Policy Analysis
No. 510 February 17, 2004

Restoring the U.S. House of Representatives

A Skeptical Look at Current Proposals

by Ronald Keith Gaddie

Executive Summary

The terrorist attacks of September 11, 2001, propelled issues of security onto the national agenda. One area of debate is the continuity of government in the event of a cataclysmic attack that destroys Congress. The Senate can be quickly reconstituted via the Seventeenth Amendment, but filling House vacancies requires special elections. The average House vacancy takes four months to fill.

In this paper, a variety of proposals for the quick reconstitution of the House are examined, and an effort is made to inform this debate from the perspective of federalism. Information on the conduct of special elections, the filling of state legislative vacancies via appointment, and the electoral success of appointed state legislators and appointed senators is presented to inform the prospects for popular control of an appointed House. Proposed amendments to the Constitution are then evaluated in terms of the prospects for popular control, efficiency in implementation, triggering mechanisms, and unintended effects.

The case for a constitutional amendment concerning reconstituting the House is weak, especially given the risk of unintended consequences posed by such a major change. Legislative changes are preferable if action is necessary. In light of the costs of rapid special elections, the questionable benefits of rapidly electing House members after a disaster, and the very low probability that such a disaster will occur, the case for keeping the status quo remains strong.

Ronald Keith Gaddie is a professor of political science at the University of Oklahoma and a litigation consultant in redistricting and election law cases. Rowman and Littlefield published his newest book, Born to Run: Origins of the Political Career, *in December 2003.*

Under the Constitution, we can certainly deal with the prospect of sudden and massive vacancies in the House. Can we do so in a timely fashion?

Introduction

Modern technology makes possible the unleashing of destructive forces capable of disrupting or disabling American legislative institutions. The need for a legislative branch of the U.S. government and the demand for legislative activity in times of national crisis have focused the attention of scholars and lawmakers on issues of membership maintenance. The Constitution provides sufficient mechanisms to quickly reconstitute a Senate bereft of its quorum. The House, however, is potentially vulnerable to long periods without a quorum, because of the constitutional requirement that members be directly elected. This paper explores proposed changes to the Constitution pertaining to the use of non-elected, temporary members to ensure continuity of the U.S. House of Representatives. Issues of electoral control and accountability, efficiency, and possible unintended consequences are explored.

The Scenario

> Nearly 300 tons of aircraft and fuel struck the east face of the building at a top speed of three hundred knots. The aircraft disintegrated on impact. No less fragile than a bird, its speed and mass had already fragmented the columns outside the walls. Next came the building itself. As soon as the wings broke up, the engines . . . shot forward, one of them actually smashing into and beyond the House Chamber . . . the real damage took a second or two more, barely time for the roof to start falling down on the nine hundred people in the chamber . . . a second later it ignited from some spark or other, and an immense fireball engulfed everything inside and outside of the building.
>
> Tom Clancy, *Debt of Honor*[1]

The above is the nightmare scenario, government decapitated and the people's representatives obliterated by an act of destructive terror. In the blink of an eye, more than 90 percent of the House and Senate is wiped out by an act of terror involving an unanticipated turn by a renegade jetliner or the deployment of some other weapon of mass destruction. How would we keep representative government functioning?

The events of September 11, 2001, propelled security issues to the forefront of the political debate. Norman Ornstein, writing that October in *Roll Call*, brought the topic out of the realm of fiction, noting that "absent [the heroism of passengers on United Flight 93], the airliner might well have hit the Capitol—with both chambers of Congress filled with Members at the time. . . . What if the terrorists had succeeded . . . obliterating many or most of the Members of the House of Representatives and the Senate?"[2]

Congress began considering ways to restore institutions of government.[3] The conversation turned to alternatives for dealing with the sudden disability or death of members of the House in such large numbers as to threaten the presence of a quorum. Under the Constitution, we can certainly deal with the prospect of sudden and massive vacancies in the House. Can we do so in a timely fashion? The initial report of the Continuity of Government Commission contains recommendations on continuity of Congress, focusing on achieving a working and legitimate quorum in the House. The reasons advanced for quickly reconstituting a depleted Congress were many, including the need to pass emergency assistance legislation, to affirm war powers, and to provide for the active oversight of the executive.

The report concluded that procedural options were insufficient to maintain the legitimacy and speedy functioning of the House. Legislative remedies, and probably constitutional remedies, are required. Can a solution be devised that preserves the character of the House as the chamber closest to the people?[4] And should the solution be a one-size-fits-all national policy, crafted in a

detailed amendment? Or should Congress, or the states, be authorized to develop appropriate statutory remedies? For that matter, is any solution required?

The Values at Stake

Amendments to the U.S. Constitution have typically expanded popular democracy by extending guarantees of the franchise, by outlawing devices and practices that constrain participation, or by expanding popular control of government. The most conspicuous of those is probably the Seventeenth Amendment, which shifted control of the selection of U.S. senators from the state legislatures to the people.

