

CONTINUITY IN REPRESENTATION ACT OF 2004

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JANUARY 28, 2004.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. SENSENBRENNER, from the Committee on the Judiciary,  
submitted the following

R E P O R T

together with

DISSENTING AND ADDITIONAL VIEWS

[To accompany H.R. 2844]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2844) to require States to hold special elections to fill vacancies in the House of Representatives not later than 21 days after the vacancy is announced by the Speaker of the House of Representatives in extraordinary circumstances, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

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The amendments are as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Continuity in Representation Act of 2004”.

**SEC. 2. REQUIRING SPECIAL ELECTIONS TO BE HELD TO FILL VACANCIES IN HOUSE IN EXTRAORDINARY CIRCUMSTANCES.**

Section 26 of the Revised Statutes of the United States (2 U.S.C. 8) is amended—

(1) by striking “The time” and inserting “(a) IN GENERAL.—Except as provided in subsection (b), the time”; and

(2) by adding at the end the following new subsection:

“(b) SPECIAL RULES IN EXTRAORDINARY CIRCUMSTANCES.—

“(1) IN GENERAL.—In extraordinary circumstances, the executive authority of any State in which a vacancy exists in its representation in the House of Representatives shall issue a writ of election to fill such vacancy by special election.

“(2) TIMING OF SPECIAL ELECTION.—A special election held under this subsection to fill a vacancy shall take place not later than 45 days after the Speaker of the House of Representatives announces that the vacancy exists, unless a regularly scheduled general election for the office involved is to be held at any time during the 75-day period which begins on the date of the announcement of the vacancy.

“(3) NOMINATIONS BY PARTIES.—If a special election is to be held under this subsection, not later than 10 days after the Speaker announces that the vacancy exists, the political parties of the State that are authorized to nominate candidates by State law may each nominate one candidate to run in the election.

“(4) EXTRAORDINARY CIRCUMSTANCES.—

“(A) IN GENERAL.—In this subsection, ‘extraordinary circumstances’ occur when the Speaker of the House of Representatives announces that vacancies in the representation from the States in the House exceed 100.

“(B) JUDICIAL REVIEW.—If any action is brought for declaratory or injunctive relief to challenge an announcement made under subparagraph (A), the following rules shall apply:

“(i) Not later than 2 days after the announcement, the action shall be filed in the United States District Court having jurisdiction in the district of the Member of the House of Representatives whose seat has been announced to be vacant and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code.

“(ii) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives.

“(iii) A final decision in the action shall be made within 3 days of the filing of such action and shall not be reviewable.

“(iv) The executive authority of the State that contains the district of the Member of the House of Representatives whose seat has been announced to be vacant shall have the right to intervene either in support of or opposition to the position of a party to the case regarding the announcement of such vacancy.”.

Amend the title so as to read:

A bill to require States to hold special elections to fill vacancies in the House of Representatives not later than 45 days after the vacancy is announced by the Speaker of the House of Representatives in extraordinary circumstances, and for other purposes.

**PURPOSE AND SUMMARY**

The “Continuity in Representation Act of 2003” provides for the expedited special election of new Members to fill seats left vacant in “extraordinary circumstances.” “Extraordinary circumstances” occur when the Speaker of the House announces that vacancies in the representation from the States in the House exceed 100. Under the bill as reported by the Committee on House Administration and the Committee on the Judiciary, when such “extraordinary circumstances” occur, a special election must be called within 45 days, unless a regularly scheduled general election for the office involved

is to be held within 75 days. Within 10 days of such an announcement by the Speaker, the political parties of the State that are authorized to nominate candidates by State law may each nominate one candidate to run in the election.

#### BACKGROUND AND NEED FOR THE LEGISLATION

H.R. 2844, the “Continuity in Representation Act of 2003,” was introduced on July 24, 2003, by House Judiciary Committee Chairman F. James Sensenbrenner, Jr., House Rules Committee Chairman David Dreier, Representatives Candice Miller and Tom Cole (both former chief State election officials), House Constitution Subcommittee Chairman Steve Chabot, and Representative Ron Paul. House Judiciary Committee Ranking Member John Conyers, Jr. and Representative Howard Berman are co-sponsors of H.R. 2844. It also has the support of Speaker Hastert.

#### A. CONSTITUTIONAL ISSUES

The Continuity in Representation Act will protect the people’s right to chosen representation. The uninterrupted tradition is that only Representatives duly elected by their local constituents should serve in the House. Indeed, while some argue that adopting an amendment to the Constitution that allows for the appointment of replacement Members will deter a terrorist attack designed to disrupt the functioning of Congress, the very adoption of such an amendment itself would strike a fatal blow to what has otherwise always been “The People’s House.”

The House is rooted in democratic principles, and those principles must be preserved. James Madison used the strongest of terms when stating the House must be composed only of those elected by the people. Madison wrote in Federalist Paper No. 52 that “As it is essential to liberty that the government in general should have a common interest with the people, so it is *particularly essential* that the [House] should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are *unquestionably the only policy* by which this dependence and sympathy can be effectually secured.”<sup>1</sup> Madison continued: “Who are to be the electors of the Federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States.”<sup>2</sup>

Madison explicitly *rejected* the proposition that the appointment of Members authorized by Congressional legislation is compatible with the American Republic. In Federalist No. 52, Madison stated “The definition of the right of suffrage is very justly regarded as

<sup>1</sup> Federalist No. 52 (Madison), at 327 (Clinton Rossiter ed., 1961) (emphasis added).

<sup>2</sup> Federalist No. 57 (Madison), at 351. *See also* Federalist No. 39 (Madison), at 242, 244 (“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.”); Federalist No. 57 (Madison), at 351 (“The elective mode of obtaining rulers is the characteristic policy of republican government.”). Madison also refers to the “requisite dependence of the House of Representatives on their constituents.” Federalist No. 52 (Madison), at 328. In *Jackson v. Ogilvie*, the Seventh Circuit held that “the people’s right to chosen representation is not limited to exercise at a biennial election, but is a *continuing right* which is not to be defeated by death of a Representative once chosen, or other cause of vacancy.” 426 F.2d 1333, 1336 n.7a (7th Cir. 1970) (emphasis added) (quoting M. St. Clair Clarke and David A. Hall, Cases of Contested Elections (Washington, D.C. 1834), the Case of John Hoge of Pennsylvania, at 139).

a fundamental article of republican government. It was incumbent on the [Constitutional] convention, therefore, to define and establish this right in the Constitution. *To have left it open for the occasional regulation of the Congress, would have been improper for the reason just mentioned.*<sup>3</sup> Further, in his “Speech in the Federal Convention on Suffrage,” Madison stated, “The right of suffrage is certainly one of the fundamental articles of republican Government, and ought not to be regulated by the Legislature. *A gradual abridgement of this right has been the mode in which Aristocracies have been built on the ruins of popular forms.*”<sup>4</sup> The very alternative offered by some opponents of H.R. 2844—a constitutional amendment to allow Congress to require that vacant House seats be filled by appointment—was explicitly rejected by the Founders as antithetical to republican government.

Further, during the height of the Cold War, when the nation feared a potential nuclear or biological attack by the Soviet Union on the entire land mass of the United States, the Senate three times passed constitutional amendments similar to those some are proposing currently, and the House chose not to act on any of them.<sup>5</sup> Demonstrating that this is not a partisan issue, but one concerning the legitimacy of all Members of the House and of the legislation it passes, the House of Representatives rejected such Senate-passed amendments both when it was controlled by Republicans in the 83rd Congress (221 Republicans, 213 Democrats), and when it was controlled by Democrats in the 84th Congress (232 Democrats, 203 Republicans) and in the 87th Congress (262 Democrats, 175 Republicans).

H.R. 2844 would provide for, among other things, expedited special elections in the States to fill vacant House seats in extraordinary emergency situations. Congress has the clear constitutional authority to enact such legislation under article I, section 4, clause 1 of the Constitution, which states that “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations . . .*”<sup>6</sup> In enacting such legislation, Congress would uphold the Founders’ understanding of what is essential to democracy, maintain the uninterrupted tradition that only duly elected Members serve in the House of Representatives, and preserve the American people’s right to their chosen Representatives. Consistent with the right to chosen representation, the Founders explicitly

<sup>3</sup> Federalist No. 52 (Madison) at 326 (Clinton Rossiter ed., 1961) (emphasis added).

<sup>4</sup> James Madison, “Speech in the Federal Convention on Suffrage,” (August 7, 1787) reprinted in *James Madison: Writings* (Jack N. Rakove, ed. 1999) at 132.

<sup>5</sup> See Sula P. Richardson, “House Vacancies: Proposed Constitutional Amendments for Filling Them Due to National Emergency” CRS Report for Congress (RL-32031) at 5.

<sup>6</sup> In *Smiley v. Holm*, 285 U.S. 355 (1932), the Supreme Court held that “[i]n exercising this power, the Congress may supplement . . . state regulations or may substitute its own . . . It has a general supervisory power over the whole subject.” *Id.* at 366–67 (quotations and citations omitted). The Supreme Court described “the whole subject” over which Congress has general supervisory power as follows: “The subject-matter is the ‘times, places and manner of holding elections for senators and representatives.’ It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.” *Id.* at 366. Also, the House alone has the authority to judge the elections of its own Members. Article I, section 5, clause 1 of the Constitution provides that “Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . .”.

considered Congress's power to require expedited special elections as the solution to potential discontinuity in government in emergency situations. As Alexander Hamilton wrote in Federalist Paper No. 59, in discussing article I, section 4, clause 1, "[The Constitutional Convention has] reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety. Nothing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs."<sup>7</sup>

While some imagine horrific scenarios regarding catastrophic attacks on the Nation's capital, more inspiring scenarios can be imagined that resonate more closely with the American spirit. Following such an attack, millions of people around the country might fill schools, gymnasiums, churches, and meeting halls, and freely exercise, in the wake of terrible actions by vicious haters of democracy, their right to chosen representation—a right that has survived uninterrupted throughout the history of the United States. When terrorists attacked on September 11, 2001, it was an elected—not an appointed—Congress that acted in its wake, and the legislation passed by that elected Congress has a legitimacy that legislation passed by an appointed Congress would not have had. While some argue that Congress must immediately reconstitute itself in order to check a President imposing martial law, the President's potential abuse of power is already subject to check by the impeachment process, which, as any President will know, could be initiated by both a depleted or a later repopulated House of Representatives.

Another proposed solution is a constitutional amendment that grants Congress blanket authority to legislate how Members would come to serve in this body. That provides no solution, but only potential mischief and the prospect of political gamesmanship by future Congresses. Further, if the statute enacted by Congress under such an amendment allows appointed Members to run in the special elections following their appointment, they would be distracted by campaign politics at the very moment they are expected to be focusing on legislative duties. If, on the other hand, such legislation provided that appointed Members could not run in such special elections, they would have no institutional connection to the electorate's desires. Either way, legislation passed by an appointed House that did not comport with the people's will would have to be repealed by a later elected House, leading to further discontinuity at the very time continuity is most important. A time following a catastrophic attack in this country would be one of the most significant times in our history, and that is precisely *not* the time, if ever there is one, for the laws to be written by appointed

<sup>7</sup>Federalist No. 59 (Hamilton) at 363 (Clinton Rossiter ed., 1961) (emphasis added). Hamilton continued: "The natural order of the subject leads us to consider, in this place, that provision of the Constitution which authorizes the national legislature to regulate, in the last resort, the election of its own members . . . I am greatly mistaken, notwithstanding, if there be any article in the whole plan more completely defensible than this. Its propriety rests upon the evidence of this plain proposition, that *every government ought to contain in itself the means of its own preservation* . . . It will not be alleged, that an election law could have been framed and inserted in the Constitution, which would have been always applicable to every probable change in the situation of the country; and it will therefore not be denied, that a discretionary power over elections ought to exist somewhere . . ." *Id.* at 361–362 (emphasis in original).

