CONTINUITY OF GOVERNMENT COMMISSION MEETING
Wednesday, October 16, 2002

The Brookings Institution
1775 Massachusetts Avenue, NW
Washington, D.C. 20036

COMMISSION MEMBERS PRESENT:

LLOYD N. CUTLER, CO-CHAIR
ALAN K. SIMPSON, CO-CHAIR
PHILIP CHASE BOBBITT
THE HONORABLE NICHOLAS DEB. KATZENBACH
LYNN MARTIN
ROBERT H. MICHEL

ALSO PRESENT:

JOHN C. FORTIER, EXECUTIVE DIRECTOR
ALTON FRYE,
MICHAEL GLENNON, THE FLETCHER SCHOOL, TUFTS UNIVERSITY
THE HONORABLE JAMES LANGEVIN (D-RI)
THOMAS E. MANN, SENIOR COUNSELOR
RANDY MOSS, WILMER, CUTLER, & PICKERING
NORMAN J. ORNSTEIN, SENIOR COUNSELOR
DONALD WOLFENSBERGER, WOODROW WILSON CENTER

PROCEEDINGS:

MR. CUTLER: Good morning. I'm Lloyd Cutler, and I'm the chairman--I mean, a trustee emeritus of the Brookings Institution, and I want to welcome everybody to the second meeting of our Committee on Continuity of Government, which has been convened jointly by AEI and the Brookings Institution to conduct a study of what happens in our government if a disaster occurs in which more than a majority of the elected members of the House or Senate should be killed or disabled or unable to get to Washington or unable to function. And our wonderful Constitution, which has survived better than any other written Constitution for more than 200 years, has a hole in it on this issue which we think needs to be filled.

This project is undertaken by Brookings and AEI. We're privately financed by a number of the grantmaking, nonprofit institutions around the country. And we want to make some presentations to the Congress by the end of this year so that they will be able to function on this vital, vital matter.

We have here a number of members of the Commission itself and a number of our staff advisors, and I'd like to turn the meeting over, for this morning, at least, to Tom Mann of Brookings and Norman Ornstein of AEI.

MR. SIMPSON: Lloyd, may I just say a word, if I might? It's a great honor and a privilege to serve as the Co-Chair of this Commission. Lloyd Cutler I have known for many years in various capacities, a very deeply respected American, my mentor and colleague of some time.

I just want to say this is pretty serious business, thinking about the unthinkable. We do a lot more of that now nationally and internationally in these days.

This is going to be very tough to do. Most people think, well, that sound sensible. You know, what would you do if that plane had hit the Capitol and they were in session? They'll do something reasonable. Well, I'm a politician. It will not be done easily because there are great egos. We of great egos have very serious issues that we confront, the Senate here, and replacing that is a piece of cake. Governors can get that done very shortly. The House is going to be resistive. They're going to be resistive because they are the people's House. They cherish the fact they have been directly elected. That is their heritage. They hold it close to their bosom. And it's going to be tough, very, very tough.

But there is bipartisan movement here in the House. There's much to do, and we want to have the support of Congress or we cannot succeed.

I just wanted to add that little touch. Thank you.

MR. ORNSTEIN: I'd like to thank both of our Co-Chairs for their service, once again bellying up to the bar of public service, whenever you're called you follow, and all the other members of the Commission as well.

Just to review the bidding a little bit, of course, we were created as a body in the aftermath of the horrific events of September 11th, which came with the realization--some of us that same day--that we had literally dodged a bullet in Washington. The Pentagon suffered a hit. The Capitol, the White House, we now know, at least with a fair degree of certainty, that the fourth plane, United 93, was headed for the Capitol, and we have testimony from others that suggested that they'd planned a fifth plane for the White House.

So it became clear that our institutions were imperiled in a way that we simply hadn't thought about before, not since the Cold War and in a fashion a little bit different than the Cold War.

As we saw at least some modest public debate ensue in the months that followed September 11th over the set of problems that existed and what might be done about them, we saw at least a couple of hearings held in the Congress, one in the Subcommittee on the Constitution of the House Judiciary Committee, another in the House Administration Committee, and then a few months ago, the creation in the House of Representatives of a task force under Representatives Chris Cox and Martin Frost, bipartisan, to try and grapple with some of these issues.

But it became clear that the movement in the Congress was going to be slow and deliberative and that it was appropriate for an outside group of distinguished Americans with experience in all the institutions, knowledge of the Constitution as well, to come together and grapple with these issues, perhaps move the debate along, and come up with a set of recommendations that Congress could use, was a good idea. And that was the genesis of this Commission on the Continuity of Government.

At the last meeting, the first meeting that we held last month, I suggested that, in effect, our task was to try to get Congress to write a will for the nation; that we now know that what was once fanciful and the stuff of fiction is all too real.

We learned at our last meeting a rather chilling fact that I had not been aware of before, that on the morning of September 11th at the Supreme Court, literally one block from the Capitol, there was a conference going on at which all nine Supreme Court Justices were present--not an unusual thing, of course--but along with them the 13 Chief Judges of the Courts of Appeals and 13 district court--top district court judges. If something had happened that day in that building, we would have, in effect, wiped out the lion's share of leadership in the federal judiciary as well.

We know that all three institutions have a gap, something that the Framers simply could not have anticipated, and that we have to find ways to deal with that gap. Our major focal point so far has been the Congress where the gap is the greatest. At our last meeting, we also had some consideration of problems with the Supreme Court, and that's an issue to which we will return, where the problem certainly starts with the legislative requirement of six members for a quorum, and it might be something that can be dealt with legislatively if we want to deal with it. And at a subsequent time, we will grapple with the naughty question of presidential succession where many of us believe there is also a problem, revisiting the Presidential Succession Act of 1947.

Now at this meeting, our charge is to try to go through some of the specific knotty issues that face us if there is a catastrophic attack on the Congress, in particular, and then move towards a menu of potential solutions from the level of least resistance, which would be changes in the rules of the House and Senate, up to what possibly could be done statutorily, and then ultimately whether there is a need for a constitutional amendment to fill these gaps, and if so, what kind of constitutional amendment.

This morning basically I believe we have to deal with two broad problems, problems that would occur. Just to take for a moment the most tangible example, what if a plane had hit the Capitol, crashing into the Capitol Dome at a high rate of speed, on the morning of September 11th, exploding, with jet fuel, burning jet fuel exploding all over as well, at a time when we know a large number of House members were in and around the Capitol complex, where we might have had very sizable numbers dead, many missing, many others rushed to burn units possibly to be in hospitals for a sizable period of time?

Two problems ensue from that. The first is the number of members required to do business, and at the same time, beyond the narrow issue of how many are required under the Constitution, whether it's advisable if you achieve that number but with a number so small as to make the idea of representation of the country at a time of great peril ridiculous.

The Constitution has what's called a quorum requirement. We'll have a discussion in a few minutes of the history of this, but it's flatly, plainly stated in the Constitution that a majority of members in each House is required to do official business.

So what that means, how it might be interpreted, whether and how it can be changed, and whether, if you ended up with, say, 400 of the 435 members killed, 35 members remaining, we would want 18 members making up a quorum; or to take it even further, 430 members dead, five members, three making up a quorum, choosing a new Speaker who might then be

in line to move into the Presidency on an acting basis, or making decisions as sweeping as a declaration of war or suspension of habeas corpus is desirable.

So we need to grapple with the issue of how we can be sure we have a constitutional quorum so that Congress can do business at a time of great national crisis and what that quorum ought to be.

The second question that again flows from the nightmare scenario is how you can replenish the membership of the House and/or the Senate if large numbers of members are killed and/or if large numbers of members are rendered incapacitated for a very sizable period of time.

As Senator Simpson suggested in his initial comments, it's less a problem in the Senate because there most states allow for and provide for appointment by executives to fill vacancies. The House of Representatives does not and has never had a member who has not first been elected, and special elections take many months, as we heard in our testimony at the first meeting of the Commission. But neither body has any provision to deal with incapacitation of members, and on that basis, you could have the absence of a quorum for many months in both Houses, also an issue that we need to deal with.

Those are the two central questions that we need to grapple with and look at ways of dealing with them that I hope we will be able to discuss in more detail this morning. Tom?

MR. MANN: Thank you, Norman. I'm delighted to have the second meeting of the Commission here at the Brookings Institution. If I may, initially I'd like to simply acknowledge the other members of the Commission that are here with us: Nicholas Katzenbach, former Attorney General, is with us; Philip Bobbitt, a professor of law at the University of Texas, a man who served in numerous capacities in government in the executive and legislative branch; and Bob Michel, the former minority leader of the House of Representatives for 14 years. We're delighted that you have joined our Co-Chairs at this meeting, and we expect several other Commission members to join us during the course of our deliberation today.

I also wanted to acknowledge and to thank a number of colleagues who are here with us to help in our deliberation. To my left, Randy Moss, a former director of the Office of Legal Counsel in the Clinton administration, who is now a partner at Wilmer, Cutler & Pickering; to Norm's right, John Fortier, who everyone knows is the Executive Director of this Commission and based at the American Enterprise Institute; Alton Frye, senior fellow at the Council on Foreign Relations, who also has had extensive experience in government; Michael Glennon, who is a law professor who has, I understand, recently moved to Tufts, and who was a part of early deliberations on this set of problems; and Don Wolfensberger, a long-time senior staff member of the House Rules Committee, now directing a project on Congress at the Woodrow Wilson International Center for Scholars, who has also been deeply involved in these deliberations. We're very grateful that all of you have been willing to lend a hand.

As you know, last month we had our first Commission meeting. The format was one of briefings and testimony, of gathering information. It included, I thought, useful testimony by Michael Davidson, the former Senate legal counsel, who will be joining us later. James Duff, the former AA to the Chief Justice William Rehnquist, provided, I thought, a very informative briefing on issues affecting the Supreme Court. While we won't wrestle with the

particular recommendations at this meeting today, we will arrange for deliberation by conference call to formulate our recommendations in that area.