The argument for popular control of the House is powerful. The Constitution vests the choice of members of that chamber in the people, and indeed it was only in the House that the people originally possessed a direct voice. Constitutional law has been consistently interpreted to further refine the accuracy of the voice of the people, through guarantees of minority rights and assurances of equal apportionment.

It is possible that nonelected members, lacking popular control by the electorate, will act in a manner that is not in the best interests of the nation or the constituency. For example, several proposals foresee designation of House members by a state's governor. Given the high rates of incumbent reelection in the House, the appointed members would win reelection, thereby making succession in the House a fait accompli. Designees or appointees might seize the reins of government and the advantages of incumbency without winning an initial election under competitive circumstances.

If we choose to allow appointed representatives, democratic accountability can be retained by other means. The ability to choose and control temporary representatives can be placed close to the electorate, as it is in the states. Policy of this sort is created by those who can be held accountable to the electorate and should fulfill the constitutional mandate to guarantee continuity of the national legislature, while also reflecting local preferences about exercising popular control of representation. If a procedure for the emergency restoration of Congress is deemed necessary, the choice is between crafting an amendment to allow policy that is controlled by the central government and policy that is controlled by the variety of state governments. If empirical evidence shows that the electorate can exercise substantial control over appointed legislators, then fears about temporary, appointed legislators are lessened.

Federalism is the second value at stake in these debates. Although the last century saw considerable centralization of power, the United States has a long history of decentralized state authority. If we do not have strong reasons to have Washington decide the question of how House members would be replaced, that decision ought to be left to the states.

Current Law and Policy Governing Congressional Vacancies

U.S. Senate

The Senate was originally selected by the state legislatures. However, Article I, § 3, of the U.S. Constitution permits the state governors to appoint temporary senators if "Vacancies happened . . . during the Recess of the Legislature of any State . . . until the next meeting of the Legislature." The Seventeenth Amendment grants to state legislatures the authority to empower governors to make temporary appointments to vacant seats, until such time as an election is held. Most states allow their executives to make such appointments; only Arizona absolutely requires an immediate special election to fill a Senate vacancy.[5]

U.S. House

Vacancies in the House are filled by special election or by the next regularly scheduled general election. Under Article I, § 2, of the Constitution, "when vacancies happen in the Representation of any state the executive

If we do not have strong reasons to have Washington decide the question of how House members would be replaced, that decision ought to be left to the states.

authority thereof shall issue Writs of Election to fill such vacancies."

Proposals to expedite special elections raise interesting concerns. What will campaigns look like in the immediate aftermath of a devastating event? Will a patriotic rally to the president bias the special elections?[6] Will the dynamic of "normal" elections be overturned by uncertainty? Research shows that special elections to the House look very much like other open-seat congressional elections.[7] The candidates who win often prevail because they have advantages in political experience or financial support or they run in districts biased toward their party. There is no compelling evidence of presidential referenda effects, so concerns that short-term rally effects will bias special elections appear unfounded. However, presidential approval goes up after a crisis,[8] and elections held in the immediate aftermath of a crisis could be affected by the rally. We cannot know for sure.

The problem with special elections is that they cannot be used to reconstitute the House in a timely fashion. States often expedite special elections by eliminating party primaries in favor of party nominations, by using a first-across-the-post open election (sometimes with a runoff), or by otherwise modifying the electoral rules to minimize the time between nominations and special general elections.[9] Ornstein's analysis indicates that, on average, four months is needed to replace a departed member of Congress, even when states act in a timely fashion.[10] If the goal is to achieve a full House in a brief period of time, the special election process is inadequate because of logistics and time demands.[11] Any other way of expediently reconstituting the House requires consideration of temporary, nonelected members.

Recent proposals reflect a Washingtonian perspective, in that they deal with a national solution to a possible national problem.

How States Handle State Legislative Vacancies

As we will see below, the variety of recent proposals for dealing with sudden, massive House vacancies is interesting and creative. Those proposals reflect a Washingtonian perspective, in that they deal with a national solution to a possible national problem. The conversation about the restoration of legislative quorums can benefit from a look inside the laboratory of federalism.

State legislatures often deal with vacancies differently than the national government does. Vacancies are more frequent, for various reasons, and the impact of a vacancy can be more telling because state legislators often meet for just a few months a year. An absence or incapacity during the legislative session can seriously debilitate a constituency.

As we look to the states for answers, we see that in 26 states the only method for filling a vacant state legislative seat is a special election.[12] Once a vacancy is established, the governor is required to call an election, assuming that there is time before the next scheduled election. Sometimes, in order to expedite filling a vacancy, special elections are conducted using rules that differ from the normal rules. Most often, though, anywhere from six weeks to four months is required to fill a seat.

Twenty-four states allow the appointment of interim legislators in the event of vacancy (Table 1).[13] There is substantial variation in the control of the appointment. In most states governors make the appointment, though only a few states, such as Nebraska and South Dakota, allow governors substantial latitude in choosing new members. In most states with replacement by appointment, replacements are chosen from lists of potential candidates (usually three names) provided by local party committees, state party committees, county boards of supervisors, or nominating commissions. Many states require that the new member be of the same party as the departed incumbent. Some states require that the chamber confirm the appointment before the new member is seated. Candidates' names are usually advanced by party committees or public officials who are under a high degree of control by the local constituency. The norm is to constrain executive authority with advice, consent, or direction through narrowed options.

