CONTINUITY OF CONGRESS IN THE WAKE OF A CATASTROPHIC ATTACK

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

JULY 23, 2009

Serial No. 111–17

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE
51–227 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

JOHN CONYERS, JR., Michigan, *Chairman*

HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JERROLD NADLER, New York
ROBERT C. "BOBBY" SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
WILLIAM D. DELAHUNT, Massachusetts
ROBERT WEXLER, Florida
STEVE COHEN, Tennessee
HENRY C. "HANK" JOHNSON, JR., Georgia
PEDRO PIERLUISI, Puerto Rico
MIKE QUIGLEY, Illinois
LUIS V. GUTIERREZ, Illinois
BRAD SHERMAN, California
TAMMY BALDWIN, Wisconsin
CHARLES A. GONZALEZ, Texas
ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California
LINDA T. SÁNCHEZ, California
DEBBIE WASSERMAN SCHULTZ, Florida
DANIEL MAFFEI, New York
LAMAR SMITH, Texas
F. JAMES SENSENBRENNER, JR., Wisconsin
HOWARD COBLE, North Carolina
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
DANIEL E. LUNGREN, California
DARRELL E. ISSA, California
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas
JIM JORDAN, Ohio
TED POE, Texas
JASON CHAFFETZ, Utah
TOM ROONEY, Florida
GREGG HARPER, Mississippi

PERRY APELBAUM, *Majority Staff Director and Chief Counsel*
SEAN MCLAUGHLIN, *Minority Chief of Staff and General Counsel*

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

JERROLD NADLER, New York, *Chairman*

MELVIN L. WATT, North Carolina
ROBERT C. "BOBBY" SCOTT, Virginia
WILLIAM D. DELAHUNT, Massachusetts
HENRY C. "HANK" JOHNSON, JR., Georgia
TAMMY BALDWIN, Wisconsin
JOHN CONYERS, JR., Michigan
STEVE COHEN, Tennessee
BRAD SHERMAN, California
SHEILA JACKSON LEE, Texas
F. JAMES SENSENBRENNER, JR., Wisconsin
TOM ROONEY, Florida
STEVE KING, Iowa
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas
JIM JORDAN, Ohio

DAVID LACHMANN, *Chief of Staff*
PAUL B. TAYLOR, *Minority Counsel*

CONTENTS

JULY 23, 2009

CONTINUITY OF CONGRESS IN THE WAKE OF A CATASTROPHIC ATTACK

THURSDAY, JULY 23, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:10 p.m., in room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Conyers, Scott, Sherman, Sensenbrenner, Rooney, and Gohmert.

Staff Present: David Lachmann, Subcommittee Chief of Staff; and Paul Taylor, Minority Counsel.

Mr. NADLER. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order. The first order of business, the Chair will recognize himself for 5 minutes for an opening statement.

Today's hearing deals with a very important problem: the continuity of the Congress in the event of a catastrophic attack. In the years since 9/11, this issue has virtually dropped off the radar. While the Congress has taken some actions to prepare for such an eventuality it is far from clear that our work is finished. In fact, I would say it is clear that our work is not finished. I hope to hear from today's witnesses about some of these important issues.

Most importantly, we need to know whether our current system is sufficient to ensure that necessary governing functions continue in a manner that is both constitutional and effective. We cannot wait until a crisis to find out whether we are adequately prepared for a catastrophe. I am very concerned that however we choose to respond, that the American people will have confidence in the new Congress and view its actions as legitimate.

Congress has important and exclusive functions under the Constitution and we must guarantee that those functions remain vital in a national emergency, or one might even say especially in a national emergency. I am especially concerned that a House of Representatives, well short of the majority of its 435 seats, might wield the war power or the power of the purse without legitimacy. The damage to our institutions from a rump Congress declaring war, for example, would be incalculable.

Nonetheless, we must weigh the dangers of a substantial diminished Congress against the danger of a President exercising un-

checked power in the absence of a functioning Congress. The Nation runs the risk in a national crisis of those proportions of turning into a dictatorship. If the person who controls the most divisions gets to run the show, then the attack will have been successful in a way that we cannot accept.

Similarly it is not clear how we can deal with the problem of determining when Members are incapacitated, who should make that decision, how to respond and how and when to determine that the incapacity is over.

It is not entirely clear that the current House rules deal with this issue in a manner consistent with the Constitution. It is my fervent hope that the circumstances necessitating these extraordinary actions will never come to pass. No one wants to have to contemplate such an eventuality but we cannot fail to deal with the responsibility. The Nation would be ill-served and the future of our successful system of democracy in peril.

I thank the witnesses. I look forward to your testimony.

I will now recognize the distinguished Ranking Member for 5 minutes for your opening statement.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman. Just a few years ago, Congress acted in an overwhelmingly bipartisan fashion and passed the Continuity and Representative Act by huge margins that included the support of over two-thirds of the Democratic Caucus. That legislation, which I authored with the help of then-Ranking Member Conyers and then-Ranking Member Skelton, from the House Armed Services Committee, will preserve the people's constitutional right to direct elected representation by requiring the expedited special election of new Members in the event there are more than 100 vacancies in the House.

James Madison used the strongest of terms when stating the House must be composed of only those elected by the people. Madison wrote that direct elections are, quote, unquestionably the only policy by which the House can have an immediate sympathy with the people. The House, uniquely among all the branches and bodies of the entire Federal Government, is rooted in the principle of direct elections and that principle must be preserved.

Current Federal law allows the Presidency and the Senate to consist of entirely the unelected in certain circumstances. Without an elected House, the entire Federal Government could be run, laws could be written, without a single branch representing the popular will. I have no doubt that the bond of the spirit of the American people will ensure that democracy prevails even in the most pressing conditions.

Just as the recovery of the Pentagon and the World Trade Center sites were accomplished far quicker than most imagined, I have the greatest confidence that the American people and the State and local election officials would act expeditiously to restore the people's House in a time of emergency.

A study conducted by The Elections Center, a nonpartisan organization representing the Nation's election officials, has shown that expedited special elections can be conducted within a 45-day time frame. As the CBO has pointed out, ten States already require special elections within 45 days under normal circumstances. And in the future, absentee and overseas ballots requested by electronic

means can further facilitate the timely conducting of special elections.

In the interest of providing Members with a full array of options and addressing issues such as institutionally foundational importance, as Chairman of the Committee I agree to report out adversely Representative Baird's proposed constitutional amendment that would authorize nonelected members for the first time in history.

That amendment was fully debated in Committee where amendments could be offered. Indeed, throughout that debate I asked over a half-dozen times if any Members wanted to offer any amendments and no one did. And when Representative Baird's proposed constitutional amendment received a vote on the House floor it was overwhelmingly defeated. Indeed, it failed to achieve even a one-sixth vote. The vote was 63 yes, 353 no, let alone the constitutionally required two-thirds vote.

Of all the constitutional amendments the House has ever held hearings on, that proposal was the most overwhelmingly disapproved constitutional amendment in the history of Congress.

A proposed constitutional amendment fared even more poorly in the Senate, where it failed to receive even a markup by the Senate Judiciary Committee.

On the other hand, the Senate has already begun the process of providing that all Senators be elected by holding a joint hearing in March with this very Subcommittee, on a bipartisan proposal to amend the Constitution to provide more democracy, not less, by requiring that Senators always be elected. That proposal, of course, was spurred by the corruption surrounding the appointment of President Obama's successor in the Senate.

Just a couple weeks ago it was reported that a former chief of staff to impeached Illinois Governor Rod Blagojevich pleaded guilty to taking part in a scheme to sell or trade the President's vacant Senate seat and will testify at the now disgraced Governor's corruption trial. He pleaded guilty to wire fraud for a phone conversation about appointing Obama adviser Valerie Jarrett to the seat; and in return, Mr. Blagojevich would get a job as head of a union-sponsored organization. Opening the House of Representatives to the same corrupt dealings through an appointment process is exactly the wrong way to go.

Finally, let me quote another former Senator, now Vice President Joe Biden. A few years ago he was asked by George Stephanopoulos of ABC News whether he thought it was a good idea for candidates to sign a pledge to establish specific rules to ensure that Congress could reconstitute itself through nonelected Members immediately after an attack. To that, Senator Biden stated, and I quote, I think that is the worst idea in the world.

Joe Biden is right. And with that in mind, I look forward to hearing from today's witnesses.

Mr. NADLER. I thank the gentleman, and I am glad we have on the record the statement from the Chairman that the Vice President is right on something.

In the interest of proceeding to our witnesses and mindful of our busy schedules, I ask that other Members submit their statements

for the record. Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record.

Without objection, the Chair will be authorized to declare a recess of the hearing.

We will now turn to our first panel of witnesses. Representative Brian Baird has represented the Third District of Washington since 1998. He is a licensed clinical psychologist who has practiced in Washington State and Oregon. He has also taught at the university level as a former chairman in the Department of Psychology at Pacific Lutheran University.

Prior to his election Congressman Baird worked in the State Veterans Administration psychiatric hospitals, community mental health clinics, substance abuse treatment programs, institutions for juvenile offenders and head injury rehabilitation programs.

He currently serves on the House Transportation Infrastructure Committee and the Science and Technology Committee where he serves as the Chairman of the Energy and Environment Subcommittee.

Representative Dana Rohrabacher is currently serving his 11th term in Congress representing California's 46th District. He is the Ranking Member of the International Organizations, Human Rights, and Oversight Subcommittee of the House Foreign Affairs Committee.

Prior to his first election to Congress in 1988, he served as Special Assistant to President Reagan. He is a native of Orange County. Prior to joining the Reagan White House staff, he was an editorial writer for the Orange County Register.

Representative Rohrabacher has a B.A. in history from Long Beach State College and a Master's in American studies from the University of Southern California. I shall also mention—because if I don't he will—that he and his wife Rhonda are the proud parents of triplets: Annika, Tristen, and Christian.

I am pleased to welcome both of you. Your written statements in their entirety will be made part of the record. I would ask each of you to summarize your testimony in 5 minutes or less. To help you stay within that time, as you know, there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow, and then red when the 5 minutes are up. Congressman Baird.

TESTIMONY OF THE HONORABLE BRIAN BAIRD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. BAIRD. Mr. Chairman, Ranking Member, friends and distinguished colleagues, I want to thank you for holding this hearing on what I consider to be one of the most important matters that may come before Congress during our careers and perhaps during our lifetimes. I am referring to the need to ensure that the Congress itself will continue in a constitutionally valid manner if a terrorist attack, pandemic disease, natural disaster or other catastrophic event results in the death or incapacitation of large numbers of the House of Representatives.

The matter has been discussed before but we still lack a solution that is either constitutionally valid or functional in practice. That fact suggests a failure to uphold our sacred oath of office.

I will make four points today:

First, there is no doubt that we face a real possibility of terrorist attack, disease or natural catastrophe.

Second, we have no constitutionally valid mechanism for dealing with such events.

Third, if an attack or disaster occurs, it will create a constitutional crisis and confusion at precisely the worst possible moment.

And fourth, responsible, constitutionally valid, and practical options have been proposed and it is time for Congress to act on them.

Post September 11th the first point would seem to be obvious, yet many appear to deny or minimize it. There are worse ideas, Mr. Ranking Member, to temporary placement, and that is no Congress at all. That is a much worse idea.

To those who still do not recognize the threat, let me quote from the report of the Commission on the Prevention of Weapons of Mass Destruction, Senator Bob Graham and Jim Talent.

That report begins, in quotes, Unless the world community acts decisively and with great urgency, it is more likely than not that a weapon of mass destruction will be used in a terrorist attack somewhere in the world by the end of 2013.

If we are sworn to uphold the Constitution, we should not leave such gaps as exist today. In 2005, as was mentioned, a provision was attached to an appropriations bill following a hearing—by the way, at which I was not allowed to testify on the nature of my own bill. That was passed by the House. But it creates a procedure in which the House rules set a provisional quorum in catastrophic circumstances allowing the House to operate under a provisional quorum.

First of all, let's talk about special elections. We have actually done some work on this. To our knowledge, those who passed that bill have not; but we looked into it and asked how many States actually have conducted elections in the requisite time period. In fact, only one has of the prior 21 special elections since that bill passed. The average, in fact, has been not some 40 days, but 117 days.

The most recent two elections were in response to known vacancies, not crisis events, and they took respectively 140 days in the case of Hilda Solis, 91 days in the case of Rahm Emanuel, et cetera.

Some could argue that we will move faster after a disaster. I find that a remarkable assertion, but we actually have evidence. The primary election in Louisiana was scheduled for 150 days after the President declared disaster. It did not actually occur until 239 days after the disaster election. So much for the idea that disaster speeds things up and makes people do things more quickly.

How States responded: We find very few States that have enacted any laws suggesting they could in fact conduct elections in the requisite time period.

I also believe that, as we will hear from Mr. Fortier, that the constitution of the temporary quorum is blatantly unconstitutional and, at best, a fig leaf to try to fill in the gap. It is impossible to

imagine that the framers of the Constitution wanted a Congress comprised of one or two Members and a quorum consisting of half of that for the purpose of declaring war, instituting a draft, appropriating money and impeaching a President, and possibly electing the President in the form of the Speaker of the House. I cannot imagine they were serious about that.

What happens if we don't act? What happens is constitutional crisis and uncertainty, or a rump government; either an executive branch declaring martial law or a few Members saying, "We are the Congress and we can do all the aforementioned things."

That is not the condition that we should leave this country in, and it is hard for me to believe that we would be responsible if we did.

Finally, solutions have been proposed. Mr. Rohrabacher has offered a bill which I have co-sponsored, I have offered a bill which he has co-sponsored. The Continuity of Government Commission has offered an alternative approach. The key point for us is this: The status quo is untenable, it is dangerous for a constitutional democratic Republic; solutions have been offered, they ought to be implemented—one of the aforementioned or something better perhaps, before, not after.

Now, there are critics of this. Some wish to believe that we won't ever get killed. You know I said good-bye to my kids 1 day before I went to Iraq. And one of my little boys, who is four, said, "Daddy, how do I know you are not going to get die-ded while you're over there?" And I said to him, "Son, don't worry, Daddy is not going to die." I lied to him. I am going to die, so are all of you, so are all of we. The question is how and when.

But I did take assurance that if something did happen to me, my son would be cared for. We have that responsibility and we cannot lie anymore. Neither can we put forward resolutions that are unconstitutional or based on wishful thinking, and neither can we not act.

So, Mr. Chairman, thank you for holding this important hearing. I appreciate it. And I appreciate my colleagues' attention and interest. And I am honored to be here with my good friend and colleague, Mr. Rohrabacher, who has worked so hard on this. And I yield back.

Mr. NADLER. I thank you.

[The prepared statement of Mr. Baird follows:]

PREPARED STATEMENT OF THE HONORABLE BRIAN BAIRD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. Chairman, Ranking Member, friends and distinguished colleagues.

I want to thank you for holding this hearing on what I consider to be one of the most important matters that may come before Congress during our careers, perhaps during our lifetimes.

I am referring to the need to ensure that the Congress itself will continue in a constitutionally valid manner if a terrorist attack, pandemic disease, natural disaster or any other catastrophic event results in the death or incapacitation of large numbers of the House of Representatives. This matter has been discussed before, but we still lack a solution that is either constitutionally valid or functional in practice. That fact suggests a failure to uphold our sacred oath of office

I will make four points today. 1. First, there is no doubt that we face a real possibility of terrorist attack, disease or natural catastrophe. 2. Second, we have no constitutionally valid mechanism for dealing with such events. 3. Third, if an attack or natural disaster does occur, the lack of a valid solution will create confusion and

constitutional crisis at precisely the worst possible moment. 4. Fourth, responsible, constitutionally valid and practical options have been proposed and it is time for Congress to act on them before they are needed, not after.

1. The Risk

Post September 11, 2001 the first point would seem to be obvious, yet many appear to deny or minimize it. To those who still do not recognize the threat, let me quote from the report of the Commission on the Prevention of Weapons of Mass Destruction Proliferation and Terrorism headed by our former colleagues, Senators Bob Graham and Jim Talent. The opening sentence of that document reads,

". . . unless the world community acts decisively and with great urgency, it is more likely than not that a weapon of mass destruction will be used in a terrorist attack somewhere in the world by the end of 2013."

We do not know of course where such an event might occur, but surely we must recognize that we work in a building and city that have to be high on the priority target list. As such, we should prepare for that possibility. This raises the second point.

2. Lack of Preparation and Unconstitutional Measures

If we are sworn to uphold and defend the Constitution, we should not knowingly allow a situation to occur that would virtually require the violation of fundamental principles of our Constitution. Neither should we pass laws or rules that are clearly contrary to Constitutional mandates. Unfortunately, we have in fact done both.

In 2005, a provision was attached to an appropriations bill requiring that special elections be held within 49 days of the Speaker declaring that vacancies have exceeded 100 members. Separately, House Rules now create a procedure for the Speaker of the House to set a provisional quorum in catastrophic circumstances, allowing the House to operate under a "provisional quorum", creating a dangerous and unconstitutional situation.

Let us deal first with the practicality of the Special Election requirement. Since the law was passed, there have been 21 special elections for vacant House seats. In that period, only one election has in fact been held within 49 days. The average has been 117 days. The two most recent elections, which came in response to known and predicted vacancies, had the following time frames: Judy Chu to replace Hilda Solis 140 days and Mike Quigley to replace Rahm Emanuel, 91 days. It took 90 days to replace the late Stephanie Tubb's Jones, 134 days to replace now Senator Roger Wicker, and the list goes on.

Some may argue that things would move faster after a disaster, but that assertion is contrary to the evidence from Hurricane Katrina. There, a primary election which was originally scheduled for 150 days after the Presidential disaster declaration was delayed until 239 days after the declaration and even then its legitimacy was questioned by many. So much for the idea that disaster will speed things up.

How have states responded to the Congressional directive that they be able to hold elections within 49 days of a disaster? There too, we find troubling evidence. My staff contacted secretaries of state from across the country and found that only two states had done anything to prepare for the requirements of the legislation. Many reported that they did not believe they could in fact implement elections in the time period demanded. Also troubling was the discovery that none of those contacted indicated that they had been asked by anyone else in Congress about their preparedness. Apparently, those who pushed the legislation forward did not pay subsequent attention at all to its implementation.

Turning now to the second issue, this provisional quorum, passed for the first time at the beginning of the 109th Congress, is a radical departure from House precedent and I believe, unconstitutional. Article 1, section 5 of the Constitution specifies that a "majority of each" body "shall constitute a quorum" to do business. The first order of business of the first Congress was to adjourn for lack of a quorum. Clearly, the first Congress understood that to have legitimacy as a legislative body they had to have at least half of their elected members present.

By comparison, these House rules would violate the Constitutional requirement of a majority quorum by allowing a provisional quorum to do business with as few as two or three members. Other witnesses here today, notably Mr. Fortier, have written extensively about the constitutionality or, better said, the unconstitutionality of this rule.

I find Mr. Fortier's analysis compelling, but for those who are not legal scholars, I simply ask this: Do you believe that the people who wrote our Constitution and placed such strong emphasis on proportional representation could seriously have intended that a handful, perhaps just two or three people should be empowered to take the country into war, establish a draft, appropriate huge sums of money, im-

peach a president, and perhaps even select a president in the form of the Speaker of the House? To personalize this, I then ask, would you feel comfortable knowing that you had no representative voice in this process and that the few who might claim to make up a quorum could well come from the extreme wing of the opposing party?

Most legal scholars, and most of our constituents rightly conclude that this situation is not only unconstitutional, it is foolhardy, dangerous and violates completely the principal of proportionate representation.

3. Confusion and Uncertainty at the Worst Possible Moment

We cannot know if, when or how a terrorist attack, disaster or deadly disease might arrive, but we can easily imagine that through malicious intent or misfortune large numbers of the Congress, the Executive Branch and the Judiciary might be killed or incapacitated. If that occurred under present law, the previously described constitutional questions and violations would produce profound uncertainty and conflict. What is more, the very institutions designated to resolve such issues would themselves be incapable of acting to correct and clarify the situation.

Imagine the President and Vice President have perished leaving competing interests within Congress and the Executive Branch vying for power among the limited group of survivors. Imagine that the partisan political balance of Congress is dramatically shifted, giving a former minority control of the House and Senate, including the ability to elect the Speaker—who is third in line for the Presidency. Imagine resolutions to declare war, instate a draft, declare martial law etc. being passed, then challenged for constitutionality but with no Supreme Court to hear the case.

