

Committee on the Judiciary

Testimony of

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before the

House Subcommittee on the Constitution

on

H.J. Res. 67, Providing for the Temporary Filling of House Vacancies

1:00 p.m., Thursday, February 28, 2002
2237 Rayburn House Office Building

Mr. Chairman and members of the committee, I speak here today in favor of a constitutional amendment to preserve the continuity of the fundamental role of the House of Representatives in the constitutional governance of the United States.

No one will ever forget the horrors of September 11th. Thousands of innocent lives were lost at the World Trade Center, Pentagon, and on the planes. But as horrific as September 11th was, it could have been worse, were it not for the heroism of the passengers of United flight 93, who brought down the plane before it could reach its target. While we may never know for certain the destination of that plane, it is clear it was headed for DC, and that the White House and Capitol building were prime targets.

Imagine if flight 93 had taken off on time, instead of 41 minutes late. The brave passengers would not have learned about the earlier suicide attacks from cell phone conversations with loved ones, and they would not likely have thought to rush the cockpit. Imagine the plane approaching the Capitol building at about the same time as American Airlines flight 77 crashed into the Pentagon at 9:41. My understanding is that the House floor was fairly crowded that morning. Many other members were in the building, in leadership offices, or on their way to the chamber. With no warning of the attack on the Pentagon, hundreds of members of Congress might have been killed or severely injured, along with many more staff. With hundreds dead and perhaps hundreds of others in burn units in hospitals, Congress would likely have been without a quorum, without a building without the ability to function.

In the days after September 11th, the president and Congress rallied the nation. Congress acted upon important legislation, including a joint resolution authorizing the use of military force (signed September 18), emergency aid for the rescue efforts, transportation

security, funding for the war on terrorism, compensation of victims, money for rebuilding, and measures to enhance the ability of law enforcement to detect terrorism. Now it is true that if only a handful of members survived a horrific terrorist attack, Congress might still have been able to assemble a quorum—made up of half the members elected, sworn and living—and function to pass laws like the ones above. And, to be sure, even without a Congress, America would have functioned and responded to the emergency, as long as the president or someone in the line of presidential succession was around to act. But it is hard to argue that at a time of maximum national peril, it would be desirable either to have laws made by an unrepresentative handful of lawmakers, or via a benign form of martial law.

The Problem: How a Catastrophic Attack Might Cripple Congress

Why is it that a debilitated Congress might be unable to reconstitute itself after a catastrophic attack? The problem starts with the constitutional quorum requirement. The Constitution says that a majority of each house "shall constitute a quorum to do business." On its face, it would seem that if 218 members of the House were not able to answer a quorum call then the House would be unable to function. In practice this requirement is somewhat less stringent. Since the Civil War, parliamentarians in the House and Senate have interpreted this provision to mean a majority of the sworn *and living* members. But even under this more lenient interpretation a quorum might not be met if a significant number of members were incapacitated or unable to answer a quorum call.

Some argue that the quorum requirement might not ever arise, for no member would object that there is an absence of a quorum under such trying circumstances. Perhaps, but one objection is all it takes. And even if no one suggested an absence of a quorum, it is not

a good situation to proceed for months on the fiction that there is a quorum when one cannot be mustered, and when any member could shut down the body with one objection.

There is another possibility to consider—a case in which a quorum is achievable, but with tiny numbers. Take an extreme case: that 430 members of the House of Representatives are killed. According to the established precedent, a quorum would be the majority of the sworn and living members-- in this case, 3 members. Would anyone want a House of Representatives to operate for months with three members passing important laws—perhaps including a declaration of war? Or thirty members, or even one hundred? Even in a much less severe situation, where 100 members are unable to perform their duties, would we want a Congress to operate with so many vacancies, with some states having no representation?

This problem would be largely alleviated if Congress could be replenished quickly. But under our existing system, it cannot. There are two problems: (1) the lack of a constitutional mechanism for filling vacancies in the House of Representatives in the case of a very large number of vacancies; and (2) the fact that Congress has not chosen to address the question of disabled or incapacitated members, especially the case of the incapacitation of large numbers of members.

