

THE CONTINUITY OF GOVERNMENT COMMISSION MEETING  
Monday, September 23, 2002

House Administration Committee Room  
1310 Longworth House Office Building  
Washington, D.C.

COMMISSION MEMBERS PRESENT:

LLOYD N. CUTLER, Co-Chair  
ALAN K. SIMPSON, Co-Chair  
PHILIP CHASE BOBBITT  
ROBERT A. KATZMANN\*  
LYNN MARTIN  
ROBERT H. MICHEL

\*Participating as a commissioner on matters relating to the judiciary only

ALSO PRESENT:

THOMAS E. MANN, Senior Counselor  
NORMAN J. ORNSTEIN, Senior Counselor  
JOHN C. FORTIER, Executive Director  
CAROLINE RIEGER, Assistant Director

P R O C E E D I N G S

SENATOR SIMPSON: Good morning. It's a great pleasure and honor to be here again, somewhat of a strange, atavistic--oh, no, where were we--coming back to the lair where I spent 18 years, and those were wonderful years. It's a great honor to Co-Chair this Commission. The honorary Co-Chairs, of course, are President Jimmy Carter and President Gerald Ford, and my Co-Chair is Lloyd Cutler, who I have the greatest respect and admiration for many, many years, proven in fire. We have been through some interesting ones together. But the greatest pleasure, too, is to serve with these Commission members. Let me present to you those that are here: Professor Philip Chase Bobbitt, Nicholas Katzenbach will be here soon, the Honorable Lynn Martin to my left--never has been to my left before--

[Laughter.]

SENATOR SIMPSON: --but we've attended many hearings together, hearings that forced you to do limericks, poems, things like that, but we're paying attention today, I want you to know that. Bob Michel, who was, I think, one of the greatest leaders of the House of Representatives and just about

the most decent man I've ever met in public life, and that's the truth. And Ken Duberstein, who will be here soon, and Robert Katzmann is here with us, Bob Katzmann.

The other members of the Commission are Tom Foley, Newt Gingrich, Donna Shalala, Charles Fried, Jamie Gorelick, Kweisi Mfume, and Leon Panetta. And we are capably served by senior counselors Dr. Norman Ornstein and Thomas Mann, both Doctors, right there in front. That means something. My brother has one of those. And our Executive Director, John Fortier, and Caroline Rieger.

With that, we are very eager to hear the testimony, because I could just say to you, this is serious business. I would not have been lured out of the confines of Wyoming for another commission except when Lloyd called and Norm and others on a conference call and said, this is about what would have happened, could have happened if Flight 93 had impacted into the Capitol Building on a day when the Senate and House were in session, such a bizarre scenario that none of us could ever have imagined, but we are considering it and we know that we want to do it in a way that does not transgress on the Committees of the House and Senate or their chairmen or their members. We are sensitive to that, and that's what we have to be in every sense.

But that's enough. Lloyd, if you have thoughts, certainly I defer to you, sir.

MR. CUTLER: For me, this is like being mayor for a day. I've never run for office. It's far too late for me to run for office now. I'm glad to have the fun of being up here in the chair to which I have never been elected. Just to illustrate for you how adroit our real Co-Chairman is in dealing with difficult problems, you may remember a few years ago a Senator who was a Presidential candidate was accused of overstating his law school record and Senator Simpson was asked to comment on it. He said, "Well, when I first ran for Congress out in Wyoming, someone asked me about my law school record. I said I finished in the top 20, and nobody bothered to look up that there were only 16 in the class."

[Laughter.]

SENATOR SIMPSON: That is a true story. That's true.

MR. CUTLER: Without further adieu, let's turn to Norman and to Tom Mann to alert us to this problem that I regard as a true hole, perhaps the only hole in our wonderful Constitution that needs plugging, but it does need plugging, we're all convinced.

MR. ORNSTEIN: Thank you very much to our Co-Chairs and our distinguished members. We have quite a panel that consists of top-flight Congressional leaders, formally and informally, people who have served as White House counsel and cabinet and top sub-cabinet positions, often grappling with these important issues of continuity of government. We have a distinguished jurist and top-flight constitutional scholars, a former Solicitor General among them. I'd like to start by thanking Bob Ney and Steny Hoyer, who are respectively the Chair and Ranking Member of the House Administration Committee, in whose hearing room we sit, who have themselves taken this issue very seriously--it is one of a number of bipartisan ventures in which they have undertaken--but who also have very generously given us permission to use this room, very nice hearing room, for today's meeting and hearing that we're holding. Our task, I believe, is really to ultimately convince Congress to write a will for the American people which will protect our constitutional system in the

event of a catastrophe, and unfortunately, we now know, just a little more than a year after September 11, that worst case scenarios that would have been fanciful or simply the stuff of novels a couple of years ago, that could never possibly have been conceived in the minds of people as prescient as our Framers, are now all too real and tangible.

We have had what I've called in various places, or should have had, the mother of all wake-up calls just over a year ago. It was not just the reality that we literally dodged a supersonic bullet on September 11, reinforced something that many of us believed in our hearts on September 11, that United Flight 93, the fourth plane on September 11 was headed for the Capitol dome. I thought, it must be true because it is the symbol, the most visible symbol of the American political system and our democracy. But just over a week ago, al Qaeda operatives who were in on the planning said flatly in an interview on al Jazeera television that the Capitol was, indeed, the target for that fourth plane. So just no question, if it had taken off on time instead of being just over 40 minutes late, so that the passengers under those circumstances would not have known through their cell phone and other conversations with loved ones at home or others that they were headed on a suicide mission, they probably would have reacted as the other passengers did, sitting passively in the midst of a typical hijacking and that plane would have hit the Capitol dome, probably somewhere around the same time as the plane hit the Pentagon.

If it had hit at the right moment, the jet fuel exploding, probably all over the Capitol complex, we would have ended up with hundreds of members of Congress perhaps dead and many, many others in burn units for months at a time, meaning under our Constitution, with the flat quorum requirement, no equivocation, no qualification, that half the members of each House required to do official business, combined with the constitutional provision that members of Congress can only serve if first elected, unlike the Senate, where the Constitution allows for appointments to fill vacancies temporarily, we would have had at the worst possible moment no Congress, no Congress to fill other vacancies in the Supreme Court or other positions, including very possibly the Presidency, no Congress to declare war, no Congress to authorize military force, no Congress to appropriate money for disaster relief or for building up our military to counter an outside threat, no Congress to deal with the question of rounding up potential suspects and the laws required to do so or to enhance our security elsewhere.

And, of course, we learned shortly thereafter that the threat could come in other forms, as we saw with the anthrax scare in the Senate, deadly forms of anthrax that could, we learned, very easily have gotten into the ventilation system in the Hart Building, spread throughout the Senate complex, and possibly sent substantial numbers of Senators to the hospital for long periods of time with potential inhalation anthrax.

That, along with what we have now seen, as today's paper has suggested, that the Federal Government is going to release a nationwide plan to deal with the potential threat of a smallpox epidemic, one that government officials say is perhaps a little remote, but it is, in fact, tangible and real, the possibility of sizeable numbers of incapacitated members of Congress, reducing us below a quorum level or taking us into a position where we have an absurdly low number of members who can act in an official capacity,

unrepresentative of the nation as a whole, making momentous decisions, like suspension of habeas corpus or declaration of war, things that should be and are unacceptable in our society built around our constitutional institutions.

It goes beyond the Congress, of course. The fact is, none of our three branches of government have adequate protection to ensure their continuity in the event of a catastrophic attack that could occur

in today's world, where terrorism and easy availability of weapons of mass destruction and creative use of normal tools of everyday commerce and life, from trucks to airplanes, make the possibility of destruction of these institutions or widespread incapacitation real possibilities.

So what we need to do, I think, is to consider alternatives that ensure that we have continuity of these institutions under these awful circumstances that the Framers could not have done, and act in a deliberative way. As both our Co-Chairs have suggested, we don't want to do this in a fashion that is in competition with Congress as a whole, but rather as a complement to Congress, and I believe that this is a problem that falls equally on the House and the Senate. It is not simply a problem of the House, where clearly we have to tread carefully with the tradition, going back to the beginning of the republic, that no member of the House has ever served who has not first been elected, so that we can have some provision for temporary replenishment of the House in the event that large numbers of members are killed.

But the incapacitation problem, something that we dealt with with the Presidency, but only belatedly, only with the 25th Amendment and only after we had had occasions, including, of course, most famously with President Woodrow Wilson comatose for months with no active plan to make sure that we could have a figure somewhere in the constitutional scheme of things actually running the country. It took a long time before we dealt with that problem, potential and real. Now, we need to move, I think, in a more expedited fashion and we can help, I think, the Congress by conducting our own deliberations with a group of people who span our political spectrum and who span the branches in terms of knowledge.

Now, let me say that, clearly, it would be nice, it would be wonderful if we could deal with these problems without resorting to a constitutional amendment. I don't like constitutional amendments at all, if we can avoid them. I'm not a fan of some that we've enacted. I could basically support two. One would be repeal of the 22nd Amendment, that limits Presidents to two terms. The second would be an amendment that actually was first bandied about by Woodrow Wilson, and that would be one which would give the President the authority at any time and with no explanation necessary to execute summarily any one person of his choice. Just to get the press corps' attention, that would be worth consideration.

[Laughter.]

MR. ORNSTEIN: But beyond that, in the past, I have opposed amendments because it is a precious document. I have come to the conclusion, though, inexorably and reluctantly, that to deal with these twin problems for the Congress, starting with the quorum requirement, of making sure that we can quickly replenish the House of Representatives and making sure that we can deal with the problem of temporary incapacitation of sizeable numbers of members, a problem, by the way, that simply couldn't have been contemplated even during the Cold War era, where as we looked at catastrophic experiences--and this morning, we will also go back and reflect a little bit on our history of dealing with the potential for catastrophic problems--we thought about a nuclear attack that would not only give us time to respond, because we would have missiles lobbed from Siberia, giving us a little bit of time to evacuate the Capitol, but having people temporarily incapacitated was not on the radar screen at that point.

To deal with both of those, we are going to have to consider a constitutional amendment, perhaps as narrowly crafted as we can. Later on, I hope we can talk about some of the solutions or some of the potential ways to deal with this. Clearly, the difficulty that we have for the Congress, and by the

way, for the Court, is that of a quorum requirement. As long as you are in a situation where half the members, whether you accept the interpretation of parliamentarians since the Civil War that this means half of those who are living, sworn, and elected, not just half of the overall membership, whether you accept that or not, that is still a very substantial bar to cross under circumstances that we could easily imagine right now, and you have a question of whether you can somehow change that quorum requirement short of a constitutional amendment. It may be an issue that we will have to debate and discuss. My own judgment is that the Constitution is clear in this case and that you can't play around in a statutory or rules fashion with that quorum except by skirting the edges of the Constitution.

We know, in addition, that special elections to the House, with rules that are set by the States, take, on average, between three to six months in the modern context, the average itself being four months, and that the practical reality is that we cannot shorten that time frame dramatically without very substantial additional costs, one of those costs, let me say, being that since if you have special elections, people who win those special elections are going to tend to solidify their positions and be able to serve for as long as they want, practical reality in a system where 90 percent-plus of incumbents are in safe seats.

And if you have a time frame that is shortened to a month or two, even if that were practical, and for a variety of reasons it is probably not practical, just to set up--it is one thing if you are doing one special election out of 435. But if you are doing a couple hundred or more, it is probably not practical to get them all together in a very short period of time, remember, when the country is in chaos. But even if you could, the only people who could possibly win those elections in that very tight time frame would be those who start with a very substantial amount of name recognition or with huge amounts of their own resources. So we have to consider the possibility that we could craft a Congress, if that's the solution, that would consist largely of celebrities and millionaires, much more than we have even now.

But the practical reality is, we can't shorten that time frame enough to make a huge difference, and if we could get it down even to two months, to have two months without a House of Representatives after an enormous catastrophe and in a time of great crisis in the country, is itself simply not acceptable. So we have to find ways to make sure we can have these temporary appointments. We can deal, as well, with the problem of incapacitation. Let me just outline for a moment a couple of the problems that we have to consider, because even if you come to the conclusion, as I have, that we must deal with those and deal with them in a constitutional amendment, the form of that amendment and the nature of the problems is much knottier than it may appear on the surface.

You do not want provisions of this sort, especially if it's one that tampers with this longstanding tradition of having all members of the House elected, that can be used except under conditions of dire emergency and enormous catastrophe. So we have to give a great deal of time, attention, and weight to the trigger in an amendment that would bring about these kinds of provisions. It's not something that should be used if a handful of members either perish or are incapacitated. Not just the numbers, whether it's a trigger that's caused by a certain proportion of the House that is unaccounted for, who makes that determination when you don't have a Congress around? That is something else that we have to consider.

We have to consider the time frame. What length of time do we want to allow for appointments? Whether there are any qualifications added to the appointments that are made. Whether they are made by governors, or that is something that's determined by the States themselves. Whether those

appointments, if they're made by governors, have any conditions or limitations on them, if governors can choose from within a smaller group of people. Whether, as some have suggested, the people who serve in appointed posts temporarily are not then eligible to run for election subsequently, to keep this from being a set of conditions under which people can get a foothold to stay around for their careers, whether that itself would be constitutional. How much we can do in implementing disability so that we can keep the language of an amendment, if we did one, as limited and narrowly focused as possible, and what would be or what should be included in that language. These are all areas that we need to consider, just as we need to consider what makes today's circumstances different from occasions in the past, and a little bit later on, we're going to be talking about the history and how we attempted to and how the Congress and the American people have attempted to deal with these problems in the past, and then looking forward, as well, to the Court, the Supreme Court, and to the Presidency and making sure that we are able to build this will so that it covers all of the institutions. We will be around today and in the future to help the Commission work through these problems and come up with what I hope will be a menu of well-considered options for Congress to use as it goes through the process of perhaps reconsidering the statutory language involving the Supreme Court, rules and statutes that might help us to move more quickly to making sure we can minimize the problems here, and ultimately, perhaps, to the nature of a constitutional amendment. Thank you.

SENATOR SIMPSON: Thank you very much, Norm. Tom, we are very eager to hear your testimony.

MR. MANN: Thank you very much, Senator Simpson and Co-Chair Cutler, members of the Commission. Thank you all for taking on this responsibility. Let me say that, on behalf of Brookings, we are really pleased to join with AEI in cosponsoring the Commission and I want to pledge myself and others at Brookings, along with Norm and his colleagues at AEI, to provide the kind of research and staff work that you need to make the strongest and most appropriate recommendations for dealing with this set of problems. So we are here to help you in any way we can to make this enterprise successful and constructive.

As Norm said, this is the Commission on the Continuity of Government. The hole in the Constitution is most visible with respect to the House of Representatives, but the problems go beyond the House to the Senate, where problems of incapacitation have to be dealt with. They go to problems with the Supreme Court, where concerns about a quorum could create real problems. And ultimately, they go to problems with Presidential succession. I won't burden you now with some of the bizarre possibilities that could occur with the incapacitation of the President, the Vice President, the Speaker, the President Pro Tem of the Senate, with a member of the cabinet taking office and then being deposed at some later point as a new Speaker elected by a handful of surviving members of the House declares himself or herself acting President.

There are some very strange possibilities that are permitted by our Constitution and our statutes, and at some point, the Commission needs to turn its attention to Presidential succession. But I think it's appropriate to begin with the Congress, to begin with the first branch of government, to understand that, in many respects, if the Congress can be made whole, the national government itself can be regenerated.

And that's why I think turning to the particular problem of the House of Representatives makes sense at the outset, a case, of course, following a catastrophe where the House can't assemble

because it can't create a quorum. This, in turn, creates challenges to the legitimacy of government. Even if a quorum is constituted, the number of members surviving would be expected to act on behalf of the country as a whole. Yet, it raises serious questions about the legitimacy of their actions.

What happens to the checks and balances that are essential to our constitutional system if the House is unable to establish a quorum or a legitimately-sized majority? How can actions be taken, as Norm suggested, in responding to the attack, in dealing with appropriations, taxes, borrowing? And then what about the legitimacy of a Congress that suddenly changes party control because of the nature of partisan attachments of the surviving members? These are all serious questions that simply can't be shunted away.

This is a very unpleasant subject. We all know that. In some ways, it's macabre. People's initial reaction is to say, well, let me see, if the Congress is wiped out, would you explain again what the problem is? That is to say, it's easy to make fun of the Congress and make light of the possibility, but it seems to me the Congress and all of us concerned about the continuity of our government have the responsibility to ensure that continuity in the face of a catastrophic attack. We have a responsibility to the maintenance of our constitutional democracy, but if we don't address it now, we are abdicating that responsibility. Norm suggested it is equivalent to writing a will, a responsible will for the nation and for the constitutional system, and I think that's exactly right.

