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The House Must Be Elected *NOT* Appointed

Why are some people now trying to abolish the most democratic feature of our constitutional republic, namely, the right of the people to elect the U.S. House of Representatives?

An elite group of former Clinton advisers and former public officials of both political parties gathered at the American Enterprise Institute in Washington to announce their proposal to convert the House of Representatives from an elected body to an appointed body in the event of a national emergency. This group calls itself the Continuity of Government (COG) Commission, and the acronym is apt. The COG Commission is trying to be a cog that manipulates our constitutional process of self-government.

COG offers a "solution" in search of a hypothetical problem that doesn't exist and may never exist. COG hypothesizes that it would be a second disaster if, after a terrorist attack on the U.S. Capitol killed most members of Congress, we then had to wait several months for special elections to fill the House vacancies.

It should not be high on our worry list that the House couldn't pass bills until special elections are held. Almost every year Congress goes about four months without passing anything significant.

COG proposes a constitutional amendment that would allow House members to be appointed, a procedure that is now unconstitutional. After painting an emotional picture of a worst-case scenario with most members of Congress killed, COG is hoping that Americans' fear of a recurrence of the events of 9/11 will bamboozle Congress into precipitous action. COG draws a dramatic word picture of what might have happened if United Flight 93 had departed on time and hit the U.S. Capitol instead of being forced down in Pennsylvania. In fact, only a handful of Congressmen were in the Capitol that morning.

One of COG's proposals would simply give Congress plenary power to fill vacant seats "if a substantial number of members are killed or incapacitated." Another alternative would empower each governor to replace his state's dead or disabled House members (e.g., Governor Gray Davis could appoint 53 Representatives from California).

COG's proposed constitutional amendment contains far more words than the entire ten amendments of the Bill of

*Testimony by Phyllis Schlafly
to the Senate Judiciary Committee,
Subcommittee on the Constitution,
Civil Rights and Property Rights
August 29, 2003*

Rights and is a Rube Goldberg-like plan (i.e., complex and impractical). COG would require each House and Senate member to designate in advance three to seven successors to fill his seat if it becomes vacant, and the governor would appoint Representatives from among those so designated.

Each House and Senate member would be empowered to "revise the designations" of his successors at any time. Thus, in the 2004 elections, voters would be given the task of electing a congressional candidate to whom is attached several shadows who would fade in and out of the possibility of serving in Congress and whose actual appointment would depend on the governor's choice.

Each governor's "appointment authority" would kick in after a majority of governors issued a proclamation that an "emergency" exists because a majority of the Representatives in that state are dead or "unable to discharge" their duties. The process gets even stickier if the disabled Representative rises from his sick bed and tries to resume the office to which he was legitimately elected.

James Madison did a better job of writing the Constitution than COG, whose members include Donna Shalala, Lynn Martin, Kweisi Mfume, Tom Foley and Newt Gingrich. Our present Constitution already allows governors to fill U.S. Senate vacancies, allows states to advance their timetables for special House elections, and allows Congress to require an expedited timetable.

COG's co-chairman is Lloyd Cutler, confidant of Presidents Carter and Clinton, who was also co-chairman of the 1983 Committee on the Constitutional System that tried (fortunately unsuccessfully) to change the U.S. Constitution in a dozen ways in order to eliminate our Separation of Powers. A co-sponsor of COG is the Brookings Institution, whose president Strobe Talbott (Clinton's foreign policy adviser) famously wrote in *Time* Magazine that "nationhood as we know it will be obsolete" and that he rejoiced in the coming "birth of the Global Nation."

The United States survived the real national emergencies of the Civil War and the burning of the U.S. Capitol by the British in 1814 without giving up our right to elect members of the U.S. House of Representatives. We should never relinquish that right.

Continuity Proposal a Threat to the Constitution

by U.S. Representative Ron Paul

The Continuity of Government Commission, spearheaded by the Brookings Institution and the American Enterprise Institute, recently issued proposals for the operation of Congress following a catastrophic terrorist attack. Specifically, COGC advocates a constitutional amendment calling for the appointment of individuals to the House of Representatives to fill the seats of dead or incapacitated Members, a first in American history. An examination of the proposal reveals that it is both unnecessary and dangerous.

