could not

be lowered because the Members would still be alive. If a sufficiently large number of Members were incapacitated, the House could be unable to muster a quorum and thus unable to conduct business—at precisely the time when the House will need to be able to act for the Nation.

PURPOSE OF THE HEARING

One of the most important duties of the Congress is to assure continuing representation and Congressional operations for the American people during times of crisis. This hearing marks another important step forward in the U.S. House of Representative's Continuity of Congress efforts.

Since the terrorist attacks of 9/11/2001, the Congress has taken a number of actions to improve the continuity of Government operations, including its own, in the face of any catastrophe. These efforts began soon after 9/11 with a number of Committees of the house and Senate considering both how we can prevent future attacks and how the Congress itself would function if we cannot prevent them. For example, in February 2002, the Judiciary Subcommittee on the Constitution held a hearing on a constitutional amendment approach to deal with the deaths or incapacitations of 25% or more of the body by allowing the Governors of states to appoint Members to serve until special elections could be held.

One of the most important efforts by the House since 9/11 was the foundational work done by the bipartisan Cox-Frost task force during the middle and later part of the second session of the 107th Congress. Led by Republican Policy Committee Chairman Cox and then Democratic Caucus Chairman Frost, the task force laid the groundwork for many of the continuity issues that the House is acting upon during the 108th Congress. It drew from the experience of a number of Members including Committee on Rules Chairman Dreier and Representatives Chabot, Nadler, Ney, Hoyer, Vitter, Baird, Jackson-Lee, and Langevin.

Also during the close of the 107th Congress, the House and Senate enacted landmark legislation establishing a new Department of Homeland Security, the most significant governmental reorganization in over fifty years. Additionally, both chambers began the practice of adopting concurrent adjournment resolutions that would ensure the ability of House and Senate Leadership to convene the Congress in an alternative place or at an alternative time should it be in the public interest.

Since the convening of the 108th Congress, the rules of the House also have been amended to help assure the Continuity of Congress. These changes were based on recommendations made by the Cox-Frost task force and include: (1) requiring the Speaker to submit a list of designees to serve as Speaker pro tempore for the sole purpose of electing a new Speaker in the event of a vacancy in the Office of the Speaker (clause 8(b)(3) of rule I); (2) providing for Members to serve as Speaker pro tempore in the event of the incapacitation of the Speaker (clause 8(b)(3) of rule I); (3) enabling the Speaker to suspend business in the House by declaring an emergency recess when notified of an imminent threat to the safety of the House (clause 12(b) of rule I); (4) allowing for House Leadership to reconvene the House earlier than a previously appointed

time (clause 12(c) of rule I); and (5) authorizing the Speaker to convene the House in an alternative place within the seat of Government (clause 12(d) of rule I).

On April 22, 2004, the House adopted, by a vote of 306–97, a legislative solution to deal with the deaths of large numbers of Members by requiring the States to conduct expedited special elections within 45 days if more than 100 Members are killed. In addition, the Chairman of the House Committee on the Judiciary has committed to consideration of a constitutional approach to these issues in the near future.[1] The particular focus of this hearing is to assess the House's ability to function if many Members are alive but unable to carry out their duties because of serious injury.

The Framers of the Constitution provided the nation with a structural framework for conducting business in the Congress that includes a majority quorum requirement. Under longstanding House precedent, which parallels Senate practice, a quorum has been interpreted as a majority of the Members chosen, sworn, and living. Thus, in a House of 435 Members, a quorum can only be achieved with 218 living Members.

Under another longstanding House precedent, as codified recently in clause 5(c) of rule XX, after a recommendation to that effect by the Cox-Frost task force, the Speaker is empowered to adjust the whole number of the House (and concomitantly its quorum) upon the death or resignation of Members. To illustrate, if a catastrophe occurs and 225 Members of the House were found dead, the whole number of the House would be 210. The Speaker, under the Rules, would announce that fact to the House. The number required for a quorum would be 106. The House could proceed on that basis to conduct business.

However, a catastrophe resulting in the incapacitations, but not deaths, of large numbers of Members presents a different outcome. Since those incapacitated Members are still alive, they remain a part of the quorum calculation. Thus, if a catastrophe occurs and 225 Members are incapacitated, the whole number of the House would remain unchanged, i.e. 435. The number required for quorum would remain 218. But only 210 Members would be available to vote. The House could be unable to act if a roll call vote revealed the absence of enough Members to constitute a quorum for business.

As a threshold matter, since it is the Constitution that sets the majority quorum requirement, it may be relevant to consider whether amending the Constitution is necessary to deal with mass incapacitations. On the other hand, it is also probable that the Constitution was adopted to facilitate the functioning of Government, not to act as a stumbling block, in times of national crisis.

Alexander Hamilton commented on this concept in *The Federalist Papers, #59*, with respect to House elections. He said that "every government ought to contain in itself the means of its own preservation." Additionally, Justice Joseph Story wrote in the *Commentaries on the Constitution of the United States* that the Congress, in representing the entire nation, must be able to exercise

[1] H.J. Res. 83 (sponsored by Congressman Brian Baird) failed on passage by the Yeas and Nays (⅔ required): 63–353–2 (Roll Call Vote No. 219 on June 2, 2004).

certain inherent powers to deal with unforeseen circumstances which could threaten the continuity of its operations and the safety of the nation. *See Commentaries on the Constitution of the United States*, Volume II, § 842 (1970).

In that light, the Committee on Rules majority staff has prepared a discussion draft for a proposed rules change to address the mass incapacitation problem. However, the hearing on April 29th is an oversight hearing, and there will be no formal mark up of the proposed draft. Rather, the discussion draft may facilitate the Committee's discussions on these matters. Additionally, it should be noted that this language was based on an earlier Cox-Frost task-force discussion proposal.

In summary, the discussion draft does not define incapacitation itself; rather, it addresses *the key question* for the House—how will the House be able to act if there are large numbers of Members incapacitated? The discussion draft suggests that the inability of Members to respond to multiple and lengthy calls of the House when coupled with measures designed to confirm to the Speaker that a catastrophe has occurred, may allow for a House to proceed with a provisional quorum. This temporary, provisional quorum, existing only in a time of catastrophe, would consist of a majority of those able to respond to the calls of the House.

Finally, the Committee expects that the hearing will include time for the witnesses to be thoroughly questioned by Committee Members, after the witnesses present overviews on issues such as:

- How the House previously has dealt with the incapacitation of Members;
- Precedents, House Rules, and laws affecting the Continuity of Congress;
- Mass incapacitation and its effects on quorum;
- Constitutional principles and relevant cases affecting the ability of the Congress to ensure that it can act in the face of any catastrophe;
- Role and resources of the Attending Physician to Congress; and
- Plans and procedures for dealing with a catastrophe affecting the Congress.

CONTINUITY OF CONGRESS: AN EXAMINATION OF THE EXISTING QUORUM REQUIREMENT AND THE MASS INCAPACITATION OF MEMBERS

WEDNESDAY, APRIL 29, 2004

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RULES,
Washington, DC.

The committee met, pursuant to call, at 10:05 a.m. in room H–313, The Capitol, Hon. David Dreier (chairman of the committee) presiding.

Present: Representatives Dreier, Linder, Hastings of Washington, Frost, and McGovern.

The CHAIRMAN. The Rules Committee will come to order. We obviously are dealing with some challenges in that there are no votes on the floor. But I am happy to see now, with Mr. McGovern here, that we have four members of the committee here in attendance, and I appreciate the interest on what is obviously an extraordinarily interesting and challenging issue that we have.

I have some comments that I would like to make, and then I am going to ask two of our very able staff members, Mr. George Rogers and Ms. Kristi Walseth to proceed, to join in making a Power Point presentation to us.

And then we are going to be hearing from the Parliamentarian and his colleagues, and then Admiral Eisold, and I guess we have got Mr. Dellinger as well. So this should be interesting. I think that it is going to probably take a little time for us.

So let me begin by saying how much we appreciate all of the time and energy that has gone into this on the part of an awful lot of people. We are very happy to welcome as our first witness, as I said, the Parliamentarian. He has had more than four decades of great public service, and indeed is a great pitcher. He is very well known for his athletic prowess. We are wondering when he is ultimately going to get into the big leagues. But he will continue to strive to do that. But we know that he has made a lot of very important contributions to this institution. We appreciate his service, and the service of so many of his colleagues. And I want to publicly state my appreciation to the Parliamentarian and his staff for all of the great, great work that they have done to help me get through some very challenging times on the House floor, whether I have been presiding or dealing with legislation.

Let me say on the 1st of April, Mr. Frost joined me in announcing this hearing. Yesterday the two of us sent a letter to the mem-

bers of the committee, a letter describing what we will be covering today. And I hope that we can continue to approach these very important constitutional issues in a bipartisan way, which is very important.

You know, just about 30 minutes ago, the President of the United States and the Vice President began their meeting with members of the commission focused on the tragedies of September 11th of 2001.

And we look at that catastrophe. I have gotten word this morning that there is a terrorist threat in my hometown of Los Angeles. And so we spend a lot of time realizing how September 11th has changed our lives. It really forced us here in this House to focus on the importance of assuring the American people that their government will function in times of crisis.

This discussion started off on the right foot in the 107th Congress with the work that Mr. Frost and my California colleague, Mr. Cox, co-led. And I congratulate them for their fine work. They stayed outside of the public limelight and held private discussions on issues that were very difficult, like member mortality and what steps should be taken.

I still believe that a bipartisan private work group approach is the best way for Members to freely and openly discuss their own possible demise and how we should plan for the continuity of Congress. There would be plenty of time for public discussion after the Members have thought this through together, which is what I think is very, very important for us to do.

Now, from my perspective, continuity of Congress questions fall into three major categories:

First, vacancies: how to best replace Members in the event of mass casualties resulting in death.

Number two, mass incapacitation: how to deal with mass casualties that result in the incapacitation but not the death of large numbers of Members.

And, three, administrative questions: official papers, documents, and what changes in our bicameral protocols are necessary for Congress to function in time of crisis.

I want to applaud the leadership of Speaker Hastert on continuity. And I share his great love for this institution. He has been able to accomplish much already by fine-tuning the Rules of the House to respond to a crisis.

At this point, I would like to enter into the record the statement outlining all of those changes that the Speaker has made. Without objection, it w]ill appear in the record.

[The information follows:]

- Authority to effect a joint-leadership recall from a period of adjournment to an alternate place (in concurrent resolutions of adjournment).
- Authority to effect a joint-leadership recall from a period of adjournment through designees (in concurrent resolutions of adjournment).
- Anticipatory consent with the Senate to assemble in an alternate place (in a putatively biennial concurrent resolution on the opening day of a Congress).
- Requirement that the Speaker submit to the Clerk a list of Members in the order in which shall act as Speaker pro tempore in the case of a vacancy in the Office of Speaker (including physical inability of the Speaker to discharge his duties) until the election of a Speaker or a Speaker pro tempore, exercising such

authorities of the Speaker as be necessary and appropriate to that end (clause 8 of rule I).

- Authority for the Speaker to suspend pending business of the House by declaring an emergency recess subject to the call of the Chair when notified of an imminent threat to the safety of the House (clause 12(b) of rule I).
- Authority for the Speaker, during any recess or adjournment of not more than three days, in consultation with the Minority Leader, to postpone the time for reconvening or to reconvene before the time previously appointed solely to declare the House in recess, in each case within the constitutional three-day limit (clause 12(c) of rule I).
- Authority for the Speaker to convene the House in an alternate place within the seat of government (clause 12(d) of rule I).
- Codification of the long-standing practice that the death, resignation, expulsion, disqualification, or removal of a Member results in an adjustment of the whole number of the House, which the Speaker shall announce to the House and which shall not be subject to appeal (clause 5 of rule XX).
- Establishment of a Select Committee on Homeland Security with oversight and legislative jurisdiction over matters relating to the Homeland Security Act of 2002 identified by the speaker and the responsibility to make recommendations concerning future legislative jurisdiction over homeland security matters (sec. 4, H. Res. 5, 108th Cong.).
- Establishment of an Appropriations Subcommittee on Homeland Security.

The CHAIRMAN. In addition, there are a number of things that we should consider for the continuity of Congress. The entire House voted to support the idea of sitting down with our colleagues in the Senate in a similar bipartisan manner to try to see where we could agree on these issues of continuity. Unfortunately, the Senate declined this approach to work out our differences, which I believe is very unfortunate.

There have been a number of issues during this Congress that could have benefited from that kind of bicameral dialogue that we very much wanted to have, and frankly are still pursuing if we possibly can.

One example. I wrote to the Senate leadership in November of 2003, because the language of the Senate adjournment resolution did not include the language regarding the call-back power of designees and the ability of leadership to reconvene in an alternative place. And we know our House versions consistently have included this language, and we hope very much that it could become a boilerplate for both houses of Congress.

Because of the importance of engaging the Members on these very crucial issues for the institution, I have asked our colleague who is here, Mr. Doc Hastings, who managed the rule last week on the House floor on the continuity issue—he has shown a great deal of leadership on these questions that we have had—I have asked him to work informally with the Members to find out their views on these very, very important matters that we have.

First, let me comment on the issue of vacancies. Regarding that category I note, and I just mentioned last week, the House adopted the Continuity in Representation Act. And this was legislation that I was pleased to join the Chairman of the Judiciary Committee in offering. It passed, I am happy to say, with a very strong bipartisan vote, which has been our goal all along, of 306 to 97.

This legislation, as everyone knows, requires the States to conduct expedited special elections to fill vacancies created by the deaths of large numbers of Members. I also would note that some

Members prefer a constitutional approach for dealing with vacancies. It is unclear whether even a simple majority of the House, let alone the two-thirds, would support a constitutional amendment.

Nonetheless, I am very pleased that we have an agreement with the Judiciary Committee chairman to proceed with the consideration of the constitutional approach, which I know a number of Members have encouraged, on the issue of mass incapacitation.

The second category on the continuity, which we are really focusing on in this hearing today, and that is, as I say, the topic that we have, it is a much more difficult issue, and we are only beginning to fully examine and vet it with the Members of the House. Let me briefly illustrate the particular problem that mass incapacitation could present.

The framers of the Constitution provided the Nation with a structural framework for conducting business in the Congress that includes a majority quorum requirement. And under longstanding House precedent, which parallels the Senate practice, a quorum has been interpreted as a majority of the Members chosen, sworn, and living. Thus, in the House, with 435 Members, a quorum can only be achieved with 218 Members, living Members.

Under another longstanding House precedent, which we codified in clause 5(c) of rule XX, the Speaker is empowered to adjust the whole number of the House, and thus its quorum, upon the death or resignation of Members. Thus, if a catastrophe occurs and 225 Members of the House were found dead, the whole number of the House would be reduced to 210. The Speaker under the rules would announce that fact to the House. The number required for quorum would then, of course, be 106. The House could proceed on that basis to conduct its business.

Now, a catastrophe resulting in the mass incapacitations but not deaths of a large number of Members obviously presents a very, very different outcome. Since those incapacitated Members are still alive, they remain a part of the quorum calculation. Thus, if a catastrophe occurs and 225 Members are incapacitated, the whole number of the House would remain unchanged, 435 Members. Now, the number required for quorum would, of course, remain at 218, but only 210 Members would be eligible to vote. The House would be unable to act if a roll call vote required the presence of Members to constitute a quorum for business.

The Constitution sets the majority quorum requirement, and some believe that this, too, is an important issue that requires a constitutional approach. It is no secret that I am very hesitant to touch the Constitution on any issue at all. That is why I like to point to Alexander Hamilton's quote. Last week I spent my time quoting Madison, who was to me the father of the Constitution and a lead author of *The Federalist Papers*. But I am going to point to a couple of Hamilton quotes. In *Federalist 23* he said: "It is impossible to foresee or define the extent and variety of national exigencies and the corresponding extent and variety of the means which may be necessary to satisfy them. Circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can be wisely imposed. I believe that the Constitution was adopted to facilitate the functioning of representative government, not to be a stumbling block, particularly in times of national crisis."

Supreme Court Justice Joseph Story said, in the *Commentaries on the Constitution of the United States*, the Congress, in representing the entire Nation, must be able to exercise certain inherent powers to deal with unforeseen circumstances which could threaten the continuity of its operations and the safety of the Nation.

Now, the framers have agreed, we obviously agree with Justice Story.

And Alexander Hamilton went on, in *The Federalist Papers 59*, to say: "Every government ought to contain in itself the means of its own preservation."

Additionally, I would note that even if we ultimately have to pursue a constitutional amendment approach, we would need a rule to implement the amendment. So this is, like the majority staff has suggested, a way for us to address the mass incapacitation problem by amending the House rules. It is a discussion draft, and draws on work done by the Cox-Frost task force.

In summary, the draft does not define "incapacity" itself; rather, it addresses the question for the House: How will the House be able to act if there are large numbers of Members incapacitated? The draft suggests that the inability of Members to respond to multiple and lengthy calls of the House, when coupled with measures designed to confirm to the Speaker that a catastrophe has occurred, may allow for the House to proceed with a reduced quorum.

This temporary provisional quorum, existing only in a time of catastrophe, would constitute a majority of those able to respond to the calls of the House.

Let my say that I do look forward to the testimony that is going to be offered by our witnesses. And I want to recognize our colleague who is the ranking minority member of the House Committee on Administration, Mr. Larson.

I want to compliment him on not only the fact that he is here today, but on the tremendous effort that he has put into this, and the way that he handled the debate last week that we had on the House floor. He has been a real pleasure to work with, and he joins me, and I know the rest of the members of this committee and many Members of the House, to be very dedicated to this institution.

Finally, I would like to turn briefly to the third category of the continuity of Congress, and that is administrative questions. I believe that we need to ensure that in a national emergency we can perform the basic requirements of our bicameral system. The Speaker has taken the leadership on the emergency and safety aspects of these questions.

I think we need to also assess whether our congressional protocols and structure are there so that both houses of Congress can continue to legislate and fulfill their respective constitutional duties in times of national crisis.

So with that, before we hear from the Parliamentarian and his colleagues, I would like to call on George and Kristi now, to give us a brief presentation that might allow us to address some of the questions that we have.

PREPARED STATEMENT OF CONGRESSMAN DAVID DREIER, CHAIRMAN

On April 1st, 2004, Ranking Member Martin Frost joined me in announcing this hearing. Yesterday we sent all of the Members of the Committee a letter describing what we will be covering today. I am hopeful that we can continue to approach these important institutional issues with this kind of comity.

The unfortunate catastrophe on September 11th forced the House to focus on the importance of ensuring the American people that their government will function in a time of crisis. This discussion started off on the right foot in the 107th Congress with the work of the bipartisan task force led by Representatives Chris Cox and Martin Frost.

They stayed outside of the public limelight to privately discuss issues like Member mortality and what steps should be taken. I still believe that a bipartisan, private working group approach is the best way for Members to freely and openly discuss their own possible demise and how we should plan for the Continuity of Congress. There would be plenty of time for public discussion after the Members have thought this through together.

From my perspective, Continuity of Congress questions fall into three major categories:

(1) vacancies—how to best replace Members in the event of mass casualties resulting in death;

(2) mass incapacitation—how to deal with mass casualties that result in the incapacitation, but not death, of large numbers of Members; and

(3) administrative questions—official papers, documents, and what changes in our bicameral protocols are necessary for Congress to function in crisis.

I applaud the Speaker's leadership on Continuity and share his love for this great institution. He has been able to accomplish much already by fine-tuning the rules of the House to respond to a crisis. At this point, I would ask unanimous consent to enter into the record a statement on the Speaker's efforts on Continuity.

In addition, there are a number of things that we should consider for the Continuity of Congress. The entire House voted to support the idea of sitting down with our colleagues in the Senate in a similar bipartisan manner to try to see where we could agree on continuity issues.

The Senate declined this approach to working out our differences, which is unfortunate as there have been a number of issues during this Congress that could have benefited from that kind of dialogue.

For example, I wrote the Senate leadership in November 2003 because the language of Senate adjournment resolutions did not include language regarding the "call back" power of designees and the ability of leadership to reconvene in an alternative place. Our House versions consistently have included this language, and we hoped it would become boilerplate.

Because of the importance of engaging the Members on these crucial issues for the institution, I have asked Congressman Doc Hastings, who has shown real leadership on Continuity issues, to work informally with the Members to find out their views on these important matters.

VACANCIES

Regarding the first category of the Continuity of Congress, vacancies, I note that last week the House adopted the Continuity in Representation Act. I authored this measure with the Chairman of the Judiciary Committee, and it passed with a bipartisan vote of 306–97. This legislation requires the states to conduct expedited special elections to fill vacancies created by the deaths of large numbers of Members.

