

Testimony of Rep. Brian Baird
Continuity of Congress in the Wake of a Catastrophic Attack
Judiciary Committee
Subcommittee on Constitution, Civil Rights, and Civil Liberties
May 19, 2009

Mr. Chairman, Ranking Member, friends and distinguished colleagues.

I want to thank you for holding this hearing on what I consider to be one of the most important matters that may come before Congress during our careers, perhaps during our lifetimes.

I am referring to the need to ensure that the Congress itself will continue in a constitutionally valid manner if a terrorist attack, pandemic disease, natural disaster or any other catastrophic event results in the death or incapacitation of large numbers of the House of Representatives. This matter has been discussed before, but we still lack a solution that is either constitutionally valid or functional in practice. That fact suggests a failure to uphold our sacred oath of office

I will make four points today. 1. First, there is no doubt that we face a real possibility of terrorist attack, disease or natural catastrophe. 2. Second, we have no constitutionally valid mechanism for dealing with such events. 3. Third, if an attack or natural disaster does occur, the lack of a valid solution will create confusion and constitutional crisis at precisely the worst possible moment. 4. Fourth, responsible, constitutionally valid and practical options have been proposed and it is time for Congress to act on them before they are needed, not after.

1. The Risk

Post September 11, 2001 the first point would seem to be obvious, yet many appear to deny or minimize it. To those who still do not recognize the threat, let me quote from the report of the Commission on the Prevention of Weapons of Mass Destruction Proliferation and Terrorism headed by our former colleagues, Senators Bob Graham and Jim Talent. The opening sentence of that document reads,

“...unless the world community acts decisively and with great urgency, it is more likely than not that a weapon of mass destruction will be used in a terrorist attack somewhere in the world by the end of 2013.”

We do not know of course where such an event might occur, but surely we must recognize that we work in a building and city that have to be high on the priority target list. As such, we should prepare for that possibility. This raises the second point.

2. Lack of Preparation and Unconstitutional Measures

If we are sworn to uphold and defend the Constitution, we should not knowingly allow a situation to occur that would virtually require the violation of fundamental principles of our Constitution. Neither should we pass laws or rules that are clearly contrary to Constitutional mandates. Unfortunately, we have in fact done both.

In 2005, a provision was attached to an appropriations bill requiring that special elections be held within 49 days of the Speaker declaring that vacancies have exceeded 100 members. Separately, House Rules now create a procedure for the Speaker of the House to set a provisional quorum in catastrophic circumstances, allowing the House to operate under a “provisional quorum”, creating a dangerous and unconstitutional situation.

Let us deal first with the practicality of the Special Election requirement. Since the law was passed, there have been 21 special elections for vacant House seats. In that period, only one election has in fact been held within 49 days. The average has been 117 days. The two most recent elections, which came in response to known and predicted vacancies, had the following time frames: Judy Chu to replace Hilda Solis 140 days and Mike Quigley to replace Rahm Emanuel, 91 days. It took 90 days to replace the late Stephanie Tubbs Jones, 134 days to replace now Senator Roger Wicker, and the list goes on.

Some may argue that things would move faster after a disaster, but that assertion is contrary to the evidence from Hurricane Katrina. There, a primary election which was originally scheduled for 150 days after the Presidential disaster declaration was delayed until 239 days after the declaration and even then its legitimacy was questioned by many. So much for the idea that disaster will speed things up.

How have states responded to the Congressional directive that they be able to hold elections within 49 days of a disaster? There too, we find troubling evidence. My staff contacted secretaries of state from across the country and found that only two states had done anything to prepare for the requirements of the legislation. Many reported that they did not believe they could in fact implement elections in the time period demanded. Also troubling was the discovery that none of those contacted indicated that they had been asked by anyone else in Congress about their preparedness. Apparently, those who pushed the legislation forward did not pay subsequent attention at all to its implementation.

Turning now to the second issue, this provisional quorum, passed for the first time at the beginning of the 109th Congress, is a radical departure from House precedent and I believe, unconstitutional. Article 1, section 5 of the Constitution specifies that a “majority of each” body “shall constitute a quorum” to do business. The first order of business of the first Congress was to adjourn for lack of a quorum. Clearly, the first Congress understood that to have legitimacy as a legislative body they had to have at least half of their elected members present.

By comparison, these House rules would violate the Constitutional requirement of a majority quorum by allowing a provisional quorum to do business with as few as two or three members..

Other witnesses here today, notably Mr. Fortier, have written extensively about the constitutionality or, better said, the unconstitutionality of this rule.

I find Mr. Fortier's analysis compelling, but for those who are not legal scholars, I simply ask this: Do you believe that the people who wrote our Constitution and placed such strong emphasis on proportional representation could seriously have intended that a handful, perhaps just two or three people should be empowered to take the country into war, establish a draft, appropriate huge sums of money, impeach a president, and perhaps even select a president in the form of the Speaker of the House? To personalize this, I then ask, would you feel comfortable knowing that you had no representative voice in this process and that the few who might claim to make up a quorum could well come from the extreme wing of the opposing party?

Most legal scholars, and most of our constituents rightly conclude that this situation is not only unconstitutional, it is foolhardy, dangerous and violates completely the principal of proportionate representation.

3. Confusion and Uncertainty at the Worst Possible Moment

We cannot know if, when or how a terrorist attack, disaster or deadly disease might arrive, but we can easily imagine that through malicious intent or misfortune large numbers of the Congress, the Executive Branch and the Judiciary might be killed or incapacitated. If that occurred under present law, the previously described constitutional questions and violations would produce profound uncertainty and conflict. What is more, the very institutions designated to resolve such issues would themselves be incapable of acting to correct and clarify the situation.

