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Hearing on

"Congressional Continuity: Ensuring the First Branch is Prepared in Times of Crisis"

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Written Statement

Introduction

The terrorism of 2001 and the pandemic of 2020 have brought trenchant focus on the resiliency and continuity of government institutions. For all of that time, and indeed if one goes back to the Constitutional Convention of 1787, there has been a debate about the expediency of appointments vs. the legitimacy of elections for the United States House of Representatives. I anticipate today the Select Committee will hear from other witnesses, as other committees and Congresses have, about the alleged need for a Constitutional Amendment allowing for appointments to replace Members of Congress tragically killed or incapacitated.

Yet in every case when these issues were given serious consideration by the Members who went before you, from 1787 to the present, the House has overwhelmingly supported elections in order to serve as a Member of Congress.

It is true that the U.S. Senate has attempted to push its preferences for appointments on the House in the past. That is ironic, as each body is its own judge of those who may serve in it. But more than ironic, it is troubling if you look at the debates of the past and at those that the author witnessed in the aftermath of the 9/11 attack.

In the 1787 Constitutional Convention, some delegates wanted appointments for the House. However, founding fathers James Madison, Alexander Hamilton, George Mason, and others prevailed in having direct election by the people for House Members. As Madison said, "Where elections end, tyranny begins."[1]

Madison spent considerable time thinking about the need for a lower body of the Congress that represented the national will of the people, knowing that the upper body would represent the States. Interestingly, Madison was joined in this view by Anti-Federalist George Mason, when he said, "The people will be represented; they ought therefore to choose the representatives."[2]

Madison explicitly rejected appointments when he said, "The right of suffrage is certainly one of the fundamental articles of Government and ought not be regulated by the legislature. A

[1] THE FEDERALIST NO. 53.
[2] http://www.let.rug.nl/usa/documents/1786-1800/the-anti-federalist-papers/index.php

gradual abridgement of this right has been the mode in which Aristocracies have been built on the ruins of popular forums."[3]

While many who focus on these topics look to documents such as *The Federalist* papers – which are an outstanding source for the thinking of Founding Fathers – one also should look at the *votes* that have occurred on these issues.

As described in the 103rd Congress by the Members of the Committee on House Administration in their seminal work, **The History of the United States House of Representatives**:

> Next, attention turned to who should choose Members of the House—the people or the state legislatures? This question was twice debated in the Committee of the Whole and **twice decided in favor of election by the people** of the several states. Some prominent delegates, like Roger Sherman of Connecticut and Elbridge Gerry of Massachusetts, distrusted the people and feared an excess of democracy, but the majority favored popular election. James Madison said he "considered the popular election as essential to every plan of free government." George Mason of Virginia asserted that the House "was the grand depository of the democratic principles of the Government. . . . The requisites in actual representation are that the Representatives should sympathize with their constituents; should think as they feel; and that for these purposes should even be residents among them. **When this question came before the Convention in final action, nine states voted for election of the people, two dissented, and one divided.**"[4]

The author finds it salient to the Select Committee that 2 of 12 states to the Convention were against the House being elected by the people, and they favored of appointments. Thus 16.7% were in support of appointments while 75% were for popular elections to serve in the House.

The founders of our nation faced existential crises too. The new nation had to deal with the intrigues of other nations, difficulties with finances, the prospect of open war with one of the

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[3] James Madison, "*Speech in the Federal Convention for Suffrage*," August 7, 1787.

[4] Max Farrand, **The Records of the Federal Convention of 1787**, vol. 1, 48-49, 133-34, 365, *quoted in* **History of the United States House Representatives**, HOUSE DOCUMENT NO. 103-324, 5 (Committee on House Administration, 1994)(*emphasis added*) .

most powerful nations on Earth at the time, battles internally, limited and uncertain trade routes, crop failures, pestilence, and more. Yet despite these challenges and ones such as the War of 1812's sacking of the Capitol, the Civil War, World War I, the Spanish Flu Pandemic, World War II, the Cold War and its Cuban Missile Crisis, and many other moments when the House could have taken up appointments through a Constitutional Amendment, it has *always* rejected appointments in favor of popular elections.

In the aftermath of the 9/11 terrorist attack, the House once again took up the question of appointments of its Members. The AEI Commission, a group of outstanding individuals who have offered advice to the Congress, recommended a Constitutional Amendment allowing for the appointment of House Members in the event of a catastrophic attack or other calamity.

