

**AMERICAN BAR ASSOCIATION**

**ADOPTED BY THE HOUSE OF DELEGATES**

August 9-10, 2004

RESOLVED, That the American Bar Association urges Congress, the States and Territories to enact special election procedures for filling vacancies in the United States House of Representatives in the event of a catastrophe.

FURTHER RESOLVED, That such legislation should contain the following elements:

1. A catastrophe is defined as an event or events that result in vacancies in at least 110 of the offices of the United States House of Representatives, or at least one-fourth of the total number of offices representing an affected State or Territory, or in the case of a State with four or fewer members of the House, such number and circumstances as determined by the State legislature.
2. Vacancy is defined as the death or disappearance of a Representative or Delegate of Congress.
3. Method of Filling Vacancies
  - A. The executive authority of each State or Territory, within seven days of a vacancy, should issue writs of election to fill vacant seats and such special elections should take place within 56 calendar days thereafter.
  - B. If a vacancy occurs in close proximity to an already scheduled election the special election can be consolidated with the already scheduled election.
  - C. Absentee ballots for uniformed services and overseas voters should be transmitted by a State or Territory no later than 15 days after the writ of election has been issued; valid ballots should be counted by the State or Territory if received or post marked on or before the date of the election.
4. Congress should incorporate a provision into each appropriations bill or continuing resolution for continued funding in the event of a catastrophe and a quorum cannot be met.

FURTHER RESOLVED, That the American Bar Association urges Congress to consider and study whether additional measures, including but not limited to a constitutional amendment, may be necessary to ensure continuity of Congressional operations in the event of a catastrophe.

## Report

### Background

The tragic events of September 11, 2001, revived the issue of continuity of government in a time of national crisis. That the United States Congress may have been an intended target of terrorist activity on that fateful day has specifically raised concerns about the continuity of our nation's legislative branch. What would happen if a catastrophic event or attack resulted in the death or incapacitation of a large number of Members of Congress? Would Congress be able to carry out its constitutional responsibilities and legislative duties? Could full representation of the American public be quickly and efficiently restored? These and other similar questions have focused attention on the need for procedures to ensure succession in office and the continuity of government in the face of a catastrophic or tragic event that leads to mass vacancies in Congress.

The remedy for continuity of government for the Federal legislature is to implement a quick and practical method for reconstituting large portions of the U.S. House of Representatives or Senate in the event of a dramatic loss in the number of legislators that would affect the ability to govern. The solutions currently being proposed, by Members of Congress and interested academic groups and individuals, all center around a constitutional amendment or a statutory remedy. The statutory approaches would maintain the current appointment procedure for vacancies in the Senate and require some form of expedited special election to fill vacancies in the House. The amendment proposals would add language to the Constitution to allow House seats to be filled by appointment in the event of a catastrophic event, and would extend the appointment procedure used in the Senate to include temporary appointments to replace Senators or Representatives unable to perform their duties due to incapacitation.

Because a constitutional amendment is one of the principal means being offered to address the issue of continuity of government, it is logical and essential for the American Bar Association to be a part of the debate. The need for the Association's involvement in any discussion is also heightened by its historic interest in our electoral process and system of government, which is evidenced by the work of such entities as the Standing Committee on Election Law, the Sections of Administrative Law and Regulatory Practice, State and Local Government Law, the Government and Public Sector Lawyers Division, and the Standing Committee on Law and National Security. Any debate that contemplates an amendment to the Constitution or procedures to fill vacancies in representative government would only be enhanced by the participation of the Association.

The Standing Committee on Election Law has examined the issue of continuity of government and studied the various constitutional and statutory alternatives that have been proposed. The Committee has reviewed the current methods of filling vacancies in federal elective offices, identified the problems that would have to be addressed in the event of mass vacancies, and weighed the merits of different proposals. The Committee concluded that there was a need for additional procedures to resolve the problem of mass vacancies in the House of Representatives, and focused much of its attention on this issue. In considering remedies, the Committee immediately had to confront the fundamental principle of the House as an elective body selected to represent "the voice of the people," the problems of defining "mass vacancies" and determining "incapacitation," and the question of whether a constitutional amendment was a necessary remedy in the first instance.

