

Statement of Thomas E. Mann

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**Before the Committee on House Administration
U.S. House of Representatives**

on

“The Continuity of Congress: Special Elections in Extraordinary Circumstances”

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¹ The views expressed in this statement are those of Dr. Mann and should not be ascribed to the trustees, officers, or staff members of The Brookings Institution.

Mr. Chairman and members of the Committee: Thank you for inviting me to testify on the subject of the continuity of Congress in the aftermath of a catastrophic attack and specifically on H.R. 2844, legislation that requires states to hold special elections to fill vacancies in the House of Representatives during times of crisis.

I testify today as a student of Congress and the American constitutional system for more than three decades. More specifically and immediately, however, I draw on my work as a senior counselor, along with Norman Ornstein, to the Commission on the Continuity of Government. Administered by the American Enterprise Institute and the Brookings Institution, this bipartisan commission is co-chaired by former Senator Alan Simpson and Lloyd Cutler, White House Counsel to Presidents Carter and Clinton. Its members include former House Speakers Thomas Foley and Newt Gingrich, former House Minority Leader Robert Michel, and former House members Lynn Martin, Kweisi Mfume and Leon Panetta. Other commissioners have served in high positions in the executive and judicial branches of government: Phillip Bobbitt, Kenneth Duberstein, Charles Fried, Jamie Gorelick, Nicholas Katzenbach, Robert Katzmann (serving on the commission to consider the judiciary only), and Donna Shalala.

After months of research, hearings, and deliberation, our commission unanimously approved its first report, *The Congress: Preserving Our Institutions*. I believe your committee has received copies of this report but I would be pleased to have it appended to my testimony so that it is an official part of the record of this hearing. I hope you find the report useful in considering H.R. 2844. The commission's findings on problems associated with assuring the continuity of Congress in the event a large number of representatives and senators are killed or incapacitated, and the possibility of dealing with those problems through expedited special elections, are directly relevant to the legislation before you.

I have four points to make to you today. First, the problem of the continuity of government (and of the Congress in particular) in the aftermath of a catastrophic attack is real and deadly serious. Unfortunately, Congress has been tardy in dealing with it during the two years since the horrible terrorist events of September 11, 2001. Second, H.R. 2844 mandates a procedure for special elections that would sacrifice democratic substance for democratic form. Third, even if the expedited special elections worked as proposed in H.R. 2844, they would not address the most serious continuity problems associated with the death or incapacitation of a large number of members of Congress. Fourth, expedited special elections are not an alternative to emergency temporary appointments; if structured properly, they are a useful complement to such appointments.

1. In an era of terrorism and weapons of mass destruction, the continuity of American constitutional government in the wake of a catastrophic attack cannot presently be assured. Congress has an institutional responsibility to act credibly and expeditiously to remedy this shortcoming in our political system.

The terrorist attacks of September 11, and the likelihood that the fourth hijacked plane that crashed in Pennsylvania was bound for the Capitol, have forced us to contemplate the possibility

that many or most U.S. elected officials could be killed or severely injured without warning. Scenarios involving the detonation of a suitcase nuclear device on Pennsylvania Avenue during Inaugural Day festivities reinforce that chilling possibility. Death or incapacitation could cripple the White House, Congress, and the Supreme Court. The problem is especially acute for the Congress. The Constitution, by requiring that House vacancies be filled by special election, effectively prevents the swift replacement of members of the House killed in such attacks. In contrast, the Seventeenth Amendment provides a basis for temporary appointments to fill vacancies in the Senate until special elections are held. Moreover, neither the House nor the Senate could easily replace living members incapacitated by a biological or chemical attack until the next general election.

The inability to swiftly reconstitute the House and Senate would deprive the country of a fully functioning first branch of government at a time of grave national crisis. Unable to achieve a quorum, or relying on a questionable quorum interpretation allowing a small minority (possibly a handful) of surviving members to act for the full chamber, Congress would be unable to legitimately elect a new Speaker or confirm a new vice president (both critical links in presidential succession), declare war, appropriate funds, pass legislation needed to deal with the attack, confirm Supreme Court and Cabinet appointments, oversee an executive branch possibly run by someone largely unknown to the country, and reassure a stunned nation that their constitutional democracy is alive and well.

None of the steps taken by Congress since September 11 to cope with the disruptions to regular order following a successful terrorist attack have dealt with the critical problem of mass vacancies. While some members of Congress have faced the issue squarely, more have avoided or denied the need to engage it. This glaring gap in our constitutional system is an invitation to terrorists. It is past time for Congress to act.

2. H.R. 2844 mandates a procedure for special elections in extraordinary circumstances that would sacrifice democratic substance for democratic form.

Members of the House of Representatives are understandably proud of their reputation as the “People’s House,” based at least in part on the fact that every person who has served as a member of the House was elected to that office by the people of his or her district. This is a sound principle of republican government and ought to remain a cornerstone of representation in the House. The issue before the Congress is how best to maintain that principle while at the same time acting responsibly to provide for the continuity of Congress in the face of a terrorist attack producing mass vacancies and severe injuries. My view is that the sponsors of H.R. 2844 have made the wrong choice in balancing these interests. They have constructed a 21-day timetable for special elections that would put an enormous strain on voters, candidates, and election administrators, a strain so severe that it is likely to drain this remedy of any democratic legitimacy.