So we are joined in this enterprise, but at the beginning, we might as well acknowledge that there are enormous practical, political, and constitutional obstacles facing this effort. Bob Michel and Lynn Martin know well how much the House prides itself on being different from the Senate, that every member who walks onto the floor of the House chamber and casts a vote has been sent there by a constituency, has been elected. Members of the House, many members of the House are extremely reluctant to allow anyone who has not passed that test, been elected, to assume a role even on a temporary basis a member of the House of Representatives.

But as Justice Jackson said originally and Chief Justice Rehnquist said most recently, the Constitution is not a suicide pact. If, in fact, such a catastrophic effect with our current constitutional provisions would mean the Congress cannot--the House cannot convene, the government cannot act, then so much for the pride of House members in holding to their distinctiveness over the Senate. It seems to me we need a dose of reality. We need a glass of cold water thrown in our face. We have to ask the question, is something required now to deal with the really extraordinary circumstances, whose effects would be temporary, not long-term, which would not change the essential character of the House of Representatives but would allow our constitutional democracy to survive. That's really the question that I think you, as members of the Commission, are going to have to grapple with.

Now, you should know that the House has begun the process of deliberation. We've had a committee hearing before the Constitution Subcommittee of the House Judiciary Committee. The House Administration Committee has held hearings. The leadership of the House, in a very responsible fashion, has appointed a task force, a bipartisan task force led by Chris Cox of California and Martin Frost of Texas. They have been working hard on this issue. They have fleshed out the problems. I think they appreciate the problems that exist and are determined to do something about them, but we've got to help them. We've got to provide both substantive work and political will to deal with problems, to get over the practical hurdles and the political hurdles that they face.

This task force is likely to bring before the House in the next week its first recommendation. It's really going to be a resolution urging the States to take a look at their provisions for special elections

and urging them to shorten the time table. That's a first step, but as Norm pointed out, there are problems entailed in that, and I can't imagine it ever being shorter than 60 days or two months. It's a first step.

Members of the task force are taking a look at possible rules changes regarding the establishment of a quorum. They're investigating, for example, is it possible by rules change to deal with the problem of incapacitation. They'd like to be able to do that. Just as the parliamentarians have ruled that the constitutional requirement of a majority of members for a quorum, have ruled that that means a majority of members sworn and living, could that somehow be extended to a majority of members sworn, living, and not incapacitated?

Well, it's a reach. I think we ought to look at that along with the task force, but I suspect all kinds of mischief could be done by the chair with that kind of power, deciding when someone's incapacitated because they happen to be out of town. But certainly, looking at rules changes should be part of the work of this Commission. I think the task force is also looking at statutory changes. Is it possible, for example, to set the conditions of special elections in the States by statute? Would that help in any substantial way?

A more ambitious statutory approach would be a statute to follow a constitutional amendment that is so simple as to say, Congress has the power by statute to provide for the appointment of temporary members in the face of catastrophic attack on the institution, in which case what you do is you create the constitutional possibility via amendment, but you don't deal with any of the specific provisions and then leave that to statute. There are pluses, certainly, to that. There are also minuses.

My own view is that for that to happen, the Congress would have to have a pretty good idea of what the statute is that's going to follow, and, therefore, the work of this Commission is going to be particularly important.

And then, of course, the task force and your Commission needs to consider the whole range of constitutional approaches to this particular problem. We're going to have time to talk about this in detail and you'll be hearing shortly from other witnesses who will begin to review some of the approaches that have been taken. But the real question here is, there are a lot of specific practical problems associated with a constitutional change. The question is, do you incorporate those in a constitutional amendment or do you try to keep that amendment as simple as possible and then deal with the particular practical problems in follow-up legislation? That's another issue that will almost certainly come before the Commission.

Bottom line, we've got a real problem here. For a host of understandable reasons, there are a lot of people who would just as soon not deal with it, or if they choose to deal with it, would deal with it in an incomplete fashion that wouldn't really get to the guts of the problem. I think this Commission can serve an extraordinarily important role in helping to flesh out the problems, the potential solutions, and then providing the political weight to get the attention of policy makers and the broader policy community and public and say, by God, it's our responsibility to those who follow us to preserve this constitutional democracy. Thank you very much.

SENATOR SIMPSON: Thank you very much. We see the task and we see the problems, and this is

helpful. I believe we have Michael Davidson, former Senate Legal Counsel. I've seen that fellow before. He was a very able man, indeed, when I served in the United States Senate. It is a great pleasure to see you again.

MR. DAVIDSON: Chairman Cutler, Chairman Simpson, members of the Commission.

Early in the year, when Norm Ornstein and Tom Mann convened a group to talk informally about the issues that you will probe in even greater depth, I undertook to do two things. One was to examine the history of the Congress's consideration of constitutional amendments in this area, which turns out to have been an active inquiry that ran for 15 years between 1946 and 1961. During that time multiple amendments were proposed. After an initial period in which there were proposals but not very much debate, there was active consideration of amendments in committee and on the floor. All that occurred during a time of intense anxiety about the possibility of nuclear warfare and the impact that might have on the continuity of government in the United States.

I also undertook to draft my own sense of what a constitutional amendment might look like – both Norm and Tom encouraged the formulation of lots of ideas about how to approach this matter as a way of constitutional drafting -- in light of some of the debate that I had examined.

Let me just say a couple of things briefly and then, after you have heard from John Fortier, respond to the questions you might have.

One of the conclusions of some members of Congress and witnesses who participated in that early Cold War discussion is that the matter should not be looked at simply as a question whether a House could function legally if there were mass casualties. That is, the issue is more than whether the proper understanding of the quorum rule would allow, to take an extreme example, for three members of the House, if all others had perished, to be a quorum of living members who could act in the name of the House. Instead, to some participants in the debate the question was whether our sense of representative government requires us to think of larger bodies whose membership represents the span of the country and who deliberate together. In other words, the question is more than simply what is minimally required in the way of attendance to pass an appropriations bill or to commit the nation to go to war. There is a value in replenishing the House of Representatives that goes beyond the simple legal requirements of what it takes for the House to function and to join the Senate in passing legislation.

Over the course of the period from 1946 to 1961, there was also intense interest in what the triggering event should be for a temporary appointment power, and in what detail a constitutional amendment should delineate that event. Two issues were discussed. One is whether the nature of the calamity should be described, namely, whether the event that brings a temporary appointment power into play should be described as a disaster or something else. There were proposals along those lines. Over time, the view developed that the labeling of a precipitating event could create problems of administration. It could very well be that there was a disaster and some number of the House of Representatives either perished or were incapacitated, but that others had died of natural reasons or were unable for other reasons to function in the House. At any time we might have a mixture of reasons. Who would determine that it was, in fact, a disaster? A constitutional amendment in this area should provide for greater clarity than would be allowed by importing into the Constitution something that might be difficult to evaluate, such as the term or the idea of a disaster.

The other part of the triggering issue is whether there should be a requisite number of vacancies. There was considerable debate whether it should be half of the House or a third of the House. What prompted that was an idea which you are aware of and was described in the preceding panel, that the House is a unique institution. The House, from the beginning, has been constituted only by elected persons. Amendment drafters have thought that for there to be any exception to that, there ought to be a problem of considerable magnitude, and the numbers one-half or one-third were the ones that were considered. But there were also observations that any system predicated on a number would produce a set of issues. Who would determine that the requisite number had, in fact, been reached? It

is one thing for a governor, in the case of a Senator, or for a governor in the case of a member of the House, because the governor's task would be to determine that there has, in fact, been a death of a Member or number of Members from the governor's state? A member might be missing. That has happened. An accident has occurred and wreckage of a plane has not been found. So some determination has to be made. It is one thing when that determination involved facts about one individual or a limited number of individuals only.

It is another thing if the triggering device would require that half the House had perished or that a third of the House had perished. That's a large number of people. What if it were close to the borderline, so that if it were 145 or 218, depending upon the percentage that's chosen, and it was unclear whether 217 or 218 vacancies had occurred (or what the marginal number would be if it were a third), and the country had a period in which it was unclear whether this extraordinary power could be exercised? What kind of documentation would be required in order to assure the kind of certainty that this entire effort to find a mechanism would depend upon? In the absence of certainty, the power itself would not have the hoped for utility. And would the power be vested in a single individual to determine that, in fact, the requisite nationwide loss had occurred?

Or should the temporary appointment system instead mirror the kind of system that the Framers determined was appropriate for the Senate, which would be to authorize the chief executive of a State, upon the general authorization of the State legislature, to make temporary appointments. That possibility, of course, requires consideration of the original uniqueness of the House as a body elected by the people, whereas the Senate, for whom there was a system of temporary appointments, was, of course, initially composed of persons chosen by the State legislatures.

Since the early part of the preceding century, the Senate, too, is a body that is elected by the people. It is not apportioned in accordance to the people because equal representation is provided to each State, so, in characterizing the essential nature of the House, there continues to be significance to the manner in which the House is apportioned by population. But the manner of election, by the people, is the same for both chambers. The question then arises whether that evolution in our historical way of choosing Senators and Representatives allows for consideration now of a method of filling vacancies that would be similar to the one we have for the Senate.

I'd encourage the Commission, as I know it will, to look at the history of the 1946 to 1961 debate. The question of potential calamity is not a new one. The earlier debate stopped in the early 1960's. It is unclear why. Perhaps people just accepted the idea of a nuclear threat and turned to other things, or thought that international relations had stabilized to the point that it was not an immediate matter. It was also a time in which the Congress was active in considering other constitutional amendments. When the House put aside a proposed amendment on temporary appointments in 1961, it took up a poll tax amendment. It then soon turned to D.C. voting, presidential disability, and at the end of the decade to the 18-year-old vote. But while the debate on temporary appointments did not lead to an amendment then, there was a lot of basic thinking on the issue, both by members and with witnesses, including administration representatives, who testified. The record of the 1946 to 1961 debate provides a good sense of the issues that continue to be open for discussion.

As I turn to John, let me conclude by saying that I also accepted the invitation of Norm Ornstein and Tom Mann to contribute an idea for the text of an amendment for filling House vacancies. I denominated my proposal a "Short Form Constitutional Amendment." It is predicated on the system of gubernatorial appointments to fill Senate vacancies. It would leave it to each State to determine whether to authorize governors to make those appointments so that each State would be in control of whether temporary appointments could be made in that manner. It would differ from Senatorial appointments in that House appointments would be limited in duration – lasting no more than 90 days, so that after having replenished the House temporarily, there would remain an incentive and requirement to call elections.

The short form proposal does not include some items that have been discussed over time, such as whether governors should be limited to appointing people of the same party as the lost member, or require that governors choose from a prescribed list of people. I did not include those limitations because of the view – which is one that was expressed over the years of the earlier debate, that if a temporary appointment power is to be vested, governors ought to choose the best people who are available and not be limited by prescribed rules as to party affiliation or predetermined lists.

Thank you for that opportunity to make this presentation.

SENATOR SIMPSON: Thank you very much. Now, Dr. Fortier?

MR. FORTIER: Thank you, and I do recommend that you all turn to Michael Davidson's longer form memo on the history of the 1950s and 1960s. That can be found--the Commissioners received that in earlier correspondence, but it's also on our website, which should be a resource to viewers out there. Three times, we passed a constitutional amendment through the Senate in the 1950s and then early 1960s. I'm going to speak briefly about special elections, some of the recent experience we've had, how State laws govern them, and how they're rooted in the Constitution, and I want to begin with the idea that the difference between the way the House fills vacancies and the way that the Senate fills vacancies is rooted in the Constitution.

In the Senate, the 17th Amendment governs the filling of vacancies, and that is that they have special elections but authorize the States to give governors the power to make temporary appointments to fill those vacancies until special elections can be held. Nearly all States have used that power and given that power to governors. Only two, Wisconsin and Oregon, and then one, Oklahoma in certain circumstances when the vacancy occurs later in the term, do not fill that vacancy. But nearly universally, the States will fill vacancies in the Senate, and in the case of a catastrophic event, the Senate would be replenished rather quickly by governors, within days.

As we discussed earlier, the House relies simply on special elections, and just to read quickly a short provision in Article I, Section 2, "when vacancies happen in the representation of any State, the executive authority thereof shall issue writs of elections to fill such vacancies." So there's no provision for temporary appointments in the House.

Why the difference? Was it a well thought out difference? I think the answer, looking at both the Constitutional Convention and the 17th Amendment, is that it wasn't debated widely or considered as much as we might think. In the Constitutional Convention, there was--the original provision for the Senate, of course, was that the State legislatures appointed Senators, but there was a provision that gave governors the power to make temporary appointments if vacancies occurred when the State legislatures were not in session, and legislatures were frequently in recess. They did not meet as often as they do now, although some State legislatures today meet biannually as they did then.

There was a very short exchange in the Constitutional Convention as to why there was this difference between filling vacancies in the House and filling vacancies in the Senate, and the only remark in favor of the distinction was that perhaps the Senate had more important duties and would, therefore, it would be necessary to fill the vacancies quickly. At the time, though, when that exchange was made, the Senate was being considered for even more duties than it has today. It was being considered for duties that would give it the power to appoint Supreme Court Justices, to appoint ambassadors. So even when that exchange was made, there was not quite the circumstances that existed when the final powers of the Senate were determined.

There was also the 17th Amendment, which there was considerable debate about, but primarily the

question was moving towards popular election of Senators, away from the State legislatures. There was one issue related to vacancies in that there were a number of States who deadlocked between perhaps a Republican House and a Democratic Senate in their State legislatures and were unable to select Senators, leaving vacancies for a significant amount of time. But more or less, the drafters of the 17th Amendment carried over the provision from the original amendment allowing governors to make temporary appointments, this time not when the legislatures were in recess, but before the people could have their special elections.

In practice, the States, the State law determines how special elections are held and there is a great variety of State law regarding these elections. Just to list some of the differences, some States dispense with primaries when they have special elections. Some allow the governor a good amount of freedom to determine when the election will take place.

The decision of when to have a special election or whether to have it at all sometimes depends on when the vacancy occurs in the term. A number of States' laws say, don't fill the vacancy if it occurs in the last six months of a term. They accept the fact that the new representative will take over in six months and they leave a seat vacant for six months. And some States have different procedures

for filling vacancies than their normal general elections and some have similar procedures. So there's a great variety of State laws. In looking at the history of recent vacancies, looking back from the present to the 99th Congress, approximately 112 days it takes to fill a vacancy. There's a slightly higher number for those--125 days--to fill vacancies caused by death. Occasionally, there are circumstances where a member will resign in advance and the State will allow the election machinery to go forward even before the official resignation date takes place, thus speeding up the elections. But in the case we're discussing, of course, this is a sudden, unexpected attack and perhaps the 125-day average is more appropriate.

But there's a wide range among the States. Looking at the more recent vacancies that were filled, they range from about 60 days to almost a year in a couple of cases. Virginia is on the quicker side and New Jersey is on the slower side, and they represent different political traditions, different State laws that govern when to have these elections.

The Senate, just by comparison, as we noted, has--there are temporary appointments made to the Senate, but there are also special elections, and it's typical for States, although not universal, that the special election for the Senate seat will occur at the next general election, and that sometimes means a seat that is filled by temporary appointment for nearly two years. There's an existing case of that now with Governor Carnahan and running for the Senate seat in Missouri, passed away in a plane accident shortly before the election, was elected. A temporary appointment was made, his wife, the current Senator Carnahan, to the seat, and this general election will be actually a special election which will fill the remainder of the term for either Senator Carnahan herself or her opponent. But the average time in the Senate, because of the appointments, is slightly longer to have the election. It's about 218 days before a special election, whether it occurs at the time of the general election or not, takes place.

That leads us to the question, could we really speed up elections? Norm touched on this in the earlier panel. First, I want to note again the suggestion of the Cox and Frost task force, which has gotten some support from the leadership, asking the States to scrutinize their laws in filling vacancies by special election. This is a valuable exercise. Many States don't revisit these laws very often. They may not reflect current thinking on their political climate and they may not have considered it in many years. But also, given the events of September 11, they may want to consider

emergency provisions or what they could possibly do to speed up elections. But that will not necessarily lead to a system of uniform times of elections. States still have different political traditions. Many of them will want to hold primaries. Others will, because of geographic or demographic differences, want to have elections at different time frames. So it's a valuable exercise, but it's unlikely to speed up elections to a degree that will overcome some of the issues that we discussed earlier.

Another option is that Congress could preempt State laws, and that power comes from Article I, Section 4, which gives it the power to override State laws regarding the times, places, and manner of elections. One example of this is the idea that we have a national Federal election day in November. We didn't always have that. We sometimes allowed the States to have slightly different days of elections, but we decided now that we're going to have an election on the first Tuesday after the first Monday in November. We could do a similar routine with vacancies, asking States to have a relatively uniform time period or set of procedures to hold special elections in the case of catastrophe. But again, it's not clear that this one-size-fits-all preemption would suit the political culture of many States.

