

Testimony of
Mr. R. Doug Lewis

Executive Director
CERA
September 9, 2003

The Election Center an international association of voter registration and election officials
12543 Westella, Suite 100 Houston, TX 77077 Phone: 281-293-0101 Fax: 281-293-0453 or
281-293-8739

Email: electioncent@pdq.net Website: www.electioncenter.org

September 9, 2003

Testimony for U.S. Senate Hearings
On Disasters and Special Elections
Senate Judiciary Committee
Subcommittee on Constitution

By
R. Doug Lewis, Executive Director, CERA

Senators and Distinguished Guests:

Thank you for providing an opportunity for the nation's elections administrators to have input into these hearings about how Congress would fill vacancies in the Congress should a national disaster occur.

It is sobering indeed to have to contemplate a situation that would require the use of any special provisions, whether natural disasters or human caused disasters. In a climate where, for some, it is acceptable to use violence rather than votes to achieve their goals, the planning is made necessary about how to react and replenish our democracy's representatives. This planning process can even have the positive attribute of covering all manners of disasters which would otherwise might not have received careful review and planning necessitated by either natural or human disasters.

The Election Center is a national non-partisan, nonprofit organization that represents since 1985 the nation's voter registration and elections officials and administrators at the city, township, county and state levels. Our members voluntarily join from both the local and state levels, and it is the largest elections organization in America. We specialize in voter registration and elections administration issues and we are the only organization in the U.S. to specialize exclusively in these issues. The Election Center is principally a training and resource organization to assist elections professionals in making democracy work better for America's voters. In addition, to extensive training seminars, the Election Center partners with Auburn University to certify America's elections administrators in an academically oriented program of courses to improve

professional competence which can lead to this nation's highest designation for the elections profession, the designation of Certified Elections Registration Administrator (CERA).

Additionally, the Election Center serves as the administrative management body for the National Association of State Election Directors (NASSED) in running its Voting Systems Qualification program, where voting systems in America are tested to the Federal Voting Systems Standards to assure qualified hardware and software is used in American elections.

The Election Center has long been a resource for both the Congress and for Federal government agencies including the Senate Rules Committee, the House Administration Committee, the Federal Election Commission and its Office of Election Administration; the U. S. Justice Department; the Federal Voting Assistance Program; the General Accounting Office; and U.S. Health and Human Services, as well as scores of state government agencies and legislative bodies. The Center has also been a consultant to international governments for elections and has done training of international elections administrators.

To get directly to the matter at hand, we were asked for input on whether national elections to replace Congressional Representatives could be held within 21 days and what impact such a 21-day requirement would have on the democratic process.

First let me tell you that elections administrators don't want to complicate the process in any time of national emergency. We get the message that this would be a "dire emergency" and that unusual occurrences or events would create the need for immediate response.

To respond, however, in a manner that gives you policy-makers a full range of things to consider before passing any legislation related to reacting to national disasters and/or provide for methods of Congressional successors to be put in place as quickly as possible, it is incumbent upon us to raise issues that can be too easily glossed over.

The underlying assumption for ordering a quick election would be to assure that the nation's business is attended to and that it is done with the people's elected representatives.

But that presents the first question: What is an election? Is it a date-certain event so that voters can vote, or is it more than that? Is an election in American democracy really a "process" that includes time for the identification of candidates, the ability of the candidates to mount a campaign, to raise funds, to attract supporters, to inform the voters of what their choices are between individual contestants, and then going to the polls to make that choice?

The point is that if it is only an event, then we can structure an event in a short time-frame and carry off the event as flawlessly as possible. If, however, you define it in the broader "process" terms, then you have to allow the process time to work.

It has been mentioned that many who are looking at this issue do not want to break with the tradition of having House members being elected rather than being appointed -- even for a short duration. We have no quarrel with that viewpoint. At the same time, it seems to us that the tradition of our form of democracy must weigh in equally on tradition that allows us the time to know our candidates, the issues, the choices and the selection by voters of their choices.

The genius of American democracy is that it creates fundamental faith in voters that it is fair, free, and has great integrity. But sometimes it is terribly inefficient and cumbersome and time consuming and maddeningly frustrating in its complexities, and yet it works. In order to accomplish an election within 21-days means that we would have to suspend many state laws and procedures just to accomplish the task and many of the voter protections that are contained in the current system.