I also note that some Members prefer a constitutional approach for dealing with vacancies. It is unclear whether even a simple majority of the House, let alone the necessary two-thirds, would support a constitutional amendment. Nonetheless, I am pleased that the Judiciary Committee Chairman has agreed to consider a constitutional approach to these issues in the near future.[2]

[2] *Id.*

MASS INCAPACITATION

Turning to the second category of the Continuity of Congress—and the subject of today's hearing—mass incapacitation, this is a very difficult issue, and we are only just beginning to fully examine and vet it with the general Membership.

Let me briefly illustrate the particular problem that mass incapacitations could present. The Framers of the Constitution provided the nation with a structural framework for conducting business in the Congress that includes a majority quorum requirement.

Under longstanding House precedent, which parallels Senate practice, a quorum has been interpreted as a majority of the Members "chosen, sworn, and living." Thus, in a House of 435 Members, a quorum can only be achieved with 218 living Members.

Under another longstanding House precedent (codified recently in Clause 5(c) of rule XX), the Speaker is empowered to adjust the whole number of the House (and thus its quorum) upon the death or resignation of Members.

Thus, if a catastrophe occurs and 225 Members of the House were found dead, the whole number of the House would be 210. The Speaker, under the Rules, would announce that fact to the House. The number required for a quorum would be 106. The House could proceed on that basis to conduct business.

A catastrophe resulting in the incapacitations, but not deaths, of large numbers of Members could present a very different outcome. Since those incapacitated Members are still alive, they remain a part of the quorum calculation.

Thus, if a catastrophe occurs and 225 Members are incapacitated, the whole number of the House would remain unchanged—435 Members. The number required for quorum would remain 218. But only 210 Members would be available to vote. The House could be unable to act if a roll call vote revealed the absence of enough Members to constitute a quorum for business.

The Constitution sets the majority quorum requirement, and some believe that this too is an issue requiring a constitutional approach. However, I think Alexander Hamilton had it right when he said: "It is impossible to foresee or define the extent and variety of national exigencies, and the corresponding extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason, no constitutional shackles can wisely be imposed . . . ."—Alexander Hamilton, *The Federalist Papers*, No. 23.

I believe that the Constitution was adopted to facilitate the functioning of representative Government—not to be a stumbling block, particularly in times of national crisis.

As Supreme Court Justice Joseph Story said in the *Commentaries on the Constitution of the United States*, the Congress, in representing the entire nation, must be able to exercise certain inherent powers to deal with unforeseen circumstances which could threaten the continuity of its operations and the safety of the nation. *See Commentaries on the Constitution of the United States*, Volume II, § 842 (1970).

The Framers of the Constitution would have agreed with Justice Story, as do I. In the words of Alexander Hamilton, with respect to House elections: "Every government ought to contain in itself the means of its own preservation."—Alexander Hamilton, *The Federalist Papers* No. 59.

Additionally, I would note that even if we ultimately have to pursue a Constitutional amendment approach, we would need a rule to implement such an amendment and an approach to adopt now, not years from now, while we waited upon ratification of the requisite number of states.

In this light, the majority staff of the Committee on Rules has suggested a way for us to address the Mass Incapacitation problem by amending the House rules.

It is a discussion draft and draws on work done by the Cox-Frost task force. In summary, the draft does not define incapacitation itself; rather, it addresses the key question for the House—how will the House be able to act if there are large numbers of Members incapacitated?

The draft suggests that the inability of Members to respond to multiple and lengthy calls of the House, when coupled with measures designed to confirm to the Speaker that a catastrophe has occurred, may allow for the House to proceed with a reduced quorum. This temporary, "provisional", quorum, existing only in a time

of catastrophe, would consist of a majority of those able to respond to the calls of the House.

I look forward to hearing both from our witnesses and from our Members about this approach.

ADMINISTRATIVE QUESTIONS

Finally, I'd like to turn briefly to the third category of the Continuity of Congress, "administrative questions." I believe that we need to ensure that in a national emergency, we can perform the basic requirements of our bicameral system. The Speaker has taken leadership on the emergency and safety aspects of these questions. I think we need to also assess whether our Congressional protocols are structured so that both Houses of Congress can continue to legislate—and to fulfill their respective constitutional duties in times of national crisis.

Mr. FROST. Mr. Chairman, let me—you had asked me if I wanted to make a formal opening statement, which I don't have a formal prepared opening statement, but I do want to make a couple of points.

The CHAIRMAN. Please do.

Mr. FROST. And this will be developed in the course of the testimony, and it has been highlighted by your opening statement. The question is determining the quorum under the standard of sworn and living. And the question in terms of sworn and living, of course, evolves down to the issue of incapacity.

One of our witnesses in his prepared statement, Walter Dellinger from Duke, has urged this body, this committee, that any resolution of this matter as to determining the number of sworn and living be done on a bipartisan basis. I think it is very important that that be incorporated in any rule that ultimately is reported out.

The discussion draft is interesting. It does not contemplate—if I am reading it correctly, it does not contemplate the type of bipartisan participation that Professor Dellinger is recommending. And the only reason this is of consequence is the experience that occurred in my home State last year. This was not a natural catastrophe, but it did go to determining the existence of a quorum. I know the gentleman is familiar with what happened. This was a political issue involving congressional redirecting, and there was not a constitutional quorum present. And, in fact, the house could not—the State house could not operate because there was not a constitutional quorum.

There is a fine line between determining what is a national catastrophe and what might be the exercise of the majority's will to reduce the number of a quorum. And the discussion draft speaks in terms of a catastrophe. It is unclear exactly how this would be implemented, because it is a discussion draft without particulars.

The CHAIRMAN. Well, that is why it is a discussion draft.

Mr. FROST. I understand. We would be—we would need, if we approved a rule of this nature, to be very clear as to what constituted a catastrophic situation. And I would urge that any rule many incorporate the bipartisan participation that Professor Dellinger is recommending in his prepared statement.

The CHAIRMAN. Well, thank you very much. We look forward to his testimony. And obviously this is the first time that we have had a hearing on this issue. And I do appreciate the perspective that the gentleman offers.

Anyone else wish to offer any opening statements? Okay. Then why don't we ask George and Kristi to proceed with the Power Point presentation for us.

Mr. ROGERS. I will be very brief, because the Chairman's statement went over these issues very clearly. We all know that terrorists can attack the Capitol at any time, and the American people expect that we will have plans in place to deal with that.

One of the questions we are here to talk about is the quorum in the House. And under the Constitution, Article 1, section 5, a quorum is a majority of Members. So for a fully constituted House, that is 218 out of 435.

As the Chairman mentioned, the House precedent is those Members chosen, sworn, and living. The problem, as he stated, was if Members are alive, they are still living, so they are still in the quorum. This yields what I am calling the "quorum trap." And some people don't like that term, but if you have 100 Members incapacitated, for example, a quorum remains a majority of the full House, 218, because they are still living. So you have 335 Members who can vote, and business would still continue. If there are 175 incapacitated, the quorum is still 218, you also have 260 Members able to vote, business continues.

As soon as you have a majority of Members incapacitated, that is where you start to build problems, because the quorum will remain 218 but you, by definition, won't have 218 who will be able to vote.

Now, if we are proceeding in the context of post-tragedy, like we did on 9/11, where there is a lot of agreement on both sides, we won't have a lot of roll call votes, that is one thing. But it is the opinion of the majority staff that you would be thinking about all of the "what ifs" for the situation, and you could get into a roll call vote and not be able to attain a quorum.

So in the absence of a quorum, the Constitution is specific for two things to be done. We can adjourn from day to day, and we can compel the attendance of the Members. The House rules compelling the Members to be in attendance is done by motion of 15 or more Members.

As the Chairman mentioned, if a number of Members die, the current House rules adjust for that through the Speaker. So if people die, the whole number drops, and then the majority of that whole number also drops, so the quorum drops automatically when Members die. But if they are incapacitated, the quorum remains the same.

This brings us to the question of defining incapacitation, something I am hopeful we will hear a lot from our witnesses today. I think that we will find that they will say it is fact-specific; when we talk about what would happen if we have 218 or more Members incapacitated, really we are talking about 218 fact-specific situations. And one key question is, Who would decide that—the attending physician, the Member, him or herself, the Member's family, or the House?

So the majority staff came up with the proposed solution in the folders to the Members and which was distributed to the staff. And it is an immediate solution.

As the Chairman mentioned, if we went into a constitutional amendment approach, that would take a period of time. We could still have a catastrophic situation before we could get it ratified by the required three-quarters of the States. But it also has a number of questions that we hope are answered by witnesses today.

Is it constitutionally infirm to proceed on this basis? Would it bring our laws that we passed into question? Who would be able to challenge? Who would have standing to challenge our actions? And how much might the courts rule?

Mr. FROST. Mr. Chairman, could I make one point, because I think it is very important to point out the distinction here. This does not—this whole discussion does not deal with what would happen if a large number of Members were killed. Because if a large number of Members were killed, the quorum would, in fact, be reduced.

The CHAIRMAN. Right.

Mr. FROST. If the number of Members surviving, sworn, and living would be potentially very small, this is a point that I have made on the floor of the House, that——

The CHAIRMAN. I covered that in my statement as well.

Mr. FROST. If 430 Members were killed, and you had 5 Members remaining, if I understand the Constitution and the precedents, then 3 of those 5 remaining Members would constitute a quorum, and the House could in fact conduct business.

The only issue would be, whether the public would respect the action taken by that small a number. And that really goes to the question of whether this is necessary for a constitutional amendment, so that you have a large House reconstituted over a short period of time. That is not what we are talking about.

What we are talking about today is the grey area where a number of Members are incapacitated but not dead, and so that you still have this constitutional quorum of a majority of the total House and how you deal with that,

The CHAIRMAN. Right.

Mr. FROST. The issue of whether it is necessary to have a constitutional amendment, in my mind, deals with the issue of when you have a large number of Members killed, not when you have a significant number incapacitated.

The CHAIRMAN. I know. We had that discussion at length, I know both here and on the House floor. You are correct in your assessment.

Do you want to add anything, Kristi?

Ms. WALSETH. No. You have all covered it very well.

Mr. FROST. Mr. Chairman, again I would ask the witnesses—and I don't know if, as we, each witness has had a chance to review the discussion draft. I would hope that they have, because I will want to be able to ask the witnesses questions about the discussion draft, because I have serious reservations about the discussion draft.

The CHAIRMAN. Well, that is what a discussion draft is all about.

Let me, as I have already welcomed several times, and say that it is a great pleasure for us to have the Parliamentarian here. It is very rare to have a hearing at which both the Parliamentarian as well as the Attending Physician participate. That underscores

the gravity of this issue. We know it is one that is a serious one that needs to be addressed. That is why we appreciate all of the time and effort and thought that has gone into this testimony from all who are on this panel.

So, Charlie, let me welcome you. And please proceed as you wish. If you do have any prepared remarks, they will appear in the record in their entirety.

STATEMENT OF HON. CHARLES W. JOHNSON, PARLIAMENTARIAN OF THE HOUSE, U.S. HOUSE OF REPRESENTATIVES

Mr. JOHNSON. Yes, Mr. Chairman. I appreciate you putting my prepared remarks into the record.

Thank you for the opportunity, Mr. Chairman, members of the Rules Committee. It is an honor. What I thought I would do is allow my colleagues, Deputy Parliamentarians John Sullivan and Tom Duncan, to contribute as well, and to start from the Cox-Frost task force considerations to summarize where we were in those deliberations.

The Parliamentarians all participated in all of them. Mr. Frost obviously was in all of them. The participation was excellent on all sides. It was truly a bipartisan task force, but it realized its limits. Part of the reason it realized its limits was a result of some of the questions that were asked during the task force. Mr. Frost asked many penetrating questions.

Those questions went to the precedents of the House as they now exist and to our interpretation, including the Speaker Cannon ruling in 1906 which remains the precedent today. It is not a black letter rule, but it has as much force and effect, absent a black letter rule, as the Senate rule which is a black letter rule. Both houses properly at this point have the same rule, the same interpretation; namely, that a quorum is a majority of those living and sworn.

It wasn't always that way. Prior to the Cannon ruling, it could be a majority of those living. And so when Speaker Joe Cannon in 1906 made the ruling, which was not appealed, he cited the length to which the Senate had gone since the Civil War, where there were elected Senators as there were elected House Members who were not sworn, because of the secession of the Southern States.

Since 1906, the two houses have been consistent in this respect, to my knowledge, since then and since this last year when The House invited the Senate to join in the joint committee. The Senate has not specifically addressed this question of massive incapacitation, although it does affect the Senate as it does the House.

The Senate doesn't have the luxury of filling seats, where Senators are incapacitated, through Governors' appointments. That only comes when the seats are vacant. So in this respect, the Senate and the House are in the same boat, and hopefully whether there is a joint committee or other dialogue, the two houses will approach this in a thoughtful and perhaps consistent way.

In the Cox-Frost meeting, I was asked by Mr. Cox, "All right, what would happen if the Speaker were called upon to rule, there being no black letter rule?" I said, "The Speaker would abide by the Joe Cannon precedent of 1906 because that precedent has the force and effect, as it should, of an adopted rule of the House."

And the question then was, "Well, what if there was an appeal from that ruling? What would the quorum requirement be if Speaker Cannon or any other Speaker chose to depart from precedent without a rule of the House, without a Rules Committee coming in, analyzing it, and reporting to the House; but rather, the Speaker unilaterally , based on the exigencies of the disaster, of the catastrophe, thought that the national interests required him to make a ruling that a lesser quorum could suffice, even though there were incapacitations and not deaths?"

And I said, "Well, the Speaker, if he did make such a ruling, it would not be on my advice; and if he were to make it, it would be appealable, and the vote on the appeal would require a quorum of the House as established by precedent up to that point, those living and sworn. So the Speaker's ruling wouldn't be final until the House, with a quorum present, assuming an appeal, had determined the validity of the Speaker's ruling."

So the task force, I think Mr. Frost will agree, stopped at that point and said, "well, we know that. What we want to do in the time we have is to recommend bipartisan rules changes to the House, to the extent that the House can and has time to look at what we will all agree on is not only bipartisan, but where we have had enough time to analyze the issues."

It was clear at that point, in July of 2002, that there was perhaps not time to immediately analyze this question of mass incapacitation; but we were asked to cooperate with staff, bipartisanly to look at rules change language, while also looking at the question of the constitutionality of the effort, if there were an effort made by the House to adopt a rule without a constitutional amendment sanctioning that step by the House.

All of those questions, as posed on the graphic, are legitimate questions. Is a rules change of this sort constitutionally infirm? I don't have a clear answer.

The Constitution carves out, as my submitted statement suggests, two areas—and the graphic showed that—where the House can, with a smaller than majority, do certain things. One is adjourn from day to day. Two is to compel the attendance of absentees. That has been built into the Rules of the House since the first Congress.

Can the House adopt this kind of incapacitation rule constitutionally? Some would argue that compelling public interest and the Nation's very existence, coupled with the conferral of Article 1 authority on the Congress to wage war and to provide for the common defense, would be so overwhelming as to suggest that consistent with that conferral of authority in Article 1, the Congress, the House, could and should, without necessarily having a specific constitutional permission, proceed to consider and adopt a rule with respect to incapacity.

That is part of what we want to raise as the issue. We don't have the definitive answer. The subsequent questions that are raised, are again all legitimate. All Members take an oath to support and defend the Constitution of the United States against all enemies, foreign and domestic. Does it put a responsibility on the Members of the Rules Committee to seriously consider and agree that, yes, the House can, because of this overwhelming national interest, pro-

ceed? Can the House, without a direct constitutional amendment, adopt such a rule?

If the House were to wait and adopt such a rule during a catastrophic circumstance, clearly then its effort and its resulting work product would be questioned. I am not saying that the legislation enacted under a rule adopted during a dispassionate period of time such as the present would necessarily be less subject to collateral challenge.

Clearly the Frost-Cox task force realized that this discussion was going to happen. And it is right for it to happen now, because there is not yet a catastrophic circumstance.

And it is right to ask and it is right to bring in constitutional scholars to answer the third, fourth, and fifth questions that were raised on the graphic; namely, who could challenge the rule itself or a law enacted thereunder, who—other than the House, who could challenge? When could a challenge be brought? And what would the courts say?

Those are questions to which we as Parliamentarians have no dispositive answers. But if the House brings this rule to the floor, or something akin to it, the question of its constitutionality is framed for the House and is under the precedents decided by the House by the vote on the adoption of such a rule.

Let's assume that—a draft of this sort is reported from the Rules Committee and brought to the House as a privileged resolution amending the rules of the House, and a Member were to make a point of order. "Mr. Speaker, I make the point of order that this rule is unconstitutional." The Speaker's response—there is plenty of precedent for this, although not under these precise circumstances—would be that the House by voting on its rules, on the merits of the rule, determines and incorporates all of the arguments on constitutionality. The Chair does not make a threshold ruling which would be separately and preliminarily appealable.

So I wanted you to have that background. If I were—in the Parliamentarian chair, advising the Speaker should such a rule come to the floor, and a Member were to make a point of order against it on constitutional grounds, the House does not have—a threshold mechanism for separately arguing and determining constitutionality.

That is, the compelling reason for being here in the Rules Committee today. The Cox-Frost task force envisioned it, realized that it was too complicated to make a firm recommendation in the time that it had.

Mr. Frost made the comment a few moments ago that perhaps a constitutional amendment is not needed on the question of whether the House can do this by rule. You raised the key question for this meeting today. I don't know the answer to that question precisely.

The constitutional amendments we have seen address the question of appointment of Members, may also address the constitutional sanction for the House to proceed in this area as a further carveout to conduct business with less than a quorum. I am not aware that any of the precise drafts, the Brian Baird draft, the Lofgren draft, the Rohrabacher draft, the Larson draft specifically empower the House to make these rules changes. The threshold

question in Mr. Dellinger's testimony is compelling in this area. It is certainly challenging for the Rules Committee today.

With that background our office has been available. We are not the architects of the rules change, of the draft that you have seen, and clearly there are areas for discussion in that draft. It is important that there be a starting point.

So the question of the Speaker's role in determining a catastrophic circumstance—as a nonpartisan, I couldn't agree more with Mr. Frost—that in a determination of a catastrophic circumstance triggering such a rule, the Speaker be the one to trigger the implementation of such a rule! What evidence, what testimony, would he need to rely on? What concurrence or consultation role would need to be built into the rule, or into the legislative history underlying the rule, is the other essential ingredient for this committee to examine.

The rule draft, as I recall, says that if the Speaker invokes the catastrophic circumstance standard, that it not be appealable. That is necessary, because if his invocation of a circumstance which would allow a smaller quorum to operate were appealable, the same conundrum would exist, as I said earlier that a majority of those living and sworn, quorum of the full House would be required to allow the Speaker's invocation of that new standard.

Clearly the question of how and when the Speaker invokes the rule is very technical and very important. We thought the notion of the premise, the final test of whether there are incapacities should be attendance in the House. The built-in safeguards in the draft that you have seen against an inappropriate invocation of that rule are already in the Constitution. If the House saw potential incapacitations, the House could adjourn from day to day with less than a quorum, and could deny the Speaker the ability to trigger this incapacitation rule by less than a quorum. In addition to adjourning from day to day, the House can also, by less than a majority, compel the attendance of its absentees, which is the very premise upon which a Speaker's declaration of incapacity would be decided.

So clearly the challenge to your question is, yes, there are constitutional issues. Two, what should the rule guarantee as far as the protections so that any Speaker would not be able to utilize the rule for other than promotion of the public interest.

The CHAIRMAN. Do we want to hear from John or Tom?

Mr. JOHNSON. Absolutely.

The CHAIRMAN. We would love to very much.

[The prepared statement of Charles Johnson follows:]

PREPARED STATEMENT OF CHARLES JOHNSON, PARLIAMENTARIAN, U.S. HOUSE OF REPRESENTATIVES

Chairman Dreier; Ranking Minority Member Frost; and distinguished members of the committee: I appreciate the opportunity to participate in your review of this very important matter.

The prospect of mass incapacitations among Members of the House raises serious questions. From a parliamentary perspective, the most immediate of these relate to the quorum requirement.

What is "the House"?

The Constitution requires the presence of a majority of the House to do business. However, just as the Constitution leaves it to the House to determine what is busi-

ness,[1] so also does it allow the House to determine what is the House. Thus, in attempting to discern within precisely what number the Constitution requires a majority, the seminal precedents of the House on composing a quorum begin with the question "What is 'the House'?"