What is the absolute minimum time one could hold an election? I think I'm in agreement with the earlier speakers that maybe it's two months. The Elections Director of Virginia, which is on the very quick side, once told me that she thought they could do it in 45 days, but I think that that would require dispensing with many of the features of elections that many States want in their election process, and it presumes that we would do things under ideal conditions, and here, we're talking about doing things under less than ideal conditions.

We mentioned before the need to print ballots. There are only a certain number of vendors out there who will do it. Due notice to candidates to run for elections, to voters, time for a real campaign, skipping primaries, again, that may be desirable or not desirable, depending on which State you're coming from.

And finally, even if we were to crunch the time down to, let's say, two months, is that a sufficient amount of time--do we want that much time without a Congress? Do we want a Congress which might not function for a minimum of two months? So preemption of State laws gets at the problem to some extent, but it's not clear that it solves all that it should.

Finally, the other point which has been mentioned is that short elections, if we crunch down that time again, don't we favor those who are well prepared, well known, again, well funded, and we don't give the opportunity to those who might run a campaign, even in a four- or five-month time frame where voters get to know them, that they could win the election and fill the vacancy. So these are the kind of issues I think we should consider regarding special elections and I'm going to open it up to the Chairman if we want any questions.

MR. CUTLER: Mr. Fortier, could I interrupt for just one question?

MR. FORTIER: Yes.

MR. CUTLER: That is, you spoke of Congress invoking the time, place, and manner clause to provide the date of a special election or any other election. Do you think the time, place, and manner clause could be stretched to the point of authorizing Congress to allow the appointment of temporary members pending the election? Isn't that a somewhat more difficult problem?

MR. FORTIER: I don't think it could be stretched to get to that point because I think the word "election" in itself is an obstacle to that. If you ask States to change the time, the place, or the manner of their election, that could be setting a national election date, setting a time frame for having an election, even prescribing some of the ways in which an election would take place. But an appointment, by its nature, is not an election and so I think that would be a stretch of the clause. You can read it and let the viewers judge themselves, but the times, places, and manners of holding elections for Senators and Representatives shall be presented in each State by the legislature thereof--prescribed in each State by the legislature thereof, but the Congress may at any time by law make or alter such regulations.

SENATOR SIMPSON: That's very interesting. You've given us some very helpful historical background. The activity was in the Senate through the earlier years, and then would come here and perish. No.

[Laughter.]

SENATOR SIMPSON: That's happened before in my historical review, but you've given us some thoughtful recommendations. As politicians, those of us who are politicians on this panel, you're dealing with territorial prerogatives and ego and pride, which are never in the text, but you've given us credible research. I was particularly enthralled when you talked about perhaps rules of the House could be changed. Since Lynn and Bob are here, I can think that Joe Moakley would have done beautifully with that. Joe used to kind of just craft things. He helped me one time when a bill was killed. Some amendment came on and a half-hour later, he got a new rule from the Rules Committee and there it went, rest his soul, a wonderful fellow. But statutory changes, rules changes, I think we'll have to consider those. The constitutional amendment will be a painful thing for the House to deal with and the Senate. I think they'd rather not, but that may be what we come to. In any event, I always try to remind people the definition of politics. In politics, there are no right answers, only a continual flow of compromises among groups resulting in a changing, cloudy, and ambiguous series of public decisions where appetite and ambition compete openly with knowledge and wisdom. Put that down. There will be a test on it later.

[Laughter.]

SENATOR SIMPSON: Anyway, writing a will, I like that analogy. That's what we have to do. Do any of my colleagues want to inquire? Yes, please.

MR. BOBBITT: What is the origin of the interpretation of the quorum rule to the sworn and living members? Do you happen to know?

MR. DAVIDSON: I think you're going to be hearing from the House Parliamentarian at some point in your proceedings. I can't give you an answer to what circumstance it was that caused consideration of that matter.

MR. FORTIER: I can't give you an exact answer, but I can give you a little bit of the background.

It comes shortly after the Civil War, and given the problems of secession, there was some question as to whether you wanted to recognize secession by the States who had left or declare those seats vacant, have them filled or not. So I think there was talk of how strict a majority was to be--that part of the Constitution should be interpreted as a strict majority or it should be the sworn and living members. Those members had actually resigned from Congress. So it had to do with the Civil War and the need to continue to achieve a quorum during the Civil War, but both bodies, I think, came to it at slightly different times shortly after the Civil War, but we will have the Parliamentarian before you, not today, but available to you, him to you, at a future time.

MR. BOBBITT: Thanks.

SENATOR SIMPSON: Yes, Lynn?

MS. MARTIN: You make certain assumptions that the closer it is to this enormous tragedy that would have to result, the better behaved we all will be, and that's part of the strength as a people. Virtually everything everyone has mentioned so far, there will be someone, for perhaps the best reasons, who will file a suit. With the geography of the Capitol what it is, could you comment on what if it was the Supreme Court that bore the brunt with the Capitol of the damages? I mean, you're asking us to think of the unthinkable, so I'm trying to do so.

MR. FORTIER: Well, I have an easy answer to that in that I'm going to defer to our next witness, because we are going to have James Duff, who is former Administrative Assistant to Chief Justice Rehnquist and Justice Katzmann who will be coming up as a member of the panel on the judiciary to discuss just that issue. So if you want to make that the lead-in to the next set of witnesses, we can do that, but they have considered that more than we have.

SENATOR SIMPSON: Thank you. Any further questions?

[No response.]

SENATOR SIMPSON: All right. I believe next we have Charles Johnson, do we, House Parliamentarian, and James Duff, former Administrative Assistant to Chief Justice Rehnquist, is that correct?

MR. FORTIER: Just James Duff.

JUDGE KATZMANN: A year ago, September 11 at 9:30 a.m., Chief Justice Rehnquist opened the semi-annual Judicial Conference at the Supreme Court Building, at which were present the Chief Judges of all 13 Circuit Courts and 13 other Chief Judges of the District Court. Fortunately, the Supreme Court was not hit in that attack on September 11, but if it had, we would have to consider the effect of a terrorist attack on the functioning of the High Court and on the judiciary generally. The Federal judiciary, unlike the other branches of government, is dispersed across the nation and so it does not confront the same kinds of issues that this Commission will consider with respect to the other branches. Nonetheless, it is worth considering the consequences of an attack on the Supreme Court even if at the end of the day we were to conclude that present arrangements serve

us, on the whole, well, or at least, on balance, better than the other alternatives.

I participate on this Commission to consider just that issue, pursuant to an opinion of the Committee on the Codes of Conduct of the Judicial Conference, and I'm grateful for the opportunity that Tom and Norm have presented me with.

We begin with the Constitution. The Constitution, the charter of nationhood, serves as the framework for any such consideration. Article II, Section 2, states, and I quote, that "the President shall nominate, and by and with the advice and consent of the Senate, shall appoint Judges of the Supreme Court and all other officers of the United States." That same section provides that, and I quote, that "the President shall have the power to fill up all vacancies that may happen during the recess of the Senate by granted commission which shall expire at the end of their next session."

Article I, Section 8, provides that the Congress shall have the power to create tribunals inferior to the Supreme Court, and the First Article also states that Congress is to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof. And there are a variety of statutory provisions about which we will hear in a moment.

With the Constitution as our guide and with the various statutes to be discussed in a moment to help us in this inquiry, we are privileged to have before us a most distinguished lawyer and practitioner in the administration of justice, James C. Duff, currently managing partner of the Washington office of Baker, Donelson, having formerly been a partner at Clifford, Warnke, and at Howrey and Simon in Washington. But what commends us here to him is that he was the longest serving Administrative Assistant to Chief Justice Rehnquist, and in that position occupied a very critical position in the administration of justice. For example, he served as Chief of Staff and Senior Manager of the Court. He assisted the Chief Justice in his role as presiding officer in the impeachment trial of the President. He served as assistant to Chief Justice Rehnquist in his work with the Administrative Conference, in his role as Chair of the Federal Judicial Center, and as of the Smithsonian Institution. He served as liaison for the Chief Justice with the Congress and with the executive branch. And he assisted the late Justice White in Justice White's Commission on Structural Alternatives for the Federal Courts of Appeal and its 1998 report. So we are honored that Jim Duff is here to provide his insights on the issues we confront.

MR. DUFF: Thank you very much, Judge Katzmann, for your kind introduction and for also the fine work you're doing on the Federal judiciary.

Also, I'd like to thank the Commission for undertaking this important review and for including the Supreme Court in it. The Court has not always received the same attention as the other two branches of government. Sometimes that's an advantage and sometimes it isn't. Certainly in these circumstances and the scope of the review of this Commission, it would be an oversight not to include the Court and I commend the Commission for its foresight in including the Court in this very important review. I've been asked to address potential responses to a catastrophe in which the entire Supreme Court is either eliminated or incapacitated, as well as the impact that a lack of quorum in the Senate might have on the appointment process for a new Court.

I prepared an outline of four options and have made some preliminary observations about each. Other options are certainly possible, but it seems to me that all options boil down to two basics, and that is we either do something now, before a catastrophe occurs, or two, we have a mechanism in place that would respond to such a catastrophe after it occurs, and this would include sticking with what the Constitution currently provides in the way of the appointment process, which I will

describe in a moment.

As to doing something before a catastrophe occurs, I've addressed two options. One is naming a body of existing offices--not individuals, but offices and those who would occupy them--to serve as a temporary emergency court. For example, the nine most senior Circuit Judges of the Circuit Courts of Appeals might serve in that capacity.

Or, two, appointing individuals in advance of vacancies as something of a reserve Supreme Court, if you will, for emergencies, such as the elimination of the entire Court or incapacitation of the Court. That is something I do not advocate, but in the interest of considering the full range of options, I've included it among them.

As to doing something after the fact, there is, of course, an existing mechanism for filling vacancies at the Court through the President's appointment power. But we need to examine whether this mechanism is adequate if there is an urgent need for resolution of a constitutional question before a new Court can be appointed. And moreover, what if there is not a quorum in the Senate to confirm the appointments at such a time? The President has recess appointment power, of course, which, in essence, is similar to appointing a reserve court after the vacancies occur and until the Senate reconvenes. There is, however, no check on the President's recess appointment power, other than practical considerations of the institution's reputation, and that's not an insignificant consideration. I have suggested in the outline two checks on that power that might be considered, such as requiring the President to consult with Senate leadership before making recess appointments, and/or limiting the appointments from the majority party to five Justices to provide for balance, and I'll talk about the advantages and disadvantages of each, and I do see disadvantages in that recommendation for consideration.

Additionally, I think a more important check might be when the Senate reconvenes, to impose a time limit on the confirmation process. We've seen certainly in times where there isn't chaos that that process can drag on, unfortunately. But in the event of a crisis or in the event where constitutional issues need resolution, the Commission might consider recommending imposing a Senate rule through the Senate rules, whether the Senate must vote up or down on a nominee within a set period of time, and I'll talk about that. Actually, Mexico has a provision like that.

I thought I would review briefly the current provisions of the law with regard to the absence of a quorum of the Supreme Court and then address these four options that I've mentioned for dealing with the absence of an entire Court, beginning with the status quo under the Constitution today, and, of course, I'd be pleased to answer any questions as we go through this or at the end.

The Constitution provides that the President appoints Justices of the Supreme Court with the advice and consent of the Senate. Congress has provided by statute that a quorum of the Senate is six Justices.

SENATOR SIMPSON: Quorum of the Court.

MR. DUFF: In the absence of a quorum, there are two provisions that kick in.

SENATOR SIMPSON: Quorum of the Court.

MR. DUFF: Quorum of the Court, I beg your pardon. In the absence of a quorum of the Court, the Chief Justice may order a case that's on direct appeal from a District Court to be remitted to the Court of Appeals for the circuit in which the case arose and the decision of that court shall be final.

In any other case before the Court that cannot be heard because of the absence of a quorum, if a majority of those of the Court can hear the case, is of the opinion that the case cannot be heard and decided within the Court's next term, the Court shall then enter an order affirming the judgment of the court below with the same effect of the affirmance by an equally divided Court.

These provisions do not address the issue of when no Court exists, but they are instructive, I believe, as of precedents for the Supreme Court relying on the decisions of lower courts as being final decisions. Thus, if only one Justice remains on the Court, provision is made for responding to cases with this mechanism of referral below. No provision is made, however, for reconstituting the entire Court in the event of the loss of all nine Justices, other than by the President's appointment power.

Now, the four options that I've outlined,

I would begin with option one as being the status quo. The President would nominate nine new Justices with the advice and consent of the Senate. In the event that there's no quorum in the Senate for confirmation of new appointees, the President could make recess appointments to be confirmed once the Senate reconvenes, or not. It would be up to the Senate at that point whether to confirm those appointments or not. The Senate's vacancies, I believe, could be filled very quickly, and I think John spoke earlier as to the mechanisms that would be in place for that. The Constitution provides that a vacated Senate seat may be filled temporarily by an appointment by the governor of the State until an election is held if the State empowers the governor to do so.

Now, the advantages of the status quo, it seems to me, are that there is no need for constitutional amendment. It maintains the appointment and consent powers in the executive and legislative branches. There have been historical absences of a Court, and I'll discuss those later. It does not predetermine a constitutional crisis or eliminate the Court's discretion in taking cases, as some of the other options might do. And it relies on lower courts to resolve issues until normalcy is restored. It is also consistent with the existing statutory scheme with regard to the lack of a quorum at the Court, and that is to say that there is provision when there is a lack of a quorum for affirming the judgments of the courts below.

The disadvantages of the status quo may be potential delay in obtaining final resolution of a pressing constitutional issue until a new Court is in place. There may need to be some clarification on the mechanism for relying on lower courts' decisions until a new Court is in place. And there is a public perception, which is not insignificant, a public perception of instability that should be considered.

The second option I would suggest for your consideration is imposing some checks on the emergency appointment process, and that is to say in the event that there is no Senate quorum and the President needs to exercise recess appointment power before the Senate is restored, you might consider recommending some check on the President's recess appointment power. For example, you might require the President to consult with Senate leadership before making such appointments and/or limit the nominees from the majority party to five. We have some examples of that, for example, in the Sentencing Commission, where by law the seven-member Sentencing Commission must be composed of at least three Federal judges and not more than four of its members shall be of the same political party. Now, the advantages of this mechanism would be that it would provide some check on packing the Court until the Senate confirmation process occurs.

The disadvantages are that it overemphasizes the predictability of Court appointments, and I think history has shown us that Court appointees are not always predictable by the party from whom they are appointed. You might note the recess appointments, for example, of President Eisenhower. Additionally, we have had entire Courts appointed by one party's President before. The Marshall

Court, for example, that decided *Marbury v. Madison* was an all Federalist Court, and yet that Court decided the case, as you know, denying the Federalist appointment of Marbury in his justice of the peace position because they ultimately concluded they had no original jurisdiction to do so and the statute giving them that jurisdiction was unconstitutional.

Another disadvantage of this proposal would be, I think, that it over-politicizes the Court appointment process, even more so than it currently is, and that, I think, would diminish the respect for the Court. It would resemble more of an administrative agency. There is a noble notion that there is no party affiliation of the Justices of the Court, and I think there's some danger of undermining that with the proposal I've just mentioned. And furthermore, it would require a constitutional amendment, which I think we're all hesitant to do.

A second option in this realm, though, that I think has more potential merit is to ensure an expeditious appointment process and confirmation process. Some consideration might be given to imposing a time limit for the Senate to vote on an appointee, up or down. Now, that does not take the confirmation process out of the hands of the Senate, but it gives them a time frame in which they must vote up or down on the President's nominee. Mexico has such a provision. In fact, in 1994, all 11 justices of the highest court in Mexico were appointed at the same time through this process and it worked relatively smoothly.

MR. CUTLER: Would that require a constitutional amendment?

MR. DUFF: Mr. Cutler, I don't think it would necessarily require a constitutional amendment. It could be done, I think, by Senate rule, but that is something I think the Commission may want to examine further. I think the Senate rules, they could impose upon themselves such a time limit that would not necessarily require a constitutional amendment.

MR. CUTLER: Could you do it while Senator Byrd is living?

[Laughter.]

MR. DUFF: That is a fair question. I think, actually, it would be a good idea to do whether there is an emergency or not. We have seen too much delay, I am afraid, in the confirmation process and that has happened when both parties have been in the majority of the Senate. We have seen it when the Republicans controlled the Senate and we are seeing it again today as the Democrats control the Senate. It is worthy of consideration even outside the scope of this emergency that we are addressing here in this Commission.

The third option that I would suggest for your consideration is designating certain offices to serve as a temporary emergency Supreme Court, by constitutional amendment in this instance, or if it is an inferior court, by statute. You could designate a body of judges to serve as a temporary emergency Court. For example, you could designate the nine most senior Chief Judges of the Circuits to serve as an emergency Court on a temporary basis. Or, alternatively, you could have five Chief Judges from the Circuits and four Chief Judges from the District Courts. Or you could designate a sitting Court of Appeals, for example, to serve in that capacity on a rotating basis.