Table 1
State Legislative Appointment Procedures

State	Appointment Procedure
Arizona	Within 10 days county board appoints member, from same party, to serve out term.
California	Senate only: Governor may appoint member to serve until next scheduled general election or until the office is filled by special election.
	House: Governor may fill if vacancy occurs after close of nomination period for next election.
Colorado	Provides for party vacancy committees to fill the district office with a member from the same party.
Florida	Senate: Governor may appoint a member to fill a term with less than 28 months left.
Hawaii	Appointments are made by governor if the term expires with the next general election; otherwise, appointments may be made until a special election is held.
Idaho	Legislative district party committee submits three nominees to governor, who has 15 days to choose. If committee does not act, the governor may choose on his or her own.
Illinois	Governor must appoint successor from same party within 30 days.
Indiana	District precinct committee of incumbent's party meets and chooses successor by majority vote.
Kansas	Within 21 days of vacancy, party committee of district elects member to be appointed by governor.
Maryland	Incumbent's party central committee submits name to governor.
Montana	County board(s) of commissioners submits three names, using population-weighted voting.
Nebraska	Governor appoints a qualified individual. Nevada County commissioners appoint a person of the same party as the incumbent.
New Jersey	Board of supervisors for the incumbent's party selects a candidate, who is certified by the state board of supervisors and then confirmed by the secretary of state.
New Mexico	County commissioner submits a name to the governor for appointment; in multicounty districts, the governor chooses on his or her own.
North Carolina	Party executive committee advances recommendation to governor.
Ohio	The chamber chooses an individual of the same party as the incumbent, by voice roll call.
Oregon	County commissioners must fill vacancy in 30 days. Parties nominate three to five candidates.
South Dakota	The governor appoints and fills all vacancies, or may leave seat vacant.
Utah	County/state central committee of incumbent party advances three names to governor, who picks.
Vermont	District party committees of incumbent party advance nominee to governor.
Washington	County commissioners choose a successor from the same party. If county cannot act within 60 days, the governor chooses a replacement.
West Virginia	District executive committee advances three names to governor, who chooses the successor.
Wyoming	Incumbent's party district precinct committee chooses three individuals, and the state central committee then picks a successor from the list.

Will Appointed Members Possess an Electoral Advantage?

An implicit concern in the appointment of members of the House is that appointed legislators will accrue the advantages of incumbency without "earning" them by initially facing the electorate. Incumbent members of Congress typically accrue electoral advantages of from 8 to 12 percentage points compared with candidates for open seats.[14] Almost all House incumbents who seek reelection win,[15] leaving open seats as the main avenue of entry for new members.[16] Lacking other knowledge, we might assume that appointed members will have a leg up in retaining the seat in a subsequent election.

An implicit concern in the appointment of members of the House is that appointed legislators will accrue the advantages of incumbency without "earning" them by initially facing the electorate.

Evidence from the Senate

From 1914 to 2002, 174 midterm Senate vacancies were filled through gubernatorial appointment. Of those appointees, 110 subsequently sought election in their own right. There is no evidence that appointed senators have any particular electoral advantages. Independent studies of the electoral fate of appointed senators in the 20th century indicate that appointed incumbents do worse than the proverbial coin flip at holding their seats.[17] By comparison, freshmen seeking reelection have a reelection rate of 82.5 percent.[18] It is worth noting that senators in general are far less secure than House members, but most nonetheless gain reelection.[19]

Appointed incumbents fail because they more often confront better funded or more experienced challengers, or because the electorate rejects appointing governors who either had themselves made senator or who ran after appointing a "seat warmer." Appointees of a party other than that of the previous incumbent are also less likely to win election. In sum, appointed senators perform more like candidates for open Senate seats than incumbents.

Further evidence of a responsible electorate (or skeptical electorate, if you like) comes from the treatment of corrupt bargains. Self-appointed governors almost always lose, and, further, governors who run for the Senate after appointing a seat warmer usually lose nomination or election. The electorate is historically inclined to punish such political legerdemain.

Evidence from a State Legislature

How often do appointed legislators seek reelection? How often do vacancies occur? To compile complete data on state legislative vacancies, appointees, and their reelection prospects is a daunting and time-consuming task. In the absence of comprehensive evidence at present, this section presents an analysis of appointed legislators and their reelection success in one chamber, the Nebraska Unicameral Legislature.

The Nebraska appointive system is executive-strong. The governor makes an appointment from a pool of self-selected applicants and has absolute latitude in making the choice. Appointed members will not face the electorate until the next regularly scheduled general election. Elections are nonpartisan; party identification does not appear on the ballot, though candidates campaign as partisans. And incumbency is not indicated on the ballot.