On the first problem, our constitution treats vacancies in the Senate and the House differently. The constitution allows state legislatures to empower their governors to make an immediate temporary appointment to fill a Senate vacancy, and the appointment lasts until a special election is held. House vacancies are filled only by special election. Typically, special elections following unanticipated vacancies are held between 90 and 120 days after a vacancy occurs. But depending on the particular state law and when the vacancy occurs, a seat might lie vacant for six months (See Appendices I and II).

Under normal circumstances, there is virtue in the way the House fills vacancies. The House is the institution of government closest to the people. It can rightly take pride in the fact that no member has ever set foot in its chamber who was not elected directly by the people. Also, there is no great harm to the body if a handful of seats are vacant at any given time. A body of 435 voting members is not substantially affected by a few vacancies.

But the normal mode of filling House vacancies could be disastrous under circumstances in which the House could not field a quorum. First, no new vice president could be confirmed. In the case of the demise or promotion of the vice president, a new vice president requires confirmation by votes of both the House and Senate. Second, no appropriations could be made. Third, no ordinary legislation could be passed, including a declaration of war. Fourth, a non-functioning House might also disable the Senate. If the Capitol or a wider area of Washington were not usable, the Constitution requires the assent of both houses to move the location of Congress. In such a scenario, the Senate might not be able to reconvene which would mean that no appointments could be confirmed, nor treaties ratified. Finally, a disabled Congress would be a psychological blow to the American people. We should not underestimate the sense of stability and purpose we were able to maintain after September 11th because we were able to operate all of the institutions of our government under normal constitutional procedures.

The second issue that Congress must grapple with is the question of incapacity of its members in times of a catastrophe. Under normal circumstances, neither house of Congress attempts to determine the capacity of individual members. Many members have stayed in their elected positions for months or longer while comatose or clearly unable to perform their normal duties. There has been only one recent case of a seat declared vacant while held by a living member, Gladys Noon Spellman (D-MD.) But the Spellman case is

extraordinary. Spellman fell into a deep and irreversible coma on October 21, 1980 while campaigning for re-election. Her name remained on the ballot as a candidate for re-election, and she was voted in by the people of her district in Maryland. On February 23, 1981, the House passed H. Res. 80 declaring the seat vacant because of her “absence and continuing incapacity.”

A somewhat parallel case occurred in 1972 with House Majority Leader Hale Boggs (D-LA) and congressman Nick Begich (D-AK). Both were lost in a plane crash. As the plane crash occurred close to the next election, their names remained on the ballot and certificates of election were issued showing their election. While the bodies were never found, the seats were declared vacant after an Alaska court determined officially that they were presumed to have died.

On the other side, there have been many cases of members of Congress who have not been able to show up to vote or perform their duties, but who have remained in office. Senator Carter Glass in the 1940s is one example. As is Senator Karl Mundt, whose committee slots were declared vacant by the Republican Conference, but who remained formally in his seat until his death in late 1974 despite total incapacity for a considerable period of time. The practice has been that an incapacitated member is not removed unless that person stands for reelection, wins and cannot be seated for a new term because of the incapacity.

Ignoring incapacity is understandable for a Congress operating during normal times. As with the vacancy provision, the Congress will not cease functioning if a few members are not able to perform their duties. And there is the danger of abuse of an incapacity provision, with congressional leaders or governors tempted for political or other reasons to try to

replace fit or mildly ill members by declaring them incapacitated.

But in the case of a catastrophic event, the problem of incapacity takes on a new face. The grim realities of the war on terrorism and the nature of possible chemical or biological attacks on Washington and Congress makes it perhaps more likely that Congress will have massive incapacitation than massive death. Even if no member died in an attack, if 218 members were seriously injured, the House would be unable to meet its quorum requirement.