### Current Methods of Addressing Vacancies

The issue of vacancies in representative government has been addressed in the Constitution and its amendments, as well as in federal and state statutes. The Twenty-Fifth Amendment provides remedies in the case of the President's death, resignation, disability, or removal from office. The impetus behind this amendment was the assassination of President John F. Kennedy in 1963. The amendment states that the Vice President will become President upon the President's death, resignation or removal from office. In the case of disability, the amendment sets forth a procedure by which the President can submit a voluntary written declaration to the President pro tempore of the Senate and the Speaker of the House of Representatives, declaring that the President is unable to discharge the powers and duties of the office, upon which declaration the Vice President immediately assumes the powers and duties of the office as Acting President. The amendment also sets forth a procedure by which the President can be declared unable to discharge the duties of the office through a written declaration of the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide. Further safeguards to ensure the transfer of power to legitimate authorities in the event of vacancies in both the offices of President and Vice President are set forth in the Presidential Succession Act of 1947.<sup>1</sup>

Vacancies in the U.S. Senate are governed by the Seventeenth Amendment, which provides for direct elections of Senators and allows for temporary appointments to fill vacant seats until special elections can be scheduled according to state law. The major purpose of this amendment was to replace the selection of Senators by state legislatures with direct popular election. This amendment was proposed on May 13, 1912, and was ratified on April 8, 1913. The Seventeenth Amendment allows individual states the discretion to permit the governor to temporarily appoint a successor for a Member of the Senate who has died in office, until an election is held to fill the vacancy.<sup>2</sup> Two states, Oregon and Wisconsin, require special elections and do not permit temporary appointments to fill the vacancy. Oklahoma generally requires a special election to fill the vacancy but allows for temporary appointment in some instances. Five other states, Alaska, Arizona, Hawaii, Utah, and Wyoming limit the governor's discretion in choosing the successor.<sup>3</sup> As a matter of current law, it is generally agreed that it would be relatively easy to reconstitute the Senate if a catastrophic event that killed a substantial number of Members were to occur.

All vacancies in the U.S. House of Representatives are governed by Article I, Section 2, Clause 4 of the Constitution, which requires vacant seats to be filled by means of special elections. These special elections are governed by individual state law. There is no constitutional provision for temporary appointments in the House, nor is there any such provision in state law. This emphasis on election reflects the Framers' conception of the House as a body composed of direct representatives of the people, who would reflect the people's voice, and thus provide an essential element of democratic government.<sup>4</sup>

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<sup>1</sup> 3 U.S.C. § 19 (2003).

<sup>2</sup> U.S. CONST. art. I, § 2, cl. 2.

<sup>3</sup> Sula P. Richardson & Thomas H. Neale, *House and Senate Vacancies: How Are They Filled?*, CRS Report 97-1009 GOV, (Updated January 22, 2003), at 2.

<sup>4</sup> Alexander Hamilton and James Madison, "Federalist #57," in *The Federalist Papers*, at [http://thomas.loc.gov/home/fedpapers/fed\\_57.html](http://thomas.loc.gov/home/fedpapers/fed_57.html) (last visited: May 6, 2004).

### The Need for Continuity of Government

What is the problem for continuity of government created by current law? In the case of a catastrophic event leading to mass vacancies in Congress, the Senate can be restored to full strength relatively quickly through gubernatorial appointments. However, the restoration of full representation in the House will be dependent on the completion of special elections. What is the major consequence of having to wait for elections to be completed before filling vacant House seats?

The major consequence of a delay in restoring full representation in the House is that the Congress might be unable to carry out its legislative duties due to the lack of a quorum. All legislative bodies have a quorum requirement, a provision to ensure that a minimum number of Members are present to carry out legislative business. The quorum requirement for Congress is less flexible than most quorum provisions because it is set forth in Article I of the Constitution, which states that “a majority of each [House] shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent Members.”<sup>5</sup> The simplest reading of this provision finds that a majority of the whole number of the House constitutes a quorum.<sup>6</sup> If the number of vacancies is large enough, the House would be unable to meet this quorum requirement and thus be unable to conduct legislative business. In this scenario, Congress would be unable to pass new legislation until sufficient vacancies are filled to achieve a quorum. Alternatively, Congress might have enough Members to call a quorum and take action, but the number of sitting Members may be reduced to the point where decisions are made by a relatively small number of Members representing a small portion of the country, and some states in such a circumstance may not be represented at all.