Members who have no authority from, nor responsibility to, the people.

H.R. 2844 is founded on clear, existing constitutional authority, and it preserves the vital, time-tested constitutional value of elected representation that has made this country the most successful experiment in *self-governance* the world has ever known.

#### B. ELECTION ISSUES

While some claim it would be too burdensome for special elections to be required within 45 days of a catastrophic attack, several State laws already provide for very quick special elections in *normal* circumstances, let alone emergency circumstances. For example, Minnesota law provides that a special election must be held no more than 28 days after the governor issues the writ of election, and the governor must issue the writ of election no more than 5 days after the vacancy occurs if Congress is in session, thereby requiring special election within 33 days of a vacancy occurring in ordinary circumstances.<sup>8</sup> Wyoming law provides that special elections to fill vacancies must be held within 45 days in ordinary circumstances.<sup>9</sup> Further, New York<sup>10</sup> law provides that special elections may be held within as little as 30 days and no later than 40 days after the governor issues a writ of election to fill a vacancy. Georgia<sup>11</sup> law provides that special elections to fill vacancies may be held within as little as 40 days in ordinary circumstances, and Iowa law<sup>12</sup> provides that special elections to fill vacancies may be held within as little as 45 days in ordinary circumstances.<sup>13</sup> R.

<sup>8</sup>See Minn. Stat. §204D.19 (“Special election when the congress or legislature will be in session . . . when a vacancy occurs and the congress or legislature will be in session so that the individual elected as provided by this section could take office and exercise the duties of the office immediately upon election, the governor shall issue within 5 days after the vacancy occurs a writ calling for a special election. The special election shall be held as soon as possible . . . but in no event more than 28 days after the issuance of the writ.”).

<sup>9</sup>See Wyo. Stat. §22-18-105 (“If the vacancy in the office of representative in congress occurs within six (6) months prior to the next general election, the vacancy shall be filled at the general election. Otherwise the special election shall occur not more than forty (40) days after the vacancy occurs. The governor shall declare the vacancy and issue the writ of election within five (5) days after the vacancy occurs.”).

<sup>10</sup>See N.Y. Pub.Off. §42 (“[T]he governor may in his discretion make proclamation of a special election to fill such office, specifying the district or county in which the election is to be held, and the day thereof, which shall be not less than thirty nor more than forty days from the date of the proclamation.”).

<sup>11</sup>See Ga. Stat. §21-2-543 (“Whenever a vacancy shall occur or exist in the office of Representative in the United States Congress from this State the Governor shall issue, within 10 days after the occurrence of such vacancy, a writ of election to the Secretary of State for a special election to fill such vacancy, which election shall be held on the date named in the writ, which shall not be less than 30 days after its issuance.”).

<sup>12</sup>See Iowa Code §69.14 (“A special election to fill a vacancy shall be held for a representative in Congress, or senator or representative in the general assembly, when the body in which such vacancy exists is in session, or will convene prior to the next general election, and the governor shall order, not later than 5 days from the date the vacancy exists, a special election, giving not less than forty days’ notice of such election.”).

<sup>13</sup>Also, the first Presidential Succession statute, enacted in 1792, required the election of Presidential electors (who chose the President) in a period as small as 27 days following a simultaneous vacancy in the Presidency and the Vice Presidency in an era in which the means of mass communication were exponentially less advanced. The 1792 statute provided for a process for electing a new President in as short as 2 months. See Act of Mar. 1, 1792, ch. 8, §10, 1 Stat. 239, 240-41 (repealed 1886) (“[W]henver the offices of President and Vice President shall both become vacant, the Secretary of State shall forthwith cause a notification thereof to be made to the executive of every State, and shall also cause the same to be published in at least one of the newspapers printed in each State, specifying that electors of the President of the United States shall be appointed or chosen in the several States within thirty-four days preceding the first Wednesday in December [the date the electors were to cast their votes] then next ensuing; *Provided*, There shall be the space of 2 months between the date of such notification and the said first Wednesday in December . . .”). This meant that Presidential electors could be required to be chosen in as little as 27 days because the Presidential electors were required to meet within 34 days of the first Wednesday in December to elect the President.

Doug Lewis, Executive Director of the Election Center—a non-partisan organizations representing the nation’s election officials—has stated that “many who are looking at this issue do not want to break the tradition of having House members being elected rather than being appointed—even for a short duration. We have no quarrel with that viewpoint.”<sup>14</sup> Further, Mr. Lewis has also stated that “it appears that elections administrators [from combined responses nationwide] feel that they can conduct an election within as few as 45 days.”<sup>15</sup> In any case, Mr. Lewis stated that “Election administrators . . . will perform well in any national emergency.”<sup>16</sup>

Today, absentee and overseas ballot requests by electronic means not involving physical transportation could further facilitate the timely conducting of special elections. The Pentagon has already developed a system that will allow troops overseas to vote over the Internet in the 2004 elections.<sup>17</sup> Touch-screen voting could further reduce the need for poll workers, and could even eliminate entirely the need for paper ballots. Yet while today’s constantly advancing election technology will make it much easier in the near future for people to exercise their right to elected representation in special elections, the adoption of a constitutional amendment allowing Congress to deny that right of elected representation would be permanent. Expedited special elections might not yield flawless voting, but alternative proposals for a permanent constitutional amendment would in certain crucial moments in American history ban voting entirely, for everyone, everywhere. Further, while a catastrophic attack on Washington, D.C. would no doubt cause massive disruption in the Nation’s capital, the situation is likely to be much

<sup>14</sup>R. Doug Lewis, Written Testimony for U.S. House Administration Committee (September 24, 2003) at 2.

<sup>15</sup>*Id.* at 3.

<sup>16</sup>*Id.* at 6.

<sup>17</sup>See Guy Taylor, “Online Absentee Voting Eliminates Postmarks,” *The Washington Times* (August 6, 2003) at A4 (“The Pentagon is putting the finishing touches on an electronic voting system that will allow about 100,000 military personnel and other Americans living abroad to cast their ballots through the Internet in the 2004 elections . . . The new system, in which each voter is assigned a digital signature for voting through a secure Internet connection, will replace the postal method of absentee ballots, particularly for U.S. troops deployed around the world . . . Postmarks will be obsolete under SERVE [the program’s acronym], but voters using the system will need access to the Internet and Windows software. Although she could not offer numbers, Ms. Brunelli [director of the Pentagon’s Federal Voting Assistance Program] said the ‘vast majority of troops’ on deployment overseas have such access, including many of those serving in Iraq. Although it won’t be impossible for a person using SERVE to commit voter fraud, Ms. Brunelli said the digital signature, a string of randomly generated letters and characters different for each registered voter, makes using the system as secure as visiting a voting booth. Committing fraud through SERVE would be no less difficult than committing it on election day at a regular polling station, she said, adding that the system’s security measures are “more sophisticated” than what a person must go through to partake in banking transactions through the Internet.”). Security concerns will of course have to be worked out in any such electronic voting system, and progress in developing such systems can only be obtained through trial and error. While a minority of researchers have been critical of early attempts at online voting, the project remains promising. See Dan Keating, “Pentagon’s Online Voting Program Deemed Too Risky,” *The Washington Post* (January 22, 2004) at A8 (“The concern for security is a good thing . . . ,’ Glenn Flood [a Pentagon spokesman] said. ‘But we think the thing will be secure, and security will continue to be enhanced. We’re not going to stop it.’ Supporters say the pilot for military, government and private citizens abroad is important to learn the right way to gather electronic votes and to help overseas voters who often have trouble casting ballots. The chance of a security threat has to be weighed against the knowledge gained and the improved voting access for those people, said R. Michael Alvarez, co-director of the CalTech-MIT Voting Technology Project and co-author of ‘Point, Click and Vote,’ a recent book about online voting . . . Supporters note that the late-arriving overseas ballots contributed to the 2000 Florida ballot fiasco. That election led to calls for better voting systems and better ways to collect ballots from citizens abroad.”).

less severe in localities throughout the country where special elections would be held.<sup>18</sup>

Further, just recently, an unscheduled gubernatorial recall election went forward in California. In that case, 135 candidates were certified for a statewide election that would occur just 54 days later,<sup>19</sup> with voters also asked to consider two propositions, one concerning the collection of racial data and another concerning funding for roads, bridges and other public structures. Despite the much greater complexity of such an election compared to an expedited special election in a single district to fill a vacant House seat, the election proceeded smoothly amidst unprecedentedly high voter turnout. As *The Washington Post* reported: “Voting in California’s historic gubernatorial recall election appeared to go smoothly yesterday, as fears of malfunctioning voting equipment and widespread voter confusion over a ballot listing 135 candidates to replace Gov. Gray Davis (D) failed to materialize . . . [T]here were no indications of serious problems or irregularities at most polling places across the State. According to exit polls, almost nine out of 10 voters said they had no problems with the voting equipment or the lengthy ballot. Because local elections officials had only a few weeks to prepare for the balloting, there were about 10,000 fewer polling places than usual, which some officials feared might depress the turnout. But that did not appear to be the case, as the heavy voting continued throughout the day . . . The nonpartisan Field Poll projected that as many as 10 million Californians would vote in the recall election, a 30 percent increase over the 7.7 million people who voted in 2002 when Davis was elected to a second term. A turnout of that size, representing 65 percent of the State’s 15.3 million registered voters, would be the largest for any non-presidential election in California history . . . Edana Tisherman said she had no trouble with the ballot Tuesday. ‘There’s been so much coverage of this, it’s very simple,’ she said. ‘I said, Four holes, no chads, we’re gone.’”<sup>20</sup>

#### C. SPEAKER’S ANNOUNCEMENT

H.R. 2844 provides for the Speaker of the House to make an announcement of extraordinary circumstances when more than 100 seats are vacant. In the event the Speaker is not able to make such announcements, a Speaker succession rule has already been adopted by the House and is part of the House rules.<sup>21</sup>

<sup>18</sup>The Continuity of Government Commission takes an extremely pessimistic view of the resiliency of the electoral process nationwide following an attack on the Nation’s capital, and even of the abilities of printing companies to print ballots on an expedited basis. That Commission reports that it “estimates . . . that in the chaos after an attack, it would be difficult for even the most expedited elections to take place within 3 months. Not only might there be an initial period of confusion that would delay the election, but there is also no precedent for holding hundreds of special elections at the same time. One problem along these lines [is] there are a limited number of ballot printing companies, and they are not prepared to print ballots on a moment’s notice for more than a few races at a time.” “The Congress: Preserving Our Institutions: The First Report of the Continuity of Government Commission” (May 2003) at 7.

<sup>19</sup>See “California Recall Timeline,” *The Washington Times* (October 8, 2003) at A10.