As these and other ideas were fomenting, the then-Chairmen of the Rules and Judiciary Committees, Representatives Dreier (R-CA) and Sensenbrenner (R-WI) respectively, were charged by the then-House Majority Leadership to provide for the Continuity of Congress. The author worked intensively with both, as well as with the bipartisan House Leadership, to help craft solutions that would preserve the House in a time of crisis – and preserve the unbroken requirement – that the Members of the House are elected by the people to be a national legislative body.

Consideration of the Constitutional Amendment for Appointments in 2004

During this time, the Representative Baird (D-WA) offered a Constitutional Amendment harmonious with the recommendations of the AEI Commission. H.J. Res 83, "Proposing an amendment to the Constitution of the United States regarding the appointment of individuals to fill vacancies in the House of Representatives" received a mark-up in the committee of jurisdiction, the Judiciary Committee, and it was considered on the floor of the House.

The House considered H.J. Res 83 on June 2, 2004. The yeas and nays were requested, and the Constitutional Amendment failed on a vote of 63-353[5]. Some key points about the vote:

- Under Article V of the Constitution, constitutional amendments require support of 2/3 of those present and voting, a quorum being present;[6]
- 418 Members voted in Roll Call Vote #219;

[5] Roll no. 219, 108th Congress, https://clerk.house.gov/Votes/2004219.
[6] CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE REPRESENTATIVES, HOUSE DOCUMENT NO. 116-177, § 192 (2021).

- 2/3 of 418 = 279 Members. The 63 Yea votes for the Constitutional Amendment were 216 votes short of the amount necessary for passage; and
- The 63 votes for H.J. Res. 83 out of 418 Members voting = 15.1%.

In a parallel of the Constitutional Convention, where 16.7% supported appointments over elections, 15.17% of the House did so in 2004.

Having decided to continue with all House Members serving only upon election by the people, the House next turned to the *Continuity in Representation Act*.[7] The law provides that there will be expedited special elections to replenish the House in the case of a catastrophe resulting in more than 100 Members being killed. The official summary of the legislation from the Congressional Research Service (CRS) is:

> **Continuity in Representation Act of 2005 -** Amends Federal law concerning the election of Senators and Representatives to require States to hold special elections for the House of Representatives **within 49 days after a vacancy is announced by the Speaker of the House in the extraordinary circumstance that vacancies in representation from the States exceed 100.** Waives the 49-day requirement if, during the **75-day period** beginning on the date of the vacancy announcement, a regularly scheduled general election or another special election for the office involved is to be held.
>
> Requires determination of the candidates who will run in the special election: (1) not later than ten days after the vacancy announcement by the political parties authorized by State law to nominate candidates; or (2) by any other method the State considers appropriate.
>
> Sets forth requirements for judicial review of any action brought for declaratory or injunctive relief to challenge such a vacancy announcement. Requires a final decision within three days of the filing of such an action. Makes a final decision non-reviewable.
>
> Requires a State, in conducting a special election under this Act, to ensure to the greatest extent practicable (including through the use of electronic means) that absentee ballots are transmitted to absent uniformed services voters and overseas voters not later than 15 days after the Speaker of the House announces that the vacancy exists. Requires a State to accept and process any otherwise valid ballot or other election material from an absent uniformed services voter or an overseas voter, as long as the ballot or other material is received by the appropriate State election official not later than 45 days after the State transmits it to the voter.[8]

[7] *See* https://www.congress.gov/bill/109th-congress/house-bill/841.
[8] https://www.congress.gov/bill/109th-congress/house-bill/841 (*emphasis added*)

The *Continuity in Representation Act* further enshrines the Constitution's requirement that the House shall "be composed of Members chosen every second year by the people."[9] The strength of this *Continuity in Representation Act* is that it continues the more than two hundred years of practice of every person serving in the House of Representatives being elected. No other part of the United States Government can say that. **In a national crisis, if the House were to allow for appointment of its Members, it is conceivable that an appointed President, an appointed Senate, and an appointed House could be making decisions crucial to our democracy.**

The legislation reflects the vision of the founders of our nation and resonates in modern times. In the first article of the Constitution, the Congress is given power over "the times, places, and manner" of elections. As interpreted by the United States Supreme Court, the "times, places, and manner" clause contained in Article I, section 4 is no less than the:

> [A]uthority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protecting of voters, prevention of fraud and corrupt practices, counting of votes . . . [and] making and publication of election returns.[10]

The *Continuity in Representation Act* specifies how and when elections will occur if the nation faces mass deaths (vacancies) in the House. If more than 100 Members, that is, nearly one-quarter of the House or more, are killed by a catastrophic event, then the House will be replenished by expedited special elections that occur within a **uniform** number of days.

