S. HRG. 108–701

ENSURING THE CONTINUITY OF THE UNITED STATES GOVERNMENT: THE CONGRESS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

SEPTEMBER 9, 2003

Serial No. J–108–37

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

96–926 PDF WASHINGTON : 2004

For sale by the Superintendent of Documents, U.S. Government Printing Office
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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Cornyn, Hon. John, a U.S. Senator from the State of Texas	1
prepared statement and attachment	61
Feingold, Hon. Russell D., a U.S. Senator from the State of Wisconsin, prepared statement	83
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah, prepared statement	99
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont	17
prepared statement	168

WITNESSES

Baird, Hon. Brian, a Representative in Congress from the State of Washington	9
Dreier, Hon. David, a Representative in Congress from the State of California	3
Hall, Thad, Program Officer, The Century Foundation, Washington, D.C.	26
Lewis, R. Doug, Executive Director, The Election Center, Houston, Texas	22
Ornstein, Norman J., Senior Counselor, Continuity of Government Commission, and Resident Scholar, American Enterprise Institute, Washington, D.C.	20
Wright, Samuel F., Director, Military Voting Rights Project, National Defense Committee, Arlington, Virginia	25

QUESTIONS AND ANSWERS

Responses of Thad Hall to questions submitted by Senator Leahy	36
Responses of Douglas Lewis to questions submitted by Senator Leahy	41
Responses of Norman Ornstein to questions submitted by Senator Leahy	45
Responses of Samuel F. Wright to questions submitted by Senator Leahy	48

SUBMISSIONS FOR THE RECORD

Baird, Hon. Brian, a Representative in Congress from the State of Washington, prepared statement and attachment	57
Dreier, Hon. David, a Representative in Congress from the State of California, prepared statement and attachments	65
electionline.org, Doug Chapin, Director, Washington, D.C., letter	80
Fong, Cory G., Deputy Secretary of State, State of North Dakota, Bismarck, North Dakota, letter	84
Gans, Curtis, Vice President and Director, Committee for the Study of American Electorate, Washington, D.C., prepared statement	86
Hall, Thad, Program Officer, The Century Foundation, prepared statement	89
Ho, James C., Majority Chief Counsel, Subcommittee on the Constitution, Civil Rights and Property Rights, Committee on the Judiciary, United States Senate, Washington, D.C., responses of State and local election officials to inquiries about any 21-day expedited special elections regime	101
Lewis, R. Doug, Executive Director, Certified Elections Registration Administrator (CERA), Houston, Texas, letter	171
Ornstein, Norman J., Senior Counselor, Continuity of Goverment Commission, Resident Scholar, American Enterprise Institute, Washington, D.C., prepared statement	177
Paul, Hon. Ron, a Representative in Congress from the State of Texas, prepared statement	195

Page

Phillips, Howard, Chairman, Conservative Caucus, Vienna, Virginia, statement 197
Rice, Charles E., Professor Emeritus, Notre Dame Law School Visiting Professor, Ave Maria School of Law, Ann Arbor, Michigan, statement 202
Schlafly, Phyllis, Constitutional Attorney, Briarcliff, St. Louis, Missouri, letter 206
Simpson, Hon. Alan, and Hon. Lynn Martin, Commissioners, Continuity of Government Commission, Washington, D.C., statement 207
Washington Times, Continuity of Congress, September 12, 2003 212
Wright, Samuel F., Director, Military Voting Rights Project, National Defense Committee, Arlington, Virginia, letter and attachments 214

ENSURING THE CONTINUITY OF THE UNITED STATES GOVERNMENT: THE CONGRESS

TUESDAY, SEPTEMBER 9, 2003

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:03 a.m., in room SD–226, Dirksen Senate Office Building, Hon. John Cornyn presiding.

Present: Senators Cornyn and Leahy.

OPENING STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. This hearing of the Senate Judiciary Committee will come to order. I want to thank, first of all, Chairman Hatch for scheduling this important hearing.

Earlier this year, the Continuity of Government Commission issued a unanimous report recommending measures to ensure the continuity of Congressional operations. That same morning, I spoke on the floor of the Senate to praise the commission for its hard work and its contribution, and announced that I would hold hearings in the Subcommittee on the Constitution on this issue.

Shortly thereafter, Chairman Hatch was gracious enough to invite me to Chair the full Committee proceedings here, rather than through the Subcommittee, and obviously I accepted his offer. I want to thank him again today for his leadership of the Committee and for giving serious attention, as I do all of the witnesses here, to something that needs our attention.

I also want to express my gratitude to Senator Leahy and his staff—Senator Leahy will be here with us shortly—for working with my office to put together this hearing, which is entitled "Ensuring the Continuity of the U.S. Government: The Congress."

Two years ago, America suffered its most destructive act of terror in history. Congress responded swiftly. The very next week, Congress appropriated funds to bolster national security, stabilize our economy, and provide for the families of victims, and also enacted legislation to secure our airports and authorized the use of necessary military force. To date, however, Congress has failed to ensure that the vital institutions of our Government will continue to operate on behalf of the American people should another attack occur.

Two years is too long. So this morning we will consider what measures are necessary to guarantee continuity of Congress. Next Tuesday morning, I will co-chair a joint hearing with the Chairman

of the Rules Committee, Senator Lott, on proposals to reform the presidential succession statute. Future hearings on the continuity of Government are also planned.

Congress cannot constitutionally act without a majority of its members. Article 1, section 5, of the Constitution expressly provided that a majority of each House shall constitute a quorum to do business. Our Constitution is explicit on this point because our Founders believed it was fundamental to our representative form of Government.

Alexander Hamilton explained in Federalist 59 that the Constitution empowers the States to shut down Congress, if it wishes, by refusing to send representatives. In fact, during the first Congress, neither the House nor the Senate was able to operate for an entire month because a majority of Representatives and Senators failed to appear for duty. Both chambers had to wait until a quorum, consisting of a majority of the whole number, was present.

This vulnerability was deliberate. As one delegate in 1787 urged his colleagues, "In this extended country embracing so great a diversity of interests, it would be dangerous to the distant parts to allow a small number of members of the two houses to make laws."

Congressional power exercised by just a handful of members is not representative government and it is constitutionally dubious. It raises serious questions of democratic legitimacy. The Founders properly rejected the notion that a small body of members from one region of the Nation might enact national legislation or confirm Federal officials who would have nationwide jurisdiction.

This commitment to federalism and national representation has a cost, however. Under the Constitution's requirement of a majority for a quorum, terrorists could shut Congress down by killing or incapacitating a sufficient number of Representatives or Senators.

Our ability to ensure the continuity of Congress under the current Constitution is woefully limited. States have the power to allow their Governors to appoint Senators in the case of vacancies, and 48 States have elected to do so. But the Constitution provides no immediate mechanism for filling vacancies in the House, nor for addressing incapacities in either chamber.

Vacancies in the House can only be addressed by special election. The problem is, of course, that that can take months to conduct special elections, for reasons of mechanical feasibility, democratic integrity, and the rights of military and other absentee voters.

What is more, incapacities cannot be addressed at all, although people often forget this problem affects the Senate no less than the House. If 50 Senators were in the hospital, unable to perform their duties, or resign, they could not be replaced. The Senate could be unable to operate for up to two full election cycles, a 4-year period.

According to the Continuity of Government Commission, a bipartisan panel of former Congressional leaders and government officials from across the political spectrum, this commission has unanimously endorsed a constitutional amendment to ensure continuity of Congress in case of catastrophic attack. Just as the 25th Amendment ensures continuity of the presidency, the proposed amendment would ensure continued Congressional operations following a terrorist attack.

The commission deserves our attentive hearing and respectful consideration, as well as the views of Members of Congress and others who have views to offer on this subject. Our hearing today will explore not only the commission's recommendations, but the views of Members of Congress and others on this subject.

As we mourn the tragedy of September 11, we should also take some comfort in the fact that further attacks within our borders have been thus far avoided. That is true because, in part, Congress has upgraded our ability to prosecute the war on terrorism and reorganized our Federal Government to bolster our efforts at homeland security.

Had the events of September 11 unfolded differently, however, none of this legislation might have been enacted in a timely fashion. United Airlines Flight 93 was likely headed for the Capitol. But for a late departure and the ensuing heroism of passengers on board, the ability of Congress to function might have been destroyed.

In an age of terrorism and a time of war, few things could be more important than ensuring that the U.S. Government, the Nation's most vital instrument of national security, is failsafe and fool-proof against even the most devious and destructive of terrorist plots.

No one likes to plan for their own demise, but the failure to do so, in my opinion, in this regard would be not only an abdication of our duty, but it would be foolish and dangerous. We must therefore begin the process of sending the message to terrorists that there is nothing they can do to stop the American Government from securing freedom here and around the globe. Two years is too long and the time to plan for the unthinkable is now.

[The prepared statement of Senator Cornyn appears as a submission for the record.]

We have on our first panel two distinguished members of the House of Representatives, Hon. David Dreier and Hon. Brian Baird.

Gentlemen, we appreciate you being here today to offer your views.

I know Senator Leahy is coming. Ordinarily, I would turn to him for his opening statement, but we will break and do that when he is able to be here with us. So at this time, I will recognize Hon. David Dreier for his opening statement.

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

Representative DREIER. Well, thank you very much, Mr. Chairman. Let me say that our friend, Orrin Hatch, has been known for having made some great decisions. Clearly, his most recent was to have you preside over this full Committee hearing. Once again, Orrin Hatch has demonstrated his brilliance. We are happy to have you presiding over it. As you know, I have long been an admirer of yours and your work in Texas, and appreciate the fact that you are deliberatively taking on this challenge with a very open mind as you look at the very fine recommendations that came forward from the hard work of the commission, and also the responsibility that we have.

You are absolutely right. I mean, you are the only Senator who is here right now. There are two members of the House of Representatives here. You have some other distinguished witnesses, but this is obviously not an issue that we like to spend a lot of time contemplating.

As you said in your opening remarks very appropriately, planning for your demise is not something that is particularly intriguing, but we do have a responsibility to look seriously at the challenge of the continuity of Congress.

Your closing statement was really right on target. It is important for us to send a signal to those who would do in the United States of America and our Government that we are going to ensure that, as President Bush demonstrated 2 years ago this week, we are going to be able to stand up to them and ensure that there is a continuation of this very, very important experiment that we have in representative democracy.

So I congratulate you for holding the hearing and for your focus on this issue. Of course, it is, again, as you pointed out, very timely, as this week marks the second anniversary of September 11. I do believe that we have, obviously, as I have said, some real challenges ahead of us.

My message, Mr. Chairman, is a pretty simple and basic one, and that is I want to encourage people to go slowly on this. I was just talking to my friend, Norm Ornstein, who is going to be testifying here in a few minutes, and he said he has spent a lot of time looking at this and he has come to the conclusion that the constitutional amendment is the right thing. I am not there. I want to say that I do believe that we just need to be very, very careful before we look at that as the panacea.

I have in my written testimony, which I hope you and your colleagues will have a chance to look at, gone through some very detailed analyses of the findings of the Commission, as well as some overall thoughts and recommendations that I hope you will look at.

You said that we are from the people's House. Brian has worked very hard on this issue, as well, and I have the highest regard for him. But I want to say that I would like to begin by quoting a very distinguished former member of the U.S. Senate, the late Senator John Stennis, from Mississippi, when he said, "I believe it is one of the great heritages of the House of Representatives that no person has ever taken a seat or cast a vote in that body except by virtue of election by the people. That is a great pillar of our form of government. . ." I think Senator Stennis was right on target when he made that statement.

As you know, the idea of a constitutional amendment to allow for appointment of Representatives following a national crisis is not a new idea. It is something that has been contemplated before, more by this body than the other body.

During the Cold War, a great number of constitutional amendments were proposed and at least three passed here in the Senate. However, even facing the prospect of mass attacks from numerous Soviet nuclear warheads and chemical and biological weapons, resulting in the decapitation of not only the Capitol, but most of our major cities, the House chose to oppose amending the Constitution to allow for appointment of its members.

The House has always been known, Mr. Chairman, as the people's House. The Constitution requires, under Article I, section 2, that the House "be composed of Members chosen every second year by the people of the several states." Now, many in the House revel in the fact that every member of the body has always been elected. There has been no exception, as that is what the Constitution has dictated. In fact, the House of Representatives, as you know, is the only Federal office where no one has ever served without first having been elected, and I think that is something we really need to underscore.

The Senate has always been filled differently from the House. Originally constituted by appointment by the State legislatures, it was not until the 20th century that the Senate became directly elected through the 17th Amendment to the Constitution that provides that "the Senate of the United States shall be composed of two senators from each state elected by the people thereof. . ."

The 17th Amendment further outlines how the executive authority shall issue writs of election to fill vacancies, but the legislature from any State "may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct." Thus, the amendment allows for temporary appointment and election under control of the State legislature.

We hope, Mr. Chairman, that Senators will be able to understand why I and many of my colleagues are pursuing a statutory approach, pursuant to another constitutional provision, which is Article I, section 4. We contend that this provision is part of the Constitution to allow the institutions to preserve themselves through elections which Congress can regulate.

The provision states, "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof, but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

We believe that a Federal law should be passed requiring the States to have a mass vacancy special election within a very limited time period. I will talk specifically about our proposal in a moment, Mr. Chairman, but the real point is for you to understand that any constitutional amendment calling for appointment of House members will meet considerable opposition in the House, clearly complicating the passage of it. I would urge you to examine our approach as the best method of preserving our institutions in times of crisis.

Mr. Chairman, the Founding Fathers created a republic which has become the longest continuous constitutional democracy in the world, and they did so with unparalleled genius. The Framers did not come upon this great document in a single flash of inspiration. Rather, they spent months, as you know very well, discussing, arguing and voting on the subject of how the Government should be formed. In the end, they wisely created a House and a Senate with differing size, constituency, term of office, procedural rules, duties, and prerogatives.

Nor did they casually adopt the direct election of Representatives by the people, while granting States the power of selection of Sen-

ators. However, many came to believe as the delegate James Wilson, when he stated his desire for a vigorous Government whose power "flow[s] immediately from the legitimate source of all authority—the people. . .The government ought to possess not only . . .the force but [also]. . .the mind or sense of the people at large."

Delegate George Mason concurred: "The people will be represented [in the House]; they ought therefore to choose the representatives." Delegate John Dickerson considered it "essential that one branch of the legislature should be drawn immediately from the people; and as expedient that the other should be chosen by the Legislatures of the States. This combination of the State Governments with the National Government was as politic as it was unavoidable." Of course, the Father of the Constitution, Mr. Chairman, James Madison, held that it was "a clear principle of free government" that the people must always elect at least one branch of the legislature.

In the end, the Constitutional Convention delegates saw, as Hamilton noted in Federalist 59, that direct election by the people, and not selection, which could be held hostage to the whims or even inaction of State government leaders, is the only way to ensure a national government, one that reflects the will of a majority of Americans. Hamilton sums up this thought on this provision of the Constitution with his very famous statement that "Every government ought to contain in itself the means of its own preservation."

Now, Mr. Chairman, I will tell you that I am going to just take a moment to go through our legislation and I do want to say that one of the members of the commission, highly respected, our former Minority Leader, Bob Michel, has said that a constitutional amendment should really be the last resort. Mr. Chairman, I would say that the Constitution itself contemplates this process in Article I, section 4, where it gives to the Congress, again, the power over the times, places and manner of election.

I have joined with several of my very distinguished colleagues in support of legislation that provides for expedited special elections to fill mass vacancies in the House. The list of the cosponsors: I am joined by the Chairman of the House Judiciary Committee, Jim Sensenbrenner; Steve Chabot, from Ohio, who is on the Judiciary Committee. The former Secretaries of State who serve in the House of Representatives, Tom Cole, who is from Oklahoma, and Candice Miller, who is from Michigan, join. And, of course, your fellow Texan, Ron Paul, who, as, we all know, is an ardent constitutionalist, is also a cosponsor of the legislation.

The legislation operates within the checks and balances underpinning our Constitution and recognizes, as Madison did in Federalist 52, that "It is particularly essential that the [House] should have an immediate dependence on, and intimate sympathy with, the people. . .[E]lections are unquestionably the only policy by which this. . .can be effectually secured."

Our bill, the Continuity of Representation Act of 2003, H.R. 2844, protects the people's House. It requires expedited special elections for the House in the case of a catastrophe that results in more than 100 vacancies, such as would be the case if, for example,

as you discussed in your opening remarks, as well-planned terrorist strike were to be tragically successful.

If such exceptional circumstances exist as having more than 100 House members killed, this legislation allows the Speaker of the House to call for rapid special elections in order to reconstitute the House. This approach has the support of the Speaker of the House, Dennis Hastert, who said it would allow Americans to "retain their local voice in Washington. . .without changing the Constitution."

The report of the commission begins by stating, "On average, states take 4 months to hold special elections, and in the aftermath of a catastrophic attack, elections would likely take much longer."

Now, Mr. Chairman, this four-month figure is based on an average reached by looking at the special elections since the 99th Congress. This average is a small sample by which to judge a situation with mass vacancies. Looking more broadly, the report contains data showing that more than one-third of the States have laws limiting the time on special elections from 28 to 127 days, averaging 84 days.

We believe that elections, especially in times of crisis, can take place in a much shorter period of time. The report by the commission postulates later that under the current constitutional arrangement, there is no effective way to begin filling House vacancies in less than 3 months after an attack.

The data provided by the report of the commission shows that currently laws are in effect to start the filling of vacancies earlier. Eight States currently have special elections limited to less than 90 days, with the average being 55 days. There are also 6 States averaging 90-day limits. This means that after vacancies are declared, then 14 States under their current laws would begin filling their vacancies. These include New York, California, and Texas, with substantial populations, as you and I certainly know, Mr. Chairman. Judging the impact of mass vacancies on special elections solely on the relatively few special elections sampled shouldn't carry that much weight.

Now, as I mentioned, a number of States already have special elections laws that provide in non-emergency circumstances for rapid elections, no later than 28 days in Minnesota and between 30 and 40 days in New York. California, my State, has provisions for special elections in the event of a catastrophe that require them to be held within 63 days, while special elections in non-emergency situations have up to 119 days.

It is not unreasonable to think that the American people in individual districts across the Nation can choose a representative in 21 days. If September 11 showed us anything, it is that Americans pull together in times of disaster and they accomplish amazing things.

Indeed, we believe that it is just loopy or silly to argue that finding polling places, printing ballots, and assembling volunteers, as some have tried to suggest, would stand in the way of the national will to reconstitute the House of Representatives in a time of crisis.

Some of those who advocate a constitutional amendment to appoint temporary stand-in members, Mr. Chairman, justify the need for appointing members because of the vitally important business that must be done immediately by the House of Representatives in

the wake of a national crisis. In my view, the Framers intended that such important decisions should be made in the House not by someone who is selected for the people, but by someone who is elected by the people.

Mr. Chairman, the Senate does not need a constitutional amendment to deal with vacancies. You have one already, as you know, the 17th Amendment. One must ask, is there some desire on the part of some Senators to nationalize Senate appointments by requiring Governors to choose only from a pre-selected list of candidates? Suffice it to say that many questions for appointment do remain unanswered.

Let me summarize, Mr. Chairman, by saying that I am troubled by the language of the amendment that the commission recommended. Yes, it does appear simple in form, but I am concerned that beneath its plain brown wrapper lies the constitutional equivalent of a computer virus or worm. Over time, I am concerned that it will eat away at other provisions of the Constitution, forcing the Framers' checks and balances to crash under the potential statutory fixes that such an amendment would allow.

Moreover, the commission has left unanswered a much more difficult question, and you raised it in your remarks, and that is incapacitation, particularly mass incapacitation. Unlike vacancies, incapacitation has never been fully addressed by the Congress, and the commission acknowledged the problems inherent in answering this whole issue.

Mr. Chairman, let me close by saying that I understand the desire for expediency in times of crisis. Appointing stand-in members by the executive in each State or through a list of heirs to the seat provided by each sitting Representative may seem expedient, even prudent, to some. It may seem easier than planning, creating, and implementing the infrastructure necessary to ensure rapid and fair elections in the face of mass vacancies.

However, Mr. Chairman, in the long term I believe that after a national crisis, when large numbers of members of the House have been killed, and even the existence of our republic may be at stake, we should still choose to have faith in elections and not selections. In a national crisis, printing ballots and conducting elections will not be insurmountable obstacles to Americans. Legitimacy, not expediency, should be our concern, and I believe that America is up to the challenge.

Again, I thank you very much for holding the hearing. I do have a chart that I would like to commend to you that I would like to include in the record which does go through the time frame for holding special elections.

As you know, we have an election that is coming up four weeks from today in California. It is a very unusual recall election. This process has existed since 1911 and we have never seen it, and I will tell you people are trying to describe it often as a zoo and a circus and all kinds of things.

But I will tell you that it is fascinating how the people are going to be making this decision and making this choice, and it is being done in an expeditious manner, taking into concern a number of the issues that you raise, as there have been four or five court challenges to this that have come forward and it still is moving ahead.

I would also like to include, Mr. Chairman, specific references to the constitutional provisions that do insist upon and allow for the provision of elections.

I thank you very much for holding this hearing and for your forbearance in letting me go through my testimony.

[The prepared statement of Representative Dreier appears as a submission for the record.]

Senator CORNYN. Thank you, Congressman Dreier, for your thoughtful comments. I know there is a divergence of opinion, and that is not a bad thing. We are going to hear from others who have different views, but it is very helpful to have the benefit of your views. Certainly, your written statement and that of Congressman Baird and all other witnesses will be made part of the record, without objection.

I do want to at this time make part of the record letters that we have received from State and local officials—and you and I discussed this very briefly before the hearing started—expressing some concern with expedited elections and the challenges that that would present to them.

I want to now turn to Congressman Baird and allow him to give his opening statement, and then I will have a few questions for each of you and let you go back to work on the other side of the dome.

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

Representative BAIRD. Thank you, Mr. Chairman. I commend you for recognizing the importance of this issue, and Senator Hatch, as well, and Senator Leahy.

It has been too long. I have great respect for Chairman Dreier, and he is wise in suggesting that we not move hastily to solve this issue, but it has been 2 years. The entire Constitution was written over the course of a summer, and it has been 2 years that we have known about this fundamental core vulnerability not only in the continuity of the House of Representatives, but in the presidential succession, and we have failed to act.

Fortunately, we have not had a necessity to take recourse in whatever solution we might come up with, but that is due to good fortune and perhaps our actions in preventing the terrorists. But should that day arise when we need to have a solution to the continuity question and we have not solved it, we will have done a grave disservice to this country and to the world.

I am somewhat haunted by what I believe is a very real possibility that the American people are going about their daily business and suddenly the announcement comes across the television and the radio that we have received word of a nuclear weapon being detonated in the Nation's Capital. All members of the House and Senate are believed to have perished. The President and the Vice President and most members of the Cabinet who were in D.C. at the time, the Supreme Court, thousands of Government workers, and even more average civilians are believed to have been killed. We will have more news in a minute.

If that announcement happens, we absolutely must have a constitutionally unambiguous means of telling the American people

what happens next. How do we put our Government back together? Where are the fundamental pillars of checks and balances, separation of powers? Who fills what post, and how do we get this wonderful democratic republic back on its feet again?

We cannot have prolonged periods of uncertainty and ambiguity, we cannot have power struggles. The situation we face today leaves the door wide open for precisely those scenarios.

Tom Mann and Norm Ornstein and their working group are to be tremendously commended for their efforts in trying to address this, and I think they have made some outstanding recommendations. I don't agree with all of them, but their ground work in understanding the scope of the problem and proposing different solutions is admirable and of tremendous service to this great country. On top of that, the working group within the House of Representatives, chaired by Chris Cox and Martin Frost—and Chairman Dreier was part of that as well—I believe did an extensive review of a number of these issues. So when we say we must not act hastily, that is true, but we have had 2 years to look at this and I think we have a sense of what the problems are.

What I would like to do very briefly is respond to some of the concerns of those who have legitimate questions about the issue of temporary replacement, then suggest a possible alternative.

First of all, all of us who serve in the House of Representatives are justifiably proud that we serve in a body to which one must be directly elected. That tradition is as old as this country and we are proud and honored to be part of that tradition.

But at the same time, we must recognize that we live in a time in which sudden and complete destruction can rain down upon this body and upon this Nation, and we need to prepare for that. It is a possibility that I do not think was contemplatable by the Framers. Frankly, in their day, if someone had managed to kill all of the Senators and House members and the President and Vice President, we had lost a war and that was it. Today, it is entirely possible to kill all of us and the Nation preserves. The question is who governs that nation and how do they govern it during that time of crisis?

So we have to recognize the importance of the tradition of direct election, but we also have to recognize that new conditions may require new solutions, and I would argue that the sudden destruction of the Capitol is a new condition.

I would also suggest that some of the issues that have been raised about how we might cope, I find intellectually unsatisfying. For example, some people have suggested that we can do entirely without a House of Representatives for a period of five weeks or more. During the five weeks post-September 11, a number of essential acts were performed by the Congress, the House and Senate working together, that presumably would be put on hold.

I find it supremely ironic that those who steadfastly adhere to the principle of direct election of the House would, through that very insistence, allow the entire country to be run by thoroughly unelected individuals, most likely Cabinet members, who frankly most Americans probably have no name recognition of, who were never elected, and who would fill the role of the presidency, pre-

sumably then assume extra-constitutional powers, including possibly the declaration of war and the launching of nuclear weapons.

So to say that the principle of direct election is important is absolutely true, but principles of separation of powers and checks and balances are equally true. And I think you could look through either party administrations over the last several decades and say there are some Cabinet members with whom we would all be comfortable should they fulfill the role of the presidency.

I still, regardless of how much I respect those individuals, respect that they should have checks and balances, particularly with the declaration of war. But I would add that there have been Cabinet members or Presidents Pro Tem of the Senate or Speakers of the House whom we may not necessarily feel so comfortable with were they to move to the presidency with no checks and balances. So for me, it is again ironic to say that election by the people is so essentially important that we will let unelected people run this country with no checks and balances.

I also believe that it is tremendously important that we recognize the realities of what might happen if we try to expedite an election in the way some have suggested. One of the proposals calls for the major political parties to nominate the candidates who would serve in the hastily arranged special elections. There, it seems to me we have an immediate disenfranchisement of the people to a significant degree. I am not sure how independent parties would be handled in that.

But beyond that, if you expedite election in three weeks, are we doing this in the name of an election or do we actually have a contemplative process in which people can thoroughly evaluate the qualifications of the candidates and the candidates have the opportunity to present their views before the people?

As an alternative to either leaving the House vacant for five weeks or more, to leaving an unelected person in charge of the entire country, to a rushed election that doesn't do justice to the process, it is possible to suggest that we temporarily appoint replacement for House members.

Now, let me use my State as an example. In the State of Washington, a number of tremendous statesmen could be nominated to fill those posts, and let me share with you some of these folks you know well. Senator Slade Gorton is from the other party, but I have to tell you if I were to perish and he were to be nominated in my stead, he would do an outstanding job of taking care of this country in the brief interim until a special election could take place; former Speaker of the House Tom Foley, Al Swift, Sid Morrison—people from both parties with exemplary qualifications, statesmen and states women who would serve this country with great skill in a time of profound crisis.

Are we to believe that these experienced, accomplished, wise individuals, if temporarily appointed, would be worse for the country than a complete vacancy of House functions and the assumption of extra-constitutional authority by unelected people filling the role of President? I find that somewhat of a reach.

The people in electing us to be their representatives here thereby empowered us to make profound decisions on their behalf, decisions about whether or not the country goes to war, decisions about tax-

ation, indeed decisions about all the laws of this land. It follows, to me, that an amendment that would authorize elected representatives to appoint temporary replacements in the event of their death or incapacity would be an acceptable response in the short term.

Mr. Dreier is correct. We do not want to abandon the principle of direct election in the House. No one is suggesting that over the long run. What we are saying is that extraordinary circumstances may call for special conditions and special responses.

At most, I think these appointed individuals would serve for three to 5 months, depending on the circumstances necessary for a direct election. But in that time, important work would be done, and I think they would do it well if chosen wisely. They would, at the same point, be subject to subsequent election. The Framers argued that one of the constraints upon the actions of elected representatives is the prospect of a subsequent election. That would apply to those who were appointed.

So the principle I am trying to address here is, yes, we value direct election, but we also value the House of Representatives and its constitutional authority, and I don't want to abandon that for five weeks or more during the time of gravest national crisis to people who are almost entirely certain to be unelected.

We can pretend that a handful of people under the House rules constitutes a legitimate House of Representatives, but I agree with the Chairman's opening remarks that I don't that squares with the Constitution. We can console ourselves and suggest that, no, they can't kill us all, but the pictures I have seen of Hiroshima and Nagasaki suggest otherwise.

We can imagine that in time of crisis, universal sagacity is imposed or imbued upon those survivors, but my experience of crisis has been quite the contrary. Instead, I believe we must look squarely at this. We must provide a solution, and should that horrific day arise, following the announcement of our demise there must be clear-cut, unambiguous methods of replacing us so that the American people, and indeed the world can have confidence that their Government is up and running again and has a legitimate constitutional mechanism for doing so, and that the posts are filled by wise and decent people.

I thank the Chairman for this opportunity and look forward to answering questions.

[The prepared statement of Representative Baird appears as a submission for the record.]

Senator CORNYN. Thank you very much, Congressman Baird.

I have been handed a note that says that Senator Hatch will unfortunately not be able to attend the hearing in person due to unforeseen circumstances. He and others will have and do have written statements that will be made part of the record in this proceeding.

As usual, and as our colleagues in the House know, there are Senators with other conflicting hearings. Indeed, I am missing a Senate Armed Services hearing by being here today. Of course, that is why we have the crack staff we do to help us monitor what is going on. Certainly, all those statements will be made part of the record.

I wanted to just note that Congressmen Dreier had mentioned the distinguished group of his colleagues who support his proposed statutory change to address these concerns.

I also note that, Congressman Baird, you have 86 cosponsors at last count for your House Joint Resolution 67.

Maybe, Congressman Dreier, let me ask you to take a stab at this first. Given an apparent division in terms of the approach to address what we all agree is a problem, how are we going to bridge that gap between those who believe that a constitutional amendment is required and those that think that a statutory change will be sufficient?

Representative DREIER. Well, Mr. Chairman, thank you for that. I will say that I think we have just done it here today because Brian in his very thoughtful testimony has made some of the most compelling arguments for my legislation imaginable. He began his presentation to you, Mr. Chairman, by saying that we have gone for 2 years without acting, and he is correct. As we look at what took place 2 years ago, there has been no action whatsoever.

Now, the proposal for a constitutional amendment will, as you know very well, take, as constitutional amendments have in the past, on average, 7 years for ratification. So if we were to proceed with this structure—and I don't think it would get through the House of Representatives and I don't know if it would get through the Senate, but by the time we went through the process of passing it through both the House and the Senate, then sent it to the States for ratification, it clearly—and, again, the average is 7 years—could take a very, very long period of time.

So I would argue that that means that we should responsibly step forward with our legislative solution, which is what the Constitution calls for on this, and I think that would be an effective way to bridge it.

The other point that he makes is a very interesting one. Brian talks about unelected leaders and those in the executive branch. Well, as you know, Mr. Chairman, if you look at, as I said in my remarks, the Constitution, we know that someone can become Vice President or President of the United States through appointment, as we saw with President Ford.

Obviously, he was confirmed by the United States Senate when he was nominated to be Vice President of the United States, but he became President. And all of those other positions, by definition in the U.S. Constitution, are appointed; those Cabinet members are appointed, confirmed by the Senate, but appointed. So we have a structure of, for lack of a better term, many unelected people. Obviously, the President and Vice President are, by design of the Constitution, preferably elected by the people, but the others serve by appointment.

Again, I get back to the fact of do we need more unelected people. Again, Brian criticized unelected people basically running the Government, but what we would have is, through the body that is by design from the Framers to be elected, we would have unelected people if we went the route of replacing it with our very distinguished former colleagues that he mentioned from his State, or if we had this whole idea of members behind us.

So I think that we have come to a solution here, and I have always said, as our former Minority Leader, Bob Michel, said, the constitutional amendment should be the last resort. So why don't we look for, as the Constitution has put into place, a legislative solution, which frankly we could move reasonably expeditiously, juxtaposed to the constitutional amendment, and let's see how that works and if it can, in fact, be effective?

So I think this hearing that you are presiding over, Mr. Chairman, has, in fact, gone a long way toward bridging that, as I think we could come together with what would be tantamount to a reasonably immediate solution under the standard strictures that exist for the process of lawmaking.

Senator CORNYN. Congressman Baird, do you agree with Congressman Dreier that we have a budding consensus here in the House of Representatives?

Representative BAIRD. I think we are a good ways away from it, and the reason is—

Representative DREIER. I am always very optimistic, Mr. Chairman.

Representative BAIRD. I appreciate the Chairman's optimism.

Representative DREIER. I look at the world through rose-colored glasses.

Representative BAIRD. We are a ways away from it because what has been proposed will make us feel like we have solved the problem without solving the problem.

My concern was not solely about whether or not the executive branch would be served by unelected people. What I was trying to point out is that those who adhere so profoundly—and I respect their adherence to it—to direct election of the House would, in that adherence, allow completely unelected people to run the entire country with no checks and balances, and I find that paradoxical.

What they are doing essentially, I believe, and I find it deeply troubling, is disempowering the legislative branch. Effectively, what their solution—and I will say that in quotes—does is say that for a period of up to five weeks or more, Article I of the Constitution is hereby suspended.

If the Framers had wanted us to statutorily be able to suspend Article I of the Constitution, I don't know why they made it Article I and spent so much trouble working on it. But in the absence of a House for five weeks, I don't think the executive has any choice, nor do they have any constraints should they choose not to exercise that but to act, to take this country into war, possibly nuclear war, to spend untold numbers of funds, to change fundamental laws, to impose marshal law, et cetera.

What I am saying is checks and balances and separation of powers are equally important in the principles of the Constitution, perhaps more so than would be a 3- to 4-month deviation from direct election in the case of the House of Representatives. And I would underscore that we are still calling for prompt, direct election. What I am saying is do not have a period in which Article I of the Constitution no longer prevails.

As for the ratification notion, I would underscore that when I first introduced the proposal that Governors appoint temporary replacements, this was in the context of immediate post-9/11 con-

cerns. We were about to go to war. At the time, we did not know where Pakistan was going to be on that. We did know Pakistan had nuclear weapons and we didn't know what else Al Qaeda might have up their sleeves. I felt it was important to get some mechanism through this body to be available to the people should they have, unfortunately, the need to act on that.

This notion that ratification takes 7 years, I think, is specious and a straw man, quite frankly. If this body could agree upon a constitutional amendment, then put it before the people in the very spirit of those who believe, as do I, that the people should have such power, the people through their States. Put it before the people.

Does anyone doubt that if we had a viable mechanism of replacing the House, possibly the Senate—we already have the Senate, but if we had a viable mechanism of replacing the House in a time of crisis, that the legislators would not promptly convene and ratify this amendment so that we could get the Constitution functioning and the House of Representatives back up and running?

It is in the best interest of the State legislatures and of the States to have a House of Representatives. We are the Representatives, and so too would be the temporary designees. Or do they prefer to have no representation in the House of Representatives, to abandon Article I for a period of five weeks?

I believe we could ratify this, if the time came, very promptly. Quite frankly, even lacking that urgency of that situation, I believe most States, certainly the people in my State—when I talk to people at town meetings, they tell us you folks ought to fix this.

What I would suggest is this: How do we get consensus on this? We are not going to get consensus, but let's bring it before the bodies for debate. What troubles me the most is that 2 years after 9/11, in the House of Representatives we have had a working group. The Continuity Commission has done their work. We have had one hearing in the Judiciary Committee, but this has not received attention at the public level by the full body.

More than 218 members of the House of Representatives signed a letter 2 years ago, at the end of the last Congress, asking the Speaker of the House to bring this forward, to move this forward through a bipartisan committee. That has not been done. Two years is too long. Tomorrow, we could need this.

Senator CORNYN. Well, hopefully, this hearing is the beginning of a re-starting of a discussion and hopefully will help expedite consideration of whatever solution is ultimately determined by the Congress and by the people.

I know we could ask a lot of questions and there is going to be a lot of debate on this, as there well should be, but let me just ask one final question of Congressman Dreier particularly as regards to concerns that have been expressed by some, and I have shared some of those with you, about expedited elections and what that does to potentially disenfranchise some important elements of the electorate, for example, our military and others. That is a concern.

Could you give me your thoughts on that, please?

Representative DREIER. Mr. Chairman, we learned through the election of 2000 that democracy is a work in progress. I like to often tell the joke that on July 2 of 2000 I had the honor of co-lead-

ing an election observer team to Mexico with your fellow Texan and my good friend, our former Secretary of State, James Baker. We co-lead a 75-member election observer team.

I serve on the board of the International Republican Institute and we regularly are out there as Americans observing elections all over the world, so a joke that on the night of July 2, Jim Baker and I stood in the hills above Puebla, Mexico, checking the validity of ballots, and 3 months later Jim Baker was doing the exact same thing in south Florida. So the point is a very clear one. Democracy is, in fact, a work in progress.

I would argue that I am always concerned about disenfranchising voters, and we regularly hear cases of voters being disenfranchised. But I would argue that as we week to ensure that voters are not disenfranchised, we should not disenfranchise every single voter, because this proposal basically does that.

My legislation calls for 21 days, and some argue that that is too short a period of time and again I have got these examples. It may not be exactly 21 days, but this notion of 5 weeks is, to me, not a correct one. I think it can be done within 21 days.

You know, James Madison said the problems of democracy are solved with more democracy. It seems to me that as we look at that, I wouldn't say that the problems created, as Brian pointed out in his last exchange with you, of unelected leaders are solved with more unelected leaders. I think that we need to get back to that core.

So we are always going to seek to ensure that there are no disenfranchised voters, and we should seek to do everything we possibly can to see that the military and others are able to participate in these elections. But there is nothing to say that with that time frame that we have that having communities come together as they look at feeding and clothing their children in the wake of a horrible tragedy—that choosing their leaders is a very important part of that process. It is the basis on which the United States of America was founded and I think that we need to ensure that that stays in place, and we will seek to ensure that everyone does have that right to participate.

It is nice to see my friend, Senator Leahy, here.

Senator LEAHY. Good to see you.

Representative DREIER. Good to see you.

Representative BAIRD. Could I respond very briefly?

Senator CORNYN. Congressman Baird, if you do have a brief response, and then I need to recognize the Ranking Member.

Representative BAIRD. Yes, thank you. First of all, welcome, Senator Leahy, and thank you for your presence and your leadership on this.

My only response would be this: We do not disagree there is a straw man being created as if we are favoring—those of us who favor appointment are somehow opposed to election. Not at all.

The two areas of disagreement are these. One, do we have no Congress, no Article I of the Constitution during that interim? I believe that is a mistake. Two, should the elections take place in a time that allows a truly deliberative process and that is practically functional in a time of national crisis? Three months, I believe, is

reasonable, but I think it is an error to try to push that so quickly that you disenfranchise people or lead to a distorted process.

So we are not disagreeing that elected representatives are the ideal. Nobody is disagreeing with that in this body. What we are disagreeing with is the imposed time frame and we are disagreeing with whether or not you leave the House of Representatives nonexistent or to be run by a small handful of people during a time of grave national crisis.

Senator CORNYN. Thank you very much.

I am delighted that Senator Leahy, the Ranking Member of the Senate Judiciary Committee, could be here and present his opening statement and participate in the hearing. As he observed, I think one reason why we are a little light in terms of physical presence of members today is particularly because of a Senate Armed Services Committee hearing on the conflict in Iraq and the President's recent proposal of Sunday night in terms of supplemental appropriations and the like.

With that, let me turn the floor over to Senator Leahy.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman. I am delighted to see two friends from the other body over here.

It is interesting that we are doing this, of course, almost on September 11. It is one of those things like presidential assassinations; we all know exactly where we were at that time. We also are well aware of the fact that the Capitol building that we all go to work in everyday was probably targeted for an attack, and we have to assume that it will continue to be as Al Qaeda plots in their hideouts in Afghanistan, Pakistan, and Saudi Arabia today. We know if they do as they have in the past, as they did with the World Trade towers, they will try to win this time around.

For the Senate, it is fairly easy. Under the Constitution, in the event of a Senate vacancy, even in a national tragedy, a State governor—if authorized by the State legislative—can appoint a replacement to seve in the Senate until such time as the State laws or State constitution require an election.

There is no similar provision for filling House vacancies, and for very real reasons. The Founders of this country wanted to make sure the House was as directly elected by the people and in as representative a capacity as possible. Elections are required to fill House vacancies, and depending upon the State, the elections can take some time.

Unlike in the Senate where we can have appointed Senators, at least for a period of time, every person who has served as a member of the House was elected to that office by the people of his or her district. James Madison said the "definition of the right of suffrage is very justly regarded as a fundamental right of republican government. It was incumbent on the Convention, therefore, to define and establish this right in the Constitution. To have left it open for the occasional regulation of the Congress, would have been improper for the reason just mentioned." So we do have a very heavy burden, obviously, to consider carefully whether to amend the Constitution. In fact, no matter what the amendment is, and

certainly with something this fundamental, we should weigh it very carefully.

Between 1945 and 1963, because of Cold War fears of nuclear attacks, there were 30 or more amendments proposed to allow the appointment of members of the House in cases of emergency and those proposals did not go anywhere.

Some have said the House could change its rules so that emergency appointments could be admitted to a Committee of the whole. Frankly, I think that would not address the fundamental concern; they would still be unelected. The House has allowed delegates from the territories and the District of Columbia to vote in the Committee of the whole, but the delegates were still people who had been elected by those they represent.

So the hearing raises some very interesting things. If we are going to do this by special election, how would it be funded and set up? California, which could have as many as 53 Representatives to replace, has a statute allowing for the replacement of Representatives in the event that a catastrophe causes a vacancy in either 25 percent of the seats in the House or 25 percent of the seats representing California in the House. The statue allows 56 to 63 days for an election after a proclamation by the Governor.

Tom Foley and Newt Gingrich, two former Speakers whom we all know and served with, suggested that Representatives appoint or designate a successor so that, when Representatives run for office, voters would know who the replacements would be. But regardless of the proposal, there are some basic questions to resolve, for example, how would we determine incapacity?

I am not suggesting an answer, Mr. Chairman. I think it is extremely important that you are holding this hearing and I compliment you for doing it. Just as we did during the Cold War and we talked about the catastrophe of nuclear war, we plan for the more surgical catastrophe of an attack on the Capitol building.

Frankly, if I had the proxies of everybody here in the room to write a solution other than staying where we are, I am not sure what I would do. So I think it is extremely important that you are having these hearings and I applaud you for doing that.

I apologize for the voice; I seem to be having a bit of allergy reaction. But it is good to see David, and it is good to see you, Brian.

Thank you.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Senator CORNYN. Thank you, Senator Leahy, for your comments and concerns. I am particularly appreciative of Chairman Hatch and you for authorizing us to have this hearing today at the full Committee because I do believe it warrants the attention of the full Judiciary Committee, and indeed of our full body.

Representative DREIER. Mr. Chairman, if I could just report to Senator Leahy that the fill-in for Senator Hatch has done a phenomenal job in the absence of Senator Hatch and the other members of the Senate.

Senator LEAHY. You notice how we have done it. John and I and Orrin have all tried to make sure that we show a certain amount of white-haired leadership. They, of course, show a lot more than

I do, but they are in the majority and I am in the minority, so it is only right.

Senator CORNYN. Well, gentlemen, thank you very much for your time and your thoughtful comments and testimony. They serve as an appropriate kick-off for the next panel that is going to be here, so thank you for being here.

At this time, I would like to ask our next panel to come up and take their seats. We are fortunate to have with us a number of distinguished witnesses and before I recognize them, I would like to submit for the record a joint statement from two former Members of Congress who serve on the Continuity of Government Commission, former Senator Alan Simpson and former Representative Lynn Martin.

Senator Simpson and Representative Martin both wanted to be here in person and their testimony supports that which was offered by Congressman Baird and the commission report. But we are grateful for their written testimony and their understandable absence.

In addition, I would like to submit for the record, without objection, the testimony of Congressman Ron Paul, from my home State of Texas, who writes in opposition to the commission. As Congressman Dreier mentioned, he is a cosponsor of H.R. 2844, sponsored by Congressman Sensenbrenner.

To ensure that we have an opportunity to hear from all members of the panel here, gentlemen, I am going to ask you to do something that is very difficult, and that is to hold your opening statements to 5 minutes. Since there are not going to be a lot of people asking questions, I assure you you will be able to get the gist of all of your testimony certainly offered at some point in response to questions if you can't do it during the opening statements. Certainly, your written statements will all be submitted as part of the record in this hearing.

We will also leave the record open until 5:00 p.m. on Monday, September 15, for members to submit additional documents and also to ask additional questions in writing. So you might be looking for that.

First, we are pleased to be joined by Dr. Norman J. Ornstein. Dr. Ornstein is a distinguished scholar and expert on Congress and elections, and author of numerous articles and books on those subjects. He is a resident scholar at the American Enterprise Institute. In the fall of 2002, he helped launch the Continuity of Government Commission and serves as one of its two senior counselors today and, of course, has written extensively on the subject of this hearing.

Next is Mr. Doug Lewis, Executive Director of The Election Center, a non-profit organization dedicated to promoting, preserving and improving democracy, headquartered in my home State, in the town I was born, Houston, Texas. Its members are government employees whose profession it is to serve in voter registration and elections administration, the very people who would have to conduct these elections. He has testified on election reform issues both in the other body as well as the United States Senate previously.

We are also pleased to have Mr. Samuel F. Wright here to testify. He is Director of the Military Voting Rights Project at the Na-

tional Defense Committee and is an expert on the voting rights of military personnel assigned both within the United States and outside of this continent.

Finally, we are pleased to have with us Mr. Thad Hall, a program officer with The Century Foundation. Mr. Hall has extensive experience in Federal and State politics, having worked for then Georgia Governor Zell Miller and as a policy analyst for the Southern Governors Association in Washington, D.C. He holds a Ph.D. in political science from the University of Georgia.

With that, gentlemen, we would be pleased to hear first from Dr. Ornstein.