Since 1993 there have been 19 vacancies in the unicameral legislature filled by gubernatorial appointment (Table 2). All 19 appointees sought subsequent election, and 5 (26.3 percent) failed to prevail. Three of twelve appointees of Gov. Ben Nelson (D, 1993–99) failed election, and two of seven appointees of Gov. Mike Johanns (R, 1999–) failed. Three of the four failing incumbents were beaten with over 55 percent of the vote, and five of the twelve winners had no effective opposition. The appointed incumbents lost more often than other incumbents in the unicameral, but they still fared better than the coin flip faced by candidates for open seats.

Appointed incumbents usually win election to the unicameral legislature, but they are not winning in overwhelming numbers or by consistently large margins. Members appointed by a Democratic or a Republican governor failed at similar rates in what is a decidedly

Republican state. Nebraska's experience suggests that the electorate retains control over appointed legislators.

Summary of Electoral Implications

A source of pride in the U.S. House is that no member ever served who was not chosen through popular election. The notion of appointed members, even on a temporary basis, obliterates this tradition and opens the door to legitimating less-democratic means of selecting government for the purposes of expediency. The particular concern among observers of electoral politics will be the prospect of appointed legislators accruing advantages of incumbency without first passing competitive electoral muster.

The nearest empirical evidence, derived from legislative elections at the immediately higher level (U.S. Senate) and the immediately lower level (state legislatures), indicates that this concern is probably misplaced. In high-profile Senate contests, electorates were reluctant to retain appointed senators. Most appointees try to hang on to their seats, but they often fail nomination, and they lose general elections as often as they win. An initial examination of the success of appointed incumbents in Nebraska indicates that appointed state legislators do better than can-

No House member ever served who was not chosen through popular election.

Table 2
Appointees' Election Success, Nebraska Unicameral, 1994–2002

Appointee Name (district)	Vote Share
1994	
Engel (17)	Won (vote not available)
Matzke (47)	68%
McKenzie (34)	Won (vote not available)
Monen (4)	40% (lost)
1996	
Hilgert (7)	57%
Klein (19)	47% (lost)
1998	
Pederson (42)	51%
Raires (25)	70%
Redfield (12)	57%
Suttle (10)	53%
Thompson (14)	55%
Wilhoft (34)	45% (lost)
2000	
Aguilar (35)	73%
Dickey (18)	43% (lost)
Quandahl (31)	99%
2002	
Hlava (49)	43% (lost)
Johnson (37)	100%
McDonald (41)	62%
Synowki (7)	100%

didates for open seats but worse than other incumbents.

The true electoral implications of appointed House members are unknown. Certainly, many (if not most) appointees will be reelected, though evidence from two other legislatures with appointed members indicates that those members are not invulnerable. Competition will depend less on the presence of a designated incumbent than on the qualities of other candidates and the partisan dispositions of the constituencies. A more systematic examination of state legislative elections is called for to answer this question.

In high-profile Senate contests, electorates were reluctant to retain appointed senators.

Assessment of Current Proposals

Constitutional amendments take time to ratify. They require extraordinary majorities to pass and can fail despite widespread support. The amending process is difficult in order to prevent the passage of amendments that are frivolous, topical, or driven by the passions of the moment and place crisis and urgency above sobriety and practicality. This particular debate, which seeks a remedy to a remote but real threat, also raises fundamental questions about constitutional design; federalism; and the relative power of the states, the national government, the people, and their representatives.

Different procedures exist for filling vacancies by appointment in the states. Is there a best way? Can we accommodate the goals of advocates of reform while making and implementing policy far from Washington? Need we do anything? Table 3 summarizes the proposed solutions to the issue of continuity of the House of Representatives. All have merits, as well as shortcomings. All can contribute to a federal solution to an admittedly remote but real threat.[20]

Intrusion on Popular Control

Four proposals (the Baird amendment, the Lofgren amendment, the Specter amendment and the Ornstein proposal) are triggered by excessive vacancies arising from death or incapacitation. The Baird, Lofgren, and Specter proposals are triggered by threshold portions of vacant seats; Ornstein's proposal is invoked if a majority of the seats of a majority of states are vacant and a majority of governors agree to declare an emergency. Two other proposals, the Davidson proposal and the Glennon proposal, address the problem with less specificity. Davidson's proposal mirrors the Seven-teenth Amendment and grants to the state legislatures the authority to allow governors to appoint temporary members until such time as a special election can be held to fill the balance of the term.[21] The Glennon proposal similarly empowers the national legislature to develop a statutory solution to address mass vacancies.[22]

Of the latter two proposals, the Davidson proposal intrudes least on existing constitutional arrangements in that it leaves it to the individual states to decide how to fill congressional vacancies from those states. A variety of nonconstitutional, political issues—party continuity, the listing of alternates, the degree of autonomy granted to governors in making appointments—can be decided by the states themselves. This is not popular control, to be sure, but it is close; local constituents and local legislators decide how they will be represented in an epic emergency.

Only two states that permit the appointment of state legislators allow governors the same latitude afforded for congressional appointments under the Baird and Specter amendments. *None* of the states allows a deceased or incapacitated incumbent any degree of control over his or her successor, though the political parties in the district are often afforded control in determining lists of replacements for their incumbents. Incumbent preferences, party allegiance, and gubernatorial discretion are all political issues and as such require political solutions rather than constitutional solutions.