But we also had an opportunity to hear from several Members of Congress, and I thought that conveyed to us the flavor of, as Senator Simpson said, what we're up against here. Chris Cox, who co-chairs a House task force, was with us. Vic Snyder, Congressman from Arkansas, and Brian Baird. Brian Baird has been an outspoken leader of efforts to formulate a solution to this hole in our Constitution.

Chris Cox, a very bright and very productive Congressman from California, has worked hard on this issue, but he understands, as does Vic Snyder, the political constraints that we face in the House of Representatives. As Senator Simpson said, many House members appreciate the fact that they, unlike the members of the Senate, get to vote in that chamber only after having been sent by a constituency in an election. Special temporary appointments are not permitted. That's a noble characteristic and distinction, but it's not very helpful if there are only 5 or 10 or 15 of those members after a catastrophic attack. Nonetheless, I think that testimony was particularly useful to us in our deliberations.

As Norm said, having taken that testimony and received those briefings, our agenda today is to begin to focus in on the two mega-questions, that is, achieving a quorum and replenishing the House in the wake of a catastrophic attack. And the question is: What can be done by House rules? What might be achieved by statute? And what can be achieved only through constitutional amendment?

I think that is our task today, to try flesh out those issues, and to be as specific as we can in addressing the shortcomings of each approach, but also in going through the particular subsidiary questions that arise if one believes, as I think many members of this Commission and staff do, that a constitutional amendment will ultimately be required if we are to provide a genuinely responsible will to the country to ensure the survival of the constitutional system.

After this meeting today--let me mention one other thing that has transpired, namely, the Congress, the House has acted to pass a resolution, advanced by the House task force on this continuity problem, really calling on the states to review their laws and to explore the possibility of speeding up the timetable for special elections. That is the extent of what has been achieved thus far. I think it was not inconsequential, but it doesn't go to the core of the problems we'll be dealing with.

In the weeks ahead following this meeting, the Commission and staff will be deliberating without additional meetings, but via phone and e-mail, formulating recommendations that deal with continuity problems on the Congress and the Supreme Court, formulating a report in January that will be presented to the leadership of the Congress and to the President, at which point we hope to turn our attention to some of the sticky problems of presidential succession.

So that's our agenda. Mr. Chairman, I now believe we are ready to proceed with the first substantive issue, namely, the congressional quorum.

MR. : Could we ask John Fortier, the Executive Director of the Commission, to make a presentation?

MR. FORTIER: I'd like to thank the Commissioners for dedicating their time to these important issues, and I'll jump right into the quorum.

Unlike our last meeting, I think we'd like to make this a little more conversational. I'm going to provide some background on the quorum, but we'd like you to jump in and discuss both some of the legal and precedental issues that we have, but also some of the policy considerations.

Briefly, first, what do we need to achieve a quorum? What do we need to achieve the proper number to have enough members to actually proceed with business in the House of Representatives? And then depending on some of the various interpretations, if we end up with a very small number that meets those requirements, do we want a House to operate with a five- or seven-member membership? And those are more broad questions that we might consider, but let me walk you through some of the details of the quorum, and we can get to the discussion shortly.

The Constitution has a requirement for the quorum, and it simply states that a majority of each House shall constitute a quorum to do business, a majority of either the House or the Senate.

There was discussion of this at the Constitutional Convention and, in particular, George Mason was an advocate of this provision, and there were really two competing factors: one, that we wanted to ensure that there would be a substantial number of members present to consider any business. This was democratic. It allowed large parts of the country to be represented. We didn't want the possibility of a small group going off on their own declaring themselves the Congress and enacting laws which would then either be challenged, or maybe several small groups. The history we had in the English Parliament weighed heavily on these deliberations.

There was a concern that with a large country as ours that maybe the central states might dominate, that they would send their representatives, the further-away states might not be able to get their people there, so we wanted to have a substantial number required to actually do business.

On the other side, we didn't want to make the number so substantial that the House couldn't operate, and what was settled on was a majority, a majority of each House shall constitute a quorum.

Just by comparison, the English Parliament at the time required a very small number, something like 45 out of the 500 or 600 members they had, and it was not a constitutional--a written constitutional requirement. It could be changed by the body itself. So this was an upgrade or a more difficult standard to meet than the standard that was to be met in the British Parliament at that time.

Until the Civil War, this provision was interpreted to mean that a quorum was one-half of the entire body of the House or of the Senate. Using today's numbers, 435 members, that would mean that 218 members would have to be present for any business to--

MR. : Of the House.

MR. FORTIER: Of the House, 51 of the Senate, to do business. And that number, if members had died or weren't sworn in, it didn't really matter. The number was 218 of the total electable number of seats that were present at that time.

Beginning in the Civil War, there were a number of precedents made by the chair, some of which I think we can discuss and some of which may be intentioned with the original constitutional provision, to somewhat loosen that quorum. The Civil War raised the issue of a number of states, with other states not having members elected or not having members properly elected to the Congress. There were going to be large numbers of vacancies if we considered the old rule. So there was an exception made that it would be a majority of members who were chosen for the House, properly chosen, and that exempted the Southern States, and they proceeded with a majority of members that they had chosen properly. Later--

MR. : [inaudible] there was an exception made.

MR. FORTIER: The chair rules, the Speaker ruled in the House. There's a precedent. Speaker Galusha Grow, the Speaker in 1861, made that ruling, and the Senate also made a similar ruling in 1864.

That chosen provision really was particular to the Civil War. It hasn't been used in a broader way, but there are two other additions that were made, other rulings, a series of sort of informal rulings, and then finally a formal ruling in the beginning of the 20th century that also living and sworn members might be excluded from that.

For example, if out of the current membership of 435, 35 members were to die, then would look at 400 members left living, we would make a majority of that 201. That would be the quorum requirement.

So you see there is certainly a difference between the interpretation before 1861, which would require 218 members, and this interpretation with 35 members dead, that would require 201.

MR. : John, for the record, it should be noted, of course, that at the time of the Civil War, the House was not [inaudible] 435 members. It was smaller.

MR. FORTIER: Correct. Using today's numbers--I don't have--in 1910, we set that at 435, but that number grew over the years at the beginning with 65 in the first Congress.

What are the implications--so I'd like to, once we get through a little bit more, talk about the interpretation of the House and how it's relevant to the interpretation of the pre-1861 interpretation and the constitutional requirement. It's also relevant because there are some efforts to think about possibly broadening that quorum requirement--or loosening it, I suppose is the proper word, making it easier to meet the quorum requirement in the case of members who are disabled, members who might not be dead but who wouldn't be able to perform their duties. There are discussions of those proposals.

Just what are the implications of not achieving a quorum? If at the time of a vote a member suggests the absence of a quorum and the House--it can use a variety of methods, or uses a method to determine the quorum and there is no quorum, there really are only two options for the House; that is, one, to compel other members to attend so that you can reach the

quorum, or to adjourn. One could adjourn and come back the next day, proceed again until one gets to a vote, and maybe someone raises that issue again. But one is stuck with those two options.

Then let's think about the implications of the current interpretation, that of a majority of chosen, sworn, and living members. That could lead to a very, very small number, meeting that rule requirement, and that would be if all members but five died, three would compose a quorum. Because the living members are only five, three of them would make a quorum.

MR. CUTLER: Don't the words of the Constitution itself, Article I, Section 5, negate that interpretation? Don't they say essentially that a majority of each House shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide?

Now that seems, to me at least, to say that you need a majority of those elected to do business, and the only things that are exceptions, the only allowed exceptions are to adjourn from day to day or to compel the attendance of absent members. And the Supreme Court has never really passed on this issue. How could the House Parliamentarian literally get away with that kind of interpretation? How could it possibly provide a constitutional exception?

MR. FORTIER: Let me raise a few issues on this question. First, as to the Supreme Court and what it has said on this matter, it has really ruled in one case--and it's not directly on the matter that we are discussing. There was one other major change in the quorum requirement, or it was more particularly in the way one counted the quorum, not what the quorum requirement was.

Before 1890, the House would count those present that would make up a quorum as those who were voting, not just those who were present, around. So that there was a delaying tactic that the minority used in the House, something like the filibuster today in the Senate, where the minority would sit out votes. They would not show up--or they would show up but they wouldn't vote, and then it was very difficult to achieve a quorum, very difficult to pass legislation. Speaker Reed changed that in 1890, ruled that we would count all of the members present, whether they voted or not.

This is what was ruled on by the Court in a case called U.S. versus Ballin in 1892. And in that case, the Court gives greater deference to the House, but it doesn't address directly the issue of what makes up a quorum, but more how does it count the quorum.

I could read briefly a couple of passages which are cited often by people in the House to allow the House to have this power of changing the quorum, but it is this: "The Constitution empowers each House to determine its rules of proceeding. It may not by its rules ignore constitutional restraints or violate fundamental rights"--getting to Commissioner Cutler's point--"and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be obtained."

Then it goes on: "But within these limitations, there are a lot of methods that are open to how one counts." One could count simply by a roll call vote. One could ask people to write their names down on a piece of paper. There are a lot of ways one could determine whether

one--who's there and what the numbers are. But it doesn't directly address the question of the definition of the quorum as one now interpreted as chosen, living, and sworn.

It's certainly been a precedent for a significant number of years, and that has great weight. The Court would certainly give deference to the House in many ways in allowing it to make its rules the way it would like. But there is a possibility that the Court might find that that definition or another one that might be contemplated to allow to exempt disabled members or members who can't function from that requirement. It might look askance at that interpretation.

So we should be concerned with whatever we come up with, if we're going to change rules, clarify rules, codify rules, because this is actually in the precedents. It's not formally in the written House rules that are voted on. All of this would weigh on us whether we should think about what the Court might ultimately declare certain pieces of legislation invalid if they were done under a quorum requirement that was somewhat sketchy.

MR. : John, just a question. If it were thought that by a simple ruling from the Chair you could convert the quorum requirement of the Constitution to exclude those persons who were disabled, that could not be done, as I understand it, on the basis by which we exclude those persons who are not present but living. That is, the legal fiction that they used in the past was to say that the members were, though not voting, at least in the lobby, that they were present and that courts would defer to the Speaker's determination of who was actually present, though not voting. But I take it with disabled member, that legal fiction really wouldn't serve as a basis. Is that right?