STATEMENT OF NORMAN J. ORNSTEIN, SENIOR COUNSELOR, CONTINUITY OF GOVERNMENT COMMISSION, AND RESIDENT SCHOLAR, AMERICAN ENTERPRISE INSTITUTE, WASHINGTON, D.C.

Mr. ORNSTEIN. Thank you very much, Mr. Chairman, and thank you for your leadership on this issue. Let me say it has been a pleasure working with your terrific staff, and the staff of the Committee as well, on these issues.

Senator Leahy mentioned that, of course, we are approaching the second anniversary. I have been working on this issue now for 728 days, starting on September 11. I was at Dulles Airport and got called off the jetway when the second plane hit the World Trade Center, retrieved my car, made my way back home and watched with horror through the rest of the day.

That afternoon, it became clear to me, as it did to Brian Baird, that the greatest likelihood was that that fourth plane was headed for the Capitol dome, and I began to work through the consequences of if it had hit and then realized that the Framers had, in fact, left, as they couldn't have done otherwise perhaps, a hole in the Constitution, a hole that remains a gaping one now almost 2 years after that horrific wake-up call.

I noticed the other day that Britain has begun to plan massive evacuations of London in the event of a terrorist attack, where they believe Westminster would be a major target as well. We know that the threat has not diminished. If anything, it is greater for something happening here.

Unfortunately, we have had other kinds of wake-up calls, and the history of Congress is to dawdle over issues of succession. You think about the number of times when we had no Vice President in place, or times, as with President Wilson, when he was comatose for months and really no plan for dealing with incapacitation there. Yet, it took us until modern times and the 25th Amendment to even begin to deal with those issues.

Now, as David Dreier mentioned, we did consider these questions during the Cold War. The Senate did three times pass constitutional amendments to provide for appointments in the House in the event of a catastrophe. The House did not take them up. Once, it came very close, but at a time when there were other constitutional amendments that took greater priority.

But I do think that it is instructive to think about the difference between the Cold War era and now, and to recognize that there are two sharp and critical differences between then and now. One is

the notice of an attack. Then, we had, of course, the Greenbriar set up, that secret bunker 200 miles from Washington, based on the assumption that if we had a confrontation with the Soviets, we would have notice of between 30 and 90 minutes once the missiles were launched from Siberia to evacuate the Capital. Now, we know the danger is a sudden attack occurring with no notice whatsoever.

The second is the danger of incapacitation, and I want to stress this greatly and it is also something that Chairman Dreier brought up, but did not address, and noted that we had discussed it in the Continuity of Government Commission report.

There is probably, given the nature of biological and chemical weapons available and given the experience we had, the frightening experience in the Senate, one that touched Senator Leahy directly, with anthrax in the aftermath of September 11, perhaps a greater danger of massive incapacitation than even of widespread death.

If that highly weaponized anthrax had gotten into the ventilation system in the Senate, we might well have had 60 Senators or more in intensive care units with inhalation anthrax for weeks or months; no Senate, therefore no Congress, nobody to confirm appointments, including possibly to confirm a new Vice President or to deal with other very significant issues.

Any suggestion that we can deal with this problem for the House with simply expedited elections ignores the problem of incapacitation. And, of course, it is, as you suggested, Mr. Chairman, in your opening statement, a problem that the Senate has to deal with as well. The 17th Amendment to the Constitution does not deal with incapacitation; it deals with death. We have had members of the Senate who have been incapacitated for years, unable to function.

But it doesn't matter much, frankly, for the institution as a whole when you have 1 Senator out of 96 or 1 out of 100 who isn't able to function for a period of time. It would if there were more than 50. Any interpretation of the quorum, even the questionably expansive one of House parliamentarians since the Civil War that says that a quorum is a majority of those elected, sworn and living, doesn't take into account what would happen if we had more than a majority of members incapacitated for a significant period of time. And the idea that you would simply force them to resign or expel them from office so that you could get a body functioning is not a very attractive one.

Let me say just a few other comments along the way. Our commission, 16 members, co-chaired by Alan Simpson, a former member of this Committee and of this body, and Lloyd Cutler, former White House Counsel to two Presidents—former Speakers, former Cabinet members, many former Members of Congress, constitutional scholars, and others—not one of us like constitutional amendments. Not one of us started wanting a constitutional amendment.

We went through exhaustively all the alternatives to see what could work first and came, I am afraid, inexorably to the conclusion, first, for incapacitation, but also in the case of widespread deaths, that to leave the country, as Brian Baird suggested, for weeks, if not months, without a functioning Congress, with what

might be, if we are lucky, a benign form of marshal law, is simply unacceptable.

The bill that Chairman Dreier and his colleagues have introduced, in effect, has a one-week, a seven-day period for elections, two weeks after a massive catastrophe, for parties to choose candidates, leaving out, of course, independents, any kind of independent candidates, and then one week once you have chosen the candidates to print ballots, secure polling places, get voting machines ready and certified, hire and train poll workers, and do the balloting. You leave out any voter registration, you leave out practically any absentee voting, you leave out large numbers of people, and it simply can't be done.

California may have the 63-day rule for emergencies. They are going well beyond the 60 days for this gubernatorial recall election, and it is instructive here. For one statewide election, not at a time of emergency, with 2 months from the time that the candidates are selected and the ballots can begin to be printed, election officials throughout California are saying that it is nowhere near enough time and they are afraid they are going to have another Florida on their hands. This can't be done easily within a matter of weeks.

Given what we know and what the working group co-chaired by Representatives Chris Cox and Martin Frost concluded after some exhaustive study, the number of vendors who print ballots is limited across the country. It is tough enough to hold special elections in the House within the matter of two or 3 months when there is one election going on, much less trying to do hundreds at the same time across the country.

We may be able to expedite matters with vote-by-mail or Internet voting. I could spend hours going through the perils of vote-by mail, which has led in many cases, beyond, of course, the fact that it destroys the secret ballot and that zone of privacy around the polling place, to corruption, not in Oregon perhaps, but in many other places, including wide experience in Florida and Georgia, among others. We have had conferences on Internet voting showing that, as we have seen with these worms, there is no safety or privacy there either. There is no solution.

Unfortunately, you come inexorably, as I believe this Committee will through its deliberations, to the conclusion that we need something else if we are going to have a functioning constitutional form of Government at the worst possible time.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Ornstein appears as a submission for the record.]

Senator CORNYN. Thank you, Dr. Ornstein, for those comments.

Mr. Lewis, we will hear your opening statement, please.

STATEMENT OF R. DOUG LEWIS, EXECUTIVE DIRECTOR, THE ELECTION CENTER, HOUSTON, TEXAS

Mr. LEWIS. Senator and distinguished guests, you know, I am reminded, too, that 2 years ago on September 11 I was flying up here to talk about election reform with Congress at that time, and now we are talking about something that is a little harder to contemplate, actually.

The first assumption I think we have to make when we look at it as elections administrators is is the disaster contained only in Washington. All bets are off if it is not just Washington. At that point, we have got to go back and look at if it affects States, too. If it is the kind of disaster that hits not just D.C., but many of the States, then we are going to have to look at a different set of solutions.

We don't really have a quarrel with the tradition of House members being elected rather than being appointed. The problem is that that tradition also weighs, and must weigh equally with the tradition that we have elections, that the public knows who is running, that they understand the issues, that they have the choices and know how to make those choices and who is actually going to be on the ballot.

The question, I guess, we have is do we suspend democratic processes in order to get democracy. That seems to be a little bit of an anomaly in the way we think of things if we can say that we can speed this process up so that we can claim that we had an election, when, in fact, that may not represent what we define as an election in America.

Certainly, the genius of the American political system is that the voters have fundamental faith in the process itself. If they do not have faith in that process, that the process was somehow rigged in such a way that it accelerated things to where there was no reasonable election of candidates, then can they believe in the government that results from it? We think probably not.

Certainly, in order to have a general election, you have to have some way to have the primary nomination of the candidates. The device that has been proposed is 14 days and let the parties sit down and nominate those, and then discard all those other people who might have wanted to run or might have been able to run, or should have maybe been the persons to run. It certainly eliminates all the independents; it eliminates all the minor parties because you are not going to have enough process time in order to determine who those candidates are. That is a part of the American democratic process.

Certainly, the threshold that Congress needs to look at—is that 25 members, 50 members, 100 members, a quorum? What does it constitute before this National election and national emergency kicks in?

The lessons that we learned in New York City alone from 9/11 when an election was scheduled on that day in order for us to continue with an election in a disaster—we need to then assess what is available to us. How do we go back and rebuild the process and do the process so that folks can actually come to the polls? Certainly, those lessons ought not to be wasted on us.

Presumably, Congress is going to say that a national emergency needs to take precedence and that national interests are superior to State interests in this regard. But if that is the case, then Federal law is going to have to definitely suspend a whole lot of laws on State books in order to conduct an emergency election.

Concurrently, if you are going to suspend all those laws and all those processes, you are also going to have to train poll workers to

a whole new set of rules and regulations so that they don't disenfranchise voters when they show up.

It appears from the surveys that we have done now with elections administrators around the country that most feel like we can conduct an election in as few as 45 days. But we would prefer to have more than that. We would prefer to get to the point that we have—any extra day beyond that helps us run an election that has more credibility and more ability for folks to participate.

One of the House bills says that if such an emergency occurs within 51 days of a regular election, then you go ahead with a regular election. Well, if 51 days is the basis, then 51 days probably ought to be the basis, instead of saying that we want to do it in 21.

Now, the question is can we do an election in 21 days. Elections administrators are pretty good folks. They can do pretty much the impossible, but the point is is that truly an election that represents America?

If you look at the things that we have to have—candidate filing, new voter registration considerations, preparation for absentee ballots and what are you going to do about all those who are military and overseas—are you going to suspend their rights? Are you going to suspend the rights of the disabled in the election because you don't have enough time to mail the ballots and get them back, and the transit time there?

If we had more time on the front end, we probably wouldn't have to count the ballots after election. Maybe one of the things that Congress needs to do in order to assure enough poll workers in a situation like this is to suspend all the labor laws that would keep us from using and pressing into service all of the other government employees at city and county levels so that we could do this.

Certainly, we would want to look at the ability to say can we do it? Yes, we can do it. We could hold an election in 21 days, but it would not be what America has grown to know and understand as an election and it would suspend the rights of many, many folks in the process.

Lastly, let me wrap up with saying Congress has to understand that on election day you haven't got the final totals. We are going to have to go through a canvassing period where we process those absentee ballots on the back end, unless those have been suspended. We are also going to have to understand and do the counts and qualify provisional ballots, or do we suspend those, also?

That back-end process is where it takes us a lot of time. In California, it takes them 28 days to get through all the ballots that come in on provisional voting. That is not 28 days where they can just compress that by magically waving a wand and saying they don't need all that time. It takes that much time to get it done. So these are things that Congress needs to look at when it decides on this issue.

Thank you, sir.

[The prepared statement of Mr. Lewis appears as a submission for the record.]

Senator CORNYN. Thank you very much, Mr. Lewis.

Mr. Wright, I know you are prepared to talk about military voting rights. Certainly, for me, that is one of the biggest concerns I

have about what impact expedited elections would have on the rights of those people who are representing this Nation on battle fields across the planet. We would be glad to hear your opening statement.

STATEMENT OF SAMUEL F. WRIGHT, DIRECTOR, MILITARY VOTING RIGHTS PROJECT, NATIONAL DEFENSE COMMITTEE, ARLINGTON, VIRGINIA

Mr. WRIGHT. Well, thank you. I would just like to bring to your attention—I am sure you aware of it—the Uniformed and Overseas Citizens Absentee Voting Act of 1986. It is in Section 1973ff of Title 42. It explicitly applies to special elections, as well as primary, general, and runoff elections for Federal offices.

Representative Dreier mentioned a California law providing for an expedited 63-day rule if there are more than a certain number of vacancies in the U.S. House of Representatives either overall or among the California delegation specifically. I think that law, frankly, is inconsistent with the Uniformed and Overseas Citizens Absentee Voting Act. Of course, Representative Dreier—in his bill, he could and I think he would have to provide for the suspension of UOCAVA, the Uniformed and Overseas Citizens Absentee Voting Act.

Military voting and overseas voting is difficult enough in biennial general elections. I presented in my written testimony a response to a questionnaire that I received from Hon. Matt Blunt, Secretary of State of Missouri. I asked each of the 51 chief State election officials to complete a questionnaire that I sent out in May of 2002. Secretary Blunt is the only one that did. I did get some responses from counties in Florida, but the Secretary of State there left it up to the counties and 14 of the 67 counties responded.

Secretary Blunt actually distributed my questionnaire—this was for the 2002 general election—to the 116 local election officials in Missouri and he obtained responses from 105 of them. The City of St. Louis was one of the hold-outs, unfortunately.

Among those 105 counties in Missouri, in the 2002 general election, for military and overseas voters, defined as people who used the Federal postcard application to apply for their ballots, the disenfranchisement rate was 41 percent. In other words, if you add up the applications that were rejected because they came in late or because they were somehow procedurally insufficient, and then you add to that the absentee ballots that came back late, the absentee ballots that came back on time but were rejected for procedural deficiencies, and another 350 absentee ballots from Federal postcard application voters, 350 ballots that never came back at all even as of mid-2003, then you come up to 41 percent of the applicants that did not, in fact, cast ballots that were counted in the 2002 general election.

In a special election, it is even more difficult, and I think there is no way in 21 days, or even 21 weeks, you could have an election in which people overseas could have a realistic opportunity to vote.

I recognize the importance of an elected House of Representatives, but I favor your approach or what is being considered here of having interim appointments, to be followed by special elections as soon as reasonably practicable.

[The prepared statement of Mr. Wright appears as a submission for the record.]

Senator CORNYN. Thank you, sir.

Mr. Hall, we would be pleased to hear from you.

STATEMENT OF THAD HALL, PROGRAM OFFICER, THE CENTURY FOUNDATION, WASHINGTON, D.C.

Mr. HALL. Thank you, Mr. Chairman. At this hearing, I want to focus my comments specifically on the issues associated with holding special elections on a short time frame, and here I think there are three key points that I want to make.

First, at present, State laws are not well designed to hold special elections on a very short time frame. Second, Congress does have the power to regulate elections in a way where special elections could be conducted in a relatively quick and efficient manner. And, third, there are technological changes in the election field that will likely make special elections easier to hold in the future, especially for the UOCAVA population.

Regardless of whether or not one supports the constitutional amendment or not, it seems very likely that we will be holding special elections for House members in the case of a disaster for some time, given the debate over whether or not there should be an amendment. So the fundamental question is how can Congress make the special election process work better.

Answering this, I think, requires rethinking the way elections are currently conducted in the States because State laws that govern elections are not designed for speed; they are designed for other reasons. The California example that Dr. Ornstein mentioned earlier is an interesting case in point. The California recall provides us some lessons of how State laws can impact the speed and ability of election officials to quickly hold a special election.

I was fortunate when I worked for the National Commission on Federal Election Reform to spend a week in Los Angeles to watch them run their mayoral election, and it is quite an experience to see a jurisdiction of that size run an election.

To give you an example of how large Los Angeles County is, they have 5,000 precincts if they run a full election and don't consolidate their precincts. If they do consolidate, they have about 2,000 precincts. They have 25,000 poll workers. To put that in context, there are about 5,000 Starbucks in America. There are not 2,000 Wal-Marts worldwide, and the poll workers outnumber the LAPD 3 to 1 on election day. So it gives you a sense of what is involved in putting together an election.

In L.A., they also have 135 candidates, which is creating a huge problem. There is a very low threshold for getting on the ballot. There are numerous lawsuits going on out there, and so it does have kind of circus atmosphere, in part because the people who run the elections out there have very little discretion on how they run the election. They have to run it at poll sites on election day.

They could, however, use a different model if they were freed up to do so. For instance, if you look to the north of California, in Oregon they run their elections using vote-by-mail, and they have done so since the people of Oregon passed a State constitutional amendment in 1996 to allow them to do this.

In Oregon, all registered voters are automatically sent a ballot between 14 and 18 days before an election. They then complete the ballot. They have to turn the ballot in either by sending it in by mail or dropping it off and it has to be received by election day. Then the votes can be counted at that point.

The benefit of this system in a crisis situation might be that you would not have to gear up poll sites, find poll workers, and do these things. You would be able to immediately enfranchise all the registered voters by sending them a ballot.

The effectiveness of vote-by-mail has been recently recognized internationally. The United Kingdom has an electoral commission that is similar to the soon to be created Election Administration Commission. They have been conducting experiments in local elections using vote-by-mail over the past several election cycles and they have recently recommended that all local elections in the United Kingdom be held using vote-by-mail.

However, using this system would not be without its drawbacks. One of the issues would be that people who have disabilities might not be able to vote using vote-by-mail. But localities can often operate poll sites using early voting, which you, I am sure, are familiar with, as it is used so much in Texas, where you can put up touch-screen voting systems that people can use.

In fact, Los Angeles County, which traditionally has used punch cards, has been using an early voting DRE system since 2000 in their disabled community and their language-minority community. They have to serve seven different languages in Los Angeles County under the Voting Rights Act and have found this to be very beneficial.

I think that Congress could do a couple of things to make the process work better. First, they could require States to develop a legally-binding mechanism for how they would hold special elections in the case of a disaster. States would basically determine what laws would be in place and what procedures they would have to do to make an election work in that situation. Second, Congress can obviously pass a law to accomplish the same goal.

I also think it is very important that in a disaster situation, if we are going to do these elections in the short term, Congress and the Federal Government should be willing to pay for some of the costs associated with these elections.

Some of the problems associated with these elections could be overcome if Congress did this. For example, with the issues of ballots and things like that, Congress could go ahead, or the Federal Government could put in place contracts with people so we had ballot paper in place, we had printers in place, we had all the things you would need to make an election go off quickly.

Finally, I would just like to point out that technological changes are likely to make enfranchising the UOCAVA population in the future much easier. In 2004, the Federal voting assistance program will be pilot-testing an Internet voting system that will be used in several States, and that will provide an opportunity for these people to vote using a quicker, much more efficient and effective technology, and to register using that technology. I am actually part of the evaluation team that is evaluating that process.

[The prepared statement of Mr. Hall appears as a submission for the record.]

Senator CORNYN. Thank you very much, Mr. Hall.

At this time, I want to offer, without objection, into the record the written statements of Doug Chapin, who is Director of Electionline.org; Curtis Gans, Director of the Committee for the Study of the American Electorate; and Phyllis Schlafly, President of the Eagle Forum and Chairman of the Coalition to Preserve an Elected Congress, who writes in opposition to the commission report. Mr. Chapin and Mr. Gans express concerns with an expedited election process.

I want to make just a brief statement in appreciation to Dr. Ornstein, and really to the commission that was a joint project of the American Enterprise Institute and the Brookings Institution—the Continuity of Government Commission for the outstanding work that was done on this subject. I think, to me, that stands out as a great example of the kind of scholarship and expertise that can be offered to Government to help us make better decisions, and I appreciate that very much.

Starting maybe with Dr. Ornstein, let me just ask you about Congress' traditional reluctance to pass constitutional amendments. I was reminded that in one extreme instance, a constitutional amendment was submitted to the States in 1789, but took 203 years to ratify.

If we are talking about trying to get amendments to the Constitution ratified so we can deal with what I think we can all agree is, if not urgent, a compelling need for Congress to act, can you tell me sort of what your thoughts are about how we can get it done more quickly and in a way that would address the concerns that you talked about?

Mr. ORNSTEIN. Certainly, Mr. Chairman. Thank you for your kind comments, and let me acknowledge my fellow senior counselor, Tom Mann, and the director of our commission, John Fortier, who are there in the audience, along with Kim Spears, who has worked on this issue with us.

Chairman Dreier, of course, misspoke when he said that it takes an average of 7 years for constitutional amendments to be ratified. The modern practice has been to put a 7-year limit once the amendments go through Congress and then go to the States. What we had recommended was a much shorter limit for the States.

But in this case, the critical issue is getting an amendment through the Congress while there is a Congress. Once an amendment goes to the States, I am not very worried, frankly, about ratification time because once you have got an amendment through the Congress, assuming, by the way, that we have implementing legislation, as well, in the form of a short amendment that is parallel, let me note, to the constitutional provision for presidential succession—presidential succession in the Constitution basically creates a presidency and a vice-presidency, but then delegates to Congress the responsibility through implementing legislation to select others, the subject of the joint hearing, of course, that you will be holding with the Rules Committee in the Senate next week.

If you did it in that fashion, basically just giving it to Congress, you would need some kind of implementing legislation. But once

you are through the body, then States, as Representative Baird said, beyond any question, if we had a catastrophe, would act swiftly. The difficulty comes if we don't have a plan in place and then an attack occurs.

Now, unfortunately, the history of the country in these areas is that we wait until we go from theoretical to real, and in some instances, as we had with President Wilson, from real to something even more real. It takes something that really shakes the country up, like the assassination of President Kennedy, to overcome the natural inertia in the process, normally a very commendable thing because constitutional amendments shouldn't be done lightly, to get something done.

When I am asked about this issue, people say, well, are they going to act and will they get this amendment done? And my answer is yes. The question is does it come before or after we have to pick up the pieces from an attack. So ratification time in this case, I think, is not the critical question. It is getting the Congress moving so that if something happens, we then can see the States respond quickly.

I also believe, by the way, that most constitutional amendments, once they get through Congress, unless they are highly controversial issues like the equal rights amendment for women, once Congress has managed to muster the super-majorities in both Houses to make something happen, the States recognize the reason for doing so and move much more quickly.

Senator CORNYN. I know no one likes to think about this, but would you just speak briefly to what the possible scenarios might be, the parade of horribles, I guess, in the event Congress fails to act on this proposed constitutional amendment if, in fact, a majority of the Senate is incapacitated or a majority of the House is incapacitated or killed and either body is unable to establish a quorum? Can you give us an idea of some of the scenarios that you think are possible?

Mr. ORNSTEIN. Sure. You can unfortunately find a number of worst-case scenarios that used to be the stuff of Tom Clancy novels, literally, but now they are tangible possibilities.

Probably the worst case is something happening at an inaugural. At an inaugural, we have the crisis of succession with all three branches. You have got, of course, the incoming President and Vice President, the outgoing President and Vice President involved; the outgoing and incoming Cabinet. The outgoing Cabinet is supposed to submit letters of resignation as of noon on January 20. Presumably, most of them have, perhaps not all.

Even though confirmation hearings have been held in many instances—in recent times, we have done this to try and get a Government up and running—before the 20th, you still have to have the Senate only after noon on January 20 confirm new Cabinet members.

You have the Supreme Court there, the Congressional leadership, and most of the Members of Congress. And if you did have something like a suitcase nuclear bomb, you could end up with questions about whether there was anybody in charge and maybe people popping up saying, well, I will be the President. And you might then have literally a handful of members of the House who

happen to survive announcing that they would constitute a quorum, choose a Speaker, who would then become under the Presidential Succession Act President for the next 4 years. This is not fanciful, I am afraid. It is real.

Beyond that, of course, even with expedited special elections, even if we did move within a brief period of time—and again remember that the proposal on the table, which is 14 days to choose candidates, then 7 days to hold an election—you are still going to need at least a week or 10 days or much more time, as Mr. Lewis has reminded us, afterwards to go through the ballots and then certify the candidates.

Think about what was done in the three of four weeks in the immediate aftermath of September 11, all the things that were done. Even at minimum, we are going to have that problem. Then, of course, you have those problems of incapacitation where you would be paralyzed with simply no Congress that could act under any circumstances, given the definition of a quorum.

What we are talking about now is the possibility of quarantine because of smallpox, an anthrax or sarin gas attack, another kind of biological attack. We have known in the past that what we thought was the worst case in the Cold War and post-Cold War era was the State of the Union. And, of course, we have followed the practice over the last couple of decades of having a member of the Cabinet absented from that State of the Union because this was the one occasion when all the members in the Cabinet and the President and Vice President were gathered together in that one building.

But when you consider the range of weapons of mass destruction available now over the Internet or in a fairly easy fashion, the accessibility of them to Al Qaeda and to others, including with cooperation by governments, and that the pace of technology there is only going to increase and the availability of these destructive things increase, we are no longer simply confined to a question of what happens in one building. It can be a question of what happens across the entire city.

A suitcase nuclear bomb available now with fairly ready technology literally the size of a suitcase can wipe out a 6- to 8-square-block area, basically much of official Washington, if it were in the appropriate place. And we know that some of these biological attacks can move very swiftly through the population.

So the bottom line, Mr. Chairman, is that when you take any of those scenarios and then you begin to work through what it could mean, with the House having a Speaker who is third in the line of succession, with the Senate having the important role, among other things, of confirming Vice Presidents and members of the Court and other such officials, with both bodies being needed for lawmaking, the easy ability now, unfortunately, in the age of terrorism to block those actions from taking place for weeks or months cries out for a response.

Senator CORNYN. Mr. Lewis, I know from observation that when Congress or perhaps the State legislature mandates certain election law changes, there is a very real impact on the people who actually have to administer those elections. We have heard some suggestions even here today about the use of technology, Internet vot-

ing, vote-by-mail, things like that that would perhaps expedite special elections.

Could you speak for a moment on what sort of impact that would have on those who actually administer the elections in terms of being able to successfully accomplish those elections?

Mr. LEWIS. Well, the truth of the matter is even if you look at ordering ballot stock, ballot stock is not a piece of paper. It is a stock that we use to run through equipment. If we are going to order up enough to have what essentially becomes a national election, you are going to have to order that by train car load, you know, and it doesn't come quickly. We don't keep it in stock, we don't keep it on hand.

And then as Norman has correctly pointed out, you have only got a handful of ballot printers in America. And ballot printing is not one of those things where you just take it down to any printer or down to a Qwik Copy and have them run you a copy of it. If it is going to be counted by machines, it is going to have to meet timing marks.

Or if we are going to use electronic equipment, you have got to have that programmed. The electronic equipment at least helps us eliminate all the possibilities of having to wait around on card stock and ballot stock, but then you are down to how programs all of that. There are a limited number of technical people available to us to help us get that set up in a hurry.

So when you look at it, 7 days, as proposed—I guess I am one of those loopy folks that thinks it is going to take a little longer. The truth of the matter is if you work with this enough, you find out that this does not happen overnight. We have done it so well for so long that everyone takes it for granted without understanding what goes into it. So it does take time to establish all of this.

If we ever find out a way to make the Internet a viable delivery service of votes with safety and security, we might be able to make that work. But the truth of the matter is we know it is not yet and so we haven't been able to figure that out, at least for general public use.

As we saw with what happened with the Northeast, if somehow terrorists were able to knock out the Nation's electricity, a whole lot of what we are planning and thinking of doesn't work anyway. At that point, we are all in deep trouble.

So there is no easy answer here, and certainly trying to force an election that basically is going to be held in 7 days from the date that you know the candidates does not seem to make sense. At that point, we have got to look at other options, and what those other options are I don't know. That is up to you all as Congress people to decide. But, certainly, if we are going to do an election, the election ought to have some integrity to it in terms of the way that the voters see it and perceive it as an election.

Senator CORNYN. Mr. Wright, if we are going to head in the way of a statutory solution, as proposed by some, including Congressmen Dreier, what do you see as sort of the minimum requirements necessary to preserve the rights of our military voters?

Mr. WRIGHT. I don't think it can be done. I think they would have to suspend UOCAVA, the Uniformed and Overseas Citizens

Absentee Voting Act, either suspend it explicitly, or more likely, as sometimes happens in special elections anyway, just sort of ignore it.

Senator CORNYN. Well, obviously, that is not a desirable result under any set of circumstances.

Mr. WRIGHT. Right.

Senator CORNYN. But your testimony is that you really don't see preservation of military voting rights and special elections as compatible?

Mr. WRIGHT. Certainly not a snap special election. I think you need 6 months.

Senator CORNYN. Well, I know in Texas we have four statutory election dates that offer some sense of predictability, some opportunity for preparation if there is a vacancy and a special election ordered by the Governor. But, of course, we are not talking about that. We are talking about something that would start from zero and have to gear up very quickly.

Mr. WRIGHT. But even with that, the service member or anyone overseas or anyone that needs to vote by absentee ballot for whatever reason cannot even apply for an absentee ballot until he or she knows there is going to be an election.

Now, we know there is going to be a presidential election a year from this November. So if you wait too long to apply for your ballot, the "own dumb fault rule" comes into play. My concern is about those people who apply early but still don't get their ballots on time. But in a special election, there is no way to apply early because you don't know your Congressman is going to die.

Senator CORNYN. Mr. Lewis, would you like to comment on that?

Mr. LEWIS. Yes. Some of that has been helped by the Help America Vote Act in the sense that they will then become registered for the year, and so already we will know that they are military and overseas. We can get to some of that; we can answer some of that.

If we have a minimum of 45 days, with then a period afterwards in which we can still receive those ballots, we can indeed probably, with all the transit time necessary, get the ballots out and get them back. But it is going to be humping it, and it won't get it for all of them.

Mr. WRIGHT. The usual remedy for a UOCAVA violation is a court order extending the deadline for the receipt of mailed-in ballot from outside the United States. It was a 1982 court order in Florida that is still in effect that provided for the ballots to be counted up to ten days after the election in Florida for Federal offices, President, Senate, and House.

But that would go against the whole idea of what we are talking about here. You know, the whole idea is not only do we need to have the election, but we need to figure out who is the winner and send that person here to Washington to enable the House of Representatives to have a quorum and to enact the Nation's business.

Senator CORNYN. I guess we also have to be concerned about the electorate knowing who the candidates are before they actually cast a vote and the challenges associated with getting that information to those voters. Perhaps there ought to be some provision made for at least disseminating to those voters information about the duly qualified candidates as part of that process.

Dr. Ornstein?

Mr. ORNSTEIN. Just one point. If you take what Mr. Lewis has said, 45 days being something where there is a consensus of election officials that if they were absolutely pushed maybe they could do it, although even with that we need caveats, then consider that it will take ten days or so after that to go through and certify ballots at an absolute minimum, then you are talking about having under the worst case an entirely new body come to Washington, probably including a vast majority of people with little experience in politics or government, very few former members, for example, and you need some time to organize the body.

Even now, when the House comes back with usually 90 percent of its members continuing, they take several days to enact rules, to organize, to select people for committees. Assume under the best of circumstances two or three weeks before you could actually be up and functioning, with most people not even knowing parliamentary procedures.

So even with that, we are talking 3 months or more before you could actually have a fully functioning Congress to begin to do things like declare war or authorize the use of military force or make appropriations. So under the best of circumstances, if we rely on elections, we are still talking about a gaping hole in terms of the amount of time where you are operating under marshal law.

Senator CORNYN. Mr. Hall, would you like to comment on some of the other testimony by some of your co-panelists?

Mr. HALL. I think the one thing I would like to point out is I think that Mr. Lewis is absolutely correct that you do have to take into account that there is a minimum period that you have to have to just prepare everything and then to count the votes at the end. It may not be 45 days. You may be able to shrink that somewhat, but the more you shrink into it, the more you impact the UOCAVA population.

I think in some States, 30 days is generally the minimum that they allow. You have to send out UOCAVA ballots by that point, and so if you do cut into that time, if there is not another procedure for these people to vote using the Internet or some other mechanism, you start to impact their ability to participate in the process.

Senator CORNYN. Well, of course, we also know there are other requirements that don't cover all States, but do cover some States with regard to, for example, the Voting Rights Act and pre-clearance requirements to any changes made that would have the potential of diluting or disenfranchising minority voters which present additional challenges.

Mr. Lewis?

Mr. LEWIS. One of the things that Congress may want to think about is looking at some methodology that would send experienced legislators up here and some way of finding a way to include those State legislators to get them up here so that they hit the ground running rather than people, as Dr. Ornstein correctly points out, who don't understand the legislative process, who don't understand rules and procedure or how a bill gets passed or any of that other stuff. So it may be that in your thinking you may want to look at

how do you get experienced hands up here who can hit the ground running.

Mr. WRIGHT. Something that occurred to me in listening to the other testimony about the incapacitation issue is maybe if Senators and Representatives would execute a power of attorney to someone outside the D.C. metropolitan area. Maybe your campaign Chairman or some trusted person would have the power of attorney to resign if you are in a hospital and comatose.

We have had circumstances where there were vacancies in the House for extended periods of time because someone has had a heart attack and doesn't have the capacity to sign a resignation letter. So it would serve that purpose as well. But certainly for the emergency circumstance we are talking about, or if someone is missing—you know, we are digging up the rubble of the Capitol and maybe someone is still alive under that rubble, but more likely they are not, but to resign so whatever the process is can get started.

Mr. ORNSTEIN. Let me say that the difficulty with that is you would end up perhaps having a tragedy, taking people who might be missing and then found again, or who might be incapacitated for three or four or 6 months, and basically removing them from office forever or for a very long period of time, something which is not desirable.

You can deal with incapacitation, I think, in a very reasonable fashion through this amendment process, where basically when it is clear that people are incapacitated—and it can be done through some power of attorney fashion or by other officials—there are appointments to replace them until those individuals themselves simply declare that they are ready to resume service. Then nobody is unfortunately destroyed inadvertently or the entire election process destroyed by this.

Senator CORNYN. Well, gentlemen, let me say how grateful I am to each of you, and I know I speak on behalf of the Chairman of the Committee and the Ranking Members and all members, that we appreciate your testimony.

This is the beginning of our deliberations in this body on this subject, not the end, and I hope that this hearing will generate a lot of interest in the legislative branch to deal with this subject in a responsible and comprehensive way.

This is, as I believe, Dr. Ornstein, you said, no longer the stuff of a Tom Clancy novel. This is very real, and I believe that 2 years is too long for us to actually be holding these hearings, but here we are now. And so now we can control maybe not our past, but our future in terms of the way we constructively deal with us and each of you has made a great contribution to that effort.

Before we adjourn, I would like to again thank Chairman Hatch and Senator Leahy. I will again say that we will leave the record open until 5:00 p.m. next Monday, September 15, for members to submit additional documentation for the record, and also to submit any additional questions of the witnesses. So you might look for those.

With that, this hearing of the Senate Judiciary Committee is adjourned. Thank you.

[Whereupon, at 12:00 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

THE CENTURY FOUNDATION
formerly known as the TWENTIETH CENTURY FUND, the organization was founded in 1919

WASHINGTON, D.C. OFFICE

October 17, 2003

Senator Orrin G. Hatch, Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

I appreciated having the opportunity to testify before the United States Senate Judiciary Committee regarding "Ensuring the Continuity of the United States Government: The Congress." In response to your request for additional information, I am providing written responses to the eight questions posed by Senator Patrick Leahy.

Question 1: What actions would States need to take in order to establish a streamlined specially election process to allow the replacement of deceased or incapacitated House members?

States would need to develop new election laws that could be used in this unique special election environment. These new laws would contain procedures for special elections that allowed localities to run elections in a way that would make the process faster and more expedient. In many cases, this would mean freeing local governments to run elections in the way they saw most fit. For example, California law required all voting for the October 6 special election be done at poll sites, even though approximately 30 percent of voters will vote-by-mail using the absentee voting process. It might have been much easier for some counties to use vote-by-mail for the entire recall election, bypassing polling place voting entirely. State election laws for elections after a crisis should ensure that local election officials are not bound into a system that may not work effectively.

The laws in special elections could also mean dictating that certain election features would be changed dramatically. For example, localities might freeze their voter rolls further out from the special election date than would normally be the case so that election officials can focus on managing the election itself.

States should develop these new laws in close consultation with interest groups—using a planning process similar to those required under the Help America Vote Act. Congress should consider requiring that all new state "crisis election" laws be pre-cleared both by the U. S.

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Department of Justice, which would already have to pre-clear all changes in states covered by the Voting Rights Act, and by another entity, perhaps the Department of Homeland Security or the Election Administration Commission, which would review these plans to ensure that they can actually be carried out as written.

Question 2: Are there state or federal election laws that would impede expedited special elections, and if so, please describe those?

Any federal or state laws that would impede an expedited election could vary by state and the election process they use for an expedited election. As I noted in my response to question one, state laws that require elections to be conducted in very specific ways—such as at a poll site on a single day—could cause problems for election officials. In order to avoid any delays, states should be required to develop plays before a crisis occurs, especially if these plans would have o receive pre-clearance from the Justice Department.

Question 3: What steps should the Federal Government take to assist the States in developing and implementing special election processes to choose replacements for Representatives who are killed or incapacitated by a terrorist attack?

There are several areas where the federal government can play a key role in assisting states develop and implement special elections processes. First, the federal government can provide an impetus to states to develop such plans by making this activity mandatory. The federal government should consider enacting legislation requiring states develop "crisis election" laws that would go into affect after a national disaster. Second, the federal government could provide grants to states that would fund the necessary work developing these new laws. State election laws are often quite complex, and the process of planning for such an election could be costly. Third, the federal government can fund research into new voting technologies or voting procedures that can be used in a special election. The United Kingdom's Electoral Commission has held experiments over the last two election cycles to determine how elections in the UK can be made more effective.[1] Similar research in the United States can lead to the development of new techniques that can make quick special elections a reality.

Question 4: What are the processes for canvassing and qualifying provisional voting, and are there ways to streamline these processes so that the outcomes of special elections can be finalized in an expedient manner?

The canvassing process is perhaps the most important part of the election process because it is here that all votes are reconciled and winners are determined. In many localities, the canvassing process is made more difficult by the inclusion of large numbers of provisional ballots. For

[1] Information about these studies can be found at http://www.electoralcommission.gov.uk/about-us/may2003pilots.cfm

example, in Los Angeles County, it took almost two weeks to certify the 2001 mayoral election, in large measure because of the time needed to verify provisional ballots.[2] There are, however, other jurisdictions that have less flexible provisional voting procedures in that they attempt to resolve a voter's status before allowing them to cast a provisional ballot. In an extraordinary election, state election law might have more constrained provisional ballot procedures so that the election can be canvassed faster.

Question 5: Are there safeguards that election administrators can employ to protect against fraud and disclosure of confidential information in the vote by mail process?

The vote-by-mail (VBM) experiment in Oregon is one of the best-studied forms of election administration in recent years. A 1996 survey of Oregon voters found that less than 1/10th of one percent of voters felt pressured to vote a certain way.[3] A VBM also does not have a direct impact on direct impact on the mobilization or retention of the members of any political party, but there is evidence that it boosts overall turnout by a small but significant amount.[4] These studies of VBM have found no evidence that vote-by-mail promotes vote fraud. According to the Oregon Secretary of State, Oregon has prosecuted only four cases of voter fraud since VBM's inception.[5]

There are also many features to the way in which VBM is implemented that guard against fraud. As the Oregon Secretary of State notes,

> As VBM ballots are received in election offices, counties match the signatures on the outer envelopes with the voter registration card on file, using either an automated signature database or manually checking the voter registration card. These signatures serve as a virtual 'poll book.'

In the VBM system, the signatures of all voters casting ballots are compared against their signature on file, providing security that the voter and voter registration match. As states move to statewide voter registration databases, it is likely that more and more of these processes will become automated.

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[2] A description of this process can be found in the report *LA Story* that was originally written for the National commission on Federal Election Reform. It can be found at http://www.tcf.org/Publications/Detail.asp?ItemID=191.

[3] Priscilla Southwell, and Justin Burchett. 1997. "Survey of Vote-by-Mail Senate Election in the State of Oregon." *PS, Political Science and Politics*. March: 53-57.

[4] See, for example, Adam J. Berinsky, Adam, Nancy Burns, and Michael W. Traugott. 2001. "Who Votes by Mail? A Dynamic Model of the Individual-Level Consequences of Voting-by-Mail Systems." *Public Opinion Quarterly*, 178-197; Priscilla Southwell. and Justin Burchett. 2000b. "Does Changing the Rules Change the Players? Vote-by-Mail and the Composition of the Electorate," *Social Science Quarterly*. 81, 4: 837-845; Priscilla Southwell., and Justin I. Burchett. 2000a. "The Effect of All-Mail Elections on Voter Turnout." *American Politics Research*. 28, 1: 72-79.

[5] http://www.sos.state.or.us/elections/Publications/vbm.pdf

Question 6: One concern with special elections is that ballot paper is not readily available and efforts to obtain sufficient paper would delay a special election. Is it possible to store ballot paper in advance to reduce the lead-time for printing ballots?

The federal government stockpiles a variety of items in case of a national emergency. For example, the US Department of Health and Human Services (HHS) has a stockpile of 1.6 million doses of potassium iodide, which helps prevent the development of thyroid cancer after exposure to radiation. There are also stockpiles of smallpox vaccine and the Cipro antibiotic.

Given the capacity of the federal government to maintain stockpiles and to enter into contracts that cover all jurisdictions, there is no reason why the government could not have stockpiles of ballot paper—along with contracts with ballot printers—that can be called upon to ensure that ballots can be produced on short-notice. According to several local election officials I have spoken with, ballot paper, when stored correctly, can easily be kept for two to three years. If the federal government was to stockpile ballot paper, they could replenish this stock on a regular basis, selling ballot paper to local officials and buying new stock from the private sector (which would also have no net effect on ballot paper supplies or sales).

Question 7: What is the shortest period of time in which a special election can be held, if the voting needs of overseas civilian and uniformed military personnel are to be ensured?

Currently, the Federal Voting Assistance Program encourages states and localities to send absentee ballots to the uniformed personnel and overseas civilians covered by the Uniformed and Overseas Civilian Absentee Voting Act (UOCAVA) at least 30 days prior to an election. FVAP has determined that this is the minimum amount of time that is needed to ensure that ballots can be sent to voters and returned to the election official in time for it to be counted in the election.

However, several factors are likely to make serving this population easier in the future. First, Title VII (Voting Rights Of Military Members And Overseas Citizens) of the Help America Vote Act contains a variety of provisions designed to make it easier for local election officials to maintain accurate records of UOCAVA voting, as well as ensuring that individuals who file a Federal Post Card Application remain registered as a UOCAVA voter for two federal election cycles. Second, the technological innovations mentioned in the next section are likely to improve the ability of UOCAVA voters to get their ballots back to election officials in a timely manner. Both of these innovations will likely make it easier to hold special elections in 30 days or less in the future.

Question 8: Are there voting technologies or methods planned for the near future that will reduce the time required to hold a special election?

Over the long-term, technology is likely to change the way voting is conducted, especially as the security of the Internet and wireless technologies are improved in response to pressures from the

government and the business community, which relies on the internet for more and more of its commercial activity.[6]

In the short-term, the effectiveness of Internet voting as a system for making special elections easier will be tested as a part of an Internet voting experiment that will be conducted during the next general election. In 2004, the Federal Voting Assistance Program (FVAP) will be implementing a pilot Internet registration and voting system—the Secure Electronic Registration and Voting Experiment (SERVE)—that will be used in more than 50 counties in approximately 6 states. This system will test to determine how effectively an Internet system can serve the unique needs of the approximately 6 million UOCAVA voters.

According to reports by the General Accounting Office and the Department of Defense Inspector General, there are a variety of factors that hinder effective voting by individuals who are overseas at the time of elections.[7] SERVE is designed to overcome several of these factors, including reducing the transit time for ballots and registration materials between the voter and the local election official. FVAP has also worked with states and localities to determine if it is possible to expedite the election process by having ballot materials sent between voters and local election officials by fax and email. These efforts are also designed to overcome the time constraints inherent in moving voting materials between local election officials and voters.

I appreciated having the opportunity to speak with members of the Committee about this important issue. If I can be of additional assistance to you or the Committee, please do not hesitate to contact me.

Sincerely,

/s/

Thad E. Hall

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[6] These issues are discussed in the book *Point, Click, and Vote: The Future of Internet Elections*, written by R. Michael Alvarez and Thad E. Hall (forthcoming December 2003, Brookings Institution Press).

[7] "Elections: Issues Affecting Military and Overseas Absentee Voters." GAO-01-704T. May 9, 2001. http://www.gao.gov/new.items/d01704t.pdf "Elections: Voting Assistance to Military and Overseas Citizens Should Be Improved." GAO-01-1026. September 28, 2001. http://www.gao.gov/new.items/d011026.pdf. "Overseas Absentee Ballot Handling in DoD. Department of Defense, Office of the Inspector General. June 22, 2001." http://www.dodig.osd.mil/audit/reports/fy01/01-145.pdf

The Election Center an international association of voter registrars and elections administrators
12543 Westella, Suite 100 Houston, TX 77077 Voice: 281-293-0101 Fax: 281-293-0453

Website: www.electioncenter.org Email: electioncent@pdq.net

September 29, 2003

Response to Senator Patrick Leahy's questions on Senate Testimony given 9-9-03

Senator Leahy:
Question

1. In your written statement, you indicate that election administrators could conduct an election in 45 to 60 days. Is this the time frame for precinct-based voting? If so, how would this range change if election administrators conducted the election by U.S. Mail, or if they used mail voting in combination with online voting for overseas voters and early voting for the disabled?

At the time I had prepared my testimony for the Senate, I had not yet heard back from the state election directors of Oregon (100 percent of elections by U.S. Mail) and Washington state, where approximately 54% of their voters vote by mail. Now that I have those responses, I can more fully answer your questions.

My comments on the 45-day to 60-day time period were based on precinct voting. We know we can do this because we are already doing it in several of the states for special elections within this time frame and it allows the normal process to work. This 45-day time frame usually, however, does not include the back-end of the process for vote canvassing (qualifying the official vote totals by including the absentees still arriving after an election and/or provisional ballots and qualifying any questioned/challenged ballots). We feel we can complete most of those within the total of 60 days, but some states clearly need all the additional days possible because they have such a high volume of provisional votes.

According to the directors of elections in Washington and Oregon, it appears that they would need 54 days to do an all mail ballot election. Time is needed to order ballot paper, get it delivered to special ballot printers (these are not just run at the local Quick Copy), printed, prepared for mailing, mail transit time, returning to the elections office via the mail, and then opened and processed. If ballots are to be read by balloting counting equipment, they have to meet exacting standards of opaqueness; sizing; printed with exacting timing marks to assure that they count accurately and read ballot positions in the correct spots; are printed so that candidates and balloting spots are not within the range of a fold on the ballot so that it could be misread, etc. For example, we can't just order the ballot paper ahead of schedule because it has a tendency to degrade over time and to absorb moisture and swell the paper to where it can't be processed accurately. And there are only a small number of qualified ballot printing firms in the U.S. I truly am trying to provide the 'thumbnail' version here to show the complexities of this. And, of course, this depends on the U.S. Postal Service being able to accept and deliver ballots.