On a clean slate, this question obviously could admit more than one answer as sensible. For example, the House could decide to measure its whole number by the number of its seats. As it happens, the House has chosen to establish its whole number as the number of its Members, including all persons "chosen, sworn, and living" (excepting, of course, any whose Membership has been terminated by resignation or by action of the House). The precedents that record the development of this living-and-sworn standard[2] are most instructive. They are abstracted in the attachment.

Until 1890 the House viewed that the Constitutional requirement of a quorum made it necessary for a majority of the Members to *vote* on a matter. Under that practice, a large faction of Members might break a quorum simply by refusing to respond to the call of the roll, even though present.[3] With the historic ruling by Speaker Reed[4] to the effect that Members present in the Chamber but not voting may be counted in determining the presence of a quorum,[5] that practice changed. Speaker Reed's ruling was upheld by the United States Supreme Court in *United States* v. *Ballin*.[6] The Court declared that the authority of the House to transact business is "created by the mere *presence* of a majority" (emphasis supplied). Since 1890, the point of order regarding lack of a quorum has been that a quorum is not present, not that a quorum has not voted.[7]

What is a quorum?

A quorum may be expressed as a fraction. The numerator is the number of Members who are present. The denominator is the number of Members who are extant. Because the issue in *Ballin* was Speaker Reed's method of counting the number of Members present, the decision of the Supreme Court addressed the numerator of this fraction. In dictum the Court examined the question "how shall the presence of a majority be determined?" and observed that, because the Constitution does not prescribe any method for determining the presence of such majority, it is within the competency of the House "to prescribe any method which shall be reasonably certain to ascertain the fact."

Thus in 1906, consistent with the dictum in *Ballin*, Speaker Cannon employed the still-current method of counting the number of Members extant. After reviewing the perspectives of his predecessors across the 19th century and with special regard for the considered judgment of the Senate on the same question,[8] Speaker Cannon held that once the House is organized for a Congress "a quorum consists of a majority of these Members chosen, sworn, and living, whose membership has not been terminated by resignation or by the action of the House."[9]

Alternate standards

Modern prospects of catastrophe raise the question whether a standard more discriminating than "living" might be necessary or appropriate under some circumstances. One of the challenges of the "incapacitation" issue is whether the House might legitimately shift between alternate approaches to calculating the denominator of the quorum fraction. Obviously any such dynamism in calculating "the House" would need to occur not merely on opportunistic bases but, rather, under appropriately certified catastrophic circumstances.

During the meetings of the Cox-Frost task force on continuity of legislative operations in 2002, the Parliamentarian was asked whether he ever would advise the Chair to depart from the living-and-sworn precedent in the event of a catastrophic event that were shown to have disabled a large number of Members without nec-

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[1] For example, over time the House has determined that none of the following constitute business requiring a quorum; the opening prayer, the administration of the oath of office to a Member-elect, certain motions incidental to a call of the House, or an adjournment. Indeed, by adopting clause 7(a) of rule XX the House has determined that the mere conduct of debate, where the Chair has not put the pending proposition to a vote, is not "business" requiring a quorum.

[2] Hinds' Precedents, volume 4, sections 2889 and 2890, which record the events of March 16, 1906, and April 16, 1906, respectively.

[3] Hinds' Precedents, volume 4, section 2977.

[4] Codified in clause 4(b) of rule XX.

[5] Hinds' Precedents, volume 4, section 2895.

[6] 144 U.S. 1 (1892).

[7] Hinds' Precedents, volume 4, section 2917.

[8] Since 1864, clause 1 of Senate rule VI has read as follows: "A quorum consist of a majority of the Senators duly chosen and sworn."

[9] Hinds' Precedents, volume 4, sections 2890; Cannon's Precedents, volume 6, section 638.

essarily establishing vacancies in their seats. Could the Speaker unilaterally change the approach to the constitutional quorum requirement that has been consistent in both Houses since 1906? The Parliamentarian acknowledged that the Constitution empowers each House to adopt and interpret its own rules and that the House is not necessarily bound to retain the approach established by Speaker Cannon's 1906 ruling (not appealed) or to maintain consistency with the similar Senate rule, but advised that any ruling by the Speaker effecting such a change in approach would be subject under rule 1 to an appeal to the full House and, if a record vote were had on that appeal, a quorum consisting of a majority of those living and sworn would be necessary either to sustain or to overrule the Speaker's ruling. (Even if a "runaway" Speaker were to take the further position that his ruling was not subject to appeal, that ruling of nonappealability logically would be itself subject to appeal). In the absence of a proper quorum among those living and sworn to dispose of the appeal, the House would be unable to continue its business.

The Parliamentarian believed that the Speaker should not be advised to depart from the precedents of the House in this area by a unilateral ruling, even under catastrophic circumstances tending to demand that the House be able to conduct legislative business. Rather, the House should consider—preferably in advance—what it might do in the event of such a catastrophe, addressing the contingency by a change in the standing rules adopted by the whole House in a dispassionate atmosphere with a proper quorum present. The constitutional advisability of such a rules change initially would be for the House, in its collective wisdom, to debate and determine by its vote on the proposal. The possible vulnerability of such a rule to collateral challenge in federal court would need to be evaluated in light of existing case law such as *Ballin*,[10] *Michel*,[11] and *Skaggs*.[12]

One must question whether the constitutional latitude noted in the dictum in *Ballin* is wide enough for the House to set a smaller number than a majority of Members living and sworn to do business. In section 5 of article 1 of the Constitution, the founders addressed smaller-than-majority quorums. They specified two items of business that may be transacted by a smaller number than a majority of the House. Those two items are adjourning from day to day and compelling the attendance of absentees. Whether a third item—an item like re-basing the whole number of the House in the wake of a catastrophe—validly may be added to that category without amending the Constitution is a very serious question.

The holding in *Ballin* validated Speaker Reed's noting the actual presence in the chamber of Members who chose only to lurk rather than to record their position or their presence. Speaker Reed did not find merely that the whereabouts of these Members were unknown. Rather, he found that they actually were in the chamber of the House observing the proceedings in person. The dictum in *Ballin* lends scant support for the proposition that methods of counting those present may extend beyond the most ordinary connotation of presence, to wit: physical attendance.[13]

For this reason, if the House were to devise a method of recalculating its number of the purpose of computing its quorum that, under specified catastrophic circumstances, departed from its settled living-and-sworn standard, then it would do well to focus on physical attendance as the measuring device. In catastrophic circumstances, the exercise could amount to discerning what has become of the House.

I am grateful for your attention and will be pleased to engage any questions you might have.

STATEMENT OF JOHN SULLIVAN, DEPUTY PARLIAMENTARIAN OF THE HOUSE, U.S. HOUSE OF REPRESENTATIVES

Mr. SULLIVAN. Thank you, Mr. Chairman, members of the committee, I have taken some time to go over the discussion draft very closely, and I sense that there will inevitably be questions about it.

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[10] 144 U.S. 1 (1892).

[11] *Michel* v. *Anderson*, 14 F.3d 623 (D.C. Cir. 1994).

[12] *Skaggs* v. *Carle*, 110 F.3d 831 (D.C. Cir. 1997).

[13] Another consideration is that neither the Constitution nor the *Ballin* decision contemplates any notion of "virtual presence." The founders provided for Houses of Congress that "assemble," and "meet," and forge bicameral consent to adjourn for any extended period or to meet elsewhere. They provided for Houses of Congress that keep journals, and adjourn from day to day, and easily admit votes by the yeas and nays. Even if the Houses chose to approve their journals less frequently than every day, the availability of daily votes by the yeas and nays on adjourning, alone, should rule out any notion that the founders contemplated any 18th-century analog to the "virtual presence" that today might be achieved by proxy or by teleconferencing or by discounting incapacitated Members.

So if it is all right with the committee, I will just make observations on it.

The CHAIRMAN. Please.

Mr. SULLIVAN. As I think of it very simplistically, mass incapacitation really creates two primary problems. One is with respect to the quorum and the ability of the House to move at all, and the other is with respect to representativeness, the need to replenish membership.

The discussion draft as I see it addresses the latter concern, the replenishment, only in one way: it would put the House in a position to move forward, for instance, to declare seats vacant, where they knew they ought to be declared vacant, and thereby arm the Governors with their special election writ authority. But otherwise it is focused entirely on the quorum problem.

The idea in this discussion draft is to establish a procedure that will let the circumstances produce a change in the denominator of the quorum requirement and let the circumstances largely speak for themselves. The method that it chose is to use the ability of Members to attend the Chamber as a measure of who exists or who is available for duty.

It sets up a series of hurdles in which the House tries real hard to gather a real quorum among the 435-seat House—218—and in stages. You don't move on to the next stage unless a quorum is wanting. The first step is that there be revealed the absence of a quorum, perhaps on a normal vote by the ayes and nays, if fewer than 218 are recorded either yes or no or present. After that, the rule for this provisional number might be used to actually produce a result.

The next step that has to be exhausted is the use of one of the motions to compel the attendance of Members. One of the things that the Constitution allows a number smaller than a majority to do in the House, under the Rules of the House, 15 Members can dispatch the Sergeant at Arms to round up absentees.

Mr. FROST. Excuse me. Is there a requirement that there be at least 15 Members?

Mr. SULLIVAN. The motion requires 15 yea votes. So a 15 to 14 vote, a 15 to 1 vote would do, a 15 to nothing; it could be 15 members in the Chamber. If they voted aye, it would.

Mr. FROST. If it were fewer than 15 Members, the House could not act?

Mr. SULLIVAN. The Constitution gives the House permission to ordain some small number; here the small number that the House has ordained is 15. The usual way that you get a vote in the House—object to the vote on the ground that a quorum is not present, and make that point of order—triggers the yeas and nays on the pending question. But it also theoretically dispatches the Sergeant at Arms to tell Members you need to get to the Chamber. So that level of rounding up Members will be afoot in any event.

Mr. FROST. If I may interrupt, Mr. Chairman. I apologize. But I have spent, as you know, I have spent a great deal of time on this issue and thought about this issue a lot. And we are—you are referring to rule XX, clause 5(a), I believe. And if we had a situation where there were only six or seven or eight Members remain-

ing here in Washington, or wherever the House would meet, they could not invoke this rule?

Mr. SULLIVAN. That is right. This rule requires exhaustion of—in the middle of the discussion draft there is a reference to paragraph (a) or (b); that is, to 5(a) and (b). And under this discussion draft, if the House were unable to dispose of the compulsory motion, the machine wouldn't work. That is right.

Mr. LINDER. Could a statement be done under UC, so if two people are here they could do it?

Mr. FROST. So it is only if someone asks for a recorded vote? It is important to look at every little piece of this, Mr. Chairman. I only want to make one other statement. My concern from the beginning has been public confidence in the actions of the House, whatever size that House is, and as to whatever circumstance. I think it is essential to the continuation of our democracy that the public have confidence in us, whatever size body is acting, that it is doing so in the national interest.

The CHAIRMAN. Your point is obviously a very good one. What confidence can they have in a three-Member House of Representatives? I think that is a very fair point to raise.

Mr. SULLIVAN. So those first two steps, the failure of a quorum in the first instance, and the exhaustion of an attempt to compel the attendance of Members, sets the stage for the three real hurdles of the process: a staged first lengthy quorum call. There will a plan for its length, but some real hard attempt to gather 218.

The CHAIRMAN. Repeated quorum calls?

Mr. SULLIVAN. It could be. But it has to span a certain length of time to put the Speaker in the position of deciding to enter the finding or relay the report or whatever it will end up being. The big blank in the middle of the page, pulling the trigger, saying it looks like we are going to use this provisional number machine that we have adopted in rule XX. And then that, the Speaker's invocation of the machine, is followed by yet another, probably congruent-in-length, quorum call to see whether the House can get its ordinary quorum.

If this five-stage process goes through to its fruition, then the bottom line of the rule is that it cranks out a provisional number of the House, some number to use instead of 435.

Mr. FROST. The bottom part of the fraction, the denominator.

Mr. SULLIVAN. That is right. And so if, after all of these very sincere attempts to gather as many Members as possible, the House is left with 100, then that would be the provisional number of the House, and a quorum would be 51.

It uses the circumstances, the ability of Members to respond, as a way of judging what has become of the House.

The technique that is used here is to employ tools that don't require a quorum, so we don't get trapped in a circle. One of them is the Speaker's unappealable invocation in the fourth step, the entry of the finding that catastrophic circumstances are afoot. The other is the ubiquitous availability of a possible motion to adjourn adoptable by a majority of whoever is there.

That is the chief strength, that is the chief protection in this discussion draft is that—well, first of all, the procedure can't be triggered accidently. You have to really try to get into this machine.

It is multi-staged for that purpose. And the ultimate strength is it can be aborted simply. It can be aborted during the first lengthy quorum call by adopting a motion to adjourn, or wait, even if you were to wait and see whether the Speaker were going to make the invocation, that same tool is contemplated during the second lengthy quorum call.

The Members could say, we think that we should take a breather here. And a motion to adjourn would wind the clock back to zero on this whole process. The House would come in on whatever day it adjourned to and be in the same position it was before. It also is self-sunsetting. At the end of the discussion draft, it says that when the membership who are available are enough to make a quorum in the real number of the House, whatever that might be, then this provisional number lapses. As it is currently configured, that sunset is somewhat Draconian because if—let's say that no Members are dead and the actual number of the House to which we will return is 435—we would snap back to that when the 218th Member arrived.

But at that point, you would need to maintain perfect attendance to maintain a quorum. So one of the rough edges in this discussion draft that Members might want to dwell their attention on is whether it is too Draconian and whether some other point should be the snap-back-to-normalcy point, so as not to leave the House in a position where it needs perfect attendance to do anything.

Obviously the weakness, the biggest weakness in the discussion draft is that it has got blanks in it, and one great big blank in the middle, and that is—that blank is where the Members would address the potential for pretextual use of the process.

The ways that we have kicked around to address that, really, number two. One is to attempt to specify parameters of catastrophe in some way that will allow objective observers to say that that is, and that isn't. And it is a self-reviewable question.

The other way, and the way that I have spent more time thinking of, so far at least, is to invest in some ministerial agent the prefatory role of an arming, cocking the hammer for the Speaker, to pull the trigger to go into the second lengthy quorum call, perhaps the Sergeant at Arms, when advised by the Sergeant at Arms that catastrophic circumstances are what is causing this problem. That is the model that the House used in the so-called snow day authority in clause 12 of rule 1.

It is an interesting contrast. Two of the things that the House adopted at the beginning of this Congress to address elements of continuity are the emergency recess authority of the Speaker, and the authority of the Speaker to shift the convening time of the House if there is a problem.

In the former case, if there is an immediate problem, like suddenly the ventilation system of the House has been infested with contagion, if the Speaker is advised of that by anybody—it could be his staff, it could be Mr. Frost, for that matter—that immediately arms him with the authority to say that the House will stand in recess subject to the call of the Chair, even if a question is pending. Normal recess authority can't be used while a question is pending.

By contrast, the authority for the Speaker to say on Sunday night, "We ought to convene tonight because Washington is going to get 27 inches of snow in the morning and I am not sure we are going to be able to convene at the appointed time tomorrow morning," to use that authority the Speaker needs a prefatory report from the Sergeant at Arms to the effect that there is an imminent impairment of the place of convening; that he certifies that the House might not be able to convene Monday morning, and it is advisable to convene Sunday night and make some arrangement to bridge that snowstorm or that ricin attack or whatever it might be. That use of the ministerial agent in rule I is what got me thinking about using a ministerial agent as the surety in the middle of this discussion draft.

But another way to go might be a way to specify the parameter of catastrophe that would justify the Speaker's invocation of that second lengthy quorum call——

Mr. MCGOVERN. What happens if there is no Speaker?

Mr. SULLIVAN. One of the rule changes that the House adopted at the beginning of this Congress was that in the event that a vacancy in the Office of the Speaker, including his inability to exercise his office, not necessarily his demise, then the next person on a list—that is placed in a secure location—will be the acting Speaker pro tempore, pending the House's election of a successor.

Mr. MCGOVERN. What if you have a situation where, you know, there is nobody from the majority party here, and all you have left are Members of the minority party?

Mr. SULLIVAN. What we do at the organization of a new Congress where there is no Speaker, is the Clerk takes the chair and recognizes for nominations from the floor to elect a Speaker.

If there were a case where the list of Speakers pro tempore in waiting is exhausted, I think we would ask the Clerk or the successor Clerk to take the chair and entertain nominations for the office of Speaker.

The CHAIRMAN. From those Members who are remaining?

Mr. SULLIVAN. Yes.

The CHAIRMAN. Thank you. Let me—we have obviously begun, and we want this to be informal, because we are having a discussion here which we are getting into some very important points.

Do you want to add anything, Tom?

STATEMENT OF TOM DUNCAN, DEPUTY PARLIAMENTARIAN OF THE HOUSE, U.S. HOUSE OF REPRESENTATIVES

Mr. DUNCAN. I thought that I would add, very briefly, a historical note on how the House during the Civil War evolved to deal with this issue. The 36th Congress had 237 Members from all of the States prior to 1861. After that time, and the Southern States had seceded, the House in the 37th Congress had only 183 Members, in effect subtracting the former Representatives from the Southern States, because as far as the House was concerned, those States had not chosen Members to the House and The House had no knowledge of the States sending people to Washington unless they appeared.

They effectively reduced the denominator at that time and The House treated that as the standard, being chosen and living. That

1861 ruling laid the groundwork for the rule in 1906. I thought that may be useful.

The CHAIRMAN. Thank you for that. Let me just say that a lot of thought has gone into this by a lot of people. There are still a lot of questions. As I was listening to your comments, there are a few questions I have. Then I want my colleagues, Mr. Hastings and Mr. Frost and Mr. Linder and Mr. McGovern, to ask further questions as well.

We talked about the rule of 15 when it comes to telling the Sergeant at Arms to seek Members who are not present. I am just wondering, when has that been utilized in the past? I don't remember myself——

Mr. JOHNSON. It really is a little bit of a relic. Because under our rules now, the only business requiring the presence of a quorum is pursuant to a vote, and the so-called automatic roll call rule, clause 6 of rule XX, has its own built-in mechanism. It doesn't take 15. Any one Member objecting requires the Sergeant at Arms to go out and round up Members by virtue of the operation of that rule. So the rule of 15, while it is there because the Constitution invites a rule to be there, the more frequent practice is to utilize the automatic yea and nay vote to, where necessary, tell the Sergeant at Arms to go up and round up absentees.

The CHAIRMAN. We have seen a lot of changes take place on this whole issue of doing business and a quorum as it relates to it. We know in the past debate could not proceed without a quorum being present, and I just wondered what thoughts you have as to where we are going on this issue of doing business as it relates to a quorum.

Mr. JOHNSON. Our prepared statement does allude to this evolution.

The notion that debate is no longer business requiring the adoption of a quorum came into the rules in the 1970s. It was a major change to allow the House to conduct its debates without—repeated points of no quorum during general debates. There are certain safeguards that allow one point of no quorum in the Committee of the Whole during general debate at the discretion of the Chair and one during the 5-minute debate but not again until the Chair puts the question to a vote. That is the key. Voting is obviously business. You cannot deny that a vote is business of the House.

The CHAIRMAN. What is your interpretation of the way that has worked? You just described that as a slightly different definition over what it was in years past and that being the ability to compel that a quorum was present at any point during debate. Do you think that has worked well?

Mr. JOHNSON. Yes. The House has changed in addition with its ability to cluster and postpone votes, but I have observed——

The CHAIRMAN. I remember here fighting that in the past; and now, of course, it is now part of the rules instruction that was put into place. We used to argue—and this was back when I was sitting on this side—the notion of having length of time between debate on amendments was not a healthy thing and we should compel a vote on that amendment following the debate of that amendment, rather than doing a clustering procedure.

Mr. JOHNSON. It is still a compelling argument under certain circumstances.

The CHAIRMAN. Thank you very much. I appreciate a little vindication there.

Mr. JOHNSON. So the notion that debate does not constitute business, with closed circuit television and other abilities of Members to observe debate, has allowed the House to facilitate its business. But I don't think the House could adopt a rule saying that certain votes are not business.

The CHAIRMAN. You mentioned closed circuit television, so that just sparked something else for me.

A couple of Congresses ago, we got into this big debate about what would be tantamount to a virtual Congress and this issue of—there were a number of people who came, I remember, before us arguing that technology—I come from California, and technology is very important issue, the technological changes that we observed, and I spend a lot of my time promoting technological changes and advances. Some people argue that we should use that technology to allow people to cast votes from their congressional districts or elsewhere.

Part of the question gets to the issue that we are discussing here today, and we have successfully beaten that back, talking about the importance of interaction. But the question really centers around on this issue of incapacity in response to catastrophe. What do you think would be a responsible way for us to go in light of these technological changes that have taken place that do create the potential for some sort of virtual Congress?