MR. FORTIER: Well, I mean, it's been ruled on. One could even argue, if one wanted to be a purist about it, that that applies to the exceptions for living and sworn also.

Just to back up a little bit, one has to actually object or make a point of order that there's an absence of a quorum. Much business goes on and there aren't a lot of people on the floor, not enough to make up a quorum, and yet it goes on because no one makes the point of order.

That being said, there is the assumption that there are people who might be able to attend, might be there, that we haven't really counted adequately, and if we really did count, we would come up with a sufficient number. In the case with large numbers of people dead or large numbers of people unable to make it to the floor of Congress, stuck in a hospital somewhere, then there is no--there can be no assumption that those people could show up, and that might undercut the view that what's going on is completely appropriate, even if no one objects to the absence of a quorum.

MR. : John, we have two senior members of the House leadership right here in our Commission, and I take it we all know that bills gets passed with maybe three people on the floor. But it's always because it's without objection.

What if there is objection, Congressman?

MR. MICHEL: Well, quite frankly—

MR. : Push your button, Bob.

MR. MICHEL: Quite frankly, particularly when they're considering bills under suspension of the rules, it would require two-thirds of the membership to vote, you know, and the presiding officer usually will say, Those in favor, aye; those in favor, no; two-thirds having voted in the affirmative, blah, blah, the bill passes; and there are only ten people on the floor.

Well, of course, if somebody's really opposed to the measure is there and he says, Mr. Speaker, I object to the vote on the grounds that a quorum is not present, and then the roll has to be called, and, of course, that makes--it could very well make a difference in the outcome.

MR. SIMPSON: Let me just add one fascinating curiosity. I can't tell you how many times in the U.S. Senate in my 18 years and as assistant leader for 10, the fun and games that goes with the quorum is legendary. I can tell you that I can remember many times when all 100 of us were on the floor and someone suggested the absence of a quorum, and they called the roll. The quorum call having been called, now the clerk will call the roll, and here we are a hundred of us right there. And that gives time for the leadership to round up votes, or the opposition.

But then, of course, the ordering of the sergeant-at-arms to sally forth and gather up the troops happened a couple of times in my time. They had a lot of trouble with Lowell Weicker, he was 6'7", weighed 240, and he told them to clear out or he's punch their lights out. I remember that. And the sergeant-at-arms did leave his cloistered chamber at that time.

But it is--the horrible part of it is they would figure a way to do it, and then the challenge could come later at any time. But I can assure you, politicians will figure a way for a quorum and to do business. The issue is whether it's legitimate, whether it would stand. And in the chaos of what we're describing, forget clarity. You've got guys running around burned, in hospitals, and the nation's business, and people in California and Wyoming and saying, Do something. They're not here in this remarkable place of chaos.

So if we can deal with that, knowing that the creativity will be unbounded.

MR. : Then, too, it's happened in the Senate more than in the House when, on a very critical vote, one makes the difference. And members have been disabled in the hospital and, of course, brought to the floor of either the House or Senate in a stretcher to cast their vote.

Now, they've got their senses about them, but they're pretty disabled, you know. Then you get into the question of what is really disabled under our definition during these deliberations.

MR. ORNSTEIN: We do know that large numbers of pieces of legislation have been passed with only a handful of people on the floor and that, in theory, they could be challenged on the basis that a quorum was not present. But all you'd have would be--we know that the membership is living, they're around. All you'd have would be the visual evidence that might come from a C-SPAN camera or people in the gallery, which wouldn't be much to go on.

What we have to concern ourselves with here as much as anything is if a majority of members are dead and it's clear that they're dead, and then Congress tries to operate on the

tenuous basis that no one member will stand up and object on the basis that a quorum is not present. But actions taken under those circumstances would clearly be unconstitutional, if you accept the notion that a quorum is half the members, because there weren't half the members.

So all those things could be challenged later on, including, of course, extraordinarily sweeping and critical pieces of legislation.

We've had some Members of Congress suggest to us not to worry about it because no one would object. Obviously, all it would take would be one objection. But even if you didn't have the objection, we have to concern ourselves with the nightmare that could also take place of all of these actions being thrown out later on because they were manifestly unconstitutional.

MR. : If that occurred, could they be ratified? When you did have a quorum, could their past actions be ratified, go back and ratify them?

I must say I'd love to be--if you couldn't get a quorum, one person can object, have a huge amount of power: I'm going to object unless you do it this way.

MR. ORNSTEIN: Well, you could have not only one person objecting, but then if you did have a quorum of, say, three people, two of them constituting two-thirds could override any presidential veto as well.

MR. : Yes, but I think the fact that unconstitutional legislation could, in fact, be later ratified is an important ingredient in determining what might happen.

MR. : On the ratification point, I think it may depend in part on what sort of legislative action is taking place. Perhaps a declaration of war, we have a President who's gone to war with authorization from broad members of the House. The House of Representatives has authority to expel members. What would happen if members were expelled?

I think in general your garden variety statute probably could be ratified, but I think there could be circumstances--

MR. : [inaudible] be ratified.

MR. : Let me add one that would be--could possibly be ratified afterwards, but would certainly be hard to take back, and that is, if we allowed a very small number to go forward as if there were a quorum, and if this attack had also killed the President and the Vice President, then that very small number of people would elect a Speaker, say five people would elect a Speaker who would become the President of the United States.

MR. : Or suppose that legislation had suspended the writ of habeas corpus, and somebody had been arrested and tried by a military commission and shot. You can't ratify that. It's certainly going to get to court to challenge the constitutionality of it, I should think.

MR. : I must say, the President elected by the two members or three members of the House as the Speaker I think would have some difficulty getting huge popular support.

MR. : Isn't that really the problem with ratification later? At the time you want--in the condition of such chaos, you want absolute clarity because you want legitimacy. You want something more than simply we're doing this tentatively on the hope that someday at a future time our actions will be judged proper by some future body.

MR. : I guess what was going through my mind--and I haven't made it up--is that in that kind of a crisis, whichever kind it is, you're going to have--if there is a President, he's going to seize authority, use the authority with or without the Congress; and, therefore, while you want to legitimize that as soon as you can, it would not astound me to have a President exercising that kind of authority for 60 or 90 days. And if you knew if you were going to have a Congress in 60 or 90 days, I think that might serve as something of a caution in terms of what he might do.

But I guess my tentative thinking on this is that--this is a risky thing for me to say in this company, but the crucial issues is really whether you have a President or a Vice President that is capable of gaining popular support in that kind of a crisis. If you don't have that, you really have chaos. And I don't think it's chaos that the House and the Senate, with all their wisdom can fill.

MR. ORNSTEIN: Just to take slight issue with that, this is something that's come up in a more, I suppose you could say, jocular vein for many of us when we've discussed this issue. We wouldn't have a Congress for 60 or 90 days, and the reaction is: And the problem is? And that's included, of course, from some Members of Congress.

The problem is really whether even at a time of that enormous crisis you want to resign yourself to the expectation that you could get benign martial law, and that, in effect, is what you're saying. It's not a big problem. It would be martial law, but it would be benign because whoever would seize power under those circumstances--maybe the President who is elected, maybe the Vice President who is elected, maybe someone further down the line of presidential succession--would operate in a reasonable or benign way because he would know--he or she would know that 60 or 90 days down the road there would be a Congress back.

For a lot of us, that's not a comforting thought that we could be left with that possibility.

MR. : Norm, in thinking about that point, it seems to me that there is one check on the President under those circumstances, which is impeachment. And if the President has popular support and is operating outside of the law, the President could operate with some confidence that they wouldn't face impeachment proceedings.

If the President did not have that popular support and was doing truly radical things, when the Congress was reconvened, the President would be subject to impeachment.

MR. : Yes. I guess the answer's yes.

MR. : First of all, welcome to Commissioner Lynn Martin. Delighted that you're here, Lynn. Just if I may take a minute to review the bidding on this whole issue of what has been achieved through the rules, what might be achieved, and what the problematics are, the first issue has to do with potential constitutional problems with using House rules to deal with quorum problems.

Lloyd has raised the issue of whether the current House precedents that define the quorum from among members who are elected, sworn, and living is consistent with the Constitution, noting that it really hasn't been addressed by the Supreme Court directly. Then the additional constitutional question is whether that matter not having been resolved you can add further or subtract further from the denominator in calculating the quorum by basically excluding disabled members. And certainly that discussion is taking place on Capitol Hill now.

Don Wolfensberger may have some insights into where that's going, but at the very least, I think we have focused on a potential constitutional problem in trying to address the disability problem through the House rules.

Now, the second set of concerns beyond the constitutional issue are the issue of the number of members who are actually present and functioning in the wake of a catastrophic attack. Mr. Katzenbach has discussed the possibility of sort of temporary actions sort of being constrained by a functioning and legitimate President or acting President and by the likelihood that a full Congress would be replenished 60 or 90 days down the road.

The concerns, I think, go to the legitimacy of any actions taken by a very small number of members who could constitute one state delegation out of 50 or a handful of members, and then the bizarre possibilities that might result in terms of veto overrides and presidential succession as a result of the small group.

So I think those are the two sets of concerns that arise when one tries to deal with the problem of quorum through House rules or Senate rules. And I'm wondering if the Commission sees it like that and, therefore, would tend to be moving in the direction that House rules provide a rather inadequate means for dealing with the problem of a quorum.

MR. CUTLER: Alton, did you wish to say something?

MR. FRYE: Mr. Chairman, I did think if it's appropriate at this point to relate the quorum issue to the general issue of the House's authority under the rules. I don't want to make the argument that Speaker Foley and Speaker Gingrich and I have put in print elsewhere in favor of an expansive reading of the rulemaking authority. But I do think that this discussion needs to be embedded in the fact that the Court has been extremely deferential to the latitude of the Congress under its rulemaking authority.

If you would bear with me, I'd like you at least to hear the full relevant paragraph from that Supreme Court decision in 1891. I think you will see that it is very expansive.

