

Testimony of
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Committee on the Judiciary

Testimony of

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on

"Ensuring the Continuity of the United States Government: The Congress"

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Mr. Chairman and members of the committee, I speak here today as we approach the two year anniversary of the attacks of September 11th. I have a simple message: Congress must act to ensure it is able to reconstitute itself if, God forbid, terrorists were to perpetrate an attack on the first branch of government. This is no longer the stuff of Tom Clancy novels. Plotters of the September 11th attacks have told the media that the fourth plane, United flight 93, was headed for the Capitol, and but for its forty minute delay at takeoff and the bravery of the passengers on that flight, we might very well have had no functioning Congress for several months, just at the time the strong leadership of Congress in our constitutional system was required. I cannot commend this committee enough for taking up this important subject, and I urge serious deliberation on the matter, but deliberation with dispatch, for, unfortunately, the timetable for action is in the hands of those who would attack the United States, not our own.

My testimony has two aims. First, to explain and urge you to consider the analysis and recommendations of the Continuity of Government Commission, in particular, the reasoning that led us to the conclusion that a constitutional amendment to provide for temporary appointments in extreme circumstances is what is necessary to ensure the continuity of Congress. Second, to analyze an alternative to our recommendation that has been proposed, special elections on an extremely expedited timetable, and to show how our commission seriously considered such an option, but ultimately found it unworkable.

The Continuity of Government Commission is a bipartisan, non-profit commission run by the

American Enterprise Institute and the Brookings Institution. I serve as senior counselor. Presidents Jimmy Carter and Gerald Ford serve as our honorary co-chairs. It is co-chaired by a former member of this committee, Senator Alan Simpson and Lloyd Cutler, White House counsel to presidents Carter and Clinton. It includes two former Speakers of the House, Thomas Foley and Newt Gingrich, a former House minority leader, Robert Michel, and several others who served in the Congress in addition to other high level positions: Lynn Martin, Kweisi Mfume and Leon Panetta. Other commissioners have served in high positions in the executive and judicial branches of government: Phillip Bobbitt, Ken Duberstein, Charles Fried, Jamie Gorelick, Nicholas Katzenbach, Robert Katzmman (serving on the commission to consider the judiciary only), and Donna Shalala.

Our commission held two all day public hearings on the continuity of Congress, where we heard testimony from constitutional, congressional and legal scholars. We solicited input from the public and have received numerous faxes, emails and letters from concerned citizens, many of whom took the time to send us detailed proposals. At the end of our deliberative process, we counted unanimous support for our report's analysis and recommendations.

Here in a nutshell is what we found:

Continuity of Congress: The Problem

In the aftermath of an attack that killed or severely injured a large number of representatives and senators, there is a high probability that there would be no functioning Congress, or a Congress with such a small membership as to call into question the legitimacy of its actions. A catastrophic attack that killed many members would directly affect the House of Representatives because the Constitution effectively prevents the swift filling of vacancies in that body. An equally problematic scenario would be an attack that left many members incapacitated, which would affect both the House and Senate because neither chamber can easily replace living, but incapacitated, members until the next general election. The twin problems of mass death and incapacitation would threaten the functioning of Congress just at the time our country is most in need of strong leadership.

I. The Problem of Mass Vacancies

The House of Representatives would be severely affected by mass vacancies caused by a catastrophic attack. The difficulty is rooted in our Constitution, which prescribes different methods for filling vacancies in the House and Senate. For vacancies in the House of Representatives, ARTICLE 1, SECTION 2, CLAUSE 4 provides that "when vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies." A special election is the only method for filling House vacancies. By contrast, the Seventeenth Amendment, which governs vacancies in the Senate, provides that "when vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies; provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct." Because almost all state legislatures have given their governor the power to make temporary appointments until an election is held, Senate vacancies are, in practice, filled almost immediately by gubernatorial appointment.