Mr. JOHNSON. I think footnote 13 in my prepared statement addresses that directly.

The counterargument is that the Constitution and the Founders of the Constitution and Jefferson's Manual all conceive of the requirement of collegial meeting, of a physical presence and attendance. That is constitutionally based, I don't think an electronic capability should depart from that. The draft rule is based on securing actual attendance and the documentation——

The CHAIRMAN. Obviously, I completely concur with that. I think it is a very interesting commentary that as we look at all of these technological changes that have taken place over the last several decades that the notion that the Framers had of ensuring that there be that physical interaction is an important one, and I am glad that it is being retained. Mr. Hastings.

Mr. HASTINGS of Washington. Thank you, Mr. Chairman.

Thank you for your testimony. It has been helpful and continues to be helpful.

I had some discussion with some of my colleagues off the record in a casual way to try to find a level of—since this hearing is on incapacitation, let me ask you a couple of questions. In your view, the House has the authority to change the denominator; is that correct? We have done that in the past.

Mr. JOHNSON. That is the first, most basic question here: Does the House have that authority absent a constitutional amendment conferring that authority? I think there is a compelling argument that it does, if only because the collateral challenge to a successful House effort in that respect would not be immediate or perhaps not

successful. So I am not saying it should be a power play, but I think, ultimately, the House, as the adopter and interpreter of its own rules and given compelling national interest, would be well advised to address a rule of this sort even at the expense of subjecting it later on to a plaintiff who might complain about a law enacted during such a session, but in the meantime the Congress is here to respond.

Mr. HASTINGS of Washington. I just wanted to get that directly on the record. Because that, to me, is the essence of what we are grappling with, the idea about what the definition of incapacitation is.

Mr. SULLIVAN. I think 1906 is a very interesting example on that question. What was on the bubble in 1906 was the oath. Nobody disagreed that the Speaker ought to back out of the denominator a Member who had died and another Member who had resigned, but two Members elect hadn't shown, and what was being decided by Speaker Cannon in 1906 was whether those two unsworn Members were or were not in the denominator of the fraction. So he was deciding and that House was deciding how to compose the denominator of that fraction at that time.

I think it would have been just as legitimate for him to decide, let us not count bodies, let us count seats. The denominator of the fraction is the number of seats apportioned. He could have gone lots of ways. I doubt that he could have said it is the Members chosen, living, sworn, and able to bench press 200 pounds, but he might have been able to say the number of Members chosen, living, sworn and able to answer a call within 96 hours.

Mr. HASTINGS of Washington. Looking to your attachment, when you talk about those 1906 rules, Speaker Cannon's justification of that is he referenced the Senate rules. But he also referenced in there in the Senate rules they did not debate the issue of sworn or living one or the other. With that in mind, it might be some value for us, since this is a huge, huge step in the future, for us to put in our rules what the definition or at least have a debate as to the rule change, rather than let precedent guide us as to sworn and living and so forth. There would be some value for us to do that because, Charlie, in your testimony you said that these are precedents that are well-founded and that is the way it is, but that precedent is based upon an undebatable decision that was made in the Senate. So it would at least have value for us to have that debate as we pursue this.

Mr. JOHNSON. I think that debate is absolutely essential and integral to this. You have to have that debate. If you emerge saying we don't want to deal with incapacity, does it make sense for the Rules Committee to have a resolution amending the rules of the House saying, all right, a quorum is the majority of those living and sworn? Is that the residual approach your Committee should take if you can't find agreement in this area?

It certainly puts into black letter form what has been a precedent for almost 100 years. Whether it helps establish the legitimacy of a work product by the House or allows people to further question the lack of legitimacy if there is not such a quorum because it is a black letter rule, Mr. Hastings, I honestly don't think it makes all that much difference. I think the key question is whether you

want to go the further step and allow a different number; and, if you do, I would certainly recommend that it be a rules change, not just a reinterpretation by the Speaker. But to maintain the status quo and incorporate it as a rules change I am not sure is essential, although it may be helpful.

Mr. HASTINGS of Washington. Well, the reason I say that—and I don't know if it is in your testimony or Professor Dellinger's testimony, maybe both—suggest that we do this now, to have some debate to ward off some challenges. This one area I think is a bit gray, and if we can make that more black and white, it would be beneficial to us. That is the reason I say that in that context. In other words, if we say by our rules what that definition is, we arrive at it; and we say that before—hopefully, we will never have a catastrophe like—then we will have guarded ourselves from some.

Mr. JOHNSON. I can't disagree with what you said. I just think that 100 years of precedent—While I do not necessarily equate 100 years of precedent with a black letter rule, I certainly give to it every bit of weight and would hope that the House will respect the Speaker's ruling because it is precedent just to the same extent they would respect it because it is written down as an adopted rule each year.

Mr. HASTINGS of Washington. One last thing. There is always an out when you have rules. Essentially, unanimous consent agreements are suspension of the rules, which when we ever get to this point, then, of some sort of definition of incapacitation where you have a problem that the rules would kick in where a quorum would be established, presumably with a smaller number it would be easier to get a UC. You essentially could do business by unanimous consent because you are suspending the rules.

Mr. JOHNSON. Unless a vote of record countermanded that unanimous consent request. I don't think The House could by unanimous consent ignore the constitutional requirement for a majority, but if The House acts by unanimous consent and no one objects and there is no record to show absence of the quorum, yes, the rules are suspended in every other respect.

Mr. HASTINGS of Washington. Mr. Frost brought up the issue of 15 Members. Unanimous consent simply suspends the rules to allow some sort of business or activity for a period of time. The UC generally has, at least from what I have seen, a short period of time to deal with a particular point of business. So we still have that option that is available.

Mr. JOHNSON. There is always the presumption of a quorum present when the House starts its daily business, and a lot of unanimous consent business and voice voting and even division is done clearly without the presence of a real quorum, but that absence is never ascertained. Therefore, the business is legitimate.

The CHAIRMAN. When I first came here, I was told that under unanimous consent you could waive the Constitution.

Mr. HASTINGS of Washington. Should we put that in our rules?

That is all I have. Thank you.

The CHAIRMAN. Mr. Frost.

Mr. FROST. Mr. Chairman, I want to mention something else, because this was taken up during the deliberations of our task force.

Because of a quirk in the Presidential succession law as it currently exists, this discussion of what constitutes a quorum of the House of Representatives is extraordinarily important. Let me explain.

Under the current Presidential succession law, if the President, Vice President and the Speaker and the President pro tempore of the Senate are all killed in a catastrophe and a Cabinet member survives, that Cabinet member in the line of succession becomes President. However, a subsequently elected Speaker by a reconstituted House of Representatives would bump that Cabinet member and become President. So that being able to reconstitute the House and pick a new Speaker is very important because that new Speaker could then become President if the top four people in the line of succession were killed in a catastrophe. Is that correct, Charlie?

Mr. JOHNSON. Yes, sir.

Mr. FROST. And we have not changed that Presidential succession law. Some of us have advocated changing the Presidential succession law to eliminate the bumping rights of a subsequently elected Speaker just so you have certainty, assuming that a Cabinet member was sworn, that the Cabinet member would continue to serve as President, but that is not the law as it exists right now.

Mr. JOHNSON. The Judiciary Committee has that jurisdiction over such a bill. It would take a bill passed by both Houses and enacted into law.

Mr. FROST. This is not just an academic discussion I would say about how to reconstitute the House of Representatives or how to make sure there is a quorum in the House of Representatives. Because this reduced quorum House of Representatives, if in fact we adopt a rule that permits a reduced quorum, could be selecting the next President of the United States in its vote for replacement Speaker.

The CHAIRMAN. Is there any bill on that now?

Mr. JOHNSON. I think there is an introduced bill. I am not sure of the status of it. We think there is a bill that would just eliminate the Speaker and President pro tempore, the question being whether they are officers within the meaning of the Constitution. The Constitution says Congress may by law provide which officers of the United States may succeed, and that bill takes them out. I think that is the only bill as we sit here, but there may be others.

Mr. FROST. But the point is Congress has not acted on that. So the Presidential succession law as it exists right now is that a new Speaker selected by a House of Representatives of diminished size under certain circumstances would become President of the United States.

Mr. JOHNSON. Yes, sir.

The CHAIRMAN. Mr. McGovern.

Mr. MCGOVERN. Let me just ask a couple of questions.

On this rule, the 15-person rule that you had talked about before, where if somebody were to call a quorum vote 15 people would have to be here, and you were asked what if there weren't 15 people here, and Mr. Linder said somebody could ask unanimous consent and then the process could move forward. If there were 12 people here and one of those 12 asked for a vote of no quorum, does everything kind of stop?

Mr. SULLIVAN. Yes. The House is able to do only two things when it lacks a quorum.

Mr. MCGOVERN. Isn't that really a potentially significant issue? I can imagine a situation where there were 10 people here and let us say of the 10 people nobody in the leadership of either party is here and somebody becomes concerned about not just can we do this but if we can't move ahead will anything we do here have any credibility?

Mr. SULLIVAN. That is a serious issue, and I think the Members may decide that that second of these five hoops ought not be in there for that reason.

Mr. JOHNSON. But the point I tried to make earlier was, while that rule is in place, which says, in the absence of a quorum, a majority comprising at least 15 Members may compel the attendance of absent Members, that the absence of a quorum is only determined when a vote is in progress under our current rules. The House does not have separate ascertainments of quorum for the most part during debate.

Mr. MCGOVERN. But somebody could ask for a vote; right?

Mr. JOHNSON. Yes. But then the automatic rule of The House in clause 6 of rule XX says that when such an automatic vote is in place, then the Sergeant at Arms is required, under the operation of that rule, to gather absentees. So you don't need 15 members telling him to do that.

Mr. SULLIVAN. The reason why it remains a problem under the discussion draft is that the first hoop is failure of a quorum at all, and the second one is the disposition of a specific motion, not the automatic dispatch of the Sergeant at Arms on the yea and nay vote, but rather the specific—a motion under paragraph (a) or (b) has been disposed of. So the discussion draft may be a little bit too energetic on that point.

Mr. MCGOVERN. But it is an issue that, obviously, we have to think about some more.

Just one other question. The chairman talked about being from California with all the technology and stuff. I didn't know there was a lot of technology in California. I thought it was all in Massachusetts.

The CHAIRMAN. We are happy that you have some there, too. I support it in Massachusetts as well as in California.

Mr. MCGOVERN. But the other—when we are talking about incapacitation, you could have a situation where Members are home and are unable to get together. I mean, it could be a breakdown of our transportation system. There could be all kinds of things going on where it becomes impossible for people to get from where they are to a place where they can meet together.

I guess one of the concerns would be that if—let us say you had 15 people that were able to get together in Washington, other Members who weren't dead but couldn't get here couldn't be part of anything and couldn't be part of any process, whether or not that could be the basis to say we are going to do the House business with 15 people. Everybody else, too bad. I think that would raise some serious issues about the credibility of what was going on here.

So he was talking about technology. At least that would be one kind of issue that might be worth talking about. I understand the reason—the concerns against it, but the idea that somehow we would be able to function by using technology, given the fact that Members may technically be incapacitated because they can't get here but they are still alive and they still represent constituents——

Mr. JOHNSON. It is a very valid observation. The definition of catastrophic occurrence and the determination of it by presence or absence would be dispositive. These Members were just isolated but certainly willing and able to try to get here or wherever.

The CHAIRMAN. If the gentleman would yield, the only comment I would make on that is there is a grand total of 537 federally elected officials, the President and Vice President, Members of the House and the Senate; and the Sergeant at Arms would clearly have the ability to use virtually any resources of the Federal Government whatsoever I believe in his quest to get Members here. So when we talk about the need to—I am sure you can talk about problems of breakdown of the transportation system and other things, but I think that there are extraordinary means that are available for use of dealing with that.

Mr. FROST. If the gentleman would yield, while this is—I don't believe this would actually occur under our current system, there is at least the possibility of——

The CHAIRMAN. We are hoping that none of this will occur.

Mr. FROST. There is at least the possibility of rival Congresses.

We have a long history in the south of having rump conventions. This is a serious issue. You may remember in 1964 the State of Mississippi sent competing delegations to the Democratic National Convention and the question was which delegation would be seated.

Now the question is, what happens if you had 15 or 20 Members of Congress who were off at some location? Maybe they were attending Aspen Institute or something. I won't get into that in great detail, but they were off at some remote location and they decided that they were the Congress and that you only had five or six people somewhere else, maybe here in Washington or some other location. I don't know how you deal with that.

What happens, Charlie, if you had competing groups of Members attempting to constitute themselves in different locations and act as the Congress?

The CHAIRMAN. And contemplate the Aspen Institute running the U.S. Government.

Mr. JOHNSON. In 1965, there were competing candidates from Mississippi to the House who filed election contests; and the House, by judging the qualifications of its Members, decided to seat those who had the certificates, but it went through an examination in each—I think four or five of the districts. But if two sessions suddenly materialized, the proper place would be where the Congress itself has established that Congress meet. Congress can only meet elsewhere than D.C. if two Houses agree. So a rump session without preauthority by the two Houses I don't think would be considered a valid session of the House under Article 1, section 5 of the Constitution.

Mr. FROST. Even if it were a larger group that convened at an agreed-upon place, the agreed-upon place is either here or someplace else. If this building were destroyed, it would be someplace else.

Mr. JOHNSON. This Congress on opening day for the first time gave authority of the two Houses to meet elsewhere than in the seat of government. So if now the two Houses adopted a concurrent resolution, the House could meet elsewhere.

Mr. FROST. Are we required to adopt a concurrent resolution permitting that Congress set forth an alternative location?

Mr. JOHNSON. Under the Constitution neither House can adjourn for more than three days nor to any other place than the seat of government without the consent of the other House. That is why on opening day a concurrent resolution was adopted, the two Houses saying that either House can adjourn to meet at another place and then the House rule allows its Speaker or acting Speaker to convene the House in another place. But any rump group not acting under that authority I don't think would be considered a valid meeting of the House.

The CHAIRMAN. Let me just say that the discussion draft is going to continue to be discussed. You all have been very helpful in providing us with a lot of insight, and one of the things that we found from—at these discussions that we have had is that, just as we pursue clarification, more questions arise, and I think that today is no exception to that.

We do appreciate the attempt that we are going to make in bringing about a resolution to some ongoing questions. We thank all of you for the time and effort, and we will continue to talk about this in the days and weeks and months and years to come.

Thank you all very much and thanks to my colleagues for your patience here.

The CHAIRMAN. Professor Dellinger, we are very happy to have you as our constitutional expert, and we are pleased to have your insight and thought on these issues. We know that you were Solicitor General to President Clinton. The president of my alma mater is dean of your law school. Pamela Gann is a good friend of mine. Let me say, as I have to the parliamentarians, your prepared remarks will appear in the record in their entirety; and we welcome your testimony.

Mr. FROST. Let me add that my oldest daughter is a graduate of the University of North Carolina at Chapel Hill, and they have spirited contest.

STATEMENT OF HON. WALTER DELLINGER, DOUGLAS B. MAGGS PROFESSOR OF LAW, DUKE UNIVERSITY, AND FORMER ACTING SOLICITOR GENERAL OF THE UNITED STATES

Mr. DELLINGER. Chairman Dreier and ranking members of the Committee, in October of 1993 I was confirmed by the Senate to head the Office of Legal Counsel, and shortly thereafter I asked my predecessors in that office—all of the ones who were around were from the other party, but I asked them to meet with me in the secure facility at the Justice Department and got all of them a one-day security clearance at the highest level to tell me what they

thought I really needed to know that wasn't in the published opinions of the OLC. And very graciously Ted Olsen, Bill Barr, Tim Flanagan, and Chuck Cooper all spent a day with me bringing me to where I needed to be.

One of the first things they said was, do you have a book, in case the President is incapacitated, on everybody's desk? And I said I do not, and in change of party administrations these things often get lost. And I realized that I needed a book that was on the desk of the Attorney General of the White House Counsel, the Chief of the Staff for the President, Chief of Staff of the Vice President, that told everybody exactly what to do and what sequence. The Secretary of the Cabinet shall convene the Cabinet.

It became quite clear that death was much less of a problem than incapacity of the President and the uncertainty that accompanies a President who is incapacitated. Until we worked through that process, I woke up many mornings at 4 a.m. thinking this is my responsibility, and if I hear at 5 o'clock that something has happened to the President and no one knows who is supposed to do what, then it is my burden, and once I had those books on everybody's desk, I felt better.

So I appreciate what the Committee is doing to look at this issue in light of 9/11 and to understand that we need to do this.

Basically, there are—if there is widespread incapacity of House Members, basically, one of three things has to happen. Either the House will be unable to act at all; or the House will operate with temporary Members appointed in some fashion, stand-in Members to fill out; or the House will act through a reduced number of Members, which would have the advantage that those people would have been elected from their districts or with the disadvantage that they might be relatively few in number. Those are the three choices.

I think not only is the first one of the House unable to act unthinkable, it also would not happen. The country in those dire circumstances would be ruled in some form or fashion, even if it were by Presidential decree. There would have to be a House. This is the body that shares responsibility for the common defense, for taxing and spending, for raising and supporting armies, for declaring war. These are matters that must be taken care of in the event of a crisis of that magnitude and would be taken care of.

So we are realistically talking about whether to operate with temporary Members or to operate with a reduced number.

You have taken a very positive step by moving forward to try to have elections as soon as practicable, and you all have debated what is as soon as practicable, but it is clear that that is the best device. The question is, what do we do in the interim?

The reason I think it is worth considering whether to operate with fewer Members—and I will mention that briefly before I discuss why I think it is constitutional to do so, why I think the courts are not likely to invalidate it, and finally why I think there needs to be a bipartisan consensus before we take such a step. I think, first of all, that it is presently the result we have when there are a large number of deaths. We would have, everybody knows, under the present rules a House which would operate with very few Members. Given the alternatives of rushing in temporary replacements

or having the fewer numbers operate, I think there is a case to be made for the fewer numbers.

The decision of who those would be will be made either by the Lord or by chance, depending upon one's faith, but they would not be representative of the whole country, but they would have been elected by the people in districts in a random way, and I believe those men and women would step up to their responsibilities, no matter how few they were, until the House was replenished by elections. They would be experienced.

It is not the worst—the horror of a very small number is not as great as we think. The first Congress consisted of 65 House Members and 26 Members of the Senate. They did, of course, represent the whole Continental United States, but it was a smaller number, and they passed the Judiciary Act under which we continue to be basically be ruled.

I share the chairman's reluctance about amending the Constitution. Edison once said, never do electrically what you can do mechanically. If you can do it in a simple way, do it; and it also has the advantage that——

The CHAIRMAN. Is that Edison or Madison?

Mr. DELLINGER. Edison. Madison believed the Constitution should be amended only rarely.

The question was put I think very well by Speaker Cannon in 1906 when he said that he looked at the provision and he said the Constitution specifies that a majority of each House shall constitute a quorum to do business.

This brings to the forefront the question of what constitutes the House, what constitutes in a sense the denominator of which the Members present in the Chamber are the numerator, what constitutes the denominator. Now there is a very good argument that the constitutional rule should have been that it is 435 or whatever the full membership is, that that is the House, is the number 435, regardless of resignations or deaths or whatever. If the House had adopted that rule, the courts and I think scholars would have said that is one of the constitutional choices to determine what is the House.

As the chairman noted, the House has had several different views of what constitutes the House; and now it is the chosen, sworn, living Members whose membership has not been terminated by resignation or action of the House. Could the House choose a rule that would exclude from the denominator incapacitated Members?

Let us first think about why no Speaker or parliamentarian has done that. They haven't done that in ordinary times because it doesn't make sense to impose that kind of subject judgment on the Speaker or the parliamentarian.

The nice feature of the existing rule is it is quite objective. You can count the people there and the people who are dead and you can count who is resigned and you know what one more than half is, so you have got an objective way to determine a quorum. But it is really for convenience that we don't do that. You could eliminate the small number of incapacitated Members in ordinary times, but it is not worth the debate over doing it.

I think that in the event of an extraordinary catastrophe it is within the power of the House to say we have a different House now than we did the day before yesterday. A House that has been decimated by catastrophic attack where we have hundreds of Members who are incapacitated, it is a different House, and we are going to have a quorum rule that says a majority of what is now the House decimated by incapacitated will be—of that it would be a majority of doing business.

I think there is a great advantage to adopting a rule now if we can get really widespread and bipartisan agreement on it, because you are acting now behind what one of the philosophers calls the "veil of ignorance." You don't know whose party is going to be benefited, whose faction is going to be burdened by this. You don't know.