Is the Issue Vacancy or Catastrophe?

Are we concerned with the treatment of vacancies in general or vacancies in the event of great catastrophe? Differences between the

proposals rest first on this dimension. All but one, the Davidson proposal, contain triggers that are based on sudden and dramatic vacancies, or otherwise require a state of emergency. The Davidson proposal potentially alters the filling of legislative vacancies even in non-emergency situations. All of the remaining proposals either empower Congress to craft legislation to address mass vacancies or direct a solution by amendment.

Some proposals require extraordinary levels of vacancy (25–50 percent of seats) to trigger the appointment amendment. Such bright lines could be potentially debilitating,

Table 3
Proposed Solutions to the House Vacancy Problem

Proposal (sponsor)	Description	Popular Checks
H. J. Res. 67 (Baird)	Constitutional amendment. If 50 percent or more of members are unable to serve due to death or incapacity, governors of affected states will appoint a new member within seven days.	Special election will be held within 90 days to choose a permanent replacement. Appointed incumbent is eligible to run.
H. J. Res. 77 (Lofgren)	Constitutional amendment. Congress may by law provide for the appointment of temporary members, to serve for any period in which 30 percent or more of the seats of the House are vacant due to death or resignation.	Replacement member serves until vacant seat is filled under applicable state special election law.
S. J. Res. 30 (Specter)	Constitutional amendment. If 50 percent or more of members are unable to serve due to death or incapacity, governors of affected states will appoint a new member within seven days.	Replacement member must be of same political party as previous incumbent. Special election will be held within 90 days to choose a permanent replacement. Appointed incumbent is eligible to run.
Ornstein Proposal	Constitutional amendment. In the event of an emergency, when the majority of a state's delegation is dead or incapacitated, the governors of affected states may make appointments to last until the congressional session ends. Sitting members will submit a list of 3-7 designated successors.	None.
Davidson Proposal	Constitutional amendment.Permits state legislatures to empower the governor to appoint temporary members for Special election is held, up to 90 days or until a special whichever comes first.	Initiative for filling any vacancy by means other than special election resides with the state legislature. Special election required to fill seat.
Glennon Proposal	Constitutional amendment Grants to Congress the authority to create legislation to address mass vacancies due to death or incapacitation.	Unknown.
H. Con. Res. 190 (Sensenbrenner, Dreier, Miller)	Legislative solution. Requires expedited special elections within 21 days if Speaker declares over 100 vacancies.	Consistent with electoral and legal environment, though Voting Rights Act may present challenges to implementation.

because the absence of large numbers of members, but fewer than needed to trip the trigger, may be sufficient to debilitate the House. Where is the bright line? Ornstein's proposal avoids the bright line issue; it effectively places the designation of successors in the hands of the incumbents and leaves the declaration of an emergency to several governors.

The Ornstein proposal has two potentially huge flaws. The amendment could be triggered when the House had few vacancies but could go untriggered when the House lacked a majority of members. Imagine, for the moment, that the delegations of the 11 "Super-States"[23] are largely incapacitated or killed, but the other delegations are largely intact. The Ornstein Amendment *could not be legally triggered* and Congress would still lack a majority of members. Conversely, Congress could still have a quorum with the delegations of the smallest 26 states eliminated, but the emergency provision would nonetheless be triggered if the governors declared an emergency. The other problem is that it requires transmission of notice of vacancy to federal legislative officers who may very well be dead, and who cannot be replaced in the absence of a legislative quorum!

Should Appointed Members Be Eligible for Election?

If we allow appointed members, should they be eligible for election? Perhaps not. Appointment might translate into election. Making temporary appointees ineligible opens the doors for a competitive succession. But, if we make appointees ineligible, will the best decisionmakers accept those seats? Talented potential members of Congress may take a pass on a short-term seat in order to prepare for the special election.[24] And what of the members we do appoint? They will act without reelection in mind, without the check of voter ratification looming over their legislative decisions.

The electoral accountability of members must be preserved, and the only way to do that is to make temporary members eligible for election. Electoral data on appointed members of other legislatures indicate that the electorate can exercise a high degree of control over gubernatorial preferences. Better to allow the electorate the chance to pass judgment on appointees than to appoint members who govern without the electorate's wishes ringing in their ears.

Better to allow the electorate the chance to pass judgment on appointees than to appoint members who govern without the electorate's wishes ringing in their ears.

Should Party Be Institutionalized in the Constitution?

The concept of political party is not in the Constitution. The Specter amendment would, for the first time, institutionalize that concept by making party membership a qualification for interim members. Such a provision is often contained in state legislative appointment statutes or is implicit in a state's processes, but some states do not place that constraint on the gubernatorial appointment power.

The effect is to create the potential basis for a property right to legislative seats. Provisions of the Constitution are often stretched beyond their original intent via judicial interpretation. By indicating that vacant seats are the "property" of the party that won the previous election, a foundation of an argument for party proportionality in the apportionment of seats within a state might be created.