<sup>20</sup>Edward Walsh and Dan Keating, “Despite Lines, Voting Goes Smoothly,” *The Washington Post* (October 8, 2003) at A19.

<sup>21</sup>In the event the Speaker is physically unable to perform his duties, Speaker succession is provided for in House rule I(8)(b)(3), which provides that “In the case of a vacancy in the office of Speaker, the next Member on the list [provided by the Speaker] shall act as Speaker pro tempore until the election of a Speaker or a Speaker pro tempore. Pending such election the Member acting as Speaker pro tempore may exercise such authorities of the Office of Speaker as may be necessary and appropriate to that end . . . [A] vacancy in the office of Speaker may exist by reason of the physical inability of the Speaker to discharge the duties of the office.”



It is also appropriate to grant the Speaker the authority to make such announcements because the Speaker already has the authority under House rules to adjust the quorum requirement downward to reflect deaths that leave seats vacant.<sup>22</sup>

#### D. JUDICIAL REVIEW

H.R. 2844 provides for judicial review of announcements of vacancies by the Speaker. It is these provisions that are within the jurisdiction of the House Judiciary Committee. These provisions are based in part on the provision<sup>23</sup> in the Bipartisan Campaign Reform Act of 2002,<sup>24</sup> and similar provisions in other Federal statutes, that provide for review by a three-judge panel. This language references 28 U.S.C. § 2284, which sets out the procedures by which three-judge panels will convene. The judicial review provisions in the bill also prohibit appeals from decisions of the three-judge court. The provisions also allow State Governors to intervene in the case and to have their views heard.

#### E. PROCEDURAL HISTORY

H.R. 2844 and related issues have had a long procedural history. On February 28, 2002, the House Subcommittee on the Constitutional held a legislative hearing on H.J.Res. 67, a proposed constitutional amendment to allow rule by a non-elected House of Representatives. Witnesses who appeared at the hearing included Norman Ornstein of the American Enterprise Institute, which issued a report on Continuity in Government, Professor Charles Tiefer, who for a decade was the solicitor and deputy general counsel for the House of Representatives, and Harold Relyea, Expert and Specialist in American National Government and emergency preparations for the Congressional Research Service.

During the 107th Congress, a bipartisan working group co-chaired by then-House Republican Policy Committee Chairman Christopher Cox and House Democratic Policy Chairman Martin Frost, met regularly to discuss the issues surrounding this legislation, and as a result the House passed H.Res.559, whose chief sponsor was Representative Cox, expressing the sense of the House of Representatives that each State should examine its existing statutes, practices, and procedures governing special elections so that, in the event of a catastrophe, vacancies in the House of Representatives may be filled in a timely fashion. Unfortunately, only one

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Providing for the repopulation of a largely depleted House would be necessary and appropriate to the end of electing a new Speaker if there were a vacancy in the Speaker's office. *See also* Wm. Holmes Brown and Charles W. Johnson, "House Practice: A Guide to the Rules, Precedents, and Procedures of the House" (108th Congress, 1st Session) (U.S. Government Printing Office: 2003) at 638 § 2 ("The Member acting as Speaker pro tempore under this provision may exercise such authorities of the Office of Speaker as may be necessary and appropriate pending the election of a Speaker or Speaker pro tempore.")

<sup>22</sup>The House rules were changed at the beginning of the 108th Congress to provide that a quorum of the House is a majority of those Members duly sworn and elected, and *living*. House rule XX(5)(c) provides that "Upon the death, resignation, expulsion, disqualification, or removal of a Member, the whole number of the House shall be adjusted accordingly. The Speaker shall announce the adjustment to the House. Such an announcement shall not be subject to appeal. In the case of a death, the Speaker may lay before the House such documentation from Federal, State, or local officials as he deems pertinent." This rule essentially codified existing House precedent. In 1906, Speaker Cannon established the precedent contained in the House Manual, § 53, which provides that "the decision of the House now is that after the House is once organized the quorum consists of a majority of those Members chosen, sworn, and living whose membership has not been terminated by resignation, or by the action of the House."

<sup>23</sup>*See* 2 U.S.C. § 437h note.

<sup>24</sup>Pub. L. No. 107-155.

State, California, responded to that request and expedited their special election laws in the event of a catastrophe.

Consequently, House Judiciary Committee Chairman Sensenbrenner and the other original sponsors of H.R. 2844 responded precisely as the Founders would have expected, by acting pursuant to authority under article I, section 4, clause 1, of the Constitution to ensure that the House of Representatives can be repopulated expeditiously in extraordinary circumstances. H.R. 2844 received a hearing in the House Administration Committee on September 24, 2003, and it was marked up and reported out of the House Administration Committee on December 8, 2003. The House Judiciary Committee received a sequential referral on the portion of the legislation within its jurisdiction, and reported out H.R. 2844 on January 21, 2004.

HEARINGS

No House Judiciary Committee hearings were held on the judicial review provisions of H.R. 2844 over which the Committee had jurisdiction. Similar issues were raised in a hearing, before the Constitution Subcommittee on H.J. Res. 67 on February 28, 2002. The Committee on House Administration held a hearing on H.R. 2844 on September 24, 2003.

COMMITTEE CONSIDERATION

On January 21, 2004, the Committee met in open session and ordered favorably reported the bill H.R. 2844 with an amendment by a recorded vote of 18 to 10, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of Rule XIII of the Rules of the House of Representatives, the Committee notes that the following recorded vote occurred during the committee consideration of H.R. 2844.

1. Motion to report H.R. 2844, as amended, by a rollcall vote of 18 yeas to 10 nays, the motion was agreed to.\*

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde .....			
Mr. Coble .....	X		
Mr. Smith .....	X		
Mr. Gallegly .....	X		
Mr. Goodlatte .....	X		
Mr. Chabot .....	X		
Mr. Jenkins .....	X		
Mr. Cannon .....	X		
Mr. Bachus .....	X		
Mr. Hostettler .....	X		
Mr. Green .....	X		
Mr. Keller .....	X		
Ms. Hart .....	X		
Mr. Flake .....			
Mr. Pence .....	X		
Mr. Forbes .....	X		
Mr. King .....	X		
Mr. Carter .....	X		
Mr. Feeney .....	X		

## ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mrs. Blackburn .....			
Mr. Conyers .....		X	
Mr. Berman .....			
Mr. Boucher .....		X	
Mr. Nadler .....			
Mr. Scott .....		X	
Mr. Watt .....		X	
Ms. Lofgren .....		X	
Ms. Jackson Lee .....			
Ms. Waters .....			
Mr. Meehan .....		X	
Mr. Delahunt .....			
Mr. Wexler .....			
Ms. Baldwin .....		X	
Mr. Weiner .....		X	
Mr. Schiff .....		X	
Ms. Sánchez .....		X	
Mr. Sensenbrenner, Chairman .....	X		
Total .....	18	10	

*\*Note: If Representative Maxine Waters had been present at the time of the vote, she would have voted "Nay."*

## COMMITTEE OVERSIGHT FINDINGS

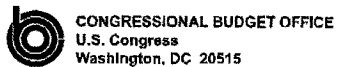
In compliance with clause 3(c)(1) of Rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of Rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

## NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of Rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

## CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of Rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2844, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:



*Douglas Holtz-Eakin, Director*

January 23, 2004

Honorable F. James Sensenbrenner Jr.  
Chairman  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2844, the Continuity in Representation Act of 2004.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Sarah Puro, who can be reached at 225-3220.

Sincerely,



Douglas Holtz-Eakin

Enclosure

cc: Honorable John Conyers Jr.  
Ranking Member



CONGRESSIONAL BUDGET OFFICE  
COST ESTIMATE

January 23, 2004

**H.R. 2844**

**Continuity in Representation Act of 2004**

*As ordered reported by the House Committee on Judiciary on January 21, 2004*

**SUMMARY**

H.R. 2844 would provide for the continuity of the House of Representatives if the Speaker of the House announced that there were “extraordinary circumstances”—effectively 100 or more vacancies in the House of Representatives. The bill would require states to hold special elections to fill vacancies in the House of Representatives within 45 days of such an announcement. The bill also would provide for judicial review of challenges to the announcement of extraordinary circumstances. CBO estimates that enacting H.R. 2844 would have no significant impact on the federal budget.

By requiring states to hold elections within 45 days of an announcement of “extraordinary circumstances,” H.R. 2844 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA). CBO estimates that the costs of that mandate over the next five years would not exceed the threshold established in that act (\$60 million in 2004, adjusted annually for inflation).

H.R. 2844 contains no new private-sector mandates as defined in UMRA.

**ESTIMATED COST TO THE FEDERAL GOVERNMENT**

CBO estimates that enacting H.R. 2844 would have no significant impact on the federal budget over the next several years. Although the bill could affect the timing and amounts spent on Members' salaries (which are classified as mandatory) and office expenses (which are subject to appropriation), CBO expects that any such impact is unlikely to occur and would be minor in any event.

**INTERGOVERNMENTAL MANDATES CONTAINED IN THE BILL**

H.R. 2844 would require states to hold elections within 45 days after an announcement by the Speaker of the House that there are “extraordinary circumstances”—effectively 100 or more vacancies in the House of Representatives—unless a regularly scheduled general election would occur within 75 days. This intergovernmental mandate would require 40 states to hold general elections more quickly than they currently would in the event of a vacancy that does not coincide with a regularly scheduled election; some states would need to amend their state constitutions. Further, the bill would likely prohibit states from holding primaries—as required by law in some states—for two reasons. First, the short time frame for the general election would make the holding of a primary logistically infeasible, and second, political parties would be required to furnish a candidate within 10 days of the announcement of extraordinary circumstances.

**ESTIMATED DIRECT COSTS OF THE MANDATES TO STATE AND LOCAL GOVERNMENTS**

Based on information from state and local election professionals, CBO estimates that the cost to run a special election ranges from \$200,000 to \$500,000 per district (in 2004 dollars), depending on the circumstances and location of the special election, the total number of special elections being held nationwide, and other factors. In the absence of the bill, states would hold elections and fill vacancies, but CBO estimates that the new requirements and short time frame required by the bill would likely generate significant additional costs for states. However, the likelihood is small that, over the next five years, events would occur triggering the provisions of H.R. 2844. Even if such an event were to occur, the additional costs for special elections might not exceed the threshold established in UMRA (\$60 million in 2004, adjusted annually for inflation).

**ESTIMATED IMPACT ON THE PRIVATE SECTOR**

H.R. 2844 contains no new private-sector mandates as defined in UMRA.

**PREVIOUS ESTIMATES**

CBO provided an estimate for H.R. 2844 as ordered reported by the House Committee on Administration on November 19, 2004. The bills and the cost estimates are identical.

**ESTIMATE PREPARED BY:**

Impact on State, Local, and Tribal Governments: Sarah Puro (225-3220)  
Federal Costs: Deborah Reis (226-2860)  
Impact on the Private Sector: Paige Piper/Bach (226-2940)

**ESTIMATE APPROVED BY:**

Robert A. Sunshine  
Assistant Director for Budget and Analysis

## PERFORMANCE GOALS AND OBJECTIVES

H.R. 2844 does not authorize funding. Therefore, clause 3(c)(4) of Rule XIII of the Rules of the House of Representatives is inapplicable.

## CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of Rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 4, clause 1; article I, section 5, clauses 1 and 2; and article III, section 2, clauses 1 and 2 of the Constitution.

## SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Sec. 1. Short Title. Section 1 provides that the title of the Act is the “Continuity in Representation Act of 2003.” The Committee on the Judiciary adopted a technical amendment to change the year to 2004.

Sec. 2. Requiring Special Elections to Be Held to Fill Vacancies in House in Extraordinary Circumstances.

Section 2 provides for the expedited special election of new Members to fill seats left vacant in “extraordinary circumstances.” “Extraordinary circumstances” occur when the Speaker of the House announces that vacancies in the representation from the States in the House exceeds 100. When such “extraordinary circumstances” occur, a special election must be called within 45 days, unless a regularly scheduled general election for the office involved is to be held within 75 days. Within 10 days of such an announcement by the Speaker, the political parties of the State that are authorized to nominate candidates by State law may each nominate one candidate to run in the election. The bill as introduced provided for a 21-day period, but the Committee on House Administration adopted an amendment providing for the 45-day period, and the Committee on the Judiciary adopted the version passed by the Committee on House Administration.

Section 2 also provides for judicial review of announcements of vacancies by the Speaker and references 28 U.S.C. §2284, which sets out the procedures according to which the three-judge panels are convened. The judicial review provisions in the bill also prohibit appeals from decisions of the three-judge court. The provisions also allow State Governors to intervene in the case and have their views heard.

## CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):



**SECTION 26 OF THE REVISED STATUTES OF THE  
UNITED STATES**

SEC. 26. **[The time]** (a) *IN GENERAL.*—*Except as provided in subsection (b), the time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.*

(b) *SPECIAL RULES IN EXTRAORDINARY CIRCUMSTANCES.*—

(1) *IN GENERAL.*—*In extraordinary circumstances, the executive authority of any State in which a vacancy exists in its representation in the House of Representatives shall issue a writ of election to fill such vacancy by special election.*

(2) *TIMING OF SPECIAL ELECTION.*—*A special election held under this subsection to fill a vacancy shall take place not later than 45 days after the Speaker of the House of Representatives announces that the vacancy exists, unless a regularly scheduled general election for the office involved is to be held at any time during the 75-day period which begins on the date of the announcement of the vacancy.*

(3) *NOMINATIONS BY PARTIES.*—*If a special election is to be held under this subsection, not later than 10 days after the Speaker announces that the vacancy exists, the political parties of the State that are authorized to nominate candidates by State law may each nominate one candidate to run in the election.*

(4) *EXTRAORDINARY CIRCUMSTANCES.*—

(A) *IN GENERAL.*—*In this subsection, “extraordinary circumstances” occur when the Speaker of the House of Representatives announces that vacancies in the representation from the States in the House exceed 100.*

(B) *JUDICIAL REVIEW.*—*If any action is brought for declaratory or injunctive relief to challenge an announcement made under subparagraph (A), the following rules shall apply:*

(i) *Not later than 2 days after the announcement, the action shall be filed in the United States District Court having jurisdiction in the district of the Member of the House of Representatives whose seat has been announced to be vacant and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code.*

(ii) *A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives.*

(iii) *A final decision in the action shall be made within 3 days of the filing of such action and shall not be reviewable.*

(iv) *The executive authority of the State that contains the district of the Member of the House of Representatives whose seat has been announced to be vacant shall have the right to intervene either in support*

*of or opposition to the position of a party to the case regarding the announcement of such vacancy.*

MARKUP TRANSCRIPT

**BUSINESS MEETING**

**WEDNESDAY, JANUARY 21, 2004**

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10:05 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will be in order, and a working quorum is present. Pursuant to notice, I now call up the bill H.R. 2844, the "Continuity in Representation Act of 2003," for purposes of markup, and move its favorable recommendation to the House. Without objection, the bill will be considered as read and open for amendment at any point, and the text as reported by the Committee on House Administration, which the Members have before them, will be considered as read, considered as the original text for purposes of amendment, and open for amendment at any point.

[The Committee Print follows:]

**[COMMITTEE PRINT]**

**[Showing H.R. 2844 as Reported by the Committee on House Administration]**

108TH CONGRESS  
1ST SESSION

**H. R. 2844**

**[Report No. 108-404]**

To require States to hold special elections to fill vacancies in the House of Representatives not later than 21 days after the vacancy is announced by the Speaker of the House of Representatives in extraordinary circumstances, and for other purposes.

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IN THE HOUSE OF REPRESENTATIVES

JULY 24, 2003

Mr. SENSENBRENNER (for himself, Mr. DREIER, Mrs. MILLER of Michigan, Mr. COLE, Mr. CHABOT, and Mr. PAUL) introduced the following bill; which was referred to the Committee on House Administration.

DECEMBER 8, 2003

Reported from the Committee on House Administration with an amendment; referred sequentially to the Committee on the Judiciary for a period ending not later than January 31, 2004 for consideration of such provisions of the bill and amendment as fall within the jurisdiction of that committee pursuant to clause 1(k), rule X.

[For text of introduced bill, see copy of bill as introduced on July 24, 2003]

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**A BILL**

To require States to hold special elections to fill vacancies in the House of Representatives not later than 21 days after the vacancy is announced by the Speaker of the

House of Representatives in extraordinary circumstances,  
and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Continuity in Rep-  
5 resentation Act of 2003”.

6 **SEC. 2. REQUIRING SPECIAL ELECTIONS TO BE HELD TO**  
7                   **FILL VACANCIES IN HOUSE IN EXTRAOR-**  
8                   **DINARY CIRCUMSTANCES.**

9       Section 26 of the Revised Statutes of the United  
10 States (2 U.S.C. 8) is amended—

11           (1) by striking “The time” and inserting “(a)  
12       IN GENERAL.—Except as provided in subsection (b),  
13       the time”; and

14           (2) by adding at the end the following new sub-  
15       section:

16       “(b) SPECIAL RULES IN EXTRAORDINARY CIR-  
17 CUMSTANCES.—

18           “(1) IN GENERAL.—In extraordinary cir-  
19 cumstances, the executive authority of any State in  
20 which a vacancy exists in its representation in the  
21 House of Representatives shall issue a writ of elec-  
22 tion to fill such vacancy by special election.

23           “(2) TIMING OF SPECIAL ELECTION.—A special  
24 election held under this subsection to fill a vacancy

1 shall take place not later than 45 days after the  
2 Speaker of the House of Representatives announces  
3 that the vacancy exists, unless a regularly scheduled  
4 general election for the office involved is to be held  
5 at any time during the 75-day period which begins  
6 on the date of the announcement of the vacancy.

7 “(3) NOMINATIONS BY PARTIES.—If a special  
8 election is to be held under this subsection, not later  
9 than 10 days after the Speaker announces that the  
10 vacancy exists, the political parties of the State that  
11 are authorized to nominate candidates by State law  
12 may each nominate one candidate to run in the elec-  
13 tion.

14 “(4) EXTRAORDINARY CIRCUMSTANCES.—

15 “(A) IN GENERAL.—In this subsection,  
16 ‘extraordinary circumstances’ occur when the  
17 Speaker of the House of Representatives an-  
18 nounces that vacancies in the representation  
19 from the States in the House exceed 100.

20 “(B) JUDICIAL REVIEW.—If any action is  
21 brought for declaratory or injunctive relief to  
22 challenge an announcement made under sub-  
23 paragraph (A), the following rules shall apply:

24 “(i) Not later than 2 days after the  
25 announcement, the action shall be filed in

1 the United States District Court having ju-  
2 risdiction in the district of the Member of  
3 the House of Representatives whose seat  
4 has been announced to be vacant and shall  
5 be heard by a 3-judge court convened pur-  
6 suant to section 2284 of title 28, United  
7 States Code.

8 “(ii) A copy of the complaint shall be  
9 delivered promptly to the Clerk of the  
10 House of Representatives.

11 “(iii) A final decision in the action  
12 shall be made within 3 days of the filing  
13 of such action and shall not be reviewable.

14 “(iv) The executive authority of the  
15 State that contains the district of the  
16 Member of the House of Representatives  
17 whose seat has been announced to be va-  
18 cant shall have the right to intervene either  
19 in support of or opposition to the position  
20 of a party to the case regarding the an-  
21 nouncement of such vacancy.”.

Amend the title so as to read:

A bill to require States to hold special elections to fill vacancies in the House of Representatives not later than 45 days after the vacancy is announced by the Speaker of the House of Representatives in extraordinary circumstances, and for other purposes.

Chairman SENSENBRENNER. The Chair recognizes himself for 5 minutes to explain the bill.

I had introduced this bill on July 24th along with Rules Committee Chairman David Dreier and Representatives Candice Miller and Tom Cole, who are both former chief State election officials, and House Constitution Subcommittee Chairman Steve Chabot and Representative Ron Paul. Ranking Member John Conyers is also a co-sponsor of this bill. It has the support of the Speaker of the House. It received a hearing before the House Administration Committee which favorably reported the legislation on December 8th of last year.

This bill will protect the people's right to chosen representation. The bill provides for the expedited special election of new Members to fill seats left vacant in extraordinary circumstances. Extraordinary circumstances occur when the Speaker announces that vacancies in the representation from the States in the House exceed 100. Under the bill, when such extraordinary circumstances occur a special election must be called within 45 days unless a regularly scheduled general election for the office involved is to be held within 75 days. Within 10 days of such an announcement by the Speaker, the political parties of the State that are authorized to nominate candidates by State law may nominate one candidate to run in the election.

The bill also provides for judicial review of announcements of vacancies by the Speaker. For purposes of markup, this Committee only has jurisdiction over the judicial review provisions which are contained in section 2(b)(4)(B) of the bill. These provisions provide for judicial review of the announcement of vacancies by the Speaker. They are based on the provision in the Bipartisan Campaign Reform Act of 2002 and similar provisions in other Federal statutes that provide for a review by three-judge panels. These provisions reference 28 United States Code 2284, which sets out the procedures according to which three-judge panels will assemble themselves. Congress has the clear constitutional authority to enact this bill under article 1, section 4, which states that, quote, "Congress may at any time by law make or alter," unquote, State election laws.

Consistent with the right to chosen representation, the Founders explicitly considered Congress' power to require expedited special elections as the solution to potential discontinuity of Government in emergency situations. As Alexander Hamilton wrote in the Federalist Papers, the Constitution gives the Congress, quote, "a right to interpose" its special election rules on the State, quote, "whenever extraordinary circumstances might render that interposition necessary to its safety." The Supreme Court has unanimously approved such clear congressional authority.

Senator Cornyn, the Chairman of the Senate Subcommittee on the Constitution, has agreed to work with what the House determines to be the most appropriate manner of filling House seats in emergencies, and I urge swift approval of the provisions within our Committee's jurisdiction so that this important legislation may move forward expeditiously.

The gentleman from Michigan.

Mr. CONYERS. Good morning, Mr. Chairman. Happy New Year to you and the Members of the Committee.



We are called now upon to address one of these unfortunate potential problems in terms of a national emergency. There are several directions that you have outlined, a constitutional amendment, a change of the House rules, and a predesignation of interim successors, and a final approach which requires States to hold special elections within a 45-day time frame. This is a problem, and the solutions are going to require careful examination. It seems to me that a constitutional solution should be avoided at all costs.

