

E-CONGRESS: PROSPECTS, PROBLEMS & ALTERNATIVES
STATEMENT OF DONALD R. WOLFENSBERGER
BEFORE THE HOUSE ADMINISTRATION COMMITTEE
WEDNESDAY, MAY 1, 2002

Mr. Chairman and Members of the Committee:

I appreciate this opportunity to testify before you today on the prospects, problems, and alternatives for carrying on the work of Congress in the event our Capital is the subject of a catastrophic event that leaves large numbers of Members of Congress dead or incapacitated and renders Washington, D.C. unsafe as the seat of government. Specifically, you are asking whether some form of e-Congress might be a viable alternative to our two-centuries-old tradition of assembling as a single body, in a single location, to deliberate and vote on the people's business in the sunlight of public scrutiny and accountability.

If it seems to you that my previous sentence is loaded with value-laden terms and phrases, you are absolutely correct: I believe in tipping my hand early—especially if my time is limited. And in this instance, I want to weigh-in heavily on the side of reconstituting Congress in a constitutional manner. To me that means reconvening Congress as soon as possible, at a new site, with elected representatives of the people, assembled in a collective manner to deliberate. And by deliberation I mean a reasoning *together* about the nature of a problem and alternative solutions, and, out of that process, the arriving at a mutually agreed upon policy consensus. If there were still be any doubts as to where I am coming from, I could recommend reading my book, *Congress and the People: Deliberative Democracy on Trial*—but that might sound too much like a plug.

We should keep in mind, first and foremost, that Congress literally means “a coming together,” and if you lose that you will lose the very essence of our representative and deliberative democracy. The worst mistake you could make is to start at the wrong end of the reassembly process and work back, that is, to begin with what may be the most convenient, safe, and secure arrangement for *individual* Members of Congress, such as permitting their committee and floor votes to be cast

from remote computer stations in their districts. Instead, you must begin with what is in the best interests of the institution of Congress and the American people which it serves and represents.

To me, the very phrase, “convening an e-congress” is an oxymoron because you cannot have a coming together of what the Framers intended to be a deliberative body of Members if they are sitting at 435 voting stations scattered across the country. The idea of building a computer system on which Members could not only access floor or committee debates, but actually vote on pending questions, will lead to what I would call “a reverse *Field of Dreams* scenario.” You will recall in the movie, *Field of Dreams*, the Kevin Kostner character was advised by a voice about how to proceed on his dream of a baseball stadium. “Build it, and they will come,” the voice intoned. A remote voting system will have the opposite effect for the actual Congress: “Build it, and they will stay away.” We’ve already had an experience with that when we had proxy voting in House committees: it tended to encourage absenteeism.

American Express can say of its card, “Don’t leave home without it.” Give Members a remote voting card, and its motto soon will be, “Don’t leave home if you have it.” We might as well rename this body the “*Houses* of Representatives.”

In a way the current rules and practices of the House are responsible for this mentality that legislating only means voting. Every Monday and Tuesday you roll and cluster votes on suspension bills which now account for 75 percent of all laws enacted. You postpone and cluster votes on floor amendments, in the rare instances in which amendments are allowed. You can only force a quorum call when a vote is pending. It’s little wonder that some Members continue to pressure for a rule change that will allow them to do the same thing in committee, that is, show up at the end of the day to vote on all the amendments offered in markup during the course of the day.

The more that legislating in committee and on the floor is reduced in the minds of members to voting, the more you will become a plebiscitary rather than a deliberative body. If that happens, it won’t be long before the people decide they can cut-out the middle man, *you*, and cast votes

themselves on pending Federal legislation.

Before I proceed further, however, I want to commend this committee on the extraordinary work it and its staff did under very difficult circumstances in the immediate aftermath of September 11th as well as in the subsequent anthrax crisis the following month. Had it not been for the speed and flexibility of your decisions and actions in equipping Members and key staff with adequate electronic equipment to enable them to communicate and coordinate with their office staff, their party leaders, and their committees, Congress would have been hopelessly adrift for weeks rather than days. But ultimately, those electronic devices were used to facilitate a coming together to do the business of the Congress.

That is how I view the utility of our information age technologies—as a tool for accessing information and communicating with others. These wonderful new technologies, however, should not be viewed, in my opinion, as a substitute for the face-to-face deliberative process. You cannot have a genuine exchange of opinions and arguments in a cyberspace chat room; and you cannot develop compromises and consensus by spamming your colleagues via e-mail, no matter how persuasive you may think your arguments are.

The question to me is not whether an e-Congress is *doable*. The techies will tell you it is, and I suspect they will eventually be able to devise a secure way to make it so. The question, rather, is whether it is *desirable*. To me, obviously, it is highly undesirable, for it is contrary to everything our constitutional system is about. In that regard, I would suggest that, if the committee should consider providing for an e-Congress in the sense discussed above, it would require a constitutional amendment. Article I, section 4 (as modified by the 20th Amendment) requires each House to *assemble* at least once a year, and section 5 requires a majority of each House to constitute a quorum to do business. It is counterintuitive to think that a majority of members in a disassembled House, voting remotely from their districts, could count as a quorum for doing business.