The House of Representatives would have many seats vacant for a significant period of time in the aftermath of an attack because the process of filling vacancies by special election takes on average four months. In the 99th through the 107th Congress, the average time it took states to hold special elections to fill House vacancies caused by death was 126 days. Some of these vacancies were filled in as little as two and a half months, while others lasted for over nine. Differences in state laws and the circumstances of the vacancy greatly affect the time it takes to hold a special election. Some states dispense with primaries for special elections. Others give the governor broad discretion on the timing of the election. The timing of the election is often affected by when in the course of the term the vacancy occurs. Some states do not fill vacant seats if they occur in the last six months of a term.

There are good reasons for the length of time it takes to hold special elections. Candidates need a significant period of time to qualify for the ballot (e.g., by securing a number of signatures). Many states require political party primaries rather than allowing the parties to select their candidates directly. A real campaign requires time for candidates to communicate with voters, debates to take place, the media to scrutinize the candidates, etc. When an unexpected election takes place, it is important to give time for voters to register. And there are logistical limitations on setting up polling places and printing ballots, along with a need for lead time to secure and test voting machines And to hire and train poll workers. Some of these logistical challenges, like printing sample ballots and regular ballots, are complicated greatly if there are multiple special elections going on at the same time.

How quickly could states hold special elections if they adopted new laws that expedited those elections? Under ideal circumstances, states that dispense with primaries and streamline their special election process might be able to complete a special election within two months. The commission estimates, however, that in the chaos after an attack, it would be difficult for even the most expedited elections to take place within three months.

But what is the consequence to Congress if there are large numbers of vacancies that last for months? There are, in reality, two equally unpalatable scenarios. Either Congress would not be able to function at all because it would not have enough members to field a quorum, or the House might try to act with a very small number of members in ways that would question its legitimacy.

How Mass Vacancies Might Prevent Congress from Functioning at All

Like any legislative body, the United States Congress has a quorum requirement, a provision to ensure that a minimum number of members is present for the consideration of important business. Without such a requirement, a few members might meet and pass legislation, even though the voting members would represent only a fraction of the American people. But Congress' quorum requirement is more rigid than those in other legislative bodies because it is embedded in the United States' Constitution and cannot be changed without a constitutional amendment. ART. 1, SEC. 5 provides 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." It is clear from the text of the Constitution and subsequent precedents that once it is established that no quorum is present, the only actions that

the House or Senate may take are to adjourn or to compel the attendance of absent members. No other business can be conducted.

Under the most commonsense reading of this clause, the Constitution requires that a majority of the whole number of each house of Congress be present in order for that house to hold votes of substance. Under this interpretation, if fewer than 218 members of the House of Representatives were alive, then Congress could not function until special elections filled enough vacancies to reach the constitutional quorum requirement. Mass vacancies would mean that no legislation could be passed, as all legislation requires the assent of both houses. No appropriations could be made; no declaration of war; no laws passed to assist in the gathering of intelligence or apprehension of terrorists. If the Speaker of the House was killed, the House could not elect a new Speaker-- who would be the third person in the line of succession? If the president or vice president were killed, no new vice president could be confirmed, as the appointment of a new vice president requires the consent of both the House and Senate. Given the length of time it takes to hold special elections, Congress could not function in these important areas for months.

How a large number of vacancies might call into question the legitimacy of Congressional Action

In practice, the official interpretations by the House and the Senate of their quorum requirements have not been as stringent as the constitutional language would seem to require. Parliamentary rulings in the House and Senate, beginning during the Civil War, have defined the quorum more liberally than a majority of the members of each house. The quorum requirement in the House is now defined by precedent as a majority of the members who are "chosen, sworn and living."