First of all, the Court ruled in favor of the validity of the House rule on the quorum. That's fact number one, and its specific language was: "Under the Ballin opinion of 1891, neither do the advantages or disadvantages, the wisdom or folly of such a rule present any matters for judicial consideration. With the courts, the question is only one of power. The Constitution empowers each House to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations, all matters of method are open to the determination of the House, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just. It is no objection to the validity of a rule different what has been prescribed and in force for a length of time. The

power to make rules is not one which, once exercised, is exhausted. It is a continuous power, always subject to be exercised by the House, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal."

That language is, I think, quite expansive, and nothing in subsequent Court opinions of which I'm aware limits it beyond that initial formulation.

MR. CUTLER: That does leave open the question of whether there is a constitutional restraint to go down to a very low quorum.

MR. : Yes. All I would say about this provision, Lloyd, is that they were ruling on the specific issue of the adjustment on quorum requirements by rulings from the Chair, by adaptation after the Civil War. And basically they did acknowledge in this decision that the House had authority to change the precedent that had governed for the early years of the country, adapt it to the new reality, and they basically are, I think, suggesting that they are prepared to give pretty broad latitude to how the House interprets that constitutional restriction.

MR. : Just to be a little clearer, though, it deals primarily--or exclusively, actually, with the question of how the House counts to get to a majority. In this case, do they count the members who are present or do they count the members who are voting? What constitutes a quorum, whether the quorum is a majority of those sworn, living, or a majority of all of those, was not directly addressed by this, and that's the constitutional restraint. There may be many methods of counting whether we have a majority, by roll call, writing your name down, all sorts of methods. But what wasn't addressed directly was the question of what does that constitutional provision or the constitutional restraint, as the Court puts it, mean a majority of each House shall be necessary to do business.

MR. CUTLER: Since this is one of the major issues we're going to discuss today and we'll discuss in the future, perhaps while we have this learned audience here we should spend five minutes taking any questions or comments from members of the audience.

There are mikes around the room, I take it. Is there anyone who wants to make an observation other than the members of the Commission? Hearing no objection--

MR. SIMPSON: It was interesting, as I read the material here, that the rules of quorum in the House are simply set by precedent and not by rules. So it would be good perhaps if the House would codify their precedent into a rule, that would be a start as to the definition of a quorum. Isn't that correct?

MR. : The Senate--it is in the Senate rules. The House--the precedents have the effect of rules, but they're not written down in the rules and voted on in quite the same way as the precedent rulings of the Chair.

MR. SIMPSON: If anyone out there would like to get into this, feel free.

MR. ORNSTEIN: One thing we should just note here, Alan, is that certainly under discussion in the Congress right now is to add a rule that would try and deal with the problem of incapacitation by basically suggesting that incapacitated members wouldn't count in a quorum requirement.

That, I think, might get us very much to the limitations of Ballin, and, clearly--I mean, there's no doubt, as you read that paragraph or listen to that paragraph, that it's expansive. But twice they're very carefully adding the restriction within the limits of the Constitution, and what the Constitution says is fairly plain, but also consider what would happen if you had a rule that basically allowed the Chair to define incapacitated members and then exclude them from a quorum. And then the ability of a minority at non-emergency times to use its absence, in effect, as a lever would disappear entirely, and the amount of mischief that could be caused would be very considerable.

So this is an issue we have to address, I think, as well, in terms of our own judgment of whether that would fit within any constitutional stricture.

MR. : Lloyd, could I just ask a question? Can we get a definitive ruling here on Ballin and whether Ballin applies to the precedent with the language "elected, sworn, and living," or whether it only applies to Speaker Reed's decision to count members who were around but not formally indicating their presence?

MR. WOLFENSBERGER: In that case--I'm Don Wolfensberger, formerly of the Rules Committee. In that case, the ruling only went to Speaker Reed's counting people that were in the chamber, but did not respond to their names. But I think the thing that Alton Frye is pointing out is that the Court said the Court would probably give broad discretion to the House in determining its rules as to how to count for a quorum. But I think that goes to a certain limit. I think it probably would allow for the precedent of living, sworn, and chosen.

If you go beyond that, though, as I tried to do in an earlier proposal that I recommended, and say that the House by a majority vote can declare somebody temporarily incapacitated and, therefore, they would not count for a quorum, I've had second thoughts about that one.

I have said, though, if the House finds somebody incapacitated to the extent that they're not likely to regain their capacity during that term, that the House by a two-thirds vote could declare a vacancy. I think that would be found constitutional because that's the same vote you need for expelling a member.

MR. : And it should be noted, too, I think, that at the beginning of each Congress, next January 3rd, after an election of the Speaker, first order of business is to adopt the rules under which the House would operate for the coming Congress. So that's the mechanism by which you would adjust or change the rules from the previous Congress or whatever.

MR. CUTLER: Go ahead.

MR. : I want to return, before we get too deeply into the quorum business, to something that Nick Katzenbach raised that seems to me very profound, very deep, and it goes to a much broader issue than simply the House's ability to determine its quorum rules.

Were you suggesting that perhaps it wouldn't be such a bad thing if during a period of such an emergency, the President more or less ruled by martial law, waiting for us to ratify later with a full Congress, rather than go through these intricate contortions to get something for an interim period, it's absolutely better just to not have a full Congress during this period because it would be a period of such enormous emergency that, if anything, it would just gum up the works, that you'd be better off with martial law for 60 or 90 days and we shouldn't even bother with all this minutiae?

MR. KATZENBACH: I don't think I was going that far. I might have been. But I was really just exploring the question.

What I think is, in fact, true is that if there is a President when this occurs, he is going to seize that ball and run it way down the field. And he'll do that if there's a quorum, if there isn't a quorum, and they're very unlikely--if I can judge even from current history, it's very unlikely that anybody's going to stop that action.

Now, I don't want to--I think that depends very much upon having an elected President. And I think I would throw the Vice President into that mix, although not with quite the same effect. But it doesn't--if you get into succession, it's not going to do it with a successor. I don't know what the answers to these problems are. I'm trying to find out.

MR. : If I might add to that, in the case of the Civil War--it broke out in April of 1860 or '61, and it wasn't until July 4th that Lincoln called a special session of Congress to consider the necessary declarations and so on. So he in the meantime did impose martial law, suspended habeas corpus, then went to Congress on July 4th and said, Ooops, I know I shouldn't have done this, but you weren't around, and basically they ratified it retroactively. So that's what happened in that case.

MR. : That's what I remember.

MS. MARTIN: It seems you're bringing up, though, three different areas. One, I must in the midst of the rain and clearly awful news around this area say that, believe it or not, I trust whoever is the President and the House--I mean, if this is going to be that kind of an emergency, it is hard to believe they'll behave truly badly. I mean, you know--

MR. : It's hard to find anybody else to trust.

MS. MARTIN: Yes. I mean, at some point you have to say, if someone is trying to destroy the Government of the United States, it is not going to be a time of partisan, picayune bickering. And I think there will be a natural move, both good and bad, to allow the executive to do what must be done. I mean, the idea that someone would use this as a power-making authority to run, sort of in the under current here, turning it into some kind of a horrible dictatorship, although possible, strikes me as losing an essential faith in the American people and the people who represent them.

But the second part is far more likely in crafting whatever it is we end up crafting, which may or may not be anything, is the mischief that could be done with such a rule, amendment, whichever route you go, when it isn't an emergency. Now, that's far more likely for the House to do, I must tell you, as someone who used to like rules and search for those kind of things, always in the name of better for the American people, of course. But that strikes me as more likely than some of the horrendous situations and I think something we have to be very careful of in trying to protect and move the world in the course of heinous tragedy, we might be providing something that we--you know, the law of unintended consequences, where it would be used in quite another way. And I think we have to be very careful of the creativity of people that live in Washington.

MR. CUTLER: Nick, when you testified back in 1961 on behalf of the Department of Justice--

MR. Katzenbach: 1861.
[Laughter.]

MR. CUTLER: When you had appeared, like Abe Lincoln. But I think you said then that one solution might be to have a constitutional amendment that simply authorized Congress, in the event of a defined disaster, to make rules or to enact legislation that would deal with that kind of problem, and it could be done either before the catastrophe happened or after it happened. Do you still feel that way?

MR. KATZENBACH: Well, I don't change--I rarely change my mind, Lloyd, as you know.

You could do some mischief with a constitutional amendment that was broadly drafted. Now, that gives me some pause. Apart from that, it seems to me more wise to allow the whole of the Congress to provide for this and to change it from time to time as they see fit. So I think--

MR. CUTLER: Even before the disaster occurs.

MR. KATZENBACH: I think so, yes. But I do worry about the potential for mischief even in a broadly drafted constitutional amendment.

MR. CUTLER: We're going to interrupt this discussion for a moment because Congressman Langevin, of Rhode Island, I believe, is here and wants to address us on a particular project of his own.

MR. LANGEVIN: Thank you and good morning.

I'd like to begin by thanking Senator Alan Simpson and Lloyd Cutler, as well as the Brookings Institution and the American Enterprise Institute, for your collective commitment to answering the complex questions about continuity of government, a very important issue facing us right now.

As you're aware, Congress recently passed landmark election reform legislation, which included recommendations from the National Commission on Federal Election Reform, and I thank Presidents Ford and Carter and Mr. Cutler for your work on that very important issue.

It's my hope that the Continuity of Government Commission will have a similar impact by helping Congress address the issue of sustainable government in a careful, comprehensive, and bipartisan fashion.

Today, I wish to address specifically Congress' ability to communicate and conduct business in the event of disruption caused by catastrophe or a major natural disaster.

As a member of the House Armed Services Committee's Special Oversight Panel on Terrorism, and as a member of the Cox-Frost Continuity of Congress Working Group, I've called for a study into the feasibility of establishing a secure system of congressional communications and operations in the event of an emergency. This proposal, known by some as e-Congress, is certainly worthy of discussion, and I encourage the Commission to address the concept in your final report.