Imagine the President and Vice President have perished leaving competing interests within Congress and the Executive Branch vying for power among the limited group of survivors. Imagine that the partisan political balance of Congress is dramatically shifted, giving a former minority control of the House and Senate, including the ability to elect the Speaker – who is third in line for the Presidency. Imagine resolutions to declare war, instate a draft, declare martial law etc. being passed, then challenged for constitutionality but with no Supreme Court to hear the case.

By passing unconstitutional rules, we have ourselves created the potential for conditions that suspend core principals of proportionate representation and legislative checks and balances. By failing to enact valid and practical provisions for ensuring Congressional continuity, we have left a virtual invitation for terrorists to dramatically alter our political system and our governmental function. As dangerous as are the conflicts within our own land, the potential of foreign adversaries to take advantage of the confusion are profoundly dangerous.

This is not a potentiality that the most powerful nation, the leader of the free world, should allow to continue.

4. Solutions Exist but Must Be Enacted

Many people have spent a tremendous amount of time and energy evaluating the problems described here and proposing solutions. The most extensive work has been done by the Continuity of Government Commission, which was headed by Norman Ornstein of the American Enterprise Institute and Thomas Mann of the Brookings Institution, with co-chairs the late Lloyd Cutler and former Senator Alan Simpson. This commission, comprised of some of the best scholars in the country concluded that action must be taken and a constitutional amendment would be required that would empower Congress to provide for its own continuity.

Within the Congress, I have offered a proposed solution in the form of a Constitutional Amendment requiring that Members of Congress generate a list of temporary replacements who would fill vacant seats until such times as real and valid elections could be held. This mechanism would ensure that political balance not be altered by terrorist attack and that replacements would be statesmen and women of integrity and experience. What is more, as the replacements would be temporary, the public would also have a constitutionally guaranteed right to hold an election to fill the position at the earliest possible date.

Mr. Rohrabacher has a somewhat different approach, which he will describe shortly.

I should note that Mr. Rohrabacher and I have cosponsored each other's bills because what matters most to both of us is not that our legislation per se pass but, more importantly, that a constitutionally valid solution be created.

Response to Criticism

Of course not everyone will agree with these proposals.

Some, as mentioned earlier, will deny that the problem exists at all. Frankly, there is not much that can or should need to be said about this position. If people cannot grasp that a nuclear or biological weapon can kill us, it is doubtful that they will be able to grasp whatever solution is offered to deal with that reality. This limitation should not, however, be allowed to leave our nation in peril.

Others may recognize the risks but, precisely because those risks are so real and horrific, they prefer to not deal with them, finding it too stressful emotionally or too complex politically. This reaction is understandable, but it is not sufficient. We are granted profound responsibility in our positions as representatives and we must not shirk that responsibility, regardless of the difficulty.

A third response has been to suggest that we needn't act today because someone will undoubtedly survive and the magnitude of the catastrophe will ensure that they do the right thing by the country under the circumstances. This belief might be comforting, but it is based on a deeply faulty premise. There is no guarantee whatsoever that a crisis brings out the best in people or that the best people will somehow miraculously be among the survivors. In fact, crises often bring out the worst in some people and there is every possibility that some, perhaps many, of the survivors will not have the abilities, dispositions or motives to manage the situation as well as needed. That is why we must act now to ensure there is a constitutionally valid way of selecting the best people to fill vacancies beforehand, not after the fact.

Finally, perhaps the most strident opposition to the proposed solutions comes from those who assert, accurately, that no one has ever served in the House of Representatives who was not directly elected. That assertion is historically true, Constitutionally mandated, and it is something that members of the House are rightfully proud of. The trouble, however, is that it is also true that the House, Senate and Executive have never been simultaneously decapitated. The Constitution does not deal with that possibility nor likely could it have done so, given the historical context in which it was written.

Insisting that direct election to the House is more important than the existence of a House itself, is a bit like a parent of a child saying “If I am not alive to care for my family then no one can, so I won’t take out insurance or appoint a legal guardian.”

What matters most to our constituents, and to the Constitution, is not that we as specific individuals are the representatives, it is that the people have representation and that the principals of separation of powers and checks and balances are preserved.

No one, absolutely no one, who has addressed this issue seriously is suggesting that there should not be elections to replace vacancies in the House. To suggest otherwise is misleading demagoguery.

The only real questions are what should happen to Congress and to our country in the interim between a catastrophe and until elections can be held, and how best do we insure that the elections when they are held are valid and fair.

Proposed remedies by Mr. Rohrabacher, myself, and the Continuity Commission all answer these questions in ways that would allow a constitutionally valid Congress to be up and running with a full and valid quorum and with all Americans having legitimate representation in as little as twenty four hours or less after a devastating attack. I know of no better way to ensure that our liberties are preserved and that terrorists worst intentions are defeated.

If, within a day of the worst attack in our history, our Congress, executive and courts are up and running again, we will show unequivocally that the strength of this nation transcends specific individuals and that our central institutions can never be taken down by those who would do us harm, then we will have done a deep and lasting service to our nation. If, however, we knowingly fail to act, or if we act by passing symbolic but ineffective and unconstitutional measures, we will have left the nation in peril and failed in our responsibilities.

That is the choice before us today. I appreciate the committee’s attention and urge passage of real and lasting solutions.