States have many different treatments for special elections when a vacancy occurs without a time of mass catastrophe. However, in a time of extreme crisis, it is important to have uniformity in replenishing the House. If elections occur in a haphazard fashion, we could see the balance of power shift back and forth daily or weekly for many months. Speaker elections and Chairmanships would become paramount, rather than the business of the people in a crisis.

This legislation, as well as the change to the House Rules for a Provisional Quorum contained in clause 5(a), of House Rule XX, in the case of the mass incapacitation of Members, were considered <u>in the regular order</u> by the committees of jurisdiction and by the full House.

Legislative History of the Continuity in Representation Act (108th Congress):

- The *Continuity in Representation Act* (H.R. 2844), introduced by Rep. Sensenbrenner (R-WI) received a legislative hearing by the committee of jurisdiction, the House Administration Committee (CHA), on 9/24/2003;
- CHA considered, marked-up, and ordered favorably reported H.R. 2844 with an amendment by a vote of 4-3 (H. Rept. 108-404, part I), 12/8/2003;
- The Committee on the Judiciary, under its sequential referral, considered, marked-up, and ordered favorably reported with an amendment H.R. 2844 by a vote of 18-10 (H. Rept. 108-404, part II, 1/28/2004);

[9] U.S. Const., Art. I, § 2.
[10] Smiley v. Holm, 285 U.S. 355 (1932).

- The Committee on Rules held a hearing and reported a special order of business ("rule") for the consideration of H.R. 2844. H.Res. 602 made amendments in order and provided a motion to recommit with or without instructions on 4/21/2004;
- The House adopted H.Res. 602 by voice vote on 4/22/2204;
- The House considered four amendments made in order under the rule:
    - H.Amdt. 515, offered by Rep. Larson (D-CT) sought to increase from 45 days to 75 days the maximum time allowed to conduct the expedited special elections. Amendment failed by a recorded vote of 179-229 (Roll no. 128);
    - H.Amdt 516 offered by Rep. Larson (D-CT) sought to delete provisions of establishing a 10-day deadline for parties to nominate candidates in a special election and substitutes language that provides that candidates would be eligible to run in a special election if candidates meet the requirement to get on the ballot as set by state law; and it would allow states to extend the deadline for special elections. Amendment failed by a recorded vote of 188-217 (Roll no. 129);
    - H.Amdt 517 by Rep. Maloney (D-NY) that requires States to provide overseas voters 45 days to return their ballots from the date on which the ballot is mailed. Amendment agreed to by voice vote; and
    - H.Amdt. 518 by Rep. Schiff (D-CA) which sought to extend the amount of time for an action to be filed in court with regard to the Speaker's announcement of a vacancy; and modify the language concerning appeals of a court decision. Amendment failed by voice vote.
- A motion was made by Rep. Baird (D-WA) to strike the enacting clause, but it was subsequently withdrawn.
- H.Amdt 519, a motion to recommit with instructions offered by Rep. Watt (D-NC) to the Committee on House Administration to *forthwith* amend H.R. 2844 that nothing in the legislation may be construed to affect the application of special election of any Federal law governing the administration or enforcement of elections. Adopted by voice vote.
- The House passed H.R. 2844 in an overwhelmingly bipartisan vote of 306-97 (Roll no. 130[11] with 202 Republicans and 104 Democrats voting Yea.)

The Senate did not consider H.R 2844 prior to *sine die* of the 108th Congress.

Legislative History of the Continuity in Representation Act (109th Congress):

- The *Continuity in Representation Act* (H.R. 841), re-introduced by Rep. Sensenbrenner (R-WI), was considered, marked-up, and favorably reported by the House Administration Committee (CHA) by voice vote (H. Rept. 109-8 on 2/24/2005);
- The Committee on Rules held a hearing and reported a special order of business ("rule") for H.R. 841, making specified amendment in order, and providing a motion to recommit with or without instructions (H.Res. 125 on 3/1/2005);
- The House adopted H.Res. 125 by voice vote on 3/3/2005;