Of course, this is a very delicate problem. How do we define incapacity? What about temporary incapacity? What if large numbers of members are in burn units, but could recover? What if hundreds of members are quarantined because of a smallpox or anthrax attack? If the recovery period took months, Congress might still be paralyzed. But if incapacitated members are replaced, even temporarily, great care should be taken to ensure that they could return smoothly to their duties as duly elected representatives if and when they regain their capacity to carry out their jobs.

The Outlines of a Solution

As a general matter, I do not like constitutional amendments. Constitutional amendments truly should be the response of last resort. Many of the problems that proposed constitutional amendments address can and should be handled legislatively. Unlike laws, constitutional amendments are close to irreversible, and there are often unintended consequences. In this case, however, I have come reluctantly to the conclusion that a constitutional amendment is appropriate. Congress needs to create a mechanism for

temporary appointments to ensure its continued functioning in the event of a catastrophic act. There are other approaches, which I will discuss below, and the committee should consider them carefully. But my conclusion is that the most effective way to deal with this serious problem is via a constitutional amendment.

Drafting an appropriate constitutional amendment, however, is not easy. First, a constitutional amendment should be as concise and limited as possible, leaving implementing detail to legislation. But that principle means ambiguity and uncertainty in an area of sensitive and vital concern to the American people, and even greater sensitivity to the members of Congress whose lives and careers are directly at stake. So any amendment must address those concerns up front, if only by appending draft legislation to the draft amendment text.

Second, there are several knotty questions that must be resolved by an amendment and accompanying legislation. What is the threshold for triggering the amendment, the level of catastrophe requiring temporary appointments to the House? Who or what determines when that threshold is met? Who makes the temporary appointments? What is their term? Are they renewable? How is “disability” defined, and by whom? Who decides, and how is it decided, when a temporarily disabled member is ready to return to his or her duties?

Fortunately, Representative Brian Baird, who confronted this problem early and did not shrink from its difficult nature, has addressed most of these concerns. His amendment only becomes operative when a very large number of members are killed or incapacitated. It allows for short, temporary appointments followed by special elections. It recognizes the problem of incapacitated members. The outlines of his amendment are sound. I urge you to consider the Baird amendment seriously. But I also urge you to elaborate on it. Let me

suggest two ways in which we might stay within the Baird framework, but further improve the product.

First, on the question of incapacity: Representative Baird does not define incapacity in the amendment itself, nor does he say who would judge incapacity. Perhaps this is better left to implementing legislation, but members of Congress would benefit from seeing such legislation before they decide on the merits of the amendment. There are some difficult questions. Who declares incapacity? By what standard? Who decides if a member is recovered? Can a member resume his or her duties if the incapacity is lifted? Would a temporary appointment end if the incapacitated member were fit to return to his or her job? Would a special election be cancelled in such a case? These questions need to be answered during the process of consideration of the constitutional amendment. A working group I convened of constitutional and congressional scholars considered these issues and discussed appropriate language.

Second, on the mechanism triggering the amendment: Representative Baird proposes a reasonable standard by which to judge the need for temporary appointments, one quarter of the House dead or incapacitated. Others, including Senator Arlen Specter, prefer a higher threshold. The numbers may be easier to clarify than the process. The amendment does not address who determines when the threshold has been met. This issue is particularly difficult. In fact, there were several amendments similar to Representative Baird's that were proposed in the 1940s, 1950s and 1960s, several of which passed the Senate overwhelmingly, only to die in the House. In the discussions of these bills, one central question was how to trigger the amendment. Especially in the aftermath of an attack, determining the status of a large number of members would be problematic. Would the House determine when that threshold had been reached? If so, the House might be in total disarray or unable to meet so

that it could not reach a determination. Should the president decide, or individual governors?

Here is a suggestion for a balanced and prudent triggering mechanism, that can either be incorporated into the amendment or addressed in accompanying legislation: In the event of a national disaster, each state's governor would make a determination if a majority of his or her state's congressional delegation is dead or incapacitated. If the determination is positive, the governor would sign a proclamation to that effect and send it to the Speaker, the president, the Chief Justice of the Supreme Court, and if none of them or their designees is available, to the senior governor in terms of service. When a majority of governors reaches the conclusion that the majority of members in their state delegations are unable to perform their duties in Congress, the amendment would kick in.

