

Testimony of  
**The Honorable Patrick Leahy**

September 9, 2003

Statement of Senator Patrick Leahy  
Senate Committee on the Judiciary  
Hearing on Ensuring the Continuity of the United States Government  
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This week marks the second anniversary of the tragic events of September 11, 2001. It was a day that shook our Nation to the core, but also drew us closer as Americans.

In the wake of the terrorist attacks, we quickly joined together in a bipartisan effort to improve airport security, increase cooperation between our terrorist-fighting agencies and our first-line defenders, and grant the Administration powers it claimed necessary to ferret out and pursue terrorists. Since then, we have continued to review our laws and policies to make sure they promote our fight against terrorism, while preserving the liberties, freedoms and rights that make America the great Nation that it is.

One issue that we have not yet addressed is how best to ensure the continuity of our government in the event of a catastrophic attack that kills or incapacitates large numbers of government officials. The doomed United Airlines flight that crashed in Pennsylvania two years ago reminds us that those who hate us will go after our Nation's leadership and national symbols like the Capitol. What would have happened if the brave passengers aboard that flight had not fought back and prevented it from reaching its target?

The problem of ensuring the continuity of our governmental institutions is most acute in the House of Representatives. Under our current Constitution, State governors can immediately fill vacancies in the Senate by appointment. Vacancies in the House, however, require a special election. This means that many districts could go unrepresented for significant periods during a time of crisis, depending on how long it takes for States to prepare ballots, set up polling places, and take whatever other steps are necessary for special elections to be held.

September 11th brought a new urgency to this issue, and there have been a number of proposals for addressing House vacancies in the event of a national emergency that prevents a significant number of Members from serving. Some have proposed amending the Constitution to allow for the emergency appointment of Representatives. Others have argued that this approach is unnecessary and dangerous - unnecessary because States are capable of holding special elections quickly enough to guarantee the functioning of Congress, and dangerous because it would involve a fundamental departure from our constitutional heritage.

More than any other Federal body, the House of Representatives reflects the Founders' belief that the people should choose their leaders, and that those leaders should be directly accountable to the people. Without exception, every person who has served as a Member of the House was

elected to that office by the people of his or her district. To quote James Madison, the "definition of the right of suffrage is very justly regarded as a fundamental right of republican government. It was incumbent on the Convention, therefore, to define and establish this right in the Constitution. To have left it open for the occasional regulation of the Congress, would have been improper for the reason just mentioned."

Proposals to amend our Federal Constitution bear a heavy burden. Amendment is appropriate only when there is a pressing need that cannot be addressed by other means. While the possibility that the House could be weakened by a terrorist attack is frightening indeed, so too is transforming the essential nature of the People's House. Amending the Constitution should be a plan of last resort.

This is not the first time that constitutional amendments have been proposed to allow for the emergency appointment of Representatives. Between 1945 and 1963, amidst Cold War fears of nuclear attack, more than 30 such amendments were introduced. Yet, we managed to survive those perilous times without having taken this momentous step.

Some have suggested that the House could change its rules so that emergency appointments would be admitted only to the Committee of the Whole, and would not be considered full-fledged Members. While this suggestion has some superficial appeal, it would still result in non-elected Members acting on behalf of the people. In the past, the House has allowed delegates from the territories and the District of Columbia to vote in the Committee of the Whole, but these delegates were elected by the people they represented.

Critics of the constitutional approach have proposed legislation to require expedited elections for House seats in the event of "extraordinary circumstances." Under this proposal, elections would be held no later than 21 days after the Speaker of the House announced that there were more than 100 vacancies, unless there was a previously scheduled general election within 51 days of that announcement.

This hearing is an opportunity to determine the practical and logistical realities of holding special elections. Among other things, we need to know how much funding, technical assistance, and administrative support the States would need to elect replacement Representatives in a fair and expedient manner.

We should also review existing State laws and procedures, and consider their experiences in this area. For example, California, which could have as many as 53 Representatives to replace, has a statute allowing for the replacement of Representatives in the event that a catastrophe causes a vacancy in either 25 percent of all the seats in the House or 25 percent of the seats representing California in the House. That statute requires special elections to occur within 56 to 63 days after a proclamation from the state governor.

I have discussed two proposals that have been advanced for filling House vacancies in a time of national crisis, but there have been others. Former House Members Tom Foley and Newt Gingrich have suggested giving Representatives the right to designate their temporary successors. As part of this scheme, Representatives could announce their designees as a part of

their campaign platform, thereby giving the people some role, albeit indirect, in choosing crisis replacements.

Regardless of the proposal, there are some basic questions that must be resolved. What percentage of deceased or incapacitated Members would trigger emergency provisions? What would constitute incapacity? Who would make that determination? Could such a decision be made quickly? How would a temporarily incapacitated Member regain his or her seat after recovery?

[Perhaps we can survive a brief interim period without a functioning House of Representatives, especially since post-tragedy legislative actions might be governed more by emotion than by sound policy judgments. It has also been suggested that the House could simply carry on during an interim period, with a majority of the remaining Members constituting a quorum. However, there are lingering questions about this definition of quorum, as it would allow a potentially small group of Members to legislate on behalf of a large group of people to whom they are not directly accountable.]

There is a lot to consider and many questions to answer. I am pleased that we will be hearing from our colleagues in the House and other distinguished scholars including Norm Ornstein who has devoted much of his valuable time to this issue. I look forward to their testimony.

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