Issues of party continuity can be addressed through the state legislatures or by Congress. Opening the Constitution to issues of party is potentially dangerous, especially as the instrument of American government was written with an eye to taming factions rather than institutionalizing them.

Are There Differences in Efficiency among the Proposals?

There are pronounced differences in the efficiency of the proposals. The Davidson proposal is clearly the most efficient in terms of potential implementation, by virtue of expediting the filling of vacancies absent the existence of a crisis. It functions under uncertainty about the number of House vacancies and has no arbitrary trigger mechanism.

The efficiency of the Davidson proposal renders it potentially the most dangerous. Because it operates under nonemergency circumstances, it opens the door for individual

states to allow the temporary appointment of House members. If this amendment is adopted, it is certain that, under nonemergency circumstances, a governor somewhere will appoint a member to the House. The remaining amendments will likely never be triggered. But, by leaving the initiative with the states, it is also possible that an insufficient number of states will adopt statutes to allow for the speedy reconstitution of the House should the unthinkable occur.

The efficiencies of the remaining proposals are largely unknown. Although we know exactly how the remaining proposals are triggered, we cannot be sure how many vacant seats debilitate the House. Is it 50 percent? 25 percent? 10 percent? The Glennon proposal nicely sidesteps that problem by empowering Congress to regulate the filling of vacancies "in the event that a substantial number of members are killed or incapacitated." The Ornstein proposal, as I noted above, presents two inefficiencies in its trigger mechanism and could lead to a constitutional crisis.

Do We Want a National, One-Size-Fits-All Solution?

All of the proposals (except Davidson's) place the initiative with Congress or the governors to determine how to handle vacancies and require that vacancies in all places be handled in exactly the same manner. But, as noted above, different states have different approaches to dealing with legislative vacancies. There are even differences among the states that allow appointed temporary legislators. By virtue of political culture, history, experience, or executive distrust, most of the states constrain the ability of the governor to appoint members to vacancies. Those constraints are often local and are designed to ensure that local preferences are recognized, or that the party outcome of the last election is not overturned. State legislatures have initiative in determining how senators are replaced. The Davidson proposal is the only proposal that preserves the role of the states in crafting policy in this area. It is consistent with the law governing the filling of vacancies in the Senate.

The Ornstein proposal places in the hands of state governors the ability to trigger the amendment, which is logical under the circumstances envisioned. It is, however, a national, one-size solution. It empowers incumbents to designate their successors, thereby placing the judgment of both good and flawed legislators ahead of the judgment of the electorate. If we are to have designated successors, might a logical extension of this policy be to require the designation of those individuals *before election* (or their approval on the ballot) so that voters make a potentially informed choice about their representation in an emergency?

The Sensenbrenner-Dreier-Miller Proposal

One proposal, advanced in late July 2003, comes from Reps. James Sensenbrenner (R-WI), David Dreier (R-CA), and Candice Miller (R-MI). The proposal (H. Con. Res. 190) provides for emergency special elections within 21 days of the Speaker's declaring 100 or more vacancies in the House. This proposal has many merits, among them that it does not alter the Constitution or create the prospect of nonelected members of Congress.

The proposal faces one great obstacle: the reality of undertaking special elections noted above and in Ornstein's testimony. Recent events in California drive home the challenges of holding unexpected, major elections on short notice, including issues of cost, personnel, filings, and law. There are other challenges to holding numerous special elections within three weeks of a declared vacancy. The problems to be addressed include the following:

- What will be the time frame for candidate filings? A day? A week? Every day allotted for filing is a day ballots are not printed.

Most of the states constrain the ability of the governor to appoint members to vacancies.

We need to ensure that we do not foist upon ourselves unintended legal and constitutional changes.

- Will states run special elections under existing state rules or under special federal rules?[25] If states use their own rules, a second round of elections will be required in three of the four most populous states in the union (California, Texas, and Florida), as well as in two other superstates (North Carolina and Georgia).[26]
- Even if we assume a one-week filing period, can ballots be printed and distributed in two weeks? The shortest period between elections in runoff primary states is three weeks. States covered by the linguistic minority provisions of the Voting Rights Act will have to print ballots in multiple languages, further exacerbating the printing issue.
- California reduced the number of polling places to facilitate the 2003 recall. Will there be a reduction of polling places due to the expedited time frame for holding special elections? Consider also the complications under the Voting Rights Act. Under sec. 5 of the act, any change affecting voting in a covered jurisdiction, or any political subunit within it, cannot legally be enforced unless and until the jurisdiction first obtains preclearance from the U.S. District Court for the District of Columbia, or from the attorney general. To obtain preclearance, a jurisdiction must show that the voting change does not deny or abridge the right to vote on account of race, color, or membership in a language minority group. Will the Justice Department grant blanket preclearance in states covered by sec. 5? There will be lawsuits whatever happens.
- Who will cover the costs of the expedited emergency elections?
- Will the short election calendar, combined with a state of emergency, affect the campaign and election result?