Note that COGC is “self-commissioned,” its members being neither elected nor appointed by any government body. The biographies of the commissioners demonstrate that COGC is made up mostly of professional lobbyists. Of course COGC is well-intentioned, but the nation should know exactly who is trying to substitute their wisdom for that of James Madison, Alexander Hamilton and other framers of the Constitution. I think most Americans would prefer that proposals to amend the Constitution come from elected lawmakers or grassroots efforts, not from think tanks and lobbyists.

Anyone reading the COGC proposal cannot help but sense the familiar Washington conceit at work, a conceit that sees America as totally dependent on the workings of Capitol Hill. It is simply unthinkable to many in Washington that the American people might survive a period in which Congress did not pass any new laws. But the truth is that the federal state is not America. The American people have always been remarkably resilient in the face of emergencies, and individual states are far more equipped to deal with emergencies and fill Congressional vacancies than COGC imagines.

COGC is Unnecessary. Every generation seems to labor under the delusion that it lives in the most dangerous and turbulent time in human history. COGC certainly proves this point. Its proposal provides doomsday scenarios designed to make us believe that the threat of modern terrorism poses a much greater risk to our government institutions than ever existed in the past.

Yet is Congress really more vulnerable than it was at the height of the Cold War, when a single Soviet missile could have destroyed Washington? Surely Congress faced greater danger in 1814, when the British actually invaded Washington, routed the city and burned down the White House! Somehow the republic survived those much more perilous times without a constitutional amendment calling for the emergency appointment of Representatives.

The scenarios offered by the commission, while theoretically possible, are highly unlikely to disable Congress. Remember, a majority of Members assemble together in one place only rarely; even during votes most Members

are not on the floor at the same time. Inauguration ceremonies and State of the Union addresses often bring together a majority of Members in the same place, but simple precautions could be taken to keep a sufficient number away from such events.

Even a direct terrorist attack on the Pentagon failed to disrupt the operation of the Defense Department. The COGC proposal exaggerates the likelihood that a terrorist strike on Washington would incapacitate the House, and exaggeration is a bad reason to amend the Constitution.

Existing Provisions Are Adequate. It is important to understand that the Constitution already provides the framework for Congress to function after a catastrophic event. Article I, Section 2 grants the governors of the various states authority to hold special elections to fill House vacancies. Article I, Section 4 gives Congress the authority to designate the time, manner and place of such special elections if states should fail to act expeditiously following a national emergency. As Hamilton explains in *Federalist 59*, the “time, place, and manner” clause was specifically designed to address the kind of extraordinary circumstances imagined by COGC. Hamilton characterized authority over federal elections as shared between the states and Congress, with neither being able to control the process entirely.

COGC posits that states could not hold special elections quickly enough after a terrorist act to guarantee the functioning of Congress. But even COGC reports that the average length of House vacancies, following the death of a Member until the swearing in of a successor after a special election, is only 126 days. Certainly this period could be shortened given the urgency created by a terrorist attack. We should not amend the Constitution simply to avoid having a reduced Congressional body for a month or two.

In fact, Congress often goes months without passing significant legislation, and takes long breaks in August and December. If anything, legislation passed in the aftermath of a terrorist event is likely to be based on emotion, not reason. The terrible Patriot Act, passed only one month after September 11, 2001 terrorist attacks by a credulous Congress, is evidence of this.

Also, advances in technology can be used to reduce the risk of a disruption in Congressional continuity following an emergency. Members already carry BlackBerry devices to maintain communications even if cut off from their offices. Similar technology can be used to allow remote electronic voting by Members. Congress should focus on contingency plans that utilize technology, not a constitutional amendment.

States have a wide variety of electronic and telephonic technology at their disposal to speed up the process of special elections. Consider popular television shows that poll millions of Americans in a single night! Yet COGC ignores alternatives to standard voting and incorrectly assumes that states will be in disarray and unable to hold elections for months.