Now, on the quicker approach, the one before us, the 45-day time frame, the clear concern is that it may not be enough time. We are too long constitutionally, we may be too short on a 45-day. Let us see where our discussion leads today. And there are some mandates about resources that may not be covered here, and I would like to also examine the issue of Member disability or incapacity, wherever that might lead. But I do want to say that the Chairman has been working with us on a cooperative basis, and we have our colleagues on another Committee with whom we have to work. And so I am glad that the tone of this is starting off and will continue to be on a totally nonpartisan basis.

And I would yield with any time I have left, I would yield to any of my colleagues that might have a comment. If not, I return the balance of my time.

Chairman SENSENBRENNER. Without objection, all Members' opening statements will be placed in the record at this point.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

Today we're called upon to address one of the most timely questions facing this body: What should be done to ensure the continuity of government in the unfortunate event of a future national emergency such as 9/11?

Several proposals have been introduced to address this difficult issue. The first approach advocates for a Constitutional amendment which would provide for temporary appointments to the House. Another concept proposes a change in the current set of House rules allowing for the admission of "emergency delegates" and the pre-designation of "interim successors." A final approach, like the bill before us, requires states to hold special elections within a forty-five (45) day time-frame whenever extraordinary circumstances give rise to an excess of one-hundred (100) or more vacancies in the House.

I initially agreed to serve as an original cosponsor of the legislation before us because I generally believe that we should avoid amending the Constitution, when a statutory response is available. Such an approach is quicker, more likely to be passed into law, and avoids amending our most sacred national charter.

Having said that, I am the first to recognize that the bill before us raises several serious concerns. For example, it has been suggested that the forty-five (45) day time-frame may be insufficient to conduct expedited elections, and lead to the disenfranchisement of many of our men and women in the armed services. It also has been brought to my attention that the bill contains several unfunded mandates and is completely silent on the issue of Member disability or incapacity.

It is my hope that we can work together on a bipartisan basis with our colleagues on the House Administration Committee to resolve these issues and come up with a proposal or proposals that we can take to the full House. This is not an issue that should necessitate a partisan debate.

I thank the Chairman for his work on this most serious issue.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE  
IN CONGRESS FROM THE STATE OF TEXAS

STATEMENT BY

CONGRESSWOMAN SHEILA JACKSON LEE

CONCERNING

H.R. 2844, CONTINUITY IN REPRESENTATION ACT OF 2003

Committee on the Judiciary, Markup Hearing

January 21, 2004, 10:00 a.m., 2141 RHOB

January 28, 2004, 10:00 a.m., 2141 RHOB

Chairman Sensenbrenner and Ranking Member Conyers, thank you for your efforts in convening today's markup hearing concerning H.R. 2844, the "Continuity in Representation Act of 2003" as introduced by the Chairman and Representatives Dreier, Chairman of the Committee on Rules, Chabot, and Paul. This bill, in general, will establish the framework for conducting special elections to fill House vacancies that could result from a terrorist attack or similarly emergent situation. Its main purpose is to ensure that there will be a functioning House of Representatives in such an event that will keep this nation safe and that will not allow our nation to break down.

The voice of the Framers of our Constitution, led by such innovators as James Madison, in the Federalist Papers, reminds us that it is in the continuous spirit of that document that Representatives be chosen by means

of an election by their local constituents. This legislation attempts to maintain a commitment to that dictate even in the face of a nationally debilitating emergency.

However, this bill does have flaws that require the attention of the Committee Members who are in this room. Since one of the pillars of our government is the principle of Due Process as set forth in the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the U.S. Constitution, it is critical that a piece of legislation such as this that deals with the mechanics of electing leaders in emergency situations be crafted with full respect for those principles. The 45-day deadline for state special elections set forth in this bill, as drafted, will not alleviate the fact that states won't have sufficient time to hold primary elections. Furthermore, such a short amount of preparation time could arguably favor candidates who are wealthy or well-backed because only these candidates would have the resources and ability to prepare such a quick election campaign.

Therefore, I have proposed amendments that are geared toward the maintenance of our Due Process guarantees with respect to the emergency special election process that would be triggered under this Act.

Amendment Proposals

The first amendment, JACKSO.\_\_\_\_\_, reads as follows:

On page 3, line 24, replace the number “2” with “7”

JACKSO.\_\_\_\_\_ would amend the section of the bill that deals with the time in which a person(s) may file a lawsuit arising out of the Speaker of the House’s announcement of vacancies in the House of Representatives in excess of 100. This change would amend paragraph (4), subparagraph (B)(i) and expand the ability of an aggrieved party to file suit for either declaratory or injunctive relief from just two (2) days to seven (7) days.

Because not every state has a Capital Beltway or even a superhighway system, and because information travels at a different rate in every location, it is important that we establish a fair standard for a filing rule that affects every state in the country. The principle of procedural due process dictates that every citizen have a realistic opportunity to obtain legal relief through our Judicial Branch.

The second of my amendments, JACKSO.\_\_\_\_\_ speaks even more to the issue of due process for all citizens. Its text reads as follows:

On page 4, lines 11-13, delete the words “and shall not be reviewable” and add the following sentence: “an expedited appeals process shall be given during the vacancy announcement made under subparagraph (A) of this section.

Because the 45 day deadline for special state elections already places significant constraints on the electoral process and on the citizens represented due to its brevity, taking away the right to an appeal from the U.S. District Court would excessively curtail the procedural due process rights enjoyed by citizens. Given that the time in which a federal judge has to compose an order disposing of these matters is provided in this bill, an equally expeditious appeals process should be provided so as to maintain consistency with the U.S. Constitution and the commitment to both the 5<sup>th</sup> and 14<sup>th</sup> Amendments.

Thirdly, I offer the following amendment, JACKSO.\_\_\_\_\_:

On page 4, line 14, after the words “The executive authority,” add the following: “, any citizen or citizens, or any official state political party”

This amendment is very important to protect the interests of all citizens in the various congressional districts in the midst of party politics. As the bill is drafted, Section 2, paragraph (4), subparagraph (iv) would confer the right to sue in the event of a vacancy announcement by the Speaker of the House solely to the “executive authority,” in Houston’s case, the Governor. Such very limited language almost certainly threatens to deprive the citizens of a right that they should enjoy in the event that the Governor chooses not to

participate in a suit for declaratory or injunctive relief pursuant to a vacancy announcement made by the Speaker of the House. In order to protect the rights of every person who truly has an interest in a call for a special election under this Act, this provision must be amended to allow citizens and political party representatives to sue for relief.

I urge my colleagues on this Committee to support my amendments because it is really the rights of our constituents that are at stake with the passage of this legislation. Chairman and Ranking Member, thank you for your consideration.

**AMENDMENT TO COMMITTEE PRINT  
(H.R. 2844)  
OFFERED BY MS. JACKSON-LEE OF TEXAS**

Page 3, line 24, strike “2 days” and insert “7 days”.

Page 4, line 11, insert after “the action” the following: “(taking into account an opportunity for an expedited appeal of the initial decision)”.

Page 4, line 18, insert after “vacant” the following: “and any citizen of the district and any political party of the State”.

Chairman SENSENBRENNER. Are there any amendments? And the Chair would remind the Members that the only part of the bill that is within the jurisdiction of this Committee and thus amendable is the provision in the bill requiring expedited judicial review by a three-judge panel. Are there any amendments? If there are no amendments—

Mr. WATT. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from North Carolina.

Mr. WATT. I don't have an amendment. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman. And I have listened to the Chairman's comments and to the Ranking Member's comments, and am encouraged to hear that this is not a partisan issue. Since I am about to take a position that is contrary to both the Chairman and the Ranking Member, I will be consistent at least with that position.

The thing that is troubling about this is that not long after September 11, the Speaker and the Majority Leader—minority leader, I am sorry, came together and appointed a committee that we had been told would consider this issue at some length. It was to be chaired by Mr. Dreier, the Chairman of the Rules Committee. And part of the reason for that I thought was that this legislation or the solution to what is an apparent problem that didn't become apparent to most of the world until after September 11th kind of transcended the jurisdiction of several Committees, no particular Committee, House Administration, Judiciary, any of the Committees seemed to have full jurisdiction over it. I would submit if any Committee does have jurisdiction over the full matter it would be the Judiciary Committee. But it seemed to me that the Speaker and the leadership in the House decided that this should be an issue that should be resolved by a broader range of people from several different Committees. I happen to know that because I was one of the designees to that Committee that was set up by the Speaker and the minority leader. I didn't seek the position, I was asked if I would serve, and I say yeah, okay, fine. It sounds like a big problem and one that needs to be solved.

And the problem that I am having is that that Committee has done nothing. Now, maybe that is why this bill was introduced and this Committee is stepping into that void, but it seems to me that at a minimum the Members of that Committee ought to have been cut into the process, to the extent of being involved in the hearings; if there were going to be hearings about any bill, all of the bills should have been given some consideration. And I am not sure that I have any particular problem or brief for this bill, but it doesn't seem to me that its moving is a function of anything other than the fact that the Chairman of this Committee happens to have introduced it, which might make it a good bill but doesn't necessarily make it a good bill. And the fact that the Ranking Member has co-introduced it might make it a good bill, but doesn't necessarily so.

The bottom line is I think this is an issue that cries out for substantially broader hearings, and as a consequence—I am sure I am whistling in the wind, but I did want to put in the record my intention to vote against this bill at this point because in my opinion it



has not had the requisite hearings. And to come 1 day, 2 days after we have been on a break and rush to a markup seems to me to be premature.

Mr. CONYERS. Would the gentleman yield?

Mr. WATT. I would be happy to yield to the Ranking Member.

Mr. CONYERS. Is there a process by which this bill could be referred back to the Committee upon which you were named to serve and given back to us?

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. WATT. If the gentleman would extend for one additional minute to respond.

Chairman SENSENBRENNER. Without objection.

Mr. WATT. I don't know what that process would be. I mean, I am frustrated with the other process, too, because that Committee, the Chair, the Ranking Member of that Committee has done absolutely nothing that I have seen. And maybe that is a compelling reason to be pushing this bill. But it seems to me that this is a much, much broader issue that requires a lot more review.

Chairman SENSENBRENNER. Would the gentleman yield to me?

Mr. WATT. I would be happy to refer to you.

Chairman SENSENBRENNER. The sequential referral that the Speaker gave to this Committee expires on January 31st. So if we don't do anything by that time, the bill gets taken away from us. One of the things that I have been very insistent on to preserve our Committee's jurisdiction is to hold markups before our sequentials expire, and that is why we are having a markup today.

Mr. WATT. But Mr. Chairman, what is the consequence of that? I mean.

Chairman SENSENBRENNER. Without objection, the gentleman is given another minute.

Mr. WATT. If our Committee's jurisdiction expires, but in the process of marking up a bill that has had no hearings on an issue of such magnitude—

Chairman SENSENBRENNER. If the gentleman—

Mr. WATT.—aren't we just rushing to judgment to do something?

Chairman SENSENBRENNER. If the gentleman would yield. The House Administration Committee did have hearings on this. They marked up those parts of the bill that were in their jurisdiction. We are having a markup today in dealing with it, the one part of the bill that was in our jurisdiction. The January 31st date is not determined by anybody on this Committee; that is one of the Speaker's prerogatives and he set the date.

Mr. WATT. Mr. Chairman, let me just ask the Chairman a question. Does the Chairman have any idea how this all ties in with this other Committee that was appointed by the leadership? I mean, is there a division of how this will work itself out?

