

STATEMENT OF DONALD R. WOLFENSBERGER
BEFORE THE HOUSE ADMINISTRATION COMMITTEE
U.S. HOUSE OF REPRESENTATIVES
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Mr. Chairman and members of the Committee:

I am grateful for this opportunity to testify today on H.R. 2844, the “Continuity in Representation Act of 2003,” introduced by Representatives Sensenbrenner, Dreier, and others. I strongly support the rationale behind this bill which is to provide for expedited special elections to fill House vacancies in extraordinary circumstances as an *alternative* to a constitutional amendment that allows for the appointment of temporary Representatives.

In my considered opinion, such a constitutional amendment would be a dangerous corrosion of the very cornerstone of our governmental edifice, and that is its dependence on popularly elected Representatives. If you take that away, even for a brief period, you will seriously undermine the legitimacy and moral foundation of our representative democracy.

You do not have to be a constitutional scholar or political scientist to understand just how central the nature of this institution is to the strength, endurance, and resilience of our constitutional framework. You are the First House of the First Branch of our Federal government; the Framers did not put you at that point in our founding document by accident. Even a grade school student learns early on that the moral underpinning of our democracy as enunciated in the Declaration of Independence is that government derives its just powers from the consent of the governed. If you remove that element of consent, you jeopardize the confidence of the people in the justness of governmental decisions and actions. That is the last thing you should want to risk at a time of national crisis and confusion that would trigger an emergency replacement procedure for House members. That is why it is all the more imperative that you reconstitute the House in a constitutional

manner as intended by the Founders, through special elections, and not through a new constitutional mechanism that completely subverts that intent.

Turning to the specifics of H.R. 2844, the Speaker of the House is authorized to declare that vacancies exist. If the Speaker announces that there are more than 100 vacancies, then the expedited special elections are triggered. Under these extraordinary circumstances, the executive authority in states having vacancies shall issue writs of election to fill them by special elections which shall take place not later than 21 days after the Speaker's announcement. In those states in which political parties are authorized to nominate candidates, each party may nominate one candidate for each election to fill a vacancy within 14 days after the Speaker's announcement. Finally, the Speaker's determination and announcement of the existence of extraordinary circumstances that trigger the expedited elections is not subject to appeal in the House. However, the Speaker's announcements of vacancies are subject to judicial challenge in the form of actions requesting declaratory or injunctive relief before a three-judge court convened in the U.S. District Court having jurisdiction over the congressional district of a challenged vacancy. The action must be filed not later than two days after the Speaker's announcement, the court's decision must be made not later than three days after the filing of the action, and the decision is not reviewable.

Obviously the two main question this committee must address are what the threshold of vacancies should be to trigger the expedited special elections, and what time period should be allowed for those elections to take place. The Sensenbrenner-Dreier bill has a threshold of more than 100 members or roughly 23 percent or more of the House membership. Other proposals range anywhere between 20 percent and over 50 percent of the House membership. I lean more toward the higher threshold level to trigger expedited special elections (see attachments to this testimony).

H.R. 2844's 21-day timetable for special elections is the greatest point of controversy. I understand that a large number of state election officials have already weighed in that this is not a realistic time frame to prepare for an election. While I am not an election expert, I believe a two-month period is probably more practical and reasonable. Can the nation survive for two months without a full House? I think it can. President Lincoln did not call Congress into special session until July 4, 1861--nearly three months after the war began on April 12. Granted, in the interim Lincoln took some steps that were extra-constitutional in nature, such as suspending habeas corpus. But he acknowledged as much and laid these things before the Congress for retroactive consideration. Congress not only approved all of Lincoln's emergency measures but called for more. A month later it adjourned, having passed a raft of war legislation.

The proponents of a constitutional amendment providing for almost immediate appointment of temporary representatives (or "temp-Reps") claim such an instant-House is necessary to do such things as declare war and appropriate emergency funds, and to give it all the legitimacy of a full House. I would reply that if the U.S. is attacked again with the resulting loss of most of Congress, you are already at war, and no declaration is necessary. The founders recognized the right of the president to act unilaterally in response to a direct attack on the country without a declaration of war.

As to emergency funding, that can easily be provided by statute as standby authority to the President in the event that Congress cannot convene immediately or muster a quorum; or, it can be provided retroactively as was the case in the Civil War. The replenishment of the House by duly elected representatives of the people, even if it takes a couple of months, is more important than allowing laws to be written by temp-Reps with no direct authority from the people.