COGC is Dangerous Because the House Must be Elected.

At its heart, the COGC proposal is fundamentally at odds with the right of the people always to elect their Members of the House. The House must be elected. Even "temporary" appointees would be unacceptable, because the laws passed would be permanent.

The problems with appointment of "representatives" are obvious. COGC calls for a general constitutional amendment that gives Congress wide power to make rules for filling vacancies "in the event that a substantial number of members are killed or incapacitated." Such an amendment would be unavoidably vague, open to broad interpretation and abuse. In defining terms like "vacancy," "substantial" and "incapacitated," Congress or the courts would be setting a dangerous precedent for a more elastic constitutional framework. Members of Congress simply cannot appoint their colleagues; the conflict of interest is glaring.

Alternate proposals allowing state governors to appoint Representatives from a list of successors nominated by Members are no better. The House represents the people, not the states. Single states often exhibit wide variations in political makeup even among voters of the same party. Appointments by governors, even though the successors represent the dead Members' party choice, could change the ideological composition of Congress contrary to the will of the people. Furthermore, voters choose an individual candidate, not a panel. They should not be required to consider the qualifications of a candidate's potential successors.

COGC focuses on government legitimacy, arguing that a House of Representatives with only a handful of surviving Members would not be seen as legitimate by the public. In fact, the opposite is true: Appointed "representatives" will never be seen as legitimate and in fact would not be legitimate. Without exception, every Member of the House has been elected by voters in the Member's district. Madison states in *Federalist 52*: "The definition of the right of suffrage is very justly regarded as a fundamental article of republican government." The very legitimacy of the House of Representatives is based on its constitutional status as the most directly accountable federal body.

The House passes numerous laws, often by voice vote, with very few Members present. The legitimacy of those laws is not called into question. Even a House made up of only five elected Members would have more legitimacy, as the living continuation of the only elected entity in government, than a House composed of five surviving Members and 430 appointees. Furthermore, even a decimated House membership would have to pass legislation with the concurrence of the Senate, which could be restored to full strength immediately by state governors.

Consider a scenario COGC forgot to mention. Imagine a terrorist strike kills a majority of House Members. Two hundred survive, and 235 are appointed by governors on a "temporary basis." This new body considers a bill that

drastically increases taxes to pay for emergency measures, while suspending civil liberties and imposing martial law. The bill passes, with 195 elected Members opposed and all 235 appointed Members in favor. Only five elected Members support the measure. Would the electorate consider this legislation legitimate? Hardly. Yet this is the type of outcome we must expect under the COGC proposal.

Conclusion. We must not allow the understandable fears and passions engendered by the events of September 11 to compel a rushed and grievous injury to our system of government.

The Constitution is our best ally in times of relative crisis; it is precisely during such times we should hold to it most dearly. Rather than amending the Constitution, Congress should be meeting to discuss how to preserve our existing institutions — including an elected House — in the event of a terrorist attack. The Constitution already provides us with the framework, while technology gives states the ability to organize elections quickly. The COGC proposal not only makes a mountain out of a molehill, but also acutely threatens the delicate balance of federal power established in the Constitution.

Importance of Election of the House by the People

by Charles E. Rice, Professor Emeritus,
Notre Dame Law School

Without a single exception, every person who has ever served as a member of the House of Representatives has been elected to that office by the people of his district. This is a non-negotiable point. The Constitution provides that those are qualified as electors of the House who are qualified as electors of the most numerous branch of the state legislature. In commenting on this in *Federalist 52*, James Madison wrote: "The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the 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."

Not even a pressing necessity should justify even a supposedly "temporary" abrogation of the right of the people to elect their representatives. Indeed, it is precisely in times of crisis or catastrophe that it is most important to preserve in the representatives "an immediate dependence on, and an intimate sympathy with the people." (*Federalist 52*) If a terrorist attack decimated the House of Representatives, the confidence of the people in our democratic institutions would be enhanced by their direct election of the replacement members and would be diminished by the appointment of those replacements by executive fiat. . . .