The Sensenbrenner-Dreier-Miller proposal, although arguably the most democratic, mandates a solution that would be much vexed by the practical challenges of holding elections. If, however, Congress should provide funds for implementation—paying election personnel and upgrading voting technology—and also allow for either waivers of the Voting Rights Act or mandate expedited preclearance for VRA-covered jurisdictions, then this solution would be technically workable and constitutionally benign.

Conclusion

Considerations of democratic accountability and federalism suggest three maxims to guide Congress on questions of the continuity of the federal government.

Do No Harm

We need to ensure that we do not foist upon ourselves unintended legal and constitutional changes. If we are to amend the Constitution to allow for emergency measures, such changes should change the status quo no more than is necessary. The amendment should not create an unintended basis for new election law. The amendment should be as free as possible of flaws in activation, in order to avoid a constitutional crisis at the very time we do not need one. The constitutional proposals discussed above do not appear to meet the standard of nonintrusiveness.

Do It Legislatively

Nonetheless, some people might say that the current political environment requires that we do something. A legislative solution, such as the Sensenbrenner-Dreier-Miller proposal, runs up against the historic and legal realities of the conduct of special elections. However, a legislative solution does not lead to the types of unintended consequences that might arise from amending the Constitution, and it has the advantage of being quick, immediate, and harmless.

Do Nothing, Maybe

In the end, all of this may be unnecessary. The probability that we will need to replace a

large part of the House of Representatives is small. Moreover, if we are realistic, the benefits of rapidly replacing the House are also small. Congress, in the immediate wake of national crisis, acts largely as an observer and ratifying agent of executive action. In the wake of the September 11 attacks, the executive acted with tremendous independence and latitude, and Congress was left largely in the role of observer. The effect of the war rally muted almost all opposition to national security initiatives, and only now, almost two years later, do we see the emergence of a real, viable opposition to initiatives such as the Patriot Act. A fully constituted Congress was not much more of a lever against executive authority than no Congress at all would have been.

On the other hand, even the best current proposal for replacing House members, the Sensenbrenner-Dreier-Miller proposal, involves monetary costs for new technology, new procedures, and the effort to deal with the Voting Rights Act complications. Those costs are real and are perhaps greater than the benefits to be expected from new legislation. It's very unlikely that a large portion of the House will be incapacitated and very unlikely that a restocked House would serve as an effective check on executive power. Congress might be justified in concluding that real spending now for remote or nonexistent benefits in the future makes little sense.

Notes

I wish to thank Chuck Bullock, Glen Krutz, Ron Peters, and John Samples for their timely and critical comments on the manuscript.

1. Tom Clancy, *Debt of Honor* (New York: Putnam, 1994), pp. 985–86.

2. Norman Ornstein, "What if Congress Were Obliterated? Good Question," *Roll Call*, October 4, 2001.

3. Continuity of Government Commission, *Preserving Our Institutions: The Continuity of Congress*, first report of the commission (Washington: American Enterprise Institute, 2003).

4. Even with expedited powers to fill congressional vacancies, the U.S. government will need to function for some time before vacated seats are filled. There are practical realities: The vacancy must be confirmed by a declaration of the member's death or certification of incapacitation. Then, the appointing authority must act. And the new members must join Congress and be sworn in. It will take many days or weeks to reconstitute the legislature.

5. A historic concern surrounding appointed senators is corrupt bargains. On six occasions in the 20th century, a state's governor resigned and arranged for his successor to appoint him. Nine other governors appointed weak "seat warmers" and then sought the Senate seat in a subsequent special election.

6. Walter Lippman, *Essays in the Public Philosophy* (Boston: Little, Brown, 1955); Lee Sigelman and Patricia Conover, "The Dynamics of Presidential Support during International Conflict Situations," *Political Behavior* 3 (1981): 303–18; Richard Stoll, "The Sound of Guns: Is There a Congressional Rally Effect after US Military Action?" *American Politics Quarterly* 15 (1987): 223–37; and James L. Regens, Ronald Keith Gaddie, and Brad Lockerbie, "The Electoral Consequences of Voting to Declare War," *Journal of Conflict Resolution* 39 (1994): 168–82.

7. Lee Sigelman, "Special Elections in the US House: Some Descriptive Generalizations," *Legislative Studies Quarterly* 6 (1981): 577–88; Donley Studlar and Lee Sigelman, "Special Elections: A Comparative Perspective," *British Journal of Political Science* 17 (1987): 247–56; Frank C. Feigert and Pippa Norris, "Do By-Elections Constitute Referenda? A Four-Country Comparison," *Legislative Studies Quarterly* 15 (1990): 183–200; Ronald Keith Gaddie, Charles S. Bullock III, and Scott E. Buchanan, with the assistance of Andrew Hicks, "What Is So Special about Special Elections?" *Legislative Studies Quarterly* 24 (1999): 103–12; and Ronald Keith Gaddie and Charles S. Bullock III, *Elections to Open Seats in the U.S. House: Where the Action Is* (Lanham, MD: Rowman and Littlefield, 2000).

