

UNIVERSITY OF BALTIMORE SCHOOL OF LAW
Charles Tiefer 3904 Woodbine Street
Professor of Law Chevy Chase, MD 20815
CTIEFER@ubmail.ubalt.edu Tel: (301) 951-4239

**TESTIMONY BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
HOUSE COMMITTEE ON THE JUDICIARY**

by Professor Charles Tiefer

**DO WE NEED A CONSTITUTIONAL AMENDMENT
FOR EMERGENCIES
IN THE HOUSE OF REPRESENTATIVES?**

I thank the Subcommittee for the opportunity to testify about H.J.Res. 67. The House and the public learned a lesson last September 11th - that we were much more vulnerable to attack than we had realized. I commend the Subcommittee for considering H.J.Res. 67, because the Subcommittee shows wisdom, in light of that lesson, in taking time to evaluate the ways we would respond to an emergency striking the membership of the House. As Solicitor and Deputy General Counsel of the House in 1984-95, and as the author of a thousand-page treatise on Congressional Practice and Procedure (Greenwood Press 1989), I have both experience, and an immersion in the precedents and history, on the subject generally of how the House has handled and can handle special problems.

1. The Quorum of the Reduced Body. The particular concern after September 11th, reflected in H.J. Res. 67, is how the national government could function, in an emergency that reduced the House's membership by more than a quarter through death or incapacitation. My own procedural guide is the House precedents, principally from the onset of the Civil War, recorded in the Constitution, Jefferson's Manual, and Rules of the House of Representatives ("House Manual"). These are summarized, in section 54 following the Quorum Clause of the Constitution, that a quorum consists of "a majority of those Members chosen, sworn, and living" whose membership had not been terminated. Thus, for example, even though the Confederate secession in 1861 depleted the House's membership, a quorum consisted of a majority of the remainder.

My own view is that if an emergency - say, a terrorist attack on the chamber, or a use of a chemical or biological weapon against the Membership - radically depleted the House's membership, a quorum would consist of the living remainder. I have said, and I maintain, that if even three Congressmen survive - say, from being out of town at the time of an attack - then two of them would be a quorum for legislative action.

2. Action Subject to Later Ratification. I also believe that in the event of a grave emergency, the legal way to describe interim governance of the country would be on the basis of temporary presumptive authority subject afterwards to legislative ratification. Again, the Civil War furnishes an example. President Lincoln took a number of steps, from calling for volunteers to establishing a blockade, before Congress came into session, and Congress ratified these when it did meet. The legal concept of public action, in situations which warrant proceeding without contemporaneous legal authority, subject to ratification afterwards, is a concept I have discussed. Charles Tiefer, War Decisions in the Late 1990s by Partial Congressional Declaration, 36 San Diego L. Rev. 1, 20 (1999). Putting these two concepts together, after an emergency that depleted the House, I think the surviving members would meet and constitute a quorum able to legislate under the Constitution, but I also think that Executive - or Congressional - actions, such as expenditures of funds beyond appropriated levels, taken during the period before the House resumed something like ordinary functioning, would be taken with the expectation of doubts about authority or legitimacy being resolved by ratification later, as in 1861.

3. Problems with H.J. Res. 67. I am glad that Representative Baird introduced this proposal, and that this Subcommittee is holding a hearing on it. Moreover, I understand that Norman Ornstein, for whom I have high regard, has been working on this issue, and I am glad about that too. September 11th should inspire exactly such an effort. I make some observations about problems, not in the spirit of criticism, but simply to provide my thoughts when looking at a concrete proposal on the table.

(A) In general, the fewer constitutional amendments, the better. The less we tinker with the Constitution, the stronger it remains as a barrier protecting vulnerable liberties and institutional structures from legislative moods. The more this Subcommittee bottles up proposed amendments, the better. Moreover, on the particular subject of amendments to deal with emergencies, the view of observers in retrospect about Amendment XXV, dealing with Presidential disability, is that it is overly detailed and cumbersome, a problem hard to avoid in planning for the hard-to-imagine. If there are steps short of a constitutional amendment to address emergencies, we would all favor them.