There are advantages and disadvantages of each and a lot of issues would be raised under such a consideration. The advantages would be that a Court would be readily available in the event of need for urgent resolution of a constitutional issue. It would provide some sense of stability. It

would build in certain diversity of the appointees that would be lacking if a single President were to appoint all nine, which would have to happen ultimately anyway, but for the moment, at least, in the temporary arrangement, you would have diversity in the Court. Specific individuals would not be named. It would be those individuals occupying the offices at the time. I think, also, it's likely that it would have a very brief tenure, assuming that new appointments to the new Court would moved quickly, and I've mentioned mechanisms to ensure that that might happen. And I think, frankly, that the President and the Senate in such an emergency situation would rise to the occasion and move the appointments quickly anyway. But you could provide some mechanism to ensure that.

The issues I see arising under this proposal would be the need, perhaps, to provide a time frame for its existence, which might be another incentive to expediting new appointments. You might need to provide for its discretionary review. For example, who determines when such a Court is needed? Does the Court itself? Who determines whether the issue that is deemed to be urgent and of a constitutional crisis nature needs resolution? Does that decision ultimately rest with this temporary emergency Court itself or does someone else make that determination for that Court's existence to kick in? Those are issues that I see coming into play under this proposal.

Disadvantages under this third proposal would be if its decisions are final and not reviewable, that is, this emergency temporary Court, there is a risk that the decision might not carry the weight of authority that might be needed for such an urgent constitutional crisis or an issue that requires such resolution. It is also a relatively narrow pool of appointees. Appointees to the Court ultimately do not necessarily come from these courts, although many do. Also, if its decisions are not final, and that is to say if they are ultimately reviewable by the new Court, such a temporary Court would provide no more finality of decisions than would a currently existing Court of Appeals, and our lower courts today, of course, decide constitutional issues at the District Court level and the Court of Appeals level. So unless this temporary Court would be empowered to issue final decisions, not subject to review, it really doesn't buy you anything or there's no value added to creating such a Court, no value added over the current Courts of Appeals. Also, I think it might deplete judicial resources of the Courts of Appeals, and I think it would require constitutional amendment unless it's created as an inferior court.

The fourth and last option that I would suggest, and I'll have outlines to you, would be to appoint nine individuals as a reserve Court in the event of emergency, either by constitutional amendment or by statute if it's an inferior court, and empower the President to appoint them with the advice and consent of the Senate, nine individuals to serve in the reserve emergency situation. The temporary Court would sit only on an emergency basis to resolve constitutional questions that require immediate resolution.

As with the last proposal, I don't know that you'd want such a temporary and emergency Court to take on all responsibilities of the Supreme Court, that is, reviewing the 7,000 petitions for cert that the Court gets throughout the course of a term. I think what you might want to consider is a more narrow application of these temporary emergency Courts. I might note that Argentina, for example, has something similar. They draw substitutes to their highest court from their courts of appeals, and if that cannot be accomplished, new judges are drawn from a preexisting list of alternate judges. The executive in Argentina designates a list of ten alternate judges and it's held in reserve for such emergency situations. Their justices sit there, by the way, for only three-year terms, so there are differences. Switzerland also has a reserve or substitute judges to serve. They name 30 substitute judges to serve on their federal court.

The advantages here would be, of course, that there would be a Court in place and available in the event of a catastrophe. It provides a sense of order and stability. It also raises a number of issues, some of which I raised with the last proposal, including you might need to provide a limited time frame for its existence to add an incentive to appointing the new Court. The questions with regard to whether it has discretionary review or not are applicable here, as well. Who determines when the Court is necessary or needed if the Court itself doesn't make that determination? Are its decisions final or reviewable by a newly constituted Court? And you may want to limit, also, its scope of its review to these important constitutional issues and not all Court functions.

The disadvantages of this one, I think, are numerous. It would require a constitutional amendment. Judicial power, as you know, is vested in one Supreme Court under the Constitution. And if its decisions are not final or if it's established by Congress as an inferior court, it provides no added value over the currently existing lower courts. I think it also risks weakening the perception of the Supreme Court. It also has its own confirmation process, which could be lengthy. There are a number of other issues that I've provided in the outline that I won't share with you. The diversity of appointees, at least in the initial years on such a temporary Court, would be lacking, as well. And overall, I think it's the least viable of the alternatives that I've suggested.

I want to add one last issue for your consideration, and that is with regard to the administrative duties of the Chief Justice of the United States. There are over 80 statutes that impose administrative responsibilities on the Chief Justice. It is one of the little known facts about that office. One of those duties--there are many that are important, but among the important ones are assigning Circuit Court judges from one circuit to hear cases in a different circuit in the event of emergencies, where there are not enough judges in a particular circuit to hear cases. That's an important function of the Chief Justice and only the Chief Justice has that authority. If we find ourselves in a situation where there is no Chief Justice for a period of time, I do foresee some administrative problems within the judiciary as a whole unless we provide a back-up mechanism for that approval, appointment process of moving one circuit judge from one circuit to another on a temporary emergency basis, and I would recommend the Commission consider that, as well.

JUDGE KATZMANN: If there is a surviving Justice, under the statute, would that Justice assume the administrative functions of the Chief Justice?

MR. DUFF: He would, Judge Katzmann, or she would. If there are surviving Justices, the most senior Justice assumes the power, the authority of the Chief Justice by statute. But we are considering also in the event that there are no Justices remaining, and that's the provision I would suggest you consider at that time. If there are remaining Justices, the most senior Justice performs the functions of the Chief Justice until the President appoints a new Chief Justice. So in conclusion, on balance, I think at this stage of my review, and it's been preliminary, I think I would favor no change, no real change in the appointment process. I think you should consider all of these options that I've outlined, but I think there is an implicit assumption in the existing statutes with regard to a lack of quorum at the Court that we're comfortable with relying on the lower courts to make constitutional decisions until we get a new Supreme Court in the event of catastrophe. I'd be happy to answer any questions you might have.

JUDGE KATZMANN: Historically, haven't there been periods in which the Supreme Court has not functioned? I'm wondering if you can address that.

MR. DUFF: There have been, Judge Katzmman. Interestingly, in 1801, as President Adams left office, as you will recall--Senator Simpson will recall this--

[Laughter.]

MR. DUFF: --President Adams and the Federalist Congress enacted the so-called "Midnight Judges Act." It had some good provisions in it. It eliminated the Justices riding circuits, and had it been in a different time, it probably would have survived as a good law. But it also created 16 new judgeships that were all filled by Federalists, and so when the Jeffersonians took office and the Jeffersonian Congress took office, they immediately repealed the Midnight Judges Act. And in addition to doing that, they changed the term of the Court. In effect, the Court did not sit for a period of 14 months. So we had a period of time in our history where there was no Court sitting for over a year, and you might say, well, times have changed. In the event of a catastrophe that we're talking about here, there might need to be more urgent review of constitutional issues. But then again, the republic was in its infancy then and there were certainly serious constitutional questions, among them was Marbury v. Madison at the time that waited 14 months for resolution. There were a couple other periods, actually, too, that the Court did not sit. I think in 1811, the Court did not sit for an entire year because there was no quorum. And in 1866 and 1867, there was almost a period of two years where the Court did not sit. I borrowed from the Supreme Court's library the terms. So there have been periods of time where there has been no sitting Court. I don't advocate that, obviously, but I suggest that we've survived it, and lower courts have filled the void at the time.

SENATOR SIMPSON: I want the record to show that Judge Katzmman serves on this Commission or participates in the Commission only on matters relating to the judiciary. I didn't write that opinion, either, but that's the way it is. And it's a great pleasure to have you here and to have you participating, Judge.

JUDGE KATZMANN: Thank you.

MR. CUTLER: May I ask one question, and that is the fact that the quorum is defined by statute may not have helped us here in the sense that if we change the quorum by statute, you would need to have a functioning House in order to vote for the new statute or amend the old one, and there may not be a functioning House.

MR. DUFF: Is the suggestion being that we take care of that provision in advance rather than at the time, or--

MR. CUTLER: I was simply raising the issue. It may be that you cannot wait until the emergency arises and then fix the problem by statute because Congress doesn't have 218 members who can vote on a statute.

MR. DUFF: I think that's a good observation, yes.

JUDGE KATZMANN: If, for example, there are two Justices surviving, walking through mechanically the steps as to the functioning of the Court--

MR. DUFF: Well, the most senior of the two would assume the authority of the Chief Justice. With regard to the lack of quorum statutes, the absence of a quorum, if the two of those Justices, being the majority, determine that they could not hear a case that would come before them by the end of the next term, they would refer the case, or not refer the case, but they would simply issue an order affirming the decision of the Court of Appeals below. It has the impact of an affirmation by an equally divided Court. By law, it's the same provision as an equally divided Court. If--

JUDGE KATZMANN: Could they wait? Could they do nothing and wait until the Court is constituted so that it can make that decision?

MR. DUFF: They could, I think, and if they would come to the conclusion that they would be able to hear the case by the next term, that's probably precisely what they would do. They would hold on to it until a new Court and a quorum exists--a new Court and/or a quorum exists to hear the case.

JUDGE KATZMANN: Under the temporary Supreme Court options that you set forth, once a majority or once six nominees are confirmed to the Supreme Court, then does that temporary Court cease to operate?

MR. DUFF: That's a very good question and may need some clarification, because under the Constitution, the recess appointment--well, there are two questions there, it seems to me. Under the recess appointments, whether they would continue to sit after the Senate reconvenes and confirms, do they sit until the end of the Senate's session, which is actually what is provided in the Constitution--

JUDGE KATZMANN: Because the language says the President shall have the power to fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session.

MR. DUFF: Right. So as it currently reads, the recess appointments would sit until the end of the next Senate session, and you might give some consideration to whether that's a good idea, or should we move in the new appointees more quickly than waiting until the end of the Senate session. I think that's a very good issue for further study and recommendation.

SENATOR SIMPSON: I think it's obvious that the issue of quorum and definitions and successor could be applicable to both. It's very interesting that the provision of selecting successors, and that's in our background material, that a member of Congress would submit names of those persons, a list of those names or name of who would succeed them. That would be an interesting concept. The other one is, knowing the fractious nature of some of my former colleagues, someone might object to a quorum being present. That would be not too good if there are only five of them.

[Laughter.]

SENATOR SIMPSON: But there are many things here that are fascinating and of great interest and that's what we're here to discern. Another administrative duty of the Chief Justice, as you are well aware, was Chancellor of the Smithsonian, with the appointment of the Regents being made by the Vice President of the United States and then the Chief being the Chancellor. You were there, I remember, a time or two.

MR. DUFF: Thank you, Senator Simpson.

SENATOR SIMPSON: Any questions?

MR. MICHEL: Mr. Chairman, before we conclude this morning's session, if we're about to do that, one point. Professor Bobbitt earlier raised the question about the source of elected and sworn, and the answer focused on the Civil War period of secession by the States. Of course, more recently, I am reminded by my good friend Mr. Pitts when I was leader that Adam Clayton Powell, a member of Congress from New York, had been elected a number of times, Chairman of the Education Committee, and then he engaged in some activities that the House felt were not a credit to the House and they asked Adam Clayton Powell to step aside when we normally all took the oath of office, and then by a majority vote, the House declared the seat vacant.

Now, in that case, he appealed it to the courts and the courts overruled what the House did, which really reaffirms what the Constitution has always said about those qualifications for a member of the House, that you be a resident of your State from which you are elected, achieve the age of 25 years, and a citizen for seven years, and it says nothing else. It is very important that we always come back to the basic document, and that's the Constitution. Then more recently, the question arose, and probably more appropriate for the time, when our dear friend Gladys Noon Spellman, a member of Congress from nearby Maryland, suffered an illness, I believe it was, but she lapsed into a coma for an extended period of time. She was on the ballot for reelection, got reelected by the people, but then, of course, after an extended period of time, the people of Maryland were denied their real representation because of her complete incapacity.

And at that time, we introduced a resolution, I forget who it was, but we adopted a resolution then declaring the seat vacant because she hadn't taken the oath of office. So a little fine distinction that probably ought to make the record complete. Thank you, Mr. Chairman.

SENATOR SIMPSON: Well, with that, I think we will recess until 1:30. Thank you so much. This is very helpful to us all. Thank you.

MR. DUFF: Thank you, Senator Simpson.

[Whereupon, the meeting was recessed for lunch, to reconvene at 1:30 p.m., this same day.]

## AFTERNOON SESSION

SENATOR SIMPSON: We have completed our arduous recess and will go on with a very fine young man I worked with when I was in Congress. We Senators were paid the same as those in the House, you remember that, the same pay, same--

MS. MARTIN: We got more.

SENATOR SIMPSON: Did you get more over here? I thought perhaps you might have. But anyway, it is good to have you here, and very important to add you to those who are educating members of the Commission and bringing us to a level of understanding. We have a lot of background material we've reviewed, but we've had some excellent testimony this morning and look forward to hearing from three very capable Congress persons who have been involved in the issue. With that, Representative Chris Cox. It's good to see you again.

MR. COX: Thank you very much, Mr. Chairman, and to all of the members of the panel, it is an honor and an entertainment to be on this side and to be speaking to so many members of the hall of fame in the process. I want to thank you for the opportunity to address your Commission on what is a very serious subject. As you know, it is the reason for your gathering, after all. Since September 11, there has been a great deal of speculation on what might have happened if the United States Capitol had been an additional terrorist target. As a matter of fact, many people believe, particularly based on very recent evidence, that Flight 93, the plane that crashed in a field in Pennsylvania, was, in fact, headed for the United States Capitol, and on that busy Tuesday morning, the Capitol was, in fact, crowded with members. To imagine what could have been on that day, we need look no further than the video images that we've all seen of the World Trade towers and of the Pentagon. That would have been the Capitol.

Had Flight 93 hit the Capitol, not only would the human toll have been catastrophic and the blow to our national esteem, but also the functioning of our government would have been impaired and possibly imperiled. An attack, for example, that left half the Representatives killed or maimed would have left the entire Congress, the House and the Senate, incapable of functioning, and it would have been incapable of functioning not just for days or weeks, but for months.

The problems that the House would encounter in the event of such a catastrophe are unique. The Senate, after all, can fill its vacancies through gubernatorial appointment. The House cannot. And in the House, because the Constitution does not specify but rather leaves to the States the time of the special election, in the House, that time could be more than six months. Even though the Senate could quickly replenish its membership, because there is no House with which to transact business, the Senate would be just as becombed as the House of Representatives.

So if a terrorist plan to attack the Congress had succeeded, America could have been left without a Congress, or a crippled Congress would have been incapable of fulfilling one of its most important functions, acting as a check and balance against the other branches. We can stipulate that this is an extraordinary time, this scenario that we're outlining here, one in which the Commander in Chief, if that person has survived, is going to be seeking to exercise the fullest amount of his or her powers, and that, according to history, is the very moment when the other branches need to be vigilant to make sure that our system maintains. We don't want the Commander in Chief in a national emergency to so overstep his or her bounds that we no longer recognize our constitutional system.

That's why the checks and balances are so important and that is the very time at which, under this scenario, that check would be missing, both the House and the Senate incapable together of producing any real, certainly in the sense of an exercise of power, any real legislative check.

Let us imagine still a third alternative, that hundreds of members are killed but the House, the few that are left, by unanimous consent agrees to ignore the fact that a quorum is lacking and then proceeds to establish a new quorum for business. Then you have a serious question of legitimacy, because a handful of members now is seeking to act as if it were the legitimate representatives of the American people. Would the public or even the other branches of government listen? Would they accept as legitimate the actions of this House, composed of only a fraction of its full membership? Would there be public challenges to the legitimacy of the House and its actions?

To take us back where I started, but for the bravery of the people aboard Flight 93, these almost unthinkable scenarios could have come to pass. Coupled with the almost daily warnings that another terrorist attack is not only likely but inevitable, we certainly must act as an institution in the best interest of our country by ensuring that our Federal legislature can endure any future terrorist attack. Of course, action without deliberation is panic, and that is why your Continuity of Government Commission is so important and the work that you are doing is so important. I want to thank you very much for that.

As the Co-Chairman of the bipartisan working group tasked with studying all of the proposals and possible alternatives here within the Congress, I want to thank you for the opportunity that we've had to work together for ensuring that Congress continues to function under all circumstances. I want to assure the members of this Commission that the Congress will act. Virtually every proposed solution, whether it be a change in the rules of the House, a statutory change, or an amendment to the Constitution, presents very serious legal issues. We are not the first to grapple with those issues. The very first Congress, meeting at Federal Hall in New York, where we were just days ago, grappled with the issue of Presidential succession. One can hardly imagine a Congress more in touch with the sentiments and intentions of the Founders than was that very first Congress, and one can hardly imagine a government more tentative or fragile and in need of the stability a well-defined and certain line of Presidential succession would provide. And yet the first Congress was unable to agree on a Presidential succession law and they went without.