What I find with the statements that we could use internet voting for the military and overseas voters is the naive assumption that the Defense Department will be able to use its computers in times of a national disaster. The military and overseas internet voting experiment is not designed to be even of the same caliber of protected software as those of military defense standards and yet there is the mistaken notion that it is likely to be available for use for voting.

If whoever and whatever has the capability to wipe out a significant portion of the U.S. Congress, administration, etc., why is there the belief that internet services will be available? Isn't one of the first rules of engagement to knock out the ability to communicate and thereby disrupt the government and operation of the opponent's ability to have cohesive action? Are we to assume that the terrorists or engaging armies are going to leave us with the capability to use the internet to allow our military to vote? Seems far fetched.

I am all for "early voting" of the disabled in such an instance, as the question implies. But how do we vote early in such an instance? We don't know the election is going to be scheduled until it is scheduled. This is not an anticipated event but rather a reaction to an unanticipated event. And, remember, that for the vast majority of disabled, transportation is the single largest factor in being able to vote in person, and scheduling that well ahead of time is the necessity not the exception. If we set up early voting in a location or handful of locations, can the majority of the disabled get to it quicker and easier than precinct based voting? It is why many of the disabled and elderly choose to become "permanent" absentee voters in states that allow such, so they can vote by mail. Then we are back to transit time and printing issues for absentee ballots.

Senator Leahy, you and your colleagues and staff are just beginning to see the complexities we face all the time in conducting elections and especially quick elections. We don't want to make this difficult and I certainly don't want folks to feel we are establishing barriers in any of this. We are simply pointing out reality and just how long it takes to have an election that would be recognized as a valid election by America's voters.

Some have suggested that we just print Xeroxed ballots, mark them by hand and count them by hand. And we can do that. But consider what that really means. There are currently 150 million registered voters in America and in the 2000 Presidential Election, there were just less than 101 million actual voters...and the news media and others have decried that as only roughly half of the potential voters aged 18 and older in America.

If we have a national disaster that wipes out most of Congress and significant portions of the Federal government, does anyone honestly believe that our numbers of voters will not significantly increase for this special election to reconstitute Congress? The daunting task of counting 100 million votes by hand and having the results known within a short time is almost beyond comprehension. But if we increase it by 25% or 50% or even 75% due to a wave of patriotism as a reaction to the national disaster, we could be counting votes for weeks on end. And we know for a fact, that human counted ballots are far less accurate in such large numbers than ballots counted by voting equipment.

Question

2. In your written statement, you conclude that "Federal law here will definitely have to vacate all of the state laws concerning these practices [process and qualifications] in order to stay on the Federal timetable." Given that the Constitution indicates a clear preference for states' developing and implementing their own elections, shouldn't the States decide what processes and qualifications they believe should be changed in order to meet a deadline set by the Federal Government?

Alas, any discussion here is likely to result in a continuous circle with all due respect to the chicken-and-egg conundrum of the ages.

For instance, a pending Federal bill, calls for Federal elections within 21 days. How do we do that using the states' prescribed methods for selection of candidates through primary elections? How do we reconcile states that indicate a cutoff of voter registration 30 days prior to an election? Are all voters now magically eligible? Or only the ones who were registered prior to the call of this emergency election? What do we do with the military and overseas voters? The only prudent answer is that we must rely on absentee ballots for those voters because we have to assume that an internet capability will simply not be useable for such an election. If there are absentee ballot rules and procedures by the states that require that you have requested an absentee ballot 30 days prior to an election, do we just serendipitously shorten this time frame even though required by state law?

Do we allow states such as California to follow its normal process of qualifying provisional ballots? They now take (and need) 28 days to fully research and resolve provisional ballots. Los Angeles County alone had 101,000 provisional ballots in the 2000 Presidential election and qualified 61,000 of those. If we don't have a Federal law that overtakes these kinds of processes, how do we produce a national result within the time frame allowed?

If the law that allows for *emergency* elections does not overtake the laws of the states for the elections, then there is little ability to wave off normal processes and requirement which can and will delay the ability to conduct the "emergency" election.

Another example: we have state laws requiring poll workers to live within the precincts in which voting is conducted. In an emergency election is this necessary or prudent? We will almost assuredly have some difficulties coming up with enough poll workers for precinct-based voting if this election looms large due to reaction to the national disaster. Can we override state laws concerning poll worker training and the schools required? Can we override state and Federal labor laws that would preclude us from pressing into service city and county employees and the overtime that results from working a polling site 12, 14 or 16 hours? Without those employees, it is less likely that we can conduct such an emergency election.

Without belaboring each and every kind of law that would need to be taken care of in order to make this work, it is unlikely that a 21-day election would be able to be conducted without such efforts. Certainly, if we allow the elections to proceed more on the 45-day to 60-day scenario, we would have to be less reliant on Federal laws overriding state laws. In the shortened time

period we have to completely retrain the poll workers; in the longer period, state laws and training still prevail.

End analysis is that if you allow more time for the "emergency" election and allow it to operate more like the special elections we already conduct, then there is less need for these measures. Then we can allow time for the printing of ballots, mailing of ballots, return of ballots, qualification of ballots on the back end, etc. In a true national emergency, we don't need the 90 to 150 day requirements that many states now have for special elections We know we can conduct reasonable elections within a 45 to 60 day time period, because we have numerous states that already do so for special elections.

But, unless the Congress is prepared to overwrite state laws that govern the voting process for anything less than 45 days, it will require Federal laws superseding state laws for the emergency election. Additionally, all must realize that 45 days is the minimum and does not include all of the back end processes to wrap up the election.

Finally, any substantial shortening of the election processes almost guarantees court challenges. What will be required to get courts to speed up their decision making in a severely short election cycle? And will those legal challenges be allowed under existing state law? Or will it require new legislation that requires courts to use new Federal laws?

Norman Ornstein,
Senior Counselor, Continuity of Government Commission, and Resident Scholar,
American Enterprise Institute

Responses to Questions by Senator Patrick Leahy regarding the September 9, 2003 hearing of the Senate Judiciary Committee on "Ensuring the Continuity of the United States Government: The Congress"

Question 1: "In your submitted testimony, you state that elections are complex because among other things, poll sites have to be secured and poll workers hired. Do you agree that mail voting or online voting would decrease some of this complexity and reduce the time required to hold an election?

Answer: The process of voting is complex whether it is voting by mail or voting in a polling place. In the testimony submitted to this committee by Doug Lewis, he surveyed election administrators from around the country and found that voting by mail would require a longer time frame than voting at a polling place. As a whole, election administrators responded that 45 days was the bare minimum time for holding an election, with 60 days a more reasonable minimum. In addition, 10 additional days would be needed to canvass the vote and certify the results. Election administrators from Oregon, which votes exclusively by mail and Washington, which typically has over 60% of its votes cast by absentee ballot, indicated that it would take a bare minimum of 54 days with additional time to canvass the vote. The California recall election, with up to 2.1 million absentee votes and the potential for delays of four to six weeks after the election itself, underscores the reality that vote by mail is no panacea. Online voting poses such security challenges that it is nowhere close to a viable option, and won't likely be for many years—not to mention the fact that it, like vote-by-mail, loses entirely the privacy of the voting booth.

Finally, even if there were a particular system of elections that would modestly speed up the conduct of elections, there is great diversity in this country as to how elections are conducted, and it may not be wise to impose one system of election on all states. Many states, for example, rely on a system that holds political primaries to choose party candidates rather than letting party bosses select them. A bill that would require a 7, a 21, or a 35 day election would require all states to forego primaries. A bill that would require voting by mail would require radical changes in almost all of the state's electoral processes, and for those changes to work well, they would have to be used and tested in ordinary elections not employed for the first time after a catastrophic attack.

Question 2: "In your submitted testimony, you question whether an expedited special election would allow time for debates, election advertisements and media scrutiny.

a. It has become customary for us to see well-packaged ads and highly publicized debates, as well as receive round-the-clock media scrutiny, but do

you believe that these aspects have become so integral to the election process that a fair, democratic election cannot be conducted without them?

b. Would it also be effective to orchestrate a one-time all-candidate debate that would be publicized through live broadcast and thorough reruns?

c. Given that the Nation would need leaders who had the experience to hit the ground running in such a crisis situation, do you agree that the most viable candidates would already be familiar to the voting public and might not need as much pre-election introduction as an unknown or inexperienced candidate?

Answer: I believe that a real campaign requires time for voters to weigh properly the strengths and weaknesses of the candidates. An overly-short election period would not allow for candidates to the media and voters to scrutinize candidates, for candidate mailings, for grassroots efforts, etc. I favor the idea of broadcast of candidate debates, but I would hesitate to limit it to one debate, where a single mistake could wholly drive the outcome of an election. More would be better. There is no way to get around a reasonable time period for candidates to reach out to voters and for voters to deliberate. If you shorten this period too much, you will have had an election, but it will not have been a democratic election.

I favor the alternative of emergency interim appointments to fill vacancies until elections can go forward. This would allow for vacancies to be filled immediately and for the Congress to continue its operations. It would also allow for special elections to go forward immediately on a timetable that states determine is feasible and allows voters an opportunity to cast an informed vote.

As for the question of experienced leaders, it would be preferable to have experienced leaders in the case of a crisis. The system of temporary appointments would very likely yield experienced leaders, retired members of Congress, for example, to assume office immediately after a catastrophe. Voters, however, would be able to decide whether they wished to continue these experienced leaders in office when special elections were held. A system of expedited elections would not guarantee the election of experienced people any more than other methods of filling vacancies. Parties in many cases would be tempted to choose well-known celebrities over highly experienced political or governmental figures, who might not be as broadly known to the voting public.

Question 3: One of the concerns in your submitted testimony is that unregistered voters could be disenfranchised in an expedited special election. Even assuming that you are correct, do you not agree that the risk of disenfranchising unregistered voters is less anti-democratic than the certainty of disenfranchising *all* voters, registered and unregistered, through the temporary appointment of replacement Members?

Answer: A system of very expedited special elections would risk disenfranchising large numbers of voters. Unregistered voters, absentee voters and overseas military voters would surely be disenfranchised by a seven day special election as is proposed by the

Sensenbrenner bill. Also, even with an expedited election, there would be vacancies that would last for weeks or months where large parts of the country would be effectively disenfranchised because they would have no representation until elections took place. Finally, if there were a sufficient number of vacancies to stop the House from functioning altogether, all voters would be effectively disenfranchised, as no representative could act, and the executive would go completely unchecked.

A system of emergency interim appointments would in no way disenfranchise voters—it would be followed as quickly as possible with elections to fill the seats. The election process would commence immediately after an attack. I must emphasize that we do not propose and would not accept emergency interim appointments without elections that would follow expeditiously; the two are and should be inextricably linked. I also want to reemphasize that no special election process can deal adequately with the problem of incapacitation. If large numbers of lawmakers are incapacitated for weeks or months with, say, inhalation anthrax, the only way to replace them via expedited elections is to oust them from office, an unacceptable outcome when these victims of a terrorist attack would be able to resume their offices sometime later in their terms. For incapacitation, a greater threat to both houses of Congress in the age of terrorism perhaps than widespread deaths, emergency interim appointments would be the only way to ensure a quorum and the ability to function as a legislative body.

National Defense Committee
Rear Admiral (Ret.) James J. Carey--Chairman
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September 29, 2003

Senator Orrin G. Hatch
Chairman, Senate Judiciary Committee
United States Senate
Dirksen 224
Washington, DC 20510

Re: Response to written questions--September 9 hearing on Continuity in Government

Dear Senator Hatch:

Thank you for your letter of September 23, forwarding to me the questions of Senator Leahy, following up on my September 9 testimony. Thank you especially for giving the National Defense Committee (NDC) and me the opportunity to testify. As you will recall, that hearing dealt with competing proposals to address the catastrophic results of a successful terrorist attack on the Capitol. Under the Constitution, Governors can appoint Senators, but not Representatives. Senator Cornyn, who chaired the September 9 hearing, favors a constitutional amendment allowing Governors to make temporary interim appointments to the House, but only in a case of dire national emergency caused by mass deaths of House members.

Representative David Dreier testified, along with Representative Brian Baird, on the first panel on September 9. Representative Dreier opposes the proposed constitutional amendment and has offered legislation providing for "snap elections" in just three weeks to fill catastrophic mass vacancies in the House. I testified on the second panel, to the effect that military personnel and other absentee voters would be inevitably disenfranchised in such a snap election.

Senator Leahy's question refers to the Department of Defense (DOD) pilot projects on electronic voting in 2000 and 2004. I am happy to respond, but let me emphasize that I have no official U.S. Government responsibility for these pilot projects. You may wish to address your inquiry to Ms. Polli Brunelli, the Director of DOD's Federal Voting Assistance Program (FVAP). Her telephone number is 703-588-1584. Her e-mail address is brunellip@fvap.ncr.gov.

In 2000, the DOD electronic voting pilot program was originally advertised as including 500 military personnel in five states. Early in the process, for reasons never

made clear to me, Missouri dropped out. Then, the project was to involve 350 military voters in four states, but in the final analysis only 84 voters participated in this pilot project. As you can imagine, the cost-per-voter was enormous due to the up-front computer and software programming costs, but the pilot at least served to validate the concept. I believe that all 84 votes were in fact counted. I am not aware of any particular problems encountered.

DOD did not conduct an electronic voting pilot program in the 2002 congressional elections, but it is planning to conduct a much larger project called SERVE for 2004. The SERVE project is to involve 100,000 voters in ten states in the 2004 presidential election. I invite your attention to www.serveusa.com.

We (the NDC) are impressed with the scope of the arrangements that are under way, but we are concerned about a possible recurrence of the 2000 experience, when the number of personnel actually participating ended up being much fewer than originally advertised. For example, the SERVE web site lists Minnesota as one of the states participating in the 2004 project. Rear Admiral (Ret.) James J. Carey, Chairman of the NDC, contacted Minnesota Secretary of State Mary Kiffmeyer by e-mail. Secretary Kiffmeyer's Elections Division responded, stating that the SERVE web site is in error and that Minnesota will not in fact be participating.

Even if 100,000 service members participate in 2004, that still leaves more than 1.3 million personnel who will need to vote the old-fashioned way, by "snail mail." As a nation, we still conduct military absentee voting in much the same way that we did in World War II and the Korean War, by shipping pieces of paper around the world. As you can imagine, there are three time-consuming steps in the absentee voting process. First, the absentee ballot request must travel from the voter to the election official by mail. Second, the unmarked ballot must travel by mail from the election official to the voter. Finally, the marked ballot must travel from the voter back to the election official by mail. Each of these steps can take weeks if the postal service must be used, but only seconds if secure electronic means are authorized. If the service member is on a ship or submarine at sea or has been deployed from his or her regular duty station to a combat zone, mail transmission can take months.

We (the NDC) are firmly convinced that electronic voting, with appropriate safeguards, is the only way to enable overseas military personnel to vote with some reasonable assurance (i.e., greater than 90%) that their ballots will be counted. The success rate in traditional military absentee voting, by mail, is less than 60%. Only slightly more than half of the military personnel who try to vote (i.e., complete and submit Federal Post Card Applications) are in fact able to cast ballots that really are counted.

We (the NDC) are optimistic that the majority of military personnel will have the opportunity to vote by secure electronic means by the presidential election of 2008, or perhaps 2012. But electronic voting for unanticipated, and unanticipatable, special congressional elections is still many decades away, in our view. The September 9

personalized letters to each of the 51 Chief State Election Officials (CSEOs). We have asked the CSEOs to pass along copies of our letters to local election officials in their respective states. However, we do not depend entirely upon the CSEOs. We are also communicating with local election officials directly. We have already obtained and tested fax numbers and/or e-mail addresses for most of the 5,000 local election officials who administer absentee voting for Federal elections.

Thank you again for giving the NDC and me the opportunity to testify and to respond to these follow-up questions. I hope that this letter is helpful to the committee in its deliberations. Please let me know if you need further information from me.

Very respectfully,

Samuel F. Wright

Enclosures

Copy to: RADM James J. Carey, USNR (Ret.)
Ms. Polli Brunelli

NATIONAL DEFENSE COMMITTEE

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COMMUNICATE WITH YOUR MILITARY CONSTITUENTS-- FREE

The Department of Defense (DoD) operates the **Voting Information Center (VIC)** to help military personnel and others inform themselves about elections and public affairs in their home States and congressional districts, so that they can cast informed absentee ballots. Military personnel and others call the VIC toll-free from all over the world on DoD's telephone system or at 1-800-438-VOTE to listen to messages recorded by Governors, Senators, and Representatives.

Military personnel do vote. According to a DoD survey, 64% of active duty service members voted or attempted to vote in the 2000 Presidential election, 13% above the overall national voting rate. **Military ballots have determined the outcome of many important elections in recent years.**

Of those military personnel who voted in the last Presidential election, almost 90% did so by absentee ballot. Service members normally vote at home, by mail, not in person where they are currently stationed, even when they are stationed within the United States. In other words, most of the military personnel who vote in your State or district are not physically present there on election day or in the months leading up to the election. As a result, they do not have the opportunity to watch local television, listen to local radio, or read local newspapers in your State or district. During the campaign, they do not receive visits from "precinct captains" or calls from "phone banks." They receive little if any political direct mail.

The VIC was established to give military personnel a way to find out about elections and public affairs in their home States and congressional districts, but the system currently is of little use **because so few officials have recorded messages.** As of August 22, 2003, only one Governor, 21 Senators, and 145 Representatives had recorded messages. For all other officials, callers hear a "default message" saying "No message has been recorded."

Please record a VIC message as soon as possible. Contact Mr. John Godley of DoD's Federal Voting Assistance Program at (703) 588-1584. He will give you a telephone number and personal identification number that you will need to record your message by telephone. To listen to existing messages, call **1-800-438-VOTE.**

VOTING INFORMATION CENTER

DRAFT MESSAGE

Thank you for calling the Voting Information Center, and thank you for your service to our country. I am **********, the United States Senator (Representative) from **********.

First, let me say that I really appreciate the service that you and your colleagues in the Armed Forces provide to our country. Were it not for your service, and the service of your counterparts throughout our history, we would not enjoy the precious values of liberty, freedom, and democracy. Along with my colleagues in Congress, I am very much aware that **freedom isn't free**, and that the highest price is paid by those who serve in our Armed Forces. The September 11 atrocities and our success in OPERATION IRAQI FREEDOM have reminded us anew of this essential truth.

Ensuring our national defense must always be the first priority of our Federal Government. That means ensuring that you are adequately paid and that our nation keeps its promises to you. It also means giving you the tools you need to do your job with maximum confidence and minimum casualties. Unfortunately, during the Clinton Administration our nation took an eight-year military procurement "holiday." As a result, many of you now operate and maintain ships, aircraft, tanks, and other pieces of equipment that are substantially older than you are. Redressing this sad state of affairs is my top priority in Congress.

Whether you serve within the United States or abroad, or even on a ship at sea, you can remain informed about what I am doing on your behalf here in Washington. Please see my web site at www.**********. My staff and I keep the site updated on a regular basis. You can also communicate with me via the web site or by e-mail at **********.

I want to hear from you. After listening to this message, press **ONE** on your touch-tone telephone, to be connected to my office here in Washington. If you are calling outside regular business hours, please speak distinctly so that we can understand your message. Please include your complete name and mailing address (as well as e-mail address) and your permanent home address in our state, so that I can respond to you.

If there is ever anything that I can do for you or your family, please do not hesitate to get in touch with me. You can write to me at **********.

Please realize that the prayers of a greatful nation go out to you and wish you a safe and successful return to our state. God bless you, and God bless America.

CARD DIVISION

VOTING IN ARMED FORCES

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HEARINGS

U.S. Congress. House.

BEFORE THE

SUBCOMMITTEE ON ELECTIONS OF THE COMMITTEE ON HOUSE ADMINISTRATION, HOUSE OF REPRESENTATIVES

EIGHTY-SECOND CONGRESS

SECOND SESSION

ON

H. R. 7571 and S. 3061

BILLS TO PERMIT AND ASSIST FEDERAL PERSONNEL, INCLUDING MEMBERS OF THE ARMED FORCES, AND THEIR FAMILIES, TO EXERCISE THEIR VOTING FRANCHISE

JUNE 26 AND JULY 1, 1952

Printed for the use of the Committee on House Administration

52 · 61555

UNITED STATES
GOVERNMENT PRINTING OFFICE
21777 WASHINGTON : 1952

I can give you a list of the States, when the ticket closes in the various States, which I will be glad to submit to the committee if they desire that information.

Mr. HALLECK. I would like to have that in the record if we could

Mr. BURLESON. Without objection, it is so ordered.

Mr. HALL. I will read it off. Some we do not have information.

Alabama, 21 days.

Mr. HALLECK. What do you mean by 21 days?

Mr. HALL. It is the closing of the ticket, as I understand it.

Mr. CARRIGG. Is that the last day they shall file?

Mr. HALL. That is right.

In Arizona, 30 days. In Arkansas, as I mentioned, it is 20 days. California, I think, is 37 days. Am I right, Colonel Blocker?

Colonel BLOCKER. Yes.

Mr. HALL. Colorado, 30 days. On Connecticut we have no information here.

Colonel BLOCKER. On this list, I might say, where there are no figures it means they are 45 days or more. Some of them are 60 and some of them are 90. I just did not report those.

Mr. HALL. Delaware is 45 days or more.

On Florida I have no information. Have you anything on that?

Colonel BLOCKER. That is one of those questionable States. Where there is a question mark on the list it means the ballot will be sent out when available or as soon as possible, something like that. No date is given.

Mr. HALL. Georgia has a new law. They have 70 days now.

Idaho is 30 days.

Illinois is 30 days. Is that right?

Colonel BLOCKER. No; it is not. Illinois is one of the complying States.

Mr. HALL. I am sorry.

Mr. VURSELL. The primary is April 7.

Mr. HALLECK. What is Indiana?

Mr. HALL. Indiana is 30 days.

Iowa is 45 days or more. Kansas is 26 days.

Kentucky. Do you have any information on it?

Colonel BLOCKER. A question mark.

Mr. HALL. Kentucky is when the ballots are available.

Louisiana is 30 days, and Maine is 37 to 40 days.

Maryland is a question mark here.

Colonel BLOCKER. Maryland is 55 days.

Mr. HALL. Fifty-five days in Maryland.

Massachusetts——

Colonel BLOCKER. When available.

Mr. HALL. No further information on that?

Colonel BLOCKER. No. It is when available.

Inasmuch as I prepared this, suppose I read these down for you.

Mr. HALL. Fine.

Colonel BLOCKER. Michigan is 25 days. A question mark on that. They have a new law recently, and I think that will be changed to 45 days. We have not got any information yet.

Minnesota is 12 days. Mississippi is 15. Missouri is when available. Montana is 30 days, Nebraska is 25 days, Nevada is 45 or over.

The critical situation is, of course, for those who are stationed overseas, and for those who are overseas it is very difficult for the ballot to get over to them, be completed, and sent back within the 30-day period.

Mr. HALLECK. I wonder about that. The law imposes the responsibility on the services to expedite this matter of voting and to provide air transport and other things. Do you mean to say that you could not send a ballot air mail to Korea and get it to a soldier over there and back by air mail in time?

Colonel BLOCKER. It seems unreasonable, I admit, Mr. Halleck, but here are the figures: From San Francisco to Seoul, Korea, is 9 days by air transport, and 6 days to come back. Now, that does not take into account that MATS does not run a plane every day. It does not take into account it will take probably 2 days on an average from the capital of the State to get it into the mail and get it up there on board the plane, and then to start looking for this man. He may be in Pusan or may be up on the line. Then they find him, and by the time you make allowances there, and he takes it and acts on it, and it maybe takes him 2 or 3 days before he has a chance to sit down, take a pencil and act on it, and then it starts back, adding days on days there, I would say a 30-day turn-around from Seoul would be fast.

Mr. MORANO. Is it possible for you to come back Tuesday with a figure that would break down the number of voters that could vote that met this criteria, and then the number of States that permit 30 days, and then the number of States that require 25 days and so on—break it right down to the final figure?

Colonel BLOCKER. Yes.

Mr. MORANO. So we know exactly what it is.

Colonel BLOCKER. We shall compile those, give them to the committee at that session.

Mr. BURLESON. Would you gentlemen submit them to the committee if you cannot be here personally? Is that all right?

Mr. MORANO. Yes.

Colonel BLOCKER. Yes, sir.

Mr. BURLESON. Mr. McCormack, I know the time is short——

Mr. MCCORMACK. I would like to hear Dr. David.

Mr. BURLESON. Can you not be with us Tuesday?

Mr. DAVID. I have urgent business in Chicago. I planned to go out tomorrow, but I could be here tomorrow morning if that opportunity were available. I could stay over.

Mr. MCCORMACK. I am afraid tomorrow morning we will have to meet at 10 o'clock.

Mr. BURLESON. Mr. McCormack, if you would—I am simply advising with you now—like to hear Dr. David?

Mr. MCCORMACK. It would be awfully nice if we could.

Mr. BURLESON. After all, you are the author of this legislation.

Mr. MCCORMACK. Thank you.

Mr. BURLESON. All right, Dr. David. And if any members want to direct questions to these gentlemen who have already made statements, we will do so before we leave.

We will hear you now, Doctor.

In this report, the special committee of the American Political Science Association, has set forth a servicemen's bill of voting rights, which I believe is so sound and right that it deserves the support of the Congress and the country:

"We believe that all servicement of voting age, whether in the United States or overseas, should have the right—

"1. To vote without registering in person.

"2. To vote without paying a poll tax.

"3. To vote without meeting unreasonable residence requirements.

"4. To vote without meeting unreasonable literacy and educational requirements.

"5. To use the Federal postcard application for a ballot.

"6. To receive ballots for primary and general elections in time to vote.

"7. To be protected in the free exercise of their voting rights.

"8. To receive essential information concerning candidates and issues.

"9. To receive essential information concerning the methods by which the right to vote may be exercised.

"10. To receive essential information on the duty of 'citizens in uniform' to defend our democratic institutions by using, rather than ignoring, their voting rights."

In contrast to these standards, there are 24 of our States—exactly half—in which many of our soldiers, sailors, and airmen will be unable to vote effectively and easily in 1952. Seven of these States appear to have laws that are in conflict with the provisions of the Servicemen's Voting Act of 1946. These States either make no provision at all for absentee voting, or require registration by servicemen in person. In addition, there are 17 States in which the statutory interval permitted between the sending out of the absentee ballots and the time when the ballots must be returned is so short that it will deprive service people overseas of a decent chance to get their ballots back on time.

The report I am transmitting to the Congress recommends ways of overcoming these defects, either through special action by State legislatures or through more efficient and flexible administration of State laws, or through court action. It also recommends that the States take action to permit voting by spouses and dependents of persons serving in the Armed Forces, and by other civilians serving overseas. I hope all State officials concerned will take these recommendations to heart, and do all they can to improve the situation in their respective States. The best and most effective way to assure our service people of their right to vote is through State action.

Some of the recommendations of the report are directed at the executive branch of the Federal Government, and are designed particularly to strengthen the administration of soldier voting in the Department of Defense. I am sending the report to the Secretary of Defense, requesting him to consider these recommendations, to act on them where possible, and to report progress to me. The Department of Defense has the important duty, not only to facilitate voting, but also to see to it that the information that service voters receive is presented in a completely fair and nonpartisan manner.

The Members of the Congress will be particularly interested in the recommendations made for Federal legislation. The committee recommends a long-range program which will encourage service voting, provide adequate voting information to service people, and require regular reports to the Congress on the manner and extent of soldier voting.

As a first step, the committee recommends that the Congress continue in effect existing statutory provisions affirming the right of service people to vote. These provisions, which are contained in the first two sections of the Servicemen's Voting Act of 1946, are, by their terms, effective only "in time of war," and will therefore lapse when the peace treaty with Japan comes into effect. I have already called this problem to the attention of the Congress in my communication to the Vice President and the Speaker of the House concerning the proposed Emergency Powers Extension Act.

In addition, the committee recommends that the Secretary of Defense report biennially to the Congress, commencing in January 1953, on action taken by the respective States in carrying out the Servicemen's Voting Act. The committee further recommends that the Secretary of Defense, in cooperation with the Bureau of the Census and the several States, be required to compile and publish statistical reports on the number of applications and executed ballots received from servicemen in each State, as well as the number of servicemen of voting age in each State. Such information will serve as a basis for improving existing laws and procedures in the light of experience. In order to acquaint servicemen

SUBMISSIONS FOR THE RECORD

Senate Committee on the Judiciary
Testimony of
The Honorable Brian Baird (D-WA)
10:00 a.m., Tuesday, September 9, 2003
Room 226 Senate Dirksen Office Building

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Briefly, the proposed amendment addresses the following problems:

1. Provides a mechanism for very rapid reconstitution of the Congress as a functioning legislative body in the event of large losses.
2. Addresses concerns about appointments influencing the partisan makeup of the house without inserting partisan language or requirements into the Constitution.
3. Provides for prompt restoration of representation in the event of extensive losses to a state delegation or political party, but obviates determination of a triggering threshold of losses to become effective.
4. Places responsibility for identifying potential temporary "Designees" with the person elected by voters of a district to make decisions as their direct representative to Congress.
5. By referring to "Designees" rather than Representatives, does not violate the principle of direct election to full membership in the House of Representatives.
6. Leaves to the States decisions about the time and place of special elections.
7. Does not set a fixed time for special elections to allow for extenuating circumstances that might accompany a devastating attack.
8. Authorizes Congress to address incapacity statutorily.

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

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

JOHN CORNYN

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FOR IMMEDIATE RELEASE
September 9, 2003

STATEMENT OF U.S. SEN. JOHN CORNYN

United States Senate
Committee on the Judiciary

Senator John Cornyn (R-TX), Chairman
Senate Subcommittee on the Constitution, Civil Rights and Property Rights

Ensuring the Continuity of the United States Government: The Congress

Tuesday, September 9, 2003, 10 a.m., Dirksen Senate Office Building Room 226

Two years ago, America suffered the most destructive act of terror in our history. Congress responded to that attack swiftly. The very next week, Congress appropriated funds to bolster national security, stabilize our economy, and provide for the families of the victims, and enacted legislation to secure our airports and authorize the use of military force. To date, however, Congress has failed to ensure that the vital institutions of our government will continue to operate on behalf of the American people should another attack occur.

Two years is too long. So this morning, we will consider what measures are necessary to guarantee continuity of Congress. Next Tuesday morning, I will co-chair a joint hearing with the chairman of the Rules Committee, Senator Lott, on long-needed reforms to the presidential succession statute. Future hearings on the continuity of government are also planned.

Congress cannot constitutionally act without a majority of its members. Article I, section 5 of the Constitution expressly provides that "a Majority of each [House] shall constitute a Quorum to do Business." Our Constitution is explicit on this point, because our Founders believed it fundamental to our representative form of government.

As Alexander Hamilton explained in *Federalist 59*, the Constitution empowers states to shut down Congress by refusing to send representatives. In fact, during the first Congress, neither the House nor the Senate were able to operate for an entire month, because a majority of Representatives and Senators failed to appear for duty. Both chambers waited until "a quorum, consisting of a majority of the whole number, [was] present."

This vulnerability was deliberate. As one delegate to the 1787 Constitutional Convention in Philadelphia urged his colleagues, "[i]n this extended Country, embracing so great a diversity of interests, it would be dangerous to the distant parts to allow a small number of members of the two Houses to make laws."

Congressional power exercised by just a handful of members is thus not only constitutionally dubious. It raises serious questions of democratic legitimacy as well. The Founders properly rejected the notion that a small body of members from one region of the nation might enact national legislation or confirm federal officials to govern the entire country.

This commitment to federalism and national representation has a cost, however. Under the Constitution's requirement of a majority for quorum, terrorists could shut Congress down, by killing or incapacitating a sufficient number of Representatives or Senators.

Our ability to ensure continuity of Congress under the current Constitution is woefully limited. States have power to allow their governors to appoint Senators in cases of vacancies, and 48 states have elected to do so. But the Constitution provides no immediate mechanism for filling vacancies in the House, nor for redressing incapacities in either chamber.

Vacancies in the House can be filled only by special election. That takes months to conduct, for reasons of mechanical feasibility, democratic integrity, and the rights of military and other absentee voters. What's more, incapacities cannot be addressed at all – and, although people often forget, this problem affects the Senate no less than the House. If 50 Senators were in the hospital and unable either to perform their duties or resign, they could not be replaced. The Senate could be unable to operate for up to two full election cycles – a four-year period.

Accordingly, the Continuity of Government Commission – a bipartisan panel of former Congressional leaders and government officials from across the political spectrum – unanimously endorsed a constitutional amendment to ensure continuity of Congress in cases of catastrophic attack. Just as the Twenty-Fifth Amendment ensures continuity of the Presidency, the proposed amendment would ensure continued Congressional operations following a terrorist attack.

The commission deserves respect and attention. Our hearing today will explore their recommendations and other proposals.

As we mourn the tragedy of September 11, we should also take some comfort in the fact that further attacks within our borders have been avoided thus far, in part because Congress has upgraded our ability to prosecute the war on terrorism and reorganized our federal government to bolster homeland security.

Had the events of September 11 unfolded differently, however, none of this legislation might have been enacted in timely fashion. United Airlines Flight 93 was likely headed for the Capitol. But for a late departure and the ensuing heroism of the passengers onboard, Congress might have been destroyed.

In an age of terrorism and a time of war, few things could be more important than ensuring that the United States government – the nation's most vital instrument of national security – is failsafe and foolproof, against even the most devious and destructive of terrorist plots. Nobody likes to plan for their demise, but failure to do so is foolish and dangerous. We must begin the process of sending the message to terrorists that there is nothing they can do to stop the American government from securing freedom here and around the globe. Two years is too long, and the time to plan for the unthinkable is now.

And with that, I would turn the floor over to Senator Leahy, and then to Senator Hatch.

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from THE WALL STREET JOURNAL Editorial Page

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ON THE HILL

A Republic, if We Can Keep It

Amend the Constitution so a terrorist attack can't cripple Congress.

BY JOHN CORNYN
Tuesday, September 9, 2003 12:01 a.m.

After the Sept. 11 attacks, Congress responded swiftly in appropriating funds to bolster national security, stabilize our economy and provide for victims' families. But while legislation was enacted to secure our airports and borders as well as authorize the use of military force, Congress has yet to act on one critical protection: Keeping the legislature functioning in the wake of a future terrorist attack.

Two years is too long. So today I will chair the first in a series of hearings to examine weaknesses in our government--and do something about it. We will consider what measures are necessary to guarantee continuity of Congress.

Congress cannot constitutionally act without a majority. Our Constitution is explicit on this point, because our Founders believed it fundamental to our representative form of government. As Alexander Hamilton noted in Federalist 59, the Constitution empowers states to shut down Congress by refusing to send representatives. In fact, during the first Congress, neither the House nor the Senate was able to operate for an entire month, because a majority of representatives and senators failed to appear for duty. Both chambers waited for "a quorum, consisting of a majority of the whole number."

This vulnerability was deliberate. As one Constitutional Convention delegate urged, "in this extended Country, embracing so great a diversity of interests, it would be dangerous to the distant parts to allow a small number of members of the two Houses to make laws."

Congressional power exercised by just a handful of members thus not only is constitutionally dubious; it raises serious questions of democratic legitimacy as well. The Founders properly rejected the notion that a small body of members from one region might enact national legislation or confirm federal officials to govern the entire country.

This commitment to federalism and national representation has a cost, however: Under the majority quorum requirement, terrorists could shut Congress down by killing or incapacitating a sufficient number of representatives or senators.

Our ability to ensure Congress would be able to continue to function under the current constitutional restrictions is woefully limited. States have power to allow their governors to appoint senators in cases of vacancies, and 48 states have elected to do so. But the Constitution provides no immediate mechanism for filling vacancies in the House, nor for redressing the problem of large

numbers of members in either chamber being incapacitated.

Vacancies in the House can be filled only by special election. That takes months to conduct, for reasons of mechanical feasibility, democratic integrity, and the rights of military and other absentee voters.

What's more, it is impossible to address the problem of incapacitated members. If 50 senators were in the hospital and unable either to perform their duties or resign, they could not be replaced. The Senate could be unable to operate for up to four years.

Accordingly, the Continuity of Government Commission, a bipartisan panel of former congressional leaders and government officials from across the political spectrum, unanimously endorsed a constitutional amendment to fix this problem in cases of catastrophic attack. Just as the 25th Amendment ensures continuity of the presidency, the proposed amendment would ensure continued congressional operations.

As we mourn the tragedy of Sept. 11, we should also take some comfort in the fact that further attacks within our borders have been avoided thus far, in part because Congress has upgraded our ability to prosecute the war on terrorism and reorganized our federal government to bolster homeland security.

Had the events of Sept. 11 unfolded differently, however, none of this legislation could have been enacted in timely fashion. United Airlines Flight 93, which crashed in Pennsylvania, was likely headed for the Capitol. But for a late departure and the ensuing heroism of the passengers, Congress might have been destroyed, leaving the nation with no constitutional means of legislative response.

In an age of terrorism and a time of war, few things could be more important than ensuring that the U.S. government--the nation's most vital instrument of national security--is failsafe and foolproof, capable of surviving even the most devious and destructive of terrorist plots. Nobody likes to plan for his own demise, but failure to do so is foolish and dangerous. We must begin the process of sending the message to terrorists that there is nothing they can do to stop the American government from securing freedom here and around the globe. Two years is too long, and the time to plan for the unthinkable is now.

Mr. Cornyn, a Texas Republican, is chairman of the Senate Subcommittee on the Constitution, Civil Rights and Property Rights.

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Statement of Hon. David Dreier

Chairman

Committee on Rules

United States House of Representatives

Before the Judiciary Committee

Of the United States Senate

On

September 9, 2003
At 10:00 a.m.

226 Dirksen Senate Office Building

Hon David Dreier:

Mr. Chairman and Senators: Thank you for the opportunity to appear here today as I view the question of dealing with mass vacancies in the House and the Senate as two different questions. I commend you for your interest in how the House should reconstitute itself following an attack that leaves a great number of Representatives dead. Our potential demise is not a subject that any of us relish considering. However, as we sit here on the eve of this anniversary of 9/11, this inquiry is certainly timely.

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

I would like to first quote a former colleague of yours from Mississippi, Senator Stennis, who said:

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

As you know, the idea of a constitutional amendment to allow appointment of Representatives following a national crisis is not new. During the Cold War a great number of constitutional amendments were proposed and at least three passed the Senate. However, even facing the prospect of mass attacks from numerous Soviet nuclear warheads and chemical and biological weapons resulting in the decapitation of not only the Capitol but most of our major cities, the House chose to not to amend the Constitution to allow for appointments of its Members.

The House has always been known as the "peoples' House" as the Constitution requires under Article I, section 2, that the House of Representatives "be composed of Members CHOSEN every second year BY THE PEOPLE of the several states." (Emphasis added.) Many in the House revel in the fact that every Member of the body has always been elected. There have been no exceptions, as that is what the Constitution has dictated.

The Senate has always been filled differently from the House. Originally constituted by appointment by the State legislatures, it was not until the Twentieth Century that the Senate became directly elected through the XVII Amendment to the Constitution that provides that "the Senate of the United States shall be composed of two senators from each state ELECTED BY THE PEOPLE THEREOF, ..." (Emphasis added.)

The XVII Amendment further outlines how the executive authority shall issue writs of election to fill vacancies, but the legislature from any State "may empower the executive thereof too make temporary appointments until the people full the vacancies by election as the legislature may direct." Thus the Amendment calls for allows for temporary appointment and election under control of the State Legislature.

So as the "Peoples' House," we have never contemplated appointment and as such we want to preserve our distinct quality of being sent as elected representatives of the

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

We hope, Mr. Chairman, that Senators will be able to understand why I, and many of my colleagues, are pursuing a statutory approach pursuant to another Constitutional provision, Article I, section 4. We contend that this provision is part of the Constitution to allow the institutions to preserve themselves through elections, which Congress can regulate. The provision states:

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

We believe that a Federal law should be passed requiring the States to have a "mass vacancies special election" within a very limited time period. I will talk about our proposal later, but the real point is for you to understand that any Constitutional Amendment calling for appointment of House Members will meet considerable opposition by the House Membership complicating passage. I would urge you to examine our approach as the best method of preserving our institutions in times of crisis.

Mr. Chairman, let me now turn to a discussion of the historical underpinnings of the differences in the House and Senate on matters of election of their members.

Constitutional Background

Mr. Chairman, the Founding Fathers created a republic which has become the longest continuous constitutional democracy in the world, and they did so with unparalleled genius.

Beyond creating a masterful framework for our entire government, they balanced the interests of small states and large, the citizens, and the needs of a fledgling democracy to create a lasting democratic civilization. At the time the labored for a constitution in 1787, the future of our nation was by no means secure. Their sense of "homeland security" when they met in Philadelphia must have been very limited in those days as they faced the threat of intrigues with Europe and the prospect of open war again, battles with indigenous peoples, limited trade routes, uncertain crops, the ravages of disease, and more.

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

Nor did they casually adopt the direct election of Representatives by the people while granting states the power of selection of Senators.

However, many came to believe as Delegate James Wilson when he stated his desire

for a vigorous government whose power "flow[s] immediately from the legitimate source of all authority – the people . . . . The government ought to possess not only . . . the force but [also] . . . the mind or sense of the people at large." Delegate George Mason concurred: "The people will be represented [in the House]; they ought therefore to choose the representatives."

Delegate John Dickerson considered it "essential that one branch of the legislature should be drawn immediately from the people; and as expedient that the other should be chosen by the Legislatures of the States. This combination of the State Governments with the National Government was as politic as it was unavoidable." Delegate James Madison held that it was "a clear principle of free government" that the people must always elect at least one branch of the legislature.

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

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

The Continuity in Representation Act of 2003 (H.R. 2844)

The Framers of the Constitution did their job well. The Congress and the Nation have amended the Constitution but 27 times (including the Bill of Rights' 10 amendments) in 216 years.

Today you will consider the need for a constitutional amendment to change for the first time in those 216 years the manner by which Members of the House are empowered by the public to serve as their representatives to the Congress.

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

The Constitution itself contemplates this process in Article I, Section 4, where it gives to the Congress the power over the times, places, and manner of elections. As interpreted by the Supreme Court, the "times, places, and manner" clause is no less than the:

"Authority to provide a complete code for congressional elections, not as only to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes . . . [and] making and publication of election returns."
Smiley v. Holm, 285 U.S. 355 (1932).

Accordingly, I have joined with several of my distinguished colleagues in support of

legislation providing for expedited special elections to fill mass vacancies in the House of Representatives,

The list of cosponsors includes several Members knowledgeable on the subject of the Constitution and elections by the states. They are:
The Chairman of the Judiciary Committee, Mr. Sensenbrenner of Menomonee Falls, Wisconsin; the Chairman of the Constitution Subcommittee of the Judiciary Committee, Mr. Chabot of Cincinnati, Ohio;
the former Secretary of State, Ms. Miller of Harrison Township, Michigan;
the former Secretary of State, Mr. Cole of Moore, Oklahoma; and the ardent Constitutionalist, Dr. Paul of Surfside, Texas.

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

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

This bill, the Continuity in Representation Act of 2003, H.R. 2844, protects the "People's House." It requires expedited special elections for the House in the case of a catastrophe that results in more than 100 vacancies—such as would be the case if, for example, a well-planned terrorist strike were to be tragically successful. If such "exceptional circumstances" exist as having more than 100 House Members killed, this legislation allows the Speaker of the House to call for rapid special elections in order to re-constitute the House.

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

This approach has the support of House Speaker Dennis Hastert who said it would allow Americans to "retain their local voice in Washington . . . without changing the Constitution."

The report of the Commission begins by stating: "On average, states take four months to hold special elections, and in the aftermath of a catastrophic attack, elections would likely take much longer."

This four-month figure is based on an average reached by looking at the special elections since the Ninety-Ninth Congress. This average is a small sample by which to judge a situation with mass vacancies. Looking more broadly, the report contains data, showing that more that one third of the states have laws limiting the time on special elections from 28 to 127 days, averaging 84 days. This shows that the relatively small number of special elections that the commission based their four months on could turn out to be considerably less.

Some editorial prejudice against expediting special elections is shown on page 19 where it is stated: "A severely shortened election is likely to provide little choice for the voters. Only the most well-known and well funded candidates would be able to gain name recognition in an abbreviated campaign."

The Commission states that it "prefers that mass vacancies be filled quickly by temporary appointments and that special elections take place within 120 days."

Moreover, \the Commission's report states that they believe that the appointment should last until the special election is held to fill the seat, but that the special election shall be held after 120 days of vacancy. This would potentially leave too many seats unfilled for too long.

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

The report by the Commission postulates later that:

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

The data provided by the report of the Commission shows that currently laws are in effect to start the filling of vacancies earlier. Eight states currently have special elections limited to less than ninety days with the average being 55 days. There are also 6 states averaging 90-day limits. This means that after vacancies are declared then 14 states under their current laws would begin filling their vacancies. These include New York, California, and Texas with substantial populations. Judging the impact of mass vacancies on special elections solely on the relatively few special elections sampled shouldn't carry that much weight.

Of course, this wouldn't happen if the implementing law requires elections to last the full 120 days as the Commission proposed.

In addition, if you look at the facts of the elections following Senator Wellstone's death and Senator Torricelli's resignation, the two states, Minnesota and New Jersey, were able to dispense with some election niceties and complete them closer to 30 days. These were previously scheduled elections not conducted in a time of crisis. Nevertheless, the courts sustained the last minute change of ballots, some limiting of absentee voting, and other measures to accomplish these elections.

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

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

A survey of all 50 states shows many of the larger states have requirements for special elections to be completed within 60-90 days, perhaps a majority of the populace. (See the chart attached in Appendix A.)

Any criticism that 21 days is too short a time neglects the facts precipitating our legislation: a national emergency where nearly one-quarter of the House of Representatives--or more--is killed. Under such dire circumstances, we believe that all the resources of our nation will be devoted to conducting these elections.

It is not unreasonable to think that the American people in individual districts across the nation can choose a representative in 21 days. If 9/11 showed us anything, it's that Americans pull together in times of disaster and accomplish amazing things.