What we really want to ensure in that time, as I think Mr. Frost and the chairman said, is legitimacy. We want the country to think that the actions of the government at this time are legitimate. If you adopt a rule now, even though there could be debate about whether it is the validity of the rule, if you adopt the rule and the Congress then—the House then acts according to that rule, you have got a lot of legitimacy that you wouldn't have if you made up a rule on the spot.

We have an agreed-upon way of doing this. We don't know what the party membership would be, who was left, so this is how we agree to do it. So I would agree that it be done.

I think that the adoption of such a rule, if it were to be challenged now that no one would have standing and a challenge would not be right, I don't believe that a Member could challenge the rule.

I should note that I argued *Raines v. Byrd* on behalf of the United States, in which the Court, 7 to 2, rejected, standing on behalf of Senator Byrd and Senator Moynihan who challenged the line-item veto. It was later challenged by someone who didn't get a benefit that had been voted by Congress.

That is the point in which after the fact when the legislation goes into effect, and someone who is charged with a crime was denied a tax benefit as a result of this smaller Congress will challenge the validity of that, and the courts—it certainly would have standing, and the courts would adjudicate it. But in my view, the tradition is that, now, that they would defer to the resolution made by Congress, rather than making that resolution themselves.

There is some doubt caused by *Bush v. Gore* whether the court was willing to step in with respect to a matter some of us thought committed to Congress when it exercises its function of counting the votes, and a court might adjudicate in order to approve, in order to give some rubber stamp to the validity of it.

Here is the issue about adopting a rule now. There is understandable concern—given the sort of nature of the partisan level of confrontation we have experienced in the recent past, there is some concern if you adopt a rule now it will be invoked in something other than this catastrophic circumstance that we are all talking about, that a Speaker will declare the existence of a catastrophe. That is a genuine worry on the one hand.

Just saying that there has been a catastrophe, that is a word we often use, unfortunately, in our public life. People on both sides of the most contentious issues will say it is a catastrophe if the other side prevails. There is a loosening of that language.

So I would think what one would want to do to make this rule palatable is to ensure that you really expanded the definition of the trigger, that it has the incapacitation of a large number of Members built into the rule and ideally in my view would have some sort of bipartisan trick.

I fully realize that no Speaker, past or present, wants to share power. It is not the tradition of the House. There is more of a tradition in the Senate. But Speakers of whatever party do not like to act in conjunction with the concurrence of some other Member of the House, and no Speaker is eager to see a precedent established whereby the Speaker with the agreement of the ranking member of the other party, et cetera.

There may be ways around that. Because I think they would be much more comfortable if one thought you are going to be doing this only when it is a genuine emergency of the 9/11 variety and when there would be bipartisan agreement that we should go to this radically reduced House.

Perhaps one way to do it is to allow the Speaker to make the declaration but that a precondition of that Speaker's exercising that power is some form of bipartisan agreement. I think you are better suited than I am to figure out how that should be done, but I think it is the best way to do it.

Once we work out the legislation you all have been considering, we will try to replenish the House with elected Members as soon as possible. What to do in the interim, I think there is a lot to be said for doing it with a reduced number of Members of Congress, rather than amending the Constitution to bring in temporary replacements, which seems to me quite awkward, and that it is best now done by rule so that the country will be assured so, though it is 78 Members who are exercising this power, that was the rule that was agreed upon in a bipartisan understanding in 2004, and those 65 Members will act—or 75 or 58, however many there are—will act until their colleagues are no longer incapacitated or, in the case of deaths, elections replenish the House.

That is basically the essence of my statement.

The CHAIRMAN. Great. Thank you very much. It is very helpful, and I appreciate those thoughts.

[The statement of Mr. Dellinger follows:]

PREPARED STATEMENT OF WALTER DELLINGER

Mr. Chairman, and members of the Committee, thank you for inviting me to appear today. My name is Walter Dellinger. I am the Douglas B. Maggs Professor of Law at Duke University; I am also a partner and head of the appellate litigation section of the law firm O'Melveny & Myers. The attacks against our nation on September 11, 2001, made clear the need to address structural vulnerabilities that could impair the functioning of the national government after a major terrorist attack or other catastrophe. I am glad that this committee, and the entire House of Representatives, have taken their responsibility to address these issues. I hope that my perspective as a professor who has studied the Constitution for over 30 years, and a lawyer who has advised past presidents and attorneys general on constitutional issues, will be of value as this committee continues its important work to ensure the continuity, effectiveness, legitimacy, and representatives of the legislative branch in the aftermath of a major attack or disaster.

In preparing to testify today, I have studied the relevant constitutional provisions, court cases, and historical evidence on the Constitution's quorum requirement and the House's rulemaking power. I have also studied committee staff's drafts of proposals amending the quorum requirement in House Rule XX. Finally, I have reviewed other proposals aimed at ensuring continuity in government, such as the Continuity in Representation Act of 2004, H.R. 2844, and various proposals for constitutional amendments. I believe that an amendment to the House Rules' quorum requirement not only would be constitutional, but also will be a vital part of any solution to the continuity in government problem. I believe that the draft rule amendments I have seen go a long way toward filling that role, but fall short in certain respects. More specifically, my conclusions, discussed in detail in the remainder of these remarks, are that:

• First, the Constitution would permit the House to adopt a rule providing that a majority of non-incapacitated members shall constitute a quorum to do business in the event of a major catastrophe imperiling the ability of the House to otherwise function. The time to adopt such a rule is now, in advance of any possible catastrophe, and when the rule will have the added legitimacy of having been debated by the entire House, and adopted in the clear absence of partisan motives. Whether such a rule change is a better solution than any particular constitutional amendment is a question I express no position on today. But at the very least, such a rule is advisable as a stopgap measure while possible constitutional amendments addressing the question are debated by Congress and by the States.

• Second, I do not believe that the propriety of such a rule change would be justiciable by the courts. Rather, lawsuits challenging such a rule will likely be dismissed by the courts as nonjusticiable for lack of litigant standing, for lack of ripeness, or because such cases would present a political question constitutionally entrusted to Congress itself rather than to the courts.

• Third, although the courts would have no rule in judging such a rule, the Constitution imposes on the House a solemn duty to make sure that any rule change is not only capable of addressing the threats at issue, but also faithful to the principle of majority rule, congruent with the Framers' constitutional plan, and precise enough to prevent the manipulative use of the rule in situations for which it was not intended. Because the goal of the rule change is to safeguard the House's ability to function as a representative body when external events have rendered the House otherwise unable to act, the rule must be broad enough to include incapacitating events that we might not now be able to forecast. But a rule aimed at safeguarding our country in extremis ought not to be drafted in a way that would permit its use by factions aiming for undemocratic results—constitutional legitimacy demands that the rule be narrowly tailored in order to prevent abuses. The proposals I have seen so far, unfortunately, do not quite succeed on that count. As a result, I recommend that the Committee continue to work on drafting a rule change that would be consistent and not subject to partisan manipulation. More specifically, I recommend that such a rule (i) have a clear and precise definition of the extraordinary circumstances in which external events incapacitate large numbers of Representatives, triggering the rule's taking effect; (ii) take effect only upon bipartisan recognition of those triggering circumstances; and (iii) provide that the extraordinary quorum rules cease operation within a definite time period, unless the emergency circumstances are periodically recertified by that bipartisan authority.

I. The Constitution permits the House to address the quorum issue by rule

The quorum requirement comes from Article I, § 5, cl. 1 of the Constitution, which provides that: "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."

The House's rulemaking power comes from clause two: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."

Some terms in the quorum clause are clearly not open to debate. When the Constitution requires a "majority," it seems clear enough that that means, as the dictionaries put it, "more than half." Other terms are more fluid and open to interpretation. The question is, who is counted towards the majority, and a majority of what number. To determine whether a given number of Representatives constitutes a "majority," we calculate a fraction, with a numerator and a denominator.

The rule establishing the "numerator" for the quorum determination has changed significantly over the years. For many years, the House did not count towards the quorum members present in the Chamber unless they answered to a roll call—a practice changed in 1890 by Speaker Reed, who directed the Clerk to enter on the record the names of Members present but not voting, and count them towards the quorum. This practice was formalized on February 14, 1890, when the House adopted a rule that: "On the demand of any Member, or at the suggestion of the Speaker, the names of Members sufficient to make a quorum in the Hall of the House who do not vote shall be noted by the Clerk and recorded in the Journal, and reported to the Speaker with the names of the Members voting and be counted and announced in determining the presence of a quorum to do business." That rule was upheld by the Supreme Court in the 1892 case *United States* v. *Ballin,* and today's House Rules persist in the practice.

The proposed rule considered today concerns the "denominator" in the quorum determination—what constitutes the House from which a majority must be present. Here, too, historical practice has varied. Between 1861 and 1891, the House had a practice of counting all Members chosen and living as the body from which a majority must be present. Later rulings revised the criteria so that a quorum would consist of a majority of Members who had been elected and sworn-in, and had neither died, nor resigned, nor been expelled. I believe that each of these methods of counting a quorum is constitutional, as would be the proposal to include in the denominator only Members who are not incapacitated, in the event of a serious catastrophe threatening congress' functioning. In other words, the Constitution is flexible enough to permit a number of different formulas for determining a quorum—and the fact that Congress is empowered by the rulemaking clause to adopt a relatively strict version of the rule does not mean that it is prohibited from adopting a looser version.

This is not to say that there are no limits on the House's ability to define what constitutes a quorum. As noted before, the Constitution's use of the term "majority" is clear and unambiguous. No matter what the House chooses to make the numerator and denominator for the quorum inquiry, it is obvious that the House could not decide that some fraction less than 50% was a majority. Nor, I submit, could the House decide to exclude from the denominator properly sworn members entitled to vote who have chosen of their own free will not to attend. This is because the Constitution envisions a different method of reconciling such Member non-cooperation with the House's need to do business: the Constitution empowers the non-majority of the House that is present to "compel" the absent Members' attendance—a power that would be unnecessary if the House could simply count those absent members towards the quorum's numerator or exclude them from the denominator. Similarly, it would be unconstitutional for the House to adopt a rule that eviscerated the quorum requirement by defining it out of existence. For instance, a rule that chose for the denominator the number of Members already present in the Chamber would be illegitimate. Such a rule would mean that there was always a quorum—making a mockery of the Framers' plan that there would be times when the failure of a quorum did indeed prevent the House from doing business.

But within these restrains, the Constitution should be read as conferring a fair amount of discretion on the House to determine from whom the quorum must be drawn. It would be fine for Congress to decide that a quorum consists of a majority of the statutorily-provided number of Representatives (currently 435). It would be equally legitimate for the House to exclude from the denominator those Representatives who are dead, those who have resigned, those who have been expelled, or, as we are discussing today, those who have been rendered temporarily or permanently unable to discharge their duties as a Representative. Article I, Section 5 simply is not so specific as to require or prohibit any one of these ways of defining the quorum.

There is another reason why the Constitution must be read as permitting this kind of rule change. The legislative powers that Article I vests in Congress would be absolutely critical for our nation to respond to the type of calamity that the rule change is designed to address. It is Congress that has the constitutional power to "lay and collect Taxes," and spend and borrow money; to "define and punish Offenses against the Law of Nations"; to "raise and support Armies" and "provide and maintain" the Navy; to legislate regarding "the Militia"; to suspend the writ of habeas corpus when "in Cases of Rebellion or Invasion the public Safety may require it"; and, of course, to "declare War." Depending on the type and scope of the catastrophe at issue, the immediate exercise of some or all of these powers might be absolutely necessary to provide for the safety of the citizenry and for the very continu-

ation of republican, constitutional government itself. It is simply inconceivable that a Constitution established to "provide for the common defense" and "promote the general Welfare" would leave the nation unable to act in precisely the moment of greatest peril. No constitutional amendment is required to enact the proposed rule change, because the Constitution as drafted permits the Congress to ensure the preservation of government.

The Constitution's framers recognized that it was just as important to empower the federal government to act properly as it was to prevent the government from acting improperly. As Alexander Hamilton put it in the Federalist Papers, "[t]he public business must in some way or other go forward." We must not forget "how much good may be prevented, and how much ill may be produced, by the power of hindering the doing what may be necessary, and of keeping affairs in the same unfavorable posture in which they may happen to stand at particular periods."

Allowing the Congress to simply cease functioning in the event of a major catastrophe would serve not a single structural interest of the Constitution. It would not serve federalism interests, because even a congress much smaller than that authorized by law would represent the nation's diverse geographic interests better than no Congress at all. It would not serve the separation of powers, because even a greatly diminished Congress would serve as a better check and balance on the executive branch than would no Congress at all. (Indeed, the existence of a functioning Congress might well prove critical to the very survival of the executive branch: in the event of an attack that harmed the President, Congress might be called upon under the Twenty-Fifth Amendment to determine who is to exercise the powers of the presidency if there is a dispute over the President's own capacity to discharge the powers and duties of his office.) Finally, a nonfunctioning Congress would not serve the cause of individual rights, because, in the absence of congressional authority, the country would presumably have to convert to some form of martial law—a kind of government especially unlikely to respect due process and individual rights. In short, whether or not a reduced quorum is desirable in normal circumstances, it is absolutely vital to the constitutional scheme when the alternative would be the total incapacitation of the Legislative Branch.

In fact, a functioning House is so critical in times of emergency that, one way or another, it would be necessary, if much of the House were incapacitated, for the remainder to find a way to continue to function. In the event of a major catastrophe, the House will have to find a way to fulfill its duties, whatever you decide today. One of the main points I wish to make is that if disaster does strike, a diminished House of Representatives would have far more legitimacy operating under an emergency quorum rule that had been decided in advance than it would operating under a quorum rule devised ad hoc under emergency conditions. A rule adopted now will have the legitimacy of having been debated and approved by the full House, operating under traditional quorum rules—it will therefore escape the bootstrapping problem that would occur if a diminished House tried to change the quorum rules. Moreover, a rule adopted now, in advance of any emergency, would gain the legitimacy of having been adopted from behind what John Rawls called a "veil of ignorance." In other words, a rule adopted now will be perceived as neutral and fair, because it will have been adopted by a Congress that did not know which party, which faction, or which individual representatives would be empowered by the rule's eventual invocation. This will especially be the case if, as I suggest in Part III below, the rule adopted is clear and precise about the triggering mechanisms necessary for the Rule's invocation. That way, whoever is in the leadership when the rule is invoked will benefit from the legitimacy of having applied a clearly applicable law, rather than having made merely a debatable judgment call.

Certainly, changes to the quorum requirement could also be accomplished by constitutional amendment. Such an amendment either could address the quorum calculation directly, or could ensure the presence of a quorum by providing for temporary replacements of incapacitated members. There have been a variety of proposals for constitutional amendments, including one by the bipartisan Continuity of Government Commission, a joint project of the American Enterprise Institute and the Brookings Institution. Although I have studied some of these proposals, I do not think it is my place to comment on them here. What I can say is that the constitutional amendment process is invariably slow, and that waiting for a constitutional amendment would leave us vulnerable to potential lapses in the continuity of government for too long a time. Even if the House believes that a constitutional amendment is the best way to solve the continuity in government problem, it makes sense to act now with a change to the House rules, to provide for the continuity of government until a constitutional amendment can be proposed and ratified.

II. Changes to the quorum rule would be nonjusticiable

When we say that a case is nonjusticiable, we mean that the federal courts are jurisdictionally foreclosed from hearing the case under Article III of the Constitution, either because the dispute is not the kind of "case" or "controversy" to which the judicial power extends (usually where the dispute is too abstract or hypothetical), or because the dispute involves the sort of "political" question that the Supreme Court has decided ought to be resolved by the legislative or executive branch. I believe that, if the House adopts a rule that changes the method of calculating a quorum when extraordinary circumstances render much of the House incapacitated, lawsuits challenging the constitutionality of the rule change would be dismissed for lack of jurisdiction.

There are two situations in which litigants might attempt to challenge the constitutionality of such a rule. First, some plaintiffs might attempt to sue after the rule's passage but before it has ever been invoked. Under current Supreme Court precedent, no plaintiff (including Members of Congress who might wish to sue) would be held to have legal standing to raise the issue in such circumstances. Until the rule is invoked to find a quorum present where one would otherwise not exist, the propriety of the rule would be only an abstract issue ineligible for judicial decision. Later on, a court might be called upon to decide the constitutionality of the rule change if and when the new quorum rule was actually used to pass laws for which a quorum would otherwise have been absent, and a litigant affected by such a law argued that the law was not properly enacted. Even then, the rule would probably be held to present a nonjusticiable political question, and the case dismissed.

For a plaintiff to have standing to litigate, the Supreme Court has said, the plaintiff must have an "injury in fact"—that is, "an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" With only one exception not relevant here, the Supreme Court has held that a litigant has standing only to complain about an injury that is "particularized" as to that plaintiff, and affects him "in a personal and individual way." It should be obvious why I believe this requirement will not be satisfied by a plaintiff complaining about the mere passage of a rule amendment. The fact that Congress passes a rule change that would not take effect except in certain catastrophic and unlikely situations does not presently work a concrete harm to anybody's legally protected interests. The passing of such a rule change does not put anyone in jail, make anyone richer or poor, or inhibit the exercise of anyone's constitutional rights. A plaintiff cannot be granted standing merely to vindicate his abstract interest in the legality of congressional rules; a series of cases reject basing standing on such "generalized grievances" as citizens' shared interest that their government follow the law. And to the extent that there is any injury at all to a particular plaintiff stemming from such a rule's passing, the injury is the very essence of "conjectural" or "hypothetical." Such a plaintiff would have to complain that he or she would be harmed if (i) a catastrophic triggering event occurred, and (ii) the House decided to invoke the reduced quorum rule, and (iii) the House then passed a bill which it would otherwise have been prevented from passing by lack of a quorum, and (iii) the bill was thereafter enacted into law (by concurrent Senate passage, and then either a presidential signature or a congressional override of presidential veto), and (iv) the bill substantively disadvantaged the plaintiff. An injury contingent on so many unlikely happenings is far too speculative to confer standing. At the very least, a court is likely to conclude that challenges to the rule change are not "ripe" until the rule has actually been invoked and used to pass laws.

A court is just as likely to discuss a case challenging the rule change if the case is brought by a Member of the House complaining that the rule change infringed his or her prerogatives as a Representative. In *Raines* v. *Byrd*, the Supreme Court dismissed on standing grounds a lawsuit brought by Members of Congress challenging the constitutionality of the Line Item Veto Act. The Court noted that a prior case had upheld a congressman's standing to challenge his exclusion from the House of Representatives (and his consequent loss of salary). But, the court added, that case did not provide precedent for finding standing for legislators who were not "singled out for specially unfavorable treatment as opposed to other Members," and did not claim to be "deprived of something to which they personally are entitled." The Court in *Raines* also noted another previous case which had found standing for members of a state legislature who alleged that their vote on a particular piece of legislation had been "completely nullified" by an allegedly improper procedure; there, the Court said, standing was justified because the legislators alleged that under a proper procedure, their votes "would have been sufficient to defeat . . .

[that] specific legislative Act." None of the conditions that might justify legislative sanding were present in *Raines,* and none were present here. No Member of Congress could claim that amendment of the quorum rules specifically disadvantaged him or her as against other members. (To the contrary, if the rule change is enacted in advance of any catastrophe, as I recommend, then all members are on an equal footing—not knowing whether they would be among those incapacitated by a future attack, or among those left to govern under the new rule.) Nor does the rule affect the personal prerogatives or property rights of particular members. Finally, the rule change will not nullify any Member's vote. (Any Representatives among the incapacitated would be physically incapable of casting a vote to be nullified in any case; those present and voting after a catastrophic disruption would have their votes counted just like anyone else.)[1]

It is true that the U.S. Court of Appeals for the D.C. Circuit has occasionally granted Members of Congress and the public standing to challenge the internal operations of the House. In *Vander Jagt* v. *O'Neill*, for instance, the D.C. Circuit found that individual Members had standing to protest the allocation of committee seats between majority and minority parties; the Court in *Vander Jagt* held that the plaintiff-Members had stated a valid claim in alleging that the challenged practice had "diluted" their power and influence. A later case, *Michel* v. *Anderson*, further found standing for voters who had elected Members whose voting power had allegedly been diluted by a House rule permitting delegates from the District of Columbia, Puerto Rico, and various territories to vote in the Committee of the Whole. This line of authority does not change my analysis of the standing issue. To begin with, both *Vander Jagt* and *Michel* were decided before the Supreme Court's decision in *Raines* v. *Byrd*. In contrast, immediately after the *Raines* decision, the D.C. Circuit issued an opinion in *Skaggs* v. *Carle* denying standing to a group of Representatives and voters (as well as the League of Women Voters) challenging a newly enacted House rule requiring a three-fifths majority for actions involving tax increases. *Skaggs* did not reject the "vote dilution" theory of *Vander Jagt* and *Michel*. To the contrary, *Skaggs* expressly reaffirmed it. But *Skaggs* nevertheless found a lack of standing on the ground that plaintiffs in the case has suffered no "imminent injury," since the rule in question could simply be suspended, waived, or modified by majority vote of the House at any time. Similar considerations ought conceivably to govern any challenge to the quorum rule changes that might be brought in the D.C. Circuit. Moreover, as part of its legislative standing analysis, the D.C. Circuit employs a doctrine of "remedial discretion," under which it generally elects not to provide a remedy that would enjoin a Congressional rule. Hence, even if the D.C. Circuit were to find standing to hear a challenge to the rule change, it would likely dismiss the case nevertheless as a matter of remedial discretion. This was, in fact, the outcome in *Vander Jagt* and several of the other cases in that court finding standing to challenge congressional procedures.