September 11th and the subsequent anthrax attacks on our congressional offices exposed just how vulnerable we are, particularly because we're centrally located. In fact, had the Pennsylvania flight taken off on time and headed straight for the Capitol, we would have been casting a journal vote in the House of Representatives when the plane hit.
In December 2001, I introduced legislation calling for -- [tape ends].

-- after the House Administration Committee held hearings on the legislation, I incorporated several of the witnesses' suggestions into another measure, H.R. 5007, which would direct the Comptroller General to work with the National Academy of Sciences and the Librarian of Congress to study the possibility and costs of implementing an emergency electronic communications system for Congress.

I'm not alone in my concerns for the unthinkable. Four years ago, Speaker Gingrich and President Clinton made a historic commitment to analyze U.S. national security in the 21st century, particularly the threat of terrorism here and abroad, and to establish concrete recommendations to address this threat and safeguard the American people and institutions. The Hart-Rudman report was the result of this visionary pledge. This report concluded that, and I quote, "America will become increasingly vulnerable to hostile attack on our homeland, and our military superiority will not entirely protect us. States, terrorists, and other disaffected groups will acquire weapons of mass destruction and mass disruption, and some will use them. Americans will likely die on American soil."

We cannot ignore what so many leaders and experts in international terrorism have been telling us over the past several years. The time is ripe for Congress to take responsible, appropriate steps to ensure that we can continue to function smoothly if the Capitol Hill buildings are destroyed or Members of Congress cannot deliberate in Washington, D.C.

E-Congress is a powerful option, but it's not the only option. The most important aspect of such a plan is to establish a two-way backup communications system that is both reliable and secure. Moreover, this plan would be executed in an emergency. The traditional personal, face-to-face interactions that we all enjoy in Congress would not be jeopardized. The e-Congress idea is simply a means to facilitate an organized system for congressional continuity if, and only if, an attack or other disaster strikes again.

While several Members of Congress have expressed discomfort with the concept of an e-Congress, I believe it is our duty to prepare the legislative branch for any kind of disaster. By addressing these concerns presently, we may have a more comprehensive understanding of how such a system could be incorporated in methods of deliberation, parliamentary procedure, a method for the public to follow congressional activities, and other such details for effective and constitutional continuity of operations.

I'd also like to note that other components of government have already begun such conversations. For example, the Federal Reserve has adopted an e-Governors system so that members of the Board of Governors may receive information, engage in deliberations, and vote in a secure online environment. The technology is available to make this a reality for Congress, and I have no doubt that we may implement such a program in a responsible manner that preserves the integrity of our institutions.

I urge you to conclude this issue of emergency communications in legislative operations in your agenda, and I look forward to working with you on this and other matters. I also want

to commend each and every one of you for your work on this continuity of government issue.

Thank you very much.

MR. CUTLER: Does anyone have any questions for the Congressman? Tom?

MR. MANN: Have you explored whether the single provision in the Constitution dealing with the quorum puts any constraint on the proposal that you have in mind? That is, the language reads, "A majority of each shall constitute a quorum to do business, but a smaller number may adjourn from day to day and may be authorized to compel the attendance of absent members in such manner and under such penalties as each House may provide."

The reference to attendance suggests a meeting, a meeting place, a coming together of members. Would a backup provision of the sort you're talking about for emergencies require constitutional change, or do you think it would be compatible with the language of the Constitution?

MR. LANGEVIN: It's been our opinion that it would be compatible with the Constitution. Obviously, in terms of the word "meeting," it would require a broader interpretation than the Framers could have envisioned at the time that they wrote the Constitution. But in terms of--just by way of example, the members of the Board of Governors of the Federal Reserve, quote-unquote, hold their meetings in some cases by electronic means and actually vote. And I would say that the same would hold true that the Members of Congress could, in fact, meet by electronic means and conduct business.

But, again, I underscore the point that I would only advocate this be done in the event of a national emergency. I clearly prefer the face-to-face communication and interaction with members on the floor or in a location that is central and allowing us to come together. But we recognize now that we live in a day and age that we no longer may have that luxury or that option in the event there were the use or threat of chemical, biological, or nuclear attack.

MR. MANN: And I presume this is a solution to a problem of a catastrophic attack at a time when members are--many members are dispersed in their districts. So it's not--you don't have to grapple with an incapacitation problem. It really is just--it goes more to the problem of not being able to congregate from disparate locations. So it's one piece of the problem which I gather wouldn't really answer the question what if an attack occurred that wiped out half or more of the members of a House.

MR. LANGEVIN: Right. It wouldn't specifically address that. We'd have to deal with quorum issues. I know that those are things that you're discussing right now. Of course, it would be important to resolve those as well. We're dealing with that in the Continuity of Congress Working Group, the Cox-Frost Commission.

MR. CUTLER: What about Section 2 of the 20th Amendment which requires the Congress to assemble at least once a year? It fixes the date as January 3rd.

MR. LANGEVIN: Yes, and perhaps that's something that could be addressed by a rule or by a joint resolution of both the House and the Senate. It would meet in the--I think in the Cox-Frost Commission we're also dealing with meeting in other locations other than the

Capitol by passing a joint resolution in the beginning of the year that may allow for us to meet in places other than the Capitol if it were necessary. So perhaps that's something that, you know, you have in terms of a joint resolution at the very beginning of the year that would allow this to happen in the event of an emergency.

MR. CUTLER: Why would Congress ever meet except in a pro forma way if you had an e-Congress method of balloting on all issues?

MR. LANGEVIN: I wouldn't advocate for, again, use as a matter of routine. I think that the face-to-face communication and interaction is far more preferable. And that may be the danger that, you know, there would be some who would say that it may be more efficient to have a meeting by e-government as opposed to--an electronic meeting as opposed to traveling across the country to come to one particular location. But it's not something that I would support as a matter of routine, and that would be the challenge for us not to make it something that is used as a matter of routine.

MR. : May I ask a question of the Congressman?

MR. CUTLER: Yes, sir.

MR. : Has anybody addressed Clause 4 of Section 5, Article I, which implies how each House shall sit in a single place, "Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting." Of course, the House consists of members elected by the people. How could some members be sitting one place and other members be sitting another place?

MR. LANGEVIN: Again, that's something that, as we said, would be decided upon by joint resolution in the beginning of the year that in the event of an emergency that we could do that. I think it could be addressed in that way.

Again, I think what--I just want to make the point, too, that this may come down to the issue of do you want more or less involvement by members in the event of a national emergency? Do you want an ability to conduct business or not? It may come down to--I know in dealing with this quorum issue, there are some who say that--on the Cox-Frost Commission we're dealing with allowing members between three to six days to come to a central location if we weren't able to work out at the Capitol, and whoever gets there within the three to six days, that would constitute the quorum, and those that aren't there would not be part of the membership.

And I would say that, again, it comes down to do you want more or less participation, do you want more or less members functioning in their capacity as representatives? If you're not concerned with maximum participation, maximum attendance in a, quote-unquote, congressional session, then you're not going to be concerned with e-Congress. If you want maximum participation, maximum ability for representation, then e-Congress I think presents a very powerful option.

MR. CUTLER: Under Article I, you could adjourn to a different place with the consent of the other House.

MR. LANGEVIN: That's what I would advocate.

MR. CUTLER: But you're proposing adjourning to an infinite number of places.

MR. LANGEVIN: It becomes a matter of interpretation of the word "other places."

MR. CUTLER: Any other questions?

[No response.]

MR. CUTLER: Thank you very much, Congressman.

MR. LANGEVIN: Thank you. Again, thank you for the work that you're doing.

MR. ORNSTEIN: We should probably move on to a discussion of replenishment, Mr. Chairman. We might just note that one of the issues that Representative Langevin raised--and it gets to a point that Lynn Martin made earlier as well--is making sure that any provisions we deal with are for conditions of dire emergency. As we move towards consideration of recommendations, one of the areas that we should be considering this morning, this afternoon, and subsequently is how we set thresholds for determining when any of the provisions we're talking about take effect; that we really do want to make sure that there is no opportunity for mischief here in a non-emergency condition. It's a separate set of issues when it comes to an e-Congress, certainly, a whole separate set of issues that we would want to consider, including the constitutional ones, but for any of these others as well.

MR. CUTLER: John, do you want to move to that point? Alan?

MR. SIMPSON: I just think, looking at Lynn and Bob and thinking, without saying anything, how many times you wish you could have designated someone as incapacitated. It would have been a marvelous thing. I can think of several, and several votes where that would have been a critical decision.

MR.   : May I raise a point before you move on to replenishment? Something that Congressman Langevin mentioned which I think is very pertinent here, it's a problem that was raised by John Fortier at the bottom of page 3 of his background piece, and that's what I call the Catch-22. How do you jump-start a new Congress that's reconvened somewhere else when you're operating under the old quorum rule? You're assuming, you know, 218 for a quorum, and so for the new Congress to meet before it can declare vacancies, you've got to establish that quorum, unless, of course, nobody objects and you proceed under unanimous consent.

And I think what Congressman Langevin was referring to in his task force is having an emergency rule that applies when--and I have tried to devise something along this line that I'll be glad to pass out, which says that when you have extraordinary circumstances where a substantial number of members are presumed missing or dead, and Congress reconvenes under an emergency designation by the Speaker--or someone designated by the Speaker if the Speaker has been killed, and they now have a way of doing that--that the people that show up and answer to their names initially shall be considered the members that are alive, and that the Speaker shall have regulations to certify those that are subsequently considered to be living and accounted for so that they would count towards a quorum then once you have identified people that--members that are alive. And I call this a common-sense quorum, but

I can't imagine that the Founders ever envisioned a Catch-22 situation where you couldn't jump-start yourself once you had a substantial catastrophe.

And so I would like to just pass this out, and perhaps this is something that the Commission would like to consider.

MR. ORNSTEIN: That's a very helpful and important point. Mr. Chairman, if I may, let me just raise the sort of structure of the issues that we're dealing with now quickly.

When it comes to replenishment, as I suggested earlier, we're dealing really with two problems. One is how you can replenish the House and Senate if substantial numbers of members are killed in some kind of terrorist attack. And as we suggested earlier, the Constitution as amended provides for the rapid replacement of Senators by giving states the ability to have appointments made. In most instances--not every, but in most instances, the states have given Governors the right and ability to make appointments to fill vacancies.