Chairman SENSENBRENNER. If the gentleman would yield. The answer is no. But this Chair has been a very firm supporter of dealings with legislation through standing Committees that have specific jurisdictions under the rules rather than creating ad hoc or select Committees like the Homeland Security Committee.

Mr. WATT. If I could just wrap up, Mr. Chairman. I would just say that I am not defending the jurisdiction of a Committee that was created on an ad hoc basis. I didn't institute this process, I have no vested interest in that process. But it seems to me, if the

leadership goes out of its way to appoint a Committee to do something, one would think that it would be of sufficient magnitude that that Committee—maybe I am taking my beef up with the wrong people, but I just wanted to get on the record that there is a separate process that was set up to deal with this, and it seems to me under those circumstances this is not the process we ought to be following. And I plan to vote against it for that reason.

Chairman SENSENBRENNER. The gentleman's time has expired. Are there amendments?

Ms. LOFGREN. Mr. Chairman.

Chairman SENSENBRENNER. The gentlewoman from California.

Ms. LOFGREN. I would like to move to strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. LOFGREN. I am concerned. I certainly appreciate the Chairman always attempts to protect our jurisdiction. I think the Committee is of one mind on that point, that we do want to protect our jurisdiction. However, I have a number of concerns about the bill before us and will not support it.

First, you know, I thought a lot about this, and as a matter of fact in the last Congress introduced a proposed constitutional amendment that would allow the Congress by statute to provide for the temporary replacement of House Members after a disaster. But as I look at the bill—and here as scenario. Last night we were all at the State of the Union, and what if there has been a terrorist incident that actually resulted in the elimination of all of the Members of the House of Representatives and Senate. In the case of the Senate they would be appointed, the replacements would be appointed by Governors and the Senate could be quickly reconstituted. In the case of the House there could be no House and the President would of necessity be required to assume dictatorial powers.

It seems to me that there needs to be an ability in the case of a worst-case scenario for the House of Representatives to be reconstituted on a temporary basis so that the President is not required to assume dictatorial powers and then elections quickly to follow. This bill does not do that. I did not reintroduce my constitutional amendment in this Congress because there was no action in the last Congress. And I guess I am inquiring whether, if this bill does not become law, there might be a willingness on the part of the Committee to consider either my proposed constitutional amendment or another so that we could address this need for immediate relief and then a quick election, because obviously we don't want appointees to serve.

Chairman SENSENBRENNER. Would the gentlewoman yield?

Ms. LOFGREN. I certainly would yield.

Chairman SENSENBRENNER. I think the gentlewoman has I think highlighted the difference of opinion on what to do in case there is a catastrophe. And that is, whether there should be appointed Members should sit in the House of Representatives for the first time in the history of our country or, conversely, whether we should have some type of expedited special election procedure in which the replacement Members are elected, and States which have inordinately long special election procedures would end up

having that short-circuited so that representation could be filled in as quick a manner as possible.

I elect for the special election procedure. I respect those that feel that we should have some type of appointed system at least temporarily, but that would require a constitutional amendment. And constitutional amendments, as we know, take a very, very long time to consider, to pass in the Congress and to be ratified by the States. The Constitution Subcommittee has had hearings on this issue, and I think that at least those of us who support this bill come down on the side of figuring out a way to try to give the voters a chance to elect the replacement Members rather than to do as the two most popular amendments have proposed to do, and that is either to have a Governor appoint a temporary successor or an incumbent Member who happened to be wiped out in a terrorist attack designating a successor and choosing a successor.

Now, I am sure that the gentlewoman from California, as do I, would not particularly appreciate our Governors appointing a successor because we come from opposite parties to the party that the Governor has, nor do I think our voters would be very happy with us trying to keep a secret saying—who is going to be the successor should we be wiped out in a terrorist attack.

So this is a difference of philosophy. I respect that. I go on the side of expedited special elections, and that is what is in this bill.

Ms. LOFGREN. Since I have so generously yielded to the Chairman, I would ask unanimous consent for an additional 1, 2 minutes.

Chairman SENSENBRENNER. Without objection.

Ms. LOFGREN. I would just note none of us wants an appointed House of Representatives, however, nor do I think that the House ought to be an appointed body as the Senate is after an incumbent Senator dies. However, the problem of the President of necessity seizing dictatorial powers in the case of a disaster needs to be addressed. And I think certainly it is possible in a constitutional amendment to provide for a very short period of time of that appointment. For example, a period of—I am just pulling out a number—2 months so that you would not have a situation in the Senate where individuals serve for a period of 2 years. But I don't think where we might prefer the House of Representatives, none of us would argue that the Senate is not a democratic body, small d, and it certainly is the case, I mean, first that Senators who die can be replaced by Governors of a different party. If—that would be the case in California and in your State, but it is more important that we reconstitute the Government itself, that we have three branches of Government that function than that we be hung up on partisan issues.

I would also like to note that in the bill before us 45 days is probably not enough time to hold elections. It would not probably allow for overseas or military voters to participate. I think there is a need also to address incapacity issues. There probably would not be time for a voter registration or primaries or ballot access for independent and third party candidates.

So I appreciate the spirit with which this bill has been offered. I think it does not solve the worst case problem that we need to solve. And I yield back my time.

Mr. CONYERS. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CONYERS. Thank you. Is there a possibility within the time the Committee has the jurisdiction of the bill that we hold at least one hearing to more fully explore some of the reservations that have been articulated here so that this measure will not be subject to having been whipped through without—

Chairman SENSENBRENNER. Will the gentleman yield?

Mr. CONYERS. Of course.

Chairman SENSENBRENNER. Given the amount of time that we are in session before the 31st of January, I think the answer is no, because we have a markup scheduled of important legislation already, what is left over from this markup, practically all day next Wednesday.

What I can point out, however, is that the House Administration Committee had at least two hearings on this subject. We had a general oversight hearing on the subject of constitutional amendments before the Subcommittee chaired by the gentleman from Ohio, Mr. Chabot. And, really, all that is in the jurisdiction of our Committee is whether or not there should be a three-judge panel to have an expedited review of the Speaker's power to declare an emergency when 100 or more seats in the House of Representatives are vacant.

You know, to answer the questions relative to disability, I would prefer to have State law prevail on that. We are representatives of States, not national law. And with respect to the concern that the gentlewoman from California raised relative to overseas and military electors voting by absentee, the State of Wisconsin requires that absentee ballots be mailed 21 days prior to any election. That has never been a problem in the ballots reaching people overseas or in the military in a timely manner and being returned. And if you look at the time frame in this bill, the Speaker declares an emergency 10 days after that the parties nominate their candidates; that gives 14 days to print the ballots and to get them in the mail, which should be an adequate period of time. Some States have primaries for special elections; other States like Kentucky, where there is a special election campaign going on, has the parties nominate the candidates and there is no primary election.

You know, I think the object is to fill these vacant seats as quickly as possible with people who can come to Congress with a mandate, and I think that this bill does it in as quick a time as possible given the mechanics of declaring a vacancy, nominating candidates, calling an election, and printing the ballots and having the people vote.

Mr. CONYERS. Well, Mr. Chairman, your State isn't Florida. So let us—you know, I am happy about the 21-day rule in your State, but there are States that I don't know if 45 days is enough, frankly.

But at any rate, what I am trying to move toward is the mere fact that we will be back sometime between now and the expiration of our jurisdiction date, and I would just feel better knowing that those who had reservations and objections would have been given as much time.

Now, the jurisdiction question. From my point of view, this is a Judiciary Committee matter of which the Administration Com-

mittee might have found something to get a paragraph or two in on.

Mr. WATT. Would the gentleman yield on that point?

Mr. CONYERS. But I just can't understand how we end up being the tail wagging the dog and this other Committee, as good and important as it is, ends up deciding a question of such constitutional gravity and we get a little section. And I yield to my friend from North Carolina.

Mr. WATT. I thank the gentleman for yielding, and I couldn't agree with the gentleman more. If there is any Committee that really does and should have jurisdiction over it, if the leadership hadn't appointed a kind of an umbrella Committee, it should be this Committee. We shouldn't be arguing about a three-judge panel. This is a matter of national constitutional import, and for the life of me I can't see why 90 percent, 95 percent of the bill would go to House Administration on an issue of this magnitude. I just, I agree with the gentleman.

Mr. CONYERS. I will return my time, sir.

Chairman SENSENBRENNER. Are there amendments?

Mr. SCHIFF. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from California, Mr. Schiff.

Mr. SCHIFF. I want to thank the Chairman for yielding, and I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCHIFF. I appreciate all the work that the Chair has put into this, and many other Members. I share the concern that an undertaking of this magnitude really is deserving of more time and opportunity for study for this Committee. We have a very thoughtful report by the Continuity of Government Commission, and I think many of the Members would benefit from having some soft participants of that commission come before this Committee, give us an opportunity to question them, ask them about really what appear to be the two competing philosophies here: Whether we are better off preserving the sole body for which all its Members come here with a mandate from the electorate or whether it is prudent in the event of a catastrophe to have a short-term appointment pending the election. I think it is a very legitimate question.

The Commission that has studied this came down on the opposite side of what the Chairman is recommending in his bill. I think it would be valuable to bring in not only those that advocate these temporary short-term appointments to make sure that the gravamen of the problem, the immediate necessity of having a check on the executive in the event of a catastrophe is properly weighted against the desire to keep the elective nature of this body intact. And I would inquire of the Chair of the possibility of a letter from the Chair and the Ranking Member to the Speaker requesting that this deadline be expanded. I would imagine, given the gravity of this issue, a bipartisan request for more time to give us the opportunity to have an oversight hearing prior to the markup would be looked upon with favor by the Speaker. I would ask if that is an alternative we might pursue.

Chairman SENSENBRENNER. If the gentleman would yield. We already had an oversight hearing before Mr. Chabot's Subcommittee.

Those issues were very, very adequately ventilated at the time by our colleague from Washington, Mr. Baird, and others, and I don't see that anything new would come out as a result of this. I think we all know what the issues are, we all know what the debate is on both sides of the issue. There is a philosophical disagreement on that, and the place to work the philosophical disagreement out is not in this Committee, which was given a very limited jurisdiction by the Speaker, and which will not change as a result of House Administration reporting the bill out in December, but simply sending the bill out to the floor and letting the House work its will.

Mr. SCOTT. Mr. Chairman.

Chairman SENSENBRENNER. The time belongs to the gentleman from California.

Mr. SCHIFF. Mr. Chairman, I would be happy to yield such time as I have remaining to the gentleman from Virginia.

Mr. SCOTT. Thank you.

Mr. Chairman, I would ask unanimous consent that a letter from the gentleman from Connecticut, Mr. Larson, the Ranking Member of the House Administration Committee, be entered into the record.

Chairman SENSENBRENNER. Without objection.