This process has several advantages. One, it decentralizes the trigger mechanism and moves it out of Washington, an important consideration if our capital is the target of an attack. Second, because twenty-six governors would have to make a similar determination, it removes the power to trigger temporary appointments from one hand and ensures that no abuse of power for political or other purposes can occur.

Other Options

I have been writing and thinking about this serious problem since September 11. Over the past couple of months, I convened a working group of constitutional, legal and congressional experts. During our deliberations, there was universal acceptance that something had to be done about the problem of maintaining a functioning Congress in the face of an attack. But there were many different views on how to solve the problem. Some

were not comfortable with the complexity of an amendment like Baird's. Former Senate Counsel Michael Davidson was among those suggesting a more simple and direct approach. His draft would provide that when vacancies occur in the House, governors shall issue writs of election as they now do. The state legislatures would be authorized, as they are in the case of Senate vacancies, to empower governors to make temporary appointments. But to assure that these appointments are brief, in contrast to the appointment of interim senators, temporary appointments would last no longer than 90 days.

Distinguished constitutional law professor Michael J. Glennon of the University of California, Davis suggested a simple amendment authorizing Congress to deal with mass vacancies by legislation. He has also drafted legislative language to implement such an amendment; this legislation defines incapacity and allows for temporary appointments.

Others thought that many of the issues could be dealt with legislatively, perhaps avoiding the extreme step of a constitutional amendment. Don Wolfensberger, a veteran staff member of the House Rules Committee now at the Woodrow Wilson Center, drafted language that makes the best case for a statutory and rulemaking, not constitutional, approach. There were also some innovative approaches, including Alton Frye's idea that members of Congress could designate in advance their successors in case of their own incapacity. While I prefer the Baird approach, I believe it would be helpful for you to have a sense of the other approaches to further debate on the issue.

Let me outline the approaches that members of our working group proposed:

Baird amendment with Ornstein modifications:

- When a majority of governors declare that a majority of their state's congressional delegation is dead or incapacitated the amendment kicks in.
- In the case of vacancies, governors may make 90-day temporary appointments and schedule a special election.
- In the case of incapacity, a temporary member is appointed until the incapacitated member indicates he or she is recovered and resumes the seat. Or if an incapacitated

member dies, a temporary appointment of 90 days is made until the seat is filled by special election.

Simple constitutional amendment. The House will adopt a procedure similar to Senate procedure for filling vacancies:

- When any vacancy occurs (whether there is an emergency or not), state legislatures may empower governors to fill the vacancy with a temporary appointment until a special election can be held.
- Temporary appointments limited to 90 days.

Simple constitutional amendment that gives the Congress the power by statute to deal with mass vacancies and incapacity:

- General amendment grants the power to Congress to deal with mass vacancies.
- Statutory language clarifies issues surrounding temporary appointments, incapacity, etc.

Statutory solution to require states to hold expedited special elections in case of mass vacancies and rulemaking proposal on counting quorums:

- When half the seats in the House are vacant, an emergency procedure kicks in to require each state to hold a special election within 60 days.
- House may declare a member temporarily incapacitated. Such incapacitated members would not count in the determination of the quorum requirement. They would continue to receive full pay and benefits. And they may resume their seats when they declare they are fit, subject to approval of the House.

Statutory language to allow members to designate their own temporary successors in the case of vacancies:

- All members will designate in advance a successor who would serve in the members place in case of death until a special election could be held or in case of a temporary incapacity.

Mr. Chairman, I urge you to consider all these alternatives, and to examine carefully the Baird Amendment and ways to make it workable and achievable. I urge you to act with some dispatch. God willing, we will never have to confront a scenario as horrific as the one we are considering today. But it is your duty to make sure that the country, and its Congress, can function just in case.