Proponents of a constitutional amendment note that there is an important symbolic and psychological value to restoring representation in government quickly to affirm the continuity of government and thus strengthen public confidence. They also contend that the lack of a quorum may lead to a situation in a time of crisis or national emergency wherein Congress would be unable to act for months. In this view, the time lag involved in the staging of special elections would prevent the Federal government from taking actions necessary to meet a continuing threat or respond to the effects of a catastrophe.

The Standing Committee considered the issues associated with the need for a quorum and the remedy of special elections very carefully. Specifically, the Committee considered the authority of government to act in response to attack or in the context of a national emergency, and assessed the extent of the limitations that might be placed on government action in the event of the lack of a quorum in the House during a period prior to the holding of special elections. The Committee believes that existing mechanisms are flexible enough to enable the government to take necessary and appropriate actions during the relatively brief period of time before Congress would be reconstituted.

The power of the executive branch of government is significant and cannot be understated in a time of war or national emergency. The authority of Presidential executive orders is derived from the Constitution by the President acting in his role of directing employees and actions of executive branch agencies or as Commander-in-Chief or from specific authorization from

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<sup>5</sup> U.S. CONST. art. I, § 5, cl. 1.

<sup>6</sup> For a discussion of the quorum requirement in the context of mass vacancies, see *Preserving Our Institutions: The Continuity of Congress*, Continuity of Government Commission, (2003), at 6-10.

Congress, including delegated emergency powers. In accordance with precedent and current legal doctrine, the President has broad authority to respond to attacks against the nation and its citizens, to protect American lives and property against threats, to act in emergency situations, and to carry out the administration of law. For example, in 2001, immediately following the attacks of September 11, President George W. Bush authorized a variety of actions, including the creation of an Office of Homeland Security within the executive branch.<sup>7</sup> The President's role as Commander-in-Chief is a powerful one, especially in times of crisis.

Although there are many actions that the government can undertake without a quorum in the House, appropriating funds is not one of them. The Committee identified the authority to appropriate funds as an essential power that would be needed in the immediate aftermath of a catastrophic event, but would be impossible to exercise if a quorum in the House was lacking. The Committee felt that statutory solutions were available to address this potential situation, and thus concluded that quorum considerations did not necessitate an amendment to the Constitution. A simple way to address this concern would be to add a standard clause to each and every appropriations bill that would provide for a continuing appropriation in the event of a catastrophic event or other occurrence leading to mass vacancies in the House and Senate.

#### Constitutional Versus Statutory Remedy

Perhaps the most publicized remedy to ensure continuity of government in the event of mass vacancies is one proposed by the Continuity of Government Commission ("Commission") convened by the American Enterprise Institute and the Brookings Institution. The Commission issued a report on June 4, 2003 that addresses the continuity of the Federal legislature.<sup>8</sup> The Commission's recommendations propose an amendment to the Constitution that would allow large-scale vacancies in the U.S. House of Representatives and Senate to be filled by means of temporary appointments. Appointments would be made either by state governors or drawn from a list of prospective appointees made in advance by each Member of Congress. The Commission's proposal would permit temporary appointments not only for Members whose seats are vacated, but also for Members who are declared to be incapacitated and thus unable to discharge the duties of office. Individual Members who are replaced due to incapacity would be able to return to their seats upon self-declarations that they are fit to return to office. Those who are appointed to seats in the House or Senate would serve until special elections are held to fill those seats. The Commission contends that this approach constitutes the most logical and expedient method of assuring a working legislature.

The alternative to an amendment to the Constitution is that of a statutory remedy in the form of proposed legislation that would provide for expedited elections. Most recently, House Judiciary Committee Chairman James Sensenbrenner, House Rules Committee Chairman David Dreier, and Representative Candice Miller have proposed legislation that would provide for expedited elections within 45 days of the announced vacancy in the event that large numbers of Members of Congress are killed.<sup>9</sup> Proponents of expedited elections believe that appointments of any kind, even those that are temporary, are contrary to the representative nature of the House of Representatives -- whose Members have always been elected as the people's representatives in Congress.

