

Testimony of
The Honorable David Dreier

September 9, 2003

Statement of Hon. David Dreier

Chairman

Committee on Rules

United States House of Representatives

Before the Judiciary Committee

Of the United States Senate

On

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At 10:00 a.m.

226 Dirksen Senate Office Building

Hon David Dreier:

Mr. Chairman and Senators: Thank you for the opportunity to appear here today as I view the question of dealing with mass vacancies in the House and the Senate as two different questions. I commend you for your interest in how the House should reconstitute itself following an attack that leaves a great number of Representatives dead. Our potential demise is not a subject that any of us relish considering. However, as we sit here on the eve of this anniversary of 9/11, this inquiry is certainly timely.

Mr. Chairman, I would like to submit my written statement for the record and offer a brief summary of my remarks.

I would like to first quote a former colleague of yours from Mississippi, Senator Stennis, who said:

"I believe it is one of the great heritages of the House of Representatives that no person has ever taken a seat or cast a vote in that body except by virtue of election by the people. That is a great pillar of our form of government. . . ."

As you know, the idea of a constitutional amendment to allow appointment of Representatives following a national crisis is not new. During the Cold War a great number of constitutional amendments were proposed and at least three passed the Senate. However, even facing the prospect of mass attacks from numerous Soviet nuclear warheads and chemical and biological weapons resulting in the decapitation of not only the Capitol but most of our major cities, the House chose to not to amend the Constitution to allow for appointments of its Members.

The House has always been known as the "peoples' House" as the Constitution requires under Article I, section 2, that the House of Representatives "be composed of Members CHOSEN every second year BY THE PEOPLE of the several states." (Emphasis added.) Many in the House revel in the fact that every Member of the body has always been elected. There have been no exceptions, as that is what the Constitution has dictated.

The Senate has always been filled differently from the House. Originally constituted by appointment by the State legislatures, it was not until the Twentieth Century that the Senate became directly elected through the XVII Amendment to the Constitution that provides that "the Senate of the United States shall be composed of two senators from each state ELECTED BY THE PEOPLE THEREOF," (Emphasis added.)

The XVII Amendment further outlines how the executive authority shall issue writs of election to fill vacancies, but the legislature from any State "may empower the executive thereof too make temporary appointments until the people full the vacancies by election as the legislature may direct." Thus the Amendment calls for allows for temporary appointment and election under control of the State Legislature.

So as the "Peoples' House," we have never contemplated appointment and as such we want to preserve our distinct quality of being sent as elected representatives of the people. Our House elections take place every other year in an effort to best represent the most current expression of the will of the people in each of 435 individual districts.

We hope, Mr. Chairman, that Senators will be able to understand why I, and many of my colleagues, are pursuing a statutory approach pursuant to another Constitutional provision, Article I, section 4. We contend that this provision is part of the Constitution to allow the institutions to preserve themselves through elections, which Congress can regulate. The provision states:

"The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof, **BUT THE CONGRESS MAY AT ANYTIME BY LAW MAKE OR ALTER SUCH REGULATIONS**, except as to the places of choosing Senators." (Emphasis added.)

We believe that a Federal law should be passed requiring the States to have a "mass vacancies special election" within a very limited time period. I will talk about our proposal later, but the real point is for you to understand that any Constitutional Amendment calling for appointment of House Members will meet considerable opposition by the House Membership complicating passage. I would urge you to examine our approach as the best method of preserving our institutions in times of crisis.

Mr. Chairman, let me now turn to a discussion of the historical underpinnings of the differences in the House and Senate on matters of election of their members.

Constitutional Background

Mr. Chairman, the Founding Fathers created a republic which has become the longest continuous constitutional democracy in the world, and they did so with unparalleled genius.

Beyond creating a masterful framework for our entire government, they balanced the interests of small states and large, the citizens, and the needs of a fledgling democracy to create a lasting democratic civilization. At the time they labored for a constitution in 1787, the future of our nation was by no means secure. Their sense of "homeland security" when they met in Philadelphia must have been very limited in those days as they faced the threat of intrigues with Europe and the prospect of open war again, battles with indigenous peoples, limited trade routes, uncertain crops, the ravages of disease, and more.