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

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

Moreover, even assuming there is rapid selection of stand-in Members by governors or from a list of designees in the wills of each sitting Member, how quickly will they really be sworn in?

Questions of qualifications and the resolution of the likely lawsuit(s) over the constitutionality this new scheme would potentially need to be resolved—it could be months or more before the Supreme Court is able (even assuming it is in place after such a catastrophic attack) to render judgment.

In contrast, our legislation works within the existing constitutional framework and is unlikely to have protracted litigation.

The "Stand-In Amendment"

Mr. Chairman, your distinguished committee is not here today to consider only how I would attempt to solve the problem of mass vacancies. Instead you have before you the report of the Continuity of Government Commission, which is recommending what I call the "Stand-In Amendment," as it would allow for the Congress to pass a law for the appointment of temporary replacements to fill vacant seats in the House after a catastrophic attack.

Mr. Chairman, the Senate does not need a Constitutional amendment to deal with vacancies, you have one already--the 17th Amendment. One must ask, is there some desire on the part of some senators to nationalize senate appointments by requiring

governors to choose only from a pre-selected list of candidates?

The Commission's work has helped to shine a light on an important area for the Congress to address—will we be able to fulfill our Constitutional duties, even in a time of crisis? The members all worked hard and we again thank them and applaud their patriotism and their support for our institutions.

The Commission, in their Appendix III, entitled "Relevant Constitutional Provisions" chose not to include several provisions including the provision upon which our statutory approach is based--Article I, section 4, the "times, places and manner" clause of the Constitution. They have selected only a few of what I personally view as relevant constitutional provisions. Many of these provisions, which are not highlighted in the report, will be affected by the implementing legislation that must accompany the constitutional amendment. Because of the potential impact on the Constitution I must raise a number of concerns about the Commission's constitutional recommendation.

For example, the Commission did not mention what would be the impact of Article I, Section 5: "Each House shall be the judge of the elections, returns and qualifications of its Members." Does this mean that the stand-ins can judge the elections, returns and qualifications of members, but the elected members can't judge the appointments--only their qualifications?

Yet the Commission did include the remainder of the sentence for that part which deals with the constitutional quorum—"And a Majority of each shall constitute a quorum to do business . . . ." The House has always preserved by its rules the right to determine whether vacancies exist.

Another relevant provision, the next sentence in Article I, Section 5, after quorums: "Each House may determine the rules of its proceedings..." Will the implementing legislation attempt to change quorum requirements and how the House rules currently operate?

Is the Fourteenth Amendment relevant to any stand-in appointment?
"No person shall be a Senator or representative in Congress . . . or hold any office, civil or military, under the United States, or under any state . . ."
Does this mean that stand-ins will be able to serve their state legislatures as well?

Suffice it is to say that many questions for appointment remain unanswered. The Commission's recommendations also do not adequately address a number of very important questions that will have to be answered in the implementing legislation that will accompany any amendment. These include, naming a few:

Who determines, and on what criteria, when a vacancy or incapacitation exists?

What are the time requirements and who controls the appointments of stand-ins?

Who is eligible and what qualifications are necessary to be on a list candidates for appointment?

Will appointed stand-ins be allowed to run for election and will new campaign laws be enacted as part of the implementing law?

Will the potential lists of stand-ins be made public?

How will the temporary stand-ins affect the existing rules of House, or Senate, procedure?

Will the oath of office be required and administered to the stand-ins?

Will stand-ins be paid; have full staffing and provided pensions?

Can you hold another office, such as state legislator, while you are appointed to be a stand-in?

Will stand-ins be subject to freedom from arrest?

At their core, these unanswered questions are a part of the actual implementing language for the constitutional amendment—which we have not yet seen or introduced.

I apologize for having spent some much of your time asking questions about the Commission's proposal and its impact on arcane rules and provisions of the Constitution. However, I know that the House and the Senate both cherish their rules and traditions and certainly don't want to underline the integrity of the Constitution.

In sum, I am troubled by the choice of the language of the amendment the Commission recommended. Yes, it appears the simplest in form, but I am concerned that beneath its plain-brown wrapper lies the constitutional equivalent of a computer "virus" or "worm." Over time, I am concerned that it will eat away at other provisions of the Constitution, forcing the Framers' checks and balances to crash under the potential statutory fixes that such an amendment would allow.

Moreover, the Commission has left unanswered a much more difficult question: incapacitation, particularly mass incapacitation. Unlike vacancies, incapacitation has never been fully addressed by the Congress and the Commission acknowledged the problems inherent to answering this question at page 13:

"There is also the danger of abuse of an incapacitation provision, with Congressional leaders or governors tempted by political or other reasons to replace members by declaring them incapacitated."

This is an area of such potential abuse that I believe the consequences and impact must be fully examined and put before the public before we begin to act on a constitutional amendment.

Joint Committee for Congressional Operations and Security

Mr. Chairman and Senators, while my foregoing testimony indicates my opposition to starting with a constitutional amendment for re-constituting the House following a

catastrophic attack or disaster, I do believe that no matter what method we ultimately choose for replacing Members—be it an amendment or a special elections law—we, the House and the Senate would greatly benefit from considering in a nonpartisan, bicameral manner the continuity of Congress.

I would like to take a moment to speak about H. Con. Res. 190, which passed the House with overwhelming support as well as the strong support of both Speaker Hastert and Democratic Leader Pelosi.

We believe the House vote was a strong expression of our Members' support for a comprehensive examination of the issues that would face the Congress in the event of a national emergency. Now that the Congress has reconvened following the August District Work Period, we hope the Senate will act quickly on this measure, with whatever amendments might be necessary to accommodate the concerns of Senators, in order that both Houses can begin work on these serious matters.

As you know, a catastrophic attack against the Capitol (or any other location where a large number of Members of either body or caucus were gathered) could affect not only the ability to quickly assemble legitimate quorums, but could also, in the worst case, endanger the stability of our republic. We believe it is of the utmost importance that the Congress is able to function during any such crisis, and accordingly, we see the joint committee as an ideal entity to examine those issues that could hinder the functioning of our bicameral institution in a time of grave crisis.

We are particularly concerned that there be a mechanism that will allow both Houses of the Congress to review those mechanisms and procedures. The Framers of the Constitution correctly held that the House and the Senate should be separate entities with different procedures and prerogatives. We are not proposing that those differences be altered; rather, we are committed to making a thorough examination of how the Congress would go about fulfilling our mutual constitutional duties.

We want to assure you that we intend to maintain and preserve the institutional prerogatives and individuality of each body of Congress. We merely want to ensure we have in place the procedures to be able to function in the case of an extreme emergency so that the American people can have confidence that their government is in place and working on their behalf.

Conclusion

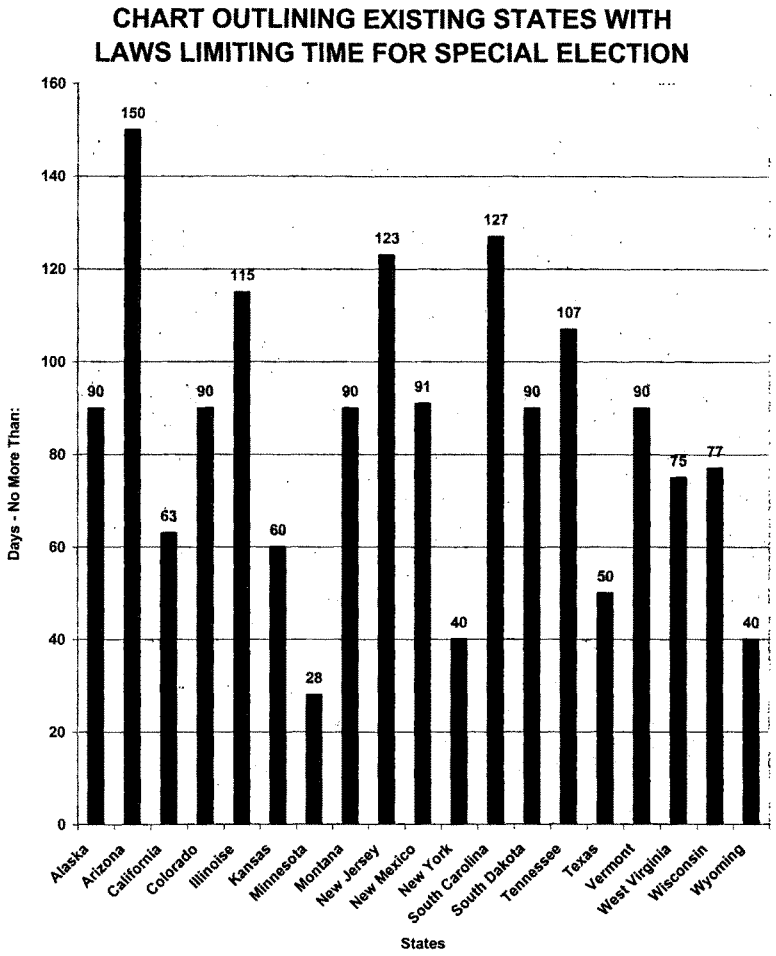
Mr. Chairman, in closing, I understand the desire for expediency in times of crisis. Appointing "stand-in" Members by the executive in each state or through a list of "heirs to the seat" provided by each sitting representative may seem expedient, even prudent to some. It may seem easier than planning,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

However, in the long term, I believe that after a national crisis, when large numbers of Members of the House have been killed and even the existence of our republic may be at stake, we should still choose to have faith in ELECTIONS, NOT SELECTIONS.

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

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

APPENDIX – 1



Average Number of Days: 84

APPENDIX - 2

STATEMENT OF THE HONORABLE DAVID DREIER

RELEVANT CONSTITUTIONAL PROVISIONS

Article I: Legislative Department

Section 2: The House Of Representatives

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

Section 4: Elections

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

Section 5: Powers And Duties Of The Houses

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

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

Section 6: Rights And Disabilities Of Members

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

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

RELEVANT CONSTITUTIONAL PROVISIONS - (CONTINUED)

Fourteenth Amendment: Rights Guaranteed

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

Seventeenth Amendment: Popular Election of Senators

Clauses 1-2:

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

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

Twenty-Fifth Amendment: Presidential Vacancy and Disability

Sections 1-4:

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

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

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

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

RELEVANT CONSTITUTIONAL PROVISIONS - (CONTINUED)

Twenty-Fifth Amendment: Presidential Vacancy and Disability - continued

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

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

Source: Congressional Research Service

electionline.org

Your first stop for election reform information.

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September 8, 2003

The Honorable John Cornyn
Chair, Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, DC 20510

RE: H.R. 2844, the "Continuity in Representation Act of 2003"

Dear Chairman Cornyn:

Thank you for the opportunity to submit written testimony as part of the Judiciary Committee's September 9 hearing on continuity of Congress issues, including H.R. 2844, the "Continuity in Representation Act of 2003."

My name is Doug Chapin and I am Director of *electionline.org*, a clearinghouse of election reform news, information, and analysis sponsored by The Pew Charitable Trusts through a grant to the University of Richmond. *electionline.org*'s mission is to track the progress and implementation of election reform nationwide – especially in the wake of the Help America Vote Act of 2002, P.L. 107-252 (HAVA). In the course of our work – which includes two annual reports on the status of election reform and a host of "Election Reform Briefings" on key aspects of reform – we have researched the specific requirements of each state's election laws in order to gauge the potential impacts of proposed reforms on the conduct of elections in the United States.

Although *electionline.org* is non-partisan and refrains from advocating for or against any specific reform proposal – legislative, administrative, or otherwise – we are occasionally called upon to offer insights into the effect certain proposals might have on the electoral process. In that capacity, I would like to take a brief opportunity to comment on some potential issues that may arise with respect to any requirement for special elections in the event of a catastrophic attack on Congress.

At the outset, I want to commend the Committee for its willingness (borrowing from a Cold War sentiment) "to think the unthinkable." The prospect of an attack on Congress that would leave 100 or more vacancies is almost too terrible to comprehend, and Members of Congress and Congressional scholars deserve recognition for grappling with the practical aspects of our nation's response to such a tragedy.

That said, given the task before the Committee today I want to offer a few observations regarding H.R. 2844's special election requirement – and specifically the requirement that special elections to fill a catastrophic Congressional vacancy of 100 or more seats in the House of Representatives occur within 21 days of the announcement of a vacancy by the Speaker.

The ongoing debate over election reform – begun in earnest after the disputed November 2000 election, followed by Congressional consideration of HAVA and continuing through current state and local efforts to proceed with HAVA implementation ~ has revealed the complexity of the American electoral process. Specifically, policymakers and scholars have discovered what elections officials have known all along – that each election is the end result of weeks and months of preparation that ends, not begins, when the polls open on Election Day.

Similarly, recent events have demonstrated the impact that haste and/or expedited elections can have on the electoral process. For example:

In 2001, the State of Florida implemented a sweeping election reform law aimed at addressing the state's experience in the 2000 election. As part of this reform, many jurisdictions purchased new voting machinery to be used as part of the state's 2002 gubernatorial primary. In most parts of the state, these changeovers occurred without incident; however, in South Florida (specifically, Broward and Miami-Dade Counties) new equipment arrived so close to the September primary that there was little time to train election personnel and poll workers on the new technology. As a result, on Primary Day many precincts were unable to open on time, forcing precincts across the state to remain open late, costing local governments thousands of dollars statewide;

Similarly, this year's gubernatorial recall in California is creating difficulties for local election officials because of the state's constitutional requirement that the election occur within eight weeks of certification of the recall. Several jurisdictions have temporarily scrapped plans to upgrade their voting technology because of the short time frame for the recall and/or have been forced to go with reduced numbers of polling places because of the lack of availability of polling places and poll workers for the recall election.

In light of these experiences and *electionline.org*'s conversations with state and local election officials nationwide, I believe that any expedited special election requirement – and specifically the 21-day requirement contained in H.R. 2844, which is shorter by nearly a month than any current period between elections nationwide – may create difficulties for state and local election officials in the following areas:

- *Registration deadlines.* In the states which require voter registration prior to Election Day (i.e., as opposed to North Dakota, which does not require registration and those states that currently allow for election-day registration), slightly more than half close their registration books more than 21 days before an election (typically 25 to 30 days) in order to allow their election officials time to prepare registration poll books.

- *Ballot/machine preparation.* A frequently underappreciated aspect of elections is the necessity of preparing the ballot for voters on Election Day. For jurisdictions using paper-based technology (paper ballots, punch cards, or optical scan) this means formatting and printing ballots; in jurisdictions using lever machines there is the need to configure the ballot so that all races fit on the array; and in jurisdictions using the newer direct recording electronic (DRE – also known commonly as "touch screen") machines officials must program the machine to display and record votes correctly. Another aspect of this process that cannot be overlooked is the Voting Rights Act's requirement that some jurisdictions provide

jurisdictions in languages other than English – a task that requires translation and other lead time to comply;

- *Identification of polling places*. There is tremendous diversity of practice among the states regarding what types of buildings/establishments are used as polling places. In some states, public buildings (schools, libraries, etc.) are used, while other states – most notably California – rely heavily on private property (even private homes) as voting locations. Expedited elections complicate the choice of polling places in that many of these buildings – public or private – are already reserved for non-electoral functions. Moreover, growing sensitivity about access for voters with disabilities has narrowed the class of properties that are considered suitable locations – a smaller pool that might shrink further in the face of expedited elections. Many jurisdictions facing expedited elections could respond with reduced number of polling locations or switch entirely to voting-by-mail, which eliminates the need for polling places entirely;

- *Poll worker recruitment/training*. In addition to places for Election Day, there is also the need for people to staff them. Assuming a jurisdiction does not do away with polling places entirely (see above), each polling place requires workers to check registration and voter identification (where applicable), provide provisional ballots as required under HAVA, ensure proper access to the polls for voters with disabilities, offer assistance to bilingual voters, and generally manage the polling place on Election Day. Given the increasing complexity of the poll worker's job – and the shrinking pool of people ready, willing and able to do it – an expedited election could make it difficult for state and local election officials to recruit enough people to staff the polls and train them to do their jobs properly.

In fairness, some of these difficulties could (and likely would) be overcome by state and local election officials' – indeed, all Americans' - desire to show unity in the type of tragic attack this bill envisions. Nevertheless, while it is natural to hope for and expect such a "can-do" attitude, it may not be prudent to count on it.

The Committee's best resource on these matters is state and local election officials themselves. Thus, to the extent that they have not been consulted in drafting H.R. 2844 or other "continuity of Congress" legislation –specifically on the issue of expedited elections - it would be my recommendation that you do so.

To summarize, my understanding of state laws and local practices involved in conducting elections suggests that the choice of an interval for expedited elections as part of "continuity of Congress" legislation could create difficulties for election administration. Thus, any such interval should be derived following consultation with the state and local election officials with responsibility to conduct such elections.

In conclusion, I commend the Committee once again for considering this difficult issue and appreciate the opportunity to provide testimony today.

Sincerely,

Doug Chapin

Senator Russell D. Feingold
Hearing before the Senate Judiciary Committee
"Ensuring the Continuity of the United States Government: The Congress."

Mr. Chairman, thank you for holding this hearing on what steps Congress should take to protect the continuity of Congress following a catastrophic terrorist attack. As we approach the second anniversary of the terrorist attacks of September 11th, 2001, we are reminded that the dangers of mass terror are very real. Protecting the country from terrorism should be the highest priority for this Congress, but no security system is infallible, and there is always a danger of further attacks on the scale of 9/11. It is our responsibility to anticipate catastrophic events of this kind, and do everything we can to make sure the country is prepared to survive them with our democracy intact.

The Continuity of Government Commission's report highlights the consequences for the continuity of our government if a terrorist attack kills or incapacitates a large number of representatives or senators. Mass vacancies in the House or Senate could seriously obstruct Congress from responding to the crisis created by the attack. Were the president, vice-president and cabinet also to be killed, presidential succession could be thrown into disarray. There are serious questions as to whether the laws that would apply in such a scenario, including the federal Constitution, state election laws, and legislative rules of procedure, are adequately structured to deal with crises of this kind.

Some have recommended amendments to the United States Constitution to address these threats to the continuity of our government. I approach all proposals to amend our Constitution with great caution, because changes to our fundamental charter can have far-reaching consequences and are extremely difficult to undo. But the goal of these proposed amendments is unquestionably laudable, and they deserve careful scrutiny.

I particularly appreciate the Commission's efforts to address the question of whether federal legislation could be adequate to address the threat, because I believe a constitutional amendment is almost never appropriate when an issue can be addressed with legislation. I look forward to reviewing in the Judiciary Committee the Commission's arguments on this subject and to hearing from other experts.

Amending the Constitution should be a last resort. Since the Bill of Rights, only 17 amendments have been adopted, out of the thousands that have been proposed. But times of national crisis have in the past shown the need for re-examination of the Constitution, as when the assassination of President Kennedy led to the adoption of the Twenty-Fifth Amendment. Securing our democracy is a paramount goal, and in the weeks and months ahead, Congress must determine whether changes to our national charter are necessary to accomplish that goal.

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September 8, 2003

The Honorable John Cornyn, United States Senator
Chairman, Senate Subcommittee on the Constitution, Civil Rights and Property Rights
United States Senate
Dirksen Senate Office Building Room 139
Washington, DC 20510

Dear Senator Cornyn:

Thank you for the opportunity to comment regarding the proposals pending before the Subcommittee which would require special elections to be held to fill multiple congressional vacancies resulting from a catastrophic event.

I write to express concern that requiring these special elections to be held within 21 days after a catastrophe would result in the disfranchisement of both candidates and voters, and would undermine public confidence in the legitimacy of the election process.

Although it is conceivable that these special elections could be conducted on an expedited schedule, attempting to do so within a 21-day period would effectively prohibit party candidates from being nominated in a primary election. In the aftermath of a national emergency that would prompt these special elections, election procedures, which impose additional restrictions on the ability of voters to nominate and choose among candidates for office, will undermine their confidence in the integrity of the election process.

A 21-day special election schedule would have a dramatic impact on the ability of military and overseas voters to participate in the election process. For many years, the Federal Voting Assistance Program within the Department of Defense has advocated a 45-day turn-around time for absentee ballots to reach and be returned by military and overseas voters as being the minimum period necessary to prevent the disfranchisement of these voters. Currently, the state of North Dakota makes absentee and early voting available to voters 40 days before the election, still five days short of the Federal Voting Assistance Program recommendation. A 21-day election cycle would further reduce this timeframe.

Since absentee ballots are not printed and distributed to any voters until after the list of candidates has been finalized, the actual time available for any absentee voter to receive and cast an absentee ballot would be significantly less than 21 days. Disabled, elderly voters, and other voters who have come to rely on the U.S. Postal Service to deliver and return absentee ballots on time would lose their opportunity to participate due to the expedited schedule required for a special election held within a 21-day period.

The selection of polling places for these special elections would result in an additional impediment to the election process, and could result in the disfranchisement of voters. Many local jurisdictions must enter into contracts with private businesses to use a facility as a polling place in any election, and currently must do so at least 70 days before Election Day to ensure that the facility will be available and that proper notice of the voting location may be provided.

Given such short notice for a special election, many usual polling places are likely to be unavailable. If it becomes necessary to consolidate polling places as a result, voters will have less opportunity to learn where the polling place has been relocated.

In summary, a 21-day schedule for special elections has the potential to undermine public confidence in the election process just when this confidence would be needed most.

If the Subcommittee chooses to recommend the enactment of legislation to provide for special elections in these cases, I urge that a more realistic time period to accommodate the legitimate interests of voters, candidates, and political parties, such as 60 days, or more, be considered. In any event, federal legislation in this area should be very narrowly tailored to address the catastrophic scenario, and not spill over into any other type of special election for federal office.

Thank you for your consideration of my comments regarding this matter.

Sincerely,

Cory G. Fong
Deputy Secretary of State

CSAE

Maurice Rosenblatt
President

Barbara S. Davies
Treasurer

James Fitzpatrick
Counsel

Curtis B. Gans
Director

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Richard Whalen

Founding Chairman
The Hon. Terry Sanford

STATEMENT

of

CURTIS GANS, VICE-PRESIDENT AND DIRECTOR

COMMITTEE FOR THE STUDY

OF THE AMERICAN ELECTORATE

to the

HEARING

of the

SENATE JUDICIARY COMMITTEE

SEPTEMBER 9, 2003

Mr. Chairman: Thank you for the opportunity to submit this statement for inclusion in the record of your September 9, 2003 hearing on legislation and/or Constitutional Amendments to provide for succession in the event that a majority of members of the House of Representatives (or a large number smaller than that depending on how one reads historical precedents) are killed or sufficiently incapacitated from the performance of their duties.

My name is Curtis Gans. I am and have been for the past 26 years vice-president and director of the non-partisan, non-profit, tax-exempt institution called the Committee for the Study of the American Electorate which has been studying and reporting on issues surrounding voter participation for a quarter of a century. And based on the knowledge and experience gained from that study, I would like to comment on the issues before this committee.

In the best of all possible worlds or even in a reasonable one, this [illegible] necessary. Only in light of

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terror attacks that threatened both the President and Congress on September 11, 2001 were we made aware of the problem of succession and the lack of procedures for such succession in the U.S. House of Representatives in the event a future attack was successful. Thus, the irrational has made this hearing a rational response to potential impending crisis.

There are essentially two proposals before you – one a broad and necessarily vague Constitutional Amendment conveying upon Congress the right to provide for such succession in a timely manner of its choosing and the other, embodied in H.R. 2844, to provide for special elections in each District whose representative has been killed or otherwise rendered unable to perform his or her duties within three weeks of that event.

While understanding the motivation for the latter response – to swiftly provide for a popular mandate for the new member – it is clear to me that such a procedure would be next to impossible to implement, would not result in any real popular mandate and would denigrate the democracy it purports to promote.

Under the terms of this proposal, the political parties would have two weeks to nominate a successor, the public would have one week to consider the choices and election officials would have a total of three weeks to prepare for such an election. It is possible to conceive that the major parties might arrive at choices within two weeks, but it would be next to impossible for those other than the major parties to meet the criteria to qualify for the ballot in such a short time and thus it would both deny citizens access to candidacy and the public to a fuller choice than the two major parties. As such this procedure is likely to be both challenged and ruled unconstitutional.

One week is too short a time for a campaign, for edifying the citizens of the nature of their choices and for mobilizing the electorate to provide a reasonable mandate for the new member. It is a prescription for minimal and uninformed turnout and, perhaps, bad representation.

And three weeks is not adequate time for election officials to prepare for elections – not enough time to set up an adequate number of polling places and polling stations within them; not enough time to recruit the volunteers needed to administer the elections; not enough time to provide the requisite materials informing people of procedures, their rights and, in the states which require such information, the pamphlets that allow them to know more about what's on the ballot; not enough time to perform valid tests of the integrity of the equipment being used; not enough time to establish adequate counting procedures; not enough time, in short, to ensure an election whose results people will respect.

While I sympathize with the desires of the proponents of H.R. 2844, there are other ways to tie succession to the will of the electorate. It should be possible, under the broad terms of the Constitutional Amendment proposed by the bi-partisan commission headed by The Hon. Alan Simpson and Lloyd Cutler, to establish procedures for an interim Member until an election people can have faith in – one that permits a reasonable nominating and ballot access period; allows all possible choices to enter; provides for a robust and edifying campaign; offers some

reasonable participation and permits election officials to carry out an election which the public will recognize as valid. One can envision, for instance, that an interim Member could be selected by the highly representative state legislatures of the several states, each operating as a Committee of the Whole, under a procedure that would honor the results of the immediately previous election – namely that the interim Member be of the party which won the seat in that district. It would then be possible for government to have a degree of legitimate continuity until a special election can be held in a timely and orderly manner to restore the full mandate of the electorate.

Whatever is done in this matter, it should not be done in haste – either in deciding what to do about this problem or deciding the successor to a leadership that can no longer perform its function.

Thank you for your consideration of these views.

Committee on the Judiciary

Testimony of

Thad Hall

Program Officer

The Century Foundation

on

"Ensuring the Continuity of the United States Government:

The Congress"

10:00 a.m., Tuesday, September 9, 2003

Room 226 Senate Dirksen Office Building

Mr. Chairman and Members of the Committee:

The September 11th terrorist attacks could have been far worse had one of the airplanes hijacked by the terrorists struck the United States Capitol. The attack would have come just as the House was going into session and the House Appropriations Committee met in the Capitol building. Many members of Congress could have been killed or injured in such an attack. The question of how to maintain the continuity of our government, especially the membership of the House, is of critical importance.

At this hearing on the issue of ensuring the continuity of government—especially the Congress—in the aftermath of a national disaster, I will be discussing the issues associated with holding special elections in a short timeframe. There are three key points I want to make in my testimony today.

- First, in many states, current laws limit the ability of election administrators to conduct a special election in a short timeframe.
- Second, Congress can use its powers to regulate elections to ensure that special elections held after a national disaster are done quickly and successfully.[1]
- Third, technological changes—coupled with meaningful improvements in election administration—will make special elections easier to hold on short notice in the future.[2]

Regardless of whether or not one supports a constitutional amendment to make it possible to replace House members via appointment, the issue of how to ensure that special elections can be conducted quickly and effectively remains. If Congress determines that a constitutional amendment is necessary to remedy the continuity of government problem, passing such an amendment will likely take some time, given the supermajorities that have to be attained in the House and Senate, and the supermajority of state legislatures who must ratify such an amendment. Therefore, special elections will likely remain the way in which House members are chosen when vacancies arise for some time.

The fundamental question is this: how can Congress make the special election process work so that vacancies in the House can be filled in a timely manner? Answering this question requires rethinking the way elections are currently conducted because in many states the laws that govern elections today are typically not designed to facilitate speedy special elections.

The Current Environment

We are all in the midst of getting a national civics lesson about special elections, courtesy of the State of California. The gubernatorial recall illustrates the issues associated with running a special election, and the pitfalls that need to be avoided. Here, state law makes quickly conducting a special election difficult. For example, consider the following two factors:

1. Under California law, any special election that affects more than 1,000 voters must be conducted on a single day in poll site voting. Local election officials cannot conduct the election using innovations such as vote-by-mail.

2. Because of the tight timeframe and the lack of additional resources available to pay for the election, officials are being forced to consolidate precincts, which will make it more difficult for voters to get to the polls on Election Day.[3]

The problems associated with running a poll site election on short notice is well illustrated by the example of Los Angeles County. To run a countywide election, Los Angeles has to find 5,000 poll sites—or approximately 2,000 poll sites if they consolidate precincts—and to hire about 25,000 poll workers. To put these numbers in perspective, 5,000 sites is roughly equal to the number of Starbucks in the United States and 2,000 sites is larger than the number of Wal-Marts worldwide. The 25,000 poll workers in Los Angeles on Election Day outnumber the LAPD three to one. The County does not control any of these polling places or have any of these poll workers as permanent employees. Every election is a new process; the availability of poll sites and poll workers has to be re-confirmed. And with six language minority populations in the County, all voting information has to be prepared in 7 languages, and certain poll sites have to have either bilingual poll workers or interpreters in order to comply with the Voting Rights Act. Additionally, approximately 20 percent of voters in California will vote absentee.[4]

The California situation is not helped by the fact that the threshold for being on the recall ballot is exceptionally low. Voting machines are not generally meant to handle a race with 135 candidates on the ballot, and the size of the ballot is likely to create even more problems at poll sites on Election Day, not to mention problems counting the votes.[5]

Another Model – Vote-by-Mail with Early Voting

The California experience illustrates the difficulties of conducting a precinct-based election in a short period of time. However, if one looks north from California to Oregon, there is a different model of elections that could serve as a model for how to do special elections more effectively. In 1981, Oregon began conducting short-term special elections using vote-by-mail and it quickly grew in popularity because it was easy and inexpensive for election administrators to implement and made it easy for voters to vote—the ballot box came to them. Since 1996, when voters passed a referendum that expanded vote-by-mail, all elections have been conducted using this method.[6]

In Oregon, all registered voters are automatically sent a ballot 14 to 18 days prior to an election. The voter then votes the ballot, places it in the secrecy envelope, seals it, and places it in the return envelope. The voter then either mails it back or returns it to a ballot drop-off location by 8:00 p.m. on Election Day. The votes are then tabulated and results reported. Among the benefits of the by-mail system is that it generally results in more accurate ballots being cast[7] and provides all voters with equal access to the voting process.[8]

The effectiveness of vote-by-mail has been recognized internationally. The United Kingdom's Electoral Commission—which is analogous to the soon to be established Election Administration Commission—has recently recommended that all local elections in the UK be held using vote-by-mail. This determination was made after a series of experiments were conducted by the Commission in local elections held in both 2002 and 2003.[9]

Vote-by-mail is not without its drawbacks; perhaps most problematic is that the voting technology currently used for vote-by-mail—paper ballots of some sort—are not accessible to the disabled. However, this problem can be overcome by combining vote-by-mail with early voting on touch screen voting systems that are fully accessible. Los Angeles County has been successful in encouraging its disabled and language minority communities to use early voting so that these voters can vote on systems that are fully accessible.

Addressing the Problem

If Congress wants special elections to work in crisis situations, then Congress can follow two paths, which are not mutually exclusive.

- First, it could require states and localities to develop *legally binding* plans for how they would hold a special election in a short timeframe. These plans would be reviewed by the Election Administration Commission or outside experts to ensure

that they were comprehensive and addressed all problems associated with holding an election in a short timeframe.

- Second, Congress could pass a law that would govern all special elections held in the aftermath of a national disaster. This might structure the candidate selection process by parties and encourage localities to conduct these elections by using vote-by-mail, supplemented by limited poll site early voting and, in the future, internet voting. This same result could be obtained if Congress gave the Election Administration Commission the power to issue binding rules governing special elections that occur after a national disaster.

The Election Administration Commission could also put together a group of experts—not limited to election officials—that would think through the problem without preconception and develop short-, medium-, and long-range plans for ensuring that special elections can be conducted in a short period.

For short-notice special elections to be conducted successfully, the federal government should be willing to pay for these elections so that localities have the money they need to do the job right. Congress could require the General Services Administration or the Election Administration Commission to fund the steps necessary for states and localities to be prepared for a special election. For example, these funds might pay for special contracts with any contractors—such as ballot printing or direct mailing firms—that will

be needed to ensure that any special election can be conducted in an expedited manner. Similarly, these funds might be used to pay the premium necessary to hire poll workers and to pay for poll sites on short notice.

One of the primary limitations on how quickly special elections can be held is the time it takes to ensure that individuals covered by the Uniformed and Overseas Civilian Absentee Voting Act (UOCAVA) can participate in the election, and I would defer to the Federal Voting Assistance Program as to how quickly these voters can be served in a crisis. I would note that FVAP is a leader in promoting the use of technological innovations by local election officials to improve service to UOCAVA voters, and their innovations—such as the SERVE Internet voting project that is being implemented in 2004—are likely to make serving this population easier in the future.

We do not have a tradition in the United States of evaluating various ways of conducting elections in order to determine if we can do things better. The Election Administration Commission should be required to conduct evaluations of election management techniques that can facilitate the rapid completion of a special election, and conduct experiments in elections to determine what works best. The United Kingdom's Electoral Commission has been conducting experiments in local elections in Britain since 2000—working with local governments with the agreement of the political parties—to identify the best ways to conduct elections. Such an ongoing effort in the United States will bring forth the best ways to conduct special elections as conditions and technological improvements occur.

Biographical Note

Thad Hall is a program officer with The Century Foundation. He was a member of the professional staff of the National Commission on Federal Election Reform. In 2001, he served on the peer review committee for the Federal Voting Assistance Program's Voting Over the Internet (VOI) initiative and is currently part of the evaluation team for the Secure Electronic Registration and Voting Experiment (SERVE), which will allow certain uniformed service personnel and overseas civilians to register and to vote online in the 2004 elections. His book with R. Michael Alvarez—*Point, Click, and Vote: the Future of Internet Elections*—will be published later this year by the Brookings Institution Press. Two articles on administering elections for voters with special needs are forthcoming in the *American Review of Public Administration* and the *International Journal of Public Administration.* He has a Ph.D. in political science from the University of Georgia. Before coming to The Century Foundation, he worked for Governor Zell Miller of Georgia and for the Southern Governors' Association.

Endnotes

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[1] For an analysis of the ability of Congress to regulate elections, see Jimmy Carter, Gerald Ford, *To Assure Pride and Confidence in the Electoral Process: Report of the National Commission on Federal Election Reform*, (Washington, D.C.: The Brookings Institution, 2002), pages 217-358.

[2] See, for example, Caltech/MIT Voting Technology Project. 2001. Voting: What Is, What Could Be. June, and R. Michael Alvarez and Thad Hall, *Point, Click, and Vote: the Future of Internet Elections.* (Washington, D.C.: The Brookings Institution, forthcoming 2003).

[3] . Eugene Meyer, "Easier Voting Could Boost Turnout, Study Says," Washington Post, March 2, 2003, C4. See also James G. Gimpel and Jason E. Schuknecht, "Political Participation and the Accessibility of the Ballot Box," Political Geography, 22 (2003), 471-88.

[4] Thad Hall. "This Is No Way to Run a Railroad, or Even a California Recall." *Los Angeles Times*, August 13, 2003. Thad Hall. "L.A. Story: The 2001 Election." New York: The Century Foundation. http://www.tcf.org/Publications/Detail.asp?ItemID=191

[5] Tim Reiterman and Allison Hoffman. "Crowded Ballot May Lead to Delays, Disarray, Experts Say." *Los Angeles Times*, August 28, 2003

[6] . This history comes from Priscilla L. Southwell and Justin Burchett, "Survey of Vote-by-Mail Senate Election in the State of Oregon," PS: Political Science and Politics (March 1997), 53–57.

[7] Alvarez, R. Michael and Betsy Sinclair. 2004. "Who Overvotes, Who Undervotes, Using Punchcards? Evidence from Los Angeles County." *Political Research Quarterly*, forthcoming.

[8] There are differing views as to whether vote-by-mail in Oregon increases turnout. Compare Berinsky, Adam J., Nancy Burns, and Michael W. Traugott. 2001. "Who Votes by Mail? A Dynamic Model of the Individual-Level Consequences of Voting-by-Mail Systems." *Public Opinion Quarterly*, 178-197 with Southwell, Priscilla L., and Justin I. Burchett. 2000a. "The Effect of All-Mail Elections on Voter Turnout." *American Politics Research*. 28, 1: 72-79.

[9]), "The implementation of electronic voting in the UK." (http://www.electoralcommission.gov.uk/about-us/e-votingimplement.cfm) and "The shape of elections to come: A strategic evaluation of the 2003 electoral pilot schemes" (http://www.electoralcommission.gov.uk/templates/search/document.cfm/8346).

News Release

JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

September 9, 2003 Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Hearing on

"ENSURING THE CONTINUITY OF THE UNITED STATES GOVERNMENT: THE CONGRESS"

I want to thank Senator Cornyn for chairing this very important hearing before the Full Committee today. There is good reason to believe that the Capitol was the target of the fourth plane hijacked two years ago on September 11th. Congressional action was vital in ensuring that our nation quickly responded to the terrorist attacks by passing critical legislation.

Immediately after the attacks on our nation, the members of both legislative bodies gathered together on the Capitol steps. We did that, at least in part, to demonstrate to the nation and the world that the work of the American government would continue. In the weeks after September 11, Congress passed: a $40 billion emergency supplemental for recovery and response to terrorist attacks on the United States; the Air Transportation Safety and System Stabilization Act to preserve the continuity of the U.S. transportation system; legislation to honor fallen firefighters; and Treasury and General Government Appropriations Act to provide funding for counterterrorism measures. The work of the people needed to be done – it needed to be done immediately and the Congress responded.

September 11th revealed that we are resilient people whose government is capable and prepared to respond in a national emergency. However, the fact remains that if a horrific event caused mass casualties in the Congress, there is no way to quickly reconstitute the House of Representatives. The Constitution provides for the replacement of House members through the special election process, which on average could take four months. In the event of a catastrophic attack, elections could certainly take longer.

In the 99th through 107th Congress, the average time it took states to hold special elections to fill House vacancies caused by death was 126 days, or over 4 months. Some of these vacancies lasted as long as nine months. With this as a backdrop, it is particularly troubling that there is no precedent for holding dozens or hundreds of special elections at the same time.

The Seventeenth Amendment provides that Senate vacancies can be replaced by gubernatorial appointment until special elections can be held. But the truth of the matter is that ***neither*** body of Congress is prepared for the possibility of having a large number of incapacitated members.

One of the possible solutions to this dilemma is to look to the Constitution. Our Constitution gives us specific provisions for filling vacancies in the House and Senate, however, we do not have a procedure in place to fill mass vacancies without a constitutional amendment. A Constitutional amendment could give Congress the power to provide by legislation for the appointment of temporary replacements to fill vacant seats in the House of Representatives after a catastrophic attack and to temporarily fill seats in the House of Representatives and Senate that are held by incapacitated members.

The question of a Constitutional Amendment is a serious one to consider and I know that my colleagues in the Senate and House are always reluctant to amend the Constitution – as am I. And I agree that these are issues which will require considerable debate and a thorough examination of the possible options. Consideration of how our country and our governmental institutions would operate in the aftermath of an attack which caused mass vacancies in Congress present difficult questions my colleagues in the Congress and the American public must identify and resolve.

I thank the witnesses for appearing before us today and I look forward to hearing from all of you about these very important issues.

# # #

United States Senate
Committee on the Judiciary

Senator John Cornyn (R-TX), Chairman
Senate Subcommittee on the Constitution, Civil Rights and Property Rights

Ensuring the Continuity of the United States Government: The Congress

Tuesday, September 9, 2003, 10 a.m., Dirksen Senate Office Building Room 226

N.B. Every letter we have received thus far from state and local elections officials expresses at least mild – if not serious – concerns about any 21-day expedited special elections regime.

Alaska
- Lt. Governor (Laura A. Glaiser, Director, Division of Elections)

Delaware
- New Castle County (Howard G. Scholl, Jr., Deputy Administrative Director, Department of Elections)

Florida
- Lafayette County (Lana B. Morgan, Supervisor of Elections)
- Osceola County (Donna Bryant, Supervisor of Elections)
- Sarasota County (Kathy Dent, Supervisor of Elections)
- Sumter County (Karen S. Krauss, Supervisor of Elections)
- St. Lucle County (Gertrude Walker, Supervisor of Elections)
- Pasco County (Kurt S. Browning, Supervisor of Elections)
- Florida State Association of Supervisors of Elections (Kay Clem, President)

Idaho
- Secretary of State (Ben Ysursa)

Indiana
- Secretary of State (J. Bradley King and Kristi Robertson, Co-Directors, Election Division)
- Allen County (Pam Finlayson, Director of Elections)

Kentucky
- Fayette County (Donald W. Blevins, Clerk and Chairman, Board of Elections)
- State Board of Elections (Sarah Ball Johnson, Assistant Director)

Maryland
- State Board of Elections (Linda H. Lamone, Administrator)

Minnesota

- Cook County (Braidy Powers, Auditor-Treasurer)
- Chippewa County (Jon Clauson, Auditor-Treasurer)
- Ramsey County (Dorothy A. McClung, Director, Property Records and Revenue)
- Sherburne County (Ramona Doebler, Auditor-Treasurer)
- Secretary of State (Mary Kiffmeyer)
- Pine County (Cathy Johnson, Election Administrator)

Missouri

- Pike County (Bob Kirkpatrick, Clerk of the County Court)
- St. Francis County (Mark L. Hedrick, County Clerk)
- Daviess County (Linda Steward, County Clerk)
- Jefferson County (Eleanor Koch Rehm, County Clerk)
- Sullivan County (Mike Hepler, Clerk, Sullivan County Commission)
- Franklin County (Debbie Door, County Clerk)

North Carolina

- State Board of Elections (Johnnie F. McLean, Deputy Director)
- Guilford County (George N. Gilbert, Director of Elections)

Pennsylvania

- Bureau Of Commissions, Elections & Legislation (Monna J. Accurti, Commissioner)

South Carolina

- Pickens County (Marilyn W. Bowers, Director, Registration and Elections)

South Dakota

- Secretary of State (Kea Warne, Election Supervisor)

Texas

- Secretary of State (Geoffrey S. Connor)

Vermont

- Secretary of State (Kathleen DeWolfe, Director of Elections)

Washington

- Yakima County (Corky Mattingly, County Auditor)
- Chelan County (Evelyn L. Arnold, County Auditor)
- Clark County (Greg Kimsey, County Auditor)
- Thurston County (Kim Wyman, County Auditor)
- Island County (Suzanne Sinclair, County Auditor)

Wisconsin

- State Elections Board (Kevin J. Kennedy, Executive Director)

09-08-03 11:13am From-Division of Elections-Director's Office 18074653203 T-284 P.02/05 F-115

STATE OF ALASKA

FRANK H. MURKOWSKI, GOVERNOR

OFFICE OF THE LT. GOVERNOR

DIVISION OF ELECTIONS
P.O. BOX 110017
JUNEAU, ALASKA 99811-0017
PHONE: (907) 465-4611

September 4, 2003

Senator John Cornyn
Chairman, Senate Subcommittee on the Constitution, Civil Rights and Property Rights
Dirksen Senate Office Building Room 139
Washington, DC 20510

Dear Senator Cornyn:

Thank you for the opportunity to respond to the questions relating to the conduct of a special election in a time of crisis.

During a time of national crisis, assuming Alaska amended our statutes accordingly and forfeited elements of election procedure that we consider essential, it still may not be possible for us to conduct a special election in 21 days. The vastness of our state and the diversity of its people create unique challenges when we conduct scheduled elections – special elections require additional considerations.

To your questions:

1. **Is 21 days enough to conduct expedited special elections during crisis circumstances, as a mechanical matter?**

If Alaska were required to conduct this type of election in 21 days, there are several concerns regarding the AccuVote process.

> AccuVote programming would take several days, depending on the number of candidates and races
>
> Logic and Accuracy testing, delivering the memory cards to the regions (ensuring a regional test) and distribution of the remote cards to the Accu-Vote Coordinators/City Clerks could take at least 10 days.

printed on recycled paper

> Shipping and delivery of AccuVote systems might prove problematic due to the fact that many communities in Alaska are served only by air or bat traffic. If the weather is inclement – including fog and wind – the cards and equipment could take a week or 10 days to arrive in remote locations.

It is perhaps more reasonable, if required to conduct a special election in 21 days, that Alaska issue paper ballots to be hand counted. Accu Vote optical scan and touch screen systems would not be used due to programming and shipping challenges caused by the shortened timeline.

Ballot printing would take at least 10 days on a "rush" order for statewide ballots.

Ballots could not be printed in time to distribute to the election boards in the rural areas. Due to mail delivery in remote areas of Alaska, ballots and supplies must be mailed at least two weeks prior to the election to ensure delivery of the materials. As a result, there would only be one week, in this timeline, for ballots to be printed.

Regional offices do not keep large quantities of various election materials on hand. Forms and materials must be printed in time for distribution to the election boards. There are envelopes used in elections that take several weeks to print. Currently, forms and envelopes often take at least six to eight weeks to print.

21 days would not be sufficient time to train election officials in rural Alaska because of the vast size and amount of time it takes to travel to these locations. In addition, it would be extremely difficult to recruit election workers and polling places in this short time frame. If the special election were called during the prime subsistence (spring hunts, summer fishing & gathering, spring/summer whaling seasons) gathering months, recruitment of election workers on short notice would pose additional problems. The notification and training of election officials seems to be the most challenging aspect of meeting a 21 day election deadline, and should be a critical consideration.

Securing polling places could be more difficult as sites may be unavailable on such short notices. Time to secure alternative sites would be limited. Notifying voters of new locations would provide an additional challenge.

Due to the vast size of our state and the remoteness of many of Alaska's voting precincts, ballots and supplies (including the voter registers) are sent to precincts by mail in those areas not on a road system. After 9-11, areas in remote Alaska, areas without road or ferry connections, felt the impact more severely than the urban areas. In a like situation, it may be impossible to deliver ballots and supplies to these locations.

2. Is 21 days enough to conduct expedited special elections during crisis circumstances, as a matter of democratic integrity?

There could be no primary election. A means for determining the candidates on the ballot would have to be devised. A process for nomination by petition for those candidates not representing a recognized political party, within the 21 days seems improbable.

Selection of candidates, filing period, and submission of candidate declarations would need to be addressed, especially under the limited
time frame.

3. Would 21 days effectively disenfranchise any voters, such as absentee voters, military and overseas voters, or other categories of voters?