By passing unconstitutional rules, we have ourselves created the potential for conditions that suspend core principals of proportionate representation and legislative checks and balances By failing to enact valid and practical provisions for ensuring Congressional continuity, we have left a virtual invitation for terrorists to dramatically alter our political system and our governmental function. As dangerous as are the conflicts within our own land, the potential of foreign adversaries to take advantage of the confusion are profoundly dangerous.

This is not a potentiality that the most powerful nation, the leader of the free world, should allow to continue.

4. Solutions Exist but Must Be Enacted

Many people have spent a tremendous amount of time and energy evaluating the problems described here and proposing solutions. The most extensive work has been done by the Continuity of Government Commission, which was headed by Norman Ornstein of the American Enterprise Institute and Thomas Mann of the Brookings Institution, with co-chairs the late Lloyd Cutler and former Senator Alan Simpson. This commission, comprised of some of the best scholars in the country concluded that action must be taken and a constitutional amendment would be required that would empower Congress to provide for its own continuity.

Within the Congress, I have offered a proposed solution in the form of a Constitutional Amendment requiring that Members of Congress generate a list of temporary replacements who would fill vacant seats until such times as real and valid elections could be held. This mechanism would ensure that political balance not be altered by terrorist attack and that replacements would be statesmen and women of integrity and experience. What is more, as the replacements would be temporary, the public would also have a constitutionally guaranteed right to hold an election to fill the position at the earliest possible date.

Mr. Rohrabacher has a somewhat different approach, which he will describe shortly.

I should note that Mr. Rohrabacher and I have cosponsored each other's bills because what matters most to both of us is not that our legislation per se pass but, more importantly, that a constitutionally valid solution be created.

Response to Criticism

Of course not everyone will agree with these proposals.

Some, as mentioned earlier, will deny that the problem exists at all. Frankly, there is not much that can or should need to be said about this position. If people cannot grasp that a nuclear or biological weapon can kill us, it is doubtful that they will be able to grasp whatever solution is offered to deal with that reality. This limitation should not, however, be allowed to leave our nation in peril.

Others may recognize the risks but, precisely because those risks are so real and horrific, they prefer to not deal with them, finding it too stressful emotionally or too complex politically. This reaction is understandable, but it is not sufficient. We

are granted profound responsibility in our positions as representatives and we must not shirk that responsibility, regardless of the difficulty.

A third response has been to suggest that we needn't act today because someone will undoubtedly survive and the magnitude of the catastrophe will ensure that they do the right thing by the country under the circumstances. This belief might be comforting, but it is based on a deeply faulty premise. There is no guarantee whatsoever that a crisis brings out the best in people or that the best people will somehow miraculously be among the survivors. In fact, crises often bring out the worst in some people and there is every possibility that some, perhaps many, of the survivors will not have the abilities, dispositions or motives to manage the situation as well as needed. That is why we must act now to ensure there is a constitutionally valid way of selecting the best people to fill vacancies beforehand, not after the fact.

Finally, perhaps the most strident opposition to the proposed solutions comes from those who assert, accurately, that no one has ever served in the House of Representatives who was not directly elected. That assertion is historically true Constitutionally mandated, and it is something that members of the House are rightfully proud of. The trouble, however, is that it is also true that the House, Senate and Executive have never been simultaneously decapitated. The Constitution does not deal with that possibility nor likely could it have done so, given the historical context in which it was written.

Insisting that direct election to the House is more important than the existence of a House itself, is a bit like a parent of a child saying "If I am not alive to care for my family then no one can, so I won't take out insurance or appoint a legal guardian."

What matters most to our constituents, and to the Constitution, is not that we as specific individuals are the representatives, it is that the people have representation and that the principals of separation of powers and checks and balances are preserved.

No one, absolutely no one, who has addressed this issue seriously is suggesting that there should not be elections to replace vacancies in the House. To suggest otherwise is misleading demagoguery.

The only real questions are what should happen to Congress and to our country in the interim between a catastrophe and until elections can be held, and how best do we insure that the elections when they are held are valid and fair.

Proposed remedies by Mr. Rohrabacher, myself, and the Continuity Commission all answer these questions in ways that would allow a constitutionally valid Congress to be up and running with a full and valid quorum and with all Americans having legitimate representation in as little as twenty four hours or less after a devastating attack. I know of no better way to ensure that our liberties are preserved and that terrorists worst intentions are defeated.

If, within a day of the worst attack in our history, our Congress, executive and courts are up and running again, we will show unequivocally that the strength of this nation transcends specific individuals and that our central institutions can never be taken down by those who would do us harm, then we will have done a deep and lasting service to our nation. If, however, we knowingly fail to act, or if we act by passing symbolic but ineffective and unconstitutional measures, we will have left the nation in peril and failed in our responsibilities.

That is the choice before us today. I appreciate the committee's attention and urge passage of real and lasting solutions.

Mr. NADLER. And I now recognize Congressman Rohrabacher.

TESTIMONY OF THE HONORABLE DANA ROHRABACHER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. ROHRABACHER. Thank you very much, Mr. Chairman. And I appreciate this opportunity to testify.

Providing for the continuity of Congress has been a special cause for my colleague, Mr. Baird. And I have shared that with him, just as we have shared the experience together on the steps of the Capitol on September 11, 2001. It was clear on that day when we stood and had seen the mayhem that had gone down in New York and

this attack on the Pentagon, it was clear that day what could have happened to this branch of government on that day.

Brian and I each have our own proposals of how to deal with that threat, because that threat is still there and the current status quo does not work.

The House Joint Resolution 52 and 53 respectively, Mr. Baird's and my own, addresses the continuity of Congress in case of a man-made or a natural catastrophe. However, we both co-sponsored each other's proposals in the belief that either of these proposals are so much better than the current status quo in which we are totally vulnerable immediately after an attack. And that has not escaped those terrorists and those enemies of our country. They know that if they would bring down some attack on this Congress that would incapacitate or kill a number of us, that for a large length of time, whether it is 25 days or 45 days or 100 days, we would have no legislative branch of government.

And as my colleague has said, having someone here is certainly—and having a responsible make-up, is certainly better than not having anybody here except maybe one or two people claiming to have the powers of the Congress.

I would like to address specifically my proposal which is House Joint Resolution 53, which not only will allow Congress to continue operations in the face of a massive tragedy, but will also make Congress a little bit more democratic in the small "d" sense of the word, because we do face situations where there are vacancies every year.

Today in the Senate, we have seen Massachusetts and West Virginia lose half of their representation for weeks and months at a time because of their Senators' health problems. And not long ago in South Dakota it lost its benefit of half its Senate delegation for almost a year because our Constitution has no provision for dealing with a long-term disability if a Senator declines to resign his seat.

We have seen major controversies regarding the filling of Senate vacancies in Illinois and New York because the Constitution, in its current form, provides only for gubernatorial appointments as the only alternative to a lengthy vacancy. And then, of course, it is followed by an expensive statewide election in States like California and New York.

Until last Thursday, in my home State of California, we had two fewer Representatives than we were entitled to, and still have one fewer, because President Obama saw our delegation as a source of talent for his Administration.

Under our Constitution there is no alternative provided to a lengthy vacancy for a lack of representation, whether it is caused by a terrorist attack or whether it is caused by sickness or by a Member of Congress being appointed to another position.

House Joint Resolution 53 would solve all of these constitutional problems by providing that each person who is elected to the House of Representatives or the Senate must be elected in combination with an alternate. This provision is, of course, modeled on how we currently elect the President of the United States and the Vice President, ensuring that if any tragedy befalls the President, that we will have an alternate right there.

You know, we have had these tragedies in the past and the Vice President has stepped forward. We should have that same sort of protection for Members of the House and Senate so that our bodies will not become inoperable after a terrorist attack or after some kind of major accident.

If an airplane goes down which has Members, a large number of Members in it, it could change the Majority in our House for a lengthy period of time. That is not what democracy is all about, leaving us vulnerable to that type of situation.

So I would just suggest that having an alternate for a House and Senate Member would provide—which is Mr. Sensenbrenner's main concern—for an elected Representative just always to be here in case of an emergency. Just as an elected Vice President, a Vice President is elected just like the President; so that takes care of that democratic argument, but doesn't leave us vulnerable for months and weeks, weeks or months, at a time after some terrorist attack or some tragedy.

So I would ask my colleagues to take this as a very real challenge. We are vulnerable. This country, as we speak, is vulnerable to terrorists and we are also vulnerable to accidents. Let's correct the situation and make sure that we can always have a Senate, always have a House of Representatives, always have a Congress that can function, even though there has been a terrorist attack or some major tragedy that has existed.

I think that Mr. Baird's proposal and my own proposal will go a long way to making this country less vulnerable as it stands right now. Thank you very much.

Mr. NADLER. Thank you very much.

[The prepared statement of Mr. Rohrabacher follows:]

PREPARED STATEMENT OF THE HONORABLE DANA ROHRABACHER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Testimony of Rep. Dana Rohrabacher
Before the Subcommittee on Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
July 23, 2009

Mr. Chairman, thank you for this opportunity to testify today. Providing for the continuity of Congress has been a special cause that my colleague, Mr. Baird, and I have shared since our shared experience on September 11, 2001. It was clear that day what could have happened, and what could still happen, to this branch of government. Brian and I each have our own proposals (House Joint Resolutions 52 and 53, respectively) as to how to address the continuity of Congress in case of a man made or natural catastrophe. However, we both have co-sponsored each other's proposals in the belief that either proposal is better than keeping our dangerous status quo.

Today, I'd like to address specifically my proposal, House Joint Resolution 53, which not only will allow Congress to continue operations in the face of a possible massive tragedy, but also will make Congress a more "small d" democratic institution in the face of the smaller tragedies and problems that we face every year.

Today in the Senate, we have seen Massachusetts and West Virginia lose half their representation for weeks or months at a time, because of senators' health problems. Not long ago, South Dakota lost the benefit of half its Senate delegation for almost a year because our Constitution has no provision for dealing with a long-term disability, if a Senator declines to resign his seat.

We have seen major controversies regarding the filling of Senate vacancies in Illinois and New York because the Constitution in its current form provides gubernatorial appointment as the only alternative to a lengthy vacancy followed by a highly expensive special statewide election. Until last Thursday, my home state of California had two fewer Representatives than we are entitled to (and still has one fewer) because President Obama saw our delegation as a source of talent for his Administration. Under our Constitution, there is no alternative provided to a lengthy vacancy and lack of representation prior to a special election.

H.J.Res. 53 would solve all of these constitutional problems by providing that each person elected to the House and Senate must be elected in combination with an Alternate. This provision is, of course, modeled on how we currently elect our President and Vice President, ensuring that if tragedy befalls our President, as it has with several Presidents in the past, that there is another nationally elected official who is ready to assume the powers and duties of the Presidency.

By providing for elected Alternate Representatives and Alternate Senators, H.J.Res. 53 would continue the tradition of the House of Representatives that no one can vote here who has not been elected by the people, and largely apply that principle to the Senate, as well. My proposal provides that an Alternate becomes Acting Representative or Acting Senator until a new Representative or Senator is elected. It also provides for disability of a Representative or Senator in the same manner as the 25th Amendment provides for disability of the President. (Under the 25th Amendment, the President can transfer his powers and duties to the Vice President with a written declaration, and can reclaim those powers and duties in the same way.)

Mr. Chairman, I don't think we should accept any longer a situation where states and districts are routinely deprived of their representation for months at a time for no fault of their own. I see nothing democratic in a system by which a governor, no matter how politically discredited, can pick an unelected person as a U.S. Senator, perhaps even changing the partisan composition of the Senate in the process. Today, any enemy who wants to vastly change the nature of our government, or paralyze it entirely, can do so by killing or disabling a large enough group of us. All of these unacceptable situations can be fixed by adoption of H.J.Res. 53, and I ask for your support.

ATTACHMENT

IA

111TH CONGRESS
1ST SESSION

H. J. RES. 52

Proposing an amendment to the Constitution of the United States to temporarily fill mass vacancies in the House of Representatives and the Senate and to preserve the right of the people to elect their Representatives and Senators in Congress.

IN THE HOUSE OF REPRESENTATIVES

MAY 20, 2009

Mr. BAIRD (for himself and Mr. ROHRABACHER) introduced the following joint resolution; which was referred to the Committee on the Judiciary

---

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to temporarily fill mass vacancies in the House of Representatives and the Senate and to preserve the right of the people to elect their Representatives and Senators in Congress.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several

States within seven years after the date of its submission for ratification:

"ARTICLE —

"SECTION 1. Immediately after taking the oath of office, an individual who is elected to serve as a Senator or Representative in Congress shall provide the applicable House of Congress a list of at least three designees, ranked in order of preference, to take the individual's place in the event the individual dies, becomes incapacitated, or disappears prior to the expiration of the individual's term of office. The individual shall ensure that the list only contains the names of designees who meet the qualifications for service as a Senator or Representative in Congress. The individual may present revised versions of the list at any time during the Congress.

"SECTION 2. In the event a catastrophe results in the death, incapacity, or disappearance of a significant number of Representatives, the Speaker of the House shall immediately fill the vacancies with individuals from the most recent lists of designees (in the order so provided on the lists) presented by the Representatives whose seats are now vacant, as provided by section 1. In the event that a catastrophe results in the death, incapacity, or disappearance of a significant number of Senators, the Vice President or President Pro Tempore of the Senate shall

immediately fill the vacancies with individuals from the most recent lists of designees (in the order so provided on the lists) presented by the Senators whose seats are now vacant, as provided by section 1. An individual designated to take the place of a Senator or Representative shall serve until the Senator or Representative regains capacity, is located, or until another Member is elected to fill the vacancy.

"SECTION 3. During the period of an individual's service under section 2, the individual shall be treated as a Senator or Representative in Congress for purposes of all laws, rules, and regulations, but not for purposes of section 1. If an individual designated under section 2 is unwilling to carry out the duties of a Senator or Representative during such period, or is unable to do so because of death, incapacity, or disappearance, the Vice President or President Pro Tempore of the Senate or the Speaker of the House shall designate another individual from the same list of designees (in the order so provided on that list) presented under section 1 from which the individual was designated. Any individual so designated shall be considered to have been designated under section 2.

"SECTION 4. If an individual is designated to fill a vacancy in an office of a Senator or Representative under

section 2, the executive authority of the State involved shall issue a writ of election for such office. The special election shall be held as soon as possible after the individual is designated under section 2.

"SECTION 5. Congress shall by law establish the criteria for determining whether a Senator or Representative in Congress is dead, incapacitated, or has disappeared, and shall have the power to enforce this article through appropriate legislation.

"SECTION 6. This article shall take effect at the beginning of the first Congress that convenes after its ratification.".

○

IA

111TH CONGRESS
1ST SESSION

H. J. RES. 53

Proposing an amendment to the Constitution of the United States relating to Congressional succession.

IN THE HOUSE OF REPRESENTATIVES

MAY 20, 2009

Mr. ROHRABACHER (for himself and Mr. BAIRD) introduced the following joint resolution; which was referred to the Committee on the Judiciary

---

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relating to Congressional succession.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:

"ARTICLE —

"SECTION 1. No person shall be a Representative who has not selected and been elected together with an Alternate Representative. Alternate Representatives shall serve during the term of their Representative, and their tenure shall end when a new Representative and Alternate Representatives are elected for the same constituency. Such new Representative and Alternate Representative shall assume office immediately upon election whenever there is a vacancy in the office of Representative.

"SECTION 2. Upon the death, resignation, or expulsion of a Representative, or if at the time fixed for the beginning of the term of the Representative-elect, the Representative-elect shall have died or failed to qualify, the duties and powers of the office of Representative shall be discharged by his Alternate as Acting Representative until the Representative-elect shall have qualified or until a new Representative and Alternate Representative are elected.

"SECTION 3. Whenever the House of Representatives declares that a Representative is unable to discharge the powers and duties of his office, or a Representative transmits to the Speaker of the House of Representatives his written declaration that he is unable to discharge such powers and duties, such powers and duties shall be discharged by his Alternate as Acting Representative. There-

after, when the Representative transmits to the Speaker of the House of Representatives his written declaration that no such inability exists, he shall immediately resume the powers and duties of the office of Representative.

"SECTION 4. No person shall be a Senator who has not selected and been elected together with an Alternate Senator. Alternate Senators shall serve during the term of their Senator, and their tenure in office shall end when a new Senator and Alternate Senator are elected for the same State and class of Senators. Such elected Senator and Alternate Senator shall assume office immediately upon election whenever there is a vacancy in the office of Senator.

"SECTION 5. Upon the death, resignation, or expulsion of a Senator, or if at the time fixed for the beginning of the term of the Senator-elect, the Senator-elect shall have died or failed to qualify, the duties and powers of the office of Senator shall be discharged by his Alternate as Acting Senator until the Senator-elect shall have qualified, or until a new Senator and Alternate Senator are elected.

"SECTION 6. Whenever the Senate declares that a Senator is unable to discharge the powers and duties of his office, or a Senator transmits to the President pro tempore of the Senate his written declaration that he is

unable to discharge such powers and duties, such powers and duties shall be discharged by his Alternate as Acting Senator. Thereafter, when the Senator transmits to the President pro tempore of the Senate his written declaration that no such inability exists, he shall immediately resume the powers and duties of the office of Senator.

"SECTION 7. No one who has not been elected Senator or Alternate Senator may be or act as Senator, except that the legislature of any State may empower the executive thereof to appoint an Acting Senator in the absence of a qualified Alternate when there is a vacancy in the office of Senator, or when, pursuant to section 6 or section 9 of this article, the Senator has been declared unable to discharge the powers and duties of his office.

"SECTION 8. Alternate and Acting Senators and Representatives shall have the qualifications of Senators and Representatives, respectively, and each House may punish its Alternates for disorderly behavior, and with the concurrence of two thirds, expel an Alternate.

"SECTION 9. In the absence of a quorum for three days or more, each House may declare all of its members who have not recorded their presence during such period to be unable to discharge the powers and duties of their offices. In such a case, such powers and duties of each

such member shall be discharged by the member's Alternate until such member records his presence.

"SECTION 10. The Congress shall have power to enforce this article by appropriate legislation.

"SECTION 11. This article shall take effect at noon on the next date established by this Constitution for the beginning and ending of the terms of Senators and Representatives one year after the ratification of this article, except that qualification to be Senator in section 4 of this article shall not apply to any person who had begun his current term of office prior to the effective date of this article.".

○

•HJ 53 IH

Mr. NADLER. It is customary in this Committee that we don't ask questions of colleagues.

Mr. SENSENBRENNER. May I ask one?

Mr. NADLER. Okay. Well, we will dispense with our custom. I recognize the gentleman, the honorary Ranking Member.

Mr. SENSENBRENNER. Thank you. Just one quick one. Mr. Rohrabacher, since you are pushing this Vice Congressman bit, who would you name as yours?

Mr. ROHRABACHER. I would give it great thought and I would make sure that that person was an acceptable person and someone known for his honor and integrity. Certainly that would be something, that judgment would be something I am sure my constituents would take into consideration, because if I would pick somebody who is not representative of their values they would vote against me in the election.

Mr. SENSENBRENNER. At least the Vice President was given the job of being President of the Senate in order to earn the salary. Most Vice Presidents recently have not showed up there very much. What duties would the Vice Congressman have? Would it be kind of like Prince Charles whose job is to wait for his mother to die?

Mr. ROHRABACHER. I think the job of an alternate Congressman would be the most important job of all, and that is of being a citizen. And what is happening here is our government—this is the house of the people, this is the house of our citizens, and there could be no greater responsibility of a U.S. citizen to be ready to serve in case of national emergency.

Mr. SENSENBRENNER. Thank you.

Mr. NADLER. I will recognize myself for a couple of questions since we have dispensed with our custom. Congressman Rohrabacher, what do you call this, an alternate? What title did you give this person, the alternate, the assistant?

Mr. ROHRABACHER. Excuse me, I can't hear you.

Mr. NADLER. What title did you give this person, the alternate Congressman, the assistant Congressman?

Mr. ROHRABACHER. Alternate.

Mr. NADLER. Alternate. And this alternate would serve only until the next regular election or only until a special election to be held?

Mr. ROHRABACHER. The alternate would serve, if the Member is incapacitated or killed, until the next election.

Mr. NADLER. Until the next regular election.

Mr. ROHRABACHER. Or, in the case of a Senate, or a special election.

Mr. NADLER. Okay. Now, let me ask you a different question. Very often in the normal course of events, if any of us were to retire, announce that we weren't running again, and a bunch of candidates suddenly felt compelled to or felt called upon to declare their availability, you would expect that those candidates might include local elected officials, a State senator, a State member of the assembly, a council member, board of supervisors, whatever. Under the current Constitution, a Congressman could not also be a State senator or an assemblyman or anything else.