The Framers of the Constitution did not come upon this great document in a single flash of inspiration; rather, they spent months discussing, arguing, and voting on the subject of how the government should be formed. In the end, they wisely created a House and a Senate with differing size, constituency, term of office, procedural rules, duties, and prerogatives.

Nor did they casually adopt the direct election of Representatives by the people while granting states the power of selection of Senators.

However, many came to believe as Delegate James Wilson when he stated his desire for a vigorous government whose power "flow[s] immediately from the legitimate source of all authority - the people The government ought to possess not only . . . the force but [also] . . . the mind or sense of the people at large." Delegate George Mason concurred: "The people will be represented [in the House]; they ought therefore to choose the representatives."

Delegate John Dickerson considered it "essential that one branch of the legislature should be drawn immediately from the people; and as expedient that the other should be chosen by the Legislatures of the States. This combination of the State Governments with the National Government was as politic as it was unavoidable." Delegate James Madison held that it was "a clear principle of free government" that the people must always elect at least one branch of the legislature.

In the end, the Constitutional Convention Delegates saw, as Hamilton noted in the Federalist #59, that direct election by the people, and NOT selection (which could be held hostage to the whims or even inaction of state government leaders), is the only way to ensure a national government--one that reflects the will of a majority of Americans.

Hamilton sums up this thought on this provision of the Constitution with his famous statement that "EVERY GOVERNMENT OUGHT TO CONTAIN IN ITSELF THE MEANS OF ITS OWN PRESERVATION." (Emphasis added.)

The Continuity in Representation Act of 2003 (H.R. 2844)

The Framers of the Constitution did their job well. The Congress and the Nation have amended the Constitution but 27 times (including the Bill of Rights' 10 amendments) in 216 years.

Today you will consider the need for a constitutional amendment to change for the first time in those 216 years the manner by which Members of the House are empowered by the public to serve as their representatives to the Congress.

As I have discussed with Hon. Robert Michel, our former House Republican Leader and a member of the Continuity of Government Commission, a Constitutional amendment should be a last resort. Indeed, I believe a Constitutional amendment would be premature until Congress determines that there are no other ways to resolve these issues through its procedures, rules, or public laws.

The Constitution itself contemplates this process in Article I, Section 4, where it gives to the Congress the power over the times, places, and manner of elections. As interpreted by the Supreme Court, the "times, places, and manner" clause is no less than the:

"Authority to provide a complete code for congressional elections, not as only to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes . . . [and] making and publication of election returns."

Smiley v. Holm, 285 U.S. 355 (1932).

Accordingly, I have joined with several of my distinguished colleagues in support of legislation providing for expedited special elections to fill mass vacancies in the House of Representatives,

The list of cosponsors includes several Members knowledgeable on the subject of the Constitution and elections by the states. They are:

The Chairman of the Judiciary Committee, Mr. Sensenbrenner of Menomonee Falls, Wisconsin; the Chairman of the Constitution Subcommittee of the Judiciary Committee, Mr. Chabot of Cincinnati, Ohio; the former Secretary of State, Ms. Miller of Harrison Township, Michigan; the former Secretary of State, Mr. Cole of Moore, Oklahoma; and the ardent Constitutionalist, Dr. Paul of Surfside, Texas.

This legislation operates within the checks and balances underpinning our Constitution. It recognizes, as did Madison in the *Federalist #52*, that

"It is particularly essential that the [House] should have an immediate dependence on, and intimate sympathy with, the people. . . . [E]lections are unquestionably the only policy by which this ... can be effectually secured."

This bill, the Continuity in Representation Act of 2003, H.R. 2844, protects the "People's House." It requires expedited special elections for the House in the case of a catastrophe that results in more than 100 vacancies--such as would be the case if, for example, a well-planned terrorist strike were to be tragically successful. If such "exceptional circumstances" exist as having more than 100 House Members killed, this legislation allows the Speaker of the House to call for rapid special elections in order to re-constitute the House.

Thus, under the legislation, when the Speaker announces that the total number of vacancies in the House exceeds 100, a special election must be called to fill the vacancies, and this election must occur within 21 days, unless a regularly scheduled election is to be held within 51 days. Political parties have 14 of the 21 days to nominate candidates and all determinations of the need for a special election are subject to judicial review.