In this circumstance should Alaska have only a paper ballot, considering a filing period and submission of the candidate's names to the Division of Elections, (even if only 5 days are allotted), once the ballot is sent to the printer to print, it may be impossible to ship it to all Alaskan communities. (Even with special agreements with air services) As a result, some voters would be disenfranchised because they would not have access to a ballot.

There would not be enough time for a 60-day special advance ballot.

Absentee and Early Voting would most likely be sacrificed under a 21 day deadline. Simply printing and distributing ballots within the timeframe is questionable.

The Federal Voting Assistance Program (FVAP) has been advocating for years to secure a 45 day period for availability of absentee ballots, but the FVAP ballot distribution deadline would be drastically shortened. (if absentee ballots are considered at all)

Internet voting might afford the opportunity to conduct an election in 21 days in Alaska, but those voters who do not have access to computers, would certainly be disenfranchised.

4. If 21 days is problematic, how long would it take to ensure proper mechanical operation of expedited special elections during crisis circumstances, consistent with democratic integrity, and offering all voters -- including

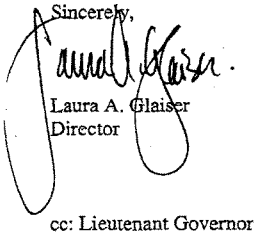
absentee voters, military and overseas voters, and any other category of voters -- a meaningful opportunity to vote?

Alaska's law for such an election requires that the election to fill a vacancy be held 45 to 60 days after the governor issues a proclamation. The proclamation is required 5 days after the vacancy occurs. That is an appropriate time frame for our situation. It was not chosen arbitrarily or randomly. To reduce the time frame by half or two thirds would limit voters' and candidates' access to the process and increase the influence of political insiders.

Lastly, I would agree with my colleagues in other states. I would hope that any federal legislation in this area would be carefully drafted to address elections in times of crisis only, so as not to threaten the individual states' implementation of elections.

Again, thank you for the opportunity to comment.

Sincerely,



Laura A. Glaiser
Director

cc: Lieutenant Governor Loren Leman
United States Senator Ted Stevens
United States Senator Lisa Murkowski
United States Representative Don Young

STATE OF DELAWARE
DEPARTMENT OF ELECTIONS FOR NEW CASTLE COUNTY
CARVEL STATE OFFICE BUILDING
820 N. FRENCH STREET
WILMINGTON, DELAWARE 19801-3531

September 4, 2003

TELEPHONE: (302) 577 - 3464
FAX: (302) 577 - 6545

James C. Ho
Chief Counsel
U.S. Senate Subcommittee on the Constitution, Civil Rights & Property Rights
Dirksen Senate Office Building Room 139
Washington, DC 20510

Dear Mr. Ho:

Mr. R. Doug Lewis, the Election Center's Executive Director, asked me and other Election Officials to respond to your inquiry as to whether 21 days is enough time to feasibly and practically conduct expedited special elections in the direct aftermath of a catastrophic terrorist attack on Congress. Thank you for seeking advice from those on the front lines. Please understand that this is my response to the questions you posed and should not be construed in any manner as an official or unofficial position of the State of Delaware or any other State official. Furthermore, my responses are based on my understanding of the capability of the Department of Elections for New Castle County to respond to the catastrophe as described above. Election Officials in Delaware's other counties or the Commissioner of Elections may have different views on these subjects.

I am the Deputy Administrative Director for the Department of Elections for New Castle County, Delaware. In Delaware elections are run by the State. Thus, I am a State employee and in collaboration with the Administrative Director have responsibility for registering voters and conducting elections within Delaware's largest county. I have served as an Election Administrator for 10 years, and have been actively involved in the planning, preparation and conduct of numerous primary, general and special elections. Additionally I served on the Election Center's National Task Force on Election Reform, and am a Certified Elections/Registration Administrator.

As I understand the task, it is to respond to the four questions listed below without regard to constitutional requirements or existing state and/or federal laws. I assume that the clock starts the day that the disaster occurred in lieu of any other guidance, that we have sufficient supplies and materials on hand, that necessary funding is quickly disbursed to the Department, and that there are no problems in configuring the State's Election Management System for the Special Election. Additionally, I am assuming that there are no nationwide or local disruptions as a result of the catastrophe that would impact on our ability to prepare for the election. Changes in any of these assumptions would result in my revising my responses to the four questions.

As a matter of information, Delaware uses a full face Direct Electronic Voting System with a paper ballot set over 504 voting positions.

1. Is 21 days enough to conduct expedited special elections during crisis circumstances, as a mechanical matter?

NO. It would not be possible to properly accomplish all the required tasks within 21 days. An important factor is staff. We have a small and very competent staff. They cannot, however, accomplish all the tasks required for such an election without augmentation. The experience and training of the augmentees, especially in the warehouse, could significantly impact my estimates that are detailed below.

a. My staff estimates that it would take 45 days to appoint and train the 2,000+ Poll Workers necessary for such an election. We would expedite the process by appointing those who served in the most recent General Election and then fill in where those folks can't or won't serve. The appointment letters would probably be mailed within 3 days of the catastrophe. The first training class would be scheduled for the 7th or 8th day following the catastrophe and conclude approximately 32 days later. We reserve between 5 and 7 days for verifying training, makeup classes and to deal with contingencies. I trust my staff's estimate, but under optimal conditions where we do not encounter any delays or other problems, we should be able to shave the time to about 40 very intense and long days.

b. The absentee process would not properly function within 21 days thus disenfranchising an undetermined number of voters. See the response to question 3 for details.

c. I believe the other processes involved in conducting a Special Election as you described could be completed within 28 days under optimal circumstances where we have trained and experienced augmentees and do not encounter any problems. These optimal circumstances include having the candidates names within 2 to 3 days of the beginning of the preparation period. These would be intense and long days of 12 to 14 hours with no days off. Where our warehouse augmentees lack experience and training, time necessary to prepare the voting machines for the election would most likely increase from 28 days to between 30 and 35 days. A complicating factor in this estimate is that the same person is responsible for several specialized tasks. These tasks are thus done sequentially. The technical requirements and expertise required for these tasks precludes them being assigned to different persons and completed simultaneously. This results in a longer total period to complete all the required tasks.

2. Is 21 days enough to conduct expedited special elections during crisis circumstances, as a matter of democratic integrity?

Most likely NO! The process of selecting candidates is very important. There needs to be an adequate amount of time (5 to 7 days at a minimum) for those involved to make intelligent choices. The custom in Delaware is to wait until after an elected official whose office is filled by a Special Election to be interred before a Special Election is called to fill his or her seat. A similar period should be considered as part of dealing with a national catastrophe. Additionally, campaigning would be limited and the voters would most likely not have sufficient time to make an informed and wise decision in a very important election.

3. Would 21 days effectively disenfranchise any voters, such as absentee voters, military and overseas voters, or other categories of voters?

ABSOLUTELY. Absentee ballots would most likely be available within 2 days of the time that the candidates for the election were set. Local folks who promptly submit their application for an Absentee Ballot would most likely have no problems voting within the 21 day period unless the volume is so heavy that we cannot process the applications and mail the ballots to meet our same day received (application) same day mailed (ballot) standard. Folks who are within the Continental United States and submit their applications promptly might not be able to complete the process within the 21 day period since it involves 3 mailings. Depending on their location a mailing could take as long as 5 to 7 days to reach its destination. The Federal Voting Assistance Program (FVAP) recommends 45 days transit time for mailing a ballot to an overseas person and receiving it back. This is a 2 mailing process (out and back). The scenario we are considering is a 3 mailing process (application mailed in, ballot mailed out and ballot returned) which would most likely increase that time. In the absence of other information, I believe the minimum time to allot for a 3 mailing process is 45 days. A significant delay by a voter in submitting his or her absentee application or in any other part of the process would greatly increase the probability that a person's ballot would not be received in time to be counted.

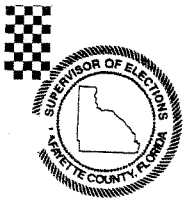
4. If 21 days is problematic, how long would it take to ensure proper mechanical operation of expedited special elections during crisis circumstances, consistent with democratic integrity, and offering all voters -- including absentee voters, military and overseas voters, and any other category of voters -- a meaningful opportunity to vote?

45 days from the date candidates are set. This would provide sufficient time to properly prepare, avoid disenfranchising absentee voters and to conduct a good election. Details for this estimate are in the responses to questions 1 through 3 above.

I hope that this is of some value. Thank you again for soliciting input from those most directly impacted. Please contact me if I can be of further assistance.

Sincerely,

HOWARD G. SHOLL, JR.
Deputy Administrative Director



Lana B. Morgan
Lafayette County Supervisor of Elections

September 5, 2003

Senator John Cornyn
Chm. Senate Subcommittee on the Const., Civil Rights and Property Rights
Dirksen Senate Office Bldg., Rm 139
Washington DC 20510

The Honorable Senator Cornyn:

I am writing regarding the questions relating to a proposed 21 day special election. Even under crisis circumstances, the 21 day election would be just about impossible. When we had the plain paper ballot and hand tabulation we could conduct an election on a four week turn around with the 10 day extension for military and overseas ballots. Since we have all automated equipment, I am afraid there would be no way to have the paper ballots printed on the required stock and the machines programmed in this short of a time frame. The ballot has to be laid out by the Supervisor before sending it to the printer.The printer has to lay it out using their overlay and then fax or email it back for proofing by the Supervisor of Elections office before the ballots can be printed. This process may take 5-7-days if the proofs are correct. It may be another 4-6 days, before I receive the ballots. Then the absentee ballots have to be mailed and the overseas ballots and at least two weeks has already passed. Poll workers have to be trained and the polling locations readied for use. The tabulation equipment must be tested, notice of the Logic and Accuracy test has to be advertised in the paper and the list goes on.

The cost of a Special Election is secondary to the other demands of conduction an election. The estimated cost to conduct a Special Election would be around $10,000 dollars and I am a very small county.

If you have any other concerns, just let me know and I will try to be as honest with you as possible.

Sincerely,
Lana B. Morgan
Lana B. Morgan
Supervisor of Elections
Lafayette County
Mayo FL 32066

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Vote or You Have No Choice

DONNA BRYANT
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September 4, 2003

Senator John Cornyn
Chairman, Senate Subcommittee on the Constitution, Civil Rights
and Property Rights
Dirksen Senate Office Building Room 139
Washington, DC 20510

Dear Senator Cornyn:

The foresight of the proposals pending in Congress on special elections in a national emergency situation is to be commended. Florida has had, in recent years, many special elections for legislative seats and has extensive experience in implementing those elections under a demanding schedule.

The cost of a special election for Osceola County, Florida, on optical scan equipment, is $168,874.80, for 100,000 voters.

The question of time to conduct special elections depends on a number of issues. Twenty-one days would be sufficient for our county if the Florida Statute 101.62 (mail absentee ballots to overseas voters 30 days before each election) was waived. Also the requirements of U.S. Justice for equal protection of minorities are a concern. Preparing ballots in several languages is a time factor to be considered. An election during the summer months in Florida would disenfranchise many voters who are "temporarily away" at that time as absentee ballots cannot be forwarded.

Military and overseas voters could timely vote if internet voting is utilized.

Thirty-five days to conduct the election would provide maximum opportunity for most, if not all, electors to cast their ballot.

Sincerely,

Donna Bryant

Donna Bryant
Supervisor of Elections
Osceola County

Email: osc_soe@osceola.org
AN AFFIRMATIVE ACTION = EQUAL OPPORTUNITY EMPLOYER

September 4, 2003

Senator John Cornyn, Chairman
James C. Ho, Chief Counsel
Senate Subcommittee on the Constitution,
Civil Rights and Property Rights
Dirksen Senate Office Building Room 139
Washington, D.C. 20510

Dear Senator:

With response to your request as to whether 21 days is enough time to feasibly and practically conduct expedited elections in the direct aftermath of a catastrophic attack on Congress, I will respond to your questions in the order asked.

1. It would probably be possible to conduct a special election in 21 days during special circumstances, mechanically, but it would be a real stretch. In Sarasota County, preparation of the ballot would take at least one full day; it would take a week to write and get a return on our absentee ballot, although this could be a problem strategically with all of the vendors needing to respond in such a crunch period and could take much longer. This would leave about 14 days to mail and have absentee ballots returned. Preparation of 1600 DRE's would require two weeks time with delivery taking one week, if all goes smoothly. Poll workers would need to be recruited (approximately 1800) and trained. Polling locations would need to be secured. There is also a question of how the election would be advertised. What about those away from home, or military or overseas? How would we handle candidate qualification and candidate finance concerns?

2. Is 21 days enough to conduct expedited special elections during a crisis circumstance, as a matter of democratic integrity? My response is no. With elections under the microscope since 2000 and with the many required elements listed above, we could be sacrificing the integrity of the election. There is too much room for error that would be multiplied in a crisis situation. Many voters could be disenfranchised, casting doubt on the outcome of the election.

3. Absentee, military and overseas voters could be effectively disenfranchised. In 2000, even with the 10 day extended period following the election in Florida, many voters still did not have sufficient time for their ballots to be returned and counted.

4. We discussed the amount of adequate time to ensure a good election recently in Florida when we discussed the elimination of the second primary.

Our compressed election cycle with the second primary allowed for only 9 weeks for three elections. Florida Supervisors of Elections argued that this was an impossible time frame and suggested to our legislature a minimum of eight weeks preparation time. The legislature, in turn, suspended the second primary. So my opinion is a minimum of eight weeks.

With reference to the cost of such a special election, I estimate it would take $400,000 in Sarasota County alone. This would include overtime, extra security measures and extra technical support which would be critical in a RUSH environment.

I believe it wise to ask the advice of the election officials who are actually in the trenches and have the expertise to make elections happen. I thank you for the opportunity to share my thoughts with you.

Sincerely,

Kathy Dent
Supervisor of Elections
Sarasota County, Florida

OFFICE OF
KAREN S. KRAUSS
Supervisor of Elections
Sumter County

DATE: September 4, 2003

TO: James C. Ho, Chief Counsel

FROM: Karen S. Krauss, Supervisor of Elections

SUBJECT: Expedited Elections

As a Supervisor of Elections, these are my concerns regarding expedited elections within 21 days of a catastrophic terrorist attack on Congress.

Sumter County uses the iVotronic Touch Screen Voting Machines. To put on a countywide election there is a lot of preparation time involved such as ballot layout, coding, loading and testing the machines but even more of a concern is the turn around time on getting the absentee ballots printed and ready to mail. If you look at the current laws in Florida there is very little room for error in preparing for an election as far as the preparation time. There are also other matters to be considered such as available polling places, training and placing poll workers, supplies, logic and accuracy tests, legal advertising, canvassing board members, sample ballots and we also have early voting at least 10 days before each election.

You also inquired about disenfranchising any voters, such as absentee voters, military and overseas voters and others. With a 21 day time frame I would say yes this would be a major problem. Everything that has to be prepared for these voters just cannot be accomplished in 21 days and plus receive these ballots back in sufficient time.

As for the cost of a special election, it wouldn't be any less than what it costs right now to put on a county wide election. Sumter County is not a very large county but it would still cost approximately between $70,000 and $80,000.00 which would not be budgeted for in the above situation. It could cause a hardship on the smaller counties.

I hope I have been of some assistance. Please know that every Supervisor of Elections would do anything within our power to put on a successful election for our voters but we are not miracle workers either. We must have sufficient time to do our jobs successfully.

Respectfully,

Karen S. Krauss
Supervisor of Elections
Sumter County

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FAX: (352) 793-0232 • http://www.sumterelections.org • E-Mail: *Kkrauss@sumterelections.org*

Gertrude Walker
Supervisor of Elections
St. Lucie County

2300 Virginia Avenue • Ft. Pierce, Florida 34982 • (772) 462-1500 • Fax (772) 462-1439

From: **Gertrude Walker**
St. Lucie County Supervisor of Elections

To: **The Honorable James Ho**
Chief Counsel
U.S. Senate Subcommittee on the Constitution, Civil Rights and Property Rights

Date: **September 9, 2003**

Subject: **Requested reply**

I am aware of the 21-day proposal and listed below are my answers and concerns:

1. **Is 21 days enough to conduct expedited special elections during crisis circumstances, as a mechanical matter?**

   Answer: NO. 21 days is NOT sufficient time to prepare for a possible countywide election especially during a crisis situation such as a terrorist attack on America.

2. **Is 21 days enough to conduct expedited special elections during crisis circumstances, as a matter of democratic integrity?**

   Answer: NO. The time it takes to contact, prepare a contract; confirm ADA compliance of polling places alone takes more than 20 days. Not to mention a qualifying period that is equal and fair to all, appointing/training poll workers, ordering/preparing and testing ballots and systems setup would take at least 45 days or longer.

3. **Would 21 days effectively disenfranchise any voters, such as absentee voters, military and overseas voters, or other categories of voters?**

   Answer: Yes. Additionally assuming this is a result of a terrorist attack, how would we expect ballots to be shipped to cover a countywide election? Chances are that shipping; airlines and trucking agencies would be on high alert and generally not in operation until the country was back on stable ground. This would make ballot orders next to impossible.

4. **If 21 days is problematic, how long would it take to ensure proper mechanical operation of expedited special elections during crisis circumstances, consistent with democratic integrity, and offering all voters – including absentee voters, military and overseas voters, any other category of voters – a meaningful opportunity to vote?**

   Answer: 45 days. There would be a huge disenfranchisement of the overseas and military personnel that are protecting our country. Since the average mailing deadline of 35 days prior to the election is insufficient, and we add the additional 10 days afterwards, that gives a total of 45 days. I would consider this the absolute minimum to assure the integrity of the election.

The estimated cost associated for running such elections would be $400,000.00. Hopefully what I have contributed will help.

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Kurt S. Browning

Supervisor of Elections
Pasco County
Post Office Box 300
Dade City, FL 33526-0300

September 10, 2003

Mr. James C. Ho
Chief Counsel
U.S. Senate Subcommittee on the Constitution,
Civil Rights and Property Rights
Dirksen Senate Office Building, Room 139
Washington, D.C. 20510

Dear Mr. Ho:

I apologize for the delay in getting this information to you as requested by Mr. Ed Kast, State Director, Florida Division of Elections. I hope the following information will still be of some value to you.

It is my opinion after having served 24 years as the Supervisor of Elections for Pasco County, Florida, that 21 days does not give enough time to adequately prepare for and conduct an election. In the event of a terrorist attack on Congress, the last thing that should be contemplated would be hastily held elections. Under this scenario, it would be adding insult to injury.

Additionally, conducting an election within 21 days would be very problematic as it relates to preparing and mailing absentee ballots to overseas servicemen and women. It would also not allow sufficient time for the timely return of these ballots to be counted.

My opinion is that it would take a minimum of 45 days with 60 days being more realistic. Also, as requested, an election will cost Pasco County approximately $225,000.00

I appreciate the opportunity to comment on this issue. As always, please call me if you have any questions or need additional information.

Sincerely,

Kurt S. Browning

KSB/tlc

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pascovotes.com

Founded in 1946, the F.S.A.S.E. is a professional association of Florida's Supervisors of Elections. The Association seeks changes in election laws to benefit voters, provides educational opportunities for its members and offers a forum for the exchange of ideas among election officials.

Executive Committee 2003-2004

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Ronald Labasky, Esq.

September 8, 2003

Senator John Cornyn
Chairman, Senate Subcommittee on the Constitution, Civil Rights and Property Rights
Dirksen Senate Office Building Room 139
Washington, DC 20510

Dear Senator Cornyn:

It has been brought to my attention that Congress is considering having expedited elections in the event that a catastrophic terrorist attack on Congress occurs. I have a few concerns about the logistics of having a special election only twenty-one days after just such an event. They are as follows:

Absentee ballots would not have enough time to be created, proofed, printed, mailed to voters and then mailed back to our office. Absentee voters, military and overseas voters would definitely be disenfranchised. Florida law presently states absentee ballots must be mailed to overseas voters thirty-five days before the primary and forty-five days before the general in order to allow adequate time for the voter to receive and return their ballot. Obviously, if we only had twenty-one days this would not happen.

Hypothetically, we could create an absentee ballot in three days, one day for proofing, one week for it to be printed, three days to stuff and mail the ballots, and we are already up to fourteen days before the ballots are even mailed. Once the absentee ballots have been created, we would then be able to move on to creating and proofing ballot for the touchscreen machines. The touchscreens then get programmed, tested and prepared to be shipped to the polling locations. At the bare minimum we need forty-five days in order to accomplish all of the above and not compromise the integrity of the election.

The cost of having a special election in the event of just such a crisis would cost Indian River County, Florida, with 74,000 registered voters, $145,000.

Sincerely,

Kay Clem

Kay Clem
President, Florida State Association
Of Supervisors of Elections

F.S.A.S.E. • P.O. Box 350 • Tallahassee, FL 32302 • (850) 681-0311

SEP-05-2003 FRI 03:15 PM ID SECRETARY OF STATE FAX NO. 1 208 334 2282 P. 02

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SECRETARY OF STATE

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Trademarks/Notaries Division
208 334-2300
Elections Division
208 334-2852
Legislative and Executive Affairs
208 334-2300
Fiscal Division
208 334-5355
Computer Services
208 334-5354

September 5, 2003

Mr. James C. Ho
Chief Counsel
U.S. Senate Subcommittee on the Constitution,
Civil Rights & Property Rights
Dirksen Senate Office Building, Rm. 139
Washington, DC 20510

Dear Mr. Ho:

As chief election official for the State of Idaho, I am concerned with any proposal that would require an election to be conducted in a 21 day time period. There is no question that 21 days would be a mechanical nightmare, integrity of the election would be compromised and certainly absentee voters, particularly military and overseas voters would be disenfranchised unless the deadline to accept absentee ballots were extended several days after the day of the election.

I believe that at least a six week period would be required to enable election officials and voters to maintain integrity in the election process. I further believe that if the unfortunate situation arises, an immediate appointment to fill the vacancies would allow our national government to continue to operate at a most critical time.

I would appreciate your assistance in conveying my concerns and thoughts to Chairman Cornyn.

Sincerely,

Ben Ysursa

BEN YSURSA
Secretary of State

BY/pdy

STATE OF INDIANA

TODD ROKITA, Secretary of State

J. Bradley King, Co-Director
Kristi Robertson, Co-Director

ELECTION DIVISION
302 WEST WASHINGTON STREET, ROOM E204
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September 3, 2003

The Honorable John Cornyn, United States Senator
Chairman, Senate Subcommittee on the Constitution, Civil Rights and Property Rights
United States Senate
Dirksen Senate Office Building Room 139
Washington, DC 20510

Dear Senator Cornyn:

Thank you for the opportunity to comment regarding the proposals pending before the Subcommittee which would require special elections to be held to fill multiple congressional vacancies resulting from a catastrophic event.

We write to express our concern that requiring these special elections to be held within 21 days after a catastrophe would result in the disfranchisement of both candidates and voters, and would undermine public confidence in the legitimacy of the election process.

Although it is conceivable that these special elections could be conducted on an expedited schedule, attempting to do so within a 21 day period would effectively prohibit Democratic and Republican party candidates from being nominated in a primary, and would preclude the nomination of independent or minor party candidates through any voter petitioning process. In the aftermath of a national emergency that would prompt these special elections, election procedures which impose additional restrictions on the ability of voters to nominate and choose among candidates for office will undermine their confidence in the integrity of the election process.

A 21 day special election schedule would have a dramatic impact on the ability of military and overseas voters to participate in the election process. For many years, the Federal Voting Assistance Program within the Department of Defense has advocated a 45 day turn-around time for absentee ballots to reach and be returned by military and overseas voters as being the minimum period necessary to prevent the disfranchisement of these voters.

Since absentee ballots are not printed and distributed to any voters until after the list of candidates has been finalized, the actual time available for any absentee voter to receive and cast an absentee ballot would be significantly less than 21 days. Large numbers of disabled and other voters who can rely on the U.S. Postal Service to deliver and return

absentee ballots on time would lose their opportunity to participate due to the expedited schedule required for a special election held within a 21 day period.

The selection of polling places for these special elections would result in an additional impediment to the election process, and could result in the disfranchisement of voters. Many local jurisdictions must enter into contracts with private businesses (and even some homeowners) to use a facility as a polling place in any election, and currently must do so thirty to sixty days before election day to ensure that the facility will be available. Given such short notice for a special election, many usual polling places are likely to be unavailable. If it becomes necessary to consolidate polling places as a result, voters will have less opportunity to learn where the polling place has been relocated. Some voters will inevitably lose their race against the clock to reach the correct polling place before the polls close.

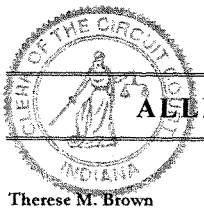
In summary, a 21 day schedule for special elections has the potential to undermine public confidence in the election process just when this confidence would be needed most.

If the Subcommittee chooses to recommend the enactment of legislation to provide for special elections in these cases, we would urge that a more realistic time period to accommodate the legitimate interests of voters, candidates, and political parties, such as 30 to 60 days, be considered. In any event, federal legislation in this area should be very narrowly tailored to address the catastrophic scenario, and not spill over into any other type of special election for federal office.

Thank you for your consideration of our comments regarding this matter.

J. Bradley King
Co-Director

Kristi Robertson
Co-Director



ALLEN COUNTY ELECTION BOARD

Therese M. Brown
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Pamela Finlayson
Director of Elections

September 8, 2003

James C. Ho
Chief Counsel
U.S. Senate Subcommittee on the Constitution
Civil Rights & Property Rights
Dirksen Senate Office Building Room 139
Washington, DC 20510

Dear Mr. Ho,

Mr. R. Doug Lewis, Executive Director of the Election Center, asked me and other Election Officials to respond to your inquiry as to whether 21 days is enough time, either as a mechanical matter, or as a matter of democratic integrity, to conduct special elections during crisis circumstances. I will attempt to respond as succinctly as possible.

I believe responses from election officials will relate directly to each jurisdiction's size, voter registration system and voting system. Allen County, Indiana serves approximately 210,000 active registered voters. We have 298 precincts. We have a fully automated voter registration system. We use a first generation Direct Recording Electronic Voting System for precinct voting and Optical Scan Ballots for absentee voting.

I have some experience with putting together a federal level special election. In 1989, ten counties in northeast Indiana had to hold a special election to replace Dan Coats who was then our Representative for the then 4th U.S. Congressional District. The Governor of Indiana put out the notice of special election on January 8, 1989. The candidates were selected by caucus of precinct committeemen of the Republican and Democratic Parties and certified by the Secretary of State on February 8, 1989. We received certification of candidates on Monday, February 13, 1989 and held an election on Tuesday, March 28, 1989. This gave us 56 working days from date of announcement and 30 working days from date of certification of the candidates. I do not remember working weekends or overtime for this election. Election preparation was straightforward.

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Phone (260) 449-7329 • Fax (260) 449-7908
E-mail pam.finlayson@co.allen.in.us
www.allencounty.us

The key elements for success would be the response of the general public and governmental structures, strong leadership in each jurisdiction and a crisis election plan in place. We find that local people respond to an emergency. I have faith that in a crisis situation, all forces would come together for a solution. That said; the primary consideration is simple logistics.

With the simplified ballot of a special election, we could vote people by regions in a few large voting locations. This level of consolidation is not possible in most elections with the large number of districts that come into play on each ballot. Consolidation would equate to fewer voting locations and more efficient use of precinct workers and equipment. This efficiency would lighten the burden of precinct worker recruitment, notification and training and voting location setup. This efficiency would also require the use of fewer machines since voters would move through the voting process at a much faster rate.

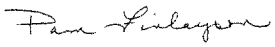
> Is 21 days enough to conduct expedited special elections during crisis circumstances, as a mechanical matter?
>
> Is 21 days enough to conduct expedited special elections during crisis circumstances, as a matter of democratic integrity?
>
> Would 21 days effectively disenfranchise any voters, such as absentee voters, military and overseas voters, or other categories of voters?
>
> If 21 days is problematic, how long would it take to ensure proper mechanical operation of expedited special elections during crisis circumstances, consistent with democratic integrity, and offering all voters -- including absentee voters, military and overseas voters, and any other category of voters -- a meaningful opportunity to vote?

When we look at 21 days, we realize we are looking at 21 days of non-stop work, no days off, with overtime. If everything came together for us and we modified some processes currently required in Indiana, we in the Allen County Election Board office believed we could have everything in place within 21 days except for absentee voting. This process cannot begin until the candidates are in place and the ballots prepared. I would imagine that a week would be a conservative estimate of time required for candidate selection and ballot preparation. Some voter verification must remain in place or this type of voting can be abused on a large scale. There is also the simple logistics of communication with these voters and turn around time for ballot material. With that, we have now reduced the voting period to two weeks. During that two-week period we also need time to schedule bi-partisan teams to go into the field and vote those who are confined. We do not believe we can turn around the ballot material that fast and not disenfranchise voters.

In Allen County, Indiana, we believe we would need at least 30 days for the entire process with at least 21 days for voting absentees. We can fax ballots to overseas voters in Indiana. E-mail and faxed communication would have to be fully utilized. Mail service would not meet the needs of those overseas.

All of our considerations are based upon the presumption that our county has not been attacked and we are fully functional. I hope you find this information helpful as you work through this important question.

Sincerely,



Pam Finlayson
Director of Elections
Allen County, Indiana

SEP-08-2003 MON 12:49 PM FAY CO CLK LIEN DEPT FAX NO. 859 225 5754 P. 02

Donald W. Blevins
Clerk of Fayette County

September 8, 2003

James C. Ho
Chief Counsel
U.S Senate Subcommittee on the Constitution, Civil Rights and Property Rights
Dirksen Senate Office Building Room 139
Washington, D.C. 20510

Dear Mr. Ho:

Mr. R. Doug Lewis has asked members of the Election Center to take the opportunity to respond to your questions relating to the aftermath of a catastrophic terrorist attack on Congress and conducting expedited special elections within 21 days. I would like to state that I feel it was a very wise decision on your part to ask these questions of those officials that would be dealing directly with the situation and I thank you for this opportunity.

I can relate personally to limitations that must be considered when any type of election is to be conducted within my jurisdiction. I have been elected County Clerk for Fayette County Kentucky since 1981. For the past 22 years it has been my statutory responsibility to provide all aspects for elections. I also, by statute, serve as the Chairman of the Fayette County Board of Elections. Fayette County has approximately 165,000 voters, 251 precincts, and over 1,000 election officers that serve at the polling places. I served on the Election Center's National Task Force on Election Reform, the Kentucky Help American Vote Act Advisory Committee and numerous other Task Forces in Kentucky.

1. **Is 21 days enough to conduct expedited special elections during crisis circumstance, as a mechanical matter?**

NO. It would be physically impossible to complete even minimum requirements for any election in 21 days.

Candidate Filings - Time would be required to allow for candidates to file for office. Independent candidates (which require large numbers of voter signatures on petitions) and minor party candidates must be given ballot access. Just a very few days here would back up the entire process but ballot access must be protected.

Ballot and Voting Device Preparation - Time must be allotted for ballot preparation once the candidates who are to appear on the ballot are known. Minimum turnaround time in my jurisdiction for absentee ballot printing for the simplest ballot is 10-12 days. The vendor who sets our voting devices (a DRE Shouptronic 1242) also sets devices for 90 of our 120 counties. The vendor could not physically do this in 21 days. Another situation that must be considered is

162 East Main St. • Lexington, KY 40507 • 859 / 253-3344
Fax 859 / 231-9619

the requirement that machines remain impounded for 30 days after any general election. What if the catastrophe happened during this time period? This problem could be solved with legal changes by federal statute, but all machines need to be locked at least 10 days to protect the integrity of the previous election as well as to provide for the possibility of recanvass and recounts. After the machines are set they must then be tested by staff and certified by the Board of Elections. This increases the time element by at least two days. There is the need for the machines to be delivered to the voting precincts. We contract a moving company to complete this task. This takes, at the very least, eight days.

Precinct Locations - We usually have about four months to secure proper, handicap accessible locations for all precincts. The facilities have time to plan for election days well in advance. Without advance notice and confirmation, many locations would not be available for voters. There is also the added problem of informing voters whose locations have changed, of where they will be voting. This would increase the amount of work required by our staff as well as expenses and would require a time allotment to complete.

Election Officers - One of the major challenges would be to secure election officers to serve at the polls. Again, time and planning are the things that make an election happen. Many officers would not want or be able to serve. In this case, statutes regarding numbers of officers and parties of officers protect the fairness and integrity of the election and need to be kept in place. Even in the best of situations securing election officers has become a most difficult task. Training of officers and training facilities are other avenues that must be taken into consideration. Training officers and having them at the facility on election day would be physically impossible to accomplish in 21 days.

Staff Numbers and Time - Regular staff experienced in election detail is limited. This type of personnel with election knowledge and expertise is not readily available. Additional staff would be required and be required to work quite a bit of overtime to complete tasks not requiring specific election knowledge. I think it would also be a factor to consider "Patriotic Depression" of all Americans and workers after a catastrophe of this nature.

Absentee Voting - 21 days would definitely disenfranchise many voters, especially senior citizens, military, and overseas voters. (See question 3 for detailed explanation.)

2. Is 21 days enough to conduct expedited special elections during crisis circumstances, as a matter of democratic integrity?

NO. Elections are important business and even though continuity would be a factor in this situation it would not be fair to American voters to push elections so quickly that they feel disenfranchised, especially during a time of catastrophe. Out of respect to lost Americans, campaigning would be limited and many people would be uninformed. There would not be sufficient time for candidates to take stands on many issues, let alone get their ideas to the voting public.

3. Would 21 days effectively disenfranchise any voters, such as absentee voters, military and overseas voters, and other categories of voters?

YES, YES, YES. In my jurisdiction it would be impossible to have absentee ballots printed in less than 10-12 days from the time the candidates are known. This would leave only 9 or 10 days to mail ballots out and have them returned by mail. Three specific groups would be severely affected by this limited time factor. Military and overseas citizens for obvious postal reasons would be affected. American troops serving overseas in combat areas would be completely disenfranchised. Senior citizens would be affected simply because it takes them a longer time period to do things. They usually make plans for absentee voting well in advance and many of these ballots would not be returned. Regular paper absentee ballots in Kentucky require four separate mailings between the voter and the county clerk. Mail delivery would make it impossible to mail and receive ballots to voters with this limited time frame.

Federal law requires a minimum of 30 days for absentee ballots. If an absolute minimum of 35 days was allowed to conduct the election, most overseas citizens and military would be completely disenfranchised. It is never desirable to disenfranchise any group but military and overseas citizens represent the smallest number of voters. After a terrorist attack of such magnitude, this situation may be acceptable but certainly not desirable.

4. If 21 days is problematic, how long would it take to ensure proper mechanical operation of expedited special elections during crisis circumstances, consistent with democratic integrity, and offering all voters – including absentee voters, military and overseas voters, and any other category of voters – a meaningful opportunity to vote?

From my experience a minimum of 45 days from the day the candidates are set would be the absolute minimum. This would provide sufficient time to conduct the election with integrity and fairness and without disenfranchising absentee, overseas citizens and military voters. Keep in mind that time is included here for proper respect to the situation, ballot access, certifying candidates, printing and mailing absentee ballots, securing and training election officers, securing polling locations and providing extra staff. Elections are a very precise business and must be conducted in a manner where all mistakes are eliminated before the election begins.

A total of 50 states must be taken into consideration when setting a time element of this nature. States are dealing with many new situations such as statewide data bases, provisional voting, and new voting devices and vendors resulting from the Help America Vote Act. This opens the election process to a wide opportunity for mistakes. A time element too pressing could well result in unforeseen disasters and loss of voter confidence in the election process.

Sincerely,

Don Blevins

Donald W. Blevins
Fayette County Clerk
Chairman,
Fayette County Board of Elections

SEP-08-03 MON 04:12 PM STATE BOARD OF ELECTIONS FAX NO. 5025734369 P. 02

State Board of Elections

140 Walnut Street
Frankfort, Kentucky 40601-3240
Phone: (502) 573-7100 Fax: (502) 573-4369
Website: www.sos.state.ky.us/elecdiv.htm

John Y. Brown III.
Chairman

Mary Sue Helm
Executive Director

September 8, 2003

The Honorable John Cornyn
United States Senator
Chairman, Senate Subcommittee on the Constitution, Civil Rights and Property Rights
Dirksen Senate Office Building Room 139
Washington, DC 20510

Dear Senator Cornyn:

We have recently been made aware of a 21-day proposal for filling vacancies in congressional offices as result of a disaster or emergency situation. We are very concerned with maintaining the integrity of an election in such a short time span.

Our current state law on vacancies in congressional offices calls for an election 35-days from the time the Governor issues a proclamation of the vacancy. The statute allows ample time for candidate nomination, election preparation including printing of the ballot, publishing of the ballot in the newspaper, and absentee voting.

It is often very difficult for voters to request the absentee ballot application, fill out and send back, mail ballot back to voter, voter fill out and mail to election official within our current 50-day absentee voting for regular elections, and our 15-day absentee voting for all special elections. If we were to adjust our current 35-day special elections to a 21-day election, we would have to diminish our absentee voting time, which would adversely affect the voter.

We would prefer a minimum 35-day time frame for conducting a vacancy in congressional office election. Thank you for your time and please do not hesitate to contact our office should you have any questions.

Sincerely,

Sarah Ball Johnson
Assistant Director

MARYLAND

STATE BOARD OF ELECTIONS

P.O. BOX 6486, ANNAPOLIS, MARYLAND 21401-0486 PHONE (410) 269-2840

Linda H. Lamone, Esq.
Administrator

Timothy G. Augustine
Deputy Administrator

Ross Goldstein
Terry Holliday
Candidacy and Campaign Finance

September 5, 2003

Via Facsimile and Electronic Mail Only

The Honorable John Cornyn
Chairman, Senate Subcommittee on the Constitution, Civil Rights, and Property Rights
United States Senate
139 Dirksen Senate Office Building
Washington DC 20510

Dear Senator Cornyn:

Thank you for the opportunity to comment on the proposals concerning the continuity on Congressional operations. As the Administrator of Elections for the State of Maryland, I would like to offer a pragmatic opinion on the proposal requiring special elections to be held within 21 days to fill congressional vacancies resulting from a catastrophic event.

Election administration is a complex and interdependent operation. While many election preparation activities occur simultaneously, there are many fundamental activities that must be completed in a specific order and are dependent upon previously completed events. Any shortening of the time required to have a special election will significantly impact the electoral process, the participation of candidates and voters, and undermine public confidence in the electoral process. The proposal to require a special election within 21 days after a catastrophic event would **not** be feasible in Maryland.

Although special elections are often conducted on an expedited schedule, conducting a special general election within 21 days of a catastrophic event would effectively prohibit the Democratic and Republican Parties from nominating candidates through their primary election process, preclude the use of the petition process to nominate candidates from other political parties, and limit the timeframe for voter registration. Additionally, the administrative steps required to conduct an election (i.e., accepting candidate filings, ballot preparation, identifying polling places, recruiting and training election judges, absentee voting) could not be completed within 21 days. This proposal would significantly alter the normal democratic processes and would jeopardize the public's confidence in the openness, fairness, and integrity of the electoral process.

In addition, conducting a special election within 21 days of a catastrophic event would effectively disenfranchise absentee, disabled, military, and overseas voters. This timeframe does not provide sufficient time for the absentee ballot application process, the finalization of the candidate list, the printing and mailing of absentee ballots, and the return through the U.S. Postal

(410) 974-2019
Relay Service (800) 735-2258

Toll Free Phone Number (800) 222-8683
http://www.elections.state.md.us

151 West Street, Suite 200
Annapolis, Maryland 21401

Sep-08-03 07:38 From-MD STATE BOARD OF ELECTIONS 410 974 2019 T-367 P.002 F-648

Service of the voted ballot. You should be aware that the Department of Defense's Federal Voting Assistance Program advocates a minimum timeframe of 45 days for absentee voting by military and overseas voters.

If the Subcommittee chooses to recommend the enactment of legislation to provide for special elections in this case, I would recommend that a more reasonable timeframe be considered. Under current Maryland law, a special election for a vacancy in the office of Representative in Congress must be scheduled at least 36 days after the date that the vacancy occurs. For a vacancy in the office of United States Senator, the Governor appoints an individual to fill the vacancy, and unless the vacancy occurs within 21 days before the filing deadline, the special elections are scheduled for the same time as the next regular statewide primary and general elections. The statutory method of filling a vacancy in the office of United States Senator is the most cost effective and orderly process to conduct a special election.

Although Maryland's timeframe is tight, it does afford the election administration process to be completed while providing sufficient time for candidates and voter to participate and maintaining public confidence in the electoral process. As suggested by other states, I would urge the U.S. Congress to restrict any legislation requiring a special election within a specific timeframe to be limited only in response to a catastrophic event.

Lastly, the cost of a special election with Maryland's current voting equipment would be approximately $8 million. This estimate is based upon the use of optical scan voting equipment. Because Maryland is in the process of implementing a Direct Recording Electronic (DRE) voting system statewide, the estimated cost of a special election using a DRE voting system is unknown.

Thank you for allowing election officials to provide our practical experience while the Subcommittee is considering these proposals. If you or your Subcommittee staff have any questions or require additional information, please do not hesitate to contact me at 410-269-2840.

Sincerely,

Linda H. Lamone

Linda H. Lamone
Administrator

LHL/nbt

Sep-08-03 07:38 From-MD.STATE BOARD OF ELECTIONS 410 974 2018 T-367 P.003 F-649

Cook County Auditor-Treasurer

COURT HOUSE • P.O. BOX 1150 • GRAND MARAIS, MINNESOTA 55604-1150 • (218) 387-3000 • FAX (218) 387-3043

Braidy Powers
(218) 387-3000 ext 146
braidy.powers@co.cook.mn.us

September, 5, 2003

To Whom It May Concern:

Cook County is a very small rural county. We could mechanically conduct a hand-count paper ballot election with the county courthouse as the sole polling place within the 21 days.

I believe that the integrity of the process would suffer greatly. Would the candidates be of high quality? The election judges would not be as well trained as usual. Would the electorate be as aware of the election and the of the candidates' qualifications as they should be? Would the electorate be able to make good decisions based on very little information?

I believe that overseas and absentee voters would effectively be disenfranchised. Many people plan activities around the electoral cycle. They would be caught without time to make changes. Marginal voters of any type would be caught unawares and lose the option to vote.

I believe it would take at least twice what is being proposed, that is, 42 days.

I think a better option would be for states to have an orderly rule of succession for federal offices, much like the presidency, with an orderly special election to follow.

Sincerely,

Braidy Powers
Cook County Auditor-Treasurer

CHIPPEWA COUNTY AUDITOR/TREASURER

Telephone 320-269-7347 • 629 North 11th Street • Montevideo, Minnesota 56265

JON CLAUSON
Auditor/Treasurer

September 5, 2003

Senator John Cornyn, Chairman
Senate Subcommittee on the Constitution,
Civil Rights and Property Rights
Dirksen Senate Office Building, Room 139
Washington, DC 20510

RE: Election Law Proposals

Dear Senator Cornyn,

It has come to my attention that there are proposals being considered that would provide a 21 day time period for emergency elections to be held as the result of attacks that would cause the loss of life of a large number of congressional officers and/or other elected officials.

In my opinion a 21 day time period does not provide sufficient time to conduct an election under any circumstances. Currently, in Minnesota we operate on an approximate 60 day cycle with most precincts using some sort of electronic vote counting equipment (precinct count or central count optical scan). The 60 day cycle includes the filing period all the way through to election day. This time line is extremely tight when considering computer programming and ballot printing and distribution.

Whether a crisis situation or a regular election, a 21 day time frame is almost impossible to make without jeopardizing democratic integrity. I think the recall election in California is a good example. Consider the number of candidates who filed for election and the process needed to trim that number down for a fair election.

The Help America Vote Act (HAVA) is presenting a number of challenges to election administrators already. Only having 21 days would make it very difficult to provide equal access to overseas and military voters.

I hope that my input is useful, if you have questions I can be reached at 320-269-7447 or by email to jclauson@co.chippewa.mn.us.

Respectfully,

Jon Clauson

Jon Clauson,
Auditor/Treasurer

AN EQUAL OPPORTUNITY EMPLOYER

Property Records and Revenue
Director
Dorothy A. McClung
845 Government Center West
50 West Kellogg Boulevard
St. Paul, MN 55102-1696

Fax: 266-2199
TTD#: 266-2002

September 4, 2003

James C. Ho
Chief Counsel
U.S. Senate Subcommittee on the Constitution, Civil Rights & Property Rights
Dirksen Senate Office Building, Room 139
Washington, DC 20510

Dear Mr. Ho,

I am the election official for Ramsey County, Minnesota and have the following responses to your four questions.

1. Is 21 days enough to conduct expedited special elections during crisis circumstances, as a mechanical matter?

   Answer: Yes. We have conducted special elections in less than 21 days.

2. Is 21 days enough to conduct expedited special elections during crisis circumstances, as a matter of democratic integrity?

   Answer: Yes.

3. Would 21 days effectively disenfranchise any voters, such as absentee voters, military and overseas voters, or other categories of voters?

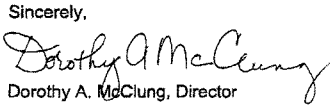
   Answer: Some voters residing overseas in remote locations would clearly be disenfranchised by an election process that encompassed only 21 days from start to finish.

4. If 21 days is problematic, how long would it take to ensure proper mechanical operation of expedited special elections during crisis circumstances, consistent with democratic integrity, and offering all voters – including absentee voters, military and overseas voters, and any other category of voters – a meaningful opportunity to vote?

Answer: We periodically conduct special elections within 33 days of an election being called. However, to ensure that all voters, particularly those overseas, are able to vote, it would be better to have a 56 day window in which to conduct a special election. In lieu of such a schedule, it may be beneficial for Congress to authorize voting at U.S. military and consular facilities overseas, with expedited delivery of election materials to and from the United States. Alternatively, some form of electronic voting could be made available to overseas voters.

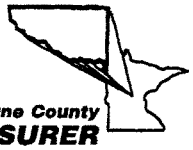
If you have any additional questions about the special election process, please feel free to contact me.