[11] https://clerk.house.gov/Votes/2004130

- The House considered the following amendments were considered under the rule on 3/3/2005:
    - H.Amdt. 17 offered by Rep. Ney (R-OH) to extend the maximum time for expedited special elections to 49 days (7 full weeks). Agreed to by voice vote.
    - H.Amdt. 18 offered by Ms. Millender-McDonald (D-CA) which sought to change the overall deadline for holding expedited special elections from 49 to 60 days. Amendment failed by recorded vote 192-229 (Roll no. 49); and
    - H.Amdt 19 offered by Rep. Jackson-Lee (D-TX) sought to expand the ability of filing suits for declaratory or injunctive relief from 2 days to 5 days; provide for an expedited appeals process; and provide for expansion of the right to sue for declaratory judgement to others beyond a State Governor. Amendment failed by a recorded vote of 183-239 (Roll no. 50);
- A motion was made to strike the enacting clause by Mr. Baird (D-WA), but it was subsequently withdrawn;
- A motion to recommit the bill with instructions to the Committee on House Administration was made by Rep. Conyers (D-MI). The motion failed by a recorded vote of 196-223 (Roll no. 51);
- The House adopted H.R. 841 by voice vote. However, upon unanimous consent the voice vote was laid on the table and a recorded vote was demanded by Rep. Millender-McDonald on the question of the passage of the bill; and
- The House – with a larger bipartisan margin than the 108th Congress – passed the *Continuity in Representation Act* by a vote of 329-68 (Roll no. 52[12] with 206 Republicans and 122 Democrats and 1 Independent voting Yea, on 3/3/2005).

The House and Senate adopted the *Continuity in Representation Act* as a part of the *Legislative Branch Appropriations* bill for FY 2006, and the President signed it into law.

Mass Incapacitation of Members

The House, having acted to preserve the continuity of government in the case of mass **deaths** of Members through expedited special elections with the enactment of the *Continuity of Representation Act*, next turned to the question of dealing with the "Quorum Trap" in the case of **mass incapacitation** of Members.

The thorny question of how to define incapacitation was intertwined with the question of how to have a sufficient quorum to do business. The Congress began to wrestle this issue in the 107th Congress. The bipartisan Cox-Frost Task Force, headed by former Republican Policy Committee Chairman Cox (R-CA) and Democratic Caucus Chairman Frost (D-TX) with a number of Members, including Rules Committee Chairman Dreier and Representatives Hoyer (D-MD), Chabot (R-OH), Nadler (D-NY), Ney (R-OH), Baird (D-WA), Vitter (R-LA), Jackson-Lee (D-TX), and Langevin (D-RI). The Task Force looked into the Continuity of Congressional

[12] https://clerk.house.gov/Votes/200552.

operations. Many of the recommendations of the Cox-Frost Task Force were adopted at the start of the 108th Congress (2003-04). These included:

> (1) requiring the Speaker to submit a list of designees to serve as Speaker pro tempore for the sole purpose of electing a new Speaker in the event of a vacancy in the Office of the Speaker (clause 8(b)(3) of rule I);
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> (2) providing for Members to serve as Speaker pro tempore in the event of the incapacitation of the Speaker (clause 8(b)(3) of rule I);
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> (3) enabling the Speaker to suspend business in the House by declaring an emergency recess when notified of an imminent threat to the safety of the House (clause 12(b) of rule I);
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> (4) allowing for House Leadership to reconvene the House earlier than a previously appointed time (clause 12(c) of rule I); and
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> (5) authorizing the Speaker to convene the House in an alternative place within the seat of Government (clause 12(d) of rule I).

The Cox-Frost Task Force also looked at the issue of rule change for incapacitation of Members, but an impasse was reached over how to define incapacitation of Members. The Task Force decided to allow for more analysis of the difficult question.

On April 29, 2004, the Committee on Rules held an original jurisdiction hearing on the Mass Incapacitation of Members and on the proposal to create a new rule of the House to adjust the quorum in times of national crisis. Attending the hearing were: Chairman David Dreier (R-CA), Ranking Member Martin Frost (D-TX), and Rules Committee members Reps. John Linder (R-GA), Jim McGovern (D-MA), and Richard "Doc" Hastings (R-WA). Testifying at the hearing were a number of experts on the House Rules and precedents, the Constitution, and the issue of incapacitation: (1) then-House Parliamentarian, Charles Johnson; (2) then-Capitol Physician, John Eisold M.D. and Rear Admiral, Medical Corps, U.S. Navy; and (3) eminent Constitutional scholar, Walter Dellinger. Also testifying were the then-Deputy Parliamentarians John Sullivan and Tom Duncan and the author, then the General Counsel of the Committee on Rules.