Do you think that the alternate, that you should be able to name as the alternate, someone who is currently serving in a different office so that the people know him—if it were your judgment—and

that he should be able to serve as alternate but obviously not as Congressman.

Mr. ROHRABACHER. The alternate would only be able to serve if he is eligible for that seat.

Mr. NADLER. No, no. But if he took the seat he would have to resign as State senator or assemblyman. But while just an alternate, do you think he should be able to be a State senator or an assemblyman—or he has to be completely separate?

Mr. ROHRABACHER. The answer is no, because he would be the Congressman at that time.

Mr. NADLER. No. Before he became the Congressman. In other words, you are naming someone as the alternate.

Mr. ROHRABACHER. No, you could not serve in another position.

Mr. NADLER. While you are an alternate.

Mr. ROHRABACHER. Correct.

Mr. NADLER. And why do you think that is a good idea?

Mr. ROHRABACHER. I think it is a good idea because we don't need to have such a concentration of authority and potential power. There are plenty of people in our society that can serve as an alternate in case of an emergency. There would be no reason to concentrate that in the hands of someone who already holds public office.

And by the way, my staff is reminding me, we also have a situation where that alternate should be able to come in, in case someone is incapacitated because of disease, and then maybe after he is cured of an illness he would then come back and the alternate would give up that seat.

Mr. NADLER. Thank you. Congressman Baird, do you want to comment on these questions?

Mr. BAIRD. I do. And I think the key point I would take in a bit of a different direction, and it would be this. If we have a vote today and most of us are on the House floor and most of us are killed, or State of the Union where vast numbers are killed, under the current situation you would have a huge question mark who is going to fill that seat. You will have no representation.

Most people in the United States of America will have no representation at all in the House of Representatives. And it is important to suggest that those who are hard over and say, validly on the one hand, nobody has ever served who wasn't elected, that somehow that is more important than having some representation. I just differ with that.

I would at least like to have somebody chosen by the person who I have elected from my district, from my State, at least under the Constitution, giving a voice if we are going to start a draft, have a war, appropriate funds, impeach a President. I want a voice there.

Now, the question for me is if I nominate——

Mr. NADLER. And you would assume that the person who is elected to Congress would select for such an alternate someone of the same political views, philosophy, et cetera.

Mr. BAIRD. Exactly. That is exactly the point.

Other proposals, one of the problems with the Senate system is that you have partisanship. Mr. Sensenbrenner alluded to that. You have people trying to say, well, let's switch part of those key

parties, et cetera. You shouldn't have that. We would most likely select statesmen and stateswomen to fill our shoes.

I could name somebody right now. Don Bonker, a former Representative, well respected in this institution, would do an admirable job, perhaps better than I would do, if I perished.

And here is the point: With the proposal I put forward, or Mr. Rohrabacher, within 48 hours, maybe 24 hours of the worst decapitating event in the history of this country, the House of Representatives could be reconstituted and the American people and the world could watch them reconvene. And you would have people like Don Bonker and Lee Hamilton or Slade Gorton or distinguished statesmen and stateswomen serving the country within a 24-hour period, fully comprised 435 voting Members of the House of Representatives, constitutionally valid immediately.

Then you have your special elections, then you deal with declarations of war, but with full representation filled by statesmen and stateswomen. And to imply we pick somebody else, through graft or something else, is I think rather specious.

Mr. NADLER. I agree with what you say. Let me just say I think that, considering the fact that this person wouldn't function if the person who picked them was still around, you wouldn't have that temptation.

Mr. BAIRD. Plus I am dead. Where is the bonus of the graft?

Mr. NADLER. That is what I just said.

Mr. ROHRABACHER. And during that time period, we have already experienced after 9/11, that during that time period important things happen. Laws are passed to deal with the current crisis.

We do need elected—and I agree with Jim and the idea of having elected officials here. And I think that what I am offering that person is no less elected than the Vice President of the United States is elected. And we need that to happen.

And I will just—one last thought, if you will. And that is, Brian and I first got to know each other, I didn't know Brian until September 11, 2001. We were standing on the steps with everybody else out here when they held that press conference with Dick Gephart and I guess Denny Hastert.

And we were standing there and the thing began to break up, and I grabbed my buddy by the arm, my buddy who I never met before, and I said, you know, we need to sing God Bless America. And you know, the two of us, this bipartisan duo, started singing God Bless America, and everybody turned around and started coming back.

And you know, it was that unity that we demonstrated, all of us together that day, that important day, that I think helped bring America together. So I think it is very fitting today that we are taking care of business with the friendship that we started there on 9/11. All of us need to think about the potential of something horrible like that happening and do our duty to make sure the American people are well served. Thank you.

Mr. NADLER. Thank you both for your initiative in this and for your testimony. And thank you, you are excused.

And we will ask the second panel to come up, and I would ask the witnesses to take their places. In the interest of time I will in-

troduce the second panel of witnesses while they are taking their seats.

John Fortier is a research fellow at the American Enterprise Institute. He is Executive Director of the Continuity of Government Commission. He has taught at the University of Pennsylvania, the University of Delaware, Boston College, and Harvard University. He holds a B.A. from Georgetown and a Ph.D. from Boston College.

Dr. Eric Petersen is an analyst in American National Government in the Congressional Research Service. His areas of specialization include continuity of government and emergency preparedness and congressional administrative operations. In addition to his service at CRS, Dr. Petersen teaches at Virginia Tech in the Department of Political Science, and has taught in the State University of New York System, Syracuse University, and the Catholic University of America. He holds a Bachelor's degree from the University of Pennsylvania, Master's in Public Administration from Virginia Tech, and Master's of Arts and Ph.D. from Syracuse University.

Dr. Harold Relyea for over 3½ decades was a specialist in the American National Government with the Congressional Research Service of the Library of Congress. A member of the CRS staff since 1971, he held both managerial and research positions during his career. His principal areas of research responsibility included the Presidential office and powers, executive branch organization and management, executive-congressional relations, congressional oversight and various aspects of government information policy and practice.

Currently in private practice he is preparing a book on national emergency powers. He serves on the editorial board of Government Information Quarterly. He received his undergraduate degree from Drew University and his doctoral degree from the American University.

I am pleased to welcome all of you. Your written statements will be made part of the record in its entirety. I would ask each of you to summarize your testimony in 5 minutes or less. To help you stay within that time there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow, and then red when the 5 minutes are up.

The questioners will be recognized in the order of seniority on the Committee, alternating from Majority to Minority. I will reserve the right to take someone out of order if they have to leave or if they can only be here a brief time. It is customary for the Committee to swear in its witnesses. If you would please stand and raise your right hand to take the oath.

[Witnesses sworn.]

Mr. NADLER. Let the record reflect that the witnesses answered in the affirmative. You may be seated.

And the first witness is Dr. Fortier.

TESTIMONY OF JOHN C. FORTIER, RESEARCH FELLOW, AMERICAN ENTERPRISE INSTITUTE

Mr. FORTIER. Thank you, Chairman Nadler Ranking Member Sensenbrenner, and Members of the Subcommittee for holding this hearing on a very important topic.

All of you know that it is almost 8 years since 9/11, and many of us have been working on these issues since near the beginning.

I pay particular tribute to Representatives Baird and Rohrabacher and my colleague Norm Ornstein at the American Enterprise Institute who really began thinking about these issues within hours or days of 9/11.

We have held many hearings in this Committee and around the Hill and outside of Congress, and I think we actually have some common understanding of what the problems are; but we do have some differences as to what the solutions are or whether what Congress has done in the meantime has really been adequate.

The goal, really, is to have a legitimate functioning Congress quickly after a catastrophic attack. That is important because the real important decisions are made in the 2 to 3 months after an attack, after 9/11, after what might befall us in the future.

If we don't have a Congress at all or if we have a Congress that is made up of a very small and unrepresentative part of the House of Representatives or in the Senate, we don't serve the American people well. We potentially defer too much to the Executive, we may be deferring to an Executive who is not the original President, who is a secondary figure pulled by the line of succession into office.

So the important goal is to have a legitimate, as full as possible, functioning Congress as quickly as possible for those decisions that will be made after an attack. The problems to get to that really are that the House has trouble filling vacancies quickly. It has special elections, not appointments.

The Senate, most States have given their Governors the powers to make appointments. The Senate could probably be in place quickly after an attack that most of its Members were killed, not incapacitated but killed.

And then we also have a problem with incapacitation in both the House and the Senate where conceivably a large number of Members killed or incapacitated could persist for many months, or even years, where there was no way to potentially replace those Members, and you limped along with either a Congress that couldn't meet because it didn't have a quorum or a Congress that had very small bodies that didn't look like the people that had originally elected them.

Our recommendation in the Commission, the Continuity of Government Commission, was to have a form of temporary appointments to fill vacancies in the House and to have some temporary appointments available to fill in for Members who are incapacitated in extreme circumstances.

Again, we take no issue with the current situation in the House and the Senate. In fact, I think we would agree with Ranking Member Sensenbrenner that the House should be the people's House, that in normal circumstances a vacancy for a time is not going to affect the functioning of the House. But in a case of large numbers of Members of Congress, Members of the House especially, killed or incapacitated, the representative character of the House is hurt, and potentially the actual functioning of the House is hurt, and that would shift dramatically the balance of power between the branches.

So what has been done? One, we have passed some legislation to speed up special elections in catastrophic situations. And two, we have changed the rules or codified some new rules on the quorum. I don't think either of these are adequate.

One, the speeding up the special elections, as Representative Baird referred to, is likely not workable. The 49-day limit, some States do have in their laws the provision to have quick elections, but most election officials will tell you that is very difficult to do; that you would have to skip primaries, that you would have to change the laws now in advance of an attack, and most States have not taken that up. And I think it is very unlikely that States would meet that deadline. And even if they did, that is still quite a long time for many Members of Congress to be missing, for Congress to be missing two-thirds or three-quarters of its Members during the most important decisions that have to be made.

I have in my testimony more on the quorum. But briefly I think the Constitution is pretty clear on the quorum; that the quorum is a majority of each house. A majority of the House, a majority of the Senate constitutes a quorum.

And while we have had some precedents and now a change in the rules that have had some situations that would attempt to lower the quorum, I don't believe that was consistent with the framers' original intent to have a body that was widely representative of people, not a small group of people claiming to represent others. And also that a Congress like this would be extremely unrepresentative; that it could represent one part of the country and not the other.

At the end of the day, I don't think we are much more prepared than we were on 9/11. And I note that in the 1950's and 1960's we went through many of these debates, even passed constitutional amendments through the Senate. Ultimately that issue was forgotten. And I hope it isn't today because we still have more work to do.

Mr. NADLER. Thank you very much.

[The prepared statement of Mr. Fortier follows:]

PREPARED STATEMENT OF JOHN C. FORTIER

The views expressed in this testimony are those of the author alone and do not necessarily represent those of the American Enterprise Institute.

Thank you Chairman Nadler, Ranking Member Sensenbrenner and Members of the Subcommittee for inviting me to testify before you on preserving the continuity of Congress after a terrorist attack. I am the executive director of the Continuity of Government Commission, a joint effort of the American Enterprise Institute and the Brookings Institute, now co-chaired by former senators Alan Simpson and David Pryor.

It has been nearly eight years since the horrific day of September 11, 2001. Even after the passage of time, the country cannot forget the magnitude of the attack that killed many innocent people and changed the way we think about our security.

But members of this chamber more than anyone know that the damage done on September 11th could have been even worse. There were three planes that struck their intended targets at the two towers of the World Trade Center and the Pentagon leaving nearly 3,000 innocent people dead. But there was also a fourth plane, United 93, which took off from Newark 42 minutes late. Because of the delay, the passengers on that flight, who were herded to the back of the plane, learned about the fate of the other three planes from cell phone conversations with their loved ones. They made the fateful decision to storm the cockpit. All of them lost their lives, but their heroic actions spared America the loss of many more lives and pre-

vented the disruption of our constitutional institutions of government, and our ability to respond effectively to that terrorist attack.

The target of that fourth plane has been confirmed by the 9/11 Commission; it was headed toward Washington, D.C., and the hijackers planned to fly it into the Capitol. The aim was not only more death and destruction, but to debilitate the Congress and to throw into chaos our constitutional system.

THE LEGAL AND CONSTITUTIONAL PROBLEMS FACING CONGRESS IN RECONSTITUTING ITSELF AFTER A CATASTROPHIC TERRORIST ATTACK

Shortly after 9/11, two individuals began to think about what would have happened had the fourth plane reached its target and devastated the United States Congress. My colleague at the American Enterprise Institute, Norm Ornstein, thought this problem though two weeks after 9/11 in a *Roll Call* piece entitled "What if Congress Were Obliterated?" And inside the House, Representative Brian Baird had similar thoughts and conversations immediately after 9/11. These individuals have continued to work on these issues, and their efforts have spurred thoughtful and constructive debate by others. Our Commission is one example; in its early years, it was chaired by Senator Alan Simpson and former White House Counsel Lloyd Cutler, and it includes as its members many former public officials from all three branches of government. The purpose of the Commission is to make recommendations on how the institutions of government could reconstitute themselves after a terrorist attack. After many hearings of public testimony, the Commission issued its recommendations in a report in 2003 on the Continuity of Congress, which can be found on our website *www.continuityofgovernment.org.* Recently, the Commission issued a second report on our presidential succession system.

Our Commission, however, was only one institution studying this problem. Congress itself has studied this issue extensively with high level task forces, such as the House group chaired by Chris Cox and Martin Frost. And this committee and others in the House and Senate have held multiple hearings on the matter.

All of these investigations have come to a common understanding of the problem, even if not all agree on the solutions.

Here is a short summary of the consequences of a catastrophic terrorist attack that kills or incapacitates a large number of members of Congress. These problems center around two issues. First, how would House and Senate get back to full membership after such an attack? Second, how would the House and Senate get back to a point where they could operate constitutionally, legitimately, and practically, even if their full membership has not been restored? One aspect of this second question is how the House and Senate could meet their quorum requirements to conduct business, but the quorum is only one aspect of this larger question of restoring a legitimate Congress after an attack.

The House and the Senate would face this situation in very different ways, with the House having greater difficulties in reconstituting itself.

THE SENATE

When vacancies occur in the Senate, in the vast majority of cases, they are filled quickly by gubernatorial appointments. The Seventeenth Amendment gives state legislatures the ability to empower their governors to make temporary appointments to fill Senate vacancies. Those temporary appointees serve until a special election is held to fill out the remainder of the term. By tradition and with the guidance of court cases, the length of that appointment cannot extend much beyond two years. States often schedule special elections at the time of the next general election. Almost all states have given their governors the power to fill vacancies. There are five or six exceptions. Wisconsin and Oregon have had a long standing practice not to fill Senate vacancies with appointments. Instead, they allow the Senate seat to sit vacant until they hold a special election. Oklahoma has allowed appointments in certain circumstances, but in others the law directs leaving the seat vacant until a special election is held, depending on the timing of the vacancy. And in the last five years, Alaska, Massachusetts and Connecticut have changed their laws, and they no longer provide for governors to make temporary appointments to fill vacancies. They too leave the Senate seat vacant until a special election is completed.

The upshot of this gubernatorial power to fill Senate vacancies is that seats do not remain vacant long. If one imagines a catastrophic attack that kills all or nearly all of the senators, the Senate could quickly reconstitute itself. Governors in most of the states would make temporary appointments within days. And the Senate would have nearly full membership quickly.

The Senate and the House are each governed by a constitutional clause that requires a majority of the body to be present to conduct business. With governors

making temporary appointments to the Senate, a quorum would be achieved quickly.

THE HOUSE

The House has one chief difference with the Senate that makes its reconstitution after an attack much more difficult and lengthy. There is no provision for filling House vacancies with appointments. The Constitution provides only one way for House vacancies to be filled: special elections. When a House vacancy occurs, the seat remains vacant, typically for several months, as the state conducts a special election to fill the vacancy.

In normal circumstances, the only downside to this arrangement is that the district has no one to represent its interests during this period. The House itself is not adversely affected, as it can conduct its business effectively with 434 or 433 members as well as it could with the full membership of 435.

But in the case of a catastrophic attack with hundreds of members killed, the House itself would not be able to reconstitute itself for months. In our original report, we found that House vacancies created by the death of a member took over four months to fill. Many state laws allow for vacancies of longer duration, and some do not fill the vacancy at all if it occurs in an election year.

The most likely outcome of a catastrophic attack on the House killing many members would be a House not repopulated for many months. There would also be a serious question whether the House could conduct any business because it would be short of its constitutional quorum requirement of a majority of the body.

INCAPACITATION

One additional factor which would complicate the reconstitution of the House and Senate is incapacitation of members of Congress. There is no provision for removing or otherwise dealing with a sworn member of Congress who is alive, but becomes incapacitated and unable to perform his or her duties.

In ordinary times, the Senate or the House might have an individual member or two who might not be able to vote, to show up on the floor, or who could have an extended period of illness. These individual cases may affect occasional votes, but they do not affect the functioning of the House or Senate.

But in the case of a catastrophic attack, a significant number of incapacitations would be likely and would greatly complicate the House and Senate reconstituting themselves.

Imagine an attack on the Senate kills twenty senators, and gravely wounds the rest. Most of the twenty vacant Senate seats could be filled quickly by gubernatorial appointments. But the eighty senators who were gravely injured could not show up for work, but could also not be replaced by gubernatorial appointment or even by a special election. As these seats are not vacant, there is no mechanism to fill the seats.

In addition to the problem of replenishing the membership of the Senate, there is the additional problem of the Senate meeting its constitutional quorum requirement of a majority of the body. If the Senate could not meet its quorum requirement, it could not conduct business at all. In theory, this situation could last for a very long time, until the incapacitated senators recovered, resigned, died, or their terms expired.

The House would face a similar problem. If many of its members were incapacitated, states could not begin the process of filling vacancies. The House would be left with a few members and the possibility that it could not meet its quorum requirement.

WHY IT MATTERS THAT THE HOUSE AND SENATE RECONSTITUTE THEMSELVES QUICKLY AND LEGITIMATELY

This committee does not need a lecture about the importance of Congress in our constitutional system. It is in everyone's interest for Congress to function as the Constitution intends as quickly as possible. But let me list a few simple points as to why it we should not be without a regularly functioning Congress in the immediate aftermath of an attack.

- After 9/11 Congress passed many pieces of significant legislation directly relating to the attack: the authorization of force in Afghanistan, as well as measures to save sectors of our economy, to appropriate funds, and to improve our ability to protect against and detect future attacks.
- In the absence of Congress, the president might act unilaterally without the check of the Congress.

- A president acting with the backing of Congress will be on stronger ground with the American people and with our friends and adversaries abroad.
- The president of the United States might not be the president that was elected. In the aftermath of a catastrophic attack, it is possible that the president, vice president and others in the line of succession have been killed. The new president might be unknown to the American people, inexperienced, and would greatly benefit from the presence of Congress to reassure the American people that our constitutional system is functioning.
- Our Presidential Succession Act has leaders of Congress in the line of succession. If the House and Senate leaders had been killed, but Congress could not meet to select successors, then no new Speaker or Senate President Pro Tempore could be selected to assume the presidency. Or if the House or Senate were to act with very few members using a more flexible definition of the quorum, they could elect a leader who would become president, but who would have little legitimacy. Imagine, for example, that twenty members of the House survive an attack, which also kills the president and vice president. These twenty members might select one of their own to be the Speaker of the House, and that Speaker could then ascend to the presidency for the duration of the term.

It is for these reasons and others that our Commission strongly believed that the House and Senate must be reconstituted quickly and legitimately. We would not want to face the aftermath of a catastrophic terrorist attack with no Congress, or a House or Senate so small and unrepresentative as to be illegitimate in the eyes of the Constitution and the American people. And we do not believe that it is okay for this condition to persist for months. The real action occurs in the two or three months after a catastrophic attack. Congress should not be absent or deformed in the period it is most needed.

OPTIONS:

THE CONTINUITY OF GOVERNMENT COMMISSION'S RECOMMENDATIONS

The Commission studied the problems laid out above and aimed to find a solution that would allow Congress to reconstitute itself quickly (within days or at most weeks) and legitimately. Our central recommendation was that we must pass a constitutional amendment that would apply to extraordinary circumstances when there were large numbers of members dead or incapacitated. This constitutional amendment would allow for temporary appointments to be made to fill vacant seats until special elections could be held. And it would also allow for appointments to be made to fill in for incapacitated members, and those appointments would last until the member recovered, the member died, or a regularly scheduled election occurred.