This approach has the support of House Speaker Dennis Hastert who said it would allow Americans to "retain their local voice in Washington . . . without changing the Constitution."

The report of the Commission begins by stating: "On average, states take four months to hold special elections, and in the aftermath of a catastrophic attack, elections would likely take much longer."

This four-month figure is based on an average reached by looking at the special elections since the Ninety-Ninth Congress. This average is a small sample by which to judge a situation with mass vacancies. Looking more broadly, the report contains data, showing that more than one third of the states have laws limiting the time on special elections from 28 to 127 days, averaging 84 days. This shows that the relatively small number of special elections that the commission based their four months on could turn out to be considerably less.

Some editorial prejudice against expediting special elections is shown on page 19 where it is stated: "A severely shortened election is likely to provide little choice for the voters. Only the most well-known and well funded candidates would be able to gain name recognition in an abbreviated campaign."

The Commission states that it "prefers that mass vacancies be filled quickly by temporary appointments and that special elections take place within 120 days."

Moreover, the Commission's report states that they believe that the appointment should last until the special election is held to fill the seat, but that the special election shall be held after 120 days of vacancy. This would potentially leave too many seats unfilled for too long.

We believe that elections, especially in times of crisis can take place in a much shorter time period.

The report by the Commission postulates later that:

"Under the current constitutional arrangement, there is no effective way to begin filling House vacancies in less than three months after an attack."

The data provided by the report of the Commission shows that currently laws are in effect to start the filling of vacancies earlier. Eight states currently have special elections limited to less than ninety days with the average being 55 days. There are also 6 states averaging 90-day limits. This means that after vacancies are declared then 14 states under their current laws would begin filling their vacancies. These include New York, California, and Texas with substantial populations. Judging the impact of mass vacancies on special elections solely on the relatively few special elections sampled shouldn't carry that much weight.

Of course, this wouldn't happen if the implementing law requires elections to last the full 120 days as the Commission proposed.

In addition, if you look at the facts of the elections following Senator Wellstone's death and Senator Torricelli's resignation, the two states, Minnesota and New Jersey, were able to dispense with some election niceties and complete them closer to 30 days. These were previously scheduled elections not conducted in a time of crisis. Nevertheless, the courts sustained the last minute change of ballots, some limiting of absentee voting, and other measures to accomplish these elections.

As mentioned above, a number of states already have special election laws that provide in non-emergency circumstances for rapid elections--no later than 28 days in Minnesota and between 30 and 40 days in New York.

California, my home state, has provisions for special elections in the event of a catastrophe that requires them to be held within 63 days, while special elections in non-emergency situations have up to 119 days.

A survey of all 50 states shows many of the larger states have requirements for special elections to be completed within 60-90 days, perhaps a majority of the populace. (See the chart attached in Appendix A.)

Any criticism that 21 days is too short a time neglects the facts precipitating our legislation: a national emergency where nearly one-quarter of the House of Representatives--or more--is killed. Under such dire circumstances, we believe that all the resources of our nation will be devoted to conducting these elections.

It is not unreasonable to think that the American people in individual districts across the nation can choose a representative in 21 days. If 9/11 showed us anything, it's that Americans pull together in times of disaster and accomplish amazing things.

Indeed, we believe it to be just "loopy and silly" to argue that finding polling places, printing ballots, and assembling volunteers, as some have tried to suggest, would stand in the way of the national will to re-constitute the House of Representatives in a time of crisis.

Some of those who advocate a constitutional amendment to appoint temporary, stand-in Members justify the need for appointing Members because of the vitally important business that must be done immediately by the House of Representatives in the wake of a national crisis. In my view, the Framers intended that such important decisions should be made in the House not by someone who is selected for the people, but by someone who is elected by people.

Moreover, even assuming there is rapid selection of stand-in Members by governors or from a list of designees in the wills of each sitting Member, how quickly will they really be sworn in?

Questions of qualifications and the resolution of the likely lawsuit(s) over the constitutionality this new scheme would potentially need to be resolved--it could be months or more before the Supreme Court is able (even assuming it is in place after such a catastrophic attack) to render judgment.

