

**MEMO TO JUDICIARY: DON'T RUSH  
FLAWED CONTINUITY MEASURE**

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*Roll Call*

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The 108th Congress will be especially notable and valuable to scholars and teachers of the legislative process as they write and lecture to students and legislators everywhere: It is a near-ideal ongoing case study in how not to legislate.

For example, let's look at H.R. 2844, the continuity of government measure scheduled for markup today in the House Judiciary Committee. It looks like the measure will be rammed through the committee and onto the House floor without serious consideration of ways to fix its key problems.

The original bill — the brainchild (I use the term loosely) of House Judiciary Chairman Jim Sensenbrenner (R-Wis.) and Rules Chairman David Dreier (R-Calif.) — mandated that all states hold special elections to the House, when the Speaker declares 100 or more seats vacant, within 21 days.

But the bill's drafters did nothing before dropping the bill in July to get reactions to the idea from election officials, scholars, local governments or anybody else. Last fall, the Senate Judiciary subcommittee on the Constitution invited some of these experts to testify during a hearing on continuity issues. Later on, the House Administration Committee held a parallel hearing. At both, huge problems were raised with the bill.

Then in mid-November, at Sensenbrenner's behest, the House Administration Committee marked up the bill — which had been slightly changed to extend the time for these emergency special elections to no more than 45 days — with 10 days allowed for parties to select candidates. The bill

passed through on a party-line vote, with members acknowledging many of the problems raised by ranking member John Larson (D-Conn.) and saying there would be a response from the Judiciary Committee.

There was nothing close to a full or adequate response — and the one that was drafted arrived the day the committee report was filed in the House. Now the bill will be brought quickly to the floor, probably on a closed rule crafted by bill co-sponsor and enabler Dreier, with the following key problems:

- It pre-empts election laws in all 50 states, but in ways vague enough that it leaves lots of states in limbo as to which of the provisions in their own state laws can or cannot apply to these special elections. Many have laws involving absentee voters, military voters and party candidate selection processes that run afoul of this bill. What if they can't reconcile the two? What if their own communities have been hit by terrorist attacks? What if they fail to meet the 45-day deadline? Are their elections to the House then invalid?
- Forty-five days is much better than 21 days, but it is still woefully inadequate, especially for a real election. It is a near-impossible time frame if applied simultaneously to hundreds of House races when it comes to finding ballot stock and printing ballots.
- With only 10 days to choose nominees to go on the ballot, primaries, of course, are out of the question — a few party insiders would handpick candidates. If they could not get it done in 10 days they would be out of luck and without a candidate for Congress, according to Sensenbrenner. Minor parties and Independent candidates would be out of luck, period.

- Printing and mailing absentee ballots takes a lot of time. Thirty-five days to an election pretty much precludes absentee voting, including overseas military absentees. This violates federal law, not to mention violating laws in most states.

- The list of those shut out of the most consequential House election in history does not stop with Independent and third-party candidates, absentee and military voters. It also shuts out new voters not yet registered.

- The bill is a major unfunded mandate for states, which will have to pay premium rates for ballot printing, extra costs for poll workers, more for voter registration and so on.

- The bill does absolutely nothing to deal with what may be the biggest threat to governance in the age of terror — widespread incapacitation of Members of the House and Senate. If there is no quorum, there is no official business. If many Members are killed, half of the remainder arguably can constitute a quorum and keep the House and Senate acting, perhaps even to pick an acting president if the president and the vice president are also killed.

But if many Members are alive but incapacitated after an attack, we may have no quorum for long periods of time.

- Let us say that the bill can be made to work. At best, for 55 or 65 days (including the time to certify election results and get Members to Washington) there would be an America governed under a form of martial law, with no Congress to declare war, give authorization for use of military force, appropriate emergency money, oversee the waiver of civil liberties and the exercise of prosecutorial power.

I hope that responsible members of the House Judiciary Committee will address

some of these issues in the markup, although the committee has limited jurisdiction over many of them, and they cannot deal either with the two-month gap under martial law or with the huge problem of incapacitation without considering a narrowly targeted constitutional amendment.

I fear that Judiciary members will be bullied by their chairman into ignoring the problems and let the bill go through without any further serious scrubbing. The goal here is really to get a bill through the House as quickly as possible so that the body can wash its hands of the problems of continuity and deflect any further criticism. Is this any way to legislate?