With such appointments, both the House and the Senate would have nearly full membership, representing the whole country within days of an attack. The appointments would be temporary, and as soon as special elections could be held, the newly elected members would replace these temporary figures. The Congress could act in the greatest time of need, clearly meeting its quorum requirement, and with a membership that represented the whole country.

The Commission supports several options for appointments. Governors could make appointments. Appointments could be made from an ordered list of successors supplied by each member of Congress. Or governors could pick from among successors on such a list. The goal is to make the appointment quickly and legitimately so that each district and state in the country has adequate representation in a short period of time.

WHAT HAS BEEN DONE

The recommendation of our Commission has not been adopted. Two measures have been adopted that pertain to congressional continuity, but they are inadequate to address the central issue of the continuity of Congress after an attack.

First, Congress passed the Continuity in Representation Act, which requires states to hold quick special elections if there are a large number of vacancies in the House. States would hold these elections in 49 days.

Second, the House has amended its rules to redefine the quorum that is required to do business which allows the House to operate with a very small number of members if there are significant numbers of deaths or incapacitated members.

WHY EXPEDITED SPECIAL ELECTIONS ARE NOT THE ANSWER

The Commission supports the idea that states should reexamine their laws for filling House vacancies and consider conducting them on a more expedited basis. But the legislation passed requiring a 49-day election is unworkable. In the aftermath of an attack, almost all states will not be able to hold elections in this shortened timeframe. At the same time that 49 days is too short to hold elections, it is also too long a period to be without a Congress with full membership. A functioning Congress is needed in the weeks and first two or three months after a catastrophic attack.

Almost no states hold special elections for sudden vacancies in the timeframe contemplated for the legislation. And there is good reason why elections would be hard to hold so quickly. Polling sites need to be secured, machines calibrated, and ballots printed. Candidates have to qualify for the ballot. In most states, the people get to speak in primary elections as well as a general election. Absentee ballots need to be mailed out and returned, not only to local residents, but to overseas voters. And finally, there has to be some time for a campaign in which voters get to know the candidates. Merely holding an election without sufficient time for voters to digest the choices is treating an election as a formality.

The only way for states to meet the 49-day mandate would be for them to dispense with primary elections, which many states are loath to do.

As it stands today, almost no states have modified their laws to comply with the federal mandate of holding elections in 49 days. As far as I know, no states practice holding expedited elections. The likelihood is that special elections would take a minimum of two or three months after an attack, too long to go without Congress.

THE REDEFINITION OF THE QUORUM IS UNCONSTITUTIONAL, AGAINST THE INTENT OF THE FRAMERS OF THE CONSTITUTION, AND DANGEROUS IN THE TIME OF TURMOIL SURROUNDING AN ATTACK

The other change that has been made since 9/11 has been to redefine in House rules what constitutes a quorum to do business.

The constitutional language on the quorum is clear. A majority of each house shall constitute a quorum to do business. When the framers debated this question, their intentions were explicit. They did not want a small number of members, representing a small fraction of the country, meeting and acting as the Congress. They considered both lower and higher thresholds for the quorum, but settled on a majority of the seats in each House as necessary to achieve a quorum.

During the Civil War and in several precedents afterwards, the House began to chip away at this original definition of the quorum. The House came to define the quorum as a majority of those chosen, sworn and living. In other words, if there are 435 members in the House, the quorum is 218. If, however, there are two vacancies, then the majority of those in the House is 217.

Since 9/11, the House has codified this precedent in its rules.

The appeal of such a rule is obvious. No matter how many members of Congress have died, there is still the possibility of achieving a quorum by rounding up a majority of those still living. If 100 members are alive, then 51 is a quorum. If 15 remain, then 8 is a quorum.

But this is an arrangement that treats the quorum as a mere formality, not as a basis for legitimacy as the framers intended. A House of Representatives made up of ten members is no House at all. It is wholly unrepresentative. The remaining members could all be from the same state, political party or gender. Nearly the entire country would have no one representing their districts—all at the time where the most important decisions are being made.

The answer seems to be that continuity of Congress is preserved if some semblance of Congress is preserved, no matter how small, how unrepresentative and how illegitimate it is.

In addition to this simple change in House rules, the House has further amended its rules to deal with incapacitated members. A majority of chosen, sworn, and living members would not yield a quorum to do business if many members were alive, but unable to come to the floor of the House due to incapacitation.

The further rules change, through a series of assessments and decisions by the remaining members, allows for incapacitated members to be ignored in the counting that determines if a quorum is present. Essentially, after an attack and a several-day waiting period, a determination could be made that a small number of members is alive and able to perform their duties, and from this number a majority would constitute a quorum. Imagine an attack that severely wounds 400 members, perhaps an attack involving infectious agents. A determination could be made that only 35 members are able to come to the floor, and that a quorum for business is eight-

een members. Those eighteen members could act at the House of Representatives conceivably for up to two years or until the end of the terms of the incapacitated members.

CONCLUSION

The danger of a catastrophic attack on Congress is real. It might have happened on 9/11.

To allow for Congress to reconstitute itself quickly and legitimately after an attack, temporary appointments to fill vacancies and to fill in for incapacitated members are needed. These appointees could fill the gap in time until special elections could be held. And it would allow for a fully representative Congress to be present when the most important decisions following an attack are being made.

The alternatives enacted by Congress are insufficient. The provision to hold quick special elections is not likely to work in practice. And a period of 49 days or two or three months with most of the seats of the House vacant is not an acceptable situation when the input of Congress into vital decisions is needed.

The attempt to redefine the quorum is unconstitutional. And as a policy matter, it falls into the trap that the framers tried to avoid. It would allow a small number of members, representing a small portion of the country, to make legislative decisions and to elect leaders who would be in the line of presidential succession. Such a Congress would lack legitimacy in the eyes of the Constitution and the American people.

Mr. NADLER. Dr. Petersen is recognized for 5 minutes.

TESTIMONY OF R. ERIC PETERSEN, ANALYST IN AMERICAN NATIONAL GOVERNMENT, CONGRESSIONAL RESEARCH SERVICE

Mr. PETERSEN. Mr. Chairman, Ranking Member Sensenbrenner, Members of the Committee, thank you for the opportunity to appear before you today.

Congress and the U.S. Capitol are globally recognized icons of American government and American values. As such, they are a potential target of high symbolic and strategic value to adversaries of the United States Government. A catastrophic attack on Congress could disrupt government and impede it from carrying out its constitutional responsibilities.

Since 2001, as a number of the witnesses have noted, a number of efforts have been attempted to better ensure the continuity of Congress. In addition to continuity of congressional representation, there are administrative efforts, there are coordinative efforts between the branches, and a number of other programs in place.

I am going to focus on continuity of congressional representation, which is filling large numbers of vacant seats in the House, and addressing concerns related to incapacitation or missing Members in the House and the Senate.

Generally since 2001, we have seen two broad approaches: the combination of Chamber rules changes in legislation, and a proposal to amend the Constitution. In the 109th Congress the House adopted rules to establish a provisional quorum after catastrophic circumstances based on the longstanding precedent that a quorum consists of a majority of those Members chosen, sworn and living, whose membership has not been terminated by resignation or by action of the House.

Legislation passed by Mr. Sensenbrenner was also enacted to require States to hold special House elections when extraordinary circumstances cause mass vacancies in the House.

Proponents of these actions have argued that they enable the House to withstand a sudden change in membership of many Members. They support the principle that House membership is gained only through election by the people. That they are far less cumbersome to implement than amending the Constitution, and they afford the House sufficient protection following a disruption.

Opponents of these practices argue that the protections are insufficient and could raise constitutional objections. The quorum requirements are properly based on the number of seats in either Chamber rather than the number of Members present to conduct business. And for opponents of these practices, a more appropriate remedy is to amend the Constitution to allow for rapid replenishment of vacant seats.

Since 2001, 14 proposed constitutional amendments to address the consequences of catastrophic loss of congressional membership have been introduced, including measures in the 111th Congress by Mr. Baird and Mr. Rohrabacher.

The proposals have been designed to address two or more of the following issues: the conditions under which the vacancies would be filled; the level of vacancies needed to invoke implementation of the measure; who would select replacement Members; and the duration of any temporary appointments.

In addressing any effort to assure its continuity, Congress would likely face questions related to demands for an elected representative government; the need to assure that Congress can carry out its responsibilities in challenging circumstances; the extent to which further consideration of these issues might be necessary; and whether developing additional plans for continuity of representation would better prepare Congress to withstand potential interruptions.

Thank you again for inviting me to testify, and I will be happy to address any questions you might have.

Mr. NADLER. Thank you very much.

[The prepared statement of Mr. Petersen follows:]

PREPARED STATEMENT OF R. ERIC PETERSEN

Constitutional Approaches to Continuity of Congressional Representation: Background and Issues for Congress

R. Eric Petersen
Analyst in American National Government

July 17, 2009

Congressional Research Service
7-5700
www.crs.gov
R40628

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

The terrorist attacks of September 11, 2001, subsequent biological incidents, and natural threats such as hurricanes or pandemic illness, have motivated consideration of contingency planning options in government and the private sector. In Cougress, contingency planning includes the consideration of options for the succession of congressional leadership, or for filling multiple vacancies in either chamber that might occur due to wide-scale death of Members or their absence from Congress due to injury or incapacitation. Concerns have been expressed that current plans may be insufficient or raise constitutional issues.

Several proposed constitutional amendments to address the consequences of catastrophic losses of congressional membership have been introduced since the 2001 attacks, including H.J.Res. 52, introduced on May 20, 2009, to temporarily fill mass vacancies in the House and the Senate. Many of the proposals introduced since 2001 are similar to those introduced during the early years of the Cold War, between 1946 and 1962. In each era, the measures attempted to address two or more of the following issues: the conditions under which the vacancies would be filled, the number or percentage of vacancies needed to invoke implementation of the measure, and the duration of the temporary appointments.

This report will be updated as events warrant.

Contents

Tables

Contacts

Assuring Congressional Representation: Background

The terrorist attacks of September 11, 2001, subsequent biological incidents, and natural threats such as hurricanes or pandemic illness, have motivated consideration of contingency planning options in the federal government[1] and the private sector.[2] Contingency planning incorporates a broad array of planning processes and preparedness capacities, including basic emergency preparedness[3] and recovery plans leading to the resumption of normal operations of an organization.

In Congress, contingency planning efforts include the consideration of options for the succession of congressional leadership,[4] or for filling multiple vacancies in either chamber that might occur due to wide-scale death of Members or their absence from Congress due to injury or incapacitation. Concerns have been expressed that following an incident in which many Members of Congress are killed, incapacitated, or missing, a delay in seating new Members, or identifying sitting Members who might continue to serve, could adversely affect the ability of Congress to carry out its constitutional responsibilities. Some efforts to incorporate Member replacement activities into legislative branch emergency preparedness planning[5] may raise constitutional issues.

---

[1] CRS Report RS22674, *National Continuity Policy: A Brief Overview*, by R. Eric Petersen.

[2] CRS Report RL31873, *Banking and Financial Infrastructure Continuity: Pandemic Flu, Terrorism, and Other Challenges*, by N. Eric Weiss; Buffy Rojas, "Constellation Energy Exemplifies Planning Excellence," Continuity Insights, Sep./Oct. 2006, pp.13-16; Buffy Rojas, "Wal-Mart: Looking Beyond BCP Basics," Continuity Insights, Mar./Apr. 2006, pp. 10-13; Cole Emerson, Planning for Manufacturing Operations, Disaster Resource.com website, at http://www.disaster-resource.com/cgi-bin/article_search.cgi?id=%27146%27; Securities Industry and Financial Markets Association (SIFMA), Business Continuity Planning Rules, available at http://www.sifma.org/services/business_continuity/html/rules.html; and AXA UK website, Business Continuity Guide for Small Businesses, available at http://www.axa4business.co.uk/resources/files/BizContinuityGuideT1404.pdf.

[3] Basic emergency preparedness may be seen as a generic set of capacities that business or government would need to develop as part of their regular operations. Capacities might include the development of evacuation or shelter-in-place plans; staff accountability and safety; and a test, training, and exercise program to assure the reliability of those plans.

[4] House Rule I, cl. 8(b)(3), requires the Speaker to designate in writing a number of Members who would serve as Speaker pro tempore in the event of the Speaker's death or disability, until a successor Speaker or Speaker pro tempore could be elected by the House. Soon after a new Congress convenes, the Speaker's list is delivered to the Clerk, and the delivery is announced on the House floor. See "Recall Designee" and "Announcement by the Speaker Pro Tempore" *Congressional Record*, daily edition, Jan. 6, 2009, p. H24.

[5] Filling large numbers of vacant seats or addressing concerns related to incapacitated or missing Members are among several contingency planning challenges facing Congress. Through legislation, the House and Senate adopted changes to their recess and convening authorities to permit emergency recesses. At the beginning of the 108th Congress (2003-2004), the Speaker and chair of the Committee of the Whole were granted emergency recess authority. Additionally, the Speaker was authorized to convene the House in a place at the seat of government other than the Hall of the House, when warranted, in his opinion, by the public interest. See House Rule I, cl. 12. The Senate adopted provisions authorizing the presiding officer of the Senate to suspend any proceeding of the Senate, including a roll call vote or a quorum call, and declare a recess or adjournment of the Senate whenever he or she has been notified of an imminent threat. When the Senate is out of session, the Majority and Minority Leaders, or their designees, acting jointly, may modify any order for the time or place of the convening of the Senate when, in their opinion, such action is warranted by intervening circumstances. See S.Res. 296, 108th Congress, adopted Feb 3, 2004. During the 108th Congress, both chambers agreed to H.Con.Res. 1, regarding consent to assemble outside the seat of government. The measure authorized the Speaker of the House and the Majority Leader of the Senate, or their respective designees, acting jointly (continued...)

Prior to the September 2001 attacks, congressional practice regarding disruptions of membership in either chamber was dependent on the type of disruption. The confirmed death of an individual Member in either chamber creates an automatic vacancy which could be filled under existing procedures.[6] In the House, the existence of a vacancy is communicated to the appropriate state, and a special election to fill the seat is held pursuant to state law. The laws of most states authorize governors to make temporary appointments to the Senate, with some exceptions.[7] Where procedures regarding the death of a Member of Congress are well established,[8] matters related to the capacity or availability of a Member to serve have been addressed by the House and Senate only on a case by case basis.[9] In instances of death or incapacitation, congressional practices appear to assume a membership disruption of one Member at a time, and do not address the potential implications of mass congressional casualties, or the perceived need to quickly reconvene Congress after an incident so it can continue to carry out its constitutional responsibilities.

While issues related to Members who are missing or incapacitated affect both chambers, concerns related to mass vacancies in membership appear to fall more heavily on the House, due to the requirement that its Members be selected only by election. As a consequence, questions have been raised about the ability of the House to meet constitutionally mandated quorum requirements to conduct business after an incident in which many Members may have been killed or injured, or go missing. In response, during the 109th Congress (2005-2006), the House adopted

---

(...continued)

after consultation with the Minority Leader of the House and the Minority Leader of the Senate, to convene the House and Senate at a place outside the District of Columbia whenever, in their opinion, the public interest warranted it. Similar measures, each designated as H.Con.Res. 1, were introduced in the 109th, 110th, and 111th Congresses. In the 109th and 110th Congresses, the measure was adopted by the House, sent to the Senate, and referred to the Committee on Rules and Administration. No further action was taken. In the 111th Congress, the measure has followed a similar course, and was referred to the Senate Committee on Rules and Administration on January 6, 2009. No further action has been taken as of the time of this writing. Administrative planning by congressional officials began pursuant to a joint bipartisan leadership directive directing the Capitol Police Board (comprising the Sergeants at Arms of the House and Senate and the Architect of the Capitol) to "develop and manage" a "comprehensive Legislative Branch emergency preparedness plan." To facilitate this effort, the board was to work "with the Attending Physician and the Chief, US Capitol Police, and in coordination with the Officers of the Senate and House" to develop "an integrated architecture which will address all hazards which could impede the continuity of essential Legislative Branch functions." According to the directive, this integrated architecture was to include "at a minimum, emergency preparations, response, mitigation and stabilization activities, and recovery operations." Trent Lott, (then Senate Majority Leader), J. Dennis Hastert, (then Speaker of the House), Thomas A. Daschle, (then Senate Minority Leader), and Richard A. Gephardt, (then House Minority Leader), "Directive to the United States Capitol Police Board." September 6, 2000.

[6] House vacancies are addressed in the Constitution in Article I, Section 2, paragraph 4, which requires states to issue a writ of election to fill vacancies. Procedures governing vacancies in the Senate were initially established by Article I, Section 3, as later amended by paragraph 2 of the 17th Amendment, which provided state legislatures with the authority to grant temporary appointment authority to governors until an election can be held.

[7] Exceptions include Connecticut, Massachusetts, Oregon, and Wisconsin, where the governor is not permitted to make interim appointments, and any Senate vacancy must be filled by special election. In Oklahoma there is limited gubernatorial appointment authority; if the Senate vacancy occurs after March 1 of any even-numbered year and the term expires the following year, no special election is held; rather, the governor is required to appoint the candidate elected in the regular general election to fill the unexpired term.

[8] CRS Report RL34347, *Members of Congress Who Die in Office: Historic and Current Practices*, by R. Eric Petersen and Jennifer E. Manning.

[9] "Declaring Vacancy in 97th Congress from Fifth Congressional District of Maryland," *Congressional Record*, vol. 127, Feb. 24, 1981, pp. 2916-2918; Compensation in Lieu of Salary to the Honorable Gladys Noon Spellman, *Congressional Record*, vol. 127, Jan 27, 1981, pp. 974-975; and *Congressional Record*, vol. 119, Jan 3, 1973, p. 12.

rules to establish a provisional quorum after catastrophic circumstances,[10] formally codifying longstanding House practice that a quorum is a majority of the Members elected, sworn, and living.[11] In practice, the Speaker or Speaker pro tempore now typically announces a revised whole number of the House in light of changes in the membership of the House,[12] but the question of whether a provisional quorum is constitutional has not been addressed.

In addition to rules changes, during the 109th Congress, legislation was enacted to require states[13] to hold special House elections when extraordinary circumstances cause mass vacancies in the House. The act[14] provides that extraordinary circumstances exist following an announcement by the Speaker of the House that vacancies in the chamber have exceeded 100 seats. States in which a vacancy exists in its House representation are then required to hold a special election within 49 days, subject to some exceptions.[15] States are required to (1) make a determination of the candidates who will run in the special election not later than 10 days after the vacancy announcement by the political parties authorized by state law to nominate candidates, or by any other method the state considers appropriate; (2) ensure to the greatest extent practicable that absentee ballots for the election are transmitted to absent uniformed services voters and overseas voters not later than 15 days after the Speaker announces that the vacancy exists; and (3) accept and process any otherwise valid ballot or other election material from an absent uniformed services voter or an overseas voter, as long as the ballot or other material is received by the appropriate state election official not later than 45 days after the state transmits the ballot to the voter.[16]

---

[10] House Rule XX, Cl. 5(c).

[11] House Rule XX, Cl. 5(c)(7)(B). In 1906, the House established the precedent that "a quorum consists of a majority of those Members chosen, sworn, and living, whose membership has not been terminated by resignation or by the action of the House." See U.S. Congress, House, *Hind's Precedents of the House of Representatives of the United States*, vol. IV (Washington: GPO, 1907), p. 64.

[12] For example, *Congressional Record*, daily edition, Dec. 17, 2007, p. 11115472; and Dec. 13, 2007, p. 11115442.

[13] The measure also applies to the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, Guam, and the U.S. Virgin Islands, but the presence of those Members would not be counted by the House for purposes of establishing a quorum to do business.

[14] 2 U.S.C. 8(b).

[15] The 49-day requirement would be waived if, during the 75-day period beginning on the date of the vacancy announcement, a regularly scheduled general election or another special election for the office involved is scheduled to be held. During consideration of the measure, concern was expressed that a 45-day period, as then was proposed, could affect the quality of the administration of a special election, and could raise questions about how effectively all potential voters (including overseas and military voters in particular) could participate. Other concerns included relatively short campaigns that could leave citizens unable to make reasoned, informed decisions about candidates and issues. For example, a more compressed campaign could put candidates who are not as well funded or as well known at a comparative disadvantage. In addition to those potential challenges, if a number of states were attacked, or a natural occurrence caused widespread damage or necessitated quarantine measures, it might also be difficult to hold elections in the time frame specified by the statute. See individual testimony, prepared statements and written submissions of Thad Hall, Doug R. Lewis, Cory G. Fong, and Curtis Gans, in U.S. Congress, Senate, Committee on the Judiciary, Ensuring the Continuity of the United States Government: The Congress, 108th Cong., 1st Sess., Sept. 9, 2003 (Washington: GPO, 2003), pp. 22-24, 26-41, 86-100, available at http://a257.g.akamaitech.net/7/257/2422/28dec20041100/www.access.gpo.gov/congress/senate/pdf/108hrg/96926.pdf.