In contrast, our legislation works within the existing constitutional framework and is unlikely to have protracted litigation.

The "Stand-In Amendment"

Mr. Chairman, your distinguished committee is not here today to consider only how I would attempt to solve the problem of mass vacancies. Instead you have before you the report of the Continuity of Government Commission, which is recommending what I call the "Stand-In Amendment," as it would allow for the Congress to pass a law for the appointment of temporary replacements to fill vacant seats in the House after a catastrophic attack.

Mr. Chairman, the Senate does not need a Constitutional amendment to deal with vacancies, you have one already--the 17th Amendment. One must ask, is there some desire on the part of some senators to nationalize senate appointments by requiring governors to choose only from a pre-selected list of candidates?

The Commission's work has helped to shine a light on an important area for the Congress to address--will we be able to fulfill our Constitutional duties, even in a time of crisis? The members all worked hard and we again thank them and applaud their patriotism and their support for our institutions.

The Commission, in their Appendix III, entitled "Relevant Constitutional Provisions" chose not to include several provisions including the provision upon which our statutory approach is based--Article I, section 4, the "times, places and manner" clause of the Constitution. They have selected only a few of what I personally view as relevant constitutional provisions. Many of these provisions, which are not highlighted in the report, will be affected by the implementing legislation that must accompany the constitutional amendment. Because of the potential impact on the Constitution I must raise a number of concerns about the Commission's constitutional recommendation.

For example, the Commission did not mention what would be the impact of Article I, Section 5: "Each House shall be the judge of the elections, returns and qualifications of its Members." Does this mean that the stand-ins can judge the elections, returns and qualifications of members, but the elected members can't judge the appointments--only their qualifications?

Yet the Commission did include the remainder of the sentence for that part which deals with the constitutional quorum--"And a Majority of each shall constitute a quorum to do business" The House has always preserved by its rules the right to determine whether vacancies exist.

Another relevant provision, the next sentence in Article I, Section 5, after quorums: "Each House may determine the rules of its proceedings..." Will the implementing legislation attempt to change quorum requirements and how the House rules currently operate?

Is the Fourteenth Amendment relevant to any stand-in appointment?

"No person shall be a Senator or representative in Congress . . . or hold any office, civil or military, under the United States, or under any state . . ."

Does this mean that stand-ins will be able to serve their state legislatures as well?

Suffice it is to say that many questions for appointment remain unanswered. The Commission's recommendations also do not adequately address a number of very important questions that will have to be answered in the implementing legislation that will accompany any amendment. These include, naming a few:

Who determines, and on what criteria, when a vacancy or incapacitation exists?

What are the time requirements and who controls the appointments of stand-ins?

Who is eligible and what qualifications are necessary to be on a list candidates for appointment?

Will appointed stand-ins be allowed to run for election and will new campaign laws be enacted as part of the implementing law?

Will the potential lists of stand-ins be made public?

How will the temporary stand-ins affect the existing rules of House, or Senate, procedure?

Will the oath of office be required and administered to the stand-ins?

Will stand-ins be paid; have full staffing and provided pensions?

Can you hold another office, such as state legislator, while you are appointed to be a stand-in?

Will stand-ins be subject to freedom from arrest?

At their core, these unanswered questions are a part of the actual implementing language for the constitutional amendment--which we have not yet seen or introduced.

I apologize for having spent some much of your time asking questions about the Commission's proposal and its impact on arcane rules and provisions of the Constitution. However, I know that the House and the Senate both cherish their rules and traditions and certainly don't want to underline the integrity of the Constitution.

In sum, I am troubled by the choice of the language of the amendment the Commission recommended. Yes, it appears the simplest in form, but I am concerned that beneath its plain-brown wrapper lies the constitutional equivalent of a computer "virus" or "worm." Over time, I am concerned that it will eat away at other provisions of the Constitution, forcing the Framers' checks and balances to crash under the potential statutory fixes that such an amendment would allow.

Moreover, the Commission has left unanswered a much more difficult question: incapacitation, particularly mass incapacitation. Unlike vacancies, incapacitation has never been fully addressed by the Congress and the Commission acknowledged the problems inherent to answering this question at page 13:

"There is also the danger of abuse of an incapacitation provision, with Congressional leaders or governors tempted by political or other reasons to replace members by declaring them incapacitated."