Finally, I believe that, if catastrophic circumstances do come to pass and the reduced quorum rule is invoked to pass laws that would otherwise have failed, then certain individuals particularly affected by those laws could have standing to challenge them. Even the, however, such lawsuits would be subject to dismissal as nonjusticiable under the political question doctrine.

The classic statement of the political question doctrine is found in *Baker* v. *Carr*: "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Several of these considerations would be especially prominent in a case challenging laws passed under reduced quorum rules during a national emergency. Most particularly, a court in such

[1] *Raines* did leave open the possibility that the House itself may have standing to litigate (or to authorize certain members to litigate) disputes threatening its institutional power. But since the House also has the ability simply to change any rule it finds offensive, it is unlikely to authorize a member to challenge on its behalf a rule that the House has adopted and refuses to change. Even if the House did attempt to authorize a member to litigate such a case on its behalf, the case would almost certainly be held nonjusticiable for lack of a truly adversarial relationship between the parties.

circumstances would properly consider the need to avoid multifarious and contradictory pronouncements during a time of national emergency.

In addition, given the range of historical precedents on the quorum issue, and the fluidity of the terms at issue (as discussed above in Part I), a court applying the political question doctrine in this sort of suit is likely to find a lack of judicially manageable standards, and a textual commitment of the quorum determination to the House itself. *United States* v. *Ballin* made clear that the House's rulemaking power is not limitless. But, as the Supreme Court showed in the 1993 case *Nixon* v. *United States*, which dismissed a challenge to a Senate rule permitting a Senate committee to take testimony during impeachment proceedings, the combination of a vague and judicially unmanageable constitutional standard, and a textual commitment of a question to Congress, militate strongly in favor of finding a political question.[2]

III. Suggestions for changes to the quorum rule

What considerations would I recommend that drafters of a rule change keep in mind, in order to maximize the legitimacy and effectiveness of the rule, and minimize the potential for misuse?

• The substantive condition that would trigger the rule must be stated generally enough that the rule can really safeguard continuity of government, yet specifically enough so as to prevent fractional misuse. The events of September 11, 2001, show that it is not necessarily in our capacity to predict precisely the type of damage our enemies might wish to inflict on us. Moreover, the need for continuity in government is not limited to the aftermath of terrorist attacks; it would be folly to draft a rule that applied only to terrorist attacks, and not, for instance, to natural disasters. At the same time, the triggering event cannot simply be the failure of the House to produce a quorum. As I have discussed above, the Constitution specifically envisions that the House will be without a quorum at some times when Members refuse to appear; the method to deal with that is not by changing the quorum rule, but rather by using the power to compel the attendance of absent Members. The rule must distinguish true disasters imperiling the very existence of the government, from the sorts of concocted, rhetorically overblown "crises" based on policy disagreements that are recurrent features of our constitutional scheme. Similarly, the rule should be triggered not by the mere absence of members from the House Chamber, but rather by their inability to discharge the duties of their office because of intervening external events. A rule incorporating all these concerns need not be excessively complex or convoluted. The rule's condition precedent could simply read: "In the event of an extraordinary catastrophe incapacitating a majority of members and preventing them from discharging their duties as Members of the House, . . ."

• For the rule's invocation to have true legitimacy, there must also be some procedural guarantee that the rule is not being improperly invoked for factional reasons. Unlike the traditional rule, where the quorum calculation is based on strictly objective measures such as death, the reduced quorum rule for extraordinary circumstances would be based on less clear-cut circumstances, presenting a heightened danger of manipulation. This loss of objective standards may be necessary in order to deal with the special problem the rule is designed to address; but Congress should certainly take care to minimize the risk of manipulation. For that reason, I strongly recommend that the power to invoke the rule be placed not solely in the discretion of the Speaker, but rather require as well the concurrence of one or more members of the minority party's leadership, from a list chosen ahead of time. This need not be viewed as an encroachment on the Speaker's or the majority party's authority. Rather, the rule might well be drafted to place the ultimate decision on invoking the rule in the Speaker's discretion, requiring only that this discretionary authority be triggered by a prior certification from outside the Speaker's own party. Once again, the language providing for this could be quite simple: "Upon certification by two of the five most senior Members of the House not from the Speaker's own party, that an extraordinary catastrophe has incapacitated a majority of Members and prevented them from discharging their duties as Members of the House (or upon certification of two of the five most senior and nonincapacitated Members not of the Speaker's party, if any of the five most senior are incapacitated), and

[2] The only doubt on this point is created by the Supreme Court's decision in *Bush* v. *Gore* and *Bush* v. *Palm Beach County Canvassing Board*, where the Court was apparently untroubled by the Constitutions's apparent commitment of electoral vote disputes to Congress. See generally Rachel E. Barkow, More Supreme than Court? The Fall of the Political Question doctrine and the Rise of Judicial Supremacy, 102 Colum. L. Rev. 237 (2002).

upon the Speaker's subsequent determination that such circumstance poses a grave threat to the nation, the Speaker shall be empowered to declare that the following extraordinary quorum rules are in effect. . . ." This is but one suggestion. There are a number of alternatives that would serve to insure that the special quorum rule was not invoked for political purposes, but was rather used only in cases of bipartisan agreement that truly extraordinary circumstances exist.

• To ensure that the unusual quorum rules remain in effect no longer than the extraordinary circumstances that gave rise to them, any declaration that the extraordinary quorum rules are in effect should be subject to an automatic sunset provision, providing that the House will revert to its ordinary quorum rules unless the minority party recertifies that the extraordinary situation still obtains, and the Speaker chooses to reinvoke the special quorum rule. This, too, will minimize the risk of manipulation, since public scrutiny of successive recertifications would provide a valuable check against abuse of the reduced quorum rule.

The CHAIRMAN. Just a moment ago you were talking about this whole definition of catastrophe. I found that to be intriguing, and I am wondering are you envisaging that we would establish some kind of specificity on the issue of catastrophe?

Mr. DELLINGER. Here is the tension, Mr. Chairman. You don't want the definition of the triggering mechanism to be too narrowly drawn, that is, the trigger that would authorize the Speaker, with or without whatever consultation. Because one of the things we learned on 9/11 is it is hard for us to imagine some of the things that might happen. So you want it broad enough so that it is not so narrowly drawn that we are thinking of the last thing someone did to it rather than the next thing.

At the same time, you want to give assurance now that you are adopting a rule that has enough of a definition that it doesn't give just any abusive Speaker who might in the future be elected the authority just to declare catastrophe and invoke a different set of rules.

The CHAIRMAN. You were here for our discussion with the parliamentarians, Mr. Johnson and his crew. It would seem to me that when we get right down to it the definition would clearly be the death or, as we would conceivably go through this quorum process, basically the incapacity of Members to be here. And part of the question would be—and we talked about the Sergeant at Arms playing a role in making this determination and the use of this honest broker term comes into the mix here. I guess one question that would come forward is, what responsibility would that honest broker have? Could he be legally challenged, ultimately, in a decision that has been made advising the Speaker on this question?

Mr. DELLINGER. Ultimately, the check is political, and a Speaker could in some instances declare tomorrow, if a number of the Members of the minority party left town, declare tomorrow that we are in a catastrophic situation, and it is clear that that would be so untenable that it would be rejected.

So if you have a rule that the country can understand then that cabins a Speaker's authority to be abusive. Because if it said something like, in the event of an extraordinary catastrophe, an incapacitating majority of the Members and preventing them from discharging their duties, people would say this is clearly not met. They are in Greenbrier, West Virginia, having their party caucus. This is not that circumstance.

So the honest broker—I don't know the institution of the House in a way that you all would know that institution, whether various

Members of the House or staff are beholden to the majority in a way that would not give that credibility. If the Speaker—if you don't want to share the power of the Speaker to declare this circumstance and really—I take it the minority leader is really not an officer of the House itself. It is more an informal matter of your caucus, so it makes it a little awkward. If we have a constitutional House officer who was the minority party member, you could say with the concurrence of both of those. It is really a matter of what makes not just the present minority comfortable but any of the Members comfortable who imagine in their heads their least favorite Speaker of the other party being the Speaker at the time. What makes you comfortable——

The CHAIRMAN. When Mr. Frost and I were laughing earlier, we were contemplating individual personalities of both political parties.

Mr. FROST. We won't mention them.

Mr. DELLINGER. I was certainly not going there with names.

But that is the usual test to do, and it is not actually the Speaker at the time of the genuine catastrophe. What you have to worry about is the Speaker at the time of a noncatastrophe but who is invoking this rule for partisan means or some other kind of factional means and what sort of what—you wouldn't want a rule that said, whatever is really, really important to do, the Speaker may declare that a quorum consists of whatever happens to be in the House. Obviously, you would want to ratchet it up so there will be some public constraint.

The CHAIRMAN. I appreciate that.

Mr. Frost in his opening remarks talked about the importance of a minority being involved in this process; and having served 14 years as a member of the minority and understanding Madison's view on the rights of the minority, I feel very strongly about that and I believe it should be brought as part of the equation. Thank you very much.

Mr. HASTINGS of Washington. Thank you Mr. Dellinger, for being here for your testimony.

Just for the record, I apologize for going in and out. Some of my constituents are here, and they traveled a long way. So I wanted to acknowledge them.

But in your testimony you said you feel very strongly that we should——

The CHAIRMAN. We didn't consider it a catastrophe, by the way, when we didn't have a quorum when you were back there with your constituents.

Mr. HASTINGS of Washington [continuing]. You feel very strongly that we should adopt a rule before hopefully an event ever happens.

Mr. DELLINGER. I believe you stated it very well, Mr. Hastings, when you were here earlier. You talked about using different language. You used different terminology to really make the same point, that there will be much more public confidence—I think was your quote—public confidence in your actions according to a rule that we adopt now. Even if the Houses were to proceed with a constitutional amendment—and very thoughtful work was done by Norman Ornstein and his colleagues, very thoughtful work. Even

if one were to proceed down that route, it would be a while before we do that. So some consideration of a rule now, even if you wanted to amend the Constitution to allow the appointment of temporary Members.

Mr. HASTINGS of Washington. The chairman pointed out we are dealing with the incapacitation area here. In that regard, if we were all home, for example, what are your thoughts? Some people have talked about a power of attorney if I may be incapacitated. So you have somebody externally making that decision. What are your thoughts on that suggestion?

Mr. DELLINGER. That is very interesting. I think that it is actually a very good idea, that you have someone that you trust who is capable of informing the Speaker of your incapacity to do that. That actually would solve some of the problems of uncertainty, and it would actually be very good to advise all of the Members, as we should or you should, that one should have this for one's health care as a general matter. I think if the Members would do that as part of a package dealing with their own medical health care power of attorney and adding to it for Members a determination of disability authorization on file with the relevant House officer——

Mr. HASTINGS of Washington. I am not going to draw a judgment on this, but it seems an approach like that, if that happened and we were all home, the Speaker—there would be some time period before he would get reports back from whoever makes that decision.

I just say that as an observation. I wanted to get your perspective on it.

Mr. DELLINGER. I do think a virtual Congress consideration could be done at some point for a very limited period of time, given the technology we now have. One would not—it would have dire consequences in my view in the long run, because one of the advantages of going to the national capital is people gain a larger perspective than they do if they mailed in their votes from home.

Mr. FROST. The building may not exist.

Mr. DELLINGER. The building may not exist. This entire area might be contaminated.

Mr. HASTINGS of Washington. That is all I have. I take very seriously your suggestion and the Parliamentarian's that we should act on it. Obviously, the difficulty we are going to have is how we define the incapacitation.

In reading your testimony, you made one other observation. Maybe you said this in your oral testimony. But you suggested very strongly that even a House in diminished numbers acting clearly where there would be some parts of the country not being represented—because incapacitation or general revocation is better than having nobody in place at all. Did you——

Mr. DELLINGER. Absolutely. I think that it would have been, as I said, chance or divine intervention that it left a few Members able to act, and they may be from different districts. They may be from—we have all read about how different our congressional districts are, but they at least would have been elected by some group of—a constituency of American citizens would have elected these people, and at a time of a national crises I think some of our more partisan disputes would seem relatively trivial and having people

elected by their friends and neighbors—a sort of random constituencies.

The CHAIRMAN. If you would yield on that point, I think that you made a very interesting argument on the issue of elections, and Mr. Frost has brought to the forefront this issue of the overall national confidence if in fact we had three Members of the House of Representatives with the constitutional responsibility that is placed in this body, would we in fact be in a position to address all these questions? And you are arguing even with this view as three Members——

Mr. FROST. I raised five, but three constitute a quorum.

The CHAIRMAN. Well, we could be down to three——

Mr. DELLINGER. That is the worst-case scenario. I think that it is better than not having any House at all, and I think the mechanism of having—we know that is actually what happens if all but three Members were killed. If you had a joint—God forbid, a joint session, and three Members were not in attendance, we all know that under the present rules those three people would constitute the House in the case of death.

That would not be the case if we went to Mr. Ornstein's favorite position that has been rejected historically, which is 435, so the number has to be always to 218.

But that is where we are. I think we have the spectrum of likelihood. The more you get down to that few Members, the more unlikely and extreme it is. We need to take into the highly unlikely but the less unthinkable possibility that some kind of biological or chemical attack leaves us with only 110 Members or 90 Members, and I think there would be a lot of public confidence. These were 90 people elected by people who know them in their own districts, and they were elected, and they are not appointed, they are not replacements, they are not temporaries.

I have a lot of confidence in 90 Members of this House stepping up to the occasion, rising above partisanship, recognizing that they want to proceed—with the concurrence of the Senate and the President or acting President they can do one thing that—I must say, in the interest of candor, I did think of one counterargument that I would ask.

My question would be, suppose, Professor Dellinger, one of the first thing that rump did was to repeal the law that provided for expedited election of new Members. That is the hardest case, that they would seize power, but it would have to pass the Senate and be signed by the President.

The CHAIRMAN. Even if that were to happen, there still is in place a structure, even though it is not expedited, for dealing——

Mr. DELLINGER. There would be special elections——

The CHAIRMAN. And in some States—one of the points we made during the debate, the State of New York, for example, handles those within a 40-day period, what we call in our preemption participation a 45-day period of time.

Mr. FROST. I want to apologize to Dr. Eisold, who sat patiently through this. I won't be able to be here. I read your statement, and I find it very interesting. I may want to talk to you privately about that.

A lot of things come to my mind. I believe that Professor Dellinger's urging us to involve the minority—it is a serious problem, and I would point out to the majority that if we have a couple more months like this last one in Iraq, the current majority may find itself in the minority the next Congress.

Mr. FROST. And it is not without possibility that there will be changes in the parties in the next Congress.

The CHAIRMAN. Sure. It is always a possibility.

Mr. FROST. Secondly, my point on the constitutional amendment, I still favor a constitutional amendment for replacement of Members—Members who have been killed.

I do recognize the fact, the difficulty, of getting a constitutional amendment adopted. It takes years and years. And I think, because of that, I am certainly willing to entertain and hope that I can support a rules change that would be in place right away, although I have some questions about the way the rules change is drafted.

But I think that your point, even though we disagree on the constitutional amendment issue—because I believe that ultimately it should have been a constitutional amendment—I agree to appointment of Members pending elections.

I recognize that that is unlikely to occur anytime soon, if ever, that we will ever amend the Constitution. I will continue to support it, but if it were to happen, it wouldn't happen next year.

Mr. DELLINGER. I didn't mean to suggest that I was opposed to the constitutional amendment. I share the Chairman's reluctance about amending the Constitution.

Mr. FROST. I do, too.

Mr. DELLINGER. And I think that it will be a while before we get it, and there is something to be said for a——

The CHAIRMAN. If you would yield. On that point, you went on to argue, very persuasively, about the need for elected Representatives. Then you were critical of the notion of appointments.

Mr. DELLINGER. That is true. I take the Chairman's point that I am more agnostic about—the appointment by the Governor temporarily, if we can get into the things about having your own personal successor——

Mr. FROST. We are not. My preference is an appointment by the Governor. But that is another matter for another time. I just—I find your testimony very helpful. I hope that we can devise a way to, if we adopt this type of rule, to have bipartisan participation.

The CHAIRMAN. Absolutely.

Mr. FROST. We have got to be very careful in terms of the definition of a catastrophe, in terms of what we would trigger in this particular rule. I am not at all concerned about diminishing the quorum below 218. I think there are circumstances in which a quorum being less than 218 would be compelling, and that we have to figure out how to do that.

I am concerned that we could all be affected by the common tragedy. We hope that never happens. And the issue of who determines incapacity is a very serious issue because this House is the judge of its own Members. I don't know that we can delegate to anyone.

So ultimately either the Speaker could take advisement, but whether it is the Speaker or whatever mechanism we set up, some-

one in the House would have to determine whether a Member was incapacitated or not. We couldn't just delegate that to the Member's doctor in advance. It would have to be ratified in some form by this body, I believe, to be legal.

The CHAIRMAN. Absolutely.

Mr. FROST. But it is an extraordinary issue. I hope to continue to move forward. We have made some progress on some relatively noncontroversial measures in the last 2 years. And I believe that you introduced those in the record.

The CHAIRMAN. Yeah. The litany of all of the changes.

Mr. FROST. But while they have been important, they have not dealt with the larger issues. And it is important that we deal with this very large issue of incapacity. And I thank you for being here.

Mr. DELLINGER. Thank you.

The CHAIRMAN. Mr. McGovern.

Mr. MCGOVERN. I want to thank you for being here. I am like Mr. Frost, I am inclined to want to support some sort of a rules change. I think this is a discussion draft that there are a lot of questions that have arisen. I guess my concern is that, you know, it goes back to the issue of legitimacy, as to what people across the country will actually view as legitimate in case of a catastrophe.

I mean, if there are 200 Members here, I guess the people—that sounds like a lot of Members. People might feel that these people are capable of making sound decisions; 100, maybe it becomes a concern to some. But if you get down to 50 or 30 or the 20 or 10, I mean, the decisions that would be made I would assume in the aftermath of a catastrophe might be decisions like we are going to go to war somewhere, might include decisions to revoke people's civil liberties, establishing curfews, some pretty serious decisions will be made. And I am not sure that the American people might—will feel confident if a handful of people of one party, you know, or under 10 people or 15 people are making those decisions, would be credible.

I mean, I worry about, you know, you try to take this to kind of the worst-case scenarios. And I am especially concerned if you have a situation that arises where people cannot get together, where you have people who are physically and mentally able to make decisions but they are trapped in their districts, they are trapped outside of the capital city, or they are unable to kind of get together.

And so this issue of legitimacy I think is incredibly important. I think you can devise all kinds of ways to keep this thing running. One person can change the rules and adopt all kinds of things to kind of keep things going.

On the other hand, I don't think—I think it would be very difficult to go—or to have this government make the right decisions if people did not trust that the people were there to make those very decisions.

Mr. DELLINGER. Here is the dilemma. You could imagine putting in the rule a floor, that a quorum will be the capacity—a majority of the Members with capacity, but in no event shall it be lower than 50 Members, of which a quorum shall be 25.

Now, I think what you would be implicitly doing in that case is saying if, God forbid, it got below that, there would be no House. I think it would be implicitly acknowledged that the President

could simply act alone. That is what Lincoln would have told you. If you really had no House at all, Lincoln would tell you the President's first obligation is to preserve the Union. He would have announced that he has declared war and he is raising taxes, and that he is doing this. And history would judge him or her on the basis of the validity of those choices, but would not question, I think, his decision to make them.

So at some point the question is, is it better to implicitly do without a House at some—does the level get so low, recognizing that I think you are basically suspending the Constitution rather than trying to comply with the letter——

The CHAIRMAN. So we would have a President who could conceivably want to do in the first branch of government, then?