It was left to the Second Congress to finally pass the first Presidential Succession Act in 1792. This Act simply stated that in the event of a vacancy in the office of the President and the Vice President, succession would pass first to the President Pro Tem of the Senate, and second to the Speaker of the House. The Act has only been amended twice in all the intervening years, first following the assassination of President James Garfield in 1881 and the death of Vice President Thomas Hendricks in 1886. Concerns were raised then because at the time of their deaths, Congress had not yet convened, leaving the offices of President Pro Tem and Speaker of the House vacant. As a result, in 1886, Congress removed the Speaker and the President Pro Tem from Presidential succession. In 1945, President Truman urged Congress to restore the Speaker to the line of succession and to restore the President Pro Tem of the Senate. Two years later, in 1947, Congress did so, but this time putting the House first and the Senate second.

This brief history demonstrates the time and deliberation that have gone into the very few changes that have been made to our Presidential succession laws since the very inception of the republic. Those of us tasked with finding a solution to the problem of Congressional continuity should take comfort in a history where thoughtful deliberation has been the rule, not the exception.

Together with my Co-Chair, the Ranking Democrat on the House Rules Committee, Martin Frost,

since our first meeting in May, the bipartisan working group has been diligently and deliberatively considering every possible option. I want, Mr. Chairman, for the record to thank the other members of this working group. In addition to myself and Chairman Frost, Chairman David Dyer of the Rules Committee, Chairman Steve Chabot of the Constitution Subcommittee of the Judiciary, and Chairman Bob Ney of House Administration, their respective Ranking Members, Representative Steny Hoyer of Maryland, Brian Baird, who is with us here today, David Bidder, who is the Chairman of the Legal Reform Subcommittee of the Policy Committee, Sheila Jackson Lee from Texas, and Jim Langevin, who perhaps is also going to be with us, I don't know. We continue to work and will meet again tomorrow morning to consider possible changes to the rules of the House and the Presidential Succession Act of 1947. That is our agenda for tomorrow morning's meeting. Also, next week, the House will have on the floor a resolution that our working group has prepared addressed to the States, to the governors and legislators of each State, urging them to review their special election laws and to amend them to ensure that in the event of a catastrophe, we will have replacement members expeditiously. We believe that it is important to consider every possible option for ensuring the continuity of our government. We, therefore, look forward to observing the progress of your Commission, to working with your Commission closely, and to implementing the recommendations that together we come up with. I thank you for the opportunity.

SENATOR SIMPSON: Thank you very much, Chris. That's very helpful. I think I will speak for this group, which is really very difficult to do, in fact, is also very hazardous, but we do appreciate your taking the time and know that nothing can succeed here without the legislative input, and it's got to come first from the House, knowing the other body as I do. I believe that takes care of that. Are there any questions about anything?

MR. COX: It was sufficiently comprehensive and I can't imagine there would be any questions.

[Laughter.]

SENATOR SIMPSON: Very well put. I like that.

MR. CUTLER: I have a question.

SENATOR SIMPSON: Yes, Lloyd?

MR. CUTLER: I have a question, Congressman Cox, and that is among the other Democratic constitutions of the world, there may be some interesting provisions that we might consider and we're very pleased that you are taking the interest you are taking. One of the things we hope to lay before you is what is done in some other countries. In France, as I understand it, as in the United States, if you are elected a member of the legislature, you cannot serve in the cabinet. But the French system, as I understand it, is one in which if you are elected to the legislature and you designate someone to be your substitute in the event you are elected to the cabinet, so that the voters will know at the very beginning when you stand for election that if you join the cabinet, they know who your successor will be. Do you think that precedent is worth taking a look at?

MR. COX: Indeed, and I know that it is very much under consideration in this Commission. It is

also a proposal favored by, or at least a variation of that proposal is favored by multiple members of our working group. The experience and the tradition of other countries is a very good teacher here. And to name two other European examples, in the case of the United Kingdom, we have a precedent much favored by the Chairman of the House Judiciary Committee. Never has a member of the House of Commons or the House of Representatives of the United States served who has not been elected. In Germany, I know from discussing this with Germany parliamentarians who were here very recently, they have in their modern practice and procedure a very different circumstance in which they believe they are fully protected from this kind of assault. I think we ought to study each of these, because rather than constructing something purely notional, we will be able to infer from real world experience and see the flaws and the attractions of these various different approaches.

I should add, Mr. Cutler, that in our working group, this is work in process. As of about two months ago, we decided we needed to do something rather thorough-going, and if you are also doing this, we want to share all that data. It is very important for us to understand what our options are.

MR. CUTLER: Thank you.

MR. MICHEL: Chris, isn't it true that a quorum of the House, 218 members, is really all that's required currently for you to do business, right?

MR. COX: That's correct, 218 people presumably actually showing up.

MR. MICHEL: So that if we get into this question of how many, well, the manipulation comes about only if it's in excess of 218 members.

MR. COX: That are impaired.

MR. MICHEL: Right.

MR. COX: Yes. The problems--there are two separate sets of problems, one with death and the other with impairment. In the case of death, the problem under our current practice is that it has been traditionally the will of the whole House to accept that there is a vacancy, and if you don't have the 218 in the first place and if the number of vacancies exceeds 218, you might never put together a quorum. You start with the old 218 requirement, and if you have only 217 living members, you can't put together a quorum to meet to determine that you have to reduce the quorum requirement. It would require unanimous consent.

Alternatively, if you have impairment, that is, people are still alive, we have a Speaker Cannon precedent that tell us--this is current precedent--that tells us that if you're alive, then you count in the denominator for figuring what a quorum is and, of course, by definition, you can't show up and be therein the chamber, and so again we could be stymied or becombed.

I happen to think that the latter problem is easier to solve and that we can fix this in our House rules. We are often cited to the United States v. Ballin, which I think fully supports the notion that the House can set its own rules, and by rules change, I think we could deal completely with the

problem of precedent going the other way. The precedents are nothing more than the interpretations of then-existing rules. If we change our rules, then we should have solved the problem, and that's why we're looking very hard at House rules as a means of getting at this quorum issue.

SENATOR SIMPSON: Yes, Phil?

MR. BOBBITT: I just want to make sure I understand the House rules as they are now. A quorum depends upon a majority of the people sworn and living now? That's the current rule?

MR. COX: And present.

MR. BOBBITT: If you got down to ten members, but they were the only ones sworn and living--

MR. COX: Oh, I'm sorry. The denominator. Yes, indeed.

MR. BOBBITT: And the problem then, for impairment, you say can be taken care of by a change in the House rules similar to that interpretation that allows you to interpret members as sworn and living, as opposed to just members who might have been deceased. In both cases, you can fix this just by House rules, is that right?

MR. COX: I think that is right. There is--so as a matter of constitutional authority, there is much less problem dealing with this than there is, for example, the problem of special elections. I will say that as between the two variations on the incapacity problem, death and disability, or incapacity, death is innately less subject to manipulation. While we can agree about what constitutes proof of death, and there could be mischief played with death certificates or what have you, it is much less likely than in the case where someone is in the hospital. We have members in the hospital all the time, for surgery where they go under, and not counting such people for a quorum or counting them for a quorum in the case of close votes could give rise to all manner of opportunities to tinker with the results of legislation, and so we have to be very careful in drafting something. I find it easy to answer the question about constitutional authority and very difficult to write the rule.

MR. BOBBITT: And do you happen to know the origin of the House rule that for purposes of a quorum, we just count the living members?

MR. COX: Yes. That is precedent of the House.

MR. BOBBITT: Do you happen to know how it came about? Is this the early--

MR. COX: The citation to which we are most often directed is from Speaker Cannon.

MR. BOBBITT: Thanks.

SENATOR SIMPSON: Yes, Lynn?

MS. MARTIN: Chris, isn't it also true that we're talking about a time when, although we could do mischief, to do so would also risk political harm to you, to this person doing this down the road? I mean, we're talking about an incredible national emergency, when you're talking about how do we define and could there be mischief done. So if we were able to take care of the death part of it, as difficult as that may be, at some time, we have to have some trust in our fellow legislators and citizens for this brief, relatively brief period of time. I think we could almost hope as Americans and believe that they would work together. The longer it takes, the more chance for mischief. I don't mean to ignore the mischief, but I think also we should be very clear we're not talking about normal political times. We're talking about a time when people would be Americans first.

MR. COX: I think that's right. We have seen that phenomenon since September 11 and the way that Congress has risen to the occasion and outperformed itself in virtually everyone's estimation. The difficulty in crafting a rule is that either you have to have a predicate, which is only in the event of this extraordinary circumstance does this rule apply, that is, draft it so tightly that it couldn't apply in any other circumstance, or you have to have a rule that applies all the time, and if it applies all the time, then in those times when it is just the usual political back and forth and not a national emergency, the Speaker could attempt to be very creative.

You and I have served in a House under Leader Michel, and I think that if we hear from our current minority members, they would complain perhaps of the way the majority treats them these days, where such things as two days becoming one and so on happen for the purpose of getting the legislative job done. I think whether you're in the majority or the minority, looking down the road, you have to worry about what kinds of unintended consequences there are when you're operating outside this paradigm when, by definition, we'd all be putting the Nation's interest first. And also, even when we are assuming fairly that everybody in Congress is going to have the national interest first and will rise to the occasion, anything that requires unanimous consent, I think we should also count on the diversity of the American population to give us at least one contrarian who is going to mess it all up.

MS. MARTIN: I would never understand that, of course--

[Laughter.]

MS. MARTIN: Then may I take from what you say that there would probably be among a majority of House members--they would view as a greater desirability a much more limited look with specificity on sort of what the situation was, rather than to have an idea that was so broad that creative people could use it in many different ways? Is that what I take from that?

MR. COX: Yes, I do. I think that if a precondition for any of these procedures to kick in is that hundreds of members be killed or incapacitated, that you will assuage the concerns of many.

MS. MARTIN: Thank you.

SENATOR SIMPSON: Thank you very much, Congressman Cox. We appreciate your willingness to be here and taking the time, knowing how this works.

MR. COX: I can't think of anything more important, and I want to again thank everyone on this Commission for the time that you're taking to help us solve this problem.

SENATOR SIMPSON: Thank you very much. And now, we have Representative Brian Baird of the Third District of Washington State. He and I can sing, "I Dreamed I Saw Joe Hill Last Night," and that's a union organizing song and I learned that in Wyoming, so it shows you that it is a great country. Of course, I never received any awards from the AFL-CIO, but I just thought I'd throw that in anyway.

[Laughter.]

SENATOR SIMPSON: They don't have my name at their headquarters anywhere. I believe that takes care of that diversion.

[Laughter.]

SENATOR SIMPSON: So we'd love to hear your further thoughts. We've enjoyed hearing your informal thoughts, so please go forward.

MR. BAIRD: Thank you very much, Senator. We did share--my alma mater was University of Wyoming--

SENATOR SIMPSON: Oh, yes. I forgot to throw that in.

[Laughter.]

MR. BAIRD: We have that in common, as well, in addition to having father who admired--

SENATOR SIMPSON: Don't say anything about the football team.

MR. BAIRD: No, we won't. We'll stay away from that.

SENATOR SIMPSON: Just leave that out.

MR. BAIRD: Although catastrophic outcomes may apply to the football team of late. Maybe they need a continuity plan, from what I saw.

[Laughter.]

MR. BAIRD: But I want to begin by thanking the American Enterprise Institute and Brookings for hosting this, and Norm Ornstein and Tom Mann, who have done an outstanding job of leadership on this, we too often say in Congress, this most important issue, but I think here, it may well apply. This is one of the things that we hope will never, ever be needed, with all our heart, but if it is ever needed, there may well be few things that we do in our lives that are more important than having

accomplished a responsible and constitutionally valid mechanism for continuity.

I'll give you just a little background of my work on this and then share a couple of proposals. On the night of September 11, members of the House were brought to a secured location and briefed about the ongoing potential threats. There was substantial debate that evening of whether or not we should go back into the House, resume business as a way of showing defiance and solidarity towards the terrorists and as a way of buttressing the spirits of our nation.

At the time, there were apparently quite legitimate security threats, and it occurred to me that if we go in, in all good intention of showing solidarity and courage, and instead what people see is a horrific image of that building itself blowing up with all of us inside it, we may not actually have done the service we hoped to provide, and I began to wonder what we would tell the American people, specifically what the media would tell the American people, in the event of a catastrophic attack on the Capitol Building, and the more I studied it, the more I realized that there were great ambiguities and that we might have a number of significant constitutional and procedural questions that would arise. So I began quietly working to try to explore the issue and to propose some possible remedies. Simultaneously, Norm Ornstein was doing very much the same work, and ultimately, we got together and shared and compared thoughts.

My initial concern was that we were clearly about to go to war in Afghanistan, and at that time, Pakistan was not yet telling where they were going to side, Pakistan a known nuclear power. It seemed to me that we raised the possibility of entering into a conflict with the possibility of someone possessing nuclear weapons on the other side. It occurred to me that we needed some form of mechanism out there should we be destroyed that would allow the States to rapidly reconstitute the House.

As Chris Cox said eloquently, the fundamental issue for me here is the question of checks and balances. In the event of the destruction of the executive branch and the legislative and the judicial branches, where are the checks and balances, particularly given that under the line of succession, you could quite readily imagine a cabinet secretary, who, frankly, most Americans would not know who they are, appearing before the television and saying, I'm now your President, even though no one ever voted for me, and I will act now because the Congress is incapacitated. I'm going to act with extra-constitutional authority on such grave matters as declaration of wars, appropriation of funds, and on the list would go, at precisely the time that you perhaps most need those checks and balances. And Ms. Martin's comment, yes, we would hope we would all be good Americans. I assume every day on the floor of the House we are all good Americans and there are still legitimate disagreements, and that's what the representative nature is for and the checks and balances are for. So we needed some fashion to keep the House up and running. The Senate, as Chris said and as Senator Simpson knows, is easily replaced.

[Laughter.]

SENATOR SIMPSON: Just keep going.

[Laughter.]

MR. BAIRD: I'm sorry. I slipped that one in there. But, in fact, constitutionally, it is a relatively straightforward and quick mechanism. It's the House that becomes the problem and this principle of special election to which we are all so dedicated could, as Chris pointed out, take up to three to six

months to solve. My initial proposal was to suggest that we allow governors to replace House members through temporary appointment in the event that, I think I said a quarter or more are deceased or incapacitated. The point there was to get something out there that we could quickly put the House back together. I knew at the time it wasn't perfect, but I felt there was some urgency, at least possibly to have the House and Senate pass it and then conceivably actually ask the States, don't ratify this until we have further time to discuss it, but if they hit us tomorrow, we've at least got something out there. We haven't lost the very bodies that are tasked with proposing the solution to the problem you now face. We received great feedback from that. Members raised legitimate points, points about the governors already having power to appoint Senators and this would give them the power of the House, as well, and that's problematic. Secondly, there are issues of partisanship. Governors may well appoint from their own party rather than from the party of the deceased. Some proposed that we require in a proposed amendment that the replacement be of the same party. That has constitutional precedent, but it is problematic. The Constitution has never mentioned political party in its history and it didn't seem appropriate necessarily to put it forward there. There was not sufficient agreement on that initial amendment for action to be taken, but there was agreement that some action needs to be taken. Subsequent to that, I circulated a letter among my House colleagues and we obtained, in really literally a week of work, 218 signatures--we could easily have gotten more, I believe--saying that the leadership of the House should appoint a bipartisan and bicameral committee to study this issue and make recommendations back to the bodies to act upon. The working group has partly developed out of that, and I think this Commission is a great complement to that, and again, I express my gratitude.

I have given great thought to the continuity issue, obviously, in the House and think we may actually have a better way to address it and I will put one proposal briefly forward for consideration, and it draws upon something that Norm Ornstein and actually Speakers Foley and Gingrich proposed as, again, a kind of a stop-gap initially, but we could codify that constitutionally. In essence, it would allow for members of the House, upon their election, to nominate temporary designees, and we are admittedly being somewhat semantic here, but temporary designees who, in the event of a vacancy due to death or incapacity, could fill the post with the full responsibilities and rights of the deceased or

incapacitated until such time as a special election could be held. This obviates a number of issues. For example, if you have a temporary designee, you have filled the post and you needn't necessarily require an expedited election on the part of the States because the States are now represented via their temporary designees. You do not necessarily have to have a cut-off criteria by which, you know, a quarter or a half or a third, because if you can replace the members through this mechanism, you don't have to have a triggering mechanism.