Legitimacy of a Temporarily Reduced House. It is fair to ask: If an attack left the House of Representatives with only a handful of members, how could it legitimately function? The answer is twofold: First, although the Constitution provides that "a majority of each [House] shall constitute a quorum to do business" (Art. I, Sec. 5, cl. 1), it is a debatable but fair conclusion that each House has the inherent power to exclude deceased and incapacitated members in calculating the number necessary for a quorum. The issue is pertinent primarily with respect to the House of Representatives since Senate vacancies can be filled immediately by the governor. Suppose, as the COGC report conjectures, "only five House members survive" (p.2) an attack. And suppose those five members proceeded to act as the House. The republic would survive quite well. The COGC states that such a small membership could "call into question the legitimacy of its actions." (p.6) But numerous laws have been enacted, often by voice vote, with very few House members present, including, for example, the Wartime Emergency Supplemental Appropriations of 2003, the legitimacy of which has not been called into question. Also, a House of five elected members would have more "legitimacy," as the living continuation of the only directly elected entity in our government, than would a House composed of those five elected members and 430 appointed members. Any concern about a small surviving House enacting imprudent legislation should be allayed by the bicameral requirement of the concurrence of the Senate, which could be immediately restored to full strength by appointment after an attack. . . .

Stand-by Emergency Legislation. Expedited special elections provide one basic solution to the crisis scenario painted by the COGC report. The second solution is for Congress to enact stand-by legislation, including provisions for funding, authorizing the president to take appropriate action to deal with any catastrophic event even if the Congress has been practically wiped out. Such legislation should include sunset provisions requiring re-approval by congress as soon as it is reconstituted. In short, we do not need to abrogate even "temporarily" the principle of our elective government to deal with a terrorist attack or other catastrophe.

Do Not Experiment with the Constitution. The amendment proposed by COGC is at war with the right of the people always to elect their members of the House of Representatives. The proposed amendment, moreover, is unnecessary. When it is not necessary to amend the Constitution, it is necessary not to amend the Constitution.

Note: In November 2003, Senator John Cornyn introduced a constitutional amendment (S.J.Res.23) to give Congress the power to decide who shall serve if one-fourth of the Members of either House are killed or incapacitated. His bill (S.1820) to accompany the proposed amendment would give states three options to fill the vacancies: appointed by the governor, chosen by the state legislature, or selected from a list previously created by the dead or incapacitated incumbent.

Statement by Representative F. James Sensenbrenner

Chairman, House Judiciary Committee,
to the House Administration Committee
re: the Continuity in Representation Act, H.R. 2844

H.R. 2844 would provide for the expedited special election of new Members to fill seats left vacant in "extraordinary circumstances," which the bill defines as occurring when the Speaker of the House announces there are more than 100 vacancies in the representation from the States. Within 14 days after such an announcement, the political parties of states with House vacancies, as provided by State law, may nominate candidates to run in a special election to be held within 21 days.

Some are arguing for the adoption of a constitutional amendment that would allow for the appointment of replacement House Members if large numbers of vacancies are left following a terrorist attack. Such an amendment would destroy the uninterrupted tradition that *only* Members duly elected by their local constituents should serve in the House. Even worse, such an amendment would take away the people's right to choose representation while ignoring the current mechanism for preserving continuity in government the Founders, in their wisdom, included in the Constitution, and which is the basis for H.R. 2844. . . .

While 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, I have different view. While a catastrophic attack on Washington, D.C. would no doubt cause massive disruption here, the situation is likely to be much less severe in localities throughout the country where special elections would be held. . . .

And while no elections are perfect, even in the best of circumstances, democracy is undeniably an essential government function in the United States of America, and I have no doubt the boundless spirit of the American people will ensure that democracy prevails in even the most pressing conditions. . . .

The Committee to Preserve an Elected Congress asks all citizens to help stop the plan to change the U.S. House into an appointed body by signing the Petition to Preserve an Elected Congress.
<http://www.ElectCongress.org>

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