Last week the Senate received the testimony of election administrators from around the country documenting the steps entailed in running special elections and the time needed to accomplish them. This committee, which played a central role in the enactment of the Help America Vote Act, should be especially sensitive to practical issues of election administration. You know the

challenges associated with securing poll sites, recruiting and training poll workers, generating accurate voter registration lists for each precinct, designing comprehensible ballots, printing those ballots, sending out absentee ballots, providing for provisional voting, programming voting and vote-counting machinery, securing the services of a limited number of vendors, informing the public about polling locations and ballot content, managing the vote count, canvassing and certifying the results, and dealing with any legal challenges along the way. The difficulty of this set of formidable tasks is multiplied when there is no regularly scheduled election and everything must be done in scores or hundreds of districts within a three-week window immediately following a national crisis. Administrative and judicial experience with the current recall election in California underscores these challenges, and California is a single state operating with a 60 to 80 day timetable, not 21 days. In sum, the federal mandate on state and local election administrators provided for in H.R. 2844 is burdensome, expensive, unrealistic, and very likely to fail in its implementation.

Expedited special elections face an even more serious problem in the burden they place on voters and candidates. Genuine democratic elections require reasonable opportunities for potential candidates to seek their party's nomination, for candidates to develop and disseminate their campaign platforms, and for voters to receive enough information about the competing candidates to make an informed choice. The 21-day timetable, which includes a bare 7 days guaranteed for the "general" election, makes it virtually impossible to satisfy these requirements.

Members of this body should not delude themselves into thinking that any form of election is preferable to emergency temporary appointments in the wake of a national catastrophe. After all, North Korea has elections. So too did Saddam Hussein's Iraq and the Soviet Union. Only democratically legitimate elections merit our approval.

The House already has a problem with very limited competition and choice in the overwhelming majority of its districts. It would be a shame to exacerbate this pattern by creating a remedy to the continuity challenge that compounds it.

Congress should not accept a solution to the continuity problem that sacrifices democratic substance and administrative feasibility for democratic form.

3. Even if the expedited special elections worked as proposed in H.R. 2844, they would not address the most serious continuity problems associated with the death or incapacitation of a large number of members of Congress.

Let us assume for the moment that special elections to fill mass vacancies in the House can be conducted in the 21-day period provided for in H.R. 2844. Would this resolve the problems of the continuity of Congress following a catastrophic attack? Clearly not.

Under the scenarios outlined above, Congress would be unable to function during the critical three weeks after an attack resulting in mass vacancies. In reality, that three weeks would almost certainly extend to four weeks or more to allow for the official canvassing and certification of results in each special election. Yet this is precisely the time when critical decisions would have to be made, as they were following September 11. Allowing a president or acting president to

act alone or relying on some form of martial law during this interim period, without the constraints and supports of our constitutional checks and balances, is a far cry from American democracy as we know and revere it. Add to that the further mischief that could be caused by a rump group of surviving House members electing a new Speaker who then claims the presidency for the remainder of the term.

Then there is the very real problem of mass incapacitation. Having already experienced a serious anthrax attack, members of Congress can easily imagine a situation in which a more aggressive biological or chemical strike on Capitol Hill disables many of their colleagues. Their seats would not be vacant, meaning neither expedited special elections in the House nor the existing temporary appointment power for the Senate would be responsive to this situation. In the case of temporary incapacitation in both chambers, members should have the right to reclaim their seats as they return to health. At the same time, both House and Senate need a relatively full complement of members to act expeditiously and legitimately in the days and weeks following a catastrophic attack. No such remedy now exists for either body. Expedited special elections are irrelevant to this problem, just as they fail to adequately address mass vacancies.

4. Expedited special elections should properly be viewed not as an alternative to temporary special appointments but as a useful complement to such appointments.

As I indicated above, the challenge facing the House is how best to maintain the principle of democratically-elected representatives while at the same time acting responsibly to provide for the continuity of Congress in the face of a terrorist attack producing mass vacancies and severe injuries. For the reasons spelled out in this testimony, I believe H.R. 2844 does not meet this challenge. In my view, Congress needs to pass a constitutional amendment allowing emergency temporary appointments in the face of mass vacancies and incapacitation. The possible forms of that amendment and the content of implementing legislation are discussed in detail in our commission report. Here I stress **emergency temporary appointments**. What we recommend is an interim measure to allow the Congress to function until regular members can be chosen through special elections or temporarily incapacitated members reclaim their seats. Anything that can be done to improve the special election process would be desirable. But uniformly reducing the time in which such elections are held is only one consideration. Members of this committee should pay equal attention to questions of how the special elections would be administered by state and local officials and whether voters and potential candidates would have adequate time and resources to fulfill their democratic responsibilities.