[16] In addition, the statute sets forth requirements for judicial review of any action brought for declaratory or injunctive relief to challenge a vacancy announcement, and requires the judiciary to provide a final decision within three days of the filing of such an action. The law makes a final decision non-reviewable. See U.S. Congress, House, *Continuity in Representation Act of 2005, Report to accompany H.R. 841*, 109th Congress, 1st sess., H.Rept. 109-8, Part 1 (Washington: GPO, 2005), at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:hr008p1.109.pdf; and U.S. Congress, House, *Report to accompany H.R. 2985*, 109th Congress, 1st sess., H.Rept. 109-139 (Washington: GPO, 2005), at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&(continued...)

Those who support the adjustment of the quorum and the enactment of law to require special elections in extraordinary circumstances believe those provisions afford the House sufficient institutional protections. Some critics argue that those actions are insufficient. The critics argue that holding special elections to seat new Representatives up to seven weeks after an announcement of extraordinary circumstances could deprive the nation of a functional, broadly representative legislative response at a time of great national challenge.[17] Others raise what they believe to be constitutional concerns related to provisional quorum rules.

Those who oppose current House practices regarding provisional quorum procedures argue that, contrary to longstanding House practice, quorum requirements are based on the number of seats in either chamber, and not on the number of Members present to conduct business. Article I, Section 5, Clause 1 of the Constitution states, in part, that " ... a majority of each [chamber] shall constitute a Quorum to do Business ... ," but does not specify whether the majority is based on Members or the number of seats authorized for the chamber. Observers raising constitutional concerns believe that if more than half of the 435 seats in the House, or the 100 seats in the Senate, were vacant because the Members who held them were killed, or those members were unable to serve because they were incapacitated or missing in the aftermath of an incident, any actions taken by fewer than a majority of the remaining Members in either chamber could be seen as potentially illegitimate, and arguably unconstitutional.[18]

Actions in the House have attempted to enable the chamber to withstand a range of interruptions that could kill or incapacitate large numbers of Members, while supporting the principle that membership in the chamber is gained only through election by the people. In the Senate, most vacant seats could be replenished in a relatively brief period through appointments (assuming state-based authorities were available to make such appointments),[19] but similar questions may arise if a sufficient number of Senators survive but are incapacitated, or if their whereabouts are unknown, and the Senate cannot meet with a quorum to do business.[20] As a consequence, some observers argue that the policies adopted or enacted since 2001 may not provide adequate protection against a sudden loss of membership in either chamber, and may raise constitutional and implementation concerns. They believe that these concerns can only be remedied by

---

(...continued)

docid=f:hr139.109.pdf.

[17] Thomas E. Mann and Norman J. Ornstein, The Broken Branch: How Congress Is Failing America and How to Get It Back on Track (Oxford: Oxford University Press, 2006), pp. 200-207; and Avi Klein, "Death Wish," The Washington Monthly, Nov 2006, pp. 19-22.

[18] John Bryan Williams, "How to Survive a Terrorist Attack: The Constitution's Majority Quorum Requirement and the Continuity of Congress," William and Mary Law Review, vol. 48 (2006), pp. 1025-1090; Bruce Ackerman, "If Washington Blows Up," The American Prospect, Mar 2006, pp. 22-27; Bruce Ackerman, Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism (New Haven: Yale University Press, 2006), pp. 142-155; and Mann and Ornstein, The Broken Branch, pp. 207-210.

[19] S.J.Res. 7, proposing an amendment to the Constitution relative to the election of Senators, has been introduced in the 111th Congress. The measure would require Senate vacancies to be filled by special election. If passed by Congress and ratified by the states, the Senate would be in a position similar to that of the House regarding challenges in filling mass vacancies in its membership. S.J.Res. 7 was introduced by Senator Russell D. Feingold on January 29, 2009. The measure was referred to the Committee on the Judiciary, which held hearings on March 11, 2009. No further action has been taken on the proposed amendment at the time of this writing.

[20] The Senate in 1864 resolved that a quorum in that chamber consists of a majority of the Senators duly chosen. In 1877, the Senate revised its rules, providing that a quorum should consist of a majority of Senators "duly chosen and sworn." See *Hinds Precedents*, vol. IV, pp. 64-65. No action has been taken on the matter of incapacitation of a large number of Senators.

amending the Constitution to allow for the rapid replenishment of vacant seats in the event of a significant loss of membership in either chamber.

Several proposed constitutional amendments to address the consequences of catastrophic losses of congressional membership have been introduced since the 2001 attacks. During another period of uncertainty, 1946 to 1962, similar measures were proposed. In current times, the perceived need for such measures is based on the possibility that terrorists could target Congress itself, or the Washington, DC, region. Earlier, the emergence of the Cold War between the United States and its allies and the Soviet Union and its allies, the successful testing of an atomic bomb by the Soviets in September 1949, and subsequent claims that it might be stockpiling atomic weapons, brought considerable interest to the issue of filling congressional vacancies in the event of a national emergency among some Members of Congress.

Continuity of Congress-Related Constitutional Amendments, 2001-2009

111th Congress

On May 20, 2009, Representative Brian Baird introduced H.J.Res. 52, proposing an amendment to the Constitution to temporarily fill mass vacancies in the House and the Senate. The measure, which was also introduced in the 110th Congress, would amend the Constitution to require individuals elected to the House or Senate to provide and revise a list of at least three designees, ranked in order of preference, to take their place in Congress if they die, become incapacitated, or disappear prior to the end of their term of office. Designees would be required to meet the qualifications of Representative or Senator, as appropriate. If "a catastrophe results in the death, incapacity, or disappearance of a significant number" of Members, the Speaker, Vice President, or President pro tempore would fill vacancies in their respective chambers with individuals from the most recent lists of designees provided (in the order provided on the list) by Members whose seats were vacant. Designees would be treated as Representatives or Senators in all respects, but would not be required to provide a list of designees of their own. If a designee fills a vacant seat in the House or Senate, the executive authority of the state involved would be required to call an election "as soon as possible" to have another Member chosen. The amendment requires Congress to establish by law criteria to determine whether a Member of Congress is dead, incapacitated, or has disappeared, and grants Congress the authority to enforce the proposed article through appropriate legislation. Among the matters that Congress could consider, if the amendment were passed and subsequently ratified by the states, is a statutory definition of a "significant number" of Members for purposes of implementing provisions of the proposed amendment.

110th Congress

In the 110th Congress (2007-2008), two constitutional amendment proposals to provide for filling vacancies in the event of the catastrophic loss of Members were introduced. These were H.J.Res. 56 and H.J.Res. 57.

On October 4, 2007, Representative Brian Baird introduced H.J.Res. 56, proposing an amendment to the Constitution to temporarily fill mass vacancies in the House and the Senate.

The measure, which was reintroduced in the 111th Congress as H.J.Res. 52, would have amended the Constitution to require individuals elected to the House or Senate to provide and revise a list of at least three designees, ranked in order of preference, to take their place in Congress if they die, become incapacitated, or disappear prior to the end of their term of office.

The same day, Representative Dana Rohrabacher introduced H.J.Res. 57, proposing a constitutional amendment on congressional succession. The measure would have amended the Constitution to require the simultaneous election of an alternate member together with each Representative and Senator. If a Member died, resigned, or was expelled, or if at the beginning of the term, a Representative-elect or Senator-elect had died or failed to qualify for office, the alternate member would discharge the duties and powers of office as acting Representative or acting Senator until a Representative-elect or Senator-elect qualified, or a new Member and alternate member were elected. When either chamber declared that one of its Members was unable to discharge the powers and duties of their office, or if a Member transmitted to the Speaker or President pro tempore, as appropriate, that they were unable to discharge the powers and duties of their office, those responsibilities would be discharged by an alternate as acting Representative or acting Senator. Upon written declaration to the Speaker or President pro tempore, as appropriate, that an inability did not exist, the Member would immediately resume the powers and duties of their office. The measure provided that states could authorize by law the appointment of an acting Senator in the absence of a qualified alternate when there was a vacancy in the office of Senator. Alternates would be required to meet the qualifications of Representative or Senator, as appropriate, and each chamber could punish its alternates for disorderly behavior, or expel them with the concurrence of two-thirds of its Members. If the House or Senate were unable to establish a quorum for three days or more, the measure would permit either chamber to declare Members who had not recorded their presence to be unable to discharge the powers and duties of their offices. Those powers and duties would then have been discharged by the Member's alternate, until the Member recorded their presence. The amendment would have granted Congress the authority to enforce the proposed article through appropriate legislation.

109th Congress

In the 109th Congress (2005-2006), one proposed amendment on congressional succession was introduced. On February 17, 2005, Representative Dana Rohrabacher introduced H.J.Res. 26. The amendment would have required a candidate for election to the House or Senate to select, in rank order, three alternates who would stand for election with the candidate. If, after election, the Member died, the first ranked alternate would assume office in an acting capacity until a new Representative or Senator was elected. The amendment provided the Member the authority to declare his or her inability to discharge the duties of office, and for the three alternates, by majority vote, to declare their Member unable to discharge their duties. Finally, the proposed amendment made provisions under which a Member could vacate a declaration of inability and return to office.

108th Congress

Six constitutional amendment proposals to provide for filling vacancies in the event of the catastrophic loss of Members were introduced during the 108th Congress (2003-2004). Five were introduced in the House, and one was introduced in the Senate. Only one measure, H.J.Res. 83, was considered in either chamber. On June 2, 2004, the House rejected H.J.Res. 83 by a vote of

63-353, the two-thirds needed for passage of a constitutional amendment not having been attained.

Representative Brian Baird proposed two constitutional amendments—H.J.Res. 77, introduced on November 19, 2003, and H.J.Res. 83, introduced on December 8, 2003—that would have allowed state governors to temporarily appoint an individual from a list of at least two successors pre-designated by a Representative to take the Member's place if he or she died or became incapacitated. Under both proposals, a Representative-elect would present the list of successors to the chief executive of state prior to taking the oath of office.[21] If a majority of the whole membership of the House could not carry out its duties because of death or incapacity, or if the House adopted a resolution declaring the existence of extraordinary circumstances, which "threaten the ability of the House to represent the interests of the people," the governors could appoint replacement Members within seven days after the deaths or disabilities had been certified. An appointee would serve until the incapacitated Member he or she was replacing regained ability to serve, or until a special election was held to fill the seat. Both H.J.Res. 77 and H.J.Res. 83 would have authorized Congress to enact "appropriate legislation" to enforce them, but they differed slightly in the language prescribing the means for determining whether a Member was dead or incapacitated.[22]

On March 11, 2004, Representative John Larson of Connecticut introduced H.J.Res. 89, a constitutional amendment that would have permitted temporary appointees to be chosen by the affected state legislatures or the chief executives of state. H.J.Res. 89 would have allowed less than a majority of the House to adopt a resolution declaring that a vacancy existed in the majority of the seats in the House. The legislature of each affected state would have five calendar days from the day after the House adopted such resolution to convene a special session for appointing individuals to temporarily fill the vacancies. The state legislature would then be required to appoint an individual to fill each vacancy within three calendar days from the date the legislature convened in special session. If the state legislature did not convene the special session or make the appointments within the time prescribed, the chief executive of state would appoint individuals to fill the vacancies. Appointees would be required to meet the constitutional qualifications for service as House Members and would be required to be members of the same political party as their predecessors. Further, appointees would serve until special elections were held to fill the House vacancies, but they would be prohibited from being candidates for election to the House during their temporary service. In addition, H.J.Res. 89 would have empowered Congress "by law to specify circumstances constituting when a vacancy happens in the Representation from any State in the House and to address the incapacity of Members of the House of Representatives." As such, the proposal would have empowered Congress to enact legislation addressing the issue of incapacitation.

Representative Zoe Lofgren on March 11, 2004, introduced H.J.Res. 90, a proposed constitutional amendment that would have permitted Congress to enact legislation providing for the appointment of temporary Members of the House to serve during any period in which 30% or more of the House seats were vacant because of death or resignation.

[21] After taking the oath of office, the Member could revise the list at any time during the Congress.

[22] H.J.Res. 83 provided that Congress could by law establish the criteria for determining whether a Member of the House or Senate was dead or incapacitated. H.J.Res. 77 would have allowed for "the adoption of rules by the House of Representatives to determine whether a Member was dead or incapacitated." Provisions for enforcement through "appropriate legislation" could also have applied to the establishment of such criteria.

On April 2, 2004, Representative Dana Rohrabacher introduced H.J.Res. 92, a proposed constitutional amendment that would have authorized candidates in the general election for the House and Senate to publicly designate no fewer than three and no more than five ranked potential temporary successors (i.e., "Acting Representatives or Acting Senators"). In the event of the Member's death, a successor would serve in an acting capacity until a new Member was elected. In the event of incapacity, the highest ranked successor would assume office until the Member declared an end to his inability.

Senator John Cornyn proposed another constitutional amendment—S.J.Res. 23—on November 5, 2003. It would have authorized Congress to enact law(s) providing procedures to address the death or inability of Representatives to serve and the inability of Senators to serve,[23] if one-fourth of either house were killed or incapacitated. Congress would declare who would serve in place of the deceased and incapacitated Members until the disabled Members regained ability to serve or new Members were elected. Procedures established would have been in effect for 120 days, but that time frame could have been extended (for additional 120-day periods) if one-fourth of the seats in either house remained vacant or occupied by incapacitated Members.

107th Congress

During the 107th Congress (2001-2002), three constitutional amendment proposals to provide for filling vacancies in the event of the catastrophic loss of Members were introduced. These were H.J.Res. 67, H.J.Res. 77, and S.J.Res. 30.

Representative Brian Baird introduced H.J.Res. 67 on October 10, 2001. The measure provided for a constitutional amendment that would have authorized governors to appoint persons temporarily to take the place of Representatives who had died or become incapacitated whenever 25% or more of Representatives were unable to perform their duties.[24] Appointees generally would have been allowed to serve 90 days or less until a special election was held. The House Judiciary Committee's Subcommittee on the Constitution a held hearing on February 28, 2002.[25] No further action on the measure was taken.

On December 20, 2001, Senator Arlen Specter introduced a similar proposal, S.J.Res. 30. It would have provided for the appointment of temporary Representatives by governors if 50% or more of Representatives died or were incapacitated. [26] Further, it would have required that the appointee be of the same political party as the Member who had died or was incapacitated. The measure was referred to the Senate Committee on the Judiciary, Subcommittee on Constitution. No further action was taken on the proposal.[27]

---

[23] The 17th Amendment of the Constitution already provides for special elections or appointments (as determined by each state) to fill vacant Senate seats, but no provision is made for de facto vacancies due to the inability of Senators to serve.

[24] The question of who determines that a Member is unable to perform their duties was not addressed.

[25] U.S. Congress, House Committee on the Judiciary, Subcommittee on the Constitution, Temporary Filling of House of Representatives Vacancies During National Emergencies, hearing on H.J.Res. 67, 107th Cong., 2nd sess. (Washington: GPO, 2002).

[26] The question of who determines that a Member is unable to perform their duties was not addressed.

[27] While the hearings held by the House Subcommittee on the Constitution in February 2002 focused on H.J.Res. 67, some of the provisions and concepts in S.J.Res. 30 and in H.J.Res. 77 were discussed by some of the witnesses who testified.

A third proposed constitutional amendment, H.J.Res. 77, introduced by Representative Zoe Lofgren on December 5, 2001, would have authorized Congress to provide by law for the temporary appointment of Representatives if 30% or more of House seats became vacant because of death or resignation.

Cold War-Era Proposals, 1945-1963

More than 30 proposed constitutional amendments, which provided for temporarily filling House vacancies or selecting successors in case of the disability of a significant number of Representatives, were introduced from the 79th Congress (1945-1947) through the 87th Congress (1961-1963).[28] During that period, hearings were held in the House[29] and Senate.[30] On three occasions, the Senate Committee on the Judiciary reported a proposal,[31] and three proposals were passed on the Senate floor.

From 1954 through 1960, the Senate passed by large margins three proposed constitutional amendments that provided for temporarily filling House vacancies due to a national emergency. The first proposal, S.J.Res. 39, was amended and passed by a vote of 70-1 on June 4, 1954.[32] It authorized governors to make temporary appointments to the House after notification of vacancies and "whenever by reason of the occurrence of acts of violence during any national emergency or national disaster, the total number of vacancies in the House of Representatives shall exceed one hundred and forty-five.... " The House took no action on the measure.

The second proposal, S.J.Res. 8, was passed by a vote of 76-3 on May 19, 1955.[33]

It provided that when the number of vacancies in the House was greater than one half of the authorized membership, for a period of 60 days a state governor would have authority to make

[28] The proposals are as follows: 79th Congress (1945-1947)—H.J.Res. 362; 80th Congress (1947-1949)—H.J.Res. 34, S.J.Res. 161; 81st Congress (1949-1951)—H.J.Res. 48; 82nd Congress (1951-1953)—H.J.Res. 155, H.J.Res. 166, S.J.Res. 59, S.J.Res. 75; 83rd Congress (1953-1955)—H.J.Res. 135, H.J.Res. 159, H.J.Res. 244, H.J.Res. 507, S.J.Res. 39, S.J.Res. 150; 84th Congress (1955-1957)—H.J.Res. 50, H.J.Res. 295, H.J.Res. 322, H.J.Res. 325, H.J.Res. 475, S.J.Res. 8; 85th Congress (1957-1959)—H.J.Res. 52, H.J.Res. 105, S.J.Res. 157; 86th Congress (1959-1961)—H.J.Res. 30, H.J.Res. 519, S.J.Res. 85; 87th Congress (1961-1963)—H.J.Res. 29, H.J.Res. 74, H.J.Res. 91, H.J.Res. 508, H.J.Res. 893, and S.J.Res. 123.

[29] U.S. Congress, House Committee on the Judiciary, Subcommittee No. 2, Constitutional Amendments for Continuity of Representative Government During Emergency, hearings on H.J.Res. 29, H.J.Res. 74, H.J.Res. 91, and H.J.Res. 508, 87th Cong., 1st sess. (Washington, GPO, 1961).

[30] U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Constitutional Amendment, Constitutional Amendments, hearings on S.J.Res. 33, S.J.Res. 59, S.J.Res. 75, S.J.Res. 117, S.J.Res. 125, S.J.Res. 127, and S.J.Res. 145, 82nd Cong., 2nd sess. (Washington: GPO, 1952); and U.S. Congress, Senate Committee on Judiciary, Subcommittee on Constitutional Amendment, Appointment of Representatives, hearings on S.J.Res. 8, 84th Cong., 1st sess. (Washington, GPO, 1955).

[31] U.S. Congress, Senate Committee on the Judiciary, Appointment of Representatives in Time of National Emergency, report to accompany S.J.Res. 39, S.Rept. 83-1459, 83rd Cong., 2nd sess. (Washington: GPO, 1954); U.S. Congress, Senate Committee on the Judiciary, Appointment of Representatives, report to accompany S.J.Res. 8, S.Rept. 84-229, 84th Cong., 1st sess. (Washington: GPO, 1955); and U.S. Congress, Senate Committee on the Judiciary, Appointment of Representatives, report to accompany S.J.Res. 123, S.Rept. 87-1449, 87th Cong., 2nd sess. (Washington: GPO, 1962).

[32] "Proposed Amendment to the Constitution to Enable Congress to Function Effectively in Time of Emergency or Disaster," Debate and Vote in the Senate on S.J.Res. 39, Congressional Record, vol. 100, June 4, 1954, pp. 7658-7669.

[33] "Filling of Temporary Vacancies in the Congress Caused by Disaster," Debate and Vote in the Senate on S.J.Res. 8, Congressional Record, vol. 101, May 19, 1955, pp. 6625-6629.

temporary appointments to fill any vacancies in the representation from his state in the House of Representatives. S.J.Res. 8 was referred to the House Judiciary Committee; no further action was taken.