Appendix I

Special Elections for the United States House of Representatives in the Cases of Vacancy due to Death of Members from the 105th to the 107th Congresses

| Congress | Open Seat | Deceased | Date of | Primary | General | Date Sworn | Successor | Time to fill |
|----------|--------------------|---------------------|----------|-------------|----------|------------|-------------------|--------------|
| 105th | Texas 28th | Frank Tejada | 1/30/97 | 3/15/97 | 4/12/97 | 4/17/97 | Ciro D. Rodriguez | 77 days |
| 105th | California 22nd | Walter H. Capps | 10/28/97 | 1/13/98 | 3/10/98 | 3/17/98 | Lois Capps | 140 days |
| 105th | California 44th | Sonny Bono | 1/5/98 | 4/7/98 | --* | 4/21/98 | Mary Bono | 106 days |
| 105th | New Mexico 1st | Steven Schiff | 3/25/98 | 4/13/1998** | 6/23/98 | 6/25/98 | Heather Wilson | 92 days |
| 106th | California 42nd | George E. Brown Jr. | 7/15/99 | 9/21/99 | 11/16/99 | 11/18/99 | Joe Baca | 126 days |
| 106th | Virginia 1st | Herbert H. Bateman | 9/11/00 | --** | 11/7/00 | 1/3/01 | Jo Ann Davis | 114 days |
| 106th | Minnesota 4th | Bruce F. Vento | 10/10/00 | 9/12/00 | 11/7/00 | 1/3/01 | Betty McCollum | 85 days |
| 107th | California 32nd | Julian C. Dixon | 12/8/00 | 4/10/01 | 6/5/01 | 6/7/01 | Diane E. Watson | 181 days |
| 107th | Virginia 4th | Norman Sisisky | 3/29/01 | 4/29/2001** | 6/19/01 | 6/26/01 | J. Randy Forbes | 89 days |
| 107th | Massachusetts 9th | John Joseph Moakley | 5/28/01 | 9/11/01 | 10/16/01 | 10/23/01 | Stephen F. Lynch | 148 days |
| 107th | South Carolina 2nd | Floyd Spence | 8/16/01 | 10/30/01 | 12/18/01 | 12/19/01 | Joe Wilson | 125 days |

Average Time to Fill a Vacancy:

*Mary Bono won a majority of the vote in the special primary election, eliminating the need for a runoff general election

in June of 1998, according to California State Code.

** The State Codes of New Mexico and Virginia do not require special primary elections. These candidates were selected by their parties, according to their states' laws. No primary election was held.

Appendix II

Time Requirements for Filling Vacant House Seats According to State

Election Code

(This data is still being gathered. The table is incomplete.)

| State | Time between vacancy and general election | Date of primary election | Maximum time between vacancy and regularly scheduled election for states to default to scheduled election (no special election) | Maximum time left in term when no election occurs to fill vacancy |
|----------------|--|--|---|--|
| 1. Alabama | | | | |
| 2. Alaska | Between 60 and 90 days | At least 30 days after vacancy | | |
| 3. Arizona | Between 75 and 100 days | At least 30 days after the vacancy | | |
| 4. Arkansas | Avg. 132 days (if no primary, 50 days) | Both parties can wave primary in favor of caucus | | |
| 5. California | Between 112 and 119 days | 56 days before general | | |
| 6. Colorado | Between 75 and 90 days | | 90 days | |
| 7. Connecticut | | | | |
| 8. Delaware | | | | |
| 9. Florida | Minimum time periods can be waived if Congress is in session | 2 special primaries, with at least 2 weeks between them. | | No election must occur if the House will not be in session again before the term expires |
| 10. Georgia | 30 days min. after writ of | | | |