We know now just as one example that we have in Missouri, in fact, a contest to fill the remainder of a term from an appointment that had been made after a vacancy, in this case caused by a plane crash with an election. But it happens with some frequency.

In the House of Representatives, there is no such provision. House vacancies can be filled only by election. States are all basically given the authority to set rules for special elections to fill vacancies in the House of Representatives. The rules vary widely. The Congress has the ability to, in effect, set a national standard if it wants by the authority to set the time, manner, and place of elections.

What we know and what we've provided to the Commission is information on the rules and laws in the states and the practices in the states that tell us that special elections generally take between three to six months and average about four months. So under the circumstances of very substantial numbers of deaths in the House, under current practice it would take four months basically before you could replenish the body--four months, of course, at this time of dire emergency.

The House has now acted to urge the states to try and shorten that time frame, and the House has suggested that it ought to be moved to 60 days. Well, that's obviously a much shorter time frame, a smaller problem, although for many of us it would remain a dire problem. But we also have to consider--and indeed the House task force had some discussion of this at one of their meetings--whether it's even practical to hold not one special election, or two or three, which happens frequently now, but 200 at the same time under conditions of chaos in the country and when we know that we have only a couple of vendors in the country who print ballots and provide all the election machinery necessary who probably couldn't do this, mobilizing in a set of districts across the country.

So it's not at all clear either that the country would have the appetite for an election within 60 days or that, practically speaking, that could take place.

So we have to really consider other means of replenishing the body in the case of an emergency and whether that can be done through any method short of a constitutional amendment. I think the conclusion is it could not, that there are ways in which you could presumably get the states to move forward or even have the Congress set a date certain within which elections could take place. But--

MR. CUTLER: Time, place, and manner.

MR. ORNSTEIN: Through the time, place, and manner clause. But whether if, say, Congress passed a piece of legislation saying that in the event of an emergency or even at any time, special elections must take place within 60 days, whether that is practical or desirable.

By the way, just to pick one other example, there will be a special election now taking place on an expedited basis in Hawaii following the death of Representative Patsy Mink. If Mrs. Mink will be on the ballot, although deceased, for the full term in the election on November 5th, if she is elected, which is a reasonable possibility here, Hawaii has announced it will then hold an election to fill the remainder of her term, but that they doubt that they can hold such an election within less than 90 to 120 days. So we have real-life examples suggesting that there's a problem.

The second problem, as I suggested earlier, is that of widespread incapacitation. The Framers did not deal with incapacitation in any form, and we know that we didn't grapple with the problem of incapacitation of a President until we got to the 25th Amendment.

We know that we had several serious problems, including, of course, that of Woodrow Wilson, and no provision for the constitutional transference of power at that time or at subsequent times. It was seen as a problem and we dealt with it, but it's never been seen as a particular problem inside Congress because when we have had instances of incapacitation--and we have: Senator Karl Mundt from a number of months; the famous case of Representative Gladys Noon Spellman of Maryland who was in a vegetative state for many months. The loss of one or two members at any given time is something that Congress can absorb relatively easily.

In the case of widespread incapacitation, it creates another set of problems, including those problems that we raised earlier with regard to a quorum. And this is a set of problems that enveloped the Senate as well as the House of Representatives, and we know that this is not fanciful either. We had a serious anthrax threat to the Senate of the United States, one that we now know involved a deadly form of anthrax that could easily have spread with microscopic particles widely through the system; speculation that if the anthrax, which was included in letters sent to a number of Senators, had instead been put in the ventilation system of the office buildings in the Senate, which are all connected, we might very well have had large numbers of Senators and staffs in the hospital for a sizable period of time with inhalation anthrax.

We know that the government at the moment is considering a whole range of scenarios to deal with what they see as a real, live, tangible prospect of smallpox as an attack mechanism that could leave large numbers of members incapacitated.

So we also have to consider ways of dealing with widespread incapacitation and, again, what can be done short of a constitutional amendment or what form of constitutional amendment.

When it comes to a constitutional amendment--and I think in both of these instances we clearly are led inexorably to the conclusion that if we deal with them, they will have to be dealt with through a constitutional amendment--we have a variety of forms suggested. Some have been suggested by our experts around the table who have participated in earlier

deliberations, others at an earlier stage, including, as Lloyd noted earlier, by Nick Katzenbach in his capacity as Attorney General back in an earlier era--

MR. : Assistant Attorney General.

MR. ORNSTEIN: Assistant Attorney General, excuse me. And that we have others that have been proposed by Members of Congress, by Representative Brian Baird, who will join us shortly, Senator Arlen Specter, and we have some of our own, that range from very simple language, either just authorizing Congress to set rules as it sees fit to deal with death or incapacitation and replenishment in time of emergency, through a simple parallel constitutional amendment for the House that is there for the Senate to provide for temporary replacements, all the way up through those that involve more detail.

Now, clearly, more detail is less desirable at any time. We want constitutional amendments to meet tests of brevity and directness. In this case, we also have to consider the mischief that could be caused by less detail, including--and the unintended consequences, including if we simply have a parallel amendment for the House that fits what we've done for the Senate, that that would be applied or could be applied in all cases, not necessarily in cases of emergency, and could provide a fundamental change in the nature of the body, including what could be done legislatively and could be done by a majority that might use it for its own purposes or amend the laws at a time of emergency to fit its own purposes.

If we get into more detail, what kind of detail? And I would suggest that we have to consider, among other things, the question of the threshold here in particular, and making sure that we provide for Members of Congress and for the country as a whole the assurance that whatever provisions we apply would only apply in the case of a dire emergency. But then we have all kinds of questions to be raised of how you set those thresholds and who sets those thresholds, but also how much we can do with a simple constitutional amendment and implementing legislation to go along with it and how much detail to get into.

I might just note here that when Representative Baird, who first as an elected lawmaker seized on this issue, proposed an amendment, he left lots of things unanswered, arguing including the question of if you replace incapacitated members, whether they can then, when they are ready to serve, come back and fill their seats again--something that was naturally of great concern to his colleagues, the prospect of being knocked out for a week and suddenly finding you can't take your job back. He said we can deal with that through implementing legislation, but unless and until you specify exactly what you're doing, members are going to be unwilling to take a leap of faith when it could lead to a disastrous consequence for themselves.

So we have lots of questions that we need to address here in terms of both replacement of members who are dead, determination of when they're dead, temporary replacement of those who are incapacitated, and if there are replacements for those who are killed, for how long, whether it should be an indefinite period of time or for a fixed period of time until you can get special elections that can then replace them, or whether we should simply rely on that special election process and leave the possibility of a vacuum for a larger period of time.

MR. SIMPSON: When did this resolution pass the House that sent things back to the states to get organized? What was the date of that? Two weeks. It just was very recent, wasn't it? I don't believe I've seen a copy of that. I'd like to, because as a state legislator for 13 years, we made a studied effort to simply ignore all Senate and House resolutions. They would

come to the floor. We'd stop business. They'd say we're now bringing a resolution from the United States Senate, and there'd just be a great chuckle go up--or House. I mean literally. I mean, I really can tell you, real life. Because they said, look, we're out here in Cheyenne or Sacramento, and we don't care a whit what they think back there.

So it will be interesting to begin to probe the state legislators, their leaders, and say, you know, I know you throw them away, but are you looking at this one? It would be very important. Very important.

MR. CUTLER: Any comment on this subject of replenishment?

MR. : I'd like to ask a question on incapacity. If you were having a special election in the state, is there any reason why the state should not be determining whether one of its representatives was incapacitated or not?

MR. : That's something of an ambiguous question whether the state decides or the House decides.

MR. : [inaudible].

[Laughter.]

MR. : You are correct. Several cases of either missing members or incapacitated members relate to this question, this clear question. Gladys Noon Spellman, the case that Norm mentioned, went into a coma shortly before the election, was elected, and then there was the time--the Congress met in January and she wasn't there, and the Congress itself passed a resolution declaring her seat vacant because she wasn't going to recover. It was clear. There was no chance of her recovering.

The other case, the Hale Boggs and Nicholas Begich case where you have both members missing in a plane crash, again, elected--on the ballot, elected while missing, ultimately an Alaska court presumed them dead. Alaska took that to mean that the seat was vacant. Louisiana didn't quite accept it. And the House then passed a resolution declaring the seat vacant.

Both the state and the Congress have some role in declaring the seat vacant, but it's not definitive whether one declares it or the other. There sort of has to be--there has to be some sort of agreement.

MR. ORNSTEIN: Let me address that as well. I think the state should have the ability and the authority to do this, partly because one of the scenarios we have to consider and really what we have to do is in the backs of our minds, or even in the forefront, think about unfortunately real worst-case scenarios. One of those scenarios is there's just simply chaos in Washington. The Capitol is smoldering and we don't know who's alive or dead or what is going on here. Congress can't in a short period of time reconstitute itself. Then you'd want the states.

Now, what I proposed in my own cut at a constitutional amendment that dealt with the larger question of how you set a threshold for triggering any of these provisions is a suggestion that the Governors of the various states in the event of a national emergency would canvass the condition of their state delegations, and that if they came to the

conclusion that a majority of their own state's delegation was dead or missing or incapacitated, they would sign a resolution to that effect. And when a majority of the Governors had signed such resolutions, then you would trigger a mechanism that could allow for replenishment.

If you then said that the Governors could determine if somebody is either dead of incapacitated and then pick a replacement, that would make some sense.

Now, that doesn't preclude a rule such as the one that Don Wolfensberger has suggested where, if you had a sizable number of members around and the question was simply constituting a quorum, that by a two-thirds vote they could also determine that a member happened to be incapacitated.

The key for all of this, to avoid any mischief, is to make sure that if somebody is incapacitated for a brief period of time or incapacitated for 60 or 90 days, but you're still within the frame of an elected member's term, that when that person is ready to come back, he or she can sign a declaration saying "I'm ready to return" and then replace the temporary replacement, obviously so that you can avoid mischief taking place. But you want both of these, I think.