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<sup>7</sup> Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (Oct. 10, 2001).

<sup>8</sup> Continuity of Government Commission, *supra* note 6.

<sup>9</sup> H.R. 2844, 108<sup>th</sup> Cong. (2003)

## The Complexity of Incapacity

In considering these alternatives, the Standing Committee discussed the threshold level of vacancies that would be required to invoke special measures, whether temporary appointments or expedited elections, and whether the determination of vacancies should include Members who are “incapacitated.” Vacancies can be defined to include Members who are killed or those who have disappeared or are determined to be missing. It is a more difficult and complex task to determine how to replace Members of Congress who are “incapacitated.” Presumably, incapacitated Members would include those who are not dead, but are unable to discharge the duties of office or continue serving for other reasons (*e.g.*, those who are comatose or those who have incurred grave mental or physical injury). The term “presumably” is used because there is no standard definition of incapacity in situations such as the ones contemplated in this report. The laws governing mental and physical incapacitation are not easily transferable to the current example. Incapacity in other contexts is generally determined by adjudication or through a series of hearings -- there is not a simple checklist of items to consider. There are many factors that would have to be considered and many different scenarios in which to consider them. How long would an individual have to be incapacitated before the seat should be declared vacant? Who would be responsible for making that determination? Who would declare the individual incapacitated? And to whom would the declaration be made?

There is one potential mechanism available that might allow seats of incapacitated Members to become open for special election. Under current law, a two-thirds vote of a House of Congress is necessary to remove a Member from the relevant body (only the House of Representatives may remove a Representative and only the Senate may remove a Senator).<sup>10</sup> However, this procedure raises the issue of the quorum requirement and the number of Members needed to constitute the two-thirds. Where a majority of either chamber is “incapacitated,” preventing a quorum from being met, either body could still proceed with business if none of the remaining Members objected to the absence of a quorum. Alternatively, there is also some historical precedent for Houses of Congress to reinterpret the quorum requirement in times of crisis, as was the case during the Civil War.<sup>11</sup> Under this interpretation, Members remaining after a catastrophic event could remove “incapacitated” Members, thus creating a vacancy that could be filled by a special election.

In an effort to resolve the questions raised by the issue of “incapacity” in times of catastrophe, the Standing Committee examined the experience under the Twenty-Fifth Amendment in hopes of finding some guidelines that might govern determinations of incapacitation. Presidential disability has been the subject of great study, but recurring examination of this issue has not led to a narrower definition of presidential disability. Nor has experience provided much guidance in this matter. The procedure contained in Section 4 of the Twenty-Fifth Amendment, which allows the Vice President and a majority of the Cabinet officers to declare a president unable to discharge the powers and duties of office, has never been invoked. The procedure in Section 3 by which a president can make a self-declaration of disability and temporarily transfer power to the Vice President has produced no definitive precedents. In 1985, when President Ronald Reagan underwent an operation requiring anesthesia for eight hours, he declared that he was not

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<sup>10</sup> U.S. CONST. art. I, § 2, cl. 5.

<sup>11</sup> Continuity of Government Commission, *supra* note 6 at 8-9.

invoking the provision in the Twenty-Fifth Amendment, even though the letter transmitted to Congress laid out the elements of the Amendment.<sup>12</sup> In 2002, when President George W. Bush underwent a medical procedure requiring anesthesia for less than three hours, he did invoke the provisions of the Amendment.<sup>13</sup> In 1981, in the aftermath of the attempted assassination of President Reagan, the provisions of the Amendment were not invoked.<sup>14</sup>

Recent analyses of presidential disability have also failed to produce standards or guidelines that might be applicable for determining the incapacity of other Federal elected officials. In 1988, The Miller Center Commission on Presidential Disability and the 25<sup>th</sup> Amendment, a national bipartisan commission, studied this subject and issued recommendations, the most important of which highlighted the need for a contingency plan outlining the procedures for governing during certain medical situations.<sup>15</sup> Presidents George H.W. Bush, Bill Clinton, and George W. Bush adopted such plans, but they are classified for reasons of national security. In 1997, the White House Working Group on Presidential Disability presented recommendations that included a reiteration of the need for a medical contingency plan, as well as the need for a determination by “constitutional officials” as to whether a particular medical situation constituted a presidential disability.<sup>16</sup> Neither the Working Group nor subsequent national study groups attempted to define “presidential disability” beyond the broad concept of “unable to discharge the power and duties of the office.”