This is an area of such potential abuse that I believe the consequences and impact must be fully examined and put before the public before we begin to act on a constitutional amendment.

Joint Committee for Congressional Operations and Security

Mr. Chairman and Senators, while my foregoing testimony indicates my opposition to starting with a constitutional amendment for re-constituting the House following a catastrophic attack or disaster, I do believe that no matter what method we ultimately choose for replacing Members--be it an amendment or a special elections law--we, the House and the Senate would greatly benefit from considering in a nonpartisan, bicameral manner the continuity of Congress.

I would like to take a moment to speak about H. Con. Res. 190, which passed the House with overwhelming support as well as the strong support of both Speaker Hastert and Democratic Leader Pelosi.

We believe the House vote was a strong expression of our Members' support for a comprehensive examination of the issues that would face the Congress in the event of a national emergency. Now that the Congress has reconvened following the August District Work Period, we hope the Senate will act quickly on this measure, with whatever amendments might be necessary to accommodate the concerns of Senators, in order that both Houses can begin work on these serious matters.

As you know, a catastrophic attack against the Capitol (or any other location where a large number of Members of either body or caucus were gathered) could affect not only the ability to quickly assemble legitimate quorums, but could also, in the worst case, endanger the stability of our republic. We believe it is of the utmost importance that the Congress is able to function during any such crisis, and accordingly, we see the joint committee as an ideal entity to examine those issues that could hinder the functioning of our bicameral institution in a time of grave crisis.

We are particularly concerned that there be a mechanism that will allow both Houses of the Congress to review those mechanisms and procedures. The Framers of the Constitution correctly held that the House and the Senate should be separate entities with different procedures and prerogatives. We are not proposing that those differences be altered; rather, we are committed to making a thorough examination of how the Congress would go about fulfilling our mutual constitutional duties.

We want to assure you that we intend to maintain and preserve the institutional prerogatives and individuality of each body of Congress. We merely want to ensure we have in place the procedures to be able to function in the case of an extreme emergency so that the American people can have confidence that their government is in place and working on their behalf.

Conclusion

Mr. Chairman, in closing, I understand the desire for expediency in times of crisis. Appointing "stand-in" Members by the executive in each state or through a list of "heirs to the seat" provided by each sitting representative may seem expedient, even prudent to some. It may seem easier than planning, creating, and implementing the infrastructure necessary to ensure rapid and fair elections in the face of mass vacancies.

However, in the long term, I believe that after a national crisis, when large numbers of Members of the House have been killed and even the existence of our republic may be at stake, we should still choose to have faith in ELECTIONS, NOT SELECTIONS.

In a national crisis, printing ballots and conducting elections will not be insurmountable obstacles to Americans. Legitimacy, not expediency, should be our concern. I believe that America is up to this challenge.

Mr. Chairman and members of the Committee, thank you, again, for your attention to my comments. I would be pleased to answer any questions that you might have.

APPENDIX B

STATEMENT OF THE HONORABLE DAVID DREIER

RELEVANT CONSTITUTIONAL PROVISIONS

Article I: Legislative Department

Section 2: The House Of Representatives

Clause 1. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Section 4: Elections

Clause 1. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time make or alter such Regulations, except as to the Place of chusing Senators.

Section 5: Powers And Duties Of The Houses

Clause 1. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each 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.

Clause 2. Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Section 6: Rights And Disabilities Of Members

Clause 1. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Clause 2. No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

RELEVANT CONSTITUTIONAL PROVISIONS - (CONTINUED)

Fourteenth Amendment: Rights Guaranteed

Sections 3: Disqualification

No Person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two thirds of each House, remove such disability.

Seventeenth Amendment: Popular Election of Senators

Clauses 1-2:

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of each 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.

Twenty-Fifth Amendment: Presidential Vacancy and Disability

Sections 1-4:

In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers

and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Whenever the Vice President and a majority of either the principal officers of the executive
RELEVANT CONSTITUTIONAL PROVISIONS - (CONTINUED)

Twenty-Fifth Amendment: Presidential Vacancy and Disability - continued

departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principle officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Source: Congressional Research Service