(B) Constitutional experts from outside the House do not understand the point I would now make:

there is a subtle but strong theme in the Constitution and in House history underlying the restriction that House vacancies are not filled by appointment, only by election. That theme is that this is the people's House, and no one can be a Representative in it unless chosen by the people. By contrast, the Senate, which the Framers initially established as not popularly elected (until popular election in the twentieth century) and which is (of course) not apportioned on the basis of population, does not have that theme in the same way; that is why gubernatorial appointments continue to be tolerable to fill Senate vacancies. I do not think H.J. Res. 67 would do large damage to that theme, but, it would be in tension with it.

4. Doubts About Alternative Mechanisms to Choose Representatives. At one point, I was told of a proposal that the Congress, under its authority to establish the "time, place, and manner" of elections, could provide by statute that, in the event of an emergency, governors (or someone else) could constitute the electorate for vacancy filling. I have strong doubts about this. Traditionally, Congress's "time, place, and manner" authority is considered highly limited. That is why national changes in the suffrage, such as the constitutional amendments about race, gender, and age, were not done by "time, place, and manner" authority. To purport to let Congress, by statute, adopt such an expansive view of its authority, it strikes me, would transgress important constitutional themes, by an assertion of large Congressional authority to enact on a subject where hitherto there has been careful limitation.

5. My Own Proposal: Admitting Emergency Appointees to "Committee of the Whole": I will put forth my own proposal. To me, the classic place of flexibility to handle difficult problems in House procedure is in the "Committee of the Whole," the device by which legislation is considered and amended by a body that is parliamentarily distinct from the full House. In the House, we know this flexibility by the classic rule since 1890 that a mere 100 members (not the majority of a full House of 218) is a quorum of the Committee of the Whole. That rule is still, of course, in effect, and, after an emergency that depleted the House, it is entirely likely that one response would be to increase the role of proceedings in the Committee of the Whole, where a reduced membership is natural and indeed was the norm before recorded roll calls started in the early 1970s. There are several good things about the flexibility of the Committee of the Whole: we have literally centuries of experience with it going back to medieval England, so it is not a worrisome innovation; it is an integral part of the special spirit of the chamber, which distinguishes the flexibility of the Committee of the Whole from the rigidity of the full House; and, the procedures for Committee of the Whole are governed wholly by the House itself, pursuant to its rule-making authority, rather than needing the Senate, the President, and (for constitutional amendments) the states.

If there is a desire to make provision for interim appointees by Governors to play a role until elections can fill House vacancies, I would suggest the House make provision to give such "Emergency Delegates" a role in the Committee of the Whole. Perhaps they might be allowed to vote in Committee of the Whole on proposed legislation, which would not, however, be deemed to have passed the House except when (and by reason of being) approved by the quorum of surviving Representatives, who, alone, would vote on final passage of legislation - until vacancies could be filled by election.

The immediate objection will be raised that no one but Representatives can vote in Committee of the Whole. But, we recall that the House provided in 1993-94 for territorial Delegates to vote in Committee of the Whole. What territorial Delegates could do, "Emergency Delegates" could do. The Delegate vote was controversial, and I do not want to revisit the controversy (I will say a little more below), except to say that even those who opposed that rule, might well find an arrangement for an emergency along such lines less objectionable than either a constitutional amendment or a statute to make gubernatorial appointees into full-fledged Representatives. Why?

(A) First, there would be no need for a rigid, detailed-in-advance, high-visibility structure like a

constitutional amendment or even a statute. The House might even forego a rule in advance of the emergency; it would suffice, in time of emergency, then to adopt a rule inviting the governors to send “Emergency Delegates,” just as the two chambers created, during the Civil War, a Joint Committee that operated powerfully without having been provided for in advance of the war. Naturally it would make sense to engage in any degree of planning or preparing in advance of an emergency to the extent practical, much as the military makes plans for how to respond to emergencies without having a rigid prescription for dealing with the unknown. The special benefit of proceeding via a House Rule would be that the response, whether presaged by a rule provision in advance or not, could be adapted readily to the particular form the emergency took.