MR. CUTLER: Norm, isn't there a question under the Powell case as to whether either the state or the Congress could declare the seat vacant? You have to be a certain age. You have to be a U.S. citizen. There's no requirement that you be sane or honest.

MR. ORNSTEIN: Under the current Constitution, that's correct. But presumably we're talking about amending it to allow for exceptions to the Powell ruling under conditions of emergency.

MR. : Also, actually, to clarify the Powell case, there are two issues: one, do you seat the Member of Congress in the new Congress and, two, expelling a member. Whether you seat the member is a majority vote, but it has been ruled in Powell that it's restricted to those three requirements, that you reside in the state, that you have a certain number of years in the state, and your age.

They did not decide on expelling, but there was some dicta there that indicated that you might only be able to expel for a certain cause or for current cause, not for past actions. And so--but the House probably could expel people with a two-thirds vote for almost any reason.

MR. CUTLER: Perhaps the House could, but a state could not.

MR. : No.

MR. : Lloyd, it may be helpful--you tell me if it's not--in thinking about the broad category of replenishing the membership in the face of a catastrophic attack, to think of sort of three approaches to it. One is the approach we have now, which is to rely on special elections, but to try to make adjustments by somehow nationalizing that process through statute, which should go beyond a resolution that's thrown in the trash can in the State Houses. But the problem there is we're going to have big delays, and it doesn't deal with the problem of incapacitation.

A second level, which we haven't discussed, but Alton may want to say something about this, and others who have looked at some international experience, is the idea of alternate members, of having some provision whereby there is a backup member to serve under certain extraordinary circumstances.

Now, the question is: Is that constitutional? Would it require a constitutional amendment? Or is it possible through House rules or statute to provide a basis for that? And what are the practical dimensions of trying to designate such an alternate member? And then the third level is temporary appointments. And once you get to temporary appointments, you have a capacity to deal with the problem of delay and the problem of incapacitation. But then you get into the nitty-gritty of constitutional amendments, which are almost certainly required, and that's where you move from the simplest form that, as I understand, Nick Katzenbach suggested in '61 and that Mike Glennon has suggested, simply giving Congress the authority to provide through statute for means of dealing with this problem, to the parallel to the Senate provision, which is not pegged to emergencies but is a routine power held by state legislatures and typically delegated to Governors, to, finally, something pegged to an emergency and then you get into all of the nitty-gritty issues of what's the triggering mechanism, who determines whether members are dead or incapacitated, whether there are any constraints on the appointment power, whether it comes from a pool of members, of people nominated by the member before a catastrophe, whether there's some reference to party, to keep the party the same as the member, the length of the appointment, and so on.

But I think it might be worthwhile to sort of move up the ladder, if you will, to see if there's any sentiment on the Commission for doing more with the special elections provision that now exists, perhaps through statute, whether there's any potential in the idea of alternate members, and then, finally, to the issues of constitutional amendment.

MR. CUTLER: Alton, do you want to bring up the French--

MR. FRYE: I'd like to speak to a couple of points, Mr. Chairman. The French, of course, have a provision, which I have not fully digested, but it amounts to including in the electoral process a designation by the candidate for office of an alternate. And I've provided the Commission references from the French Constitution and the fundamental law that implements that constitutional provision whereby the deputies to the National Assembly do create a process where their designated alternate would take the office in the event that the deputy leaves office for any reason. The alternate has to agree to take that responsibility contingently, and that would be, of course, a kind of provision that could be provided for in a constitutional amendment here. One could reach a process in which House members ran with a designated alternate on the ballot with them, not unlike executive branch candidates running as a team, as it were, de facto if not de jure.

This idea of having constituents know in advance who would take the place of the candidate for whom they are voting had some appeal in the early informal discussions we had on this issue some months ago to a number of people. I think I can mention particularly former Congressman Klinger thought that that was a way of enhancing the legitimacy of someone who would fill the gap. If that person had been identified to the electorate and the necessity arose, there would be clearly a legitimacy in that individual taking over the responsibilities.

I do want to at least mention because I think I may be in a minority around the table among those of us who've looked at the problem--and Don Wolfensberger and I have had a series of very informative exchanges, at least to me--

MR. WOLFENSBERGER: And spirited.

MR. FRYE: And spirited--about this issue. I think it's important at least to put in the deliberations of the Commission the argument, which is quite consonant with what the Court did in the Ballin case and subsequent cases, the argument that the Constitution does allow the House to adapt over time its rules to new circumstances, just as it did with regard to the quorum by the Chair taking a more expansive view of what a quorum requirement would be. Speaker Foley and Speaker Gingrich and I in various arguments and articles have made the case that the House under Article I, Section 5, could, by a reasonable application of its rulemaking authority, empower the elected member to specify not his or her successor--we need to get the vocabulary clear here--but a temporary delegate or agent to carry out the functions of the office in the event that that person could not meet his responsibilities as the elected official.

MR. CUTLER: If I ran, I would designate Alan Simpson.

MR. FRYE: That would increase tremendously the likelihood you'd win, Lloyd.

[Laughter.]

MR. FRYE: And I'm certain that Senator Simpson would say the same. If he designated you, he would improve his prospects mightily.

I think I can rehearse the relevant court cases that bear on this, including the one in which Congressman Michel was involved not too long ago. My reading of those cases is there has been no definitive judicial ruling that would preclude the House from adopting a rule that said each member can designate an agent or delegate to carry out his responsibilities in the event that the person is killed, dead, or incapacitated. And one important aspect of this is this would basically reduce to a minimum the concern about incapacitation because, presumably, a person designating a temporary agent would retain the power if incapacitated to recover the office. You would not have to define a trigger. The individual would presumably retain that authority if the member who had been elected was recovering.

I would center the argument for this on two points:

One, it's hard to identify a more legitimate source for replenishment than the most recently elected member. That is the person who carries the freshest mandate from that constituency, and it seems to me a powerful argument that that individual in representing his electorate could reasonably be empowered under the House rule to say if I can't make it, this is the person who will do so. I think that's far preferable to engaging the Governor's powers where you run into the problem of change of party control, a whole lot of other issues. You also run into the difficulty of concentrating authority in a Governor under the kind of circumstances we're considering to replenish both the House and the Senate, which is a very considerable power to designate the Governor to have.

The second point I would make--and we haven't examined this in any of the discussion I've heard in the Commission--is there is a fundamental issue of equity and representation that goes to the unpredictable mix of the calamity that could occur. For example, it might not be an attack on the Congress itself. It could well be something that wiped out a state delegation. An attack on the caucus of the California or New York delegation would

substantially skew the representativeness of the House body. And if one has a mechanism of the sort we're describing, you don't have to have a trigger. Any individual member would have prepared in advance a temporary designee, not as a successor but to perform the duties of the office until an election could, in fact, meet the constitutional goal of choosing a proper successor.

I hope that's at least a couple of points worthy of your consideration, and we can talk about it at any length you wish, but I'll stop there and invite questions, challenges, comments. I'm sure there will be some.

MR. SIMPSON: That one seems to appeal to me, and I'm just wondering, couldn't you arrange it so that that person would be sworn in at the same time as the principal so that there wouldn't be any subsequent discussion of whether they had the power and so on? In other words, as you do with a President and Vice President, the Vice President is standing there, they're sworn in, that the successor would be sworn in at that very same time. Is that a possibility?

MR. FRYE: Senator, I think it's entirely congruent with the concept, and there's no reason in the world why you could not do it that way.

Those who feel that a constitutional amendment would be required to empower a member to do this I think have the burden of demonstrating that it is required. And I would be happy to support a constitutional amendment to confirm this, but in the meantime, in the case that we have an urgent problem develop before we can get through the amending process, I think the presumption should favor the expansive view of the present authority under the House rulemaking authority. And it could include the kind of provision you're describing so that both the member and his contingent possible agent or temporary delegate would be sworn at the same time, meaning there would be no discontinuity in the capacity of the House to function as long as the temporary agent was not collocated at the site of the tragedy.

MR. SIMPSON: Politically, again--and this is the only arena I have ever played in--you would have an array of rising stars and elder statesmen that you could grace with this mantle. They've love it. You'd get a guy who's on the way up, and you'd say he's the successor for Congressman So-and-so, or this is our former national committeeman who served for 34 years and we'll put that around his shoulders. And you could get some interesting support, and you'd be within your own party. Very interesting thought.

MR. FRYE: Senator, just one last comment on that. I agree with the logic you're presenting and find it very appealing. I would record that a number of the members with whom I have spoken, first of all, are interested in the idea, but are musing over the problem it would present for them politically. If I designate Jones, Smith is likely to be a little troubled. And so some members view this as something of a burden.

MR. SIMPSON: [inaudible] campaign for Cheney to keep him away from the Senate.

[Laughter.]

MR. CUTLER: Or you could designate your spouse.

MS. MARTIN: I just have a question. Certainly a fascinating idea. When do you envision the member announcing who the titular replacement might be? At the beginning of the campaign? The day after his or her election?

MR. FRYE: I think it would be a decision to be made by the member. If I were authorized to draft the rule, I would stipulate that the designation has to occur not later than the time the individual is sworn in. But I believe different members will treat this issue as an opportunity or as a problem. Those who see it as an opportunity--and I mentioned Congressman Klinger as someone who saw immediately the advantages to legitimacy in naming during the campaign who the person would be as the temporary designee. Those who see it as an opportunity could well campaign with the name of this person visible before the electorate.

Those who take a different view would still be obligated under the rule to name such a person not later than the time of the member's being sworn in.

MS. MARTIN: I just think there are--it's certainly an interesting idea, so one never rids oneself of an interesting idea. But the chances for mischief on this one, you have to admit, are pretty high. In other words, you can also get rid of people by having--if I'm having trouble because I'm pro-NRA, do I do an anti--you know, you can see the political implications of do I appoint a white male to reassure the white males that it's going to be okay, or a black female? When do you do it? If I'm running against you, do I say you won't tell us who it's going to be? Does my opponent's person debate with my person during the--I mean, I just--of course, creatively looking at this all, it seems to me there do I say, of course, it's going to be my spouse, he/she has stood by me, as we all know, throughout--you know, that whole routine again. Or do we give it to the children?