The most significant aspect of the current interpretation for the purposes of continuity of government is the provision that only a majority of the living members needs to be present for a vote rather than a majority of the whole number of seats. In the case of a few deaths in the House, the change in the number needed for the quorum would be insubstantial. (If 2 members of the 435 were dead the quorum requirement would be 217 instead of the 218 with no deaths and a full membership). But in the case of a large number of deaths, the current interpretation of the quorum requirement would have serious consequences. On the one hand, it would ensure that the House could operate with a quorum even after a massive death toll. But at the same time, it would allow the House to operate with just a handful of members. Take, for example, an attack that kills all but 9 members of Congress. Five of those nine would constitute a quorum, and that tiny, unrepresentative group could pass legislation out of the House. More troubling is the intersection of the Presidential Succession Act with an attack on Congress. In the case of the death of the president and vice president, a nine-member House could then elect a new Speaker, who would become president of the United States for the remainder of the term. Many would question the legitimacy of that president and the actions of the House with a severely diminished membership.

Finally, there are several scenarios that would not affect the issue of calling a quorum, but would be troubling nonetheless. An attack that killed 200 members of the House of Representatives would not cripple the Congress, but it might drastically alter the political and geographical balance of the Congress. An attack might occur when one party caucus was meeting, effectively wiping out most of one party but not the other. It is also possible that an attack would hit when

state or regional delegations were meeting, thus eliminating representation for a part of the country for many months.

The Problem of Incapacitated Members

In the past, there has been little concern about the long-term disability or incapacitation of members of Congress, and no provisions exist in rules, law, or the Constitution about defining incapacitation or replacing such members, temporarily or permanently, if they are unable to perform their duties for extended periods of time. This is partly because the Framers barely considered the consequences of incapacitation for any office. There is a fleeting mention in ART. 2, SEC. 1 that Congress could provide for officers who might act when the president was incapacitated. But none of our presidential succession acts have defined incapacity or dealt with it in a substantive way. It was only with the Twenty-fifth Amendment in 1965 that incapacity was seriously addressed. That Amendment was not in place to deal with serious incapacity issues in the Garfield and Wilson presidencies as well as a number of other lesser incidents. The question of incapacity was not considered at all for members of Congress, as the loss, even for months or years, of one, two, or three members out of 100 of 435 would not be a debilitating event.

But the loss for weeks, months, or years of tens or hundreds of incapacitated lawmakers is another story. The secret creation of a bomb and radiation-proof bunker for Congress at the Greenbrier resort in West Virginia during the Cold War was based on the assumption that a nuclear attack on Washington would kill most members of Congress. The objective then was assuring, with the notice available from the time missiles were launched in Siberia until they arrived in Washington, that Congress could evacuate the 200 miles or so to the Greenbrier. No contingency plans existed for an attack without notice, or one that caused not death, but widespread incapacitation.

The threat from terrorism is different. Not only could there be an attack--including a nuclear one--with no notice, but the threat of chemical and biological warfare, or exploding jet fuel, also makes widespread temporary incapacitation a more likely scenario, and perhaps a more vexing problem. In the event of multiple deaths, the Senate at least, can quickly fill vacancies via gubernatorial appointments. But neither the House nor the Senate can fill vacancies due to temporary incapacitation. For incapacitated members, the relevant seats would be effectively vacant until the member recovers or dies and is replaced, or until the next general election. In this case, the quorum problem looms larger, since even under the expansive definition of a majority of those lawmakers "chosen, sworn, and living", incapacitated members would be included in the definition but unable to help constitute the quorum. For example, if 220 members of the House of Representatives were alive but unable to perform their duties, there could be no quorum

How Incapacitation Affects Congress

When vacancies occur in Congress, there are established processes for filling them (special election in the House; gubernatorial appointment followed by special election in the Senate). When a member of Congress is alive but unable to perform his or her duties, there is no way to fill what is in effect a temporary vacancy. Under normal circumstances, this does not pose a problem for the functioning of government. If a handful of Senators are incapacitated, the

institution can function, short a few votes. But if there are large numbers of incapacitated members, the continuity of Congress is threatened. In the House of Representatives, no special election is called until a seat is declared vacant. Similarly, in the Senate, no gubernatorial appointment or special election can occur if there is no vacancy. Mass incapacitation brings with it all the problems that mass vacancies in the House of Representatives would, but it is worse in three respects. First, mass incapacitation affects both the House and the Senate. Second, the temporary vacancies caused by incapacitation would not be filled for an indefinite amount of time, only until the member recovers, dies, or the term of office ends. Third, mass incapacitation makes it virtually certain that Congress would be unable to reach its quorum requirement even under its most lenient interpretation.