[The material referred to follows:]

ROBERT W. NEY, OHIO  
CHAIRMAN  
VERNON J. EHLENS, MICHIGAN  
JOHN L. MCCA, FLORIDA  
JOHN LINDER, GEORGIA  
JOHN F. SOOHLITTLE, CALIFORNIA  
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JOHN B. LARSON, CONNECTICUT  
RANKING MINORITY MEMBER  
JUANITA MILLENDER-MCDONALD, CALIFORNIA  
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January 20, 2004

The Honorable Robert C. Scott  
2464 Rayburn House Office Building  
Washington, D.C. 20515-4603

Dear Bobby:

I am writing today to urge you to oppose H.R. 2844, which attempts to expedite special elections to replace House members in the aftermath of a catastrophic event. This bill will be marked up in the Judiciary Committee on January 21, and it would: 1) override laws in all 50 states, 2) create a new unfunded mandate, and 3) impose an unrealistic and radical procedure for conducting special elections, the consequence of which could be voter disenfranchisement and questions of the legitimacy of the results. Defeat of this bill would allow the House to fashion more workable legislation to expedite special elections, protect the rights of voters, and respect the prerogatives of states.

H.R. 2844 is incomplete and fatally flawed, and fails to address major "continuity of government" issues, such as how the House would function in the aftermath of a catastrophe if it lacks a quorum, and the status of Members who may be disabled or incapacitated. No mere statutory solution can preclude the possibility that the House could be closed down for two or more months. Meanwhile, the Senate could be immediately reconstituted by gubernatorial appointment, but would be powerless to act, and the President, or person acting as President, could be tempted to exercise a form of martial law to fill the vacuum. Some of these critical issues of constitutional structure and governance may require consideration of a constitutional amendment, together with implementing legislation.

Under current law, states determine the manner in which special elections are conducted. Each state should be highly motivated to expedite special elections to ensure its full and timely representation in Congress. However, the mandates in H.R. 2844 will short-circuit state law, and instead substitute a uniform, but impractical statutory scheme

nationwide. And while attempting to expedite special elections, the bill will surely cause delay by embroiling states in litigation to resolve complex constitutional and procedural issues, creating uncertainty at a time when the restoration of political stability to the nation following a terrorist attack is essential.

As amended by a House Administration Committee substitute, H.R. 2844 would allow political parties “authorized to nominate candidates by state law” to select nominees for the special election during a 10 day window following a declaration by the Speaker that there are more than 100 vacancies in the House. This provision would effectively ban primaries, and place the nomination process solely in the hands of party committees. Under H.R. 2844, if a party committee failed to meet the 10-day deadline, that party would have no candidate on the ballot. The bill would require elections to be held within 45 days of the Speaker’s declaration (instead of 21 days in the unamended bill). However this new procedure would not be employed during a 75-day period immediately preceding the regularly scheduled biennial election to the House.

The bill, as amended, was reported by House Administration on December 8<sup>th</sup> (House Report 108-404, part 1), by a vote of 4-3, with all Democratic members – Reps. Millender-McDonald, Brady and myself – voting against it. However our votes were not based on partisan concerns, but upon our judgment that the bill is flawed and incomplete, as discussed at length in our dissenting views, and outlined below.

H.R. 2844 is before your committee based on a requested sequential referral relative to Section 2 (b)(4)(B) of the substitute – a minor provision relating to Federal judicial review. However there are inadequacies in the core legislation, which call for a “No” vote on the bill.

Among the principal flaws in the legislation:

- the 45-day time frame is too short for many states to select candidates, prepare ballots, and conduct viable special elections, and states may have multiple contests arising simultaneously under whatever “extraordinary circumstances” may exist;
- the bill does not allow time for party primaries in the many states which employ them, or for primaries followed by runoffs if no candidate receives a majority of the vote, a system used in a number of states, including California and Texas;
- the bill does not provide a method for minor party or independent candidates to access the ballot, relying instead upon existing state ballot access laws which may not fit into the bill’s new 45-days-to-do-everything approach;
- the bill does not allow a time frame for voters to register for the special election, unless a state can manage to shoe-horn it within the 45-days;



- in the committee report, the Congressional Budget Office states that “This intergovernmental mandate would require 40 states to adopt a quicker time frame...for holding...elections in the event of a vacancy that does not coincide with a regularly scheduled election, and some states would need to amend their state constitutions.” CBO also “estimates that the new requirements and short time frame required by the bill would likely generate significant additional costs to states” -- in other words, a new unfunded mandate;
- the bill does not provide sufficient time for absentee ballots to be printed, distributed, and returned from Americans living abroad, including military and diplomatic personnel and their families; states have laws on this subject, and DOD recommends that a minimum of 45 days be allowed from the time ballots are printed, not the day the election is called.


Expediting special elections is a laudable goal, but no serious legislative record has been assembled to justify the framework hastily thrown together in H.R. 2844. The House Administration Committee majority, when asked during the markup to explain how certain provisions of the bill might work, said it would have to consult the sponsor before providing the answers, and then immediately voted to approve the bill.

The states have not had an opportunity to seriously examine this bill or to offer comments. On October 2, 2002, the House, by a unanimous vote of 414-0, passed a resolution asking the states to change state laws to expedite special elections, in order to restore full representation more quickly in the aftermath of a catastrophe. However, little more than a year has elapsed, and there has been no analysis of the status of state actions.

Congress needs to carefully examine state laws and practices before intruding in a complex field traditionally under state regulation. H.R. 2844 would junk state laws we have never seriously examined, and impose on the states an expensive and unworkable – and possibly unconstitutional – substitute election system. Therefore, I respectfully urge you to vote “No” when this bill comes before your Committee. I you need further information, or have any questions regarding this bill, or alternative approaches to the continuity of Congress issue, please do not hesitate to contact me or Matt Pinkus of my staff at 5-2061.

Sincerely,

*Bobley -  
Hope you can  
handle some of  
our concerns*

  
JOHN B. LARSON  
Ranking Minority Member

JBL/mp

Mr. SCOTT. The letter points out that on October 2 of 2002, the House passed a resolution encouraging States to provide by State law provisions to deal with this circumstance. That would recognize the difference in various States. I know Virginia, we can hold a State house election in 2 weeks, and we have done that quite frequently as a matter of fact. Particularly during the session if there is a vacancy, 2 weeks from start to finish, from the call of the election to the election itself, 2 weeks, and the person would be seated 2 days after that. Some States might not want to do that, but if Virginia wants to do it that ought to be Virginia's decision. 45 days, therefore, might be enough in some areas, might be too much in others.

It also points out to a one-size-fits-all problem, that if you have problems of ballot access, how minor parties get on. Some States have runoffs, some States, as the Chairman has mentioned, have primaries, some can waive primaries. It may be best to just leave this to the States to deal with it itself. The States will know that there is a crisis and they need to be filled. And so I would just like this letter in the record and for the record.

Chairman SENSENBRENNER. It is the gentleman from California's time.

Mr. SCHIFF. I would be glad to yield.

Mr. WATT. Mr. Chairman, I don't want to beat this to death, but I just think this discussion illustrates the dire need for more study of this issue and some hearings. This is a very complex issue. It deals with appointment versus election, it deals with providing opportunities not only for a rush, rush, rush election, but for a real democratic election. I mean, a short period for an election limits the number of candidates to only the richest people probably in every State. I mean, there are all kinds of implications that are at play here that need to be studied. And maybe there was a hearing in the Constitution Subcommittee; it wasn't even on this bill. But this Committee really or some Committee, either the big Committee that was appointed by the Speaker or this Committee, needs to take ownership of this issue. And in the absence of that, I would encourage my colleagues to vote against this bill today.

Chairman SENSENBRENNER. The gentleman's time has expired. Are there amendments? The gentlewoman from California.

Ms. SÁNCHEZ. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. SÁNCHEZ. I wish to associate myself with some of the previous comments that were made by my colleagues regarding the possible disenfranchisement of voters that this bill has the potential to do. It has been mentioned about third party candidates, it has been mentioned about overseas and absentee ballots and whether 45 days would be an adequate time to get States to be able to get those out and get them printed, get them out in time, and receive them back for the election. Perhaps for smaller States 45 days might seem like a lot of time. But when you consider the State of California, which has 53 of the Members of Congress in it and an extremely large population in comparison to the other States, it is a logical I think acrobatic fete to try to complete all of that without disenfranchising voters within 45 days. So I would agree that I think that this Committee needs to take a harder look

at it and I can certainly understand wanting to preserve our jurisdiction over the issue. But it is, as my colleague Mr. Watt said, an issue that strikes at the very heart of our Constitution and has constitutional import. And so I don't believe that giving it such short shrift is really ideal in this case. And I agree that we should perhaps think about in the future an honest and real debate by the full Committee on issues such as this that have constitutional import. And with that, I will yield back the remainder of my time.

Chairman SENSENBRENNER. Are there amendments? If there are no amendments, a reporting quorum is present. Without objection, the short title is amended by striking 2003 and inserting 2004. Without objection, the version of the bill as reported by the House Administration Committee and laid down as the base text is adopted.

The question occurs on the motion to report the bill H.R. 2844 favorably. All those in favor will say aye. Opposed, no. The ayes appear to have it. The ayes have it.

Mr. WATT. Ask for a recorded vote.

Chairman SENSENBRENNER. A recorded vote is ordered. The question is on reporting H.R. 2844 favorably. Those in favor will as your names are called answer aye; those opposed no. And the Clerk will call the roll.

The CLERK. Mr. Hyde.

[no response.]

The CLERK. Mr. Coble.

Mr. COBLE. Aye.

The CLERK. Mr. Coble votes aye.

Mr. Smith.

Mr. SMITH. Aye.

The CLERK. Mr. Smith votes aye.

Mr. Gallegly.

Mr. GALLEGLY. Aye.

The CLERK. Mr. Gallegly votes aye.

Mr. Goodlatte.

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte votes aye.

Mr. Chabot.

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot votes aye.

Mr. Jenkins.

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins votes aye.

Mr. Cannon.

Mr. CANNON. Aye.

The CLERK. Mr. Cannon votes aye.

Mr. Bachus.

Mr. BACHUS. Aye.

The CLERK. Mr. Bachus votes aye.

Mr. Hostettler.

Mr. HOSTETTLER. Aye.

The CLERK. Mr. Hostettler votes aye.

Mr. Green.

Mr. GREEN. Aye.

The CLERK. Mr. Green votes aye.

Mr. Keller.

Mr. KELLER. Aye.  
 The CLERK. Mr. Keller votes aye.  
 Ms. Hart.  
 Ms. HART. Aye.  
 The CLERK. Ms. Hart votes aye.  
 Mr. Flake.  
 [no response.]  
 The CLERK. Mr. Pence.  
 Mr. PENCE. Aye.  
 The CLERK. Mr. Pence votes aye.  
 Mr. Forbes.  
 Mr. FORBES. Aye.  
 The CLERK. Mr. Forbes votes aye.  
 Mr. King.  
 Mr. KING. Aye.  
 The CLERK. Mr. King votes aye.  
 Mr. Carter.  
 Mr. CARTER. Aye.  
 The CLERK. Mr. Carter votes aye.  
 Mr. Feeney.  
 Mr. FEENEY. Aye.  
 The CLERK. Mr. Feeney votes aye.  
 Mrs. Blackburn.  
 [no response.]  
 The CLERK. Mr. Conyers.  
 Mr. CONYERS. No.  
 The CLERK. Mr. Conyers votes no.  
 Mr. Berman.  
 [no response.]  
 The CLERK. Mr. Boucher.  
 Mr. BOUCHER. No.  
 The CLERK. Mr. Boucher votes no.  
 Mr. Nadler.  
 [no response.]  
 The CLERK. Mr. Scott.  
 Mr. SCOTT. No.  
 The CLERK. Mr. Scott votes no.  
 Mr. Watt.  
 Mr. WATT. No.  
 The CLERK. Mr. Watt votes no.  
 Ms. Lofgren.  
 Ms. LOFGREN. No.  
 The CLERK. Ms. Lofgren votes no.  
 Ms. Jackson Lee.  
 [no response.]  
 The CLERK. Ms. Waters.  
 [no response.]  
 The CLERK. Mr. Meehan.  
 Mr. MEEHAN. No.  
 The CLERK. Mr. Meehan votes no.  
 Mr. Delahunt.  
 [no response.]  
 The CLERK. Mr. Wexler.  
 [no response.]  
 The CLERK. Ms. Baldwin.