Mr. DELLINGER. In the absence of a constitutional amendment, you are faced with a choice of either operating with a very small House or no House.

Mr. HASTINGS of Washington. I just make this observation. And if we got to the point where you said we are—our membership was down to the very precarious numbers, I think we would all acknowledge that the power could immediately flow to the executive branch, assuming the executive branch wasn't harmed in whatever caused us to have our numbers diminished.

You could see how that could have happened after September 11th. It certainly happened December 7th. It took a little bit longer during the Civil War. But that generally is what happens. But leading to that—this is just kind of thinking outside of the box—I know if there is a declaration of war, that triggers a whole lot of other things that—as to how we do business.

Is there any way that we could contemplate having, in case of a disaster, some sort of trigger mechanism to say this is a declaration of war would kick in, which allows for other acts to be done in a quick way? Has that been contemplated?

Mr. DELLINGER. You could do some version of the War Powers Resolution that has more authority conferring in really dire circumstances.

But I actually think that even a handful of Members, summoned to the White House, or a temporary equivalent, would be of great solace to the country. The President called the nine of you over and says, This has been a horrendous calamity. I want the nine of you to endorse—here is what I propose. I want the nine of you to endorse it.

You are elected from nine different places. I think that is better than nothing. I don't mean to say it is good. I can easily disparage——

Mr. MCGOVERN. I am not advocating nothing. I am kind of pursuing some of those other thoughts about whether or not people could possibly participate, you know, and not be together. I am just—I am not saying that is the right way to go, but I am saying that you could have nine Members from one State, you know.

And again, I do think, especially in the face of a catastrophe, it is important to have a check on the White House. And, you know, I mean, you want to make sure that whoever is the Commander in Chief, whether it is the President or whoever is in the line of succession, is actually asking the right questions; you know, is not

acting in a panic, you know, and that there is someone else, there is another body, you know, kind of pitching the questions. But we don't always do that now, and we have got 435 Members.

But I think on some of the decisions that would have to be made—again I am not arguing against the idea that we need to move forward with some sort of rule change, but I am simply saying that I don't think it is unreasonable to think that if only a small number of people are here, depending on who they are—I mean, if you have 10 Members from each region of the country, you can argue that we have got a little bit of everything here. But there may be some issues of credibility when it comes to some of the decisions that are being made, which can be war and as well a total restriction of our civil liberties; could be a number of things that are not that far-fetched to imagine in the aftermath of a terrible catastrophe.

So it may be worth trying to think of are there other ways, you know, to kind of beef up the numbers, maybe not putting—if it had to be 50 or 100 or 200, but to the extent that there are Members who are able to participate, whether there may be creative ways to get them to be here if we cannot get them to the Capitol.

Mr. DELLINGER. That is worth exploring.

The CHAIRMAN. Let me before you leave raise one other issue here, and it has to do with the issue that Mr. McGovern was raising. That is the question of action.

You talked of the idea of the President calling the nine remaining living Members of Congress down to the White House to get them to support an action that he might choose to take. I guess one of the points that I would make is if we do face a crisis, there are many who argue that, you know, what is it exactly the United States Congress would do? Would we have to have a debate on the Medicare prescription drug bill?

You know, the decisions that would be facing us are primarily immediate. And, yes, Mr. McGovern correctly raises, there needs to be some kind of check on this with the executive branch. But we are not going to be considering a major education bill when there are that many Members of the House left.

And I just wonder if you have any thoughts on this issue, the urgency of having the institution immediately in place and with a full complement of Members, as we deal with the potential crisis and challenge that is on the horizon.

Mr. DELLINGER. I am less persuaded than the Commission was that having a full complement in that short period is really all that beneficial, as compared with the moving ahead, concentrating on getting the elections done, and getting new Members elected.

The CHAIRMAN. We are in total agreement. I wanted to hear your thoughts on it.

Mr. MCGOVERN. Would you yield?

The CHAIRMAN. Yes.

Mr. MCGOVERN. I wasn't contemplating that we would take up a prescription drug bill during those times, although if we did, you would probably keep the roll call open until you get a majority.

The CHAIRMAN. That is a good idea.

Mr. MCGOVERN. But I—you know, but there are serious issues involving, you know, what this country—it goes to the very heart of what this country is about, the civil liberties.

The CHAIRMAN. It was not based on yours, but a number of people at the outset when this debate came forward, the question is: What exactly will we be doing the next day? Must the House of Representatives be in session? I know an argument can be made about the solidarity that we saw on the East Front of the Capitol on the afternoon of September 11 was an important symbol to the American people; but at the same time, I do think that if you look at the actual work product itself and what is necessary, I think that Professor Dellinger and I are just agreeing on that.

Mr. HASTINGS of Washington. Just one observation. And I subscribe to the idea that you have to have checks. I would suggest if you got down to nine Members, you would have to convince five people to check the President. But I would suggest if you got down to nine Members, five people checked the President, you would probably have an outrage against the five Members. So you would be in a situation where you would have to respond, and someone would have to show some leadership.

So while that is all valid, when you are talking about the issues that are in front of us and things that have to be done under those circumstances, I think you would have a backlash if you had a small number and tried to check the President under those circumstances.

And, again, if he made a bad decision, you have other opportunities when we are reconstituted in order to make these corrections. So I would just make that observation. I am not saying they are not valid.

The CHAIRMAN. Thank you very much.

Mr. MCGOVERN. I wanted to respond to what Mr. Hastings said, because I think that, conversely, you may have a group of Members who might call into question actions a President may be contemplating in the aftermath of a catastrophe and actually be heroes, actually be trying to make sure the President did the right thing.

So I am just simply saying that, you know, I know you are not disagreeing.

Mr. HASTINGS of Washington. I understand. All I am simply saying is that if you look back at past history, and when we have these sort of events that have happened, people tend to coalesce behind the executive. That is what I am suggesting. In fact, you could argue for those that—like the division of power, you would argue whenever we get into a world war, all power flows to the President.

The CHAIRMAN. Thank you very much again, Professor. Appreciate your being here.

And our final witness who has, as was pointed out by Mr. Frost on the length of his patience, has been shown by the fact that Mr. Frost walked out of the room, as you said. We are now approaching 2½ hours, and you and your colleague have been very patient in following what, obviously, is a fascinating, interesting challenge; something we don't want to ever contemplate, but we are in the business of dealing with a lot of crises that do take place in this institution.

That is why we felt it very important that you come forward to offer your remarks.

The CHAIRMAN. So we appreciate having Admiral Eisold with us. And your prepared statement will, without objection, appear in the record.

When was the last time you testified before a Congressional committee?

STATEMENT OF JOHN EISOLD, M.D., THE ATTENDING PHYSICIAN TO CONGRESS AND REAR ADMIRAL, MEDICAL CORPS, U.S. NAVY

Dr. EISOLD. Two and a half years ago; second time in 80 years.

I can get to the points that I want to make fairly quickly by paraphrasing my statement. Basically what we are talking about from my perspective is impairment and incapacitation. Clearly death, as has been discussed, is a simpler situation with which to deal with.

The CHAIRMAN. There is some finality to that.

Dr. EISOLD. My intent is, pure and simple, to ensure the continuity of government. In carrying out that mission on a daily basis, we are interested in the health and welfare of not only the Members, but the staff and visitors to the Hill. They are all important.

Our mission also includes consideration being given to prepare for potential mass casualties consequent to a weapons of mass destruction incident such as we have been alluding to here. And I am adequately staffed and resourced to accomplish this. I am fully connected with all of the local, Federal, and civilian medical authorities so that, in a situation where we are overwhelmed, I can tap into a full response with great confidence, as I did during anthrax.

One thing I will point out, though, is that in my role, confidentiality is very important. For the sake of discussion here, we would have to assume that by virtue of the public nature of whatever event it was, that the particulars surrounding a Member's health or lack of health are public knowledge. Therefore, it gets easy to talk about their situation. However, if I have been given knowledge, by virtue of taking care of a Member or if Members come to me about a significant health problem that will clearly have the potential to incapacitate a Member in a short period of time, but they have decided not to discuss this with anybody or even talk about it with their family, I will obey that trust. I would not violate that confidentiality.

And, quite frankly, in support of leadership, in situations here where it is obvious that there may be an impaired Member, if I have been approached, it has always been in the interest of the Member's well-being and dignity. So there has been a great deal of respect for that trust expressed by everybody.

Now, if I just look at the Members' health and some of the continuity of Congress problems that arise, there is a range of health status. You are well. You are dead. And somewhere in the middle is incapacitation.

If we have somebody with a minor illness like the flu, we all understand somebody is missing several votes and being out for a few days, and that is understood. If we look at another level, like major

surgery or pneumonia, again I think the tradition is that they are excused, even some for an extended cancer treatment or something like that.

But then when we get to significant disease, prolonged hospitalization, rehabilitation, or inability to get around, we need to look at what is at stake. Then you have to decide. At one end of the spectrum you ask yourself the question, Can the Member vote? Can he or she be expected to vote? Can they do constituent work? Then you have got at the other end of the spectrum a Member so ill, maybe even on a ventilator or comatose after an automobile accident, that it is intuitive to anybody that the prospect of returning to work or at least returning to work in any given time period or the ability to perform at all is so marginal, that you should even consider would this person leave before the end of the term. Would they be able to do any work at all in this incapacitated situation?

Now, implicit in this, I have raised the question of impairment. Impairment of a Member is an objective description of a Member's state of health as determined by the medical establishment. It is me discussing the things that are wrong with somebody and their degree of impairment. Usually you have got a prognosis with that as well. Will the Member fully recover? If so, when? Is it permanent impairment. Is the impairment cognitive, or is it physical? If so, to what degree? Is death a possible outcome, and so on? All of that requires some judgment.

Keeping in the back of our mind that medicine is not a precise science and that patient outcomes are not always totally predictable, sometimes you may have someone who you think is going to turn the corner, and they don't. Likewise, there is someone you thought was going to be laid up for an extensive period of time who recovers quickly.

My statement here is that a rushed judgment about a patient's ultimate status may be ill-advised. I think that whenever you are thinking of an impairment, there is a time frame. Some people are going to recover soon and some in a long time. I would keep that in mind.

Now, what do we do with any of this information about an impaired person? Maybe we judge someone as being incapacitated, raising the subject of secession, a nonmedical issue. However, when there is death of a Member, there is already a process in place whereby succession will ensue.

The difficult situation that we have been talking around today is incapacitation. Incapacitation is a subjective judgment about a Member, saying that a Member is too impaired to be likely to be able to return to meaningful public service.

At this point there has to be a determination about what is the performance standard. And the judgment about incapacitation is made relative to that standard. For example, can the Member walk into the Chamber, move about the Chamber and put their voting card in by themselves? You can think of a thousand different scenarios. But there has to be a performance standard first before you can decide whether someone is incapacitated.

The state of incapacitation would be made by nonmedical people based upon medical input. If you give me a performance standard, then I can tell you how impaired the person is and the likelihood

that they are going to be able to meet that standard. Then someone else can make a judgment about incapacitation.

If one is talking about one or two impaired people, I might possibly recommend to a Member, their or their staff that because of The Members situation they ought to think about leaving office, because it is either counterproductive to their health, undignified, or that they probably aren't going to get back to work. It is always easy when you can arrive at such a conclusion in a very collegial way or family way.

But one always has to anticipate contentious situations.

I would discuss this with appropriate people, for full disclosure. I would not, however, make a statement to leadership that a Member was incapacitated. It is a fine line. While I personally would not say, someone is incapacitated, I would say exactly how much a person is impaired and what is the likelihood a person could or couldn't do their job. Then as an institution, someone else would match that up with whatever standards have been decided upon. In a collegial way, I would work as an advisor to say, what are realistic expectations. But I would always, since my compact is with the patient and their confidentiality, focus on their health and their medical needs, while institution has to act independently with what their needs are. Then we marry the two together.

What we need to look at is incapacitation. Incapacitation really requires a lot of thought before you tell a Member they are out of the game.

While I think that under the right circumstances, with people working together, you can do that, it is the hardest part of this whole enterprise.

[The statement of Dr. Eisold follows:]

PREPARED STATEMENT OF DR. JOHN EISOLD

I am pleased to be able to address this very important member topic relating to impairment, incapacitation, succession and the Continuity of Congress with you today. In my position as the Attending Physician, I am quite cognizant of the significance that health or more importantly the lack of good health plays in all of our lives and, in particular, its vital role in the political process. At this time of many external threats to our well being, it is imperative that these issues be considered. My intent today is to define the playing field that needs to be explored to study the issues at hand. While on the surface, various approaches may seem readily workable, the truth is that the issues are quite complex, rest neither in the medical nor political arena exclusively and don't lend themselves to easy solutions.

First, let me define my clinic's mission. It is to ensure the Continuity of Government—pure and simple. In carrying out that mission, on a daily basis the health and welfare of not only the members but the staff and visitors to the Hill are important. This, also, includes consideration being given to prepare for potential mass casualties consequent to a weapons of mass destruction incident.

Currently, the clinic is adequately staffed and resourced with physicians, technicians, nurses, ambulances, transport vehicles and a mobile medical support capacity to accomplish our mission routinely. During a mass casualty situation or other major incident, we can rely on the rapid engagement of the full measure of support from Federal and regional civilian contingency health resources. Furthermore, these additional assets are regularly on standby or prepositioned for scheduled events such as the Inauguration, State of The Union, Joint Sessions etc.

Important, as well, in the delivery of healthcare, confidentiality is obligate. I raise this issue of confidentiality, because the discussion that follows assumes that any member's health status or death has become public knowledge. This would, therefore, exclude those situations where a member has poor health but has not shared this with anyone, perhaps not even with a family member. I would respect the mem-

ber's wishes, even if job performance had deteriorated, and not discuss their health status. Leadership has always understood this and never pressed my for information in even the most delicate and possibly obvious situations. In fact, if concern has been raised, it has been out of interest for a member's well-being and dignity.

Turning exclusively to the members and their health, lets look at some of the Continuity of Congress problems that can arise. Take for example the range of poor health status. A member may have a transient illness (like the flu) where he or she is temporarily out of action; not a problem. At the next level, how about a significant problem but one which is time limited, like major surgery or a severe pneumonia. Again, this has not usually been problematic and has been routinely excused. Continuing on, though, how about a chronic significant disease requiring prolonged hospitalization or rehabilitation. What is at stake? At one end of the spectrum, can the member be expected to vote or do constituent work? At the other end, is the member so ill that the prospect of return to work or the ability to perform adequately is so marginal that consideration may be given to leaving office before the end of a term?

Specifically, I have raised the issue of the degree of impairment of a member, that is, the objective description of the state of a member's health as determined by the medical establishment. Usually a prognosis is part of that description. Will a member fully recover? If so, when? Will there be permanent impairment? Will that impairment be primarily cognitive or physical or both? If so, to what degree? Is death a possible outcome and so on. The only caveat to add is that medicine is not a precise science and patient outcomes are sometimes unpredictable and even surprising. Some patients may unexpectedly deteriorate while others miraculously recover. A rush to judgment about a patient's ultimate status may be ill-advised.

What to do with any of this information raises the subject of succession, a process that is not a medical issue. Clearly, when there has been a member death while in office, steps towards succession will ensue. The more difficult situation relates to member incapacitation. Incapacitation is a subjective judgment that a member is too impaired to be likely to be able to return to meaningful public service. It is made by non-medical people but based on meaningful and accurate medical input. Subsequently, the issues of leaving office followed by succession may have to be addressed. In this regard, it is possible that I might recommend to a member and their family that leaving office early be considered because future service might be counterproductive to good health or that any return to service is unrealistic or perhaps even undignified. This is what I would view as full disclosure to a patient so that personal decisions can be made with all facts considered. I would not, however, make a statement to leadership that a member was incapacitated. I would only describe the degree of impairment. A fine line, I realize, but my compact is ultimately with the patient, not the institution. Only the institution, possibly in concert with the member, can make a decision about incapacitation and how it relates to continued service. At most, I would provide a discussion of all ramifications, if asked, but would stop short of rendering a final judgment. That would be up to leadership. After all, incapacitation must be measured relative to performance expectations. I may have an opinion but not the final say. I am an advisor.

In closing, I have tried to create a framework in which to analyze the problems of impairment, incapacitation and succession. Medical as well as institutional assessments are required, but there is a definite divide between the two when incapacitation and possible early departure from office with consequent succession are in question. While succession itself is a difficult issue, it becomes significantly more difficult when large numbers are considered or when the process of leaving office hasn't been sorted out in member impairment situations. Thank you for your attention. I will be pleased to answer any questions.

The CHAIRMAN. Good. Thank you very much, Doctor. I consider you to be an extraordinary public servant. I know you work constantly in behalf of the Members of both the House and the Senate. And I have seen the sacrifices that you have made. I just want to go on record as saying what I have told you privately many times, how much we do appreciate all that you do.

One of the things that you alluded to in the beginning of your remarks was this issue of your ability to have access to all of the assistance that you might need from, say, the Federal or private

entities, local entities. And basically you said you have the resources.

One question that I would pose has to do with the issue of your not knowing about every single Member of the United States Congress. And the question would come to the forefront, I think, What exactly should be provided to you as the Attending Physician of the Capitol as far as information about Members? Because it is very clear—I don't know what the percentage is, I don't know of Members who do utilize your services—I know that I regularly utilize your services.

But I guess I would ask, do you think it would be advisable for Members of Congress, upon their entry into this body, to provide to you dental records or DNA information or anything like that that could conceivably be helpful?

Dr. EISOLD. The larger question is just their general health. The more I know about everybody's health, the more I can help them. Admittedly, many people will keep their doctors at home.

I think that almost, as though joining the military, for example, Members, as a condition of employment should understand that when they come on board, that I will have a chance to get with them and review their medical history or perhaps even do an exam. I think that would be very helpful, to be able to get whatever medical information is on file.

The CHAIRMAN. So would you like us to actually require that of Members upon entry into this body, that they have that examination, and provide to you——

Dr. EISOLD. Either provide it to me or let my clinic do it.

The CHAIRMAN. Because right now that is not required.

Dr. EISOLD. Right. It is voluntary. I guess you can require almost anything but I don't know if you can require people to do things about their health that they don't want to do. But it certainly could be a very strong recommendation.

The CHAIRMAN. I am thinking about this in terms of this whole issue of incapacity, because as you correctly say, it is a subjective determination. But there is information on impairment, as you say, that is something that you are in a position to comment on.

Dr. EISOLD. I think it would be good practice for the health of the Congress to encourage Members, to regularly update their medical information the ideal would be to see them in the clinic and examine them every year or at least review their health status every year.

The other question you raise is a little more problematic, the DNA buckle swab.

The CHAIRMAN. That and dental records for identification.

Dr. EISOLD. It would be on a voluntary basis. It is a good idea, because there is the chance that somehow in some catastrophe, you will not be able to identify remains except by that method.

The CHAIRMAN. So maybe requiring the DNA or dental records provided to you on file may be helpful?

Dr. EISOLD. It would be. It leads you down the pathway of how you manage care for the Congress, ensure its continuity, identify people and so on. It does open up a whole number of items here.

The CHAIRMAN. Mr. Hastings.

Mr. HASTINGS of Washington. Thank you, Dr. Eisold, for being here and sitting through all of this. There will probably be a test later on for you.

In your testimony, you suggested or said that to make a determination of incapacitation from a medical standpoint is an objective practice.

Dr. EISOLD. Yes. Inherently, impairment is objective.

Mr. HASTINGS of Washington. But you would not go as far as to advise the Speaker, or whomever, as to whether that person could fulfill his or her duty?

Dr. EISOLD. I would advise them but I would stop short of saying that this person is incapacitated. For example, somebody who was paralyzed from the neck down, under the right circumstances, is perfectly capable, although severely impaired, to be a Member of Congress.

Incapacitation, in and of itself, is really only relevant to what the performance expectations are. If you give me the performance expectations, I can probably advise you. I would say I don't think he or she will be able to do that.

Mr. HASTINGS of Washington. Going to the next step then, is it fair to say that a determination of whether to—by whatever means we arrived at a conclusion to define incapacitation, that probably is a subjective determination?

Dr. EISOLD. Correct. That is the subjective part of it.

Mr. HASTINGS of Washington. So that being the case, how do we link those two together in order to somehow have some sense that this can't get out of hand from a political standpoint? What would you suggest that we do?

Dr. EISOLD. I think that you need a broker who is not looking for anything except an accurate reporting from a medical perspective on a person's health status.

Mr. HASTINGS of Washington. Should that be part of the record somehow? I am thinking I don't know how we do that because you have to—on the privacy part.