The underlying premise of the hearing and the rules change was the Congress needed to assure the American people everything was being done to provide for the continuity of government in the face of any catastrophic event. After years of looking at the question of incapacitation, the Congress took up a solution: **Provisional Quorum**. From the outset there were questions about the ability to act via rule, since the quorum requirement is set in the Constitution as a majority. At the Rules Committee hearing, experts testified that it is far better to have in place a rule *prior* to facing a crisis than to create them ad-hoc. Having a well-reasoned plan and rule adopted under the regular order is far better than no plan at all. As constitutional scholar Walter Dellinger said:

> I think there is a great advantage to adopting a rule now if we can get really widespread and bipartisan agreement on it, because you are acting now behind what one of the philosophers calls the ``veil of ignorance." You don't know whose party is going to be benefited, whose faction is going to be burdened by this. You don't know. What we really want to ensure in that time, as I think [Ranking Member] Frost and . . . Chairman [Dreier] said, is legitimacy.[13]

House Parliamentarian Charles Johnson also testified:

> [T]he Constitution empowers each House to adopt and interpret its own rules . . . . [T]he House should consider--preferably in advance--what it might do in the event of such a catastrophe, addressing the contingency by a change in the standing rules adopted by the whole House in a dispassionate atmosphere with a proper quorum present. The constitutional advisability of such a rules change initially would be for the House, in its collective wisdom, to debate and determine by its vote on the proposal.[14]

Central to the hearing was the concept of the "***Quorum Trap***" and the ability of the House, under its Constitutional authority to set its own rules, to provide a rule for its continuing operations when a catastrophe has struck the body.

The "Quorum Trap" is the inability of the House to act if large numbers of Members are alive but incapacitated. The Framers of the Constitution rejected the idea of the British Parliament's smaller number of Members constituting a quorum and instead required a majority of Members in Article I, Section 5. Subsequent House precedent has defined quorum as Members "elected, sworn, and living." If more than 218 Members are incapacitated, the House cannot act. Because they are elected, sworn, and living – even though incapacitated and unable to vote – they remain part of the denominator for determining a quorum.

For example, if 175 Members are on respirators and unable to vote, the whole number of the House being 435, quorum is 218, and there are 260 Members able to vote and business continues. However, if 300 are incapacitated, the whole number remains 435 and the quorum 218, yet only 135 Members are able to vote. In this situation, quorum traps the House and renders it unable to do business.

Longstanding House precedent, codified in clause 5(c) of rule XX, empowers the Speaker to adjust the whole number of the House, and thereby its quorum, upon the *death or resignation* of Members. If a catastrophe strikes and 225 Members are killed, the whole number of the House would be reduced to 210. The Speaker under the rules would announce that fact to the House, and the quorum of the House would reset to 106. The House can continue to do business under its rules if large numbers of Members are *dead*. The question that needed to be answered was can

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[13] *Continuity of Congress: An Examination of the Existing Quorum Requirement and the Mass Incapacitation of Members: Before* the Comm on Rules, 109th Cong. 31 (April 29, 2004)(GPO DOCUMENT NO. 95-383, https://www.govinfo.gov/content/pkg/CHRG-108hhrg95383/html/CHRG-108hhrg95383.htm).

[14] *Id*., at 16.

the House rules allow the House to continue to do its business if large numbers of Members are *incapacitated*.

The power of the House to adjust its rules, including quorum, was affirmed by the Supreme Court in the *Ballin* case. The Court in *Ballin* was asked to determine if the Speaker of the House unconstitutionally counted for purposes of quorum Members who refused to answer a quorum call in an attempt to stop the business of the U.S. House of Representatives. The Court held the Speaker could do so, stating that:

> [N]either do the advantages or disadvantages, wisdom or folly, or such a rule present any matters for judicial consideration. With the courts the question is only one of power. The constitution empowers each house to determine its rules of proceedings. . . . But how shall the presence of a majority be determined? The Constitution has prescribed no method of making this determination, and it is therefore within the competency of the House to prescribe any method which shall be reasonably certain to ascertain that fact.[15]

Dellinger also testified in the hearing about the need and power of the House to do the Provisional Quorum rule change, stating:

> The legislative powers that Article I vests in Congress would be absolutely critical for our nation to respond to the type of calamity that the rule change is designed to address.
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> It is simply inconceivable that a Constitution established to 'provide for the common defense' and 'promote the general welfare' would leave the nation unable to act in precisely the moment of greatest peril. No constitutional amendment is required to enact the proposed rule change because the Constitution as drafted permits the Congress to ensure the preservation of government.
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> In fact, a functioning House is so critical in times of emergency that, one way or another, it would necessary, if much of the House were incapacitated, for the remainder to find a way to continue to function.[16]

While the Supreme Court in *Ballin* affirmed the power of the House to determine its rules of proceeding, the Court and the Constitution are silent on the question of what

[15] United States v. Ballin, 144 U.S. 1, 5 (1892).
[16] *Continuity of Congress*, *supra* note 13, at 34-35.

constitutional scholar Paul Taylor posits as "a 'majority' *of what*?"[17] As Taylor explains:

> [W]hile the Constitution does specifically provide that "a smaller number" than a "majority" can adjourn the House and compel absent Members to attend, the Constitution itself still does not definitively answer the question: a "majority" *of what.* That is, "less than a majority" may mean, under the House Rules, "less than a majority of living and capacitated Members." The answer to the question "a majority of what?" may remain in the House's [power] to give [an answer to] under its authority to "determine the Rules of its Proceedings."[18]

At the 2004 hearing, Chairman Dreier noted at the outset one of the key questions that the Select Committee on the Modernization of Congress will consider today: "The Constitution sets the majority quorum requirement, and some believe [the mass incapacitation question] is an important issue that requires a constitutional approach."[19] However, Chairman Dreier was very hesitant to touch the Constitution and stated the Framers of the Constitution anticipated the need to act in times of crisis:

> In Federalist 23, [Alexander Hamilton] said, "It is impossible to foresee or define the extent and variety of national exigencies and the corresponding extent and variety of the means which may be necessary to satisfy them. Circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can be wisely imposed. I believe that the Constitution was adopted to facilitate the functioning of representative government, not to be a stumbling block, particularly in times of national crisis."[20]

Then-Deputy Parliamentarian of the House John Sullivan, who subsequently became the Parliamentarian of the House, described the purpose and mechanics of the provisional quorum rule as follows:

> **[T]o establish a procedure that will let the circumstances produce a change in the denominator of the quorum requirement and let the circumstances largely speak for themselves. The method that it chose is to use the ability of Members to attend the Chamber as a measure of who exists or who is available for duty.** It sets up a series of hurdles in which the House tries real hard to gather a real quorum among the 435-seat House--218--and in stages. You don't move on to the next stage unless a quorum is wanting.
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> The first step is that there be revealed the absence of a quorum, perhaps on a normal vote by the ayes and nays, if fewer than 218 are recorded either yes or

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[17] Paul Taylor, *Proposals to Prevent Discontinuity in Government and Preserve the Right to Elected Representation*, 54 SYRACUSE L. REV. 435, 451 (2004)(*emphasis original*).
[18] *Id.*
[19] *Continuity of Congress*, *supra* note 13, at 4.
[20] *Id*.

no or present. After that, the rule for this provisional number might be used to actually produce a result.

The next step that has to be exhausted is the use of one of the motions to compel the attendance of Members. One of the things that the Constitution allows [is] a number smaller than a majority to do in the House, under the Rules of the House, 15 Members can dispatch the Sergeant at Arms to round up absentees.

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So those first two steps, the failure of a quorum in the first instance, and the exhaustion of an attempt to compel the attendance of Members, sets the stage for the three real hurdles of the process: a staged first lengthy quorum call. There will [be] a plan for its length, but some real hard attempt to gather 218. . . . If this five-stage process goes through to its fruition, then the bottom line of the rule is that it cranks out a provisional number of the House, some number to use instead of 435.

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And so if, after all of these very sincere attempts to gather as many Members as possible, the House is left with 100, then that would be the provisional number of the House, and a quorum would be 51.

It uses the circumstances, the ability of Members to respond, as a way of judging what has become of the House. The technique that is used here is to employ tools that don't require a quorum, so we don't get trapped in a circle.

One of them is the Speaker's unappealable invocation in the fourth step, the entry of the finding that catastrophic circumstances are afoot. The other is the ubiquitous availability of a possible motion to adjourn adoptable by a majority of whoever is there.

That is the chief strength, that is the chief protection in this discussion draft is that--well, first of all, the procedure can't be triggered accidently. You have to really try to get into this machine. It is multi-staged for that purpose. And the ultimate strength is it can be aborted simply. It can be aborted during the first lengthy quorum call by adopting a motion to adjourn, or wait, even if you were to wait and see whether the Speaker were going to make the invocation, that same tool is contemplated during the second lengthy quorum call.

The Members could say, we think that we should take a breather here. And a motion to adjourn would wind the clock back to zero on this whole process.

> The House would come in on whatever day it adjourned to and be in the same position it was before.[21]

After the Committee on Rules hearing on mass incapacitation, the bipartisan discussions continued for the rest of 2004 and led to a number of improvements to the proposed Mass Incapacitation rule from Representatives of both the Minority and Majority parties.