So before we can have a "general or special election" there has to be some thinking allotted to our primary election process. Do we just abrogate the primary selection and jump to the general or special election? Do we allow political parties to get together to choose nominees and eliminate the process that most states use in allowing the primary voters of those parties to select candidates? What about the opportunities for independent candidates and minor party candidates? Or do we do like California did recently and just have a minimum number of low threshold requirements and allow all who can meet the low threshold apply for a ballot position? Are we prepared for 50 or a 100 candidates or more for each of these openings?

Additionally, what does Congress set as a threshold for what constitutes a "national emergency"? Is it the loss of 25 members? 50 members? 100 members? A quorum?

Lessons that we learned in New York when 9/11 happened (because an election was also set in NY for that time period) is that you need a few days just to assess what kind of disaster happened to you and what resources are even available to you. Is transportation available, can the usual delivery trucks run, can traffic flow, are offices available, is electricity available, etc.

We don't have a preconceived notion here about what are the right policy answers, only an administrative viewpoint that you need to consider these questions before deciding the general election question. And the states, which have traditionally set the processes and qualifications for these choices, have a variety of answers and solutions here. Presumably, the Congress is going to say that a national emergency needs to take precedence and that national interests are superior to states' interests...and that may even be the correct viewpoint, but deciding that issue alone is not without its impact on "tradition". Federal law here will definitely have to vacate all of the state laws concerning these practices in order to stay on the Federal timetable. And the states and locales will have to create new policies and procedures that will apply to this election only.

Currently, under "special election" situations, we allow for a period of time for the primary process to work but in a limited fashion. The difference in the situation here is that we are filling usually one or two Representative slots at any given time and that the election, while important, does not have the same sense of importance that a national election to fill numerous vacancies would presumably have in a case of national emergency.

We polled selected election officials from around the country to get a representative sample of what elections administrators would want to conduct an election with integrity, with fairness to the voters and the candidates, and which would result in serving the interests of democracy - all within a heightened environment of a national emergency.

While the responses indicated a variety of dates ranging from the shortest time period of 35 days (after determination of who the candidates will be) to a period of four months, it appears that

elections administrators feel that they can conduct an election with as few as 45 days but would be far more confident that the interest of democracy would be best served by having up to 60 days to get the elections held an organized.

Why do we need that much time especially in face of a national emergency? There has to be some process for the filing and qualification of candidates and most of our folks believe that bare minimums of 7 days is the shortest period and the largest number believe 10 days is necessary. There then has to be a period of ballot preparation, either printing paper ballots or programming electronic voting devices. In today's technology world those are both specialized functions and cannot be purchased or produced at every local printer or with local technology specialists in the vast majority of cases. In the most extreme instance of total cooperation with nothing going wrong anywhere, we can accomplish most of this within seven to 10 days.

Voter registration needs new considerations. What is the period to be allowed for registration cutoff in this kind of election, and when do elections offices need to have the voter registration cards to voters in a shortened time frame?

You can now begin preparation of Absentee Ballots for the disabled, permanent absentee voters (depending on state laws), and military and overseas voters. We need "transit" time for those voters to be mailed a ballot, delivery of the ballot to them, a reasonable amount of time to complete the ballot, and then to return the ballot to us. Some of these we can receive and count even after Election Day, so we can pick up some days within the election countdown of 45 to 60 days, but not all of that time. Actually condensing the time here is probably the wrong way to do this; if we had more time on the front end of the process to allow us to get those ballots to the voters we could then require all of them to be in by Election Day so that the results are known shortly after Election Day.

Somewhere in here has to be time for voters to find out who is officially on the ballot and to discover information about them. Do we just trust that the news media can do this job for us? What if the entire nation's electricity is crippled or even significant portions of it? Will the law allow some flexibility for instances of when best laid plans hadn't anticipated the kind of disasters confronting us?

Next, if using electronic or optical scan voting devices, we have to prepare that equipment and make it ready and test it before we press it into service. In a "special" election situation we can accomplish this because we generally know the limited turnout that will show for a "special" election, which is generally significantly less that we get in a general election. But in this instance, the presumption is that for all purposes we have to anticipate that this is a larger general election and that means preparing significantly higher numbers of voting devices for use than in special elections.