In the time remaining, let me offer some suggestions on what does need to be done if, in

extraordinary circumstances, the Congress needs to be reconstituted in a constitutional way as expeditiously as possible.

First, this Committee has jurisdiction over Federal election laws which should be amended to provide for expedited special elections. I have proposed that, in the event that over half the membership of the House are lost, the Governors of the states should be required by Federal law to schedule final elections to fill vacancies not later than sixty days after such determination is made.

Second, I would propose that House Rules be changed to provide special procedures in such circumstances, including a two-thirds vote to declare vacancies for those seats in which the House determines members are incapacitated beyond likely recovery during that Congress; and second, a rule that would not count for quorum purposes those Members granted leave of absence for reason of temporary incapacity. (A summary and text of the first two proposals are appended to this statement)

Third, I would propose that the House adopt a rule to create the Office of Deputy Clerk of the House to be elected at the beginning of each Congress, and that the deputy be located outside of the Nation's Capital, preferably in proximity to the "shadow cabinet." In the event that the Speaker and Clerk are killed in an attack, and Congress cannot reassemble in Washington to elect a new Speaker, the Deputy Clerk would be responsible for calling the survivors together in a new location, and provide for and preside over the convening of the House until a new Speaker is elected. Obviously, the Senate should adopt a parallel rule providing for a Deputy Secretary, who would work together with the Deputy House Clerk and the "shadow cabinet" to ensure an orderly reconvening of Congress in a new location, and close coordination between the branches.

Fourth, the law that now allows the President to convene Congress in a location other than the seat of government due to "the prevalence of contagious sickness, or the existence of other circumstances"(2 U.S.C. 27), should be amended to allow for the Speaker and President Pro Tempore of the Senate, or, in the event of their death, the Clerk of the House, the Secretary of the

Senate (or, if either have died, their deputies) to call for the convening of Congress in another location. Congress should not depend on a presidential proclamation to meet at another place in such extraordinary circumstances.

Fifth, in a related contingency, appropriate rules, laws and plans should be adopted so that, in the event that the Capital is subject to a bio-terrorist attack requiring a quarantine of the city, and large numbers of members are both in the Capital and outside the Capital, Congress be permitted to conduct committee and floor sessions from two locations using teleconferencing.

Sixth, I would propose that, just as the President designates a cabinet member to be away from the Capital during a joint session of Congress such as the State of the Union Address, House and Senate leaders should designate a small group of members from each House, reflecting party ratios in their respective houses, to be away from the Capital as well during such occasions.

Seventh, provision should be made for a Congress that is convened away from the Capital to have access by computers to all of the information now available to it through THOMAS, CRS, CBO, the House and Senate web sites, GPO, and other sites containing information vital to the continuity and vitality of the lawmaking process. If Congress is relocated to another location in the U.S., it should not have to be dependent on servers located in Washington which may have been disabled due to a massive attack on the Capital.

Moreover, every effort should be made for the public to have access to the same congressional web sites it now does. And, arrangements should be made with C-SPAN or an alternative broadcast facility in the new location to cover House and Senate floor proceedings for public viewing. It is more important than ever during such a crisis that the people can see what their government is doing and that Congress can perform its informing function through the Internet and broadcast media to ensure that public knowledge of and confidence in government is sustained.

And, eighth, every committee of the House and Senate and every support office which is vital to the functioning of Congress should adopt a contingency plan for the resumption of their

responsibilities away from the Capital, even if current employees do not survive an attack. This should not only include making information on the role and functioning of their offices available at the alternative location, but also identifying capable and experienced individuals now living away from Washington who could be called upon to assist in resuming the functions of those offices.

In conclusion, Mr. Chairman, I again commend you and your committee on beginning to think about and plan for the unthinkable. I likewise commend Speaker Hastert on calling for a contingency fund to allow such plans to go forward immediately. Obviously, he will need the assistance of committees like yours, the appropriators, and the various congressional support offices to flesh out how best this money should be spent. The contingency plans called for in my final recommendation could go a long way in helping to make that determination. I firmly believe that the Framers of our Constitution got it right from the start when they designed this amazingly resilient and dynamic system. It is now up to you and others to keep it right from the re-start in the event that Congress is substantially destroyed in a catastrophic occurrence.

Thank you for your consideration of my testimony and suggestions. I will be happy to answer any questions.

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

29 (C) *If a Representative who has been declared temporarily incapacitated resumes*

1 *the trust and duties of office, the leave of absence shall be vacated and the Representative shall be*
2 *counted for the purposes of determining a quorum.*

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

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

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

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

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

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