The Senate passed the third proposed constitutional amendment, S.J.Res. 39, on February 2, 1960, by a vote of 70-18.[34] It authorized governors to fill vacancies in the House "on any date that the total number of vacancies ... exceeds half of the authorized membership." The governor's appointive authority would have been limited to 60 days, and the appointee would have served until a successor was elected in a special election. In House action on the measure, continuity provisions were struck.[35]

Analysis

Many of the proposals introduced since 2001 and between 1946 and 1962 have been designed to address two or more of the following issues: the conditions under which the vacancies would be filled, the number or percentage of vacancies needed to invoke implementation of the measure, the selecting agents, and the duration of the temporary appointments. For example, some proposals would have directed state legislatures to meet and select persons to take the place of such Senators or Representatives.[36] The measures also stipulated that this procedure would go into effect only if a majority of the House or Senate were unable to perform their duties.[37] Some of the earlier proposals required a notification procedure in which the President, the Speaker of the House, or some other specified official would be required first to declare that a national emergency or disaster existed and that a specified number of the seats in the House or Senate were vacant.[38] Governors would then make temporary appointments until elections could be held.[39] The notification process raised a number of questions related to the definition of terms and the establishment of procedures. For example "national disaster" was not specified, and it was not always clear who would determine when it occurred. To address those concerns, later measures would have authorized governors to make temporary appointments to the House when vacancies

[34] "Filling of Temporary Vacancies in the House of Representatives," Congressional Record, vol. 106, Jan. 26, 1960-Feb. 2, 1960, pp. 1320,1380,1515,1528,1598,1619, 1715,1744,1749, 1765.

[35] The bill was amended on the Senate floor to include two additional provisions: one pertained to granting the District of Columbia electoral votes in national elections and non-voting delegate(s) to the House; the other eliminated the poll tax or other property qualifications as a prerequisite for voting in federal elections. The three-amendment package was sent to the House, where the anti-poll tax and House emergency appointment provisions were deleted and the District of Columbia suffrage provision was modified (H.J.Res. 757). The House amended S.J.Res 39 by substituting the language of H.J.Res. 757, and passed it by voice vote on June 14, 1960. The Senate adopted (by voice vote) the House version of S.J.Res. 39 without further amendment. S.J.Res. 39, granting three electoral votes for the District of Columbia in presidential elections, was ratified by the states on March 29, 1961, and became the 23rd Amendment to the Constitution.

[36] H.J.Res. 89 (108th Congress), introduced Mar. 11, 2004; and S.J.Res 46 (79th Congress), introduced May 29, 1946.

[37] Ibid., and H.J.Res. 34 (80th Congress), introduced Jan. 3, 1947.

[38] The number or percentage of vacancies required to invoke an emergency measure typically was one-half, one-third, or one-fourth of the membership of either chamber. For examples, see H.J.Res. 90 (108th Congress), introduced Mar. 11, 2004; S.J.Res. 23 (108th Congress), introduced Nov. 5, 2003; and H.J.Res. 519 (86th Congress), introduced Sept. 4, 1959.

[39] H.J.Res. 155 (82nd Congress), introduced Feb. 6, 1951, and S.J.Res 59, introduced Apr. 9, 1951. Under most of the measures, the term of the appointees would have been limited to 60 to 90 days, by which time an election was to have been held. In some of the earlier proposals, the individual would have been selected by the legislature; however, the person selected would have served for the remainder of the term of the Representative he succeeded.

in the House exceeded half of the authorized membership.[40] Some post-2001 proposals limited the scope of potential appointees to those specified in advance by a Representative or those who were elected in their own right as an alternate representative.[41] **Table 1** provides a summary of measures introduced since 2001.

Arguments in Support of Constitutional Proposals

Supporters of proposals to amend the Constitution to allow prearranged, temporary replenishment of congressional membership contend that the possibility of catastrophic losses in either chamber warrants taking precautions to ensure that Congress could continue to carry out its constitutional responsibilities and operate effectively during a national emergency. While no single proposal can address all of the challenges that might arise at a time of national or international crisis, proponents of such measures assert that allowing for advance directives for filling vacancies in congressional membership could help to ensure each state's representation in Congress if a significant number of Members in either chamber were suddenly killed, missing, or incapacitated. From their perspective, establishing provisions for an expedited response before an incident occurs could also demonstrate the country's determination to continue a representative form of government, consonant with their interpretation of the constitutional requirements of a quorum in both chambers, even in extraordinary times. Further, providing for a predetermined mechanism to fill vacancies could eliminate the need to hold special expedited House elections, as mandated by current law, under potentially difficult conditions.

Arguments in Opposition to Constitutional Proposals

Opponents of continuity planning through constitutional amendments could argue that the current approaches to address congressional continuity, including rules changes in each chamber, statutory procedures to expedite election to fill large numbers of seats in the House, and the ability to fill most Senate seats by appointment, are sufficient. They could argue that the changes were far less cumbersome to implement than amending the Constitution, and that an amendment might not afford a better assurance of congressional continuity than existing practices. Further, opponents could maintain that resorting to temporary appointments might contribute to unrest or fear among the nation's citizens by casting doubt upon the government's ability to respond to crises. In addition, they might point out that if such an automatic Member replenishment process were ever to be invoked, it could create two classes of Members: those who became Members through the crucible of the electoral process, and those who were part of a cohort that was appointed.[42] A sudden shift in membership in either chamber could result in a change in the legislative agenda, or majority control, although the circumstance necessitating the use of temporary members would arguably determine the nature of work a newly replenished Congress might consider. Nevertheless, the actions of the short-term appointees could have long-term effects.

Finally, opponents could argue that allowing the temporary appointment of indirectly elected or appointed alternative Representatives would depart from the basic tenet of a House kept close to

[40] S.J.Res 157 (85th Congress), introduced Feb. 26, 1958.

[41] H.J.Res. 57 (110th Congress), introduced Oct. 4, 2007; and H.J.Res. 92 (108th Congress), introduced Apr. 2, 2004.

[42] While the appointment of Senators is fairly routine, there is no precedent in either chamber for the sudden mass replenishment of as many seats as may be envisioned in H.J.Res. 52 (111th Congress).

the people, where each Member has taken his seat only as a result of direct election by the voters in the Member's district.

Conclusion

Recent arguments in favor of, or in opposition to, amending the Constitution to provide for the temporary appointment of Senators or Representatives are similar to those made during the early years of the Cold War. The events of September 11, 2001, and actions taken in response, however, may have altered the circumstances under which those issues are considered. Some concern has been expressed that the advent of suicidal terrorists who are independent of national governments and, thus, may not be deterred from using weapons of mass destruction (WMD) because of the possible consequences for their own people, may make the use of these weapons more likely in the future. On the other hand, the lack of state support, or the challenges of acquiring or improvising a WMD, and then delivering it to a target that affects significant numbers of Members of Congress, might prove beyond the capacity of a terrorist adversary. At the same time, some observers argue that the United States Capitol and Congress have been targeted in the past, and that they continue to be targets of high social, political, and symbolic significance.

If Congress believes that no action is needed to ensure the continuity of congressional representation, it might continue the status quo. Otherwise, Congress may explore additional statutory or constitutional approaches to address issues related to congressional representation in contingent circumstances. In doing so, it would face consideration of the balance between the demands of representative government on the one hand, and what some perceive as a need to assure that the legislative branch maintains the capacity to quickly carry out its constitutional responsibilities in challenging circumstances on the other. It may also take into account the extent to which further consideration of these issues might be necessary, or whether developing additional plans for continuity of representation would better prepare Congress to withstand potential interruptions.

Table 1. Continuity of Congressional Representation: Measures Introduced to Amend the Constitution Since 2001

Measure, Congress	Circumstances	Extent of Vacancy or Incapacity	Selecting Agents	Implementation	Duration of Appointment
H.J.Res. 52 111th Congress H.J.Res. 56 110th Congress	Death, incapacity, or disappearance of a significant number of Members in either chamber	Significant number and incapacity are not defined	Congressional candidates choose three designees who stand for election with the candidates	The Speaker, Vice President, or President Pro Tempore would fill vacancies in their respective chambers with ranked individuals from the most recent list of designees provided	Until a special election is held to elect a new Member in the case of a vacancy, or until a declaration that a Member's inability no longer exists, or if a Member records his presence in the chamber
H.J.Res. 57 110th Congress	A member who dies, resigns, is expelled or declared by his chamber to be unable to discharge his office, or a Member-elect who fails to qualify	One Member or Member-elect	An alternate elected with each Representative and Senator	When an individual vacancy occurs, or when either chamber is unable to establish a quorum for three days	Until a special election is held to elect a new Member
H.J.Res. 26 109th Congress	Death or inability of Member to discharge the powers and duties of office	Unspecified, but provisions applied to individual Members	Three ranked alternates elected with each Representative and Senator	Death of a Member: the first alternate would become the acting member until a new Member is elected Incapacity: The Member, or the three alternates by majority vote, could declare the Member's inability	Unspecified, but a Member could revoke a declaration of inability and return to office
H.J.Res. 77 and H.J.Res. 83 108th Congress	Death or incapacity of a majority of the House membership, or declaration by the House of extraordinary circumstances	Death or incapacity of a majority of the House membership	Representatives-elect provide state governors with a list of at least two potential successors	Governors appoint replacement members following House action	Until a special election is held to elect a new Representative
H.J.Res 89 108th Congress	Unspecified	Vacancy in the majority of the number of seats in the House	State legislatures or governors	State legislatures or governors appoint a replacement Member	Until a special or general election, as provided by state law

Measure, Congress	Circumstances	Extent of Vacancy or Incapacity	Selecting Agents	Implementation	Duration of Appointment
H.J.Res. 90 108th Congress H.J.Res. 77 107th Congress	30% vacancy in House due to death or resignation	30% vacancy in House due to death or resignation	Unspecified	Would authorize Congress to enact legislation providing for the temporary appointment of Representatives	Unspecified
H.J.Res. 92 108th Congress	A member who dies, or is unable to serve in Congress	One Member or Member-elect	Three to five potential temporary successors specified by congressional candidates	Upon the death of a Member or declaration of inability, which could be established by the Member, or the three alternates by majority vote	Until a special election is held to elect a new Member, or declaration by a Member that the inability has resolved
S.J.Res. 23 108th Congress	25% of either chamber deceased or incapacitated	25% of either chamber deceased or incapacitated	Congress would declare who would serve until disabled Members recovered or new Members were elected	Unspecified	120 days, with an additional period of 120 days if 25% of the seats in either chamber remained vacant or occupied by incapacitated Members
H.J.Res. 67 107th Congress	Death or incapacity of 25% or more of the House membership	Death or incapacity of a majority of the House membership	Governors	Unspecified	90 days or less until a special election is held to elect a new Representative
S.J.Res. 30 107th Congress.	Death or incapacity of 50% or more of the House membership	Death or incapacity of a majority of the House membership	Governors	Appointee would be required to be of the same political party as the member being replaced	Unspecified

Source: Individual measures, as noted.

TESTIMONY OF HAROLD C. RELYEA, FORMER ANALYST, CONGRESSIONAL RESEARCH SERVICE

Mr. RELYEA. Thank you, Mr. Chairman. Thank you for your invitation to appear here today.

My statement recounts emergency conditions occurring in the early months of 1861 when Congress was not in session and the newly elected President chose to address the crisis at hand unilaterally, taking actions of necessity which he trusted a reconvened Congress would ratify.

My purpose here is twofold: to provide some historical, as well as Presidential, context for the hearing.

At the time of his inauguration, as the Nation experienced rebellion within the Southern States, Abraham Lincoln took extraordinary actions, some of which he realized were of doubtful legality. He knew he needed legislative ratification of those actions, but he was not willing to convene a new Congress immediately to obtain the necessary approval. Instead, the 37th Congress did not convene for 122 days, or about 17 weeks.

The time frame is important in view of the schedule set in the Continuity of Representation Act of 2005, which basically calls for the holding of a special election within 49 days following an announcement by the Speaker that, because of extraordinary circumstances, vacancies in representation from States have exceeded 100 seats.

In congressional hearings a few years ago, some questioned that a national standard of 45 to 50 days was sufficient for the holding of mass elections after a national catastrophe. Longer periods of time, from an election administration perspective, it was suggested, would yield a better opportunity to include more of the electorate, such as Americans living overseas, armed forces personnel, travelers, and older people, and better ensure the integrity of the electoral process.

The Lincoln era-example suggests that upwards of 120 days might elapse before the occurrence of special elections facilitating a reconvening of Congress. When Congress, in an emergency, reconvenes, with or without the occurrence of special elections, what is the expectation? In the case of Lincoln in 1861, it was to ratify readily his emergency actions which, in his words, and I quote, "whether strictly legal or not were ventured upon under what appeared to be a popular and a public necessity," unquote. Among these were increases in the Armed Forces, a constitutional responsibility clearly vested in Congress.

In the aftermath of the terrorist attacks of September 11, 2001, President George W. Bush was better prepared to ensure the availability of essential government personnel to deal with the emergency resulting from that exigency.

Pursuant to the National Emergencies Act of 1976, he initially declared a national emergency for purposes of activating certain standby authority regarding Armed Forces and U.S. Coast Guard personnel.

Shortly thereafter, he issued a second national emergency declaration invoking the International Emergency Economic Powers Act to block property of, and prohibit transactions with, persons who commit, threaten to commit, or support terrorism.

While Congress may wish to explore the possibilities of enacting additional standby statutory authority to be activated by Presidential national emergency declarations relative to ensuring the continuity of the Federal Government, including Congress, it should also be remembered that Congress, pursuant to that same National Emergencies Act, may, by joint resolution, rescind a Presidential emergency proclamation or authorities so activated, which certainly is a reason for ensuring the operational capability of Congress in the aftermath of a catastrophic attack.

Ratifying the extraordinary emergency actions of the President, providing needed resources for responding to an emergency, and oversight of the response of the executive branch to an exigency are also reasons for assuring that Congress will be an active and continuous participant in the Federal Government's operations.

Mr. Chairman, thank you again for your invitation to appear here today before the Subcommittee. I welcome the questions of Members.

Mr. NADLER. I thank you very much.

[The prepared statement of Mr. Relyea follows:]

PREPARED STATEMENT OF HAROLD C. RELYEA

STATEMENT BY HAROLD C. RELYEA
CONGRESSIONAL RESEARCH SERVICE (RET.)
BEFORE
HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES
JULY 23, 2009
CONTINUITY OF CONGRESS IN THE WAKE OF A CATASTROPHIC ATTACK

Mr. Chairman, thank you for your invitation to appear before this subcommittee to testify on the continuity of Congress in the wake of a catastrophic attack. My statement, which is brief, recounts emergency conditions occurring in the nation in the early months of 1861 when Congress was not in session and the newly elected President, for a time, chose to address the crisis at hand unilaterally, taking actions of necessity which he trusted a reconvened Congress would ratify. My purpose in this presentation is twofold: to provide some historical, as well as presidential, context for the hearing.

Introduction

At various times in American history, emergencies have arisen — posing, in varying degrees of severity, the loss of life, property, or public order — and threatened the well-being of the nation. In response, Presidents have exercised such powers as were available by explicit grant or interpretive implication, or otherwise acted of necessity, trusting to a subsequent acceptance of their actions by Congress, the courts, and the citizenry. Moreover, as the historical record reflects, the response to such emergencies, whether by the executive, legislature, judiciary, or some combination thereof, may bear concomitant dangers for citizens' rights and liberties.

Among the initial efforts of Congress to legislate emergency authority were acts of September 29, 1789, and May 8, 1792, authorizing the President to call forth the militia of the states, initially to protect the inhabitants of the frontiers, and, subsequently, to execute federal laws, suppress insurrections, and repel invasions.[1] The first presidential response to an emergency occurred in August 1794 when George Washington, utilizing the 1792 statute, mobilized the militia to suppress the Whiskey Rebellion, the insurrection provoked by a federal excise tax on whiskey that residents of western Pennsylvania, Virginia, and the Carolinas forcefully opposed. Washington obtained the required judicial verification that a state was unable to suppress an insurrection, and personally took command of the forces that were called up.[2] In the case of the judicial branch, the Supreme Court's 1803 decision in the *Marbury* case was a critical ruling concerning emergency powers, although it did not specifically address the issue. Rather, in declaring for the first time an act of Congress unconstitutional, the Court established its authority for determining ultimately what is law under the Constitution.[3]

Underlying these early developments was the expectation that the federal government should have the means to protect itself and its citizenry, and that the balance of authority among the three coequal branches should not long be disrupted or sacrificed as a consequence of responding to an emergency. It is likely that most Americans did not give much consideration to the adequacy of these arrangements until the summer of 1814 when, in the latter days of August, British troops, having landed near Benedict, Maryland, on the Patuxent River, marched 55 miles to invade the U.S. capital, rout its officials, and burn most of its buildings (the edifice housing the Patent Office and the Post Office was spared due to the pleadings of Dr. William Thornton, the Commissioner of Patents).[4] It was perhaps then that the possibility of the incapacitation of the federal government for a protracted period of time first entered the popular mind.

The Lincoln Experience

Almost 50 years later, the matter of an incapacitated, or, at least, an only partially operable, federal government occurred as the nation disintegrated with rebellion in the southern states. News of the election of Abraham Lincoln, who was known to be hostile to slavery, prompted a public convention in South Carolina. It met a few days before Christmas 1860 and voted unanimously to dissolve the union between that state and the other states. During the next two months, seven states of the Lower South followed South Carolina in secession. Simultaneously, state troops began seizing federal arsenals and forts located within the secessionist territory.[5]

In his fourth and final message to Congress on December 3, 1860, President James Buchanan had conceded that, due to the resignation of federal officials throughout South Carolina, "the whole machinery of the Federal Government necessary for the distribution of remedial justice among the people has been demolished." He contended, however, that "the Executive has no authority to decide what shall be the relations between the Federal Government and South Carolina." Any attempt in this regard, he felt, would "be a naked act of usurpation." Consequently, Buchanan had indicated that it was his "duty to submit to Congress the whole question in all its bearings," observing that "the emergency may soon arise when you may be called upon to decide the momentous question whether you possess the power by force of arms to compel a State to remain in the Union." Having "arrived at the conclusion that no such power has been delegated to Congress or to any other department of the Federal Government," he proposed that Congress should call a constitutional convention, or ask the states to call one, for purposes of adopting a constitutional amendment recognizing the right of property in slaves in the states where slavery existed or might thereafter occur."[6]

Moving on, by the time of Lincoln's inauguration (March 4, 1861), the Confederate provisional government had been established (February 4); Jefferson Davis had been elected (February 9) and installed as the President of the Confederacy (February 18); an army had been assembled by the secessionist states; federal troops, who had been withdrawn to Fort Sumter in Charleston harbor, were becoming desperate for relief and resupply; and the 36th Congress had adjourned (March 3). A divided nation was poised to witness, as the late Wilfred Binkley wrote,

"the high-water mark of the exercise of executive power in the United States." Indeed, he continued, "No one can ever know just what Lincoln conceived to be limits of his powers."[7]

Lincoln's Actions

A month after his inauguration, Lincoln notified South Carolina authorities that an expedition was en route solely to provision the Fort Sumter troops, which prompted those state officials to demand that the garrison's commander immediately surrender. He demurred, and, on April 12, the fort and its inhabitants were subjected to continuous, intense fire from shore batteries until they finally surrendered. The attacks galvanized the North for a defense of the Union. Lincoln, however, did not straightaway call Congress into special session. Instead, for reasons not altogether clear, he not only delayed convening Congress, but he also, with broad support in the North, engaged in a series of actions which intruded upon the constitutional authority of the legislature. Lincoln's rationale for his conduct may be revealed in a comment he reportedly made in 1864: "I conceive I may in an emergency do things on military grounds which cannot constitutionally be done by the Congress."[8]

In a proclamation of April 15, 1861, Lincoln, recognizing "combinations too powerful to be suppressed by the ordinary course of judicial proceedings" or the United States marshals in the seven southernmost states, called 75,000 of "the militia of the several States of the Union" into federal service "to cause the laws to be duly executed." He also called Congress to convene in special session on July 4 "to consider and determine, such measures, as, in their wisdom, the public safety, and interest may seem to demand."[9]

Then, in a proclamation of April 19, Lincoln established a blockade of the ports of the secessionist states,[10] "a measure hitherto regarded as contrary to both the Constitution and the law of nations except when the government was embroiled in a declared, foreign war," noted political scientist Clinton Rossiter.[11] Congress, of course, had not been given an opportunity to consider a declaration of war.

The next day, the President ordered that 19 vessels be added to the navy "for purposes of public defense."[12] Shortly thereafter, the blockade was extended to the ports of Virginia and North Carolina.[13]

In a proclamation of May 3, Lincoln ordered that the regular army be enlarged by 22,714 men, that navy personnel be increased by 18,000, and that 42,032 volunteers be accommodated by three-year terms of service.[14] The Constitution, however, specifically empowers only Congress "to raise and support armies."