One of the things you said I don't think is--you know, here's my last present to you [inaudible], the one I don't like. I think there's one other problem here, too, within this that depending--if people could do it at different times, one of the things you do try to do with election standards is to have some consistency to them. And if I follow your reasoning, as long as it was done sometime before the swearing in, would it be possible--I'm jocularly looking at what a politician could or would do, but I suspect that I haven't even touched the surface of that.

MR. FRYE: Before you pass on, may I at least make a comment?

MS. MARTIN: It is interesting. I mean, you know, I hope I would choose the exact right person. Do they move to Washington? I mean, there's just so many questions.

MR. FRYE: I want to respect Norm's guidance that we should not get bogged down on this, so I don't want to take more time. I would observe, though, that your earlier, I think very persuasive intervention that said in a time of great catastrophe, we could look to the idealism of every elected official to meet his or her responsibilities. I think weighing this decision, frankly, would put the individual in the context of thinking about that calamity, and, therefore, I would expect most members to make this choice responsibly.

MR. CUTLER: Do you have a question, Phil, Bob, [inaudible]?

MR. BOBBITT: I think it's a very ingenious idea. I think it's something we certainly should explore. That you can do it without a constitutional amendment I have real doubts about

that. You mentioned that the burden is on people taking the position, and I accept that. Article I, Section 2 says, "The House of Representatives shall be composed of members chosen every second year by the people of the several states..." and I think that at least from a textual point of view is real roadblock to doing this without an amendment.

MR. FRYE: Except, Phil, it does not say the latitude of authority that the House will recognize in those members chosen, and, therefore, it is not unreasonable--for example, in the Senate pairs occur so that members are basically recorded in their position without them even present. And until very recently--and here's where Don and I, I know, have focused on recent history. It was, of course, the practice in committees in the House to allow proxies to be cast, which is in a sense an analogy that touches this issue--not definitive.

MR. : Let me just add to that, we should also read Section 1 of Article I, which says all legislative powers are vested in the House and the Senate, and then Section 2, the House shall consist of members chosen by the people of the states. What latitude is there? It's legislative powers. You cannot give legislative powers to someone who has not been elected by the state. Committees don't exercise legislative powers per se. They make recommendations to the House. So, you know, perhaps you could have a rule that would allow people, as we did in the committee of the whole that were not considered Members of Congress voting. But when you get down to the actual legislating, you need people elected by the state.

So I think it's an interesting idea. I think it should be in a constitutional amendment. I've been accused, when I was in the minority side of the staff on the Hill, of pushing the envelope by the parliamentarians and coming up with some creative things on rules and precedents. But this is to me breathtaking. And I would stick to a constitutional amendment if you go this route.

MR. : Not to pile on, but I was just going to refer to Section 5 of Article I, which provides that the quorum has to be composed of the Members of Congress. So I'm not sure how we get over the quorum problem by having non-members present.

MR. ORNSTEIN: We should move on now, and this is obviously something we will consider more carefully. It is possible to incorporate the thrust of this idea into a constitutional amendment, and it's interesting, if you look at what the states have done, many states enacted legislation or amendments to their own Constitutions during the Cold War era in response to the threat at the time, Delaware among them which said that in the event of some catastrophe that members of their state legislature would designate between three and six individuals as potential successors, and that the Governor would then, in replacing them, choose from that list.

Now, that has some appeal here, partly because just in practical terms, what members--when you talk to the members about these possibilities, they immediately think in very concrete terms: I don't want my Governor to replace me.

We had a colloquy in the House Subcommittee on the Constitution on this issue, and Jerry Nadler of New York raised the specter of Governor Pataki replacing him.

It's partly a question of changing the political composition of the body, and that's why Senator Specter in his proposed constitutional amendment injects party, saying that the Governor would have to pick somebody from the same party. That wouldn't necessarily

answer the question of political composition, of course, but one way to deal with this, at least, is to consider the possibility that you would limit what a Governor could do to a smaller group of people.

And given as some of you have said, if you lost an entire state delegation giving the Governor the power to replace everybody for what might be a 90-day period or longer is a fairly formidable power. Putting some constraints on that might serve the political purpose of reassuring the members that under conditions of emergency it wouldn't stray too far from the composition of the body, while also limiting that power.

So there are other ways to go here to incorporate the spirit of this idea or the thrust of it into a constitutional amendment without getting into what would clearly be a difficult question to resolve over the constitutionality of doing it short of an amendment.

MR. CUTLER: [inaudible] public session, we do want to invite questions. Once more if anybody in the audience has a question or comment, we'll take it right now.

MR. ORNSTEIN: Please identify yourself.

MR. WIRTMAN: Hi, I'm John Wirtman (ph) from the Consortium of Social Science Associations. My question would be this idea, which sort of strays just a little bit from the idea of letting the Governor appoint the House members: How about allowing the individual member of the House to designate one state official to appoint their successor? An example would be in Virginia, Jim Moran could have Governor Warner appoint his successor. Tom Davis could have Attorney General Kilgore. That would maintain party.

MR. CUTLER: Would anyone like to deal with that? It's a new suggestion.

MR. : Of course, the problem is in a party sense that there are some states in which all of the statewide elected officials, statewide, are of a single party. Now, I presume if you defined it broadly enough to include members of the state legislature, non-executive positions, you could find someone of your party who is an official of the state. But appointment powers typically reside with executives, and I suspect that might be a problem.

MR. CUTLER: Any other questions?

MR. SCOTT: Ken Scott, Stanford Law School. Two comments, one on the business of the designated successor. The French experience has suggested the problem that Lynn pointed out, and that is that when you designate the crown prince, the chances of regicide go up in the next primary.

[Laughter.]

MR. SCOTT: More substantively, in listening to the enlightening discussion this morning and trying to think analytically about it, it seems to me you're addressing two separate, interrelated issues.

One is with respect to continuity. What constitutes an interruption of continuity? I'm sure you would all agree that if you wiped out 100 percent of the members of the House, there has been an interruption in continuity, and no manipulation of quorum rules is going to change that.

When you're down to five, with a majority of three, I would suggest the same thing has happened and should not be addressed through a manipulation of quorum rules.

The question is: What is the minimum amount of survivorship that gives legitimacy to the body that enables you to say there has not been an interruption, there is continuity? And I leave to the collective wisdom of the group, whether you say there's got to be at least a 20 or a 25 or a one-third survivorship, but surely the conversation is about a survivorship of five and a majority of three, and look at the things that could happen. There would be no legitimacy whatever to anything that that kind of a body did.

If that were to happen, if you fall below the threshold and you get an interruption of continuity that you recognize, then the question is how do you address it. And there are only two ways, it seems to me. One is to try to shorten the period of the interruption, and that's what you've been talking about. The [inaudible] talking about is to consider the question of [inaudible] if, for example, you had an interruption of continuity on the part of [inaudible] the other--and we're talking about constitutional amendments, clearly--you could have a devolution of power to the other House until [inaudible]. If you interrupted [inaudible] issue is devolution of power to the executive branch, as Nick Katzenbach was suggesting is likely to occur. [inaudible] formalized, this could be addressed, but the question at that point becomes a temporary devolution of power [inaudible].

MR. CUTLER: Those points were made so well, I think we should invite you to join the Commission.

[Laughter.]

MR. CUTLER: Any others? One in the back.

MS. : Hi, Melinda Frasier (ph) with the National Association of State Election Directors. My question is more along the lines of if there's a special expedited election, how are we going to address the DOD and DOJ rules which make the states liable if they don't provide absentee or overseas voters the appropriate amount of time, because the DOJ and DOD require at least 25 days for military personnel to vote overseas.

MR. SIMPSON: I'm sorry. I had an 81-millimeter mortar platoon, and it caught up with me at 71. I didn't hear all of that, and I regret that. It's not your fault. But my wife said that I have selective hearing, and it's not true. But--

MR. ORNSTEIN: The basic point, Alan, is that we have rules of the Department of Justice and the Department of Defense now that require the states to provide adequate time for absentee ballots for military personnel overseas in particular, and for others, 25 days at least.

It's one of those factors that makes the action to push up the dates of special elections a real headache, one that doesn't solve the problem.

You consider conditions of chaos, emergency around the country, mobilizing to try and do 200 or 300 special elections all at once, and then the fact that you can only limit them so much because you're going to have to print up ballots, send them overseas, and find a way to get them back. And it suggests that at first glance the idea that you can make a 60-day election rule uniformly is dubious.

MR. SIMPSON: I think that's very important. These are very important things for us to consider. I see now that it says that 15 percent of the eligible voters have already voted. So here in the last weeks of the campaign, they're devoting--they're targeting certain things too late. People have cast their votes for various reasons. Fifteen percent, that's a huge figure. But that is a very important issue.

MR.   : It's not true in New Jersey, Senator.

[Laughter.]

MR. CUTLER: The gentleman in the rear?

MR. PHILLIPS: Howard Phillips, the Conservative Caucus. Mentioning New Jersey, perhaps we should just have the New Jersey Supreme Court fill vacancies.

But, more seriously, I think Alton Frye's suggestion is a very attractive one, especially in view of what I perceive to be the dangers of assigning powers of selection to Governors with respect to members of the House. Article I, Section 1 makes clear that all legislative powers herein granted shall be vested in a Congress of the United States, consisting of a House and a Senate. And even more before the 17th Amendment, but still today, the Senate was the body which was to represent the states, and the House is the body to represent the people. And I think the essential function of the House is susceptible to being undermined if the power of replacement is vested in a Governor.

MR. CUTLER: I'm going to close this open meeting right now. With all the doubts we've raised, I want to express my confidence in two points. The first is that if the Framers were here with us today, they would recognize their duty, their responsibility to resolve this problem. And the second is that they at least would have the wisdom to do it.

[Laughter.]

MR. CUTLER: We're adjourned. Thank you very much for coming.

[Recess.]