(B) Second, a rule for “Emergency Delegates” could be adapted to suit the nature of post-emergency politics much better than a constitutional amendment or a statute. For example, suppose the chamber had Party #1 as a majority before the emergency, and the process of making appointments occurs over time and causes a stream of appointees to trickle in that causes the chamber’s overall composition to fluctuate back and forth from Party #1 being in the majority to Party #2 being in the majority, then Party #1, and so on as any number of appointees arrive. The result (if the parties are functioning at all) would be confusion in the leadership and structure of the chamber. That same problem might occur in the Senate as its appointees trickle in, but at least there is less fluctuation as the filling of a chamber occurs toward a total of 100 than during the larger process of filling toward a total of 435; moreover, the institutional organizing role of party division is less in the Senate, where historically the “majority and minority leadership” often function together as a partnership, than in the House. If a House rule provides for “Emergency Delegates,” it could be adapted to provide, one way or another, that the process of admitting these would be managed to keep some kind of steady state and minimize the distraction of the changing composition during a gradual filling. For example, it might simply be that admission of arriving appointees would occur by loose pairing to keep matters steady - something a lot easier to arrange if the whole process is part of House procedure, than if there is a constitutional amendment conferring status upon appointees.

None of us can anticipate the politics in the aftermath of an emergency. Presumably, as immediately after September 11th, and as immediately after Pearl Harbor, there would be in the immediate aftermath such an intense national reaction as to make politics irrelevant. But politics resumes after such periods: there was tumultuous politics during the Civil War; we have returned in some measure from September 11th to ordinary politics by January and February of 2002; and, after Pearl Harbor in December of 1941, there was certainly a return in some measure to ordinary politics in time for the November 1942 election. We cannot anticipate whether the emergency will occur at the beginning, the middle, or the end of a two-year House cycle. We cannot anticipate whether the emergency will be one that sets back the course of holding elections for vacancies - for example, an epidemic that not only strikes Washington but affects more of the country. There is very little that we can anticipate. It will be enough of an experiment to have a large number of appointed Senators.

Not being able to anticipate the politics, it is better that the problem be handled flexibly, under an adaptable House Rule, than inflexibly, under a constitutional amendment. To take an unlikely but illustrative example, suppose the party of most of the governors is unpopular after the emergency, the way “Copperhead” Democrats were unpopular in parts of the nation in 1861, and this leads to their appointees to the House being unpopular, too. Then it would be better to let the role of those appointees find its natural level, than by constitutional amendment or statute to try to fix it in advance.

(C) Legally and constitutionally, having emergency appointees only serve in the “Committee of the Whole” keeps a consistent structure in place. The principle survives that no one becomes a Representative except by popular election, and, that laws still pass only by vote of Representatives. I would hope that the mixture of Representatives and Emergency Delegates would work together without unnecessary distinctions much as, in a classic wartime emergency like World War II, the

“regular” (pre-war) military and the new recruits did. But I would retain the legal primacy in the hands of the Representatives, rather than the appointees. Pre-emergency Representatives and passage by them of laws are known and established things, legally; post-emergency appointees are simply neither known nor established.

(D) I have several responses on the precise parliamentary point of those who might find the arrangement discussed here better than the alternatives but remain strongly skeptical that Emergency Delegates could sit in Committee of the Whole. As Deputy General Counsel of the House of Representatives, I had the honor of successfully defending the 1993-94 rule, regarding territorial Delegates voting in Committee of the Whole, by briefing and argument in district court and the court of appeals. I won in each - unanimously. *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994). That opinion itself reflects the degree of flexibility the House has. Furthermore, I recommend the briefs filed by the House in that case, which develop the theory and precedents on the subject more fully than the opinion. In a few words, those briefs describe how the various provisions of Article I of the Constitution were devised by the Framers with the intention of giving the House great flexibility in what it did with the Committee of the Whole, and how the House has historically made good use of that flexibility. It is a useful source of authority to tap for emergencies.

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