Dr. EISOLD. In these circumstances where you are talking about some catastrophe, I think that there is public knowledge that a person is in the hospital. Some of the particulars could be handled confidentially with the leadership.

How you would sort it out as an institution, I don't have a recommendation. Is it something that the minority leader and the Speaker would have to agree on? If one disagrees, then by definition, the Member is not incapacitated.

You have got your quorum if you declare a Member not incapacitated, but by all practical purposes this person may not be able to vote, they may be on a ventilator and the hospital physician who is taking care of the person says, "it is against medical advice to move this person." Then do you physically go out and hire a Nightingale to somehow bring them in? There are those practical issues. It is important. It is not easy.

Mr. HASTINGS of Washington. From a medical standpoint, people do improve. So one day you could be incapacitated, one day you won't?

Dr. EISOLD. Correct. It is a very fluid situation as well.

Mr. HASTINGS of Washington. Well, of the three issues that were broadly outlined by the Chairman at the outset, this by far is the most difficult, just trying to get this nailed down, in my view.

Dr. EISOLD. I appreciate your trying to nail it down without having it get politicized. because you can create all sorts of scenarios where it is absolutely a crucial vote.

Mr. MCGOVERN. First I want to think Dr. Eisold for his testimony. I have the same kind of concerns that Mr. Hastings has, because, I mean, you are not in the position to say to the Speaker, Congressman so-and-so is incapacitated; Congressman so-and-so isn't. You know, that is not your job.

Dr. EISOLD. Right.

Mr. MCGOVERN. And issues of privacy and all of this other stuff comes into play. You can serve as kind of an adviser, but you can't divulge certain things because of the patient-doctor relationship.

But I think it—I think, you know, that means, as you said, that this is very subjective. Which goes back to what Mr. Frost was saying in the very beginning of this hearing; that on this particular issue there really needs to be some sort of bipartisan consultation. I mean, there—if there is any part of this that really needs to have an agreement between kind of both sides, it is on this.

Dr. EISOLD. Right.

Mr. MCGOVERN. To protect the integrity of whatever we decide here, and to make sure that it doesn't become political. And so I would hope that on this particular issue, that maybe as we work through this draft resolution that it is not solely the Speaker's decision; that it is the Speaker in consultation with the minority leader, you know, so that there is no question that the decisions are being made based on merit and not on politics, not on something else.

It is very complicated and poses all kinds of questions as to how people come to the decision as to who is incapacitated, who is not. But I appreciate your testimony very much.

Mr. Chairman, I just also want to acknowledge our colleague from Connecticut, Mr. Larson, who has been here from the very beginning. He has worked on this issue tirelessly and devoted an incredible amount of time to this and it is evident that he takes this very seriously. He has sat through all of this, along with Dr. Eisold and the others who are here. So I want to commend him for all of his work.

The CHAIRMAN. I mentioned him in my opening remarks.

Mr. MCGOVERN. I wanted to mention him again.

The CHAIRMAN. I would like to see if Mr. Hastings would like to say something about the presence of Mr. Larson.

Mr. HASTINGS OF WASHINGTON. I would like to acknowledge the presence of Mr. Larson here, too.

The CHAIRMAN. Mr. Larson, as I said in my opening remarks, came to me yesterday afternoon and talked about the idea of being here. But what I did say earlier is that he has provided a very, very thoughtful approach to dealing with this. He is the ranking minority member of the House Administration Committee, and he has worked closely with us in a very bipartisan way in trying to address these important constitutional concerns. We do appreciate your patience in being here. So thanks, John, for that.

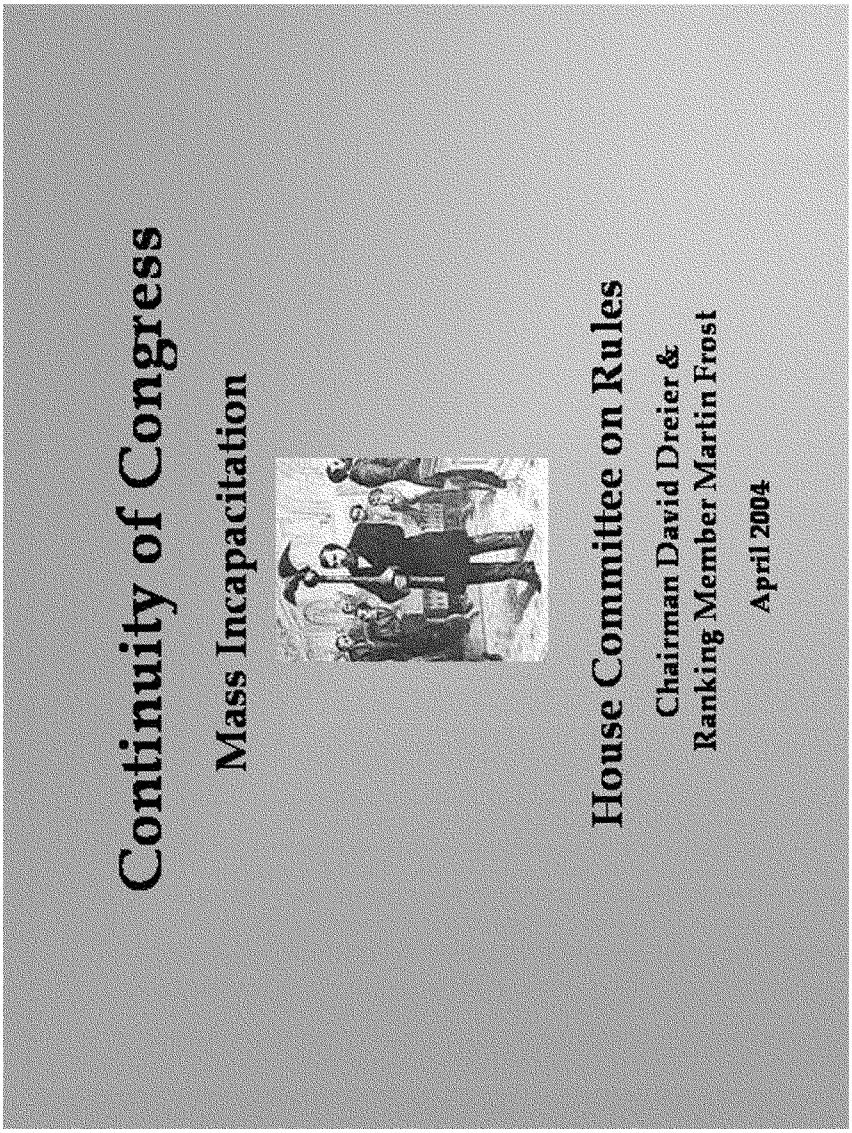
And again, let me express, as everyone else has to you, John Eisold, the appreciation for your great service and the fact that you have taken the time to be here. You know, if you think about the challenges that the Attending Physicians of the past year have faced, they are nothing like what you have gone through between September 11th and anthrax and ricin and everything else. So we appreciate your handling of this in a very professional manner, what obviously has been one of the most serious and dangerous times in the history of our Republic.

And so, without objection, the committee stands adjourned. Thank you all very much.

[Whereupon, at 12:40 p.m., the committee was adjourned.]

APPENDICES

APPENDIX A


Continuity of Congress
Mass Incapacitation
House Committee on Rules
Chairman David Dreier &
Ranking Member Martin Frost
April 2004

The Continuity of Congress

- Terrorists may strike at the Congress at any time.
- American people trust we will have the foresight to plan and the ability to act in crisis.

The Continuity of Congress

Quorum in the House

- Constitution's Article 1, Section 5: quorum is a Majority of Members (for a full House of 435, quorum is 218).
- House Precedent: quorum is those Members **chosen, sworn,** and **living**.
- Problem: If Members are alive, but incapacitated, they are still part of quorum.

The Continuity of Congress

"The Quorum Trap"

- If **100 Members are incapacitated**, quorum remains a majority of the full House (218). Since 335 Members can vote, business continues.
- If **175 are incapacitated**, quorum is still 218, and with 260 Members able to vote, business continues.
- However, if **218 or more Members are incapacitated**, quorum is 218, but less than that number can vote – **House cannot do business**.

The Continuity of Congress

No Quorum and the Constitution

- In the absence of a quorum, the Constitution states that two things can be done:
  - Adjournment from day to day; and
  - Compelling Members to attend to establish a quorum.

The Continuity of Congress

House Rules and the Adjustment of Quorum

- If Members die, the current House Rules allow for adjustment of quorum by the Speaker.
- However, if Members are incapacitated, quorum remains the same under current House Rules.
- Remember: even in the event of **mass incapacitations** after a catastrophe, quorum remains a majority of the full House. If a majority (or more) are incapacitated, the House may be unable to act --at exactly the time it needs to.

The Continuity of Congress

Questions Regarding Incapacitation

- Defining incapacitation is difficult:
  - **Fact specific**: if 218 Members are incapacitated, there will be 218 different situations.
  - **Who decides:** The Member's Family? The Attending Physician? The Member? The House?

The Continuity of Congress

An Immediate Solution: Changing the Rules

- Changing House Rules is an immediate solution to dealing with a catastrophe that results in mass incapacitations, but:
  - Is it constitutionally infirm?
  - Would our laws be in question?
  - Who would be able to challenge our actions?
  - When might the courts rule?
  - How would the courts rule?

APPENDIX B

(Submitted by Parliamentarian Charles Johnson)

Hinds' Precedents, volume 4, sections 2889 and 2890

2889. After the House is once organized the quorum consists of a majority of those Members chosen, sworn, and living, whose membership has not been terminated by resignation or by the action of the House.

On March 16, 1906, the House voted on the question of consideration of the bill (H.R. 15744) to abolish the office of Lieutenant General of the Army of the United States, and there appeared yeas 139, nays 32, answering present 21, a total of 192.

There being a question as to the presence of a quorum, Mr. Marlin E. Olmsted, of Pennsylvania, made the point of order that 192 constituted a quorum, saying:

> Mr. Speaker, the statute fixing the number of Members provides for the election of 386, and I understand that 386 were chosen. Two of those Members, one from Pennsylvania, Mr. Castor, and one from Virginia, Mr. Swanson, are not now Members of Congress, The gentleman from Pennsylvania is dead and the gentleman from Virginia, who was sworn in, has resigned. They are clearly no longer Members of this House. Two persons who were chosen to be Members have never been sworn. They have never qualified. They have not become Members of this House. That, therefore, leaves the membership of this House at 382, of which number 192 constitute a quorum. The Constitution provides that a majority of each House shall constitute a quorum. That, of course, raises the question, What is the "House?" That question has been discussed frequently here in earlier days and in the other Chamber. The question arose during the civil war, when a certain section of the country did not elect and send Representatives to the United States Congress. The statute provided for a much larger number, but only 183 Members had been chosen, of whom 92 were present. Mr. Speaker Grow announced that 92 constituted a quorum. Mr. Vallandigham, of Ohio, made the point of order that it did not, but after debate and after ruling by Mr. Speaker Grow, Mr. Vallandigham concurred. Mr. Speaker Grow did not go so far as to decide whether a Member who had been chosen, but had not been sworn, would be considered a, Member of the House. In the ascertainment of a quorum it was necessary that he should decide for the purposes of the case before him, but I understand that after debate it was held in a similar case in the Senate that a person elected but not sworn is not to be considered. The present rule of the Senate, originally adopted upon the recommendation of a committee of very able Senators, including Senator Edmunds, of Vermont, distinctly specifies that "a majority of Senators duly chosen and sworn" shall make a quorum. Three hundred and eighty-four Members have been "chosen and sworn," but one having died and one having resigned, there are living but 382, and a majority, or 192, constitutes a quorum. Much more might be said, but it seems unnecessary to consume time at this late hour. I submit, Mr. Speaker, that the House now consists of 382 Members and that 192 is a constitutional quorum.

As the Speaker was about to rule, Mr. Adam M. Byrd, of Mississippi, appeared and was recorded. This increased the number to 193, which was a quorum of 384, the number in the House after the deduction of the names of Messrs. Castor, who had died, and Swanson, who had resigned.

Therefore the Speaker did not rule on the question.

2890. On April 16, 1906, Mr. Sereno E. Payne, of New York, moved that the House take a recess until tomorrow at 11:30 a.m.

On a division there were, ayes 125, noes 9.

Mr. Jack Beall, of Texas, made the point of order that no quorum was present. The Speaker pro tempore [Charles Curtis of Kansas] directed the doors to be closed and the roll to be called, under section 4 of Rule XV, and there were, yeas 165, nays 19, answering present 7.

The Speaker [Joseph G. Cannon of Illinois], who had resumed the Chair, said:

> The yeas are 165 and the nays are 19; answering "present," 7, a total of 191 voting "yea," "nay" and "present" — in the opinion of the Chair a quorum. The Chair will hand to the Clerk a statement covering the reason the Chair has to assign for holding 191 to be a quorum.
>
> "The Constitution of the United States, in the sections relating to the Congress, specifies that 'a majority of each House shall constitute a quorum to do business.' This brings to the front the question as to what constitutes the 'House,' whether it be all the Members provided for by the apportionment, or whether it be a less number determined by existing accidents or exigencies. During the civil war, when many seats in both House and Senate were vacant, this question assumed great significance and was passed upon in both Houses. On July 19, 1861, Mr. Speaker Grow, after listening to debate, decided that a quorum consisted of 'a majority of those chosen,' but expressly refrained from deciding as to whether the fact of taking or not taking the oath of office should be considered. (See sec. 250 of Parliamentary Precedents.) In 1879 Mr. Speaker Randall intimated that he held the same view; but in 1886 Mr. Speaker Carlisle treated the question as an open one. In 1890 Mr. Speaker Reed, after careful examination of the precedents of the House, held that a quorum was a majority of those 'chosen and living,' such, in his opinion, being the intent of Mr. Speaker Grow's ruling in 1861, although the language of 1861 was not in this respect definite.
>
> "This, therefore, is the status of the question so far as the decisions of the House go. But at the present time another question arises. The apportionment gives this House 386 Members, of whom 194 are a quorum. But two Members have died, and two — Messrs. Patterson, of Tennessee, and Williamson, of Oregon-have not yet been sworn, and Mr. Swanson has resigned. If the rule be that those 'chosen and living' constitute a quorum, without regard to the qualification by taking the oath, then the quorum is 192; but if Members not qualified are not to be counted as part of the House, then the total membership is reduced to 381, and the quorum is 191.
>
> "While the question has never been passed on in the House, it has been the subject of most careful consideration in the Senate, and the result is embodied in a permanent form in Rule III, section 2: 'A quorum shall consist of a majority of the Senators duly chosen and sworn.'
>
> "At first, in 1862, the Senate declined to commit itself to the rule established by the decision of Mr. Speaker Grow in the House in 1861; but in 1864, after thorough debate, by a vote of yeas 26, nays 11, the Senate resolved that 'a quorum of the Senate consists of a

majority of the Members duly chosen.' The question of qualification was brought up in this discussion, but the Senate showed reluctance to bring it into the decision.

"On January 17, 1877, the Senate, in adopting rules, agreed to the rule in its present form, specifying the quorum as 'a majority of Senators duly chosen and sworn.' These words were adopted with very little debate, on the statement by the Senator in charge that they were the words of the old rule of 1864. But, in fact, the words 'and sworn' were inserted in the revision of 1868,\1\ being recommended by a committee composed of Messrs. Henry B. Anthony, of Rhode Island; Samuel C. Pomeroy, of Kansas, and George F. Edmunds, of Vermont. Their report does not explain their reasons for adding these words, and there was no debate on this point when the Senate agreed to the report. The Senate was undoubtedly aware of the change, however, since the words 'and sworn' are italicized in the report, indicating that they were an amendment. On October 11, 1893, the Senate discussed the whole rule briefly, and there was an appeal from a decision of the Chair based on the rule. This appeal was laid on the table--yeas 38, nays 5; but this question did not particularly touch the question of qualification.

Such is the status of this question so far as the law of the House and Senate is concerned. The rule of the Senate goes further than the decisions in the House, and does not seem to have been the subject of extended deliberation so far as the qualification feature is concerned. But in view of the learning of the committee who made the report of 1868, and of the reasons which seem to sustain that report, the Chair feels constrained to hold that after the House is once organized a quorum consists of a majority of those Members chosen, sworn, and living, whose membership has not been terminated by resignation or by the action of the House."

A quorum being present, the House stands in recess until tomorrow, at 11:30 o'clock.

APPENDIX C

Parliamentary steps taken to ensure continuity of operations in the 108th Congress

- Authority to effect a joint-leadership recall from a period of adjournment to an alternate place (in concurrent resolutions of adjournment).
- Authority to effect a joint-leadership recall from a period of adjournment through designees (in concurrent resolutions of adjournment).
- Anticipatory consent with the Senate to assemble in an alternate place (in a putatively biennial concurrent resolution on opening day of a Congress).
- Requirement that the Speaker submit to the Clerk a list of Members in the order in which each shall act as Speaker pro tempore in the case of a vacancy in the Office of Speaker (including physical inability of the Speaker to discharge his duties) until the election of a Speaker or a Speaker pro tempore, exercising such authorities of the Speaker as may be necessary and appropriate to that end (clause 8 of rule I).
- Authority for the Speaker to suspend pending business of the House by declaring an emergency recess subject to the call of the Chair when notified of an imminent threat to the safety of the House (clause 12(b) of rule I).
- Authority for the Speaker, during any recess or adjournment of not more than three days, in consultation with the Minority Leader, to postpone the time for reconvening or to reconvene before the time previously appointed solely to declare the House in recess, in each case within the constitutional three-day limit (clause 12(c) of rule I).
- Authority for the Speaker to convene the House in an alternate place within the seat of government (clause 12(d) of rule I).
- Codification of the long-standing practice that the death, resignation, expulsion, disqualification, or removal of a Member results in an adjustment of the whole number of the House, which the Speaker shall announce to the House and which shall not be subject to appeal (clause 5 of rule XX).
- Establishment of a Select Committee on Homeland Security with oversight and legislative jurisdiction over matters relating to the Homeland Security Act of 2002 identified by the Speaker and the responsibility to make recommendations concerning future legislative jurisdiction over homeland security matters (sec. 4, H. Res. 5, 108th Cong.).
- Establishment of an Appropriations Subcommittee on Homeland Security.

APPENDIX D

Discussion draft—Provisional number of the House

In clause 5 of rule XX, redesignate paragraph (c) as paragraph (d) and insert after paragraph (b) the following new paragraph:

"(c)(1) In the event that efforts to secure the attendance of a quorum have proceeded as described in subparagraph (2), the number of Members responding to those efforts by the close of the further call described in subdivision (2)(C) shall constitute the provisional number of the House. In the event that a Member included in the provisional number of the House thereafter ceases to be a Member, both the whole number of the House and the provisional number of the House shall be adjusted accordingly. In the event that a Member excluded from the provisional number of the House thereafter appears in the House, the provisional number of the House shall be adjusted accordingly.

"(2) Efforts to secure the attendance of a quorum have proceeded as contemplated by subparagraph (1) if, after a motion under paragraph (a) or (b) has been disposed of and without intervening adjournment —

"(A) a call of the House continues for longer than ___ hours (excluding time in recess) without producing a quorum; and

"(B) the Speaker —

"(i) is advised by _____ that catastrophic circumstances have left the House unable to produce a quorum; and

"(ii) announces the same to the House; and

"(C) thereafter a further call of the House continues for longer than ___ additional hours (excluding time in recess) without producing a quorum.

"(3) An announcement under subdivision (2)(B) shall not be subject to appeal.

"(4) For purposes of this paragraph, the term "provisional number of the House" means the number of Members upon which a quorum will be computed in the House until the number of Members sufficient to constitute a quorum among the whole number of the House appear in the House.".

APPENDIX E

Continuity of Congress Legislation in the 108th Congress

(1) H.J. Res. 83, proposing an amendment to the Constitution of the United States regarding the appointment of individuals to fill vacancies in the House of Representatives (sponsored by Congressman Brian Baird of Washington) failed on passage by the Yeas and Nays (⅔ required): 63–353–2 (Roll Call Vote No. 219 on June 2, 2004).

(2) H.R. 2844, the Continuity in Representation Act of 2004 (sponsored by Congressman James Sensenbrenner of Wisconsin and Congressman David Dreier of California) agreed to on passage by the Yeas and Nays (majority required): 306–97 (Roll Call Vote No. 130 on April 22, 2004).

(3) H. Con. Res. 190, to establish a joint committee to review House and Senate rules, joint rules, and other matters assuring continuing representation and Congressional operations for the American people (sponsored by Congressman David Dreier of California and Congressman Martin Frost of Texas) agreed to on passage by voice vote (June 5, 2003).