Sincerely,



Dorothy A. McClung, Director

DAM:ck



Sherburne County
AUDITOR/TREASURER
RAMONA DOEBLER

September 4, 2003

James C. Ho, Chief Counsel
U.S. Senate Subcommittee on the Constitution,
Civil Rights & Property Rights
Dirksen Senate Office Building, Room 139
Washington, DC 20510

Re: Disasters and Congressional Elections

Dear Mr. Ho:

In these unusual times, I can see that it is important to have laws, policies, and rules in place to deal with such disasters, and for us to pray that such terrible things never happen again.

I should first tell you that our county had a 2002 population of 71,537, and that we are one of the fastest growing counties in Minnesota. Currently, there are almost 38,000 registered voters in 29 voting precincts in Sherburne County. So, my comments and opinions are based only on my knowledge and experience administering elections in this county for the past 33 years. I appreciate your asking for local officials' opinions and hope that they will be of some benefit.

1. Is 21 days enough to conduct expedited special elections during crisis circumstances, as a mechanical matter?
21 days (3 weeks) is not much time. However, in emergencies we do and have done what we have to administer elections properly. With the technology available today for drafting and printing ballots, the coming of the DRE terminals, etc. it could be done in Sherburne County.

2. Is 21 days enough to conduct expedited special elections during crisis circumstances, as a matter of democratic integrity?
After the tragedy September 11, just two years ago, I think we were first stunned that such a terrible thing could happen in our country. It's hard to say how the American public would react to another devastating event such as this. 21 days might not be enough time for many voters to be ready to educate themselves about candidates, much less to believe proper elections could be prepared and accomplished in such a short amount of time.

3. Would 21 days effectively disenfranchise any voters, such as absentee voters, military and overseas voters, or other categories of voters?
In Minnesota 30 days is required for absentee ballots to be available prior to any election. Most applications and voted ballots come in the last 2 to 3 weeks before Election Day for

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Elk River, MN 55330-4601
763-241-2861 ❑ 1-800-438-0576 ❑ Fax: 763-241-2869

the Federal, State and County Elections. If the availability of absentee ballots is communicated thoroughly, military and overseas voters are accommodated and allowed to vote via the Internet or other means to guaranty their voted ballots will be accepted and counted, etc. this should not disenfranchise anyone. The new HAVA requirements should help enable anyone who wishes to vote to be able to do so.

4. If 21 days is problematic, how long would it take to ensure proper mechanical operation of expedited special elections during crisis circumstances, etc...
As I wrote earlier, I think an election within 21 days is feasible in Sherburne County, but more time would be better for the following reasons. The more time the public would have to recover from the shock of such an event, chances would be better they would be prepared to vote and believe elections were administered correctly and fairly, and with democratic integrity. More time would also show there was consideration given to voters, and to the diverse qualities and conditions of the individual states.

Sincerely,

Ramona Doebler

Ramona Doebler, Auditor/Treasurer
Sherburne County, Minnesota
13880 Highway 10 NW
Elk River, Minnesota 55330
763-241-2867 or 1-800-438-0576

Mary Kiffmeyer
MINNESOTA SECRETARY OF STATE

September 8, 2003

Senator John Cornyn
Chairman
U.S. Senate Subcommittee on the Constitution
Civil Rights & Property Rights
Dirksen Senate Office Building Room 319
Washington, D.C. 20510

Dear Senator John Cornyn:

We have been asked to respond to H.R. 2844 that would require states to hold special elections for the House of Representatives in extraordinary circumstances. I am submitting to you many of the same comments that I made to the House Committee on this issue.

Minnesota could, with changes to certain State laws, conduct expedited special elections in the direct aftermath of a catastrophic terrorist attack on Congress within the proposed 21-day period as set forth in this bill. Minnesota's current special election procedure is very close to the proposed 21-day timetable. To enable an individual to take office immediately when Congress is in session the Governor must issue a writ for a special election within five days of the vacancy and the special election must take place 28 days after the writ is issued.

However, a short time period such as 21 days means that a number of military and overseas voters will have a limited time period to apply for an absentee ballot, receive it, and then have it delivered to the polling place after it is voted. Other absentee votes would also be affected, but to a different degree. Multiple facets of candidate selection and election administration would have to be changed, for example: candidate recruitment, filing, and party nomination. Issues associated with polling place and poll worker availability may arise. The period for the voting public to become aware of the election and be informed about the candidates is reduced. Certainly in such disastrous circumstances, our county would be facing very unique circumstances and it might justify a unique way or resolving the importance of continuity of government.

Another way of resolving this issue is through an appointment. Minnesota has a specific procedure in the event of a US Senate vacancy, which provides that "...the governor

may make a temporary appointment to fill any vacancy. An appointee shall hold office until a successor is elected and qualified at a special election or until a successor is elected…for a regular six-year term." (Minn. Stat. 204D.28) This is an option used for a US Senate vacancy, which your committee might consider.

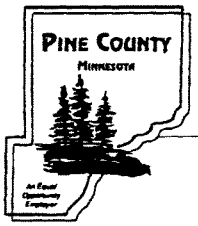
However, if a federal continuity law is enacted, I also believe that this law should specifically state who decides when the qualifications have been met, who initiates the process and when the time table for a special election starts.

For election officials it is not only the policy, but also implementation that must be addressed. I trust that these comments will be of assistance in your deliberations and would be glad to assist in addressing any further issues you may have.

Sincerely,

Mary Kiffmeyer
Secretary of State

★ 180 State Office Building ★ 100 Constitution Avenue ★ St. Paul, MN 55155-1299 ★ (651) 296-2803 ★ Fax (651) 296-9



Kaye F. Jorgensen
AUDITOR

PINE COUNTY COURTHOUSE • 315 MAIN ST. SO • PINE CITY, MINNESOTA 55063-1694

Cathy Johnson, Deputy, Elect/Tax	320-629-5631
Kaye Jorgensen, Auditor	320-629-5632
Tammy Kubesh, Deeds	320-629-5630
Pamela Lawrence, Deputy, Delq. Tax	320-629-5628
Terry Lovgren, Land Trf.	320-629-5629
Susan Youngblom, Payroll	320-629-5633

September 8, 2003

Senator John Cornyn
Chairman, Senate Subcommittee on the Constitution,
Civil Rights and Property Rights
Dirken Senate Office Building, Room 139
Washington, DC 20510

RE: Disasters and Congressional Elections

Dear Senator Cornyn:

It has been brought to my attention that a proposal has been made to allow for expedited special elections within 21 days in the case of an extreme national emergency.

I don't believe 21 days is enough time to allow for accurate and democratically held elections because accurate programming of election equipment and the printing of ballots would be nearly impossible. In addition, I don't feel vendors would be able to provide the necessary election supplies in a timely manner in order for the local election officials to distribute such supplies to the precincts.

As a matter of democratic integrity, I would question the ability of candidates to effectively reach potential voters as to their views and standpoints on various issues. As candidate filings occur, I also would be very concerned, the necessary information on the candidates could be received, processed and sent to the local jurisdictions that quickly without a high risk of errors. The ability to correct any errors would be quite unlikely given the short amount of allowed time.

21 days is simply not enough time to provide and allow for the return of ballots from absentee, military and overseas voters effectively disenfranchising these groups of voters.

Finally, the costs associated with any special election are high. Given a 21-day time constraint, required publications, the receiving and distribution of necessary supplies and the programming of equipment would be extremely costly at a multi-state or national level.

As a side note, the State of Minnesota was "put to the test" when Senator Wellstone passed away last October several days prior to the General Election. Although the state came through with, I believe, flying colors, we were already well under way with the election process, making it considerably easier to properly adjust to the circumstances. As it was, court challenges ensued and the state's election process in general, and the handling of this particular situation, was brought into question and put under the microscope.

I appreciate your consideration in this matter.

Sincerely,

Cathy Johnson
Election Administrator

CLARK POINTER
PRESIDING COMMISSIONER
DELBERT L. CLARK, JR.
EASTERN COMMISSIONER
JACK V. STUMBAUGH, JR.
WESTERN COMMISSIONER

Pike County Court
Phone: (573) 324-2412
Bowling Green, Missouri 63334

BOB KIRKPATRICK
CLERK OF THE COUNTY COURT
EDNA BROWN &
MELISSA KEMPKE
DEPUTY CLERKS
JANET MILLER &
PAULA MARSHALL
DEPUTY CLERKS
VOTER REGISTRATION

September 5, 2003

TO: James Ho

FROM: Bob Kirkpatrick
Pike County Clerk (Local Election Authority)
Pike County, Missouri

RE: Response to your inquiry about holding an election in a 21 day period of time due to a terrorist act against Congress.

Holding an election within twenty-one days will not work well in our rural area because of the following situations:

A. Mechanically – it would not be possible to select the candidates, get the ballots printed and returned, hold the election and get the ballots counted accurately – unless you disposed of the usual ballot production process, printed them locally and counted them by hand.

B. Democratically – there are significant issues with choosing candidates and holding the election within 21 days. This gives the wealthy person a huge advantage because they do not have to raise funds. They can immediately access the media and the election is over before the less wealthy candidate can fund his campaign.

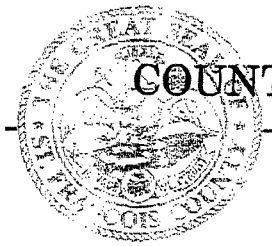
C. Overseas and Absentee Ballots – would not be a possibility in 21 days. Perhaps, if you suspended the normal pre-cautions, it might be possible to execute this process by use of fax and email but the assurance of an election without fraud would be moot.

Within 60 days, we could hold a viable election provided some of the standard requirements were suspended. We could give ten days for candidates to declare and fifty days to raise money and campaign. We could get viable ballots, countable by machine printed, distributed to absentees and returned. The military would have to make some extra efforts to distribute and collect overseas ballots and facilitate shipment of ballots in order to get them counted. We could do it in sixty days.

Thanks for Asking,

Bob Kirkpatrick & Staff
Pike County Clerk's Office

BK/ph



COUNTY OF ST. FRANCOIS

MARK L. HEDRICK COUNTY CLERK
ELECTIONS AND VOTER REGISTRATION
Courthouse
Farmington, MO 63640 (573) 756-5411
FAX (573) 756-2817

September 5, 2003

Senator John Cornyn
Chairman, Senate Subcommittee on the Constitution
Civil Rights and Property Rights
Dirksen Senate Office Building Room 139
Washington, DC 20510

Senator Cornyn:

I am writing concerning the issue of a 21-day election. I have many concerns about this issue and wish to address some of them.

As far as mechanically, the company that does the printing of ballots may be one the greatest issues, especially if several counties are requesting the ballots on an emergency basis as our printing company is used by many counties in the state. Also, my county works with the Accu-Vote computer tabulated ballots system that requires disks be programmed for each precinct. This programming is done by an election support company and then shipped to us. Again with several counties on the same system, time is an issue.

In a countywide election, I staff 200 to 250 poll workers. With short notice, it could be hard to notify, receive confirmation or replace these workers. In order to combine precincts for an election thereby requiring less poll workers, voters would have to be notified and the time frame may be too short.

I know that an election can be done in 21 days due to court orders, but I am concerned that certain disasters may make an election official's resources limited. It would depend on the type of crisis.

Absentee voters, military voters, and overseas voters might feel unable to receive, vote, and return their ballots in a timely manner, possibly causing feelings of disenfranchisement. Some of my elections involve more than a thousand votes by mail. Preparation of the disability list and requests alone takes several days to prepare. This

would require additional staff and hours to process them rapidly. Provided we have the ballots from the printer it could be done, but it would require costly additional expenses in the conduct of the election. A countywide election under normal circumstances cost approximately $50,000.

It should be stressed that the type of disaster would matter greatly. Given all resources, without strain to those resources, I believe that I could produce an effective election in 21 days. If the crisis distresses any area of the resources required for the election, problems could arise and may prevent a successful election within this time frame.

Thank you for you attention,

Sincerely,

Mark L. Hedrick

Mark L. Hedrick
St. Francois County Clerk

Linda Steward
Daviess County Clerk
102 N. Main
Gallatin, MO 64640

Telephone: (660)663-2641

Reta Rains, Deputy Clerk

September 4, 2003

The Honorable James C. Ho
Chief Counsel
U.S. State Subcommittee on the Constitution
Dirksen Senate Office Building, Room 139
Washington, DC 20510

Dear Sir:

I have become aware of a hearing planned for next week regarding the integrity and feasibility of special elections held in emergency situations within 21 days of a disaster. Having been the Chief Election Officer of Daviess County Missouri for over twenty years, I would advise that this is not possible. I would suggest, instead, that in each state, the Lieutenant Governor and one other state-wide elected official be temporarily appointed to represent each state in the Senate, making their actions the law of the land until such time as a special election could be held properly.

There are critical steps to be taken. First, there would need to be a "vacancy in the office" declared. Who would be responsible for that measure? Next, the Governors of each state would have to order an election held; the Secretaries of State would have to publish notice and open candidate filings. This measure alone would require 10 to 14 days. The ballots would have to be styled, printed and published. Computer programs for scanning and counting would have to be developed. This step will require 30 to 45 days, because each senatorial and congressional district could have more than one division in each precinct. Once the ballots are printed, overseas absentee ballots take another 30 to 45 days from the time of request by the voter to delivery of the voted ballot at election headquarters.

An estimate of 70 to 90 days would be absolutely necessary to maintain the integrity and establish the mechanics of this election.

Respectfully submitted,

Linda Steward

Linda Steward,
Daviess County Clerk

County of Jefferson

State of Missouri

ELEANOR KOCH REHM
County Clerk

JEFFERSON COUNTY
ADMINISTRATION CENTER
729 MAPLE STREET/PO BOX 100
HILLSBORO MO 63050

September 4, 2003

Jeannie Goff
Chief Deputy
Elections-Voter
Registration
636-797-5485
Email: jgoff@jeffcomo.org

Margie Southerland
Chief Deputy
Administration
636-797-5478
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msoutherland@jeffcomo.org

Web Site Address:
www.jeffcomo.org/clerk

Office Fax:
636-797-5360

Dear Senator Cornyn:

Please be assured that this office would be able to conduct expedited special elections during crisis circumstances, as a mechanical matter or democratic integrity. Just recently my staff was court ordered to conduct a special election with only about 5 days notice. The election was held without a problem. It was a smaller election, but none the less successful. We have a common election vendor with other counties. A problem would be if the vendor is unable to produce supplies in time depending on the number of counties that they would be handling.

It is always the possibility of disenfranchising voters that are out of our jurisdiction, such as military and overseas voters, but our county has few. We have phone numbers for most of the frequent voters to help expedite information, etc. Although mailing absentee ballots overseas one way has taken up to 6 weeks for delivery and then additional time for return. We do feel that the Post Office will do their utmost to expedite delivery and return.

In addition, if legal action follows, certainly the Judiciary would look with a forgiving eye. Continuity of government is priority in the case of Federal Officers.

If you require additional information, please direct them to my Chief Deputy Clerk, Jeannie Goff @ jgoff@jeffcomo.org.

Sincerely,

Eleanor Koch Rehm
Jefferson County Clerk

VOTE-and the choice is yours

REGISTER-or you have NO choice

DON'T VOTE-and the choice is theirs

Mike Hepler
Clerk, Sullivan County Commission
Michelle Cornell, Deputy
Jackie Morris, Deputy
PHONE 660-265-3786
Milan, Missouri 63556

September 5, 2003

SENATOR JOHN CORNYN
DIRKSEN SENATE OFFICE BUILING RM 139
WASHINGTON DC 20510

RE: 21 DAY ELECTION PROPOSAL

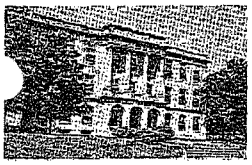
Dear Sir;

Please be advised 21 days is not enough time to conduct an election electronically with our optical scan system. Due to the fact that stock would have to be ordered, then printed, then programmed, which would in itself take longer than a 21 day period. I feel that an election could be conducted with paper ballots utilizing a hand count only system with a modest reduction of democratic integrity. However, it would be impossible to effectively deal with absentee voters, especially military and overseas voters.

In closing I would suggest a minimum of 42 days be allowed to effectively accommodate all of our voters, with any democratic integrity, even at that a paper ballot and hand count would probably still be the practical choice due to the limited time for printing, programming, etc.....

Sincerely,

Mike Hepler



DEBBIE DOOR
CLERK OF THE COUNTY COMMISSION
Franklin County
300 E. Main Street, Room 201
UNION, MISSOURI 63084
(636) 583-6355 (636) 583-6364
FAX: (636) 583-7320
frcoclerk@yhti.net

September 8, 2003

Senator John Cornyn
Chairman, Senate Subcommittee on the Constitution, Civil Rights and Property Rights
Dirksen Senate Office Building Room 139
Washington, DC 20510

Dear Senator Cornyn:

It is difficult for me to imagine having the ability to properly conduct a congressional election in 21 days. I believe that there would be voters who would not be able to vote, such as military and overseas voters. In my opinion, provisions do need to be made for catastrophic events to ensure continuity, but holding emergency elections throughout the nation could lead to another catastrophic situation. I believe it would compromise the integrity of our election systems. Remember, Missourians voted Mel Carnahan in to office three weeks after he was buried. Common sense has been thrown to the wind.

Three weeks is not enough time to properly educate the voters on the candidates. It is also not enough time to get all of the printed material ready for an election, again if every voting precinct in the United States is holding elections too. I am a newly elected County Clerk, but I would think temporary appointments would make more sense at least for 90 to 120 days at a minimum. Look at the mess in California right now trying to do a recall and elect one new governor. Imagine the chaos of trying to elect all new members to the Senate and Congress immediately after a "catastrophic" situation in every congressional district throughout the United States.

Our Constitution was written to protect us and ensure our rights through a fair and impartial election process. I believe that a Constitutional amendment would be in order now, with more thought and effort being put into setting up procedures for disaster and congressional elections.

Sincerely,

Debbie Door

Debbie Door
Franklin County Clerk

STATE BOARD OF ELECTIONS

6400 Mail Service Center • Raleigh, North Carolina 27699-6400

GARY O. BARTLETT
Executive Director

Mailing Address:
P.O. BOX 27255
RALEIGH, NC 27611-7255
(919) 733-7173
FAX (919) 715-0135

September 8, 2003

Senator John Cornyn, Chairman
Senate Subcommittee on the Constitution,
Civil Rights and Property Rights
Dirksen Senate Office Building, Room 139
Washington, DC 20510

Dear Senator Cornyn:

The consideration of an emergency election for members of Congress has come to my attention. My understanding is that an election could be scheduled to be conducted within 21 days of some catastrophic event. Please allow me to express my concerns.

Elections administrators are a rare breed in that we take whatever we are given and somehow make it work. There is not a single elections administrator that would hesitate to put into place the necessary elements for an emergency election, however, none of us are able to add more hours in the day to execute the steps necessary for an orderly election that would allow the voters to have confidence in the results.

North Carolina has a significant military population and 21 days is insufficient to provide the ballot transit time necessary to reach the military and overseas voters. Obviously many of these voters would be disenfranchised. We have tried to protect absentee ballot availability time of 50 days before the election. This provides transit time and does not include printing time.

Costs would become a significant factor. Whenever a "rush" is placed on orders it results in a price increase or a decrease in the product quality. There are a limited number of printers capable or willing to print ballots, therefore, when the demand is high and every jurisdiction is using the same printer for the same election some will receive ballots earlier than others thus creating an unequal application - a concern for those states and jurisdictions subject to preclearance requirements. Securing and staffing sufficient polling sites could also be problematic. Depending on the extent of the catastrophe, previously trained personnel may not be available necessitating the location and training of new persons.

Generally we recommend a minimum of 75 days between the decision to call for an election and the conduct of the election. Obviously elections can be accomplished in a shorter timeframe but it will not provide confidence in the process or further the appearance of democracy.

Thank you for the opportunity to voice these views. If I may provide additional information please do not hesitate to contact me.

Sincerely,

Johnnie F. McLean
Deputy Director

LOCATION: 506 NORTH HARRINGTON STREET • RALEIGH, NORTH CAROLINA 27603

GUILFORD COUNTY
BOARD OF ELECTIONS

September 8, 2003

The Honorable John Cornyn
Chairman, Senate Subcommittee on the Constitution, Civil Rights and Property Rights
Dirksen Senate Office Building Room 139
Washington, DC 20510

Dear Senator Cornyn:

I understand your subcommittee is conducting hearings, on Tuesday, September 9, 2003, on proposals for addressing the expeditious replacement of members of the Congress in the event of a catastrophic event impacting the legislative branch of government. Among the leading contenders to address this matter are, I believe, proposals to provide for replacement of members of the Congress through interim emergency appointments or by elections conducted within 21 days of the event.

In my view, and that of my senior staff members, to attempt, within 21 days following such a catastrophic event, to carry out the fundamental requirements of an election would be chaotic. These requirements include:

a. candidates file (or be chosen) to run
b. prepare, audit and test ballots
c. notify (and train) precinct officials and notify polling places
d. program machines or print ballots and deliver supplies to polling places
e. receive and process absentee requests
f. send (and receive) absentee ballots

Even if we were able to execute the mechanics of such an election, serious questions arise regarding what has been accomplished. Could such an election offer the kind of democratic integrity essential to our concept of legitimate government? This is unlikely on several counts. For example, "democratic integrity" should include the criterion of an informed electorate. While we might be able to conduct an election accurately and without fraud, the electorate would know little about whom it had elected. Another aspect of "democratic integrity" is equal protection. Numerous voters, particularly those such as absentee voters, military and overseas voters, would not have an opportunity to vote in the time frame proposed.

Elections do not take place in a vacuum. Events such as those hypothesized would likely far overshadow public concern for or interest in voting. It is highly unlikely that sufficient public or media attention regarding Congressional candidates could be

Post Office Box 3427 • Greensboro, North Carolina 27402 • Phone (336) 641-3836

garnered to provide the electorate any meaningful sense about those on whom they were voting. Such an election could produce extremely dangerous results particularly at a time of such, inevitable high, emotional content.

This latter point of course could produce equally dangerous results if an interim emergency appointment process did not offer strong democratic safeguards. The filling of such seats by the Governors or State legislatures with "of the same party..." requirements could help preserve important principles of our republic even under an appointment process.

Thank you for the opportunity to submit my views on this matter. My six years as a Legislative Assistant in the U. S. Senate and more than 15 years of Director of Elections for Guilford County, NC, have given me both incentive and many opportunities of consider the origins of the strength of our republic. This issue certainly lies at its heart.

Sincerely,

George N. Gilbert
Director of Elections

cc: Senator John Edwards

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF COMMISSIONS, ELECTIONS & LEGISLATION
304 NORTH OFFICE BUILDING
HARRISBURG, PA 17120
717-787-5280
FAX: 717-705-0721

September 8, 2003

The Honorable John Cornyn
Chairman, U.S. Senate Subcommittee on the Constitution, Civil Rights & Property Rights
Dirksen Senate Office Building, Room 139
Washington, DC 20510

Dear Senator Cornyn:

Reference is made to correspondence that I received from Mr. Doug Lewis, Executive Director of the Election Center, Inc. Mr. Lewis asked that I send my comments to you regarding whether 21 days is enough time in Pennsylvania to feasibly and practically conduct expedited special elections in the direct aftermath of a catastrophic terrorist attack on the members of Congress. The Pennsylvania Department of State has three concerns regarding a 21 day expedited schedule for special elections. Our concerns are the disenfranchisement of candidates, disenfranchisement of voters and the integrity of the special election.

Our first concern is the disenfranchisement of candidates. Pursuant to the Pennsylvania Election Code, qualified parties file nomination certificates to nominate candidates for special elections and they could do so following an expedited election calendar for a special election. Political bodies (all other political entities in the Commonwealth), however, must circulate and file nomination papers to access the ballot for special elections; these entities must be provided with adequate time to do so or they will be denied access to the ballot. Additional time is required to challenge the nomination papers and for the courts to resolve the challenges. Time must be build into the election calendar for all candidates to withdraw and for the political parties and political bodies to file substitutions or the political parties and political bodies could be disenfranchised.

The integrity of the special election can only be guaranteed by providing adequate time for the county boards of elections and voter registrars to prepare for the special election. The following events must take place after the candidates are nominated and their names are certified for the ballot. The county boards of elections must prepare and print accurate ballots including absentee ballots and specimen ballots, and program voting machines (currently lever voting machines and electronic voting systems are used in Pennsylvania). If the county board of elections is required to print election materials in a language other than English, all election materials must be translated into that language (currently, in Pennsylvania, the only alternate language is Spanish). Supplies, including the materials specifically made for certain electronic voting systems must be available and programmers must be available to program the lever machines and electronic

voting systems (some programming is done by the electronic voting system vendor) and testing of the system must occur. Polling places must be identified, and, if polling places used for primaries and November elections are not available, other polling places must be located and advertised so that electors who vote at the polling place know where they will be located for the special election. District election officials must be contacted, and, if the elected and appointed officials are unavailable, other personnel must be identified, then training must be conducted for these officials. Specimen ballots and street lists must be prepared for distribution. Absentee ballots must be mailed to all qualified absentee electors and absentee electors lists prepared. Following the close of voter registration, district registers must be printed. Election materials must be delivered to the polling places. Finally an election notice must be prepared and published in newspapers in the pertinent district. If adequate time is not provided for these administrative duties, the special election could be fraught with errors and a disaster could occur.

Our final concern is that voters could be disenfranchised if a 21 day expedited schedule is implemented. Absentee voters, including military and oversees electors, could be disenfranchised by this expedited schedule since adequate time may not be provided for the absentee ballots to be printed and distributed. The absentee electors may not be provided enough time to vote the absentee ballot and return the voted ballot to the county board of elections. As you may already know, one federal agency, the Federal Voting Assistance Program within the Department of Defense advocates a 45 day turn-around time for absentee ballots to reach military and oversees electors and for these electors to return the voted ballot, therefore, preventing disenfranchisement of these voters.

Pennsylvania currently allows a minimum of 60 days to prepare for and conduct a special election. Although the 60-day period could be shortened, it could not be shortened to 21 days without threatening the integrity of the special election and potentially disenfranchising voters.

Thank you for considering our comments and should you have any questions, please feel free to contact me at (717) 787-5280.

Sincerely,

Monna J. Accurti
Commissioner

C: The Honorable A. Pedro Cortés
Secretary of the Commonwealth

Doug Lewis
Executive Director
The Election Center

COUNTY OF PICKENS

Registrations and Elections

COUNCIL MEMBERS

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September 5, 2003

Senator John Cornyn
Chairman, Senate Subcommittee on the Constitution
Civil Rights Division
Dirksen Senate Office Building Room 139
Washington DC 20510

RE: Expedited Special Elections

Thank you for allowing local and state election officials to have input in this very important change. It seems as though we are finding ourselves having to think outside the box more and more because of situations we may possible have to deal with. I am a Public Information Officer for our Pickens County Emergency Preparedness Office so I have some background in preparing for disasters. I would strongly recommend that we have a plan similar to their disaster plan that would allow us to hold efficient and accurate elections in a very short period of time to replace our government officials in the case of a massive errorist attack on our nation.

1. Is 21 days enough to conduct expedited special elections during crisis circumstances, as a mechanical matter?

This would require using one of the newer Direct Record Electronic (DRE) voting systems that are available today. With my present system, I can have absentee ballots available (for mail or in person on DRE) the day I receive certified candidates. I do not outsource any printing because of the ballot-on-demand feature on my system. The Secure Election and Registration Voting Experiment (SERVE) that is being conducted by the Federal Voting Assistance Program (FVAP)for the 2004 elections could be expanded to allow any registered voter to vote via the Internet for an Expedited Special Election.

2. Is 21 days enough to conduct expedited special elections during crisis circumstances, as a matter of democratic integrity?

These newer systems also allow for an unlimited number of ballot styles to be programmed in each voting panel. I program voting panels with every precinct and ballot style on them for voters who vote absentee in our office and Fail-Safe voters. This would also allow for non-geographic voting so a voter could vote at regional sites in your county instead of having to open every precinct. Regional voting sites such as county libraries would reduce the number of poll managers needed thereby reducing the amount of time required to recruit and train them. The Help America Vote Act (HAVA) requires that each State have a Statewide Voter Registration System so each polling place could access this database to verify a voter's eligibility to vote and flag them as having voted to prevent them from voting more than once.

222 McDaniel Avenue, B-9 . Pickens, South Carolina 29671 . Telephone (864) 898-5948 . Fax (864) 898-5637 . E-mail: marilynb@co.pickens.sc.us

3. Would 21 days effectively disenfranchise any voters, such as absentee voters, military and overseas voters, or other categories of voters?

You would just about have to utilize some form of Internet Voting to allow voters in remote areas to cast their ballot. There would be no way to mail a ballot and have time for its timely return. A vote-by-phone method could also be developed that would insure secure access for a voter to cast his/her vote using a security password.

4. If 21 days is problematic, how long would it take to ensure proper mechanical operation of expedited special elections during crisis circumstances, consistent with democratic integrity, and offering all voters -- including absentee voters, military and overseas voters, and any other category of voters -- a meaningful opportunity to vote?

This would depend on the following:

- *Filing period for candidates*
- *Would you have primary or only general election with every candidate on ballot*
- *Timeframe for publishing legal notices*
- *Plan in place for designated polling locations*
- *Program such as SERVE already in place, tested and ready for use*
    - *Backup method would have to be in place because internet could possibly be down due to terrorist attack*
        - *Fax ballots*
        - *Each county print paper ballots in house in case all internet and power sources down*
- *Every county in the nation using an up-to-date electronic method of voting*
- *Written plan for conducting Expedited Special Elections*
    - *State level*
    - *County level*

Please do not hesitate to be in touch if you need further assistance.

Sincerely,

Marilyn W. Bowers, Director
Pickens County Registration & Elections

222 McDaniel Avenue, B-9 . Pickens, South Carolina 29671 . Telephone (864) 898-5948 . Fax (864) 898-5637 . E-mail: marilynb@co.pickens.sc.us

Secretary of State

State Capitol, Ste 204
500 East Capitol Avenue
Pierre, South Dakota
57501-5070
sdsos@state.sd.us

Chris Nelson
Secretary of State

Chad Heinrich
Deputy

September 5, 2003

Senator John Cornyn
Chairman, Senate Subcommittee on the Constitution,
Civil Rights and Property Rights
Dirksen Senate Office Building Room 139
Washington, DC 20510

Dear Senator Coryn:

An election could be held in 21 days in South Dakota but there would be the problem of getting absentee ballots to the voters and back before the polls close, sufficient time for candidates to campaign, not enough time to inform individuals on the candidates, voter registration deadline and voting information.

A special election would cost around $350,000.

Sincerely,

Kea Warne
Election Supervisor

www.state.sd.us/sos

Administration
(605) 773-3537
Fax (605) 773-6580

Corporations
(605) 773-4845
Fax (605) 773-4550

Uniform Commercial Code
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Fax (605) 773-4550

The State of Texas

Executive Division
Capitol Building, 1E.8
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Austin, Texas 78711-2697

Geoffrey S. Connor
Secretary of State

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September 8, 2003

The Honorable John Cornyn, United States Senator
Chairman, Senate Subcommittee on the Constitution, Civil Rights and Property Rights
United States Senate
Dirksen Senate Office Building Room 139
Washington, DC 20510

Dear Senator Cornyn:

Thank you for the opportunity to comment regarding the proposals pending before the Subcommittee which would require special elections to be held to fill multiple congressional vacancies resulting from a catastrophic event.

If there were a national emergency, Texas would be able to conduct a special election within 21 days to fill a vacancy in Congress – if so required by law. However, the normal election procedures would need to be abbreviated or, in extreme circumstances, some procedures may not occur at all. Currently, the earliest an election may occur is within 36 days. This allows for a complete 17-day early voting period and a five-day filing period. With a 21-day election cycle, early voting would have to be dramatically reduced and the filing period would have to be limited which could possibly cause a problem by not allowing a candidate sufficient time to circulate a petition in lieu of filing fee.

A 21-day election cycle would have a significant effect on voting by mail. Texans overseas and military voters face a huge obstacle to vote by mail. To request a ballot by mail, receive a ballot by mail, and return the voted ballot back by mail is virtually impossible to accomplish without at least a 30-day mailing period. Since absentee ballots are not printed and distributed to any voters until after the list of candidates has been finalized, the actual time available for <u>any</u> mail voter to receive and cast a mail ballot would be significantly less than 21 days. Disabled voters and voters over the age of 65 who rely on the U.S. Postal Service to deliver and return absentee ballots on time could lose their opportunity to participate due to the expedited schedule required for a special election held within a 21 day period.

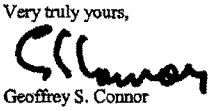
The number of elections being held on the special election date could also affect the organization of such an election since many counties contract with the same vendors to perform such services as printing ballots, programming voting machines, and furnishing election forms and supplies.

Additionally, as you are well aware, any changes in election procedures necessary to conduct such an election would need to be precleared with the U.S. Department of Justice, which usually takes about 60 days. Without preclearance from the Department of Justice or without specific legislation to address "emergency" elections, the election could be challenged in court.

I bring these practical issues to your attention in order that you be fully aware of the procedural requirements and timelines incident to an election in Texas. Of course, if a catastrophic event were to occur, I realize that special, expedited procedures would be necessary to ensure the stability of the government, and that Congress must weigh those concerns against the normal election timelines and procedures. If I can further assist you as you evaluate this issue, do not hesitate to contact me.

Thank you for your consideration of Texas' comments regarding this matter.

Very truly yours,



Geoffrey S. Connor

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State of Vermont
Office of the Secretary of State

Deborah L. Markowitz
Secretary of State

William A. Dalton
Deputy Secretary

Jessica G. Porter
Director, Professional Regulation

Senator John Cornyn
Chairman, Senate Subcommittee on the Constitution, Civil Rights and Property Rights
Dirksen Senate Office Building Room 139
Washington, DC 20510 **Faxed to (202) 228-2281**

Re: Consideration of an amendment to provide for expedited elections within 21 days of a catastrophic terrorist attack on Congress.

Dear Senator Cornyn,

Current law in Vermont provides for a special primary and then an election to fill any vacancy in the office of U.S. senator or representative, with the election to be held within 3 months of the date the vacancy occurs.

While in a national emergency, the Congress may enact provisions to override Vermont's provisions, in Vermont, we could not mechanically prepare and distribute ballots in a 21 day timeframe. We would need at least 40 days to prepare and distribute ballots and have optic scanning machines programmed to tabulate the results.

There would need to be an additional time frame to either conduct a primary, or have candidates nominated by parties or candidates petition to be on the ballot.

I would think that we would need at least 60 days to preserve the integrity of the nomination and election process.

This sixty day period would also allow time to get ballots to military & overseas voters.

I would estimate that a special election on an expedited schedule to fill a vacancy in U.S. senate or representative would cost the state of Vermont approximately $200,000.

Sincerely,

Kathleen DeWolfe

Kathleen DeWolfe
Director of Elections

SEP-08-2003 14:28 YAK COUNTY AUDITOR 509 574 1341 P.01/01

Yakima County Auditor

Corky Mattingly, Auditor
Lynda Sissom, Assistant Auditor

September 8, 2003

U.S. Senate Subcommittee on the Constitution
Civil Rights & Property Rights
Dirksen Office Senate Building Rm 139
Washington DC 20510

Attn: James C. Ho, Chief Counsel

We, the election administrators of Yakima County, Washington, do not feel 21 days is a sufficient amount of time to conduct an election and retain the integrity of our processes especially during crisis circumstances. 21 days is not enough time for ballot layout, ordering, printing and distribution. A 21-day timeframe would definitely disenfranchise our overseas and military voters – there would not be sufficient time to mail out the ballots and have the voters vote and return ballots within a 21 day period.

Forty-five days is the optimum number of days required, however, if necessary we feel we could conduct an election with a minimum of 30 days and be able to still maintain the integrity of our processes.

Sincerely,

Corky Mattingly
Yakima County Auditor

128 North Second Street • Room 117 • Yakima, Washington 98901 • (509) 574-1400 • FAX (509) 574-1341

Accounting 574-1310 | Administration 574-1409 | Elections [illegible] | Licenses [illegible] | Payroll [illegible] | Recording [illegible]

Evelyn L

Ho, James (Judiciary)

From: Evelyn Arnold [Evelyn.Arnold@CO.CHELAN.WA.US]
Sent: Monday, September 08, 2003 7:38 PM
To: 'electioncent@pdq.net'; Ho, James (Judiciary)
Subject: Letter .doc

I hope this letter works. Please let me know if there is more I can do. Evelyn

Evelyn L. Arnold, CPA
AUDITOR

Chelan County

September 8, 2003

Honorable John Cornyn
Chairman, Senate Subcommittee on the Constitution, Civil Rights & Property Rights
Dirksen Senate Office Building Room 139
Washington, DC 20510

Dear Senator Cornyn,

I have heard about the 21 day proposal and have a few concerns. We would be able to mechanical expedite such an election in Chelan County, but we would not be able to conduct such an election with democratic integrity. We would need more time to make sure we did not disenfranchise our absentee, military and overseas voters. In Chelan County about 70% of our voters have chosen to vote by absentee ballot; so this could disenfranchise more than 50% of our voters.

I believe we would need at least 45 days to conduct an election. Once internet voting has proven secure we could get by with less time. Until then we need at least 45 days.

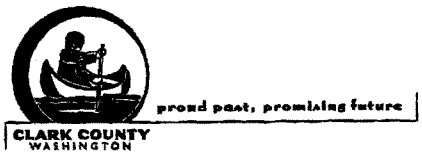
Thanks so much for reviewing my concerns. If you have any questions please contact me at evelyn.arnold@co.chelan.wa.us.

Sincerely,

Evelyn Arnold
Chelan County Auditor

9/8/2003

SEP-09-2003 14:29 FROM:CLARK COUNTY AUDITOR 3603976007 TO:2022281015 P.002/003



AUDITOR
GREG KIMSEY

September 9, 2003

Senator John Cornyn
Chairman, Senate Subcommittee on the Constitution, Civil Rights and Property Rights
Dirksen Senate Office Building Room 139
Washington, DC 2051

RE: Disasters and Congressional Elections

Dear Senator Cornyn,

James C. Ho, Chief Counsel of the U.S. Senate Subcommittee on the Constitution, Civil Rights & Property asked me to write you with my thoughts on the conduct of an expedited special election in the direct aftermath of a catastrophic terrorist attack on Congress. In particular he asked me to respond to the question of whether it was practical and/or feasible to conduct this election in a three week time period with a high level of integrity for the election without disenfranchising voters. My answer is "NO."

Assuming that an adequate supply of election materials (particularly ballots and envelopes for ballots) were on hand when the crisis occurred a minimum of seven weeks would be required to conduct the election. Because thousands of jurisdictions would be attempting to conduct this election at the same time with no ability to plan in advance and at a time of national crisis, if election materials had to be acquired it would require at least three or four additional weeks.

The timeline for this election would look something like this:

Week 1 - Candidate filing
Week 2 - Design and print ballots
Week 3 - Assemble ballot materials for mailing
Week 4 - Mail ballots to military/overseas voters
Week 5 - Mail ballots to ongoing absentee voters (state law requires these to be mailed 20 days before an election).
Week 6 - Print notifications of election in newspaper
Week 7 - Set up polling places, conduct election

1300 Franklin • P.O. Box 5000 • Vancouver, WA 98666-5000

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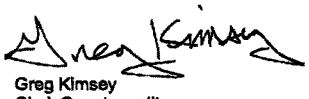
We would also require ten days to certify the election. Among other activities during that time we would be examining the thousands of provisional ballots we receive to ensure which of these voters are eligible to vote on the office on the ballot.

An issue of deep concern to me if this expedited special election occurred is how difficult it would be for voters to gather enough information to cast an informed ballot. In this situation the media's resources and the public's attention would be focused on the crisis and not on evaluating the candidates. This could well result in individuals being elected to office that in a normal situation would not survive the scrutiny of the press and the public.

Thank you for the opportunity to share my views with you on this subject. If you would like to discuss this further I can be reached by telephone at (360) 397-2078, or via e-mail at greg.kimsey@clark.wa.gov.

Sincerely,



Greg Kimsey
Clark County auditor

Cc: Doug Lewis, Executive Director, The Election Center, Inc.

Kim Wyman
AUDITOR

September 9, 2003

The Honorable John Cornyn
Chairman, Senate Subcommittee on the Constitution
Civil Rights and Property Rights
Dirksen Senate Office Building Room 139
Washington, DC 20510

Dear Senator Cornyn,

I am the election official for Thurston County, Washington. I have heard about the 21-day proposal regarding a special election for members of congress in the case of a terrorist attack. I have concerns with rushing the election process during a time of national crisis. It is paramount that the leaders we send to congress represent their constituents, especially in a time of uncertainty.

As far as the mechanics of an election, 21 days would not be enough time to conduct an expedited special election during crisis circumstances. The length and timing of the candidate filing period needs to be considered. The filing period typically lasts for a period of 5–15 days. If the filing period is to be part of the 21 days allocated to conduct the election, there would not be enough time to prepare.

For our county specifically, 21 days would be problematic as 2/3 of our voters receive an absentee ballot every election. 21 days would not be enough time to print, mail and receive ballots back by Election Day. Mailing military and overseas ballots would also be problematic for similar reasons. Washington State currently meets the federal requirements for overseas and military voters by mailing them approximately 45 days before the election and accepting them through our certification period, which is 10-15 days past election day. Accommodating pollsite voters would also be difficult in 21 days. Preparing the printed materials (ballots), voting devices, and tabulation equipment would take longer than 21 days.

In our county, following the candidate filing period, it would take a minimum of 45 days

2000 Lakeridge Drive SW, Olympia, Washington 98502-6090 VOICE (360) 786-5224
FAX (360) 786-5223 E-mail: wymank@co.thurston.wa.us

prior to the election to prepare and 10-15 days to certify the election. This timeline would help ensure the proper mechanical operation of expedited special elections during crisis circumstances, consistent with democratic integrity, and offering all voters -- including absentee voters, military and overseas voters, and any other category of voters -- a meaningful opportunity to vote.

I would also add that the cost of a special countywide election of this type would be between $275,000-350,000 for our county, which has 125,000 registered voters. It is imperative that we spend these dollars wisely by conducting an election in a crisis situation to the same high standards we have for all elections we administer.

If we learned but one lesson from the November 2000 election, it should be that people must believe in the process if they are to believe the results. We need adequate time to conduct any election and 21 days is not enough time. Please let me know if you need any other information and thank you for this opportunity to comment on this important issue.

Sincerely,

Kim Wyman

Kim Wyman
Thurston County Auditor

2000 Lakeridge Drive SW, Olympia, Washington 98502-6090 VOICE (360) 786-5224
FAX (360) 786-5223 E-mail: wymank@co.thurston.wa.us

9-10-203 4:54PM FROM ISLAND CNTY AUDITOR 360 240 5553 P. 1

Island County Auditor

Suzanne Sinclair, C.P.A.
Post Office Box 5000
Coupeville, WA 98239

September 10, 2003

Senator John Cornyn:
Chairman, Senate Subcommittee on the Constitution, Civil Rights, and Property Rights
Dirksen Senate Office Building, Room 139
Washington, DC 20510

Dear Senator Cornyn:

I understand that the Senate is considering a 21-day election process as part of emergency preparedness in case of terrorist attack or other calamity. The purpose of this emergency election process would be to provide continuity of government.

I am an elected Auditor in Washington State. I am responsible for the conduct and integrity of elections in Island County, which has 40,000 registered voters in a population of about 73,000 people. In Washington State the majority of voters vote by mail ballot. In Island County, 62% of our voters use a mail ballot.

As a mechanical process, a successful twenty-one day election would be doubtful. By act of Congress, counties in Washington will be using optical-scan type ballots for mail balloting and poll voting. Some counties may use DREs for poll voting. Optical-scan ballots are printed on specific kinds of paper and are printed to provide one ballot for each voter. There is a limited number of paper suppliers and a limited number of ballot printers. Island County would have to print 40,000 ballots. King County, with the City of Seattle, would have to print over a million. The kind of crisis that this emergency process anticipates, with its severely compressed timeline, would put an enormous strain on the printing vendors. I am not confident that Washington could conduct a "normal" election in 21 days.

A twenty-one day election held entirely by voting at the polls would avoid the mail ballot preparation and transit time, but it would still disenfranchise absentee voters, military voters, and overseas voters. For states with mail balloting, there would be a very difficult time at the polling places due to voter confusion.

Twenty-one days would not allow an election with full democratic integrity. There would be little time for candidates to explain positions and no time to prepare voter information materials. This would seriously undermine the perception of legitimacy of the election, as voters would feel rushed and under-informed.

There would be no time to investigate provisional ballots or for any real deliberation by canvassing boards, resulting in disenfranchisement or other possible errors in tabulating results.

Military and overseas voters would effectively be disenfranchised. Their votes are fragile enough as it is, due to the unpredictability of foreign and military postal services.

Absentee voters would likely be disenfranchised by the compressed timeline. Many of them are out of state for three or four months, and in the disaster scenario envisioned by this proposal, it's hard to believe that even the U.S. postal service would be operating at full capacity and normalcy.

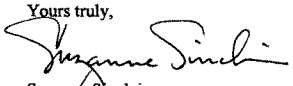
For Island County, I believe that 53 days is the bare minimum to conduct a meaningful election. This number is comprised of 3 days for candidate filing, 14 days for printing and preparation, 20 days to mail ballots to absentees, military voters, and overseas voters, 1 election day, and 15 days following for receiving absentees, military ballots, and overseas ballots and tabulating results. Campaigning would be possible over 34 of those days, but would depend on the media, which may or may not be functioning fully. Even then, some disenfranchisement would take place because postal time might be unpredictable.

The cost of such an election would be higher than usual. I would anticipate a lot of overtime hours in order to meet the compressed deadlines, and I would anticipate higher service and supply costs with no time for competitive pricing. While I believe that citizens would pull together, it would be imprudent planning to rely on patriotic fervor to reduce the election cost. In Island County, a normal general election costs about $70,000. Under emergency conditions it could easily reach $140,000.

With all due respect, if I may put in my two cents as a citizen, I think that in the case of numerous, sudden vacancies in Congress caused by a terrorist attack or other calamity, a hurried, frenzied election is not really conducive to solid self-government. I would suggest that the states' governors appoint members of the states' legislatures to the federal legislative body, followed by elections at the next regular general election, whether an even year or an odd year. Congress could stipulate that the appointee must be of the same political party as the previous member of Congress. It is unlikely that such appointments would be a majority of a state's delegation, although anything is possible, but even so, Congress would still be composed of people elected by their peers, even if a smaller constituency.