At the start of the 109th Congress in 2005, H.Res. 5, which is the resolution containing the rules of the House for that Congress (a.k.a., "The Rules Package") included the Provisional Quorum rule. This rule has been continuously adopted by each succeeding Congress including the current 117th. Clause 5(c) of rule XX, as first adopted in 2005, states:

> Provisional Quorum.--In clause 5 of rule XX, redesignate paragraph (c) as paragraph (d) and insert after paragraph (b) the following new paragraph:
>
> ``(c)(1) If the House should be without a quorum due to catastrophic circumstances, then--
>
> ``(A) until there appear in the House a sufficient number of Representatives to constitute a quorum among the whole number of the House, a quorum in the House shall be determined based upon the provisional number of the House; and
>
> ``(B) the provisional number of the House, as of the close of the call of the House described in subparagraph (3)(C), shall be the number of Representatives responding to that call of the House.
>
> ``(2) If a Representative counted in determining the provisional number of the House thereafter ceases to be a Representative, or if a Representative not counted in determining the provisional number of the House thereafter appears in the House, the provisional number of the House shall be adjusted accordingly.
>
> ``(3) For the purposes of subparagraph (1), the House shall be considered to be without a quorum due to catastrophic circumstances if, after a motion under clause 5(a) of rule XX has been disposed of and without intervening adjournment, each of the following occurs in the stated sequence:

[21] *Id.* at 17-19 (*emphasis added*).

``(A) A call of the House (or a series of calls of the House) is closed after aggregating a period in excess of 72 hours (excluding time the House is in recess) without producing a quorum.

``(B) The Speaker--

``(i) with the Majority Leader and the Minority Leader, receives from the Sergeant-at-Arms (or his designee) a catastrophic quorum failure report, as described in subparagraph (4);

``(ii) consults with the Majority Leader and the Minority Leader on the content of that report; and

``(iii) announces the content of that report to the House.

``(C) A further call of the House (or a series of calls of the House) is closed after aggregating a period in excess of 24 hours (excluding time the House is in recess) without producing a quorum.

``(4)(A) For purposes of subparagraph (3), a catastrophic quorum failure report is a report advising that the inability of the House to establish a quorum is attributable to catastrophic circumstances involving natural disaster, attack, contagion, or similar calamity rendering Representatives incapable of attending the proceedings of the House.

``(B) Such report shall specify the following:

``(i) The number of vacancies in the House and the names of former Representatives whose seats are vacant.

``(ii) The names of Representatives considered incapacitated.

``(iii) The names of Representatives not incapacitated but otherwise incapable of attending the proceedings of the House.

``(iv) The names of Representatives unaccounted for.-

``(C) Such report shall be prepared on the basis of the most authoritative information available after consultation with the Attending Physician to the Congress and the Clerk (or their respective designees) and pertinent public health and law enforcement officials.

``(D) Such report shall be updated every legislative day for the duration of any proceedings under or in reliance on this paragraph. The Speaker shall make such updates available to the House.

``(5) An announcement by the Speaker under subparagraph (3)(B)(iii) shall not be subject to appeal.

``(6) Subparagraph (1) does not apply to a proposal to create a vacancy in the representation from any State in respect of a Representative not incapacitated but otherwise incapable of attending the proceedings of the House.

``(7) For purposes of this paragraph:

``(A) The term `provisional number of the House' means the number of Representatives upon which a quorum will be computed in the House until Representatives sufficient in number to constitute a quorum among the whole number of the House appear in the House.

``(B) The term `whole number of the House' means the number of Representatives chosen, sworn, and living whose membership in the House has not been terminated by resignation or by the action of the House.".

Legislative History of the Provisional Quorum Rule

The consideration and adoption of the Provisional Quorum rule followed the regular order, including a point of order raised on its constitutionality, which was resolved with the counsel of the House Parliamentarian through the question of consideration. As the Speaker stated to the House:

> The gentleman from Washington makes a point of order that the resolution adopting the rules of the House for the 109th Congress is not in order because it contains a provision that the House does not have the constitutional authority to propose. As recorded in section 628 of the House Rules and Manual, citing numerous precedents including volume 2 of Hinds' Precedents at sections

> 1318-1320, the **Chair does not determine the constitutionality of a proposition or judge the constitutional competency of the House to take a proposed action**, nor does the Chair submit such a question to the House as a question of order. **Rather, it is for the House to determine such a question by its disposition of the proposition, such as by voting on the question of consideration. . . . As such, the House may decide the issues raised by the gentleman by way of the question of consideration of the resolution or the question of adopting the resolution**. The point of order is not cognizable.[22]

The House found the Provisional Quorum constitutional when it agreed to the Question of Consideration of H.Res 5 by a vote of 224-192.[23] Subsequently, the resolution was considered, and previous question was agreed to by a vote of 222-195.[24]

