

Testimony of
The Honorable Brian Baird

September 9, 2003

Senate Committee on the Judiciary
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The Honorable Brian Baird (D-WA)
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Room 226 Senate Dirksen Office Building

It is a privilege to testify before this distinguished committee today and I commend the Chairman and Ranking Member for their recognition of the importance of this issue and their leadership in seeking solutions to this grave problem.

To underscore the significance of this hearing, imagine the following event. The American people are going about their daily lives when television and radio broadcasts are interrupted with the news that a nuclear weapon has been detonated in the nation's capitol and all members of the Congress, the President and Vice President, the Supreme Court, Cabinet members, and thousands of government workers and residents of Washington DC have been killed.

We must make every effort to prevent such an event from ever happening, but we must also recognize that terrorists have the desire and may have the ability to obtain nuclear or chemical weapons. Should they use such weapons, all or nearly all members of the House and Senate could be killed or incapacitated immediately and without warning. As discomfiting as this reality may be, it is reality. To believe and act otherwise is wishful thinking at best and irresponsible at worst.

Yet, as it stands now, two years after September 11th, we do not have coherent, constitutional valid plans for assuring the continuity of our government. This is unacceptable.

Since September 11, 2001, a working group within the House of Representatives, and an independent commission headed by Norman Ornstein and Thomas Mann have engaged in a careful review of the Constitution, Presidential succession acts, House rules, and other procedures relating to continuity. These reviews have revealed severe problems that could jeopardize the security and orderly government of our nation.

In my comments today, I would like to briefly summarize the key obstacles to orderly continuity in the House, respond to some of the positions taken by critics, and offer a proposal which I believe would assure continuity of House functions in the event of a crisis.

The chief concern regarding continuity of Congress pertains to the functioning of the House of Representatives. As you know, vacancies in the Senate can be filled in most states by

appointment from the Governors. House vacancies, under the Constitution, must be filled by direct election.

All those who serve in the House are proud of this tradition and hold dearly to the principle that no one has ever served in the House who was not directly elected by the people. If the Congress were to be destroyed in a nuclear, biological or chemical attack, it would be a unprecedented event. New conditions demand new responses.

The problem this scenario creates is that large losses of House members would leave the House to function with just a handful of individuals (which is theoretically allowed under House rules, but of questionable constitutional validity or public acceptance). Or, if there were no survivors and all House members were killed or incapacitated, there would be no House of Representatives at all, leaving such fundamental constitutional functions as appropriating funds, declaring war, approving Vice Presidential nominees if necessary, etc. to be attended to either through extra-constitutional means or to wait until elections could take place. Again, as it stands today, no one really knows what would happen because we are not adequately prepared to deal with these circumstances. It is, however, questionable to hope or trust that in the event of such a profound crisis all the survivors would somehow magically "do the right thing". Crisis can provoke a number of reactions, but universal sagacity can not be counted among them.

Some who insist that there be no deviation from direct election to the House have argued that it is acceptable for the House to function with as few as three or conceivably even with a single member. Others have suggested that having no House at all for many weeks or months is perfectly acceptable. I believe such positions do a disservice to the intent of the Constitution, to the people we represent, and to the House of Representatives as an institution. I also believe that inaction, knowing what we now know, is an equal disservice. As an alternative, and with great reluctance, I believe it will be necessary to amend the Constitution to provide for a more orderly and expeditious means of temporarily, and I underscore temporarily, replacing House members until special elections can be held in an orderly, responsible manner.

Fundamental to my concern about continuity in the House is respect for the key constitutional principles of checks and balances and separation of powers. Ironically, those who insist that nothing other than a House comprised of directly elected members, would, by their insistence, likely leave the entire nation to be governed either by a handful of survivors, who in fact were elected by only a small fraction of the population, or by people who were not elected at all. This would likely include unelected cabinet members serving as President and Vice President, appointed Senators, or possible even military generals declaring martial law. Lacking the checks and balances of Congress, the Executive branch might claim unprecedented authority, including the power to declare war and possibly even to launch retaliatory nuclear strikes. Leaving unelected people to make such profound decisions with no checks at all is a strange consequence indeed for those who hold so dearly to the principle of direct elections.