Finally, let me say a few words about the proposed constitutional amendment recommended by the “Continuity of Government Commission” created under the aegis of AEI and Brookings. On the one hand the commission seems to endorse a “concise,” 36-word amendment (p. 24 of its report) that leaves to Congress the power to regulate by law the filling of vacancies that may occur in the House and Senate if a substantial number of members are killed or incapacitated. Now that is pretty broad and vague authority. I seriously doubt that many states would ratify such a blank check. It’s buying a pig in a poke. Even if Congress does contemporaneously enact such legislation at the time it submits a constitutional amendment to the states, there’s nothing to prevent it, once the amendment is ratified, from changing the law. In fact, the commission intimates such modifications may be necessary based on experience under the law.

The commission favors either allowing members to designate in advance who should succeed them, or to permit the governors of the states to pick their successors. Under the first option, members could designate their spouses, their first-born, their nearest living relative, or their biggest campaign contributor to succeed them. Under the second option, if state governors are authorized to designate successors, there’s no guarantee they will be of the same party or even from the same congressional district. So, the commission was torn between nepotism and political cronyism, neither of which undemocratic process is likely to ease the troubled minds of constituents in time of crisis.

On the other hand, the commission cites on the next page of its report (p. 25) what a detailed constitutional amendment might look like. By my count, the amendment runs some 612 words-- 151 words more than contained in the ten amendments of the Bill of Rights combined.

But, more importantly, the amendment would set up such a convoluted system for replacing dead and incapacitated House and Senate members that it makes Rube Goldberg look like Simple

Simon. I will not go into further detail since the commission at least had the sense to opt for a concise as opposed to detailed constitutional amendment in the spirit of the Bill of Rights. As former Chief Justice John Marshall reminds us in *McCulloch v. Maryland* 17 U.S. 316 (1819), this is

...a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs....It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly and which can be best provided for as they occur.

In conclusion, Mr. Chairman, I strongly support the statutory approach of expedited special elections to deal with the possible loss of a large number of House members. The Framers gave Congress the power to regulate such elections by law to preserve our representative system of government and protect our rights. It may take a little more time, but getting it right from the start is more important than providing instantaneous continuity from temp-Reps who would lack both authority from and accountability to the people. Thank you.

Donald R. Wolfensberger has served as director of the Congress Project at the Woodrow Wilson International Center for Scholars since June 1999. As a guest scholar at the Center from 1997 to 1999, he authored the book *Congress and the People: Deliberative Democracy on Trial* (Johns Hopkins University Press, April, 2000), and began organizing public seminars and writing papers on the congressional policy process which led to his current staff position. Wolfensberger is a 28 year staff veteran of the House of Representatives, culminating with his appointment as majority chief-of-staff for the House Rules Committee by its chairman, Rep. Gerald B. Solomon (R-NY) in the 104th Congress (1995-96). He previously served as minority staff director of the committee in the 102nd and 103rd Congresses (1991-94). Prior to his elevation to the full committee he served as minority staff director of the Subcommittee on Rules and Organization of the House (1979-80) under ranking Republican John B. Anderson (R-Ill.), and the Subcommittee on Legislative Process under ranking Republicans Trent Lott (1981-88) and Lynn Martin (1989-90). During his career in Congress he was recognized as a leading parliamentary expert on the rules, procedures, and precedents of the House, working closely with the Republican leadership over the years on the party's proposals for reforming the House. He is a 1964 graduate of North Central College, and successfully completed his course work towards a master's degree in political science at the University of Iowa in 1966. Prior to coming to Congress, he worked as a newspaper reporter, a radio news reporter and newscaster, and a Peace Corps volunteer in Africa.