Presidential disability remains an as yet untested area and regrettably does not offer a blueprint for defining and developing standards for use in resolving the complexities of congressional incapacitation. While the Standing Committee has not ruled out some future consideration of the issue of incapacitation in the context of continuity of government, a variety of procedural questions would need to be addressed before developing a legislative remedy.

### Advantage of a Statutory Remedy

Although the rules governing succession in the executive branch and U.S. Senate have changed since the initial adoption of the Constitution, the rules applicable to vacancies in the House of Representatives have not. Historically, the only significant attempts to change the procedures for filling large numbers of vacant House seats were borne of the Cold War. Between 1945 and 1962, thirty constitutional amendments were proposed to authorize temporary appointments by governors.<sup>17</sup> Only three of these proposals were actually passed by a chamber of Congress. In each of these three instances, it was the Senate, the body that would not be affected by any change, that approved the measure. None of these bills enjoyed significant support in the House and none of the bills passed by the Senate were ever referred out of the House Judiciary

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<sup>12</sup> George J. Annas, J.D., M.P.H., *The Health of the President and Presidential Candidates - The Public's Right to Know*, 333 NEW ENG. J. MED. 945-949 (1995).

<sup>13</sup> Aaron Seth Kesselheim, M.D., J.D., *Privacy Versus the Public's Right to Know*, 23 J. LEGAL MED. 523, 537 (2002).

<sup>14</sup> *Id.* at 539.

<sup>15</sup> *Report of the Commission on Presidential Disability and the Twenty Fifth Amendment*, Miller Center Commission No. 4, (1988) at [http://www.millercenter.virginia.edu/programs/natl\\_commissions/past\\_commissions/comm\\_1988.pdf](http://www.millercenter.virginia.edu/programs/natl_commissions/past_commissions/comm_1988.pdf) (last visited: May 6, 2004).

<sup>16</sup> *Annenberg Presidential Series: Presidential Illness and the 25<sup>th</sup> Amendment*, Center for the Study of the Presidency, (1998) at <http://www.cspreidency.org/events/other/981021transcripts.pdf> (last visited: May 6, 2004).

<sup>17</sup> Sula P. Richardson, *House Vacancies: Proposed Constitutional Amendments for Filling Them Due to National Emergencies*, CRS Report RL32031 (August 12, 2003), at 4.

Committee. These proposals failed largely due to the desire to maintain the House's integrity as a body whose Members are always elected.

The argument could be made that the prospect of a nuclear exchange that informed thinking during the Cold War is analogous to the current prospect of a catastrophic attack on Congress. If this comparison is accepted, then it can be assumed that the prevailing sentiment to remedy the situation will remain the same. Indeed, historically, there has been substantial resistance to proposals to amend the Constitution to alter the method of selecting Members of the House of Representatives.

More broadly, there is great resistance to amending the Constitution under any circumstance. The Constitution can be amended by approval of two-thirds votes of the House and then Senate, followed by ratification by three-quarters of the states, or by statutory convention called by applications from two-thirds of the states. Since the Constitution was adopted and ratified 215 years ago, it has only been amended 27 times, and 10 of these amendments were adopted as components of the Bill of Rights. Furthermore, it is telling that the last amendment adopted by Congress, granting 18-year olds the right to vote, was ratified more than 30 years ago. One hallmark of the success of our government has been the restraint that Congress has shown with respect to constitutional change, and the willingness of legislatures to pursue statutory solutions to issues of the day before turning to constitutional amendments.