| | | | | |
|-------------------|---|---------------------------------|--|--|
| | election is issued. The governor must issue the writ within 10 days of the vacancy. | | | |
| 11. Hawaii | At least 60 days* | | | |
| 12. Idaho | | | | |
| 13. Illinois | 115 days max. | 50-57 days from vacancy | | |
| 14. Indiana | | | | |
| 15. Iowa | | | | |
| 16. Kansas | Between 45 and 60 days after writ of election is issued. The governor must issue the writ within 5 days of the vacancy. | | Between 30 and 90 days | |
| 17. Kentucky | | No primary, parties decide | | |
| 18. Louisiana | | | | |
| 19. Maine | As “soon as reasonably possible” if Congress is in session | | | No election must occur if the House will not be in session again before the term expires |
| 20. Maryland | 72 days min. after writ of election is issued. The governor must issue the writ within 10 days of the vacancy. | 36 days after writ of election | Between 40 and 120 days | 60 days |
| 21. Massachusetts | | 35 days before general | | |
| 22. Michigan | | At least 20 days before general | 30 days | |
| 23. Minnesota | 33 days maximum when Congress is in session (5 days | | No special election must occur if the House will not | |

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|--------------------|--|--|--|----------|
| | for writ, 28 days from writ), otherwise in time for the next session. | | be in session again before the term expires and more than 150 days remain until the next general election. | |
| 24. Mississippi | 40 days min. after writ of election is issued. The governor must issue the writ within 60 days of the vacancy. | | | |
| 25. Missouri | | Parties select candidates, no primary | | |
| 26. Montana | Between 75 and 90 days | States select | 150 days | |
| 27. Nebraska* | 4 weeks after the primary (between 48 and 58 days from issuance of the writ of election) | Between 20 and 30 days after the writ of election is issued. The writ is issued at the “earliest practicable time” | There is no special election if Congress will not convene before the next general election. | |
| 28. Nevada | | | | |
| 29. New Hampshire | | | | |
| 30. New Jersey | | No primary unless they default to regularly scheduled | Less than 64 days before primary or more than 52 days before general | 6 months |
| 31. New Mexico | Between 84 and 91 days | No primary, but parties must certify candidates 56 days before general | If vacancy occurs after primary but before that years election | |
| 32. New York | Between 30 and 40 days * | No primary | | |
| 33. North Carolina | | | | |
| 34. North | | | | |

| | | | | |
|--------------------|--|--|---|--|
| Dakota | | | | |
| 35. Ohio | | | | |
| 36. Oklahoma | Approx. 50 days after writ of election is issued. The governor must issue the writ within 30 days of the vacancy. | | | |
| 37. Oregon | | There is no primary (parties decide) if the special election is called less than 80 days after the vacancy. | 61 days | |
| 38. Pennsylvania | At least 60 days after writ of election is issued. The governor must issue the writ within 10 days of the vacancy. | | | |
| 39. Rhode Island | | | 8 months, unless in the governor's opinion, the public good requires an earlier special election. | |
| 40. South Carolina | Between 120-127 days. Held on the 18 th Tuesday after the vacancy occurs. | Held on the 11 th Tuesday after the vacancy occurs, and a runoff primary on the 13 th Tuesday. | 180 days (if the 18 th Tuesday after the vacancy occurs is no more than 60 days before the general election. | |
| 41. South Dakota | Between 80 and 90 days | | 6 months | |
| 42. Tennessee | Between 100 and 107 days after writ of | Between 55 and 70 days from vacancy | 30 days | |

| | | | | |
|-------------------|--|---------------------------------------|------------------------|--|
| | election is issued. The governor must issue the writ within 10 days of the vacancy. | | | |
| 43. Texas | Between 36 and 50 days* | | | |
| 44. Utah | | | | |
| 45. Vermont | 3 months max. | Between 40 and 46 days before general | 6 months | |
| 46. Virginia | 35 days min. | No primary | | |
| 47. Washington | 90 days min. after writ of election is issued. The governor must issue the writ within 10 days of the vacancy. | At least 30 days before general | 6 months | |
| 48. West Virginia | Between 30 and 75 days after writ of election is issued. The governor must issue the writ within 10 days of the vacancy. | | | |
| 49. Wisconsin | Between 62 and 77 days* | | Between 49 and 92 days | |
| 50. Wyoming | 40 days min. | | 6 months | |

*These time periods do not begin until the governor issues the writ of election. For these states, the times between and the vacancies and the governors' announcements were not specified.