Summary of Proposals for Reconstituting the House After a Catastrophe
(Adapted from Testimony Before the House Administration Committee, May 10, 2002)

- 1. The House should enact a law requiring Governors to call for expedited special elections within 60 days after a majority of Members has been lost due to a catastrophic event.**
- 2. House rules should be amended to deal with quorum problems caused by having large numbers of members incapacitated.** (A summary and a draft of legislative language for proposals #1 & #2 are attached)
- 3. House Rules should be amended to create an office of House Deputy Clerk who would be stationed away from the seat of government and would work closely with the shadow cabinet, for the purpose of reconvening the House in a new location if that becomes necessary.**
- 4. The current law that permits the President to convene Congress away from the Capital due to “the prevalence of contagious sickness, or the existence of other circumstances. . . [that would] be hazardous to the lives or health of the members to meet at the seat of Government” (2 U.S.C. 27) should be amended to allow the officers of the House and Senate to do so as well without presidential approval.**
- 5. Appropriate rules, statutory changes, and plans should be adopted to allow for Congress to meet in two places at once, using teleconferencing, in the event the Capital is quarantined with large numbers of members both inside and outside Washington, D.C.**
- 6. The leadership of both parties in both Houses should designate a number of Members to be outside the Capital when a joint session of Congress is held.**
- 7. Steps should be taken to ensure full access to current computerized congressional data bases and information as well as for broadcast coverage of proceedings should Congress need to reconvene elsewhere.**
- 8. Every House and Senate Committee and support office should devise contingency plans for carrying on its functions elsewhere, even if existing personnel are killed in an catastrophic event.**

**SUMMARY OF PROVISIONS OF STATUTORY ALTERNATIVE
FOR FILLING HOUSE VACANCIES
UNDER EXTRAORDINARY CIRCUMSTANCES
(Amending 2 U.S.C., ch. 1, sec. 8)**

- Existing language in the law which leaves it to the states and territories to prescribe the time for holding special elections to fill vacancies in the House under ordinary circumstances is left unchanged.
- Under the extraordinary circumstances in which vacancies in House exceed half the authorized membership, the executive authority of each affected state affected shall issue a writ of election to fill the vacancy not later than 60 days after the vacancy is declared, unless a regular election occurs during that period or within 30 days thereafter.
- A vacancy by death or resignation can be declared either by the governor of the state or by the House (by adoption of a resolution), and, if both the House and governor declare a vacancy, the 60 day time frame for the election to take place begins with the date on which the earlier such declaration is made.
- The House may, by a two-thirds vote, declare a vacancy by incapacity based on the request of the incapacitated member or on its own determination, based on competent medical authority that the member is unlikely to be able to carry out the trust and duties of office for the remainder of that term.
- If the House finds that a member is temporarily incapacitated and likely at some future point during that term to be able to resume the trust and duties of office, the House shall adopt a resolution declaring temporary incapacity and authorizing a leave of absence (with compensation and benefits). During the period of absence the Representative shall not be counted as a Member of the House for purposes of a quorum.
- A person declared temporarily incapacitated who resumes the duties of office shall be counted for the purposes of determining a quorum.
- Any Representative named in a resolution declaring a vacancy or temporary incapacity shall not be counted for purposes of determining a quorum during consideration of that resolution.
- The provisions affecting the internal proceedings of the House, are enacted as part of its rule making authority; are considered rules of the House as they apply to the procedures to be followed during extraordinary circumstances; supersede other House rules only to the extent they are inconsistent with them; and are subject to the constitutional right of the House to change its rules at any time.

(Summary and text prepared and drafted by Donald R. Wolfensberger, Feb., 2002)

**A STATUTORY APPROACH TO FILLING HOUSE VACANCIES
UNDER EXTRAORDINARY CIRCUMSTANCES**

Title 2 U.S. Code (“The Congress”), Chapter 1 (“Election of Senators and Representatives”), section 8 (“Vacancies”) is amended to read as follows (with new language printed in italic):

1 Sec. 8. Vacancies.

2 (a) The time for holding elections in any State, District, or Territory for a Representative or
3 Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed
4 by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws
5 of the several States and Territories respectively.