The other issue of great importance is, when you say half the members of the House or more would be necessary for triggering, what if the Republican Conference or the Democratic Caucus are at retreat and it is just that conference or just that caucus that is hit? You could quite easily still have half the body in raw numbers, but the representative nature of that body would be greatly distorted, at least in a partisan basis, and you can imagine a similar type of distortion were it, say, the New York delegation or the California delegation, leaving vast blocks of voters disenfranchised for a potentially protracted period in a time of crisis.

So this is one way of looking at it. Whether or not we approach that approach or some other is less important to me than, and I will close with this, than the absolute certainty in my mind that we must resolve this problem.

I live in awareness every day that it is plausible that the American people will be watching television or listening to their radio and an announcement will come on that says, we interrupt this broadcast to bring you news from Washington, D.C. It appears a nuclear weapon has been detonated. All members of the House and Senate are believed to have perished. The President and Vice President were present in the White House at the time. The White House has been destroyed. They are believed to have perished as the attack came without warning. The Supreme Court is believed to have been wiped out--they were in session--along with thousands of others, government employees and private citizens in D.C. We'll return with more in a moment.

That scenario is plausible. If it happens, we must have a way that every news broadcaster can come right back on and tell the American people how they put together their constitutional democratic republic and tell the adversaries that and tell the rest of the world, who looks to us for leadership, and there can be no ambiguity about who the President is, as there is today. There can be no ambiguity--I mean, there would be today under this scenario. There can be no ambiguity about how the House and Senate would function, how checks and balances function.

We have it in our capacity to do this. I believe we must do it before it were ever needed, and then do everything in our power to prevent such an occurrence from happening. But if we fail to act and it is ever needed, I think we will have done a great disservice to our country. And so I thank you for being here and would be happy to take any questions.

SENATOR SIMPSON: That is a very powerful way of presenting it to the American public, and my

hunch is that's where you're going to succeed. I want to ask you, what do you perceive or what do you feel is the greatest concern as a legislator to get the work done?

MR. BAIRD: I think there's a clear need for leadership within both the House and Senate leadership on a bipartisan basis to set this as a priority. There are many issues we face right now. First and foremost, we obviously must work to prevent this catastrophe from ever happening, so homeland security and other issues are of paramount importance.

Second to those, I would say this would be right up there in high priority. We spend a great deal of time, as you know, on issues of seemingly imminent and great importance, but in the vast scheme of things, potentially less so should something desperate happen. I would like to see us resolve this before the 108th Congress convenes. My own desire, not that the Speaker or the Majority Leader have asked me, but my desire would be to have this Commission work with the working group, come up with our best proposal, and make it H.R. 1 and resolve it. The Constitutional Convention wrote the whole thing in a few months in Philadelphia. We ought to be able to solve this perhaps over the holiday recess. But we will need that leadership to make it work and my ideal would be that we all work together. We've had a lot of time to hammer out some of the problems. I think we can move forward and at least put it to a vote and see.

SENATOR SIMPSON: Let me just ask one other question. What is the argument of those resisting--without, of course, addressing any personality--those resisting any change? Where is the inertia? What is their explanation for doing nothing?

MR. BAIRD: There are essentially three, as I see them and as they have been presented to me. One, there's understandable and quite proper reluctance to amend the Constitution. It's served us

well these many years, and I respect that. But we are in somewhat unprecedented times. It is true, quite true, that a few decades ago this issue was debated and nothing was resolved. But the numbers of countries having nuclear weapons have dramatically increased. The numbers of countries with access to biological and chemical weapons and the potency of those weapons has expanded and we have been now attacked on our own soil by a group that made one effort to attack the World Trade Centers, was unsuccessful, and resolved and hit it again and was profoundly and terrifically successful. So, yes, there's reluctance to amend the Constitution, and I respect that. But I think we've identified some flaws, and one might have said prior to September 11, well, there have been hundreds of thousands of airplane take-offs and landings and we've never had a real great problem with those cabin doors being unsecured, so why should we spend the time and expense? We wish now we had done so.

The second argument is a principled argument that we have never had a person serve in the House who was not directly elected, and I respect that. I'm proud of that, to be part of that. But it seems the trade-off there to be made is one between honoring that tradition at the risk of having no House of Representatives or significantly diminished. Under the House rules, a quorum could be three members chosen, sworn, and living, and that person, of course, elected by--if those three survive, they elect the Speaker. That Speaker becomes the President and under the current succession law has the right to supplant a cabinet member, even if that person has already been sworn into office. I don't think the Framers wanted a House of Representatives made of three random survivors, or possibly even non-random survivors. So we may have this trade-off between a temporary deviation from the principle of direct election in order to maintain the perhaps more important principles of checks and balances and proportionate representation. Or we say, in order to preserve that principle of direct election, we are comfortable having just a few people or nobody in the House of Representatives and deviate from the many other principles of checks and balances and bicameral legislation that go with that.

The third explanation is one that I find less credible intellectually, but people simply sometimes say, well, people would figure out what to do. I don't find that a valid argument, but that's the third most common offered.

SENATOR SIMPSON: I heard one explanation that during the Second World War, that the British parliament existed and carried on its business in the threat of the battle of Britain and the daily bombings and that the response there was that Adolph Hitler didn't have an atomic or a nuclear fissionable material. Besides that, whenever the waves would come in, the parliament simply went into the underground. I think that argument needs to be--you're going to have to prepare a lot of arguments. You'll be ready for that, won't you?

MR. BAIRD: Well, I will. There is this profound and important tradition of direct election, and it does stem from the history of the House of Commons. But one can only imagine the fate of that very House of Commons had Adolph Hitler had a nuclear weapon, particularly if he didn't have to deliver it by a junker bomber coming across the English Channel. We are in a world where someone, to our knowledge, it is quite possible, could have a nuclear weapon already in the city, could wait for the right moment and press a button. There would be no warning and, de facto, we would deviate from a whole host of principles of our government procedure should that happen.

What I am trying to do is put forward a way that, as quickly as possible, we could get back to those principles that have served us so well of checks and balances and legislative relation of authority, et

cetera. So those precedents served us well in past times. We live in new times, new weapons, new threats, and new means of delivering those threats, and I think it calls for a new response so that we can preserve the very best traditions for the future.

SENATOR SIMPSON: Questions?

MR. MICHEL: Brian, is it your judgment, feeling that this issue is of much more concern to members of the Congress, who obviously would be directly involved, than with the American public?

MR. BAIRD: Actually, paradoxically, Mr. Leader, it is the reverse. I can tell you this, when I raise this issue at town halls, first of all, the town halls become deadly silent and then people say to me, you folks ought to fix that. The common sense of the American people, they cherish--

MR. MICHEL: Now let me interrupt. You have introduced legislation, and I remember when I introduced something it was not necessarily the biggest issue in the country at the time and then it generated conversation and questions in my district, and that's understandable. And then going beyond your district, where obviously you've sparked their interest in it, somehow, I haven't seen polling data or whether there really have been any, but the general public out there is not really all that concerned or knowledgeable about what's at stake.

MR. BAIRD: Well, exactly. You know, there is no PAC to raise funds for candidates who stand up for Congressional continuity. There are no independent expenditures. It doesn't poll high, I can tell you that. People are concerned, quite rightly, about whether they can find a doctor or afford their prescription medication, et cetera. But it is part of our responsibility, as you know and as you have taken leadership, and as Senator Simpson and many others, Ms. Martin, it is part of our responsibility to see things that the general public does not have in their purview, nor should they have to have it, and solve those problems. My concern is that two minutes after an attack were to occur, it would suddenly be of paramount and profound importance. I just know of nothing better for our country at that moment than if every newscaster in America and around the world can give them a clear-cut mechanism for what happens next, and right now, it would be a scramble for talking heads, each giving a different interpretation, not any of them having gone through the deliberations that your Commission or our working group have done, and the American people would say, who's in charge now? How do we put it together?

As I say to people on both sides, think about those three survivors. Think about that one cabinet member. Pick your worst three, we'll pick our worst three, and they're now in charge of the government. You just don't want that, and the American people don't want that. They cherish those principles of checks and balances, and whether they know they're imperiled or not doesn't absolve us of the responsibility of solving that peril.

MR. MICHEL: Thank you.

MR. CUTLER: I just had two comments, Congressman Baird. One is really just a technical point, and that is there is at least a veiled or indirect reference to political parties in the Constitution, and that's in the 24th Amendment, which prohibits a poll tax in a general or primary election, and a

primary election would clearly be a party election. So I wouldn't be deterred from facing up to the political aspects, the party aspects, of any solution we arrive at on the theory that that would break the precedent of the Constitution. It's already been broken.

MR. BAIRD: That would certainly, from my way of thinking, if that's what were necessary to get us to two-thirds, I have no problem.

MR. CUTLER: And the second point really is that I agree with you that the public, once it's alerted to this problem, would want to see it fixed, and I have no doubt that the 40 men who wrote the Constitution would want to see it fixed, and among the 40, they would have figured out a way. It just isn't responsible of us as Americans, and in one way or another, we would rise to this problem, but it isn't responsible to say we knew it needed fixing but we couldn't agree on the method of how to fix it and now we're in this dilemma where we cannot pass any laws or declare war or appropriate money.

MR. BAIRD: I couldn't agree more.

MR. CUTLER: Thank you.

SENATOR SIMPSON: Any other questions?

[No response.]

SENATOR SIMPSON: Thank you very much. That's very helpful to us, very helpful.

MR. BAIRD: Thank you.

SENATOR SIMPSON: And now, Vic Snyder from the Second District of Arkansas, another warrior in the cause. It is very good to have you here and share your thoughts with us as we go about our duties. Thank you.

MR. SNYDER: Thank you. It's good to be with you all. I appreciate your service addressing these challenging questions. I also want to apologize for not having a written statement to give to you. I only read about this hearing late Friday afternoon and changed my schedule around to get back here.

SENATOR SIMPSON: We never gave any ourselves, so don't worry about it.

MR. SNYDER: All right. Good. I also want to apologize, Senator Simpson, for not having a connection with Wyoming, but I'll work to rectify that as best I can.

[Laughter.]

MR. SNYDER: The overall point I want to make today, and I appreciate your time in hearing me out, is that I think it would be a mistake if September 11 motivated us to amend the Constitution

that resulted in appointees, not elected people, but appointees being sworn into the U.S. House of Representatives. We talk about continuity of our government, and I think it's important to define well what the problem is. Is it the continuity of our government, the continuity of the bureaucracy, the continuity of being sure that the chairs are all filled when we show up to vote, or is it the continuity of our democracy, the continuity of the essence of what we think our democracy ought to be about?

Historically, continuity has not always been much of a problem. It has been solved in centuries gone by by blood line, you know, the king is dead, long live the king, a very simple way of dealing with it. During the Cold War, these issues were addressed, and, in fact, the Senate passed several versions of a constitutional amendment that would provide for appointments to the House. The language on the floor by Senator Kefauver, I believe at that time, he referred to the language at that time, germ warfare, atomic blast, and his quote was, "violent attacks by irresponsible partisans," the same kind of issues that we're dealing with today, nuclear, biological, and terrorist blasts. And yet, those proposals never came to a vote on the House side.

September 11 has caused us to focus and think about these very important questions, and I would repeat again, the question to me is, what is the essence of democracy and how do we maintain the continuity of the essence of democracy in the aftermath of such a tragedy? To me, the essence of democracy is the right of a people, a free people, to yield power over their lives only to those for whom they've had an opportunity to vote. That is the nature of the People's House, and the Constitution set up the House to be something peculiarly different from the Senate.

In a lot of the public discussions, the Senate has been used as a model, but in my view it is a poor model. I say that with all due respect, Senator Simpson. You can look at the make-up of the Senate today and see members who first came to the Senate by gubernatorial appointment. And we all know, anyone who's been in this business knows that the power of the incumbency, even for a few months, can generate a healthy head start on any opponent who chooses to take you on. My fear is that if we had an amendment that would allow for gubernatorial appointment and we had 300 House members appointed with the next election in 16 months, 15 months, instead of the People's House, we would become the Appointees' House because so many of them would be able to turn that incumbency around--for good, honest reasons, would be able to turn that around into reelection.

The second point I would make is this, that no system that we come up with, and I commend Mr. Baird and Mr. Cox for all the work they are putting in on looking at the rules and looking at what State legislatures might do and looking at any kind of statutory changes we might need to make, but whatever system we come up with, no system will protect against all the uncertainties. Any system will have gaps. Any final result, product that comes out of the Congress, we can sit down in Tom Clancey style, come up with a way that breaks through that with some specific fact situation. That is the risk, in my view, of a democracy.

Expedited special elections, which may be the best way to go, in my view, to get at this, expedited special elections during a time of national catastrophe would not be perfect. It would not be fun. But democracy was not intended to be easy. Democracy was intended to be a responsibility and the responsibility occurs whether it's good times or bad times, and having those kinds of elections in the aftermath would be very, very difficult.

But you look back to what New York City did after September 11. I think their elections were a week or two later, and I think that was a very positive thing for that community to go through. It sent a message. At least, I was very touched by the power of democracy in the aftermath of what

happened in New York City.

The third point I would make is this. I think it's very important that we define the extent of the problem as precisely as we can so that our cure doesn't make it worse than it is. Maybe this is the family doctor in me coming out, but incapacity is a problem. But we also know the powers of emergency health care, the powers of rehabilitation, medical rehabilitation, and to me, if we had some proposal adopted to let governors appoint people to replace those who are incapacitated but who some months down the line recover, who after six or eight months in a burn ward, but they come out having been replaced by a gubernatorial appointment permanently, I think that would be a mistake. And you can come up with scenarios where it would not be unreasonable to expect to have 50 or 60 or 80 members in burn wards or major trauma wards for prolonged periods of time.

My overall point, then, is I don't consider myself an expert in the House rules or the special election laws of the 50 States or all these issues of Presidential succession. I think they are all very, very important. But I think that we as a Congress and we as an American people and this Commission and the House committees that are looking at this have to stay focused on, to me, this key goal, that our goal is to preserve the continuity of our democracy, and the essence of that democracy is the right of people to be governed in good times and bad by those who may have a right to elect up or down. Thank you all very much for your service.

SENATOR SIMPSON: Thank you very much. You have a sanctity toward the election process, that's obvious, and very real and very authentic. How long do you think it would take in the event of the catastrophes that have been described, how long would it take to get this done?

MR. SNYDER: It varies State to State.

SENATOR SIMPSON: We know that now, but, I mean, in your vision of how we would do it.

MR. SNYDER: I think part of what can come from the work that you all are doing and what Mr. Cox and Mr. Baird are doing, I don't think States have looked at this. For example, it's very common in Arkansas for the entire delegation to be together in one place. Now, the world will probably not pause very long if the entire Arkansas delegation, both Senate and House, were to be wiped out, or the entire California delegation wiped out because we're all in the same place or on the same plane. But I think it is worthwhile for States to realize they ought to look at, in special situations, do they want to have an expedited special elections process.

Now, you look at places like Oregon that does it all by mail. Their solution, they're going to have to make some judgments. We have to have a certain amount of time for mailing out ballots, for the ballots being mailed in. They may well want to have a different--they may well be willing to say, no, we're going to take a few weeks longer because our process will take longer.

But I don't think States like us have really looked at this very closely. Could we have a situation, a process where the governor would declare, or perhaps declare at the national level the need for the expedited process needs to go into, and then you'd have to start counting back. How quickly can you expedite that and it still be a meaningful election in a time of national tragedy? I've heard different days, 60 days thrown out and sometimes less.

MR. CUTLER: Congressman Snyder, your first point, that the person named by the governor to be a temporary member pending the election will give that person a leg up in the election, is a serious

point, but could it not be resolved, particularly if you went the constitutional amendment way, by providing that anyone who is given such a temporary appointment cannot run to fill the seat and take advantage of the fact that he's an incumbent for two or three or four or six months?

MR. SNYDER: That is a solution. That is not the language in the Constitution that currently deals with the Senate. In fact, in Arkansas, we by State statute say that the person the governor appoints cannot run for reelection. Most States don't have that provision. Most States, if you're appointed, you can run for reelection. To me, the downside, it doesn't change the fact that you would have 300, 350 appointees for a period of time that, in my view, could make some

very significant decisions, not having been elected. But it does--you are correct, Mr. Cutler, it does deal with the incumbency issue. It doesn't deal with the issue of what is the very essence of this problem. To me, it is the People's House stays the People's House.

MR. CUTLER: But what you're saying amounts to saying that what you consider to be the very essence is the problem is insolvable.

MR. SNYDER: No, sir.

MR. CUTLER: Or that there's no problem to be solved.

MR. SNYDER: I'm not saying that at all. I think that States need to be looking at how they conduct special elections and can they be conducted in a more expeditious manner. I think, looking at the rules and dealing with things like the quorum and incapacity and Presidential succession. Those are all part of the solution. Do I think that the risk of having 45 to 60 days or 70 days where we do not have 435 members here but may have 100 members or 120, is that a risk? Yes, it's a risk, but I'd rather have that risk than the risk of having 300 appointees, 350 appointees show up for work. I think it's a balancing of the risks, in my view.