Another argument that is made against temporary appointment is that appointees would have an unfair advantage in a subsequent special election. On the one hand the argument is made that the

voters must have the right to choose their representatives, but then the voters' very abilities to make intelligent choices is called into question by the assumption that the voters would automatically choose the appointee over other candidates. This is not only intellectually inconsistent, it is also contrary to the empirical evidence from elections following Senate appointments.

Further irony is added when proposals are made for expedited elections in which the major political parties, without primary elections, would select candidates, then elections among those candidates would be held within just a few weeks. Apparently, in the name of protecting the appearance of direct election, the opponents of temporary appointment are willing to sanction hastily arranged elections in which voters have limited choices of candidates and insufficient time to make truly informed choices. What is more, such proposals assume, without experiential evidence for support, that nationwide elections could in fact be arranged in just three weeks. That assumption is contrary to the judgments of most state elections officials who have stated that at a minimum two to three months would be needed to assure fair elections and full enfranchisement of voters. Finally, even if elections could be conducted within several weeks, which is highly questionable, it should be reiterated that such proposals implicitly accept the absence of a Congress for that time period.

Given the problems that would arise in the event of large losses of House members, and in view of the problems created by waiting until elections could be held, what alternative would do justice to the functions of the House and preserve the principles of checks and balances and separation of powers that have served this nation so well?

Based on the information from the Congressional working group and the independent Continuity of Government Commission I believe the best, albeit not perfect, solution is a Constitutional amendment authorizing sitting members to identify potential designees who would temporarily assume the Elected Representative's duties until special elections could be held. Draft language for the proposed amendment follows, but let me first briefly outline its merits.

Briefly, the proposed amendment addresses the following problems:

1. Provides a mechanism for very rapid reconstitution of the Congress as a functioning legislative body in the event of large losses.
2. Addresses concerns about appointments influencing the partisan makeup of the house without inserting partisan language or requirements into the Constitution.
3. Provides for prompt restoration of representation in the event of extensive losses to a state delegation or political party, but obviates determination of a triggering threshold of losses to become effective.
4. Places responsibility for identifying potential temporary "Designees" with the person elected by voters of a district to make decisions as their direct representative to Congress.
5. By referring to "Designees" rather than Representatives, does not violate the principle of direct election to full membership in the House of Representatives.
6. Leaves to the States decisions about the time and place of special elections.
7. Does not set a fixed time for special elections to allow for extenuating circumstances that might accompany a devastating attack.
8. Authorizes Congress to address incapacity statutorily.

Proposed language to ensure continuity of House:

Upon election to the House of Representatives, each Elected Representative shall present to the appropriate official of their states a confidential list of individuals who the Elected Representative has thereby nominated for potential designation to service in the House in the event the Representative dies or otherwise becomes incapable of fulfilling the duties of office. All individuals so listed as potential designees must meet the Constitutional requirements for service in the House of Representatives. Elected Representatives shall have the authority to alter their list of potential designees at their discretion.

In the event of death or incapacity of an Elected Member of the House, the Executive of the Member's state shall select an individual from the Member's list of nominees to serve as Designee to the Congress until such time as the Elected Representative regains the capacity to serve or a new Elected Representative is chosen through election. Designees shall be required to take the oath of office and during the period of their service in Congress shall have all the voting privileges and other rights and responsibilities of members elected directly. Designees shall be counted for purpose of quorum counts and all legislation enacted during their service in the House shall have the full weight of law. In the event that a designee chosen by the Governor dies or becomes incapacitated before a special election can be held, the Governor shall select from the Elected Representative's list another individual to serve as designee. The Congress shall have the authority under this amendment to define incapacity of members and to establish procedures for making such determinations.