Thank you for the opportunity to participate in this important discussion. I hope this is helpful information. Please let me know if you have any questions.

Yours truly,



Suzanne Sinclair
Island County Auditor

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suzannes@co.island.wa.us

State of Wisconsin \ Elections Board

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http://elections.state.wi.us

KEVIN J. KENNEDY
Executive Director

September 5, 2003 Sent by Fax and e-mail

The Honorable John Cornyn, United States Senator
Chairman, Senate Subcommittee on the Constitution, Civil Rights and Property Rights
United States Senate
Dirksen Senate Office Building Room 139
Washington, DC 20510

Dear Senator Cornyn:

Thank you for the opportunity to comment regarding the proposals pending before the Subcommittee which would require special elections to be held to fill multiple congressional vacancies resulting from a catastrophic event. I am the chief state election official for Wisconsin. I will endeavor to respond to your inquiries.

Twenty-one days would not be enough time to conduct an expedited special election in a crisis situation. Election preparation requires securing polling places, retaining poll workers, qualifying candidates, preparing ballots, delivering absentee ballots, setting up voting equipment and conducting the election. Candidate qualification requires a notice and filing process that will take at least 6 days, the current minimum under Wisconsin law. Ballot preparation, voting equipment programming and set up would take at least 1 week.

This leaves a week for absentee voting. This would effectively eviscerate the absentee voting privilege. The primary effect would be felt by military and overseas electors.

Twenty-one days would not be enough time to time to ensure the integrity of the democratic process. Candidate qualification would be so abbreviated that candidates would not have the time to meet qualification requirements, even if these requirements were loosened to expedite the process. In a crisis situation the focus of candidates and voters will likely be on the crisis and its daily impact. There would be no time for effectively winnowing the field through a primary, so the winner will likely have a small plurality of the vote

Twenty-one days would effectively disenfranchise many voters. Overseas and military electors generally need 45 days of ballot transit time. Voters would have very little opportunity to learn about the qualifications of the candidates, the time of voting and location of the polling place. Voters with disabilities would likely have a more difficult time participating in the proposed timeframe.

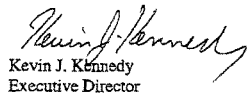
Sixty-two days is the minimum time necessary to ensure proper mechanical operation of an expedited special election , consistent with democratic integrity and offering all voters the opportunity a meaningful opportunity to vote.

An expedited special election would likely cost the state of Wisconsin and local government at least $2 million dollars in out of pocket costs for notices, ballots, postage, poll worker salary, voting equipment vendor support and supplies. The cost of state and local election officials salaries and fringe benefits would be increased for overtime and other work would be set aside for the conduct of the expedited special election.

A 21 day schedule for special elections has the potential to undermine public confidence in the election process just when this confidence would be needed most. Na expedited election process needs to be put in place, but it should not be so abbreviated that individuals elected under the process lose credibility.

If you need additional information please contact me at 608-266-8087 or kevin.kennedy@seb.state.wi.us.

State Elections Board



Kevin J. Kennedy
Executive Director

H:Legislation/2003/Prposed Federal Crisis Leg 9.5.03

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement of Senator Patrick Leahy
Senate Committee on the Judiciary
Hearing on Ensuring the Continuity of the United States Government
September 9, 2003

This week marks the second anniversary of the tragic events of September 11, 2001. It was a day that shook our Nation to the core, but also drew us closer as Americans.

In the wake of the terrorist attacks, we quickly joined together in a bipartisan effort to improve airport security, increase cooperation between our terrorist-fighting agencies and our first-line defenders, and grant the Administration powers it claimed necessary to ferret out and pursue terrorists. Since then, we have continued to review our laws and policies to make sure they promote our fight against terrorism, while preserving the liberties, freedoms and rights that make America the great Nation that it is.

One issue that we have not yet addressed is how best to ensure the continuity of our government in the event of a catastrophic attack that kills or incapacitates large numbers of government officials. The doomed United Airlines flight that crashed in Pennsylvania two years ago reminds us that those who hate us will go after our Nation's leadership and national symbols like the Capitol. What would have happened if the brave passengers aboard that flight had not fought back and prevented it from reaching its target?

The problem of ensuring the continuity of our governmental institutions is most acute in the House of Representatives. Under our current Constitution, State governors can immediately fill vacancies in the Senate by appointment. Vacancies in the House, however, require a special election. This means that many districts could go unrepresented for significant periods during a time of crisis, depending on how long it takes for States to prepare ballots, set up polling places, and take whatever other steps are necessary for special elections to be held.

September 11th brought a new urgency to this issue, and there have been a number of proposals for addressing House vacancies in the event of a national emergency that prevents a significant number of Members from serving. Some have proposed amending the Constitution to allow for the emergency appointment of Representatives. Others have argued that this approach is unnecessary and dangerous – unnecessary because States are capable of holding special elections quickly enough to guarantee the functioning of Congress, and dangerous because it would involve a fundamental departure from our constitutional heritage.

senator_leahy@leahy.senate.gov
http://leahy.senate.gov/

More than any other Federal body, the House of Representatives reflects the Founders' belief that the people should choose their leaders, and that those leaders should be directly accountable to the people. Without exception, every person who has served as a Member of the House was elected to that office by the people of his or her district. To quote James Madison, the "definition of the right of suffrage is very justly regarded as a fundamental right of republican government. It was incumbent on the Convention, therefore, to define and establish this right in the Constitution. To have left it open for the occasional regulation of the Congress, would have been improper for the reason just mentioned."

Proposals to amend our Federal Constitution bear a heavy burden. Amendment is appropriate only when there is a pressing need that cannot be addressed by other means. While the possibility that the House could be weakened by a terrorist attack is frightening indeed, so too is transforming the essential nature of the People's House. Amending the Constitution should be a plan of last resort.

This is not the first time that constitutional amendments have been proposed to allow for the emergency appointment of Representatives. Between 1945 and 1963, amidst Cold War fears of nuclear attack, more than 30 such amendments were introduced. Yet, we managed to survive those perilous times without having taken this momentous step.

Some have suggested that the House could change its rules so that emergency appointments would be admitted only to the Committee of the Whole, and would not be considered full-fledged Members. While this suggestion has some superficial appeal, it would still result in non-elected Members acting on behalf of the people. In the past, the House has allowed delegates from the territories and the District of Columbia to vote in the Committee of the Whole, but these delegates were elected by the people they represented.

Critics of the constitutional approach have proposed legislation to require expedited elections for House seats in the event of "extraordinary circumstances." Under this proposal, elections would be held no later than 21 days after the Speaker of the House announced that there were more than 100 vacancies, unless there was a previously scheduled general election within 51 days of that announcement.

This hearing is an opportunity to determine the practical and logistical realities of holding special elections. Among other things, we need to know how much funding, technical assistance, and administrative support the States would need to elect replacement Representatives in a fair and expedient manner.

We should also review existing State laws and procedures, and consider their experiences in this area. For example, California, which could have as many as 53 Representatives to replace, has a statute allowing for the replacement of Representatives in the event that a catastrophe causes a vacancy in either 25 percent of all the seats in the House or 25 percent of the seats representing California in the House. That statute requires special elections to occur within 56 to 63 days after a proclamation from the state governor.

I have discussed two proposals that have been advanced for filling House vacancies in a time of national crisis, but there have been others. Former House Members Tom Foley and Newt Gingrich have suggested giving Representatives the right to designate their temporary successors. As part of this scheme, Representatives could announce their designees as a part of their campaign platform, thereby giving the people some role, albeit indirect, in choosing crisis replacements.

Regardless of the proposal, there are some basic questions that must be resolved. What percentage of deceased or incapacitated Members would trigger emergency provisions? What would constitute incapacity? Who would make that determination? Could such a decision be made quickly? How would a temporarily incapacitated Member regain his or her seat after recovery?

[Perhaps we can survive a brief interim period without a functioning House of Representatives, especially since post-tragedy legislative actions might be governed more by emotion than by sound policy judgments. It has also been suggested that the House could simply carry on during an interim period, with a majority of the remaining Members constituting a quorum. However, there are lingering questions about this definition of quorum, as it would allow a potentially small group of Members to legislate on behalf of a large group of people to whom they are not directly accountable.]

There is a lot to consider and many questions to answer. I am pleased that we will be hearing from our colleagues in the House and other distinguished scholars including Norm Ornstein who has devoted much of his valuable time to this issue. I look forward to their testimony.

# # # # #

The Election Center an international association of voter registration and election officials
12543 Westella, Suite 100 Houston, TX 77077 Phone: 281-293-0101 Fax: 281-293-0453 or 281-293-8739

Email: electioncent@pdq.net Website: www.electioncenter.org

September 9, 2003

Testimony for U.S. Senate Hearings
On Disasters and Special Elections
Senate Judiciary Committee
Subcommittee on Constitution
By
R. Doug Lewis, Executive Director, CERA

Senators and Distinguished Guests:

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

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

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

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

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

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

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

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

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

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

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

It has been mentioned that many who are looking at this issue do not want to break with the tradition of having House members being elected rather than being appointed -- even for a short duration. We have no quarrel with that viewpoint. At the same time, it seems to us that the tradition of our form of democracy must weigh in equally on tradition that allows us the time to know our candidates, the issues, the choices and the selection by voters of their choices.

The genius of American democracy is that it creates fundamental faith in voters that it is fair, free, and has great integrity. But sometimes it is terribly inefficient and cumbersome and time consuming and maddeningly frustrating in its complexities, and yet it works.

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

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

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

We don't have a preconceived notion here about what are the right policy answers, only an administrative viewpoint that you need to consider these questions before deciding the general election question. And the states, which have traditionally set the processes and qualifications for these choices, have a variety of answers and solutions here. Presumably, the Congress is going to say that a national emergency needs to take precedence and that national interests are superior to states' interests…and that is even probably the correct viewpoint, but deciding that issue alone is not without its impact on "tradition". Federal law here will definitely have to vacate all of the state laws concerning these practices in order to stay on the Federal timetable. And the states and locales will have to create new policies and procedures that will apply to this election only.

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

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

While the responses indicated a variety of dates ranging from the shortest time period of 35 days (after determination of who the candidates will be) to a period of four months, it appears that elections administrators feel that they can conduct an election with as few as 45 days but would be far more confident that the interest of democracy would be best served by having up to 60 days to get the elections held an organized.

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

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

You can now begin preparation of Absentee Ballots for the disabled, permanent absentee voters (depending on state laws), and military and overseas voters. We need "transit" time for those voters to be mailed a ballot, delivery of the ballot to them, a reasonable amount of time to complete the ballot, and then to return the ballot to us. Some of these we can receive and count even after Election Day, so we can pick up some days within the election countdown of 45 to 60 days, but not all of that time. Actually condensing the time here is probably the wrong way to do this; if we had more time on the front end of the process to allow us to get those ballots to the voters we could then require all of them to be in by Election Day so that the results are known shortly after Election Day.

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

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

We can normally staff a special election quickly with office staff and key volunteers and key election week workers because it is a manageable size; in this instance we are talking about being overwhelmed with an election the size of a normal general election but now with only a limited number of days to do what it takes us months to do in preparation for a general election. Perhaps Congress can give election officials the ability to commandeer the services of county and city employees to serve as poll workers and election workers during a national emergency and waive any labor laws contradicting such uses.

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

Election official and precinct worker training has to come somewhere in this process and it can only come after time to recruit enough people to serve (and enough reserves when the traditional 10 percent and higher do not show up).

One item to consider is that it may be necessary to do such an election by U. S. Mail rather than through polling sites, although most American jurisdictions don't have enough experience with massive vote by mail programs such as Oregon and Washington have. It would, however, allow us to eliminate the time spent on polling place sites (and making sure they are accessible) and poll workers. Of course this assumes that the U.S. Postal Service is functional during such a national emergency.

Now, rather than saying that all of that negates the ability to run an election under emergency circumstances, we want you to know that a Can-Do attitude means that we can and will overcome most of these limitations. But to offer an overly ambitious 21-day time period is very likely to court an election disaster on top of a national disaster.

Our best answer and best advice is to give us a minimum of 45 days and every day you can grant that gets us closer to 60 days increases the likelihood that the election will mean more to the candidates and the voters and allow us to build in the kinds of quality assurance and integrity processes that have been the hallmark of elections in America. It is our understanding that one of the House bills indicates that if such an emergency occurs 51 days in advance of a regularly scheduled election, then we wait until the regularly scheduled election. If so, then shouldn't that be the minimum number of days before any election is scheduled?

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

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

One last note of caution: When Election Day is over, there will still not be any seated members of Congress. It takes a period of days after the election to do the "vote canvass," whereby we roll in the absentee votes coming in from military and overseas voters and we will still have to qualify all of the provisional ballots that are cast in such an election. In most states we can accomplish that effort in 5 to 10 days, but in some even 15 days is going to be an extreme limitation due the high numbers they have to resolve. So you need to take into consideration that whatever number you set for the election process leading to Election Day, that we still will have some back-end processes that are necessary and vital to a valid election. And one of the large considerations is the question: do you eliminate provisional voting in such an emergency? Or eliminate all absentee votes that cannot or do not arrive prior to Election Day?

There are probably easier solutions than elections but any process which looks at appointing or selecting replacements also needs to consider the public's willingness to accept the succession

plan. As long as other governmental bodies are involved in the succession plan and elected governmental representatives are providing successors, then perhaps it will be accepted. But if there is a choice of appointment rather than general public election, it may be wise to consider letting state legislators elect members from their chambers to replace lost officials so that experienced legislators can serve in the interim and will not lose time learning the legislative process while trying to react to the national emergency.

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

Committee on the Judiciary

Testimony of

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and

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on

"Ensuring the Continuity of the United States Government: The Congress"

10:00 a.m., Tuesday, September 9, 2003

Room 226 Senate Dirksen Office Building

Mr. Chairman and members of the committee, I speak here today as we approach the two year anniversary of the attacks of September 11th. I have a simple message: Congress must act to ensure it is able to reconstitute itself if, God forbid, terrorists were to perpetrate an attack on the first branch of government. This is no longer the stuff of Tom Clancy novels. Plotters of the September 11th attacks have told the media that the fourth plane, United flight 93, was headed for the Capitol, and but for its forty minute delay at takeoff and the bravery of the passengers on that flight, we might very well have had no functioning Congress for several months, just at the time the strong leadership of Congress in our constitutional system was required. I cannot commend this committee enough for taking up this important subject, and I urge serious deliberation on the matter, but deliberation with dispatch, for, unfortunately, the timetable for action is in the hands of those who would attack the United States, not our own.

My testimony has two aims. First, to explain and urge you to consider the analysis and recommendations of the Continuity of Government Commission, in particular, the reasoning that led us to the conclusion that a constitutional amendment to provide for temporary appointments in extreme circumstances is what is necessary to ensure the continuity of Congress. Second, to analyze an alternative to our recommendation that has been proposed, special elections on an extremely expedited timetable, and to show how our commission seriously considered such an option, but ultimately found it unworkable.

The Continuity of Government Commission is a bipartisan, non-profit commission run by the American Enterprise Institute and the Brookings Institution. I

serve as senior counselor. Presidents Jimmy Carter and Gerald Ford serve as our honorary co-chairs. It is co-chaired by a former member of this committee, Senator Alan Simpson and Lloyd Cutler, White House counsel to presidents Carter and Clinton. It includes two former Speakers of the House, Thomas Foley and Newt Gingrich, a former House minority leader, Robert Michel, and several others who served in the Congress in addition to other high level positions: Lynn Martin, Kweisi Mfume and Leon Panetta. Other commissioners have served in high positions in the executive and judicial branches of government: Phillip Bobbitt, Ken Duberstein, Charles Fried, Jamie Gorelick, Nicholas Katzenbach, Robert Katzmann (serving on the commission to consider the judiciary only), and Donna Shalala.

Our commission held two all day public hearings on the continuity of Congress, where we heard testimony from constitutional, congressional and legal scholars. We solicited input from the public and have received numerous faxes, emails and letters from concerned citizens, many of whom took the time to send us detailed proposals. At the end of our deliberative process, we counted unanimous support for our report's analysis and recommendations.

Here in a nutshell is what we found:

Continuity of Congress: The Problem

In the aftermath of an attack that killed or severely injured a large number of representatives and senators, there is a high probability that there would be no functioning Congress, or a Congress with such a small membership as to call into

question the legitimacy of its actions. A catastrophic attack that killed many members would directly affect the House of Representatives because the Constitution effectively prevents the swift filling of vacancies in that body. An equally problematic scenario would be an attack that left many members incapacitated, which would affect both the House and Senate because neither chamber can easily replace living, but incapacitated, members until the next general election. The twin problems of mass death and incapacitation would threaten the functioning of Congress just at the time our country is most in need of strong leadership.

I. The Problem of Mass Vacancies

The House of Representatives would be severely affected by mass vacancies caused by a catastrophic attack. The difficulty is rooted in our Constitution, which prescribes different methods for filling vacancies in the House and Senate. For vacancies in the House of Representatives, ARTICLE 1, SECTION 2, CLAUSE 4 provides that "when vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies." A special election is the only method for filling House vacancies. By contrast, the Seventeenth Amendment, which governs vacancies in the Senate, provides that "when vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies; provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct." Because almost all state legislatures have given their governor the power to make temporary appointments until an election is held,

Senate vacancies are, in practice, filled almost immediately by gubernatorial appointment.

The House of Representatives would have many seats vacant for a significant period of time in the aftermath of an attack because the process of filling vacancies by special election takes on average four months. In the 99th through the 107th Congress, the average time it took states to hold special elections to fill House vacancies caused by death was 126 days. Some of these vacancies were filled in as little as two and a half months, while others lasted for over nine. Differences in state laws and the circumstances of the vacancy greatly affect the time it takes to hold a special election. Some states dispense with primaries for special elections. Others give the governor broad discretion on the timing of the election. The timing of the election is often affected by when in the course of the term the vacancy occurs. Some states do not fill vacant seats if they occur in the last six months of a term.

There are good reasons for the length of time it takes to hold special elections. Candidates need a significant period of time to qualify for the ballot (e.g., by securing a number of signatures). Many states require political party primaries rather than allowing the parties to select their candidates directly. A real campaign requires time for candidates to communicate with voters, debates to take place, the media to scrutinize the candidates, etc. When an unexpected election takes place, it is important to give time for voters to register. And there are logistical limitations on setting up polling places and printing ballots, along with a need for lead time to secure and test voting machines And

to hire and train poll workers. Some of these logistical challenges, like printing sample ballots and regular ballots, are complicated greatly if there are multiple special elections going on at the same time.

How quickly could states hold special elections if they adopted new laws that expedited those elections? Under ideal circumstances, states that dispense with primaries and streamline their special election process might be able to complete a special election within two months. The commission estimates, however, that in the chaos after an attack, it would be difficult for even the most expedited elections to take place within three months.

But what is the consequence to Congress if there are large numbers of vacancies that last for months? There are, in reality, two equally unpalatable scenarios. Either Congress would not be able to function at all because it would not have enough members to field a quorum, or the House might try to act with a very small number of members in ways that would question its legitimacy.

How Mass Vacancies Might Prevent Congress from Functioning at All

Like any legislative body, the United States Congress has a quorum requirement, a provision to ensure that a minimum number of members is present for the consideration of important business. Without such a requirement, a few members might meet and pass legislation, even though the voting members would represent only a fraction of the

American people. But Congress' quorum requirement is more rigid than those in other legislative bodies because it is embedded in the United States' Constitution and cannot be changed without a constitutional amendment. ART. 1, SEC. 5 provides that "...a Majority of each [House] 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." It is clear from the text of the Constitution and subsequent precedents that once it is established that no quorum is present, the only actions that the House or Senate may take are to adjourn or to compel the attendance of absent members. No other business can be conducted.

Under the most commonsense reading of this clause, the Constitution requires that a majority of the whole number of each house of Congress be present in order for that house to hold votes of substance. Under this interpretation, if fewer than 218 members of the House of Representatives were alive, then Congress could not function until special elections filled enough vacancies to reach the constitutional quorum requirement. Mass vacancies would mean that no legislation could be passed, as all legislation requires the assent of both houses. No appropriations could be made; no declaration of war; no laws passed to assist in the gathering of intelligence or apprehension of terrorists. If the Speaker of the House was killed, the House could not elect a new Speaker— who would be the third person in the line of succession? If the president or vice president were killed, no new vice president could be confirmed, as the appointment of a new vice president requires the consent of both the House and Senate. Given the length of time it

takes to hold special elections, Congress could not function in these important areas for months.

How a large number of vacancies might call into question the legitimacy of Congressional Action

In practice, the official interpretations by the House and the Senate of their quorum requirements have not been as stringent as the constitutional language would seem to require. Parliamentary rulings in the House and Senate, beginning during the Civil War, have defined the quorum more liberally than a majority of the members of each house. The quorum requirement in the House is now defined by precedent as a majority of the members who are "chosen, sworn *and living*."

The most significant aspect of the current interpretation for the purposes of continuity of government is the provision that only a majority of the living members needs to be present for a vote rather than a majority of the whole number of seats. In the case of a few deaths in the House, the change in the number needed for the quorum would be insubstantial. (If 2 members of the 435 were dead the quorum requirement would be 217 instead of the 218 with no deaths and a full membership). But in the case of a large number of deaths, the current interpretation of the quorum requirement would have serious consequences. On the one hand, it would ensure that the House could operate with a quorum even after a massive death toll. But at the same time, it would allow the House to operate with just a handful of members. Take, for example, an attack

that kills all but 9 members of Congress. Five of those nine would constitute a quorum, and that tiny, unrepresentative group could pass legislation out of the House. More troubling is the intersection of the Presidential Succession Act with an attack on Congress. In the case of the death of the president and vice president, a nine-member House could then elect a new Speaker, who would become president of the United States for the remainder of the term. Many would question the legitimacy of that president and the actions of the House with a severely diminished membership.

Finally, there are several scenarios that would not affect the issue of calling a quorum, but would be troubling nonetheless. An attack that killed 200 members of the House of Representatives would not cripple the Congress, but it might drastically alter the political and geographical balance of the Congress. An attack might occur when one party caucus was meeting, effectively wiping out most of one party but not the other. It is also possible that an attack would hit when state or regional delegations were meeting, thus eliminating representation for a part of the country for many months.

The Problem of Incapacitated Members

In the past, there has been little concern about the long-term disability or incapacitation of members of Congress, and no provisions exist in rules, law, or the Constitution about defining incapacitation or replacing such members, temporarily or permanently, if they are unable to perform their duties for extended periods of time. This is partly because the Framers barely considered the consequences of incapacitation for any office. There is a fleeting mention in ART. 2, SEC. 1 that Congress could provide for officers who might act

when the president was incapacitated. But none of our presidential succession acts have defined incapacity or dealt with it in a substantive way. It was only with the Twenty-fifth Amendment in 1965 that incapacity was seriously addressed. That Amendment was not in place to deal with serious incapacity issues in the Garfield and Wilson presidencies as well as a number of other lesser incidents. The question of incapacity was not considered at all for members of Congress, as the loss, even for months or years, of one, two, or three members out of 100 of 435 would not be a debilitating event.

But the loss for weeks, months, or years of tens or hundreds of incapacitated lawmakers is another story. The secret creation of a bomb and radiation-proof bunker for Congress at the Greenbrier resort in West Virginia during the Cold War was based on the assumption that a nuclear attack on Washington would kill most members of Congress. The objective then was assuring, with the notice available from the time missiles were launched in Siberia until they arrived in Washington, that Congress could evacuate the 200 miles or so to the Greenbrier. No contingency plans existed for an attack without notice, or one that caused not death, but widespread incapacitation.

The threat from terrorism is different. Not only could there be an attack—including a nuclear one—with no notice, but the threat of chemical and biological warfare, or exploding jet fuel, also makes widespread temporary incapacitation a more likely scenario, and perhaps a more vexing problem. In the event of multiple deaths, the Senate at least, can quickly fill vacancies via gubernatorial appointments. But neither the House nor the Senate can fill vacancies due to temporary incapacitation. For

incapacitated members, the relevant seats would be effectively vacant until the member recovers or dies and is replaced, or until the next general election. In this case, the quorum problem looms larger, since even under the expansive definition of a majority of those lawmakers "chosen, sworn, and living", incapacitated members would be included in the definition but unable to help constitute the quorum. For example, if 220 members of the House of Representatives were alive but unable to perform their duties, there could be no quorum

How Incapacitation Affects Congress

When vacancies occur in Congress, there are established processes for filling them (special election in the House; gubernatorial appointment followed by special election in the Senate). When a member of Congress is alive but unable to perform his or her duties, there is no way to fill what is in effect a temporary vacancy. Under normal circumstances, this does not pose a problem for the functioning of government. If a handful of Senators are incapacitated, the institution can function, short a few votes. But if there are large numbers of incapacitated members, the continuity of Congress is threatened. In the House of Representatives, no special election is called until a seat is declared vacant. Similarly, in the Senate, no gubernatorial appointment or special election can occur if there is no vacancy. Mass incapacitation brings with it all the problems that mass vacancies in the House of Representatives would, but it is worse in three respects. First, mass incapacitation affects both the House and the Senate. Second, the temporary vacancies caused by incapacitation would not be filled for an indefinite

amount of time, only until the member recovers, dies, or the term of office ends. Third, mass incapacitation makes it virtually certain that Congress would be unable to reach its quorum requirement even under its most lenient interpretation.

Continuity of Congress: Recommendations

It is essential that large numbers of congressional vacancies be filled shortly after they occur to ensure that in the event of a catastrophic attack, Congress can continue to function in a way that properly represents the American people. To address this problem, the Commission recommends a constitutional amendment to give Congress the power to provide by legislation for the appointment of temporary replacements to fill vacant seats in the House of Representatives after a catastrophic attack and to temporarily fill seats in the House of Representatives and Senate that are held by incapacitated members.

The commission favors a relatively simple amendment that authorizes Congress to specify the details of the solution with implementing legislation. The procedure for temporary appointments would only need to become operative if there were large scale vacancies, not for ordinary vacancies. Governors could make the temporary appointments, or members could specify a list of successors in advance to fill vacancies. A third option is a combination of these two methods: governors would select from a list provided in advance by each member of Congress. Incapacitated members of Congress who are replaced by temporary appointees, should be able to reclaim their seats as soon as they determine that they are able to carry out their duties.

There are many more details that the commission has considered and that would have to be addressed by legislation. However, the central point is that a constitutional amendment is needed to allow Congress to provide for temporary appointments in the case of mass vacancies or incapacitations of member of Congress.

Why Expedited Special Elections are not the Answer

Since the release of our report, there has been much discussion of the question of continuity of Congress. There is widespread acceptance that there is a problem ensuring continuity of Congress that calls for a solution, although a few seem to want to wish the problem away. We have found many members of Congress and the public convinced that our recommendations are sound. There have however been several lines of criticism against our approach, and one major alternative proposed.

The two major criticisms of our approach are (1) that we should be reluctant to amend the constitution and (2) that our proposal undermines the House of Representatives as the "People's House" as it allows for some members of the House of Representatives to be appointed rather than elected, albeit in the most extreme circumstances.

On the question of amending the constitution, our commissioners could not agree more that we should have a profound reluctance to amend the constitution. A constitutional amendment is a serious step and one that is hard to reverse. Constitutional amendments should be reserved for problems that cannot be solved through legislative

means. Our reservations about constitutional amendments notwithstanding, our commission looked at every option short of amending the constitution and concluded that they would all fall far short of ensuring the continuity of Congress after a catastrophic attack.

The second objection is that temporary appointments, even those made in the most extreme circumstances, undermine the House as the "People's House." Every member of the House of Representatives has been elected by the people. No one has ever served there by appointment as many have in the Senate. Those who make this argument, also advocate federal legislation that would require states to dramatically speed up special elections. The idea is that if special elections can be held very quickly, then Congress will not have trouble functioning for more than a few weeks and that therefore no constitutional amendment or temporary appointments would be needed.

The commission takes very seriously the argument that the House is distinctively the "People's House." Six of our commissioners served in the House of Representatives for a total of 128 years. The procedure for filling ordinary vacancies works well, and the House is not hampered by having one or two seats vacant for several months as special elections are held. It is our contention, however, that the House cannot be the "People's House" unless it adequately represents the people as a whole. The founders, who were concerned with the subject of elections for the House, were also clear that the House was to represent the whole country. If there are 300 vacancies in the House and the remaining 135 proceed with business, then more than two-thirds of the country would not be represented in its decisions. Furthermore, if Congress were unable to function and the country had to rely on executive rule, a benign form of martial law, for many months,

that would hardly fulfill the democratic promise of the "People's House." Our position is that we need the broadly representative chamber of the House of Representatives after an attack, and if we do not allow for emergency interim appointments in these extreme circumstances, we will have either a chamber that represents very few people or one that does not function at all.

The major alternative to our commission's recommendation is federal legislation to pre-empt state laws requiring that states hold expedited special elections. One such bill is proposed by Representative Sensenbrenner and requires elections within 21 days, with 14 days for the parties to select candidates and another seven for the general election. Advocates of this sort of proposal believe that it solves the problem of the continuity of Congress without requiring a constitutional amendment or employing temporary appointments.

Our commission considered and seriously analyzed the option of expedited special elections. Our conclusion was that there is no way to hold democratic special elections in less than two months under normal circumstances and in the aftermath of an attack, it would be hard to imagine holding such elections within three months. We believe that two or three months is too long to be without a Congress, especially in a time of great national crisis.

There are two major reasons why very quick special elections are a bad idea. First, it is not possible from an election administration perspective to hold elections in a short time

period. Second, even we were able to have very quick elections, they would not be democratic elections in the normal sense. There would be no time for candidate recruitment or primaries and little time for the voter to get to know candidates.

On the question of the mechanics of holding elections, there are some states that are able to hold special elections under ordinary conditions within two and a half months. This is only possible because these states eliminate party primaries. Candidates are usually selected by party committees. While it is perfectly legitimate for a state to bypass the primary system, do we want to mandate that no state would be allowed to have party primaries in selecting candidates for a special election?

Beyond the need for a primary, elections are complex activities. Poll sites have to be secured, poll workers hired, ballots designed, and ballots printed. In each of these areas, there are serious problems with holding an unannounced election. Take for example the printing of ballots. There are limited numbers of ballot printing companies. In a general election where there is an election day set years in advance, companies can stagger the printing of ballots. But imagine holding hundreds of elections across the country on short notice. The example of the California recall is fresh in our minds. Officials there are struggling mightily to hold an election in one state in 80 days. Printing presses are furiously printing ballots, and the number of polling places is greatly reduced from a regular election.

Think also of unregistered voters. The announcement of an election with due notice to voters allows those who are unregistered or have moved to a new jurisdiction to properly register. Quick elections would effectively disenfranchise these voters. Short elections would not allow for the casting of absentee ballots. Seven days is not enough to

print ballots, receive requests from voters who need absentee ballots, mail the ballots and receive them back. While some vote absentee as a convenience, there are many who are too frail to visit a polling place or out of town for legitimate reasons. Most troubling of all are overseas military voters, who are serving to defend our country, but would be unable to vote in elections following an attack at the heart of our nation. What about state and federal laws concerning campaign finance, disclosure requirements, etc? At every turn, having elections too quickly undermines the democratic character of the elections.

In addition to many of the election administration difficulties is the question of what sort of election we could have in just a few days or weeks. Who could run in such an election but the richest or most famous? Would there be time for debates? Would candidates be able to run ads informing voters of their positions, promises and character? Would the media have time to scrutinize the candidates? In short, such elections could be mere coronations for the rich and famous, who would run without voters knowing much at all about them—and nothing about alternatives to them.

Finally, proposals to hold quick special elections do nothing for the case of incapacitated House members or Senators. As their seats would not be technically vacant, there would be no way to hold special elections, and Congress might not be able to function at all for an indefinite period of time.

Our commission did not come lightly to the conclusion in favor of a constitutional amendments providing for temporary appointments in the case of mass vacancies and

incapacitations. But after serious study and deliberation, we unanimously endorse that recommendation. We have a hole in our constitutional fabric, one that might result in a country without a Congress for many months after a catastrophic attack on our government. The fact that you are holding these hearings shows a seriousness of purpose on the part of this committee. We offer our recommendations with the hope that it will aid you in your endeavor to strengthen the greatest democratic beacon in the free world, the United States Congress.

RON PAUL
14TH DISTRICT, TEXAS

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Ron Paul

Statement of Congressman Ron Paul for the Hearing

"Ensuring the Continuity of the United States Government: The Congress. "
Senate Judiciary Committee
9-09-03

Mr. Chairman, thank you for holding this hearing and for providing me the opportunity to present comments on the important issue of how to maintain continuity of government if a majority of members of the House of Representatives are incapacitated. This issue has recently attracted attention because of the proposal of the "Continuity of Government (COG) Commission," that the Constitution be amended to allow appointed persons to fill vacancies in the House in the event of an emergency.

Since the COG Commission made its' proposal I, along with other members of Congress, journalists, academics, and policy experts, have expressed concerns that having appointed members serve in Congress function is inconsistent with the House's historic function as the branch of Congress most directly accountable to the people. A superior way to address concerns regarding continuity of House operations in the event of an emergency is contained in HR 2844, the Continuity of Representation Act, introduced by my distinguished colleague, House Judiciary Chairman James Sensenbrenner.

Even with the direct election of Senators, the fact that members of the House are elected every two years while Senators run for statewide office every six years, means that members of the House of Representatives are still more accountable to the people than any other part of the federal government. Appointed members of Congress simply cannot be truly representative. Turning once again to Federalist 52, we find this point eloquently made by Mssrs Madison and Hamilton: "As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured."

Mr. Chairman, there are those who say that the power of appointment is necessary in order to preserve checks and balances and thus prevent an abuse of executive power. Of course, I agree that it is very important to carefully guard our constitutional liberties in times of crisis, and that an over-centralization of power in the Executive Branch is one of the most serious dangers to that liberty. However, Mr. Chairman, during a time of crisis it is all the more important to have representatives accountable to the people making the laws. Otherwise, the citizenry has no check on the inevitable tendency of government to

infringe on the people's liberties at such a time. I would remind my colleagues that the only reason we are reexamining provisions of the PATRIOT Act is because of public concerns that this Act gives up excessive liberty for a phantom security. Appointed officials would not be as responsive to public concerns.

Supporters of this plan claim that the appointment power will be necessary in the event of an emergency and that the appointed representatives will only be temporary. However, the laws passed by these "temporary" representatives will be permanent.

Mr. Chairman, this country has faced the possibility of threats to the continuity of this body several times throughout our history, yet no one suggested removing the people's right to vote for members of Congress. For example, the British in the War of 1812 attacked the city of Washington, yet nobody suggested the states could not address the lack of a quorum in the House of Representatives though elections. During the Civil War, the neighboring state of Virginia, where today many Capitol Hill staffers and members reside, was actively involved in hostilities against the Untied States Government, yet Abraham Lincoln never suggested that non-elected persons serve in the House.

The Constitution already provides the framework for Congress to function after a catastrophic event. Article I section 2 grants the governors of the various states authority to hold special elections to fill vacancies in the House of Representatives. Article I section 4 gives Congress the authority to designate the time, manner, and place of such special elections if states should fail to act expeditiously following a national emergency. As Hamilton explains in Federalist 59, the "time, place, and manner" clause was specifically designed to address the kind of extraordinary circumstances imagined by COGC. Hamilton characterized authority over federal elections as shared between the states and Congress, with neither being able to control the process entirely.

Chairman Sensenbrenner's bill exercises Congress' power to regulate the time, place and manner of elections by requiring the holding of special elections within 21 days after the Speaker or acting Speaker declares a majority of House members are incapacitated. This proposal protects the people's right to choose their representatives at the time when such a right may be most important, while ensuring continuity of the legislative branch.

I have no doubt that the people of the states are quite competent to hold elections in a timely fashion. After all, it is in each state's interest to ensure it has adequate elected representation in Washington as soon as possible. The re-call election in California shows it is possible to have a gubernatorial election, in the most populous state in the union no less, in less than three months time. Surely it is possible to hold an election in a Congressional district in under that amount of time.

In conclusion, I once again thank the Chairman of this Committee for allowing me to express my views before the House. I also once again urge my colleagues to reject any proposal that takes away the people's right to elect their representatives and instead support HR 2844, the Continuity of Congress Act, which ensures an elected Congress can continue to operate in the event of an emergency. This is what the Drafters of the Constitution intended.

Testimony of

Howard Phillips
Chairman
THE CONSERVATIVE CAUCUS
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Submitted to the

United States Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights & Property Rights

CONTINUITY OF GOVERNMENT

September 9, 2003

226 Dirksen Senate Office Building
Washington, D.C. 20510

It's time to sound the tocsin. The Constitution of the United States is often ignored, but, the original words, as amended, remain.

Now, we confront the possibility that changes will be made to the Constitution which will fundamentally alter its underlying principles, its structure, and its restraints.

The neo-conservative American Enterprise Institute and Strobe Talbott's neo-liberal Brookings Institution, funded by several foundations, including Carnegie, Packard, Hewlett, and the John and Catherine MacArthur Foundation, have joined forces to launch a Continuity of Government (COG) Commission whose recommendations, if enacted, could radically transform the Constitutional structure which has endured with changes for more than 200 years.

The COG cause is urging Congress to quickly approve (by two-thirds votes in both Houses) Constitutional amendments which, in COG's view, would enhance the "legitimacy" of the U.S. Congress as a legislative body following a hostile nuclear or CBW attack which eliminated or incapacitated a "substantial" number of members of the U.S. House of Representatives.

Should Congress first craft and adopt an amendment along the lines advocated by COG's, three-fourths of the states would then be prodded to ratify the amendment.

One of the Constitutional amendment drafts put forward by COG stipulates that "Congress shall have the power to regulate by law the filling of vacancies that may occur in the House of Representatives and Senate in the event that a substantial number of members are killed or incapacitated."

Such an amendment would, in effect, give Congress the power to act as a permanently seated Constitutional convention, able to change the law regarding selection of its members whenever it might choose to do so.

Tom Lizardo, Chief of Staff to Congressman Ron Paul, observes that a supposedly minimalist Constitutional amendment could lead to maximum damage to our republic.

"The notion of a 'broad' amendment is perhaps worse than the notion of 'loose construction.' Broad amendments actually tend to give the color of law to just about all things, whereas broad construction at least gives us a continued argument against the constitutionality of that construction. ... The idea that we have a constitutional amendment that would give Congress the right 'by legislation' to consider if and when there ought be appointed members of that body is worse even than a constitutional amendment announcing the appoint powers.... That an

amendment should pass and that Congress, without further restraints, might define (again, 'by legislation') such terms as 'substantial numbers' (of vacancies) or 'times of national emergency' should give pause to all concerned. Even worse they [COG] are so bold as to suggest that appointment for "incapacitation" might even be granted when no emergency exists."

Lizardo points out that COG completely ignores the fact that "a Congress of 199 elected members and 236 appointed members would be far less legitimate! What if the majority of elected members voted against a measure while the vast majority of appointed officials passed the measure into law? The only thing remotely resembling the 'will of the people,' would have been overturned by appointed 'representatives.' "

Lizardo says "To suggest that when a small number of members do business it is suspect as to legitimacy is to attack things we do on the House floor every week! ... better the legitimacy of the few elected than that of the 'many appointed!' "

Another COG proposal would give each governor the authority to fill vacancies (or incapacitations) in his state's Congressional delegation.

Would California Republicans welcome the prospect of Governor Gray Davis filling 53 vacancies in California's Congressional delegation? For that matter, would New York Democrats welcome the possibility of GOP Governor George Pataki filling as many as 29 New York Congressional seats?

Under the Seventeenth Amendment, governors may fill vacancies in the Senate pending decisions in special or regular elections. The Seventeenth Amendment is premised on the recognition that the Senate is supposed to represent the states and the House, the people. Never in American history have members of the House been chosen by governors on the basis of death or incapacitation.

COG Co-Chairman Alan Simpson says these gubernatorial appointments would be "temporary", but we ought be skeptical. After all, there are some "temporary" taxes and regulations which have been on the books for decades. Moreover, who defines "incapacitated"?

The COG scheme would let candidates for Congress (and even worse, members following elections) designate their own successors by appointing alternates to fill their slots should they die. Voters could embrace one set of policies and get something entirely different if the views of the alternate disagree with those of the principal.

All of these proposals constitute cures far worse than the problems they purport to address. In the unlikely event that "substantial" numbers of

representatives were to be unavailable for service or be incapacitated, there almost certainly would be some left to carry on.

Even with only a handful of members, under present rules, a quorum of the living and sworn can be established. And, of course, special elections at the state level can be held expeditiously.

Transferring control of the House from the process of direct popular election would constitute rule by elites, not accountable to the people.

Since ancient times, there have always been those who think they know what's best for the rest of us, but we must not let them substitute Plato's republic for the American republic. We must not let them undercut traditional democratic processes in the guise of promoting democracy.

Arguing further against COG arguments is the fact that, through its Article I, Section 4 authority, Congress already may require quick special elections to fill vacancies in the House. The only rationale for any other approach would be the overriding necessity for Congress to act in a matter of days rather than waiting weeks for new members to be elected and assembled.

Such a necessity seems unlikely. The President has the authority to respond to an attack, whether through law enforcement methods or as commander-in-chief. The War Powers Act, whether Constitutional or not, already allows him to take action and wait thirty days before notifying Congress. It took about one month after "September 11th" before the U.S. military began operations in Afghanistan.

In the case of mass vacancies, appointees or unelected alternates could significantly shift the balance of power in the House. Were Congress to be called on to pass sweeping emergency legislation (as happened in 2001 with the USA Patriot Act), much damage could be done by the time the elected members took their seats.

Consistent with its commitment to advance a Constitutional agenda, The Conservative Caucus has persuaded Mrs. Phyllis Schlafly of Eagle Forum to chair a new "Coalition to Preserve an Elected Congress (CPEC)". The Coalition, which has already had several discussions among its members, includes Notre Dame Law Professor Emeritus Charles E. Rice, Northwestern Law Professor Stephen Presser, Dr. James McClellan, co-editor of a recent edition of *The Federalist Papers* and former chief counsel to the U.S. Senate Judiciary Subcommittee on Separation of Powers, California attorney William Shearer, Nevada pro-family activist Janine Hansen, Congressman Ron Paul (R-Tex.), and Dr. Edwin Vieira, Chairman of the National Alliance for Constitutional Money.

It's bad enough when the Constitution of the United States is ignored. Far worse is the prospect of its fundamental principles being set aside in the wake of an establishment-backed putsch that would amend the Constitution in such a manner as to undermine principles of Federalism, separation of powers, and accountability to the American people.

The fear of terrorism should not be used to scare Americans into surrendering our liberties. It would be a terrible mistake to abandon our representative government in the face of terrorism, and it certainly is not necessary. We should adhere to the Constitution itself, and make use of the rules changes passed by the House in February. It is the fear of calamities – real or imagined – which cause people to surrender their liberties. The calamity passes, but the lost liberty seldom returns.

September 11, 2003

Statement submitted to the Committee on the Judiciary, United States Senate, on the Continuity of Government Commission's Proposal

by
Charles E. Rice
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Visiting Professor, Ave Maria School of Law

I. The Continuity of Government Commission's Proposal

The Continuity of Government Commission (COGC) warns of "a high probability" that, if a terrorist attack killed or incapacitated many members of Congress, "there would be no functioning Congress, or a Congress with such small membership as to call into question the legitimacy of its actions." (p. 6). The COGC recommends: "A constitutional amendment to give Congress the power to provide by legislation for the appointment of temporary replacements to fill vacant seats in the House of Representatives after a catastrophic attack and to temporarily fill seats in the House of Representatives and Senate that are held by incapacitated members." The COGC further recommends that Congress enact a law providing for temporary appointments be made by the states' governors, either without restriction or from a list of successors drawn up in advance by the member whose death or incapacity has occurred.

II. The Existing Provisions

Under the present Constitution, vacancies in the Senate can immediately be filled by appointment by the governor. Vacancies in the House, however, require a special election. The Constitution does not specifically deal with incapacity of a member of Congress. In 1981, the House declared vacant the seat of a comatose member when she was unable to be sworn in after her re-election. Although there is no precedent for the House to declare a member incapacitated during his term, it is a fair conjecture that both the House and Senate already possess that power by implication.

III. Unnecessary and Dangerous

The COGC proposal is a result of prolonged and serious consideration. It has an appealing simplicity and breadth. On further reflection, however, the proposal is unnecessary as well as dangerous to the integrity of our representative government.

IV. Importance of Election of the House by the People

Without a single exception, every person who has ever served as a member of the House of Representatives has been elected to that office by the People of his district. This is a non-negotiable point. The Constitution provides that those are qualified as electors of the House who are qualified as electors of the most numerous branch of the state legislature. In commenting on

this in The Federalist, no. 52, James Madison wrote: "The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the Convention therefore to define and establish this right, in the Constitution. To have left it open for the occasional regulation of the Congress, would have been improper for the reason just mentioned."

Not even a pressing necessity should justify even a supposedly "temporary" abrogation of the right of the people to elect their representatives. Indeed, it is precisely in times of crisis or catastrophe that it is most important to preserve in the representatives "an immediate dependence on, and an intimate sympathy with the people." (The Federalist, no. 52) If a terrorist attack decimated the House of Representatives, the confidence of the people in our democratic institutions would be enhanced by their direct election of the replacement members and would be diminished by the appointment of those replacements by executive fiat

V. A Constitutional Amendment is Unnecessary

A. Expedited Special Elections

In any event, it is not necessary to amend the Constitution to enable Congress to function after a catastrophic attack. Vacancies in the Senate can be filled immediately by appointment of the governor. With respect to the House of Representatives, the states can expedite the required special elections to fill vacancies. The COGC reports that the average length of a vacancy since 1985, from the death of a member until his replacement was sworn in after the special election, was 126.4 days. (Appendix IV). It is fair to surmise that the elapsed time could be shortened under the urgency created by a terrorist attack,

B. Legitimacy of a Temporarily Reduced House

Special elections, however, do not happen overnight. It is fair to ask: If an attack left the House of Representatives with only a handful of members, how could it legitimately function? The answer is two fold: First, although the Constitution provides that "a Majority of each [House] shall constitute a quorum to do business" (Art. I, Sec. 5, cl. 1), it is a debatable but fair conclusion that each House has the inherent power to exclude deceased and incapacitated members in calculating the number necessary for a quorum. The issue is pertinent primarily with respect to the House of Representatives, since Senate vacancies can be filled immediately by the governor. Suppose, as the COGC report conjectures, "only five House members survive" (p. 2) an attack. And suppose those five members proceeded to act as the House. The republic would survive quite well. The COGC states that such a small membership could "call into question the legitimacy of its actions." (p. 6). But numerous laws have been enacted, often by voice vote, with very few House members present, including, for example, the Wartime Emergency Supplemental Appropriations of 2003, the legitimacy of which have not been called into question. Also, a House of five elected members would have more "legitimacy," as the living continuation of the only directly elected entity in our government, than would a House composed of those five elected members and 430 appointed members. Any concern about a small surviving House enacting imprudent legislation should be allayed by the bicameral requirement of the

concurrence of the Senate, which could be immediately restored to full strength by appointment after an attack.