SENATOR SIMPSON: Yes, Bob?

MR. MICHEL: Thank you, Mr. Chairman. Congressman, with the witnesses today, you are a dissenting voice. There is nothing wrong with that.

MR. SNYDER: That is why I--

MR. MICHEL: I came aboard this Commission at Norm and Tom's request because, quite frankly, I was really shaken up over what happened on the 11th and how much worse it could have been had the prospect of a good part of the Congress being destroyed. But in my 38 years in the Congress, whenever somebody came to me and said, oh, Bob, why can't we get this done or that done, let's have a constitutional amendment, and I'd say, get off that kick with me. That's too precious a document to be fiddling around with with what you've got in mind. And I guess that was one of my prejudices, is that sacred document out there, it's tough to amend it, and rightly so, occasionally it has been, and we're at the point where I guess we've got to come to grips with is it really necessary to take that drastic step, or is it possible to do something less than that. But there's nothing wrong in raising the dissenting voice, because if anything really requires a full aerated debate at the particular time, it's on amending the Constitution. That's why it takes two-thirds of both Houses, three-fourths of the States to get ratified.

MR. SNYDER: I appreciate that. I'm not at all sure that my being in the dissent today means that I am in the minority on the House or Senate floor today.

MR. MICHEL: Well, I appreciate that. I just want to make the point that we're going to have to hear all voices on this issue before it's finally resolved.

MR. SNYDER: I share your conservatism about amending the Constitution. However, in my looking at this, I'm not so sure we wouldn't be ahead by amending the Constitution to say that all Senate replacements ought to be by election, also. So I'm kind of coming--that's been the progression of the Senate. The original Constitution, I think they were elected by State legislatures, and then we gradually moved, and the next step in this may be to say, when you look at the Senators today, the ability of an appointee to turn that into incumbency--and more power to them, they're wonderful people and they step forward at a time of need in their State's history--but it may well be in a modern democracy that even the Senate should be replaced by special election and not by gubernatorial appointment.

MR. BOBBITT: Congressman, one thing troubles me about what you say. I agree that democracy is a marvelous thing, but it is not an end in itself. The reason we have elections is to get qualified and capable people like you to come up here and represent us. It's representation that's the goal of democracy, not voting. We don't vote just to vote. If I understand your position, you'd be happier with, oh, maybe 100 Representatives here or 80, all of whom were elected, and then, I suppose, another 350 constituencies with no representation at all, and this might last, as you say, for weeks or months. But whatever mischief they could do surely is necessarily no less than what an unelected group appointed for a temporary time and limited, as Mr. Cutler suggested, would do. I just don't quite understand how you can draw the balance in favor of voting and then disenfranchise millions of people who will not be represented at all.

MR. SNYDER: We do disagree on what the essence of democracy is. To me, it is the power of the vote, the power of me being up here voting for-- representing the Second District of Arkansas, knowing that my voters can throw my butt out if they decide to. If it's only representation, we could do it by random draws out of the phone book, like we select juries. We could do it by gubernatorial appointment. We could rotate, you know, this year it's going to be the As. Next year, we'll have somebody from the Bs. To me, it is not just that somebody is up here representing the people, it is how that person is chosen. I think that's what the whole cry of no taxation without representation, they meant representation that we sent up there, not the king sent there or the king-appointed governor sent there, that we as voters sent there. Of course, at that time, it was all white male landowners, but other than that, we got it cleaned up as time went by.

MR. BOBBITT: Thank you.

SENATOR SIMPSON: Let me ask a question, because I don't track this. I'm from Wyoming and we have one Representative. She gets wiped out, and I have to sit here as a constituent way far away and watch 100 guys that have no interest in my State. Is that democracy? Or the New York delegation gets knocked off and New York has to sit here with nobody representing them, while all the California delegation got saved and they and another 100 people are running the country and we're just out in the bow-wows. That doesn't sound like democracy.

MR. SNYDER: The length of time that Wyoming stays unrepresented in the House is the decision of the State legislature and the voters of Wyoming. If you choose to have a special election process that runs for six months, that's your choice. If you are a State that chooses to expedite it, that is Wyoming's choice. Obviously, there is a minimum length of time, but we deal with that now. I'll

use my example, the Arkansas. If the Arkansas delegation is wiped out, we won't have representation up here for a while. At any given time, it seems like we have had somebody resign or somebody pass away up here and there are always empty districts and their staff are kept on skeletal crews and they're not involved in any political activity. But we always have periods of disenfranchisement, much longer periods than, I think, what people are talking about and what I would envision under an expedited special election process, because the States really have not looked at that.

I think you and I are in agreement. If you thought about your whole delegation being wiped out, you think, well, that's a problem for us. But it's a problem that the States make the decision about, and if it's six months, that's their process.

MS. MARTIN: There isn't a good answer here to everything.

MR. SNYDER: No, there's not.

MS. MARTIN: There just isn't, but--

MR. SNYDER: My goal is to be the fly in the ointment here for you all today.

MS. MARTIN: No, no, that's okay.

SENATOR SIMPSON: We all did that. We love it.

[Laughter.]

MS. MARTIN: That's not--here's what I think, because I come in without a particular dog in anybody's hunt. We are not talking, though--if this all happens, this horror happens, the first two months--and all of us, I don't think there's anybody here that would suggest we could move any elections faster than 60 days. We all know--

MR. SNYDER: I agree with that.

MS. MARTIN: --that even 60 days would be miracle time. But let's assume that we could do that miracle, even if it weren't across all 50 States. It is those first two months that are the most important to face the world, and Representatives, whether they're from Arkansas or Wyoming or Illinois or any of them you've mentioned, aren't going to be making State decisions. You know, that's not the time we're going to get the dam for my district, as my as it's deserved. That would be the one time when the House has to continue acting as a whole for the country. It would be the one time where your district or my district isn't as important. So I'm wondering where that comes in your mix.

MR. SNYDER: I think what you said earlier, Congresswoman, what I call the pay-back principle. Let's suppose that the State of Arkansas is the only State that survives, and for a glorious 90 days,

we control the House of Representatives and we take all the money from Texas and we take all the money from Wyoming and we do things that are inappropriate for a time of national emergency. I think that there is, as you pointed out earlier, that would be contrary, dramatically contrary to the wish of the American people. During that first few weeks is the time when we're all going to want to pull together because we have a national emergency. As time goes by and the other members come in, I think that there would be a tremendous price to be paid for having acted irresponsibly and having taken advantage of having been one of the 120 members that survived the catastrophe.

MR. CUTLER: But if only 120 survived, you couldn't declare war, you couldn't appropriate money, you couldn't fund the army, you couldn't amend a statute. The country could not function, could not carry on the war that it needs to carry on.

MR. SNYDER: I don't agree with that, Mr. Cutler. We have all kinds of legislation that's passed on the floor of the House and the Senate and signed into law--

MR. CUTLER: But you wouldn't have the constitutional quorum to pass it.

MR. SNYDER: It goes, I think, to what Congresswoman Martin was talking about. People pull together. We will have bills passed, voice voted, no quorum call--

MR. CUTLER: There's no quorum. Anything you do is subject to challenge.

MR. SNYDER: I think that's debatable. We have never had--

MR. CUTLER: Is debatable good enough?

MR. SNYDER: Well, we pass a lot of things on the floor of the House and Senate with one or two members on the Senate floor and four or five on the House floor, and clearly, there are not quorums present and the C-SPAN cameras document that, bill after bill after bill. But it is a system that we have confidence in. My guess is that that's what would happen, going back to Congresswoman Martin's point, that in those first few weeks would be a time when people are pulling together and, my guess is, would work by consensus on things like declaring war and appropriating money--

MR. CUTLER: But you don't have 100 elected members who are dead.

MR. SNYDER: I'm sorry?

MR. CUTLER: You do not have 100 elected members who are dead when you adjourn from day to day with less than a quorum, for example.

MR. SNYDER: Well, all I can say is I don't see that that would be a problem in the kind of emergency situation you're talking about, where the American people would want their government to do well, to respond to a national emergency, to declare war. If there were five members that were able to be there for some specific reason because the country was in a disaster, I would think that it

would--while it would make for a legalistic discussion, it would be difficult for me to foresee that a year and a half later, there would be a court case that said those five members that acted to declare war and appropriate money for the defense of the country, they really shouldn't have done that. I don't think that would be the result anyway. But it's difficult for me to see that that would be one of the risks of having a small number operating.

SENATOR SIMPSON: Someone stated before, and I think you were present, about the anomaly of being maybe governed by a cabinet secretary, but you're holding tight, which I've done in a lot of places and have my old ball dome hammers around this place. But your mantra is to be governed by persons elected. How do you think the American people in Arkansas and Wyoming feel if they're governed by persons they've never even heard of?

MR. SNYDER: Are you speaking of Presidential succession?

SENATOR SIMPSON: Yes. I'm just talking about--

MR. SNYDER: Yes. My comments today are only addressed at the issue of a constitutional amendment that would allow for appointees to end up being sworn in rather than folks that have been elected. I agree with--I think Norm and Mr. Mann have both been concerned about the problems of Presidential succession and how to deal with that. The President Pro Tem of the Senate is the senior-most member, I think as under their current rules. Obviously, that needs to be looked at. I share your concerns about Presidential succession.

SENATOR SIMPSON: Well, we have our work to do, that's for sure, and at the Court, too, as Mr. Katzmann has shared with us. The Court--if our obligation is called the continuity of government, but our real tough one will be right here in this House of Representatives.

MR. SNYDER: I think so, too.

SENATOR SIMPSON: You know that and you've got a good pulse of it, but it's a quandary, conundrum, and--

MR. CUTLER: Wrapped up in an enigma.

SENATOR SIMPSON: --wrapped up in an enigma. That's right. I don't know who said that. Lloyd Cutler.

[Laughter.]

SENATOR SIMPSON: We'll have some good discussions and need to hear people like you speak as well as those in favor. But I see it as a whole--to me, cataclysmic is cataclysmic, and when you've got a bunch of people running around on fire with their clothes tattered off and back in Wyoming they're saying, we've got to have an election within the next 60 days, and some jerk with the money surfaces and says, I'm your guy, you know, I think that's about as humdrum and nutty as any other scenario. A quick election when your Congress person has been burned to a crisp or is laying in a

hospital wanting to get the job back and hoping--and knowing that when somebody says you're ready to get the job back, which is part of this material, you get the job back. It will be a tough one. But the good people are working on it, people of good will, good intentions, and good minds, and you certainly add a good dimension to that.

MR. SNYDER: Thank you.

SENATOR SIMPSON: Are there any other questions?

[No response.]

SENATOR SIMPSON: Thank you very much, Victor. I think I'll turn it back to Norm.

MR. ORNSTEIN: Thanks, Mr. Chairman. One of the pieces of information which we will pull together for the Commission is--just for edification--is the election success rates of those who have been appointed. In fact, those who have been appointed to the Senate have, I think, slightly less than a 50 percent rate of success when they run for election themselves. The election success rate of those who run in special elections and then run again is, I believe, much greater, but we'll try and pull that information together just so that we have it all on the table.

I want to end at least with a few housekeeping matters about the next meeting and thank some people for putting all this together. But what remains to be done today as we look forward, I think, is to talk a little bit about the range of solutions and get some things on the table so that we can then, between now and our next meeting on October 16, think through and see what seems to work or not work.

One thing I might say just at the outset here, Congressman Snyder has raised some very interesting questions about what the essence is, not just of democracy but of our political system, which is, of course, a republican, small "r", form of democracy, a representative form of democracy. The Framers, of course, viewed elections as something very important, but from the get-go didn't view the Senate as a body that needed to be elected directly. What's interesting here is, as we've discussed the quorum requirement, is to go right back to square one. Why have a quorum requirement? Why did the Framers feel it necessary to put high up in Article I a requirement for a quorum of 50 percent of the members to do official business? Clearly, it is because they were very much sensitive to and concerned about the representative nature of the body. They did not want however many were elected or appointed by State legislatures or elected by State legislatures or by whatever other manner the States devised to have a wildly unrepresentative group of a smaller number of members able to make laws and make those decisions. They set up the system very consciously to make it representative of the country as a whole. That was a very high value for them, and that perhaps higher than the value of election itself.

I also believe, frankly, that, apropos some of the discussion earlier, even with Congressman Cox, the quorum requirement is very plain in the Constitution. There is no qualification and no equivocation about it. It says that half the members are required to do official business.

Now, Speaker Cannon was widely known, legendarily known for making all kinds of judgments based on his own desires, and the precedent, frankly, that he started and established, that you could recognize as a quorum fewer than half the members by defining them as those who were elected, sworn, and living, and it is the one that we rely on most frequently, has never been challenged. I'm

not sure where it would end up if it were challenged, but it's actually possibly of dubious constitutionality itself. I personally am very skeptical that rules made in the House that redefined a quorum down to a smaller number, given the history of the quorum requirement and the plain nature of the language, would ultimately pass muster.

And while we could do things that might--we could say work in the short run, because, after all, who's going to question them when we're in this state of emergency, remember one of the nightmares we have to deal with here is a subsequent challenge to sweeping laws passed based on whether they were done in a constitutional fashion. Frankly, we don't want even two years after the fact to have something that was done at a time of emergency challenged and very possibly overturned. So we need to be careful here as we go through, not just to deal with the most compelling element, the chaos ensuing after some catastrophic attack and making sure that the American people are reassured and that we are all reassured that we actually have our constitutional process in existence, but also that we don't end up with legitimate challenges because we've done things in a slapdash fashion or we've done things just as a way of expediting us through a process. It will be good to have done that if there's no other alternative, but we need to make sure that we have other alternatives.

Now, as we go forward and we think first about the Congress, it seems to me we have to take ourselves through a decision process. The first is, what can we legitimately do short of a constitutional amendment, and what can we do that will help in the event of this great catastrophe that will work in that fashion? I should note here, as well, that we are not just talking about the stuff of a Tom Clancey novel. There is a reason why this administration has over the last year frequently sent the Vice President off to an undisclosed location. It's not for political purposes. It's not for show. It's because of a fear at the highest levels of our government that a catastrophic attack, including particularly the suitcase nuclear bomb or the dirty nuclear device, could occur in the Capitol, something that may not wipe out the city, but that could take out several square blocks and that we need to have protection against this. So these are real and serious problems for all the branches.

Are there ways that we can deal with this short of a constitutional amendment? In your materials, and let me note that for anybody other than a member of the Commission or somebody directly connected here, everything that we will be discussing can be found on the website of this Commission, which is [www.continuityofgovernment.org](http://www.continuityofgovernment.org). It's all there. We have listed and put in detail the various proposals for reform, going back to the constitutional amendments proposed by and passed through the Senate in 1954, 1955, and 1960, up through the joint resolutions proposed in this Congress by Representatives Baird and Lofgren and Senator Specter, including a series of other proposals, constitutional amendments set out by Michael Davidson, who testified with us earlier this morning, the former counsel of the Senate, by Michael Glennon, a professor of constitutional law at the University of California at Davis, my own proposed constitutional amendment, as well as a whole series of ideas put forward by Don Wolfensberger, former chief counsel or staff director of the House Rules Committee that would be short of a constitutional amendment, and a proposal originally put forward by Eldon Fry of the Council on Foreign Relations and joined by former Speakers Foley and Gingrich that we need to consider. And, of course, some of the things that are now under the consideration of the task force, as well.

So, what could we do? Well, we do have proposals to expedite special elections and we have proposals to change the definition of a quorum. Proposals to expedite special elections are clearly within the Constitution, clearly could be implemented. But as Representative Martin and others

have suggested, the practical reality is, as we move forward to do this, and it can come as the House apparently will take up next week with a simple resolution urging the States to change their methods, or it could come by a piece of legislation under the constitutional provision allowing Congress to set the time, manner, and place of elections, as a mandate from Congress, reality is, we could not get this below 60 days. There are other problems that emerge if you move it down to a 60-day period. We have never before had to contemplate more than one or two or at most a handful of special elections at any given time, and we have the luxury, if you know you're going to have 433 or 432 Representatives around to make decisions, or 98 or 99 Senators, of taking our time, or if we wanted to speed it up, it would be pretty easy for one State with one Representative to do so.