Continuity of Congress: Recommendations

It is essential that large numbers of congressional vacancies be filled shortly after they occur to ensure that in the event of a catastrophic attack, Congress can continue to function in a way that properly represents the American people. To address this problem, the Commission recommends a constitutional amendment to give Congress the power to provide by legislation for the appointment of temporary replacements to fill vacant seats in the House of Representatives after a catastrophic attack and to temporarily fill seats in the House of Representatives and Senate that are held by incapacitated members.

The commission favors a relatively simple amendment that authorizes Congress to specify the details of the solution with implementing legislation. The procedure for temporary appointments would only need to become operative if there were large scale vacancies, not for ordinary vacancies. Governors could make the temporary appointments, or members could specify a list of successors in advance to fill vacancies. A third option is a combination of these two methods: governors would select from a list provided in advance by each member of Congress. Incapacitated members of Congress who are replaced by temporary appointees, should be able to reclaim their seats as soon as they determine that they are able to carry out their duties.

There are many more details that the commission has considered and that would have to be addressed by legislation. However, the central point is that a constitutional amendment is needed to allow Congress to provide for temporary appointments in the case of mass vacancies or incapacitations of member of Congress.

Why Expedited Special Elections are not the Answer

Since the release of our report, there has been much discussion of the question of continuity of Congress. There is widespread acceptance that there is a problem ensuring continuity of Congress that calls for a solution, although a few seem to want to wish the problem away. We have found many members of Congress and the public convinced that our recommendations are sound. There have however been several lines of criticism against our approach, and one major alternative proposed.

The two major criticisms of our approach are (1) that we should be reluctant to amend the constitution and (2) that our proposal undermines the House of Representatives as the "People's House" as it allows for some members of the House of Representatives to be appointed rather than elected, albeit in the most extreme circumstances.

On the question of amending the constitution, our commissioners could not agree more that we should have a profound reluctance to amend the constitution. A constitutional amendment is a serious step and one that is hard to reverse. Constitutional amendments should be reserved for problems that cannot be solved through legislative means. Our reservations about constitutional amendments notwithstanding, our commission looked at every option short of amending the constitution and concluded that they would all fall far short of ensuring the continuity of Congress after a catastrophic attack.

The second objection is that temporary appointments, even those made in the most extreme circumstances, undermine the House as the "People's House." Every member of the House of Representatives has been elected by the people. No one has ever served there by appointment as many have in the Senate. Those who make this argument, also advocate federal legislation that would require states to dramatically speed up special elections. The idea is that if special elections can be held very quickly, then Congress will not have trouble functioning for more than a few weeks and that therefore no constitutional amendment or temporary appointments would be needed.

The commission takes very seriously the argument that the House is distinctively the "People's House." Six of our commissioners served in the House of Representatives for a total of 128 years. The procedure for filling ordinary vacancies works well, and the House is not hampered by having one or two seats vacant for several months as special elections are held. It is our contention, however, that the House cannot be the "People's House" unless it adequately represents the people as a whole. The founders, who were concerned with the subject of elections for the House, were also clear that the House was to represent the whole country. If there are 300 vacancies in the House and the remaining 135 proceed with business, then more than two-thirds of the country would not be represented in its decisions. Furthermore, if Congress were unable to function and the country had to rely on executive rule, a benign form of martial law, for many months, that would hardly fulfill the democratic promise of the "People's House." Our position is that we need the broadly representative chamber of the House of Representatives after an attack, and if we do not allow for emergency interim appointments in these extreme circumstances, we will have either a chamber that represents very few people or one that does not function at all.