Incidentally, the Patriot Act was enacted by the full House and Senate after 9/11. That act is a subject of debate and concern as a dubious and hasty response to that crisis. If both elected chambers of Congress can produce such a questionable law, why would it make sense to nail into the Constitution a potential warrant to empower a Congress, dominated by unelected appointees, to enact whatever it sees as an appropriate response to such a crisis?

C. Stand-by Emergency Legislation

Expedited special elections provide one basic solution to the crisis scenario painted by the COGC report. The second solution is for Congress to enact stand-by legislation, including provisions for funding, authorizing the president to take appropriate action to deal with any catastrophic event even if the Congress has been practically wiped out. Such legislation should include sunset provisions requiring re-approval by Congress as soon as it is reconstituted. In short, we do not need to abrogate even "temporarily" the principle of our elective government to deal with a terrorist attack or other catastrophe.

VI. Unavoidable Difficulties in Any Constitutional Amendment

The COGC report "recommends an amendment of a general nature that allows Congress to address the details through implementing legislation." (p. 58). The amendment proposed by Professor Michael Glennon (p. 51) provides "Congress shall have power to regulate by law the filling of vacancies that may occur in the House of Representatives in the event that a substantial number of members are killed or incapacitated." This language is unavoidably open to broad interpretation and potential abuse. What are the limits, if any, to the potential definitions of "substantial" and "incapacitated"? Nor is there any discernible limit to the legislation Congress would be authorized to enact. The proposal by Norman J. Ornstein embodies the concept of gubernatorial appointment from a list of "designated successors" named by the House member or senator. This provision is designed to forestall appointments made uniformly from the governor's own party that could change the political composition of the Congress. The Ornstein proposal is for a constitutional amendment rather than a statute. It understandably leaves uncovered some questions which could arise. For example, it requires that the member must designate his successors "in advance." But "in advance" of what? If he must designate them before the election, the people are voting, in effect, not for the one member but for his team which must include "not fewer than 3 nor more than 7 emergency interim successors." Or if the member is allowed to designate his successors after his election, how does that contribute to a fully informed decision by the voters on election day? In the Ornstein proposal, moreover, the member is mandated to "review and, as necessary, promptly revise the designations" to ensure that there are always at least three. If, before the election, he named Able, Baker and Charlie as his successors, could he later substitute Delta, Easy and Fox? Of does a successor, once designated, acquire a form of tenure so that he cannot be replaced without his consent?

These and other questions that could be raised illustrate the complications that would

necessarily arise from the abandonment, even on a "temporary" basis, of the constitutional mandate for popular election of the House. Nor could such complications be avoided by requiring the governor to appoint a successor of his own choice from the same party as the deceased or incapacitated member. In light of the ideological diversity within the Democratic and Republican parties, appointment by the governors even from the same party could change the ideological composition of the Congress contrary to the will of the people.

VII. Do Not Experiment with the Constitution

To raise these questions is not to fault the Glennon and Ornstein proposals, which were seriously and studiously crafted. They are, however, proposals for constitutional amendments. The ambiguities and open questions unavoidable found in them reinforce the conclusion that constitutional amendments ought to be proposed only with extreme caution. The amendment proposed by COGC is at war with the right of the people always to elect their members of the House of Representatives. The proposed amendment, moreover, is unnecessary. When it is not necessary to amend the Constitution, it is necessary not to amend the Constitution.

Ho, James (Judiciary)

From: Phyllis Schlafly [pschlafly@earthlink.com]
Sent: Thursday, August 28, 2003 10:29 PM
To: Ho, James (Judiciary)
Subject: SCHLAFLY TESTIMONY ON CONTINUITY

Testimony of Phyllis Schlafly

on the Continuity of Government

submitted to the

Senate Judiciary Committee

Subcommittee on the Constitution, Civil Rights and Property Rights

August 29, 2003

Why are some people now trying to abolish the most democratic feature of our constitutional republic, namely, the right of the people to elect the U.S. House of Representatives?

An elite group of former Clinton advisers and former public officials of both political parties gathered at the American Enterprise Institute in Washington to announce their proposal to convert the House of Representatives from an elected body to an appointed body in the event of a national emergency. This group calls itself the Continuity of Government (COG) Commission, and the acronym is apt. The COG Commission is trying to be a cog that manipulates our constitutional process of self-government.

COG offers a "solution" in search of a hypothetical problem that doesn't exist and may never exist. COG hypothesizes that it would be a second disaster if, after a terrorist attack on the U.S. Capitol killed most members of Congress, we then had to wait several months for special elections to fill the House vacancies.

It should not be high on our worry list that the House couldn't pass bills until special elections are held. Almost every year Congress goes about four months without passing anything significant.

COG proposes a constitutional amendment that would allow House members to be appointed, a procedure that is now unconstitutional. After painting an emotional picture of a worst-case scenario with most members of Congress killed, COG is hoping that Americans' fear of a recurrence of the events of 9/11 will bamboozle Congress into precipitous action.

COG draws a dramatic word picture of what might have happened if United Flight 93 had departed on time and hit the U.S. Capitol instead of being forced down in Pennsylvania. In fact, only a handful of congressmen were in the Capitol that morning.

One of COG's proposals would simply give Congress plenary power to fill vacant seats "if a substantial

number of members are killed or incapacitated." Another alternative would empower each governor to replace his state's dead or disabled House members (e.g., Governor Gray Davis could appoint 53 Representatives from California).

The text of COG's proposed constitutional amendment contains far more words than the entire ten amendments of the Bill of Rights and is a Rube Goldberg-like plan (i.e., complex and impractical). COG would require each House and Senate member to designate in advance three to seven successors to fill his seat if it becomes vacant, and the governor would appoint Representatives from among those so designated.

Each House and Senate member would be empowered to "revise the designations" of his successors at any time. Thus, in the 2004 elections, voters would be given the task of electing a congressional candidate to whom is attached several shadows who would fade in and out of the possibility of serving in Congress and whose actual appointment would depend on the governor's choice.

Each governor's "appointment authority" would kick in after a majority of governors issued a proclamation that an "emergency" exists because a majority of the Representatives in that state are dead or "unable to discharge" their duties. The process gets even stickier if the disabled Representative rises from his sick bed and tries to resume the office to which he was legitimately elected.

James Madison did a better job of writing the Constitution than COG, whose members include Donna Shalala, Lynn Martin, Kweisi Mfume, Tom Foley and Newt Gingrich. Our present Constitution already allows governors to fill U.S. Senate vacancies, allows states to advance their timetables for special House elections, and allows Congress to require an expedited timetable.

COG's co-chairman is Lloyd Cutler, confidant of Presidents Carter and Clinton, who was also co-chairman of the 1983 Committee on the Constitutional System that tried (fortunately unsuccessfully) to change the U.S. Constitution in a dozen ways in order to eliminate our Separation of Powers. A co-sponsor of COG is the Brookings Institution, whose president Strobe Talbott (Clinton's foreign policy adviser) famously wrote in Time Magazine that "nationhood as we know it will be obsolete" and that he rejoiced in the coming "birth of the Global Nation."

The United States survived the real national emergencies of the Civil War and the burning the U.S. Capitol by the British in 1814 without giving up our right to elect members of the U.S. House of Representatives. We should never relinquish that right.

Phyllis Schlafly is a constitutional attorney, the author of 20 books, and the president of Eagle Forum. She was a Reagan appointee to the Commission on the Bicentennial of the United States Constitution.
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Statement to be submitted to the Senate Judiciary Committee

by the Honorable Alan Simpson and the Honorable Lynn Martin

We write today as former members of the first branch of government to express our strong belief that Congress should act to ensure that it would be able to reconstitute itself after a catastrophic terrorist attack. The danger is real that terrorists could try to sow the seeds of chaos in America by attempting to destabilize our government.

It almost happened on September 11th. We know that the fourth plane, United Flight 93, was headed for Washington, DC, and very likely for the greatest symbol of our American democracy, the Capitol Dome. If that plane had hit when there were significant numbers of members of Congress on the floor, there would have been many casualties, and much shock and horror in the nation.

But even worse, it is very likely that an attack of this sort would have debilitated Congress, not allowing it to function for many months, just at the time when political leadership was needed. It is because of the bravery of the passengers of Flight 93, that this great institution of our government, the Congress, was able to function in the months after that fateful day.

For the past year, we have served as commissioners on the Continuity of Government Commission, a bipartisan effort run by the American Enterprise Institute and the Brookings Institution. The commission includes a very impressive group of former high

government officials from both sides of the aisle. It is co-chaired by Senator Simpson and Lloyd Cutler, White House counsel to presidents Carter and Clinton. It includes two former Speakers of the House, Thomas Foley and Newt Gingrich, a former minority leader of the House, Robert Michel, two former White House chiefs of staff, Ken Duberstein and Leon Panetta, a former attorney general, Nicholas Katzenbach, a former solicitor general, Charles Fried, a sitting judge, Robert Katzmann, two former cabinet secretaries, Lynn Martin and Donna Shalala, a former member of Congress who serves as president of the NAACP, Kweisi Mfume, a former high ranking official in the Defense and Justice Departments, Jamie Gorelick, and a constitutional law scholar with experience in the State Department, Phillip Bobbitt.

This diverse group with extensive experience in government came to a unanimous conclusion. We need a constitutional amendment that will empower Congress in the case of a catastrophic attack to provide for the appointment of temporary replacements to fill seats in the House of Representatives and to temporarily fill seats in the House and the Senate that are held by incapacitated members.

We are all reluctant to tinker with the Constitution unless it is absolutely necessary, but we came to recommend such an amendment because we could find no other way to ensure Congress could continue to function after a catastrophic attack.

Why is Congress so vulnerable? First, in the case of an attack killing many members of Congress, the House of Representatives would not be able to fill its vacancies quickly. In

the Senate, governors may make appointments to fill vacancies until special elections can be held. In the House, the constitution provides only one method for filling vacancies: special elections. Those elections take on average four months to hold.

If there were a large number of vacancies, the House might not be able to meet its quorum requirement and would be unable to conduct the nation's business. The constitution provides that a quorum is a majority of each body. Using that strict interpretation, if 218 members were killed, the House could not act.

Think of the legislation that was passed in the three months after September 11th: the authorization of force in Afghanistan; provisions for transportation security; appropriations to rebuild New York and the Pentagon.

Under a looser interpretation of the quorum, a small number of members might continue to operate the House, but surely with questionable legitimacy, we all believe. Would a law that was passed by a majority of the 35 remaining members of the House be valid? Or imagine the nightmare scenario if the president and the vice president were killed along with a large part of the Congress (perhaps at a State of the Union address). The remaining say 35 members would elect a Speaker of the House, who would become President of the United States under the provisions of the presidential succession act. The bottom line is simply that unless large numbers of vacancies in the House of Representatives are temporarily filled very swiftly, Congress would not be able to act or it would act with questionable legitimacy.

A second problem is that of large-scale incapacitation. This chamber had a very direct experience with an anthrax attack. If the particles had spread more widely, there might have been large numbers of senators becoming very ill and spending months recovering in intensive care units. The Senate would cease to function if more than half were so affected. For this reason we believe that if the body is unable to continue, temporary appointments should stand in for incapacitated Senators and Members until they recover to reclaim their seats.

There are many details that are necessary to address in any legislation to implement an amendment such as the one we recommend. Our goal today is to respectfully urge that it is essential for Congress to begin to act to preserve itself as an institution, even if terrorists were to try to attack its members. The chairmen and members of the Senate Judiciary Committee are to be sincerely commended for holding a hearing on this important topic, and we pledge to assist you in any possible way you may believe to be useful in your future deliberations on this critical subject.

The Washington Times
www.washingtontimes.com

Continuity of Congress

By John Cornyn
THE WASHINGTON TIMES
Published September 12, 2003

Two days after September 11, Congress approved legislation expediting benefits for public safety officers killed or injured in the line of duty that day.Three days after September 11, Congress appropriated $40 billion in emergency funds for recovery from and response to the attacks, as well as legislation authorizing the use of military force.A week later, Congress approved additional legislation to stabilize and secure our economy and our airports, and to provide compensation for the victims of the September 11 attacks.And in subsequent weeks, Congress enacted several other bills and appropriations measures to bolster national security and upgrade our capabilities to combat terrorism.

Yet two years later, Congress has failed to establish one vital protection: Ensuring that the important institutions of our government will continue to operate on behalf of the American people should another attack occur.

In order to address this gap in our national security, I chaired the first in a series of congressional hearings Tuesday. The overwhelming conclusion of this first hearing was that our current laws are woefully inadequate, because they fail to guarantee continuity of Congress.

Under our Constitution, Congress cannot act without a majority of its members present.There is good reason for such a provision, as one Constitutional Convention delegate urged, in this extended country, embracing so great a diversity of interests, it would be dangerous to the distant parts to allow a small number of members of the two houses to make laws.

This commitment to federalism and national representation has a cost, however: The same requirement also empowers terrorists to shut down the Congress by killing or incapacitating a sufficient number of representatives or senators.

The problem is that states may empower their governors to appoint senators in cases of vacancies, and 48 states have done so, but the Constitution provides no immediate mechanism for filling vacancies in the House, nor for redressing incapacitated members in either the House or the Senate.

For example, if 50 senators were in the hospital and unable either to perform their duties or resign, they could not be replaced.The Senate could be unable to operate for up to four years.

The Continuity of Government Commission, a bipartisan panel of former congressional leaders and government officials across the political spectrum, has unanimously endorsed a constitutional amendment to provide for emergency interim appointments, in cases of catastrophic attack, until special elections can be held.Just as the 25th Amendment ensures continuity of the presidency, the proposed amendment would ensure continued congressional operations.Indeed, some members of Congress have already introduced their own constitutional amendment proposals, joined by a bipartisan coalition of more than 80

co-sponsors.

Alternatively, a group of U.S. representatives, including some prominent Republican House members, have introduced a statutory proposal to require expedited special elections in cases of emergency.Parties would have two weeks to nominate candidates, and the election would occur seven days later.

I'm open to any proposal that gets the job done, and I respect the sincere desires of many House members to preserve, to the maximum extent possible, the tradition that every member of the House is elected.

I am concerned, however, that expedited special elections either take too long to conduct to ensure adequate continuity, or will sacrifice too many other important principles, such as meaningful elections and voting rights in the process. It is one thing to plan for an election that has been scheduled months or even years in advance.It is quite another to conduct an election from a standing start.

At the hearing, we heard expert testimony that special elections take months to conduct. It takes time to qualify the candidates, hire poll workers, prepare voter rolls and voting machines, and reserve polling locations. Then there's election results verification and qualification of winners.

I am also deeply concerned with testimony that such expedited elections would effectively disenfranchise military and other absentee voters. Americans who put their lives at stake to protect democracy against threats abroad have every right to participate in democracy at home. It would be impossible to send and receive absentee ballots to our troops overseas under such limited time constraints. Also, giving voters and candidates just seven days to debate issues and examine qualifications also presents serious concerns of democratic integrity.

Notably, state and local election officials who have explained their views to us unanimously expressed concerns with conducting elections in such a dramatically shortened timeframe.

This week's hearing was, I hope, just the first step in a longer process of ensuring that our more than 200-year experiment in self-government will never perish from this earth.We must begin the process of sending the message to terrorists that there is nothing they can do to stop the American government from securing freedom here and around the globe. Nobody likes planning for their own demise, but two years is too long to wait. The time to plan for the unthinkable is now.

Sen. John Cornyn, Texas Republican, is chairman of the Senate subcommittee on the Constitution, Civil Rights and Property Rights.He will co-chair a hearing on Tuesday with Sen. Trent Lott to review the presidential succession statute.

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Return to the article

National Defense Committee
Rear Admiral (Ret.) James J. Carey--Chairman
Samuel F. Wright--Director, Military Voting Rights Project
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September 3, 2003

Senator John Cornyn
Chairman, Subcommittee on Constitution, Civil Rights and Property Rights
Senate Judiciary Committee
United States Senate
Dirksen 139
Washington, DC 20510

Attention: James C. Ho, Esq.
Chief Counsel

Re: Military absentee voting in special elections

Dear Senator Cornyn:

On September 11, 2001, United Flight 93 crashed in Pennsylvania. But for the heroic resistance of the passengers, the aircraft might very well have crashed into the Capitol, killing hundreds of members of the Senate and House of Representatives. I am informed that your subcommittee will conduct a hearing on such a tragic scenario on September 9.

As you know, our Constitution provides for Governors to appoint interim Senators in case of vacancy, but there is no provision for appointing members of the U.S. House of Representatives. The only way to fill a House vacancy is through a special election. I am informed that the September 9 hearing will consider the need for a constitutional amendment to provide for the appointment of U.S. Representatives if there are simultaneously a large number of vacancies.

I am also informed that some prominent House members are opposed to the appointment of House members, even in the nightmare scenario under consideration. The alternative proposal is to hold a series of "snap elections" with only three weeks notice, in order to fill the House vacancies expeditiously. I am writing to alert your subcommittee to the likelihood that such snap elections could not provide any realistic prospect for absentee voting, especially for the young men and women who serve in our Armed Forces. Accordingly, the National Defense Committee favors your proposed constitutional amendment providing for gubernatorial appointments to be followed by special elections later, if feasible.

Absentee voting is difficult for military personnel even in biennial general elections. As a nation, we still conduct absentee voting essentially as we did in World War II, by shipping pieces of paper around the world by "snail mail." There are three time-consuming steps in the absentee voting process. The absentee ballot request must travel from the voter to the local election official, then the unmarked absentee ballot must travel from the election official to the voter. Finally, the marked ballot must travel from the voter back to the election official. Each of these steps can take weeks so long as the states require that the actual piece of paper travel by physical rather than electronic means. Each step introduces the opportunity for error or delay, resulting in disenfranchisement.

Last year, I wrote to each state's Chief State Election Official (CSEO), asking them to make every effort to facilitate absentee voting by the brave young men and women who are away from home and prepared to lay down their lives in defense of our country. I also included a questionnaire that I devised, showing the rate of disenfranchisement in military absentee voting. Attachment (1) is a copy of that questionnaire. I asked each CSEO to distribute my letter and questionnaire to local election officials in his or her state.

Ten CSEOs responded to my letter, but only Missouri Secretary of State Matt Blunt distributed my questionnaire and obtained and reported responses. Attachment (2) is a copy of Secretary Blunt's letter to me, dated August 21, 2003, with enclosures (including a chart showing data on a county-by-county basis).

Secretary Blunt distributed my questionnaire to the 116 local election jurisdictions in Missouri and obtained and reported data for 105 of those jurisdictions. (The City of St. Louis was one of the holdouts.) For military absentee voters in those 105 jurisdictions, in the 2002 general election, the disenfranchisement rate was 41.3%. Those 105 jurisdictions received 1,147 completed Federal Post-Card Applications (FPCAs) relating to the 2002 general election, and the local election officials mailed 1,136 absentee ballots in response to those applications. Two completed FPCAs were rejected as untimely, and nine more were rejected for procedural deficiencies. Of the 1,136 absentee ballots mailed in response to completed FPCAs, only 673 ballots came back on time and were counted. Fifty ballots came back on time but were rejected for procedural deficiencies, and another 81 ballots were rejected because they arrived after the deadline (November 5, 2002). Another 350 ballots never came back at all.

Absentee voting in a special congressional election is even more difficult, because the service member must be aware that his or her Representative has died or resigned and must submit an application for an absentee ballot. In the "snap election" scenario envisioned by some House members, military absentee voting (or probably any absentee voting) would be completely out of the realm of possibility.

Under a pilot project of the Department of Defense, perhaps as many as 100,000 military personnel will have the opportunity to vote by electronic means in the 2004 presidential election. That will be a big improvement over 2000, when only 84 military

personnel voted electronically in the closest election in our nation's history, but that still means that the other 1.3 million active duty service members must vote by traditional means, using snail mail. It will be many years, if ever, before the Department of Defense and state and local election officials will be ready to implement electronic absentee voting for a special congressional election held with just three weeks notice.

I hope that this information is useful to your subcommittee in its important deliberations. If you want more information from me or the National Defense Committee, please do not hesitate to call on me.

Sincerely,

Samuel F. Wright

Enclosures

SAMUEL F. WRIGHT
Attorney at Law
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703-486-4247(voice) 703-486-1274(fax) * email: samwright50@yahoo.com

July 14, 2002

Dear Election Official:

The contentious aftermath of the 2000 Presidential election, in Florida, brought to light the long-hidden problem that a substantial percentage of the military personnel who try to vote are not, in fact, able to cast ballots that are counted. It is my working hypothesis that the disenfranchisement rate among military voters approaches 50%.

The basic problem is insufficient ballot transmission time. For military personnel in combat and/or at sea, mail service is often slow and intermittent. For that reason, the Department of Defense (DoD) has recommended that each State provide a minimum of 45 days for the ballot to go from the election official to the voter and back. That means that you need to have ballots printed and ready to mail by September 21, 2002. Will you meet that deadline?

Another problem is that many local election officials do not accept the Federal Post Card Application (FPCA) as a simultaneous voter registration application and absentee ballot request, as recommended by 42 U.S.C. 1973ff-3(3). Universal acceptance of the FPCA is essential. Military and State Department voting assistance officers store and distribute FPCAs. It is not feasible for them to maintain a supply of 50 different State forms. When you respond to an absentee ballot request with a second form that the applicant must complete, the almost inevitable result is the disenfranchisement of the voter. I invite your attention to the attached letter-to-the-editor by William Shepard.

Still another problem is that military personnel and others sometimes fail to comply strictly with the many technical rules in submitting their absentee ballots and absentee ballot requests. Please apply the doctrine of substantial compliance in these instances. If the absentee ballot request or the affidavit on the back of the ballot return envelope complies substantially with your State law requirements, please accept it, even if it does not comply with every last jot and tittle. If a completed FPCA does not include some critical piece of information, please contact the applicant by e-mail. (In recent years, DoD has suggested that military voters include e-mail addresses in the "remarks" section of the FPCA.) It may also be possible for you to obtain the needed information by contacting the applicant's parent or other relative who still lives in your jurisdiction.

Please remember that hard-working military personnel are very busy (especially in wartime, like now), and many are voting for the first time. The VAOs are also very busy, and being a VAO is a collateral duty for a junior officer or mid-grade enlisted person with

many other important responsibilities.

Please understand that I am trying to find solutions, not to assign blame. There are many reasons why would-be absentee voters are disenfranchised, and I am not trying to lay this problem at the feet of election officials. Because there are many problems, there are also many needed solutions. New Federal and State laws may be needed. Adjustments in your State's election calendar may be needed in order to make it possible for you to mail out absentee ballots in a timely manner. Required procedures may need to be simplified, or perhaps just better explained in the instructions that accompany the absentee ballot. DoD and the services can certainly do a better job of assigning, training, and motivating VAOs. The data that you report will help address all of these problems.

1. The absentee ballot application

a. How many completed FPCAs did you receive for the 2002 general election? _____

b. How many of those completed FPCAs did you act on favorably by sending out absentee ballots? _____

c. How many completed FPCAs did you reject as untimely? _____

d. How many completed FPCAs did you reject for procedural reasons other than timeliness? _____ What were the most common reasons for rejecting a completed FPCA that was timely received?

Please note that the sum of b, c, and d should equal a.

2. The unmarked absentee ballot

a. On what date did you start mailing out absentee ballots for the 2002 general election? _____

b. How many ballots did you mail on that first day? _____

c. Did you, on that date, mail out ballots to all applicants who had submitted correct FPCAs prior to that date? _____ If not, why not?

d. How many absentee ballots did you mail out (to FPCA voters) after the first date when you mailed ballots? _____

3. The marked absentee ballot

a. For the 2002 general election, what was the deadline for the receipt in your office of a mailed-in absentee ballot? _____

b. Among FPCA voters, how many absentee ballots did you receive by that deadline and count? _____

c. Among FPCA voters, how many absentee ballots arrived after that deadline and were not counted? _____

d. Among FPCA voters, how many absentee ballots did not come back at all (as of November 30, 2002)? _____

e. Among FPCA voters, how many absentee ballots arrived on time but were rejected for other reasons? _____ What were the most common reasons for rejecting absentee ballots that were timely received?

I realize that FPCA voters (military personnel, military family members, and all Americans outside the U.S.) constitute a small percentage of your absentee ballot population. You undoubtedly receive absentee ballot requests from college students, business travelers, disabled persons, etc. For that reason, it would be most helpful if you could separate out the FPCA voters in completing this questionnaire.

Please note that I have written this questionnaire in a manner that the numbers will add up and make sense. For example, if you received 100 completed FPCAs [item 1(a)], and if you received and counted 60 absentee ballots from those 100 persons [item 3(b)], then the disenfranchisement rate is 40%. I hope that I have thought of every possible contingency. If I have missed something, please let me know, as this is an ongoing effort.

Please return your questionnaire to me by December 31, 2002. Thank you for your cooperation, and thank you especially for your efforts to facilitate the enfranchisement of the brave young men and women who are away from home and prepared to lay down their lives in defense of our country.

Sincerely,

Samuel F. Wright

Attachment (copy of William Shepard's letter)

The Washington Times

PAGE A26 / FRIDAY, DECEMBER 9, 1994 ★

EDITORIALS

Letters

Don't disenfranchise Maryland's absentee voters

Your Nov. 29 editorial "Mrs. Sauerbrey's tenacity" addresses Maryland's absentee voting procedures.

You note that for absentee ballot requests that came in close to Nov. 8, voters were allowed to mail in letters in lieu of sworn affidavits. Your editorial decries this, and you say that "requiring [a sworn affidavit] does offer some reassurance about the integrity of the process." Really? Just what does it add of real substance?

I spent three days in Rockville as part of the Republican volunteer team that examined absentee ballot requests. I personally examined 750 such request. Of that entire count, I recall just one that did not clearly, on its face, state why an absentee ballot was needed, in terms that accorded with the statute. I do not understand what would have been added by sending these applicants a bureaucratic form affidavit that would have been returned by them as a condition precedent for an absentee ballot, in nearly all cases so late as to disenfranchise the voter.

Your view reminded me of my attempt to vote by absentee ballot in the congressional election of 1966. I was stationed in Vietnam at the time. Weeks passed, and finally, the week before the election, I received not the requested absentee ballot, but an application for one. Of course I was disenfranchised — the solution that your editorial advocates.

During our check of procedures, it was obvious that no fraud had occurred in Montgomery County. It also seemed clear that the Elections Board has expanded its practices beyond the letter of Maryland's elections law. That needs to be tied up, but along the lines of legitimizing good practice, not disenfranchising voters.

I'll share with your readers two incidents from a rather boring three days at the elections board. The Glendening representative at my table noticed that part of a ballot affidavit, from a 98-year-old Republican, was in spidery handwriting. Then it became more legible, and we saw the notion, "helped by my son." We let it pass. An hour later I was astonished to find an affidavit in careful block letter from a 102-year-old Democrat. She missed some of the lines, but neatly printed, by means of explanation, "almost blind." We let that one pass too.

WILLIAM SHEPARD
Potomac

OFFICE OF THE SECRETARY OF STATE
STATE OF MISSOURI
JEFFERSON CITY
65101

MATT BLUNT
SECRETARY OF STATE

STATE CAPITOL
ROOM 208
(573) 751-2379

August 21, 2003

Mr. Samuel F. Wright
Attorney at Law
437 New Jersey Avenue, S.E.
Washington, D.C. 20003

Dear ~~Mr. Wright:~~ Sam

I asked local election authorities in Missouri to complete your survey regarding military absentee ballots. The survey was sent to all 116 local election authorities in Missouri, including our six election boards, one county election director and 109 county clerks. The responses from those jurisdictions are contained on the enclosed form. Ten counties and one city (St. Louis) did not respond to the survey. I have encouraged them to respond, but having not yet received any information, I thought you would prefer this incomplete data rather than no data at all. If we successfully acquire the requested information from any jurisdiction, we will send you a revised version of the attached.

Missouri election officials received approximately 1,147 federal postcard applications and mailed approximately 1,136 absentee ballots to military personnel. Only two FPCAs were rejected as untimely and nine were rejected for procedural reasons.

Election authorities estimated that 673 ballots were received by the deadline (11-5-02) and counted. Eighty-one ballots were received after the deadline, 350 were not returned and fifty ballots were rejected.

These numbers came directly from local election authorities and specific questions concerning those numbers would be directed to the county clerks or election boards. If I can assist you further, please contact my office

Sincerely,

Matt Blunt

Matt Blunt

li

Enclosure

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August 28, 2003

Honorable Matt Blunt
Secretary of State of Missouri
State Capitol
Jefferson City, MO 65101

Re: Military voting statistics

Dear Secretary Blunt:

Thank you for your letter of August 21, and thank you especially for circulating my questionnaire among the 116 local election officials and obtaining responses from 105 of them. I have incorporated your statistics into "Law Review" 96 (copy enclosed). This article will be published in *The Officer*, monthly magazine of the Reserve Officers Association (ROA), possibly in October but more likely in November. So that I can truthfully refer to you as a member of ROA, I purchased you a one-year membership, which cost me $25 (in case you are required to report gifts).

I am also enclosing a list of my 35 Missouri contacts. I am sending to each of them a copy of your letter and this letter.

Very respectfully,

Samuel F. Wright

Enclosures

Copy to: RADM James J. Carey, USNR (Ret.)
Ms. Polli Brunelli (Department of Defense)
All Missouri contacts (list enclosed)

FPCA Absentee Ballot Questionnaire 8-03.xls

	A	B	C	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
1	County	#FPCAs 2002	#ABS SENT	#REJECT-UNTIMELY	#REJECT-PROCED.	REASON REJECT	DATE MAILED	#MAIL DAY 1	E.G.	#MAIL AFTER DAY 1	DEADLINE DATE	#Rcvd by 11-5-02	#Rcvd after 11-5-02	#NOT Rcvd	#REJECT	REASON	
2	Adair County																
3	Andrew County																
4	Atchison County	2	2	0	0		9/24/2002	0	No-none rec'd	2	11/5/2002	2	0	0	0		
5	Audrain County																
6	Barry County	0	0	0	0		9/25/2002	28	n/a	0	11/5/2002	0	0	0			
7	Barton County	0	0	0	0		9/24/2002	1	No-none received	0	11/5/2002	3	0	3	0		
8	Bates County	4	4	0	0		9/24/2002	2	Yes	2	11/5/2002	2	0	2	0		
9	Benton County	0	0	0	0		9/25/2002	7	No-none received	0	11/4/2002	0	0	0	0		
10	Bollinger County																
11	Boone County																
12	Buchanan County	10	10	0	0		9/24/2002	2	Yes	8	11/5/2002	8	0	2	0		
13	Butler County	0	0	0	0		9/24/2002	0	n/a	0	11/5/2002	3	0	0	0		
14	Caldwell County	5	5	0	0		9/13/2002	1	Yes	4	10/12/2002	5	0	0	0		
15	Callaway County	9	8	1	0		9/24/2002	2	n/a	8	11/5/2002	8	0	0	0		
16	Camden County																
17	Cape Girardeau	14	14	0	0		9/25/2002	20	Yes	4	11/5/2002	9	0	5	0		
18	Carroll County	0	0	0	0		9/27/2002	1	Yes	0	11/5/2002	3	0	0	3		
19	Carter County	0	0	0	0		9/27/2002	8	n/a	0	11/5/2002	3	0	0	3		
20	Cass County	0	0	0	0		n/a	0	n/a	0	11/5/2002	0	0	0	0		
21	Cedar County																
22	Chariton County																
23	Christian County	0	0	0	0	Info not available											
24	Clark County																
25	Clinton County	0	0	0	0			0		0	11/5/2002	0	0	0	0		
26	Cole County	36	36	0	0		9/24/2002	18	Yes	20	11/5/2002	30	0	8	0		
27	Cooper County																
28	Crawford County	0	0	0				0									
29	Dade County	0	0	0	0		9/24/2002	2	No-none requested	0		0	0	0	0		
30	Dallas County	5	5	0	0		9/30/2002	5	Yes	2	11/4/2002	0	0	0	0		
31	Daviess County	0	0	0	0	n/a	9/24/2002	10	n/a	0	11/5/2002	6	0	0	0		
32	DeKalb County	5	5	0	0		9/24/2002	1	Yes	1	11/5/2002	5	0	0	0		
33	Dent County	3	3	0	0		9/28/2002	2	Yes	1	11/5/2002	4	1	0	0		
34	Douglas County	4	4	0	0		9/23/2002	8	Yes	0	10/30/2002	5	0	1	0		
35	Dunklin County	8	8	0	0		10/8/2002	7	Yes	1	11/5/2002	7	1	0	0		
36	Franklin County	8	8	0	0		9/27/2002	49	Yes	1	11/5/2002	8	0	0	0		
37	Gasconade County	2	2	0	0		9/25/2002	4	Yes	0	11/5/2002	0	0	2	0		
38	Gentry County	0	0	0	0		9/24/2002	1	Yes	0		n/a					
39	Greene County	31	31	0	0		9/26/2002	24	Yes	0	11/5/2002	31	0	0	0		
40	Grundy County	0	0	0	0		9/25/2002	12	No-none requested	0							
41	Harrison County																
42	Henry County	0	0	0	0		9/24/2002	42	No-none received	0	11/5/2002	n/a		1	1		
43	Hickory County	4	4	0	0		9/26/2002	10	Yes	2	11/5/2002	3	0	1	0		
44	Holt County	1	1	0	0		9/24/2002	1	Yes	0	11/5/2002	1	0	0	0		
45	Howard County	20	20	0	0		10/5/2002	20	Yes	0	11/5/2002	20	0	0	0		
46	Howell County	3	3	0	0		10/3/2002	1	Yes	2	11/5/2002	3	0	0	0		
47	Iron County	0	0	0	0												
48	Jasper County	5	5	0	0			0		5	11/5/2002	5	0	0	0		
49	Jefferson County	25	25	0	0	n/a	9/24/2002	5	yes	20	11/5/2002	20	2	3	0		
50	Johnson County	47	47	0	0	n/a	10/7/2002	58	yes	14	11/5/2002	42	3	2	0		
51	Knox County	0	0	0	0	0	0	0	n	0	0	0	0	0	0		
52	Laclede County	7	7	0	0	n/a	9/24/2002	7	yes	0	11/5/2002	3	1	3	0		
53	Lafayette County	0	0	0	0												
54	Lawrence County	5	5	0	0		9/25/2003	0	no	no FPCA's on that date	11/5/2002	2	0	3	0		
55	Lewis County	0	0	0	0												
56	Lincoln County	3	3	0	0		9/30/2002	2	yes		11/5/2002	1	0	2	0		
57	Linn County	1	1	0	0		10/2/2002	16	yes		11/5/2002	0	0	1	0		
58	Livingston County	0	0	0	0												
59	Macon County	8	8	0	0		9/16/2002	7	no	rec'd none	11/5/2002	6	0	2	0		
60	Madison County	0	0	0	0												
61	Maries County	0	0	0	0	n/a	10/4/2002	0	0	0		0	0	0	0		
62	Marion County	0	0	0	0		9/24/2003	50	no	rec'd none	11/5/2003	0	0	0	0		
63	McDonald County	0	0	0	0												
64	Mercer County	2	2	0	0		9/24/2003	7	yes		11/4/2003	1	0	1	0		
65	Miller County	2	2	0	0		10/1/2002	6	no	none rec'd	11/4/2002	2	0	0	0		
66	Mississippi County	2	2	0	0		8/8/2003	1	n/a	A's weren't rec'd until after 11	11/4/2003	1	0	1	0		
67	Moniteau County	3	3	0	0	n/a	9/27/2002	3	yes		11/5/2002	3	0	0	0		
68	Monroe County	0	0	0	0		10/1/2002	0			11/5/2002	0	0	0	0		
69	Montgomery County	1	1	0	0		10/1/2002	4	yes		11/5/2002	1	0	0	0		
70	Morgan County	3	3	0	0		9/23/2002	35	yes		11/4/2002	2	0	1	0		
71	New Madrid County	0	0	0	0												
72	Newton County	11	11	0	0		3-Oct	6	yes		11/5/2002	6	0	5	0		
73	Nodaway County	2	2	0	0		10/3/2002	8	no	2	11/5/2002	2	0	0	0		
74	Oregon County	7	7	0	0		9/30/2002	12	yes	0	11/5/2002	5	0	2	0		
75	Osage County	0	0	0	0												
76	Ozark County	11	7	0	4	wrong address	10/11/2002	24	yes	0	11/5/2002	1	0	0	1		
77	Pemiscot County	0	0	0	0		2/18/2002	4	n/a	0	4/2/2002	0	0	0	0		
78	Perry County	3	3	0	0	n/a	9/24/2002	3	yes	0	11/5/2002	1	1	1	0		
79	Pettis County	4	4	0	0		9/23/2002	4	yes	0	11/5/2002	4	0	0	0		
80	Phelps County	34	34	0	0		9/24/2002	65	yes	18	11/5/2002	26	0	8	0		

	A	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R
81	Pike County	0	0	0	0		10/8/2002	4	no	0	11/7/2002	0	0	0	0		
82	Polk County	2	2	0	0		10/11/2002	2	yes	0	11/5/2002	0	0	2	0		
83	Pulaski County	60	40	0	0	n/a	9/24/2002	8	yes	32	11/5/2002	27	0	13	0		
84	Putnam County	4	4	0	0		10/7/2002	1	no	3	11/5/2002	3	0	1	0		
85	Ralls County	0	0	0	0												
86	Randolph County	4	4	0	0		9/24/2002	21	yes		11/5/2002	4	0	15	2		
87	Ray County	3	3	0	0		9/26/2002	3	YES	ALL	Week before election	3	0	0	0		
88	Ripley County	2	2	0	0		4/22/2002	15	yes	2	4/22/2002	2	0	0	0		
89	Ripley County	0	0	0	0												
90	Saline County	11	11	0	0		9/30/2002	9/30/2002	yes	2	11/5/2002	9	0	2	0		
91	Schuyler County	0	0	0	0		n/a	0	n/a	0	n/a	0	0	0	0		
92	Scotland County	0	0	0	0		n/a	0	no	0	0	0	0	0	0		
93	Scott County	4	4	0	0		10/22/2002	38	yes	1	11/5/2002	0	1	3	0		
94	Shannon County	3	3	0	0			0	no	had not been requested	10/30/2002	2	0	0	0		
95	Shelby County	1	1	0	0		9/24/2002	0		1	11/5/2002	1	0	0	0		
96	St Charles County	39	39	0	0		10/1/2002	28	yes	13	11/5/2002	16	3	19	0		
97	St Clair County	0	0	0	0												
98	St Francois County	3	3	0	0		10/4/2002	122	no	3	11/5/2002	3	2	0	0		
99	Ste Genevieve County	0	0	0	0		n/a	0		0		0	0	0	0		
100	Stoddard County	0	0	0	0												
101	Stone County	1	1	0	0		9/24/2002	16	yes	0	11/5/2002	0	0	1	0		
102	Sullivant County	0	0	0	0												
103	Taney County	10	10	0	0		9/26/2002	9	yes, office shortbender	3	11/5/2003	5	77	877	0		
104	Texas County	5	5	0	0		10/1/2002	5	yes	5	11/5/2002	5	0	0	5		
105	Vernon County	7	7	0	0		9/27/2002	13	no	7	11/5/2002	7	0	0	77		
106	Warren County	1	1	0	0		9/24/2002	18	yes		11/5/2002	0	0	1	0		
107	Washington County	0	0	0	0												
108	Wayne County	4	4	0	0		10/2/2002	10	no	no military envelopes	11/5/2002	1	0	3	0		
109	Webster County	5	5	0	0		10/2/2002	2	yes	1	11/5/2002	3	0	2	0		
110	Worth County	0	0	0	0		9/3/2002	1	none requested	0		0	0	0	0		
111	Wright County	0	0	0	0												
112																	
113	Election Boards																
114																	
115	Clay County	31	31	0	0		10/3/2002	28	Yes	3	11/5/2002	16	7	13	1	Undeliverable	
116																	
117	Jackson County	49	47	0	2	No Local Address	9/24/2002	49	Yes	not available	11/5/2003	31	7	13	1	incomplete info	
118																	
119	Kansas City Board	12	9	0	3	bad signature, etc.	9/24/2002	583	yes	0	11/5/2002	5	1	5	0		
120																	
121	Platte County	4	4	0	0		9/25/2002	41	yes	3	11/5/2002	2	0	2	0		
122																	
123	St. Louis County	541	541	0	0		9/24/2002	541	yes	0	11/5/2002	249	50	200	45	2 war offered envelope	
124																	
125	St. Louis City	0	0	0	0												
126																	
127	TOTALS	1147	1135	7	6			38727		378		673	81	390	56		

LAW REVIEW 96

LOCAL ELECTION OFFICIALS RESPOND TO ROA SURVEY

By CAPT Samuel F. Wright, JAGC, USNR* When published there will be a disclaimer.

In May 2002, I sent out, on ROA stationery, 51 personalized but essentially identical letters, to each of the Chief State Election Officials (CSEOs). In most states, the Secretary of State is the CSEO. In the July 2002 issue of *The Officer*, we published the letter to Alabama Secretary of State Jim Bennett as Law Review 49. You can find that letter, or any previous Law Review article, on our web site, at www.roa.org. Click on "Legislative Affairs" then "Law Review Archive" at the bottom of the drop-down menu.

Together with each letter, I provided a questionnaire asking the number of completed Federal Post Card Applications (FPCAs) received for the 2002 general election, the number of FPCAs rejected for lateness or other reasons, the number of absentee ballots mailed, the number of ballots received on time and counted, the number received on time but rejected for procedural reasons, the number received late, and the number of ballots that never came back at all. I asked each CSEO to distribute my letter, and the questionnaire, to local election officials in his or her state. Ten CSEOs responded to my letter, but only two distributed my letter and questionnaire to local election officials.

Missouri Secretary of State Matt Blunt, a member of ROA, distributed my questionnaire to all 116 local election officials in his state and obtained and reported responses from 105 of them. (The City of St. Louis was one of the hold-outs.) The 105 responding election officials reported receiving approximately 1,147 completed FPCAs and mailing ballots to 1,136 of those applicants. Two completed FPCAs were rejected as untimely and nine were rejected for procedural reasons. Of the ballots mailed in response to completed FPCAs, 673 came back on time and were counted, for a success rate of 58.7% (673 of 1,147). Fifty ballots that came back on time were rejected for procedural reasons, and 81 ballots were rejected because they arrived after the deadline (5 November 2002). About 350 ballots never came back at all.

Secretary Blunt is a graduate of the United States Naval Academy and a Lieutenant in the Naval Reserve. In the aftermath of the 11 September atrocities, he was recalled to active duty for several months. Secretary Blunt is the only statewide elected official recalled to active duty in this century.

Florida Secretary of State Jim Smith distributed my questionnaire to local election officials and asked them to complete the questionnaires and send them to me directly. After the 2002 election, I received completed questionnaires from 14 of Florida's 67 counties. In just those 14 counties, the number of disenfranchised military absentee voters was 2,115, which is more than four times the Bush margin over Gore, in Florida, in the 2000 presidential election. What I mean is that 2,115 military personnel, in those

14 counties, submitted completed FPCAs but did not end up casting ballots that were counted.

Among those 14 Florida counties, the best was Indian River County, with an 85.5% success rate. The Supervisor of Elections received 83 completed FPCAs and mailed ballots to all 83. Seventy-one (71) of those ballots came back on time and were counted (85.5% of 83). Four ballots came back on time but were rejected for lack of a witness on the ballot return envelope. Another eight ballots never came back at all.

The worst Florida county, among those submitting information, was Orange County. That Supervisor of Elections reported receiving 13 completed FPCAs and mailing ballots to nine of the 13. (Four completed FPCAs were rejected as untimely.) Among the nine ballots mailed, none came back to be counted.

In Law Review 49, I asked ROA members to contact their local election officials, seeking cooperation to facilitate the enfranchisement of military personnel and their family members. As a result of the mention in *The Officer*, I heard from two South Carolina counties.

In Horry County, South Carolina, the Board of Registration and Elections reported receiving 17 completed FPCAs and mailing ballots to 15 of the 17. (Two completed FPCAs were rejected as untimely.) Of the 15 ballots mailed, 13 came back on time and were counted. The other two ballots came back late and were not counted.

In Richland County, South Carolina, the Board of Voter Registration reported receiving 67 completed FPCAs and mailing ballots to 64 of the 67. (Three completed FPCAs were rejected as untimely.) Of the 64 ballots mailed, 26 came back on time and were counted. Another two ballots came back late, and 35 ballots never came back at all. (The completed questionnaire did not account for the 64th ballot.)

I will be sending out a new batch of letters to CSEOs, possibly as early as November 2003 (one year before the presidential election). I greatly appreciate the assistance of ROA members in bringing this issue to the attention of state and local election officials and state legislators.

What we really need is *electronic voting*. As a nation, we are still conducting absentee voting essentially as we did in World War II, by shipping pieces of paper around the world by "snail mail." Under a Department of Defense program, perhaps as many as 100,000 military personnel will have the opportunity to vote by electronic means in the 2004 presidential election. That is a big improvement over 2000, when only 84 military personnel voted electronically in the closest presidential election in our nation's history. But that still leaves more than 1.3 million military personnel who will have to vote by traditional means, via snail mail, if they are to vote at all.