Under a set of emergency circumstances, to pull together nationwide elections, have real campaigns when there might be chaos in places other than Washington, over a 60-day period is not something that necessarily is going to work very well. So while it is desirable, it is certainly not a sufficient mechanism for us. One of the things that Mr. Wolfensberger has proposed is to allow incapacitated members to take leaves of absence, and then presumably by rule, suggest that those members who have taken leaves of absence, there are vacancies and that those positions would not count for purposes of a quorum. We may want to debate whether that is appropriate or constitutional, but it also, I think, under the conditions that we have been discussing, probably not adequate, and we will have a fuller discussion and more paper for you, including whatever has been written on whether it is, in fact, reasonable or feasible by rule to alter the constitutional quorum requirement. What Mr. Fry and former Speakers Foley and Gingrich have suggested is to have members of Congress designate their successors and then have those successors automatically serve if their seats are vacant for a period of time until you could have special elections, part of the argument being that while there is a real question about whether that is, in fact, within the purview of the Constitution, nobody's going to question it in the short run. I think we could debate that, but the practical reality is we're not going to move in that direction.

For me, all of this leads toward a discussion of what kind of constitutional amendment we ought to be considering. We certainly ought to put forward objectives and do everything we can short of a constitutional amendment. But then if we do move in that direction, there are all kinds of questions we need to raise and things we need to discuss that are not all answered by the various amendments that we have out there on the table now, and in many cases weren't intended to do so, as Brian Baird has suggested. He put his original amendment out there as a way of getting something done in the immediate term facing a direct challenge, but also to get a debate going, because nothing deserves a deliberative process and careful consideration of every word and every quotation mark, every punctuation mark, than a constitutional amendment.

We need to consider what level of detail. Among the proposals that you have before you is a simple one by Michael Glennon that would simply give Congress the power to devise a legislative solution to the problem of mass vacancies, recognizing that the Constitution doesn't do it now and that you could designate that power to Congress and then leave it to them to handle the legislative problems. That's something that I believe would have been far more appropriate right after September 11 as a quick way of making sure that we had the authority to act. The more time passes, the more it seems to me that rather than leave this to yet another level of debate when we know there will be all kinds of questions raised, we ought to try and grapple with the more direct issues.

We have the proposal by Michael Davidson, which is really simply to take a parallel path for the

House to what we have done for the Senate, and that is simply to give governors the power to make appointments to fill all vacancies. That, it would seem to me, would be perhaps the most objectionable to those like Vic Snyder, who believe so strongly in the sanctity of elections themselves, because it wouldn't necessarily apply just to cases of deep emergency. It would, more fundamentally, change the nature of the House. But it obviously has the benefit of being parallel to what exists in the Constitution, which is something that we ought to be very sensitive to, and also is very simple. Beyond that, even if we simply take a parallel process which deals really with deaths and not with the issue of incapacitation, if we decide we only want these kinds of provisions to apply in cases of deep and broad emergency, we then have to grapple with the question of what triggers these emergency provisions.

Congressman Baird's amendment basically gives governors the power to make temporary appointments to the House if more than 25 percent of the members have been killed or are incapacitated. Representative Zoe Lofgren's raises that bar to 30 percent. Senator Specter in his proposed amendment raises it to 50 percent. But none deal with the question of who would determine when the 25 percent, 30 percent, or 50 percent threshold are reached, a very grave consideration given that we might very well find that there are no members of Congress around to make that judgment, and, as you can imagine, given the weeks and months that it took to determine who was even there in the World Trade Center towers, lots of people who were missing who later turned out to be alive, we may find some serious questions there and we need to specify, I believe, much more directly a provision that triggers this amendment that may, in fact, take it away from simply Washington-based figures, given that we might have a catastrophe that would be very disruptive in Washington.

So just as an example, what I have suggested is a provision which says that if there is a disaster, governors in each State would canvass the state of their own House and Senate delegations, and if each determine that more than half the members of the delegation, the House or the Senate, were missing or dead, that governor would then sign a proclamation to that effect, and when a majority of the governors had signed those proclamations, then you would trigger this problem. So you'd have a widespread disaster and we would know that basically roughly half the members creating this quorum problem clearly were in peril. There are other ways and we need to discuss and consider whether there's something better.

Beyond that, we have the question of how you handle vacancies. Should this just be simply given over to governors to make whatever decision they want to make? Frankly, just in a practical sense, I've found many members of Congress immediately raise the political issue. I don't want my governor replacing me because I don't like my governor, I don't trust my governor, or my governor is of the opposite party.

A similar problem, by the way, that you could raise about the whole notion of having members of Congress in the line of succession in the Presidential Succession Act, as the Speaker of the House or the President Pro Tem could easily be of the opposite party of the President. One Representative, Brad Sherman of California, has introduced legislation suggesting that it should be the Congressional leader, whether Speaker or Minority Leader, who is of the party of the President and so on. But it's obviously a reflection, whether you like that idea or not, of the concern that people have about an inadvertent or unfortunate event bringing about in and of itself a change in direction of the institution or of control. And while I believe basically that it should not be as deep a concern as many members feel, that in the case of this kind of an emergency, I can't imagine a governor not rising to the level of statesman or woman and picking a clearly superior person for a

temporary appointment, it is clearly there.

One way to handle it is the way in which Senator Specter does in his proposed amendment, which is to say that the appointee will be a member of the same party as the person who is killed. Whether that would stop mischief from occurring is another issue, because you can find members of a party who may not in any way represent the beliefs or carry through on the desires of that individual. You do have the question, even if it's ameliorated by the indirect mention of party in the 24th Amendment, of whether you want to make an explicit mention of party in the Constitution.

And we could turn to other mechanisms. In the amendment that I've proposed, and following at least in spirit along the lines of the Fry proposal, I drew on what Delaware, the State of Delaware, has done in its own legislation. In fact, many States in the Cold War era enacted legislation or constitutional amendments of their own to deal with problems of succession if they were wiped out. What Delaware has done is to have each member of the legislature designate between three and eight individuals, I believe it is, who could serve as their successors, and then the appointment is made from among that group. So rather than have the individual members designate individuals, as the French do, or as the Fry proposal would, you could at least have a range of people and create some limits on what a governor could do, and that would be constitutional. Whether it's too unwieldy or gets into too much detail is another issue we have to consider.

Beyond that, obviously, we have to look past deaths and vacancies filled by governors under the 17th Amendment or under any amendment that would be parallel that would deal with vacancies because of death to deal with this question of incapacitation. I am not as confident perhaps as Congressman Cox that you could do this by simple rules change, and I believe that even though issues of germ warfare and the like were raised during consideration of Cold War era amendments, that wasn't what was primarily on people's minds. What was on their minds was the nuclear attack coming from an all-out war with the then-Soviet Union. Now, I think, given the range of chemical and biological entities that exist, given the potential for use of things like tanker trucks and airplanes as surrogate weapons of mass destruction, the possibility of widespread incapacitation for weeks or months is a much greater problem.

We have a number of proposals out there. Let me say that not one of them contemplates replacing an incapacitated member, period, without any possibility of that member returning. All of them, not surprisingly, would suggest that if you have a temporary replacement of an incapacitated individual or large numbers of them, because this clearly presents a problem in terms of the presence of a quorum, that those individuals, when they were ready to return, could return. Certainly, we can look to the 25th Amendment, which was the first time that the Constitution even dealt with the question of incapacitation of any figure in the government, and that was the President, and we don't need that level of detail, obviously, for individuals, but we can contemplate and we should contemplate ways of determining whether somebody is incapacitated, can't serve for any length of time, what kind of temporary appointment. I think it's pretty easy that as soon as an individual under those conditions is ready to return, that individual signs a document indicating a readiness to return and then can supplant any person serving in that temporary position. But we need to work out the best kind of language if we're going to work in that fashion.

And then, finally, we would have to consider how long those vacancies should be filled, 60 days or 90 days, perhaps in the case of--if it's 90 days, that should leave ample time for States then to work out--or 60 days, even--their provisions for special elections. At the same time, it would probably be advisable to have some kind of a renewable appointment if you ended up with individuals whose incapacitation went on for perhaps six or seven months during the course of a single Congress. Of

course, all of those things expiring at the end of a term when you could have an election and replenish the members of Congress.

So those are issues on the table. You have drafts of amendments that have been designed to deal with some or all of them, or legislative proposals, and we need to come up perhaps with some of our own, and we will consider those as we contemplate in the weeks that follow. And then when we come forward on October 16 for the next meeting, I hope we can go into more detail and hammer out some ideas, not with the goal necessarily of coming up with one Commission proposal, but rather with a goal of coming up with a menu of ideas, somewhat better framed than the laundry list of proposals that you have in front of you, with pluses and minuses, advantages and disadvantages, for Congress to use.

Just a word or two on the courts and the Presidential Succession Act. We have not seen nearly as much work done on what to do about the courts. So far as I can tell, there is precious little in the literature, in law journals, in books, or elsewhere, about the problem of succession of the Court under emergency circumstances. It's not something that people contemplated in the past, in general, partly because, as we have heard, you can go for a couple of years without a Court and generally, given the reactive nature of a Court, not worry about it. Under these circumstances, it seems to me we are in a completely different situation. Every one of the hypotheticals that could become all too real that we have discussed could raise immediate questions about legitimacy.

When we get to the Presidential Succession Act, it is, in my judgment, one of the most poorly drafted pieces of legislation of a serious matter that I have seen. We had alluded to it earlier, but this piece of legislation says that if in the line of succession a Speaker of the House declines to resign from his or her post and accept an appointment as temporary President and you move on down the line and get a cabinet member serving, at any subsequent point, the Speaker can bump that person and become acting President. Now, if you think about those circumstances and that dynamic, it's hard to imagine they could have put that provision in. But you can just see a Speaker sitting there and saying to an acting President, now, you'd better do as I want you to do here or you will be unemployed very shortly and I will take your post, not to mention the manipulation that could occur as a group of people, small group, perhaps, chose one of their own to be Speaker, who could then bump another person at a subsequent point, maybe removing the Speaker if they didn't like the way things were going, putting in somebody who would then be willing to bump an acting President.

It's not a very good piece of legislation. There are serious questions that could be raised about whether members of Congress are constitutionally allowed to be in the line of succession. We don't really want court cases occurring shortly after the fact without having somebody to be there to consider them. We don't want to have Courts of Appeals out there, any one of which might be contradicted by another as something moved forward. We don't want to leave any questions.

So clearly, we want to find as best we can an appropriate mechanism for ensuring that we can have a functioning court of last resort, somebody who, under a set of circumstances where there may be vacuums and power and questions raised about whether somebody is legitimately acting as President, whether the Congress is acting appropriately, has the authority, and has the quorum to do so, who is in charge here can be adjudicated by that court of last resort. So we need to spend some time, clearly, with much less on the table to work through the various worst case scenarios that are all too tangible now in that regard.

I actually believe that while we need to reconsider and revamp the 55-year-old Presidential Succession Act, there is somewhat less urgency there. There is urgency, because every person in

the line of succession to the Presidency is in Washington. The only thing worse than having an obscure cabinet member who very few people have heard of suddenly popping up on our television screen saying, I'm President, is to have a vacuum where 20 obscure people and a couple not-so-obscure pop up and say, don't worry, I'm in charge here, all at the same time. So clearly, we have to deal with that problem. But the likelihood of having every cabinet member, the Speaker, the President Pro Tem of the Senate, the President, and the Vice President all together at once is a little bit less than the regular process in which more than half the members of Congress are congregated together, the Court meets en banc very close by the Capitol, and so on. So we may have a little bit more time, and that can be done legislatively. It doesn't require the extra time and effort of a constitutional amendment. But in due course, I hope we can get to all three of those things.

So we have our work, as you say, Mr. Chairman, cut out for us. We have a lot of materials already there and we will generate more before our next meeting, when we will act, I think, more as a working group necessarily than as a hearing panel.

Let me just conclude by once again thanking the staff of the House Administration Committee and Congressmen Ney and Hoyer for allowing us to use their room, the members who have come and testified, all of whom have put a great deal of work into this, and our Executive Director, John Fortier, Assistant Director Caroline Rieger, and Kimberly Spears, who also works with us, who are putting in large numbers of hours on this project, as well.

SENATOR SIMPSON: Thank you, Norman. I want to thank these fine Congressmen, Chris Cox and Brian Baird and Vic Snyder, for giving us a great deal of information and food for thought, and my senior Co-Chair who I would be deferring to him in this circumstance, but since it is a legislative arena, he said, you go ahead. He said that. It's a great honor to serve with these people, especially those gathered today, Lloyd Cutler and Bob Michael, Lynn Martin, Phil Bobbitt, and Judge Robert Katzmann. Thank you, Norm and Thomas and John Fortier. We have our work cut out for us.

I think the biggest thing to me, as a guy who's been in politics for 31 years, the thing you want to avoid most as a person that wants to be loved, and we all do--that's a critical thing, don't forget we love it. We have egos that need to be scratched. And the worst thing that can happen to you in politics is to be ridiculed, and I think we want to look at a case, not me, but my colleagues, when the American people say, why didn't those guys and gals think of that? Why didn't they think of what would happen when this happened? They knew it could happen. Where were they? What were they doing? How did they leave us like this? To me, that's a critical issue, ridicule. I've seen it. It's the only thing that makes a bureaucrat shrivel and the only thing that makes an elected person shrivel, is, you know, hey, bonehead, how did you do that? And I don't think we ever want to be in the situation where good people of both political parties have the American people looking at them in some unknown, horrible circumstance saying, how come they never thought of that and how come they didn't do something about that? I don't understand it. There may not be a lot of people around to explain it who were involved, but that's our job, I think, and I think we can maybe do it with rules.

Maybe we can do it with rules. Maybe we can do it with statute. We certainly want to pursue that, and I certainly want to thank you all. We hear what you are saying and we will continue to give our best efforts. But you are people of good will and good intention, all of you. Thank you. Lloyd, do you have anything to add?

MR. CUTLER: I never have anything to add to what you say. Do you want to say anything, Norman, about the next meeting?

MR. ORNSTEIN: The next meeting will be October 16. We have not yet found the best place for it, but as I said--

SENATOR SIMPSON: How about an undisclosed location?

[Laughter.]

MR. ORNSTEIN: In this case, we want to disclose the location as much as possible and have the largest audience possible because a good part of what we're about is public education. Getting actually back to what Congressman Michel said earlier, most Americans, when you raise this, say, gee, I never thought about that. I didn't know it. Frankly, with most members of Congress even now, when you bring the issue up, it's not something they've thought about very deeply because they're focused, appropriately, on the legislative product.

When you raise it with people out in the country, as I have done and as Brian Baird has done, as Tom has done, as many of the rest of us have, and you start to just walk through some of the basics, the immediate reaction is, you'd better fix it. But the immediate reaction of many members of Congress is, I don't want to touch it. Now, they don't want to touch it partly because they don't want to contemplate the prospect of their own demise, and I think the will analogy here that I raised at the beginning is very appropriate. I've seen all too many people of my generation who have children, and when they think about writing a will, even something that includes the most precious element, ensuring the appropriate custody of their children, they shrink back from it. In this case, there's that shrinkage plus the shrinkage involving the possibility of amending the Constitution.

So we have an educational mission, and it is for the public as a whole, it's for people who teach about these things and who need to bring them up in the classroom, and it's for the members of Congress, the administration, and the courts themselves who might not have thought about them. So we want to make this a public meeting.

We will probably have it, although our original idea was perhaps we would have the meeting at the Greenbrier, in the bunker--remember that we have this secret meeting place for Congress set up in the Cold War era that includes--if you've ever visited there, it's a fascinating place to go now, it's a tourist attraction since the end of the Cold War, deep underground but right next to the resort--that we might meet in the chamber itself, because they set it up in the event of a nuclear attack to be basically safe from explosion and fallout, with food and other materials and a chamber for members of Congress to function, because they recognized the preciousness of having a Congress, but all under the expectation that we'd have notice to get people out of Washington, 200 miles away. So we thought about meeting there, but then realized that the practical reality of getting busy people down there was probably not going to work very well, so very likely it will be somewhere here in Washington.

We will have this set up at the next meeting not quite like a markup session for a bill, but one where our focus is going to be much more on looking at alternatives and some of the questions that I've raised and others that you might have, working them through, and trying to go from drafts of potential rules changes, statute changes, new statutes, or potential constitutional amendments,

discuss the pluses and minuses, the pros and cons, the advantages and disadvantages, and then try from that point on, from October 16 until December or January, to work them into a report which we would then vote on or pull together for the Commission and then present to the Congress, the leaders, the President, and the Chief Justice, among others. That's the plan that we have. We don't anticipate at this point witnesses at the next meeting, but I do expect that we will have people who will be there to help us along the way, expert attendees, at least.

SENATOR SIMPSON: And from a broad range of this country's best.

MR. ORNSTEIN: Yes.

SENATOR SIMPSON: I mean, you will get it all, gather it all up in a big bucket.

MR. ORNSTEIN: We've tried to reach as broadly as we can here in every respect.

SENATOR SIMPSON: I know you do, and we want to do that because that's the only way we'll ever get it into the House and the Senate. It's very important. Thank you very much, and the hearing is concluded. Thank you very much.

[Whereupon, at 3:31 p.m., the proceedings were adjourned.]