We can normally staff a special election quickly with office staff and key volunteers and key election week workers because it is a manageable size; in this instance we are talking about being overwhelmed with an election the size of a normal general election but now with only a limited number of days to do what it takes us months to do in preparation for a general election. Perhaps Congress can give election officials the ability to commandeer the services of county

and city employees to serve as poll workers and election workers during a national emergency and waive any labor laws contradicting such uses.

While there may be only a handful of candidates on the ballot (one race in most jurisdictions in America) but within our urban centers there will be multiple Congressional candidates races. And the preparation is the same regardless of how many offices are on the ballots. We still have to find the appropriate number of polling sites (many of which will NOT be available to us in this kind of election), staff it with poll workers, machines, ballots, and information - all of which takes months normally. The simple act of ordering ballot paper involves ordering months in advance for jurisdictions and is purchased in some by the boxcar load. Notifying voters of their polling sites all by itself can take a considerable amount of time especially if it is different for this election than normal elections (because the same facilities may not be available to us).

Election official and precinct worker training has to come somewhere in this process and it can only come after time to recruit enough people to serve (and enough reserves when the traditional 10 percent and higher do not show up).

One item to consider is that it may be necessary to do such an election by U. S. Mail rather than through polling sites, although most American jurisdictions don't have enough experience with massive vote by mail programs such as Oregon and Washington have. It would, however, allow us to eliminate the time spent on polling place sites (and making sure they are accessible) and poll workers. Of course this assumes that the U.S. Postal Service is functional during such a national emergency.

Now, rather than saying that all of that negates the ability to run an election under emergency circumstances, we want you to know that a Can-Do attitude means that we can and will overcome most of these limitations. But to offer an overly ambitious 21-day time period is very likely to court an election disaster on top of a national disaster. Can we do an election in 21 days? Yes, but it would not be what America has grown to know and understand as an election. It would suspend the rights of many, many voters in order to do so.

Our best answer and best advice is to give us a minimum of 45 days and every day you can grant that gets us closer to 60 days increases the likelihood that the election will mean more to the candidates and the voters and allow us to build in the kinds of quality assurance and integrity processes that have been the hallmark of elections in America. It is our understanding that one of the House bills indicates that if such an emergency occurs 51 days in advance of a regularly scheduled election, then we wait until the regularly scheduled election. If so, then shouldn't that be the minimum number of days before any election is scheduled?

None of this anticipates what courts will do within this environment. But as policy makers, you may have to consider what kind of legal challenges will be recognized in a time of national emergency and what latitude judges will have in delaying or ordering additional candidates on ballots, or the many other examples we can give you as to how courts can obviate the best intentions of elections planners.

We have skipped any cost considerations in the hopes that a true national emergency means that costs at each level are ignored, but this may or may not be a valid assumption.

One last note of caution: When Election Day is over, there will still not be any seated members of Congress. It takes a period of days after the election to do the "vote canvass," whereby we roll in the absentee votes coming in from military and overseas voters and we will still have to qualify all of the provisional ballots that are cast in such an election. In most states we can accomplish that effort in 5 to 10 days, but in some even 15 days is going to be an extreme limitation due the high numbers they have to resolve.

California, for instance, needs and uses all 28 days allowed to qualify provisional voting. That is not 28 days where Congress can wave a "magic wand" and say to California you don't need all that time. If it takes that much time, do we just not count those votes? So you need to take into consideration that whatever number you set for the election process leading to Election Day, that we still will have some back-end processes that are necessary and vital to a valid election. And one of the large considerations is the question: do you eliminate provisional voting in such an emergency? Or eliminate all absentee votes that cannot or do not arrive prior to Election Day? Can we just suspend the voting rights of the disabled, the absentee, the military, the overseas and the provisional voters?

There are probably easier solutions than elections but any process which looks at appointing or selecting replacements also needs to consider the public's willingness to accept the succession plan. As long as other governmental bodies are involved in the succession plan and elected governmental representatives are providing successors, then perhaps it will be accepted. But if there is a choice of appointment rather than general public election, it may be wise to consider letting state legislators elect members from their chambers to replace lost officials so that experienced legislators can serve in the interim and will not lose time learning the legislative process while trying to react to the national emergency.

Elections administrators in America are used to doing the impossible and doing so on less money and resources than they should. They will perform well in any national emergency. All we ask is that you not structure it in such a way to place the process in an overly risky, overly ambitious timetable which courts an additional disaster. Remember clearly that for the public to have faith in the government, they first have to have faith in the process that elected the government.