Ms. BALDWIN. No.  
 The CLERK. Ms. Baldwin votes no.  
 Mr. Weiner.  
 Mr. WEINER. No.  
 The CLERK. Mr. Weiner votes no.  
 Mr. Schiff.  
 Mr. SCHIFF. No.  
 The CLERK. Mr. Schiff votes no.  
 Ms. Sánchez.  
 Ms. SÁNCHEZ. No.  
 The CLERK. Ms. Sánchez votes no.  
 Mr. Chairman.

Chairman SENSENBRENNER. Aye.  
 The CLERK. The Chairman votes aye.

Chairman SENSENBRENNER. Are there Members who desire to record or change their votes? If not, the Clerk will report.

The CLERK. Mr. Chairman, there are 18 ayes and 10 nays.

Chairman SENSENBRENNER. And the motion to report favorably is agreed to. Without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute incorporating the—

Ms. WATERS. Mr. Chairman?

Chairman SENSENBRENNER. The Chair has announced the result of the rollcall. Would the gentlewoman from California wish to make a statement on how she would have voted?

Ms. WATERS. Yes, Mr. Chairman. I would have voted no.

Chairman SENSENBRENNER. Without objection, the gentlewoman's statement will appear in the statement following the rollcall.

Again, without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute incorporating the amendment adopted here today. Without objection, the Chairman is authorized to move to go to conference pursuant to House rules. Without objection, the staff is directed to make any technical and conforming changes, that all Members will be given 2 days as provided by the House rules in which to submit additional dissenting supplemental or minority views.



## DISSENTING VIEWS

The House Judiciary Committee favorably reported H.R. 2844, the “Continuity in Representation Act of 2003,” by a vote of 18–10, following a narrow sequential referral from the House Administration Committee. H.R. 2844 addresses the critical issue of how House vacancies are to be filled in the event a substantial number of Members are killed or incapacitated by a terrorist attack or other catastrophic incident. Although that issue, and how it is resolved, is a matter of national constitutional import, the referral to this Committee limited our jurisdiction to a single provision—the provision authorizing judicial review by a three-judge panel of the announcement by the Speaker that a sufficient number of vacancies exist to trigger the special election requirements of the bill. In our view, it is an abrogation of this Committee’s responsibility to restrict our consideration to such a minuscule, and arguably inconsequential, portion of the bill while avoiding the broader issues that implicate the very foundation of our tripartite form of government.

The events of September 11, 2001 brought into sharp focus the potential for the sudden, cataclysmic disruption of operations in one or more branches of our government. Specifically, had United flight 93 reached its intended destination the U.S. Capitol dome—the death or severe injury or disability of innumerable Members of Congress would have been imminent. Under the Constitution, although the 17th Amendment permits State governors to appoint Senators to vacant seats<sup>1</sup>, there is no comparable provision for the prompt replacement of Members of the House of Representatives. Instead, article I, section 2, clause 4 of the Constitution requires the executive authority of a State in which a vacancy occurs in the House to order a special election to fill the vacancy. But, Congress has the power under article I, section 4, clause 1 of the Constitution to “make or alter” State laws governing “the times, places and manner of holding elections” for Members of the House of Representatives. Pursuant to that authority, H.R. 2844 would require the States, upon announcement by the Speaker of the House that the number of vacancies exceeds 100, to conduct special elections within 45 days of the announcement.

The only Committee to conduct hearings on H.R. 2844, the House Administration Committee, was deeply divided on the questions whether the bill adequately addresses the myriad issues concerning the continuity of Congress and whether the bill, independent of those issues, posed a workable solution, i.e., whether it would be feasible to conduct widespread special elections during a period of incalculable vacancies and national chaos. By a vote of 4–3, the bill

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<sup>1</sup>The 17th Amendment provides no resolution in the event of widespread incapacitation of a majority of Senators. A vacancy has typically been understood to exist upon the death, resignation or expulsion of a Senator.

was reported out of the House Administration Committee over the vigorous and comprehensive dissent of the minority. While it is unnecessary to repeat the substantive concerns enumerated in the minority's dissenting views, it is important to emphasize its concern with the process. The dissent argued that the "bill's narrow focus ignores broader questions of congressional continuity," and recognized that proposals advocating a constitutional amendment to address House vacancies "if considered in the House, would fall under the jurisdiction of the House Judiciary Committee." H. Rept. 108-404, pp. 12, 14. Yet H.R. 2844 has been tailored so as to avoid the scrutiny that we believe is warranted by this Committee.

At the markup of this bill, Chairman Sensenbrenner cited the expiration of this Committee's sequential referral on January 31, 2004 as an impediment to conducting hearings on the broader issue of congressional continuity—including the possibility of a constitutional amendment—before the Judiciary Committee.<sup>2</sup> Yet as early as September 2003, in testimony before the House Administration Committee in support of H.R. 2844, Chairman Sensenbrenner indicated that there would be no further consideration of proposals to address filling House vacancies in the event of a national emergency in the 108th Congress by this Committee. The sole hearing by this Committee on this issue was held before the Subcommittee on the Constitution during the 107th Congress on February 28, 2002. H.J. Res. 67,<sup>3</sup> "Providing for the Temporary Filling of House Vacancies," called for a constitutional amendment to authorize the temporary appointment of individuals to fill House vacancies in a time of national emergency. There was, however, no Subcommittee markup or Full Committee consideration of the measure.<sup>4</sup>

Moreover, much has happened since the Subcommittee hearing on H.J. Res. 67. Several bills have been introduced in the House and the Senate urging a constitutional amendment. Also, significantly, the Continuity of Government Commission, a joint project of the American Enterprise Institute and the Brookings Institute, after months of study, issued a report in May 2003 recommending an approach totally at odds with H.R. 2844. Instead, the Commission concluded that the better approach was to pass a constitutional amendment to address mass vacancies in the Congress. The Commission was headed by honorary co-chairs former Presidents Jimmy Carter and Gerald Ford, and co-chairs Lloyd Cutler and former Senator Alan Simpson. Its members consisted of a diverse group of public servants (including former members of the House and Senate) such as Kenneth Duberstein, Thomas Foley, Charles Fried, Newt Gingrich, Nicholas Katzenbach, Kwesi Mfume, Leon Panetta and Donna Shalala. While we do not suggest that this

<sup>2</sup>The Chairman also rejected the suggestion of Mr. Schiff of California to seek, through the Chairman and the Ranking Member, an extension of the referral from the Speaker.

<sup>3</sup>H.J. Res. 67 was introduced by Rep. Baird of Washington in the 107th Congress.

<sup>4</sup>The Judiciary Committee certainly is not loathe to consider proposals to amend the Constitution. Since the attacks on 9/11, the Judiciary Committee has held hearings or markups on at least three proposals to amend the Constitution: **May 21, 2003**—Full Committee Markup of H.J. Res. 4, Proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States; **May 1, 2003**—Subcommittee on the Constitution Markup of H.J. Res. 22, the "Balanced Budget Amendment;" **March 6, 2003**—Subcommittee on the Constitution Legislative Hearing on H.J. Res. 22, the "Balanced Budget Amendment," and **May 9, 2002**—Subcommittee on the Constitution Legislative hearing on H.J. Res. 91, the "Victims Rights Amendment," a Proposed Amendment to the United States Constitution.



Committee simply accept the recommendations of an outside panel, no matter how distinguished, of experts and scholars, we do believe that it is our obligation to review, consider and evaluate all available research on this issue before casting a vote that will define the stability or instability of our democracy for years to come.

After September 11, 2001, the unimaginable have become imaginable. A constitutional amendment to address the now imaginable circumstance of massive House vacancies may or may not be necessary. What is necessary, however, is that this Committee assumes its responsibility to vet seriously and fully the wide array of proposals, and their implications, to fill House vacancies in the event of a national calamity. Our obligation to our constituents, indeed to our democracy, requires no less. Because the Committee has opted instead to rush through what may be an ill-advised statutory fix, we dissent.

JERROLD NADLER.  
ROBERT C. SCOTT.  
MELVIN L. WATT.  
ZOE LOFGREN.  
MARTIN T. MEEHAN.  
WILLIAM D. DELAHUNT.  
ANTHONY D. WEINER.  
ADAM B. SCHIFF.  
LINDA T. SÁNCHEZ.



#### ADDITIONAL VIEWS

Several proposals have been introduced to address the difficult issue of congressional succession, the procedures that should be in place in the eventuality that a substantial number of Members must be replaced in a short period of time. Such an eventuality would likely be the result of a devastating national emergency, such as a large scale terrorist attack. Unfortunately, after September 11, such an attack is no longer unthinkable.

In addition to being difficult, this is a issue central to our democracy that places notions embodied in our Constitution at odds with one another. The Framers believed in a “people’s House,” directly responsive to the public because it is directly elected by the public. However, fundamental to the Constitution is also the necessity of checks and balances—ensuring that there will not be an unchecked Executive necessitates a constantly functioning Legislative branch. Thus, replacing a large number of House Members quickly may require forgoing or modifying existing procedures for direct elections. Resolving this constitutional quandary may require the preemption of state laws governing the time and manner of holding special elections, the appointment of congressional successors by a state executive, or the designation of successors by Members of Congress.

This bill attempts to preserve the system of direct election by making only minimal changes to state election laws and continuing to allow the public to elect the “people’s House.” The Chairman reached out to me to cosponsor the bill and, because of its goal of preserving direct election and my general opposition to amending the Constitution, I am an original cosponsor of the bill. Critics have made the argument that such minimal changes, however, may fall short of providing a workable solution. Among other things, they assert that 45 days would be an insufficient amount of time for most states to hold special elections and that the interim 45 days would be too long a period of time for the nation to be without a functioning House.

Critics have proposed Constitutional amendments that would provide for temporary appointments to the House and proposals to change House rules allowing for the admission of “emergency delegates” to the Committee of the Whole and the pre-designation of “interim successors” by Members. Each of these proposals has substantial merit. However, these proposals may be criticized as being too unwieldy to be passed by Congress. A Constitutional amendment, for example, requires the assent of  $\frac{2}{3}$  of the Congress and three-fourths of state legislators. This process is intended to be difficult and the Constitution is rarely amended.

Because of the very nature of this issue—ensuring a fair and nonpartisan process for succession—I believe it cries out for a bipartisan consensus and careful consideration. Unfortunately, to date, there are too many unanswered questions about this bill and

too much opposition against it. I must, therefore, reluctantly conclude that there has been insufficient consideration and a resultant lack of consensus. I, therefore, voted against this bill in Committee and will continue to oppose it until a broader consensus is reached.

JOHN CONYERS, JR.