Representative Slaughter (D-NY) moved to commit H.Res. 5 to a select committee composed of the Majority Leader and the Minority Leader. This motion failed on a vote of 196-219.[25] Finally, the House adopted H.Res 5 (with the Provisional Quorum rule) by a vote of 220-195.[26]

Conclusion

Although it has been 17 years since the enactment of the Continuity in Representation Act and the Provisional Quorum rule codified in clause 5(c) of House Rule XX, these two Continuity of Congress measures have ensured that the People's House can function in the aftermath of a terrorist attack, natural catastrophe, or other disaster that might otherwise threaten the world's greatest democracy. Along with other rules and precedents adopted by the House, such as the Speaker's ability to declare an emergency and to assemble the House in an alternate location, the Continuity of Congress is assured by the actions taken by the elected Representatives themselves.

The U.S. House of Representatives, unlike the U.S. Senate, the Presidency, and the federal courts, is the only part of government that has always been elected, never appointed. James Madison, known as the *Father of the Constitution*,[27] "explicitly rejected" the idea of the appointment of Members. He viewed appointments to the House as incompatible with the American Republic.[28] In *The Federalist* No. 57, **Madison did not envision appointments to the House of the politically connected.** Rather, he talks about electors of Members being rich and poor, learned and ignorant, and distinguished and humble.

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[22] *Congressional Record of the 109th Congress*, page H10-11, https://www.congress.gov/congressional-record/2005/01/04/house-section/article/H7-5 (*emphasis added*).
[23] Roll no. 3, 109th Congress, https://clerk.house.gov/Votes/20053.
[24] Roll no. 4, 109th Congress, https://clerk.house.gov/Votes/20054.
[25] Roll no. 5, 109th Congress, https://clerk.house.gov/Votes/20055.
[26] Roll no. 6, 109th Congress, https://clerk.house.gov/Votes/20056.
[27] https://www.whitehouse.gov/about-the-white-house/presidents/james-madison/#:~:text=James%20Madison%2C%20America's%20fourth%20President,%E2%80%9CFather%20of%20the%20Constitution.%E2%80%9D.
[28] H.R. REP. NO. 108-404, pt. 2, at 4.

Madison underscored the point that the House's legitimacy and power are derived only through elections in *The Federalist* No. 39, "The House of Representatives . . . is elected immediately by the great body of the people . . . The House of Representatives will derive its powers from the people of America." Madison also notes in *The Federalist* No. 52, "requisite dependence of the House of Representatives on their constituents."

Proposals for appointments of Members of the House of Representatives have existed for a very long time. From the Constitutional Convention of 1787 to present day, those proposals have always been rejected. The author believes this is not accidental; rather, it shows the continuing wisdom of those in power since the founding of our great nation to not change the foundations of our system. Appointments, for any reason or rationale, would **fundamentally** alter the balance of power enshrined in the Constitution. The strength of the Provisional Quorum rule and the *Continuity in Representation Act* are that they maintain the ability to govern by elected Representatives. If the House decided someday that citizens should serve in a temporary role for the continuity of Congress to deal with the mass incapacitation, those citizens also should be elected by the people.

The author wishes to thank the Chair, the Vice Chair, and the Members of the Select Committee on the Modernization of Congress for the opportunity to testify on these foundational matters to the democracy of the United States.

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Curriculum Vitae for George Robb Rogers

Professional Experience

- Managing Partner, Republic Consulting, LLC, 2019-present
- CEO, Wexler | Walker, 2016-2018
- Sherpa/Cabinet Affairs, Presidential Transition Team, 2016
- President, Wexler | Walker, 2015-2016
- Executive Vice President, Wexler & Walker Public Policy Associates, 2013-2015
- Official Proceedings Script Team Leader & Continuity Advisor, Republican National Conventions, 2004, 2008, 2012, 2016
- Assistant to the Speaker, Speaker of the House John Boehner, 2011-2012
- Policy Advisor & Counsel, House Minority Leader John Boehner, 2006-2010
- General Counsel, Committee on Rules, U.S. House of Representatives, 2003-2006
- Counsel, Technology Policy Subcommittee, Oversight & Government Reform Committee, 2001-2003
- Legislative Counsel, U.S. Senator Richard Lugar, 1999-2001
- Deputy Majority Counsel, Indiana State Senate, 1998-1999
- Deputy Prosecutor for Sex Crimes & Domestic Violence, Grant County, Indiana, 1997
- Partner, Rogers & Rogers, PC, 1996-1997
- Associate, Kiley, Kiley, Harker, Rogers, & Certain LLP, 1994-1996

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- Indiana University School of Law, J.D. 1994
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