8. See Sigelman and Conover; and Bruce Russett, *Controlling the Sword* (Cambridge, MA: Harvard University Press, 1990).

9. See Gaddie and Bullock, p. 157; and Norman Ornstein, Testimony before the Subcommittee on the Constitution of the House Committee on the Judiciary, February 28, 2002, Appendix II, pp. 14–18, http://www.continuityofgovernment.org/pdfs/testimonynjo020228.pdf.

10. Ibid.

11. Ibid.

12. These states are Alabama, Alaska, Arkansas, Connecticut, Delaware, Georgia, Iowa, Kentucky, Louisiana, Massachusetts, Maine, Michigan, Minnesota, Missouri, Mississippi, North Dakota, New Hampshire, New York, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Wisconsin.

13. In Arizona, California, Colorado, Idaho, Illinois, Indiana, Maryland, Nebraska, New Mexico, Nevada, North Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, and Wyoming, appointment is the only mechanism for replacing departed members. In Florida, Hawaii, Kansas, Montana, New Jersey, Ohio, and Oregon, appointment and special elections are both used, depending on circumstances.

14. John Alford and David W. Brady, "Personal and Partisan Advantage in US Congressional Elections, 1846–1986," in *Congress Reconsidered*, 4th ed., ed. Lawrence C. Dodd and Bruce I. Oppenheimer (Washington: Congressional Quarterly Press, 1989); and Andrew Gelman and Gary King, "Estimating Incumbency Advantage without Bias," *American Journal of Political Science* 34 (1990): 347–62.

15. Gary C. Jacobson, *The Politics of Congressional Elections*, 4th ed. (New York: HarperCollins, 1997).

16. See Gaddie and Bullock; and Paul Herrnson, *Congressional Elections: Campaigning at Home and in Washington* (Washington: Congressional Quarterly Press, 2000).

17. James D. King, "Running on Their Own: The Electoral Success (And Failure) of Appointed US Senators," *American Politics Quarterly* 27 (1999): 434–49; and Jennifer A. Steen and Jonathan G. S. Koppell, "The Senate's Other Revolving Door: Incumbency Advantage and the Electoral Fortunes of Appointed Senators" (presentation to Annual Meeting of the Midwest Political Science Association, Chicago, April 25–28, 2002). The Continuity of Government Commission notes a 50 percent success rate for appointed senators seeking election since 1986. Continuity of Government Commission, p. 57.

18. See Steen and Koppell; and Warren Kostroski, "The Effect of the Number of Terms on the Reelection of Senators 1920–1970," *Journal of Politics* 40 (1978): 488–97.

19. Alan I. Abramowitz, "A Comparison of Voting for US Senator and Representative in 1978," *American Political Science Review* 74 (1980): 633–40; and Alan I. Abramowitz and Jeffrey A. Segal, *Senate Elections*, 2d ed. (Ann Arbor: University of Michigan Press, 1997).

20. "Federal solution," as used here, means a solution that relies on the federal system of state and national governments to find solutions, rather than just seeking a top-down national government solution.

21. The Davidson proposal is by Michael Davidson, former counsel to the U.S. Senate. His proposal takes the form of an amendment. It essentially takes the language governing Senate vacancies from the Seventeenth Amendment, replaces the word "Senate" or "senator" where appropriate with "House" or "representative," and empowers the states to allow the governors to appoint temporary members when any vacancy occurs. See Continuity of Government Commission, p. 51.

22. The Glennon proposal, which can be found in ibid., p. 51, says, in its totality, "Congress shall have power to regulate by law the filling of vacancies that may occur in the House of Representatives in the event that a substantial number of members are killed or incapacitated." The author is Michael Glennon, who is a law professor at the Fletcher School.

23. California (53), Texas (32), New York (29), Florida (25), Illinois (19), Pennsylvania (19), Ohio (18), Michigan (15), New Jersey (13), Georgia (13), North Carolina (13)—249 members total.

24. This was certainly presumed to be the case in the early 20th century, when widows of deceased congressmen were often elected in special elections to act as seat warmers until ambitious politicians could organize for the next regular election. See Charles S. Bullock III and Patricia Lee Findley Heys, "Recruitment of Women for Congress: A Research Note," *Western Political Quarterly* 25 (1972): 416–23; and Diane D. Kincaid, "Over His Dead Body: A Positive Perspective on Widows in the U. S. Congress," *Western Political Quarterly* 31 (1978): 96–104.

25. For that matter, would special federal rules be constitutional?

26. See Gaddie and Bullock, chap. 6.

Published by the Cato Institute, Policy Analysis is a regular series evaluating government policies and offering proposals for reform. Nothing in Policy Analysis should be construed as necessarily reflecting the views of the Cato Institute or as an attempt to aid or hinder the passage of any bill before congress. Contact the Cato Institute for reprint permission. Additional copies of Policy Analysis are $6.00 each ($3.00 each for five or more). To order, or for a complete listing of available studies, write the Cato Institute, 1000 Massachusetts Ave., N.W., Washington, D.C. 20001, call toll free 1-800-767-1241 (noon - 9 p.m. eastern time), fax (202) 842-3490, or visit our website at www.cato.org.