

Committee on the House Administration

Testimony of

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on

E-Congress?
Using Technology to Conduct Congressional
Operations in Emergency Situations

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Mr. Chairman and Members of the Committee:

I commend you for your leadership in ensuring the continuity of Congress after a catastrophic attack. This hearing, as well as your efforts to improve the security of the Capitol, secure alternative meeting sites, and develop emergency communications channels, are a testament to this committee's seriousness of purpose and the urgent task before it. I thank you for the invitation to testify before you today on the possibility of "convening" an e-congress with Members participating from remote locations. While I strongly support the use of technology to facilitate remote communication and to preserve and provide access to information vital for the functioning of Congress, an e-Congress is not a substitute for the real thing. Communication and voting from remote locations will not allow for the face-to-face contact that makes you true "representatives" of the people and that makes Congress the greatest deliberative body in the world.

One can imagine a number of scenarios where it might be difficult to convene Congress in the traditional sense. There is the possibility of a biological attack with many members quarantined and unable to come together for fear of spreading a dangerous infection. Chemical or conventional attacks might leave many members in hospital beds, mentally aware, but unable to meet at a central location. An attack on the Capitol building while members were in their home districts might destroy the meeting place, and leave members scattered across the country, unable to travel to Washington or another central location. After September 11th, all of these scenarios seem possible. It is for this reason that I strongly support your efforts to secure alternative meeting places in the Washington area and elsewhere, and to provide members with secure communications equipment so that they might be in touch shortly after an attack.

But I stop short of endorsing an e-Congress, defined as members situated in multiple locations debating, voting, conducting hearings and markups and doing other official business by email, webcast, or telephone. Under such a procedure, you as members would not be acting as representatives in the essential meaning of the term.

Members of Congress must represent the interests of their constituents while simultaneously interacting with other members to reconcile interests from throughout the country-- all to fashion policy that promotes the public good. Both sides of this equation are essential to true representation. That is why members lead "double lives," spending significant time both among constituents and in the halls of Congress. No matter how advanced the technology, there is no substitute for the face-to-face conversations and informal interactions between members that can build goodwill across party and region, and that are critical to genuine institutional and individual deliberation. Likewise, relationships among staff and advocacy by interest groups are important for the legislative process and would suffer dramatically if they were conducted remotely rather than face-to-face.

These relationships have the effect of knitting together the Congress and passing legislation that is broadly acceptable to the country as a whole. You are not merely 435 autonomous individuals; you are also important parts of a larger institution. I know of no major piece of legislation that could (or should) have been passed without such personal contact. And I cannot envision a bill of even modest complexity being drafted and voted on by members whose basic contact to the outside world was a phone or email address.

It is critical for Congress to consider every dire circumstance that could result from a catastrophic attack on official Washington. That includes circumstances under which members of Congress are scattered around the country and unable to travel to convene in Washington or elsewhere. I commend especially Representative Langevin for focusing on

this problem and grappling with a solution. But I frankly fear a solution that provides an imprimatur to a remotely-driven e-Congress that would too easily slide into use in non-emergencies. Emergency preparations for video conferencing a session of Congress are worth serious consideration and planning. But even to consider that alternative is a risk—it must not be done without ironclad assurances that no such plan could take place except for a very short period of time under a dire emergency. Never forget that the precedent set by an e-Congress might undermine the intrinsic deliberative nature of Congress and its regular workings by encouraging more indirect forms of legislating.

The Continuity of Congress

What is most urgent for this body to consider is how to make sure that the Congress has adequate membership to operate after an attack. We must plan for alternative meeting sites and alternative methods of meeting and voting. But it even more important to ensure that there would be enough members for Congress to operate at all. It is for this reason that I have joined with Rep. Baird and others inside and outside Congress to advocate measures to ensure that Congress can continue to operate as a constitutional body.

There are two basic problems: the constitutional quorum requirement, and the possible incapacity of many members of Congress in a catastrophe. As Don Wolfensberger suggests, it might be possible to change the rules and redefine the quorum to exclude temporarily incapacitated members. But I do not believe that such a change would deal adequately with the problem. If 200 members of the House were killed and an additional 230 incapacitated by an attack, one might manipulate the rules to allow the remaining five members to serve as the House, with three constituting a quorum. Do we really want to have three members of the House acting to authorize the use of military force,

appropriate funds for disaster relief or defense, or alter constitutional guarantees of due process to deal with a continuing terrorist threat?

Thus, while I support Congress taking immediate, interim steps through enactment of laws and changes in rules to minimize the threat to governance we now face with contemporary terrorism, I have come reluctantly to the conclusion that a constitutional amendment is also appropriate and necessary. Congress needs to create a mechanism for temporary appointments to ensure its continued functioning in the event of a catastrophic act.

Drafting an appropriate constitutional amendment, however, is not easy. Representative Brian Baird and Senator Arlen Specter have drafted slightly different versions of amendments to address these problems. Both take effect only when a significant fraction of the members of Congress have been killed or incapacitated. When such an event occurs, governors are required to appoint temporary replacements, who can serve until a special election is held.

I favor the general outlines of such an approach, but I have crafted an alternative amendment that differs in several significant ways. My amendment is triggered when a majority of governors determine that a majority of their state's delegation is either dead or incapacitated. In the case of a vacancy caused by death, governors would appoint temporary members to serve until a special election is held. In the case of incapacitated members, governors would appoint a temporary representative who would serve until the member recovers, dies, or until the next general election. In both cases, governors would appoint a replacement from a list of seven potential successors drawn up by each individual member.

There are several advantages to this approach. First, 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. Third, it makes it clear that any member who is incapacitated and recovers can resume his or her seat immediately. Fourth, it deals with the problem of governors appointing temporary members who are antagonistic to the views of the deceased or incapacitated member by requiring the governor to appoint from a list of successors designated by the individual member. A number of states have emergency procedures to this effect. I have attached a copy of an amendment along these lines.

Fortunately, a growing number of people are focusing attention around the continuity of Congress. In January, I convened a working group of constitutional, congressional and legal scholars, including Don Wolfensberger, to discuss these issues and come up with a menu of alternatives. Not all agreed with my approach of a detailed constitutional amendment, but there was consensus that the question of the continuity of Congress was one of the most serious facing our republic. We have created a webpage that details many of the proposals, articles and opinion pages on the subject:

www.aeipoliticalcorner.org/continuity.htm

I am encouraged by the committee's attention to these difficult questions. I hope that the committee will continue to explore ways in which technology might assist the Congress in the aftermath of a terrorist attack, and that it will find answers short of a move to an e-Congress. And I hope that you will also consider measures to ensure the constitutional viability of Congress as an institution. We owe it to the victims of 9/11 and all Americans to keep our institutions strong in the face of those who would seek to destroy our way of life.