The major alternative to our commission's recommendation is federal legislation to pre-empt state laws requiring that states hold expedited special elections. One such bill is proposed by Representative Sensenbrenner and requires elections within 21 days, with 14 days for the parties to select candidates and another seven for the general election. Advocates of this sort of proposal believe that it solves the problem of the continuity of Congress without requiring a constitutional amendment or employing temporary appointments.

Our commission considered and seriously analyzed the option of expedited special elections. Our conclusion was that there is no way to hold democratic special elections in less than two months under normal circumstances and in the aftermath of an attack, it would be hard to imagine holding such elections within three months. We believe that two or three months is too long to be without a Congress, especially in a time of great national crisis.

There are two major reasons why very quick special elections are a bad idea. First, it is not possible from an election administration perspective to hold elections in a short time period. Second, even we were able to have very quick elections, they would not be democratic elections

in the normal sense. There would be no time for candidate recruitment or primaries and little time for the voter to get to know candidates.

On the question of the mechanics of holding elections, there are some states that are able to hold special elections under ordinary conditions within two and a half months. This is only possible because these states eliminate party primaries. Candidates are usually selected by party committees. While it is perfectly legitimate for a state to bypass the primary system, do we want to mandate that no state would be allowed to have party primaries in selecting candidates for a special election?

Beyond the need for a primary, elections are complex activities. Poll sites have to be secured, poll workers hired, ballots designed, and ballots printed. In each of these areas, there are serious problems with holding an unannounced election. Take for example the printing of ballots. There are limited numbers of ballot printing companies. In a general election where there is an election day set years in advance, companies can stagger the printing of ballots. But imagine holding hundreds of elections across the country on short notice. The example of the California recall is fresh in our minds. Officials there are struggling mightily to hold an election in one state in 80 days. Printing presses are furiously printing ballots, and the number of polling places is greatly reduced from a regular election.

Think also of unregistered voters. The announcement of an election with due notice to voters allows those who are unregistered or have moved to a new jurisdiction to properly register. Quick elections would effectively disenfranchise these voters. Short elections would not allow for the casting of absentee ballots. Seven days is not enough to print ballots, receive requests from voters who need absentee ballots, mail the ballots and receive them back. While some vote absentee as a convenience, there are many who are too frail to visit a polling place or out of town for legitimate reasons. Most troubling of all are overseas military voters, who are serving to defend our country, but would be unable to vote in elections following an attack at the heart of our nation. What about state and federal laws concerning campaign finance, disclosure requirements, etc? At every turn, having elections too quickly undermines the democratic character of the elections.

In addition to many of the election administration difficulties is the question of what sort of election we could have in just a few days or weeks. Who could run in such an election but the richest or most famous? Would there be time for debates? Would candidates be able to run ads informing voters of their positions, promises and character? Would the media have time to scrutinize the candidates? In short, such elections could be mere coronations for the rich and famous, who would run without voters knowing much at all about them--and nothing about alternatives to them.

Finally, proposals to hold quick special elections do nothing for the case of incapacitated House members or Senators. As their seats would not be technically vacant, there would be no way to hold special elections, and Congress might not be able to function at all for an indefinite period of time.

Our commission did not come lightly to the conclusion in favor of a constitutional amendments providing for temporary appointments in the case of mass vacancies and incapacitations. But after serious study and deliberation, we unanimously endorse that recommendation. We have a hole in our constitutional fabric, one that might result in a country without a Congress for many months after a catastrophic attack on our government. The fact that you are holding these

hearings shows a seriousness of purpose on the part of this committee. We offer our recommendations with the hope that it will aid you in your endeavor to strengthen the greatest democratic beacon in the free world, the United States Congress.