In his July 4 special message to Congress, Lincoln indicated that his actions expanding the armed forces, "whether strictly legal or not, were ventured upon under what appeared to be a popular and a public necessity, trusting then, as now, that Congress would readily ratify them. It is believed," he continued, "that nothing has been done beyond the constitutional competency of

Congress."[15] Indeed, in an act of August 6, 1861, Lincoln's "acts, proclamations, and orders" concerning the army, navy, militia, and volunteers from the states were "approved and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress."[16]

The 37th Congress, which Lincoln convened in July, initially met for about a month "to consider only the measures necessary to sustain the war effort." Members returned in December for a second session, which consumed about 200 days of the next year, and a third session, beginning in December 1862, which ended in early March 1863.[17] The President had party majorities in both chambers: about two-thirds of the Senate was Republican and the House counted 106 Republicans, 42 Democrats, and 28 Unionists. The 1862 elections shifted the House balance to 102 Republicans and 75 Democrats. Despite the numerical dominance of the Republicans, presidential leadership was needed for legislative accomplishments because, by one assessment, within the House and the Senate, "no one individual or faction was able to establish firm control of congressional agendas during the Civil War." A crucial factor in Lincoln's dealings with the legislators was his role as "chief patronage dispenser in the American political system" and his serving, as well, as "a kind of court of last resort to whom congressmen could appeal lower-level decisions or whom they might use to manipulate the federal system to their particular advantage."[18]

Nexus

In early 1861, as the nation experienced rebellion within the southern states, the newly elected President, Abraham Lincoln, took extraordinary, remedial actions, some of which he realized were of doubtful legality. He knew he needed legislative ratification of those actions, but he was not willing to convene immediately a new Congress, in extraordinary session, to obtain the necessary approval. Instead, the new Congress did not convene for 122 days, or about 17 weeks, before meeting in special session on July 4 at the request of Lincoln. The time frame is important in view of the schedule set in the Continuity of Representation Act of 2005: the holding of a special election within 49 days following an announcement by the Speaker of the House that, because of extraordinary circumstances, vacancies in representation from states have exceeded 100 seats, but waiving the 49-day requirement if, during the 75-day period beginning on the date of the vacancy announcement, a regularly scheduled general election or another special election for the office involved, is scheduled to occur.[19] Exploratory congressional hearings a few years ago provided an opportunity for the airing of views questioning that a national standard of 45-50 days was sufficient for the holding of mass elections after a national catastrophe. Some, representing, among others, election officials and other pertinent professional organizations, testified at that hearing that the 45-50-day time period would be a bare minimum to hold special elections after a catastrophe. Longer periods of time, from an election administration perspective, it was suggested, would yield a better opportunity to include more of the electorate, such as Americans living overseas, armed forces personnel, travelers, and older people, and better ensure the integrity of the electoral process.[20] The Lincoln-era example suggests that upwards of 120 days might elapse before the occurrence of special elections

facilitating a reconvening of Congress.

When Congress, in the aftermath of catastrophic events, reconvenes, with or without the occurrence of special elections, what is the expectation? In the case of Lincoln in 1861, it was, at his invitation, to ratify readily his emergency actions which, "whether strictly legal or not, were ventured upon under what appeared to be a popular and a public necessity." Among these were increases in the armed forces, a constitutional responsibility clearly vested in Congress. In the aftermath of the terrorist attacks of September 11, 2001, President George W. Bush was better prepared to ensure the availability of essential government personnel to deal with the emergency resulting from that exigency. Pursuant to the National Emergencies Act of 1976, as amended,[21] he declared a national emergency for purposes of activating certain standby authority regarding armed forces and U. S. Coast Guard personnel.[22] His action followed a long-standing tradition, dating, in the federal experience, to President Washington's 1794 proclamation activating militia to suppress the whiskey rebellion in locales of western Pennsylvania, Virginia, and the Carolinas.

President Bush would issue a second national emergency declaration on September 23 regarding the September11 terrorist attacks, when he invoked the International Emergency Economic Powers Act (IEEPA),[23] and ordered its implementation to block property and prohibit transactions with persons who commit, threaten to commit, or support terrorism.[24] The IEEPA authorizes the President to regulate or prohibit any transactions in foreign exchange, bank transfers of credit or payments involving any interest of any foreign country or a national thereof, or transactions involving any property in which any foreign country or a national thereof has any interest. Earlier, President William Clinton had declared a national emergency and invoked the IEEPA to prohibit transactions with terrorists who threatened to disrupt the Middle East peace process.[25]

While Congress may wish to explore the possibilities of enacting additional standby statutory authority to be activated by presidential national emergency declarations relative to ensuring the continuity of the federal government, including Congress, it should also be remembered that Congress, pursuant to the National Emergencies Act, may, by joint resolution, rescind a presidential emergency proclamation or authorities so activated — certainly a reason for ensuring the operational capability of Congress in the aftermath of a catastrophic attack. Ratifying the extraordinary emergency actions of a President, providing needed resources for responding to such a crisis, and oversight of the response of the executive branch to an exigency are also reasons for assuring that Congress will be an active and continuous participant in federal government operations.

Mr. Chairman, thank you, again, for your invitation to appear here today before this subcommittee.

1. 1 Stat. 95 (1789); 1 Stat. 264 (1792).

2. See Leland D. Baldwin, *Whiskey Rebels: The Story of a Frontier Uprising* (Pittsburgh, PA: University of Pittsburgh Press, 1939); William Hogeland, *The Whiskey Rebellion* (New York: Lisa Drew/Scribner, 2006);Thomas P. Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* (New York: Oxford University Press, 1986).

3. *Marbury* v. *Madison*, 1 Cr. (5 U.S.) 137 (1803).

4. Anthony S. Pitch, *The Burning of Washington: The British Invasion of 1814* (Annapolis, MD: Naval Institute Press, 1998).

5. See Harold Holzer, *Lincoln President-Elect: Abraham Lincoln and the Great Secession Winter 1860-1861* (New York: Simon and Schuster, 2008); Russell McClintock, *Lincoln and the Decision for War: The Northern Response to Secession* (Chapel Hill, NC: University of North Carolina Press, 2008).

6. James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents*, Vol. 7 (New York: Bureau of National Literature, 1897), pp. 3165-3167.

7. Wilfred E. Binkley, *President and Congress* (New York: Alfred A. Knopf., 1947), p. 126.

8. George Fort Milton, *The Use of Presidential Power, 1789-1943* (Boston, MS: Little, Brown, 1944), p. 111; contemporary legal support for Lincoln's point of view may be found in a treatise by the Solicitor of the Department of War, William Whiting, *War Powers Under the Constitution of the United States* (Boston, MA: Little Brown, initially published 1862).

9. Richardson, *A Compilation of the Messages and Papers of the President*, Vol. 7, pp. 3214-3215.

10. Ibid., pp. 3215-3216.

11. Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton, NJ: Princeton University Press, 1948), p. 225.

12. Ibid.

13. Richardson, *A Compilation of the Messages and Papers of the Presidents*, Vol. 7, p. 3216.

14. Ibid., pp. 3216-3217.

15. Ibid., pp. 3325.

16. 12 Stat. 326.

17. Explaining the practices of the mid-19th century, historian David Potter has written: "Unless called into special session, Congress did not meet for its first session until thirteen months after its election, nor for its second session until after its successor had been elected." David M. Potter, *The Impending Crisis: 1848-1861* (New York: Harper and Row, 1976), p. 385.

18. Allan G. Bogue, *The Congressman's Civil War* (Cambridge, UK: Cambridge University Press, 1989), pp. xiv-xv, xviii, 57.

19. 119 Stat. 565 at 588.

20. U. S. Congress, Senate Committee on the Judiciary, *Ensuring the Continuity of the United States Government: The Congress*, hearing, 108th Cong., 1st sess., Sept. 9, 2003 (Washington: GPO, 2004).

21. 50 U.S.C. 1601-1651.

22. Proclamation 7463, *Federal Register*, vol. 66, Sept. 18, 2001, pp. 48197-48199; statutory authority so activated included 10 U.S.C. 123, 123a, 527, 2201©, 12006, 12302; 14 U.S.C. 331, 359, 367.

23. 50 U.S.C. 1701-1706.

24. E.O. 13224, *Federal Register*, vol. 66, Sept. 25, 2001, pp. 49079-49082.

25. E.O. 12947, 3 C.F.R., 1995 Comp., pp. 319-320.

Mr. NADLER. And I first recognize myself for 5 minutes for questioning.

The quorum rule that we have been operating under since the Civil War is that a quorum is a majority of Members chosen, sworn and living. This seems to suggest a majority of any number of Members chosen, sworn and living, would pass constitutional muster.

Would the House of Representatives composed of five Members be able to act under current law with only three Members present if the others are dead? If not, what is the constitutional distinction and do we have to address this problem?

Who wants to do that?

Mr. FORTIER. Well, I think your question points to the untenability of the interpretation that you can redefine the quorum as less than half the Members of the actual body. The framers debated whether we should have a quorum of a majority or a larger number or a smaller number. And the reason they came to a majority, which was a reasonably high number, was that they didn't want a small number of people.

Mr. NADLER. The question is a majority of total seats or a majority of Members living.

Mr. FORTIER. Well, the framers believed that it was a majority of the total seats. They didn't want the representatives from Virginia and Maryland to show up, and the rest of the country not.

Mr. NADLER. So our current system since the Civil War is unconstitutional.

Mr. FORTIER. I think the interpretation of the quorum rule since the Civil War has been effective. People who proposed it during the Civil War were leery of this and said, look, the States in the South have seceded; we don't want to recognize that they have really left; and yet they haven't elected anyone; we have to do something.

But they recognized that it was somewhat difficult. And the later precedents were really about an individual vote: We have a Member or two missing from the body, so we will say that the quorum is a couple less.

So I think the principle that you should have a majority of the country, if you think about the reason a number of seats represents the country. You have 218 seats and the House of Representatives would be a majority of people in the country representative of——

Mr. NADLER. Let me ask a different question. We have a tension obviously between the desires as expressed by Mr. Sensenbrenner that the House should be the people's House. It should be consisted of only elected Representatives, and the fact that as a practical matter you can't elect people quickly you might say, 100 days, 70 days, whatever. But it is going to take some time, and Congress especially potentially in a time of national emergency will have to act quickly and you want a legitimate Congress, and how do you square the two?

Would a way of squaring the two be—and I don't think either of these proposals here do that—but a way of squaring the two be to mandate special elections within a reasonable period of time, but to provide for some type of appointment until that special election; either an appointment by a Governor or, better yet, as Congressman Baird and Congressman Rohrabacher suggested, by an alternate Congressman or by someone on a list left by the Congressman, but only to function until you could arrange that special election?

Mr. FORTIER. That was the recommendation of our Commission, and we are flexible as to what sort of appointment that is. But we believe in having the special elections, we believe in getting people back who are democratically elected. But we think that the period

of time of, we think, several months, critical time, every district should be represented and there should be a temporary person.

Mr. NADLER. Anybody else want to comment on that question?

Mr. RELYEA. I will comment in this way. I am not an attorney, but I would like to offer this perspective. Historically, people have expected elected representation in the House. It changed with the Senate. But, I think, that too, the popular election or direct election of Senators, was the reflection of that mood about the House. And whatever we can do relative to preserving the House after an attack or a catastrophe that rests on an electoral base, I think is extremely commendable. And it is important not only for operational purposes but I think it is important for——

Mr. NADLER. But you would agree or disagree that pending as swift as you can manage it, you should have somebody coming in there.

Mr. RELYEA. I think the exploring of something where we see a longer circumstance of Members not being available, that this alternative of a temporary appointed process should be examined further.

Mr. NADLER. My last question is the following. We have seen two proposals for how to make such a temporary appointment. One would be, as Congressman Rohrabacher suggested, that when we run for office we should run with an alternate, and presumably that the electorate could judge my reelection partially on the basis of what they thought of my proposed alternate. As people—I don't know how many people actually vote for President based on the Vice President, but to some extent theoretically I suppose that is true.

Congressman Baird proposed that the Congressman should give a list of alternates, in ranked order I think, to the Clerk of the House.

I would ask your comments on those two alternatives, with a second question. In the case of the latter, that you give a list, a ranked list of alternatives to the Clerk of the House, some people suggested that that should be public. Once you are elected, you announce these are my three ranked alternates 1, 2, 3 and give it to the Clerk. And some have suggested—some, meaning me—have suggested that that should not be public, that you should—that the Congressman should give the three best he really thinks, without regard to political considerations or to his insulting a State senator by not putting him on the list, et cetera, and that list should become public only in the event of a catastrophe. Could you comment on that question, too?

Mr. RELYEA. I personally find the idea of an alternate, I would find that somewhat confusing. I think it would be confusing to the electorate. It is such a radically new approach. I am not saying it doesn't have merit. I am simply saying I think you would have a hard time selling that to the American people.

People vote once, they think they have done a good job whether they win or lose, and they don't want to play around with the idea of an alternate; who is this other person, et cetera.

Designating people, the second proposal, I am not so certain about that. It has merit to how wide—is this a name kind of thing,

is this a title kind of thing, do we name somebody personally or by title?

Mr. NADLER. No, no, no. You would name three people. You would give those three in ranked order to the Clerk of the House. And variant one, that would be announced publicly; variant two, it wouldn't be announced.

Mr. RELYEA. I understand, and I am still not terribly excited about that idea. Whether or not—I am clear about the idea of whether it should be public or not, and I lean very much toward it being public.

Mr. NADLER. It should be public.

Mr. RELYEA. It should be public. I don't think we would want to do things of that nature in secret. It may have a security aspect to it, but that seems contrary to the ways we have operated.

Mr. NADLER. My time is expired, but I ask if anyone else wants to comment on these two questions.

Mr. PETERSEN. Very briefly. I guess one question on the public or the secret nature of it, I mean we have public elections so that we know who our governing officials are going to be. And that would—if we were not to publish either the list of designees or the alternate, then it is possible that we are contravening that tradition, although there may be compelling security reasons why that may not be the case.

In the absence of a clear designation in the proposed amendments as to what the alternate Members or the three Members, the three alternates might be doing, whether they are government officials, whether they are drawing a salary or if they are just waiting, I think it may be difficult to specify too much at this level. And you know, we would need to have more of a conversation, you know, in the implementing legislation.

A potential issue with the three alternates, as I understand it, in addition to the rank ordering, there is a mechanism for them to declare incapacity. What do we do in the circumstance where the Member who has the three delegates, or designates rather, appears to have come through the incident that led to the emergency replenishment circumstance; but his three designees believe that he is traumatized in some way that mandates him stepping aside for a little while, and they take a vote, and that is what happens. And immediately he comes back and asserts that he is ready to take office. And just as immediately, they take another vote that suggests that maybe not. Effectively we have made that seat vacant. And I am reasonably sure that is not the intent of the legislation, but it appears to me that that is a potential outcome.

Mr. NADLER. If you gave them the power.

Mr. PETERSEN. If you gave them the power.

Mr. NADLER. Which I don't think anybody is contemplating.

Mr. PETERSEN. It is in some of the proposals.

Mr. FORTIER. If I could say, there are two precedents for both of these proposals. One—maybe it won't win many votes in the House for this—but the French do have a system like the Rohrabacher bill, where they run with the second and that second takes over if the Member goes to the cabinet or steps down.

And States—many States have enacted in the 1950's and 1960's, looking at the Cold War, systems to replenish their State legislatures with a list somewhat like the Baird bill.

Mr. NADLER. Who did that?

Mr. FORTIER. A number of States. I had a list once; Delaware and a number—Texas. There are quite a few. There are old laws on the books where Members indicate who their successors are.

I think the answer to your direct question is, I do think they should be public, my personal opinion. And I just think it would cause less conspiracy thinking about these secret people who would take over afterwards, that we should know who they are. And there are some details to be worked out, but I think they should be public.

Mr. NADLER. I thank you and my time is long expired.

I now recognize the distinguished Ranking Member, Mr. Sensenbrenner.

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

This kind of plows over ground that the Committee did over 4 years ago, following the Continuity in Government Commission's recommendations. I am certain that by saying this I will get another tantrum by Mr. Ornstein in the pages of Roll Call, but he has done it so many times that my skin is thick and my hearing aid is turned off. So I will do it again.

I think the message was given when the House voted down the Baird amendment by a vote of 63 yes to 353 no, that the House overwhelmingly opposed having appointed members, period. That is the largest rejection of a proposed constitutional amendment in the history of the House of Representatives.

And this was the amendment that Mr. Baird proposed in the Committee. We didn't try to amend it, we didn't try to modify it; it was his amendment, forward and back.

So we are talking about the other issues and how to replenish the House of Representatives. In the hearings that we held 4 years ago, Walter Dellinger did testify that he believed that the quorum requirement was constitutional. And the House does have plenary authority under the Constitution to establish its own rules, and the courts have consistently not meddled in how the House adopts its rules and how the House, or Senate for that matter, decides to enforce its rules.

So I think that the quorum requirement is a red herring, and using the hypothetical that the Chairman brought up to say there were only five sitting elected Members that survived, would it really be democratic to have the 430 appointed members outvote the five elected Members who at least had some kind of a mandate from the last election.

So we get to the issue of replenishment, and I think that by a 3-to-1 margin in the House, the determination was made that expedited special elections would be the way to deal with it. And, unfortunately, a lot of the States that have had vacancies, such as California and Illinois, in the current Congress have very lengthy special election procedures.

In the case of the vacated House seat by Kirsten Gillibrand, there the election was held within an 8-week period of time. And as I recall, Governor Paterson did not set the date of the election

immediately after then-Representative Gillibrand's resignation from the House, but delayed a bit; and it could have been done in a much prompter manner.

So the complaints about delays have largely been a result of State law requiring those delays, and the State legislatures, if they want to fill those seats, can pass a new law that allows for them to fill the seat.

I also look at the fact that in the United Kingdom, which has a similar rule to ours in that in order to sit in Commons, you have to be elected. During the Second World War, when a number of the sitting Members were killed in action or killed as a result of Nazi bombing, the average time between a vacancy and filling that seat was 42 days. And there you had a country that was almost under constant attack, being able to fill those seats.

So—and it has been mentioned earlier that before the 20th amendment was ratified, usually the election was held in November of the even-numbered year, and the new Congress was not seated and sworn in until 13 months later.

Having said all of that, I am interested in the business of incapacity and I am wondering if I can get a brief answer to this question; and that is that both Senator Byrd and Senator Kennedy have been absent for considerable periods of time as a result of illness. Do you think there should be a constitutional procedure for the Senate to declare those seats temporarily vacant and allowing a filling temporarily by the Governor until the Senators were able to come back and function or have the present system?

Maybe, Mr. Fortier, you can start.

Mr. FORTIER. I will just address your question directly.

I don't think there should be such a system because our recommendations really are about the emergency situation. We respect your view that—and the view of the Founders, that the House should be the People's House and the Senate has moved to become a more democratic body; it should be filled in normal constitutional ways.

But what we worry about is the extraordinary circumstance where we fear there will be no House or no Senate and that that period of time, 2 or 3 months, which is the most important time for Congress to be around after an attack, we should have a full Congress.

And if I can just say, it is not only that it would be small or possibly undemocratic to have a small Congress, but it could look very different. I think we all think of 20 Members or 30 Members as being sort of a mini version of today's Congress. Of course, it could have a very different majority. It could be representing only one State or one part of the country, only men or only women.

It could be a very, very different place and wouldn't look like the Congress that was elected by the people. So I don't think we should have that provision.

Mr. SENSENBRENNER. I live in Alexandria and there was a vacancy in the House of Delegates in Alexandria and Governor Kaine called an election 16 days from the time he signed the writ of election and there was somebody that was elected there.

So I guess I can say it can be done.

Mr. Petersen? Mr. Relyea?

Mr. PETERSEN. Sir, as a CRS employee, I take no position on the merits or issues of any proposal that Congress considers. What I can say related to the issue of individual capacity—incapacity—on one Member at a time, the practice has long been to address it on a case-by-case basis.

Many times, particularly in the last 30 years, as staffs have grown and presence has been delegated, a number of the activities that routinely go on in a Member of Congress's office are carried out by staff, and those continue to do so when an individual Member is incapacitated. So to some extent what we are looking at is whether or not they are appearing to vote, whether or not they are appearing to carry out their Committee duties.

For the most part, it is a question of whether they are going to come back or whether they are going to get better. And we have seen examples in which extended incapacities have ended with the Member returning healthy and well and we have seen other circumstances where missing Members have been—have had their seats declared vacant, pursuant to the State laws of whichever State they are from.

An example, there is the crash in Alaska with Mr. Boggs and Mr. Begich. Alaska has a reasonably expedited law for declaring somebody dead. That is what they did; the seat was made vacant. In the case of Mr. Boggs, it was a more protracted negotiation within the Chamber.