6 (b)(1) *Notwithstanding subsection (a), under extraordinary circumstances (as defined in*
7 *paragraph 2(A)), the executive authority of any state in which a vacancy exists shall issue a writ of*
8 *election to fill any such vacancy, with the election to take place not later than 60 days after the*
9 *vacancy is declared unless a regularly scheduled election for the office is to be held during such*
10 *60 day period or within 30 days thereafter.*

11 (2) *For the purposes of this subsection only –*

12 (A) *“extraordinary circumstances” shall be those in which vacancies in the*
13 *representation of the states in the House of Representatives exceed half of the authorized*
14 *membership of the House;*

15 (B) *a vacancy caused by death or resignation may be declared by the executive*
16 *authority of a state or by resolution of the House, but the 60 day period in which an election shall*
17 *take place shall begin with the earliest such declaration made; and*

18 (C) *a vacancy caused by incapacity may only be declared with the concurrence of*
19 *two thirds of the House either upon a written request signed by the incapacitated Representative*
20 *or upon a determination by the House, based on competent medical opinion, that the Representative*
21 *is unlikely to regain the ability to carry out the trust and duties of office during that term.*

22 (3)(A) *If a Representative is found to be temporarily incapacitated and likely at some future*
23 *point during that term to regain the ability to carry out the trust and duties of office, the House may*
24 *declare by resolution that the Representative is temporarily incapacitated and is granted a leave of*
25 *absence with full compensation and benefits.*

26 (B) *A Representative granted a leave of absence by reason of temporary incapacity*

1 *under extraordinary circumstances shall not be counted for purposes of determining a quorum*
2 *during such absence.*

3 (C) *If a Representative who has been declared temporarily incapacitated resumes*
4 *the trust and duties of office, the leave of absence shall be vacated and the Representative shall be*
5 *counted for the purposes of determining a quorum.*

6 (D) *Any declaration by the House of a Representative's temporary incapacity shall*
7 *not extend beyond the current term of the Representative.*

8 (4) *A Representative named in any resolution considered pursuant to paragraphs (2) or (3)*
9 *shall not be counted for purposes of determining a quorum during consideration of that resolution.*

10 (5) *The provisions of paragraphs (2), (3), and (4), insofar as they affect the internal*
11 *proceedings of the House, are enacted—*

12 (A) *as an exercise of the rule-making power of the House and as such are deemed a*
13 *part of the rules of the House, but applicable only to the procedures to be followed by the House*
14 *under extraordinary circumstances;*

15 (B) *supersede other rules only to the extent they are inconsistent therewith; and,*

16 (C) *with full recognition of the constitutional right of the House to change its rules*
17 *at any time, in the same manner, and to the same extent as in the case of any other rule of the House.*

Change of Place of Meeting of Congress

2 U.S.C. 27 is amended to read as follows:

1 **“Sec. 27. Change of place of meeting.**

2 (a) Whenever the Speaker of the House and the Majority Leader of the Senate, acting jointly
3 after consultation with the Minority Leader of the House and the Minority Leader of the Senate,
4 determine that the public interest shall warrant it, they shall notify the Members of the House and
5 the Senate respectively, to reassemble at such place and time as they may designate.

6 (b) If either the Speaker of the House or the Secretary of the Senate are unable, due to death
7 of incapacity, to make such a determination and so notify Members of their respective bodies, the
8 Clerk of the House and the Secretary of the Senate are authorized to notify Members of the House
9 or of the Senate, respectively, to reassemble at such place and time as they may designate.

10 (c) If either the Clerk of the House or the Secretary of the Senate are unable, due to death
11 of incapacity, to make such a determination and so notify Members of that body, their successors,
12 as pre-designated by the Speaker of the House and the Majority Leader of the Senate and confirmed
13 by that body, are authorized to notify their respective Members to reassemble at such place and time
14 as they may designate.

15 (d) If none of the officers listed in subsections (a) through (c) are able to make such
16 determination and notification of Members, the President is authorized by proclamation, to make
17 the determination and to convene the Congress at such place and time as he may judge proper.”.

Note: 2 U.S.C. 27 presently reads as follows: “Whenever Congress is about to convene, and from the prevalence of contagious sickness or the existence of other circumstances, it would, in the opinion of the President, be hazardous to the lives of the health of the members to meet at the seat of Government, the President is authorized, by proclamation, to convene Congress at such other place as he may judge proper.” The language in subsection (a) closely tracks that now used in concurrent resolutions of adjournment of the Congress for more than three days (e.g., see H. Con. Res. 360, 107th Congress, March 20, 2002: “Sec. 2. The Speaker of the House and the Majority Leader of the Senate, acting jointly after consultation with the Minority Leader of the House and the Minority Leader of the Senate, shall notify the Members of the House and the Senate respectively, to reassemble at such place and time as they may designate whenever, in their opinion, the public interest shall warrant it.”

(Drafted by Don Wolfensberger: 6/24/02)