When the quorum isn't at issue, it appears that the House and the Senate have been content with that practice.

Mr. SENSENBRENNER. Mr. Relyea?

Mr. RELYEA. I would associate myself with the remarks of both people here at the table. I think we have seen this in the past on a case-by-case basis, and States have looked at the situation relative to how long the incapacitation is going to be; and Mr. Fortier has said we have relied pretty much on elections.

What I think your question goes to, perhaps—not to put words in your mouth—what about incapacitation on a very large scale? How do we know that has occurred, that there is an attack—if there is a bombing, whatever the event may be, how do we account for missing Members or Members that we don't know what condition they are in? In other words, there are a number of Members that are in a medical condition that does not allow them to participate.

That may be more the situation of what you are thinking about, rather than the case-by-case kind of thing that has happened in the past. There—I don't have an answer to that, but perhaps there should be a greater awareness of that possibility on the part of State election officials.

I am also sitting here thinking that governors and others responsible for the electoral process sometimes have been slow because they haven't seen the urgency of the situation. Maybe we need to go back to some type of Cold War education once again to make those officials more aware of their responsibilities in this type of mass attack and the need to determine, perhaps with medical assistance and others' incapacitation, whether it be from a physical injury or some other type of injury it seems like it is another step,

out beyond what was immediately under discussion here today, but nonetheless a very important point.

Mr. NADLER. The time of the gentleman has expired.

The gentleman from California, Mr. Sherman.

Mr. SHERMAN. Mr. Baird and I have been focused on these issues for a long time. We have a division of attention. He is focused on congressional continuity; I have focused on Presidential continuity. And I am going to use my 5 minutes mostly to focus on what I know about, and plea that we also have a hearing on Presidential continuity.

Before I do, I do want to respond a bit to Mr. Sensenbrenner. September 11 occurred because we, as Americans, were too damned arrogant to realize we were vulnerable and too comfortable to think the unthinkable or to think about anything that made us uncomfortable. Yes, indeed, in Alexandria, they had elections perhaps within 16 days. That wasn't a country that had suffered 20, 30, 40 million casualties and a nuclear attack; that was just a sunny day in Virginia.

And so we had better start thinking about how our country is going to persevere after millions of casualties and not assume that every day is going to be a sunny day in Virginia.

As to Presidential succession, to wipe out Congress, you would have to kill hundreds of people and you would no doubt be killing hundreds of thousands as part of that process, or tens of thousands. To incapacitate the executive branch, which in a time of crisis might be even more important than our own, you would only need one or two bullets.

The other thing to point out about Presidential succession, it is entirely a creature of statute. So as a practical matter, should we decide to actually do something, we could actually get something done.

There are a number of problems with the current Presidential succession process. The first is and the most dangerous is what I call "bumping"; that is to say, you could swear in a President Pro Tempore of the Senate and the next day a House of Representatives elects a new Speaker. You now have a country that has suffered a major catastrophe and has two Presidents, perhaps with very different ideas as to how to respond.

Imagine yourself as a general in the Army trying to decide which commander in chief to follow.

Now we put our soldiers in Iraq and Afghanistan to defend us, but we are unwilling to face uncomfortable truths from the safety of this capital to defend our ability to persevere if we had just two or three assassinations. Keep in mind John Wilkes Booth did not just kill Lincoln; he was part of a conspiracy to kill several. He wounded the Secretary of State, et cetera.

So, thank God, al-Qaeda—I hope al-Qaeda is not focusing on our incredible self-inflicted vulnerability. But we could have two Presidents.

All of those in succession to the Presidency live here in Washington, D.C. We could easily designate some people who don't. We have been too lazy to do so; it is uncomfortable to think of the uncomfortable, so we choose not to. We have got time to rename post

offices; we don't have time to figure out who doesn't live in Washington, D.C., who should succeed to the Presidency.

We have incredible vulnerability from the day after the nominating conventions until at least a week or so after the inauguration of a President. What happens if there is an assassination of a Presidential candidate a week before the election? It is not automatic that a vote for that Presidential candidate is a vote for that—for the Vice Presidential candidate on the ticket. It is by no means clear that the Electoral College would vote for that person. So you could invalidate the legitimacy of the United States and its Presidency with one bullet at the right time.

What happens with assassinations and deaths that occur between the election and when the Electoral College meets, when the Electoral College meets until the inauguration of the President? And then when you have inaugurated a President, you have a President and a Vice President, but you may not have any Cabinet members who have been confirmed. So who is third in line—who is in line to the Presidency then? Of course, you do have the Speaker and the President Pro Tempore. The most difficult to solve problem politically is the inclusion of the Speaker pro tempore and the Speaker of the House—the President pro tempore and the Speaker of the House in the line of succession. The reason for this is you could shift the entire direction of this country with one or two bullets.

What an invitation to assassins. We could have replaced George W. Bush with Nancy Pelosi. Do you know how many crazed, intense Democrats just in my district were praying every day that that would somehow happen? Thank God. They all believe in gun control and wouldn't do anything violent.

In addition, keep in mind that just a few years before 9/11, Strom Thurmond was third in line to the Presidency. Now, someone else has gotten in trouble by arguing whether Strom Thurmond should have become President in 1948. I don't think anybody thinks he should have been President in 1998. Imagine this country responding to a crisis with Strom hobbling, at best, into the White House.

So we have a circumstance in which assassins can shift the political direction of the country, where persons who are not selected for their national leadership, but rather are selected as an honor of being the oldest, most senior Senator, are selected as President pro tempore.

We have a circumstance where in time of emergency we could have two Presidents, which is almost as bad as having none, arguably worse. And we have a whole period of vulnerability.

I suggest, Mr. Chairman, that we have hearings on this, in part to recognize that as important as the United States Congress is in a time of national crisis, it is important that we have one President, preferably under the age of 98 years old, and that there be only one claimant to the Presidency; and at very best, that if the people of the country have voted for one particular philosophy to inhabit the White House, that assassins are not able to reverse that decision.

So this is my plea for future hearings.

And I want to commend Mr. Baird for his tireless work on this effort, and I would hope that we would not put the pristine nicety of walking on the floor of the House and saying, "No appointed person ever sat on this chair," that that kind of thinking is a luxury in terms of will there be a legitimate and accepted government of a country that may have lost tens of millions of people in a nuclear attack.

I chair the Subcommittee on Nonproliferation. Don't think it couldn't happen. And the idea that there would be some meeting of the House of a few dozen people, none of them from my State, and that the entire country would say, Yes, that is our representative body—we are going to be asking the people of the United States in a time of emergency to follow their government and to make enormous personal sacrifice. We had better tell them what the institutions are and those institutions better make sense.

And we shouldn't ask people to die in Afghanistan to safeguard our institutions if we are not willing to do the work necessary to do that ourselves here. I yield back.

Mr. NADLER. I thank the gentleman.

The gentleman from Texas is recognized.

Mr. GOHMERT. Thank you, Mr. Chairman. It is a very interesting hearing, a very interesting discussion. I appreciate the witnesses, not just your testimony today, but the obvious tremendous amount of thought that has been put into this issue.

So I have some questions that arise that I am not sure you have adequate answers to. But as to my Chairman's comments, although after 9/11 some ask who would ever have foreseen crashing a jet into buildings; and my answer is, Tom Clancy, because I read that novel back, I think, in the early 1990's and there was a jet crashed into a joint session of Congress, into the Capitol building, wiped out everybody but Jack Ryan.

Mr. SHERMAN. If the gentleman would yield, some might ask who would think of shooting not only the President, but also the Vice President and the Secretary of State on the same day.

Mr. GOHMERT. John Wilkes Booth.

Mr. SHERMAN. And that is the answer to that question.

Mr. GOHMERT. Exactly. So these things have been thought about before by people who wanted to have radical change in government. And I have immense respect for both Mr. Baird and Mr. Rohrabacher; and Mr. Rohrabacher, I deem to be a very close friend.

I am trying to work through these things and like—in Resolution 53 it indicates, "Whenever the House declares a Representative is unable to discharge the powers and duties of his office"—that creates a little concern for me because knowing who is in charge, they might vote me off the island as soon as this thing passes. They have suspected Gohmert wasn't of sufficient mind to serve from the very beginning, and now that would give them the power to change that.

I mean, it seems almost humorous, but at the same time these are real issues. And the Founders knew—they just didn't trust anybody that would have this kind of power, so let us have not just one House, let us have two Houses and let us make them about equal where either one can cancel what the other is doing.

We don't trust these guys, so we don't want them electing the executive. Let us have somebody elected outside of the House, not a prime minister, but an executive.

And you know what? We don't trust either of those groups. Let us have another branch that can cancel them out at any time because of the fear of what happens when people have enough power to keep themselves in power.

And so that is what I keep coming back to. And, Mr. Fortier, what if elections were not held within 49 days after this tragic event, when would they be held? Who would determine that? What would be your best recommendation?

Mr. FORTIER. There are a couple of good points. I mean, the incapacitation question comes up. Who would decide—that is actually a question that is in the current rules about the quorum which—I don't think that is a legitimate way to address the quorum, but we have to—the way the quorum rule reads today is that there is a carefully drawn rule, but still it is several days of consideration, waiting to see who shows up and then declaring people incapacitated.

We did not recommend that in normal circumstances people should be declared incapacitated if they were a Senator or a Representative. But in this extreme circumstance it makes a big difference for the functioning of the body.

Your second question is about the elections. I mean, elections right now are determined by the State. How long they take is by State law and by State——

Mr. GOHMERT. You were saying it is not practical, as I understood, in 49 days. So my question—and actually it is not my second, it is my first real question—is, so who decides when they would be appropriate under your way of thinking?

Mr. FORTIER. The States have the current authority. We would like to see the States still have that authority.

Some States fill their seats in 30 or 40 days. I think probably more likely in the 2-to-3-month period. Then those people would come in and replace the temporary replacements. We are just looking to fill this very important time when the House will be out of commission, we believe, or very small; and that is the time where we need temporary appointment.

When it comes to State election, it doesn't occur in incapacitation because there is no vacancy. But in the case of death, the State law would prevail whenever that person was elected and the election, certified; that person would take over from the temporary Representative and we would never see the temporary Representative again.

Mr. GOHMERT. The thing that—this distrust that I share with the Founders for people, when they have a great deal of power, would bring back what we have seen in Venezuela, and what certainly appeared to be happening in Honduras, when you have a leader who decides he doesn't like the fact that he is about to be out of office and can't run again—So let's just have a vote and keep me in power.

And as I look at Resolutions 52 and 53, both have a provision that would say that Congress probably shall have the power to enforce this article through appropriate legislation; and similarly,

Congress shall have the power to enforce this article by appropriate legislation.

My concern is that you have an influx of people who have never had power and had been secondary alternates, or just recently appointed, whichever methodology you use; and all of a sudden, they like this job. And so they may decide that appropriate legislation means States—it is too soon to have an election, not 49 days, not this year, because the law, the amendment, said as soon as possible, but it is just not possible to have a fair election within this year; let's let me keep this term—and you have got a majority of people that vote to keep themselves in charge.

So I think it is a very real risk that we could lose a vast number of Representatives and Senators all at the same time. I mean, any time we have a joint session, especially State of the Union.

But I am still wrestling with that. How do you prevent the alternates from coming in and just declaring, "We are it." And appropriate legislation to them means, "We need to stay in charge for a while to keep that continuity?"

So, anyway, my time is up and the Chair has been gracious. But I am just struggling with that.

Mr. NADLER. Why don't we permit the witnesses, even though your time has expired, we will let the witnesses answer the question that you have asked.

Mr. FORTIER. Again, to repeat a bit, right now it is in the States' hands. It is not in one hand. There is some advantage to that. It is in 50 States—different rules, different legislatures, which presumably would still be out there.

You might ask the same question today: What if all of you decided you wanted to stay and never accede to your replacement? State law provides for that and provides for those elections that take place that would be there at the next general election or a special election to replace a Member.

So it is not in one hand; the State laws would be there. I suppose in a crisis, we would always worry: Would people act differently? That problem is there in the current situation. If you have a very small number of Members acting under this quorum rule, 20 of them, what is to say they won't want to keep power in a way and not let the newly elected special Representatives come in as well.

So I see the problem, but I am not sure it is particular to this solution.

Either of the others?

Mr. NADLER. Either of the others?

Okay, the time of the gentleman has expired.

I thank the witnesses.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions to the witnesses, which we will forward and ask the witnesses to respond as promptly as they can so that their answers may be made part of the record. Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

With that, I thank the witnesses, I thank the Members who have attended, and the hearing is adjourned.

[Whereupon, at 3:33 p.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

DANA ROHRABACHER
46th District, California

Committees:
FOREIGN AFFAIRS
Ranking Republican, Subcommittee on International Organizations, Human Rights and Oversight
Subcommittee on Asia, the Pacific, and the Global Environment
Subcommittee on the Middle East and South Asia
SCIENCE AND TECHNOLOGY
Subcommittee on Space and Aeronautics

Congress of the United States
House of Representatives

WASHINGTON OFFICE:
2300 Rayburn House Office Building
Washington, DC 20515-0546
(202) 225-2415 FAX: (202) 225-0145

DISTRICT OFFICE:
101 Main Street, Suite 380
Huntington Beach, CA 92648-8118
(714) 960-6483 FAX: (714) 960-7806

South Bay: (310) 377-9493

http://rohrabacher.house.gov

August 3, 2009

Hon. Jerrold Nadler, Chairman
Subcommittee on Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
B-353 Rayburn HOB
INSIDE MAIL

Dear Mr. Chairman:

Thank you again for the opportunity to testify before your subcommittee on H.J.Res. 53, my proposed constitutional amendment relating to congressional succession. I would like to take this opportunity to elaborate on the answers I provided to your and Mr. Sensenbrenner's questions at that hearing, as well as respond to questions that were raised later in the hearing about my proposal by Mr. Gohmert. I request that this statement be included in the record of the hearing.

With regard to Mr. Sensenbrenner's question mentioning the Vice President's pay, I would note that H.J.Res. 53 does not require that Alternate Representatives and Alternate Senators be paid. In fact, they would not be paid, even for such time as they might be Acting Representatives or Acting Senators, unless Congress were to use its discretion to establish such pay by law. While the Constitution currently requires that Representatives and Senators be paid, Alternate Representative and Alternate Senator are new federal offices that would be created by my constitutional amendment, and constitutional provisions that apply to Representatives and Senators would apply to Alternates only to the extent specifically stated in my amendment.

Regarding your question about whether people could hold state or local office while serving as Alternate Representative or Alternate Senator, I would like to make clear that the doctrine of incompatible offices would apply. If someone could not legally hold a particular office and simultaneously serve as Representative or Senator, neither could they legally hold that office and simultaneously serve as an Alternate Representative or Alternate Senator. As I mentioned in my answer, an Alternate might be acting as Representative or Senator for only a few days or a week during a temporary disability. It would, of course, be impossible for someone who holds an office incompatible with that of a Member of Congress to temporarily resign their other office.

Mr. Gohmert raised two concerns about my proposal after Mr. Baird and I had been dismissed. First, he mentioned that under Sections 3 and 6 of H.J.Res. 53, either House can declare their members unable to serve, and thus be temporarily replaced by their Alternate. What he left out, however, was that those sections also provide that the Member so declared may immediately reclaim the powers and duties of his office simply by submitting a written declaration to that effect. Thus there would be no ability for either House to deprive any member of the ability to even make the next vote, and therefore there would be nothing to gain for either House attempt to use these sections for mischievous purposes.

Sections 3 and 6 are needed to provide a way of activating needed Alternates if their principals are unable to transfer their powers on their own initiative.

Mr. Gohmert also expressed concern that a Congress made up mostly of Alternates in their acting capacity after a massive tragedy might pass a law pursuant to Section 10 preventing or delaying special elections from taking place to replace them. However, since there is nothing in H.J.Res. 53 that changes Congress' authority over special congressional elections, the authority granted in Section 10 to pass implementing laws would not apply to such elections.

I hope this letter has been helpful. If I can answer any other questions that you or other members of the Subcommittee may have about H.J.Res. 53, please feel free to contact me or my Chief of Staff, Rick Dykema, at 5-2415.

Sincerely,

Dana Rohrabacher
Member of Congress

DR/rtd

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

HEARING ON CONTINUITY OF CONGRESS IN THE WAKE OF A CATASTROPHIC ATTACK

Statement of the Honorable David Dreier, Ranking Republican Committee on Rules

Chairman Nadler and Ranking Member Sensenbrenner,

Thank you for the opportunity to share my thoughts on the critical subject of continuity in Congress.

Since the first day of the first session of the U.S. House of Representatives in 1789, every person who has ever served in this remarkable body has been elected by their constituents. We were reminded of this just last week with the election of our newest colleague from my home state of California, Representative Judy Chu. Unlike the presidency or the United States Senate, a Member of the House cannot be appointed, they may only be elected.

It is a model that I believe serves the Republic well; it should be broadened and not constrained. That is why I joined with my very good friend, the Chairman of the Judiciary Committee, Mr. Conyers, along with the Ranking Member of this Subcommittee, Mr. Sensenbrenner, to propose a constitutional amendment to require Senators to be directly elected. If recent history has shown us anything, it is that when voters are removed from the equation, confidence in our institutions of government is diminished.

Like so many of the problems we confront, our adherence to the principals of our founders makes our modern-day challenges more complex. The Nation's enemies know this, and try to exploit it. But because those principals can be perceived as weaknesses does not mean that we should abandon them.

Nowhere is that more true than the complex constitutional issues regarding continuity of the Federal Government in times of national emergency. The United States Senate could be quickly reconstituted by the appointment powers of state governors if there were an absence of quorum due to disaster. The line of succession to the presidency is definitive as to who may assume executive power in case of a presidential vacancy. There are no fewer than eighteen government officials in Congress and the Cabinet that are eligible to succeed to the presidency. In a time of crisis, there are mechanisms in place to allow the President of the United States and the United States Senate to immediately function in order to govern the country.

The same cannot be said for the U.S. House of Representatives. The Constitutional requirement that Members of the House of Representatives be

directly elected presents challenges due to the time it takes to hold elections once the Speaker has declared vacancies in the House.

While I was Chairman of the Committee on Rules, we held an original jurisdiction hearing titled, "Continuity of Congress: An Examination of the Existing Quorum Requirement and the Mass Incapacitation of Members." The hearing focused on the challenges that that the incapacitation of Members would pose to adhering to the House's constitutional quorum requirements.

Under longstanding House precedents, which parallel Senate practice, a quorum has been interpreted as a majority of the Members chosen, sworn, and living. Thus, in the House, with 435 Members, a quorum can only be achieved with 218 Members, living Members. If a catastrophe occurs and 225 Members of the House were found dead, the whole number of the House would be reduced to 210. The Speaker, under the rules, would announce that fact to the House. The number required for quorum would then, of course, be 106. The House could proceed on that basis to conduct its business.

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

Recognizing this issue, the House took affirmative steps to address this problem. While I was Chairman of the Committee on Rules, the House adopted clause 5(c) of rule XX in the 109th Congress. This provision permits the Speaker to establish a "provisional quorum" to allow the House to continue with business in the event of mass incapacitations. This provision, combined with expedited special election rules appearing in section 8 of title 2, United States Code, allows the House to function, while still maintaining its fundamental character as a body where everybody from the Dean of the House to the most wide-eyed freshman was elected by the people that he or she represents.

Like so many answers to difficult problems, it isn't a perfect solution. But amending the Constitution to take the people out of the "people's house" is far worse. Ultimately, it restricts the rights of our constituents, and that is something that I simply cannot support.

In the not so distant past, this House agreed with me. The Republican Leadership gave Mr. Baird a fair shot at his constitutional amendment in the 108th Congress: Only 63 Members of this institution joined Mr. Baird in supporting his amendment to the Constitution to allow appointment of House Members in times

of National emergency. More than 350 Members said that changing the nature of the House was an unacceptable price to pay, particularly when there was a better alternative.

We are rightly concerned that a vicious attack by those who hate our way of life could expose the inelegancies of our Constitutional form of government. But responding by turning the delicate compromise of our founders on its head is no solution; it's tantamount to letting the bad guys win.

Mr. Chairman, unfortunately history will already reflect that this Congress significantly curtailed the rights available to Members and the people that they represent. Most notably, we have ended a tradition of open consideration of appropriations measures that has existed since the dawn of the Republic. I urge you not to compound this Congress' legacy of rolling back rights by moving forward with plans to further disenfranchise our constituents.

Thank you Mr. Chairman and Ranking Member Sensenbrenner. I urge you to reject Mr. Baird's heartfelt, but misguided approach.