Although a number of amendments have been ratified fairly quickly, the time needed to secure ratification varies greatly, and Congressional approval offers no guarantee of success in the ratification process. The Twenty-Second Amendment, on the subject of presidential term limits, took almost four years to be ratified. The Twenty-Sixth Amendment, guaranteeing the right to vote to 18-year olds, was ratified during the Vietnam War in 100 days. The average time for ratification is one year, eight months, and seven days.<sup>18</sup> Some amendments approved by Congress, however, such as child labor, which was first sent to state legislatures in 1924, and equal rights for women, which was first sent to state legislatures in 1972, never achieved the three-fourths vote needed for ratification. Moreover, many proposed amendments, including those that have been raised in succeeding sessions of Congress or regularly introduced in Congress, have failed to secure the approval of both houses of Congress. Debate regarding a proposed balanced budget amendment has been going on since the 1930s, electoral college reform has been raised from time to time since the late 1940s, and a flag desecration amendment has been introduced in each chamber since 1990. A constitutional amendment will be more difficult to accomplish than statutory changes.

A constitutional amendment is not needed to revise the laws governing methods of selecting Members of the House of Representatives in the event of a catastrophe. Individual state laws governing special elections can be modified or enacted in order to provide for an expedited election schedule in such an event. As a case in point, California, the most populous state in our Union, has recently adopted a chapter in its election code related to vacancies in Congressional offices caused by catastrophe. Under the new California law, special elections to fill vacancies as a result of a catastrophe in the House of Representatives must be conducted no later than 70 days after the catastrophe, unless a regularly scheduled election will occur within 97 days of the catastrophe.<sup>19</sup> There have been concerns raised that under such circumstances it would be

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<sup>18</sup> David C. Huckabee, *Ratification of Amendments to the U.S. Constitution*, CRS Report 97-922 GOV, (September 30, 1997), at 1.

<sup>19</sup> CAL. ELEC. CODE Div. 10, Part 6, ch. 1, § 10733 (2003).



impossible for a state as large as California to conduct special elections in a fair and orderly fashion. As a rebuttal, one need only look to the recent October 2003 recall of then Governor of California Gray Davis. California law requires that the recall election of the Governor be held between 60 and 80 days after the date of the certification of the recall petition.<sup>20</sup> The recall election was statewide with a fairly high voter turnout of 61.2% of registered voters. There were no widespread or major reports of problems at the polls.

#### Recommendations of the Standing Committee

*Congress, the States and Territories should enact special election procedures for filling vacancies in the United States House of Representatives in the event of a catastrophe.*

The Standing Committee believes that special elections should be retained as the means of filling vacancies in the U.S. House of Representatives, and that procedures for expedited special elections should be adopted for filling disproportionate vacancies resulting from a catastrophic event. Such action is not needed for the U.S. Senate because the Seventeenth Amendment allows for temporary appointments for vacancies, regardless of the situation. We are cognizant that many respected individuals, organizations and Members of Congress advocate a constitutional amendment to allow temporary appointments for vacancies in the House of Representatives. We respectfully disagree; we believe that the Constitution should not be amended as a means of first resort. There are statutory remedies for filling large-scale vacancies in the House of Representatives. Expedited special elections should not be discounted out of hand. Consider the success of the recent recall of the governor of California -- an election that was conducted within 78 days of the announcement of the recall, with no reports of widespread problems. Special elections to replace Members of the House of Representatives will not be statewide elections and thus should be less complicated than the recall election of a governor of the largest state.

*Catastrophe is defined as an event or events that result in vacancies in at least 110 of the offices of the United States House of Representatives, or at least one-fourth of the total number of offices representing an affected State or Territory, or in the case of a State with four or fewer Members of the House, such number and circumstances as determined by the State legislature.*

A clear definition of catastrophe is needed to prevent legislation drafted in response to mass crisis events from superseding laws that govern single vacancies in Congress. There should be no mandated change in the procedures that individual states implement to replace an individual Member of Congress who has died during the term of office or resigned from office. The purpose of this proposed policy recommendation is to address instances where the nature of representative government is at stake, due to large-scale vacancies in the House of Representatives as a whole, or a significant number of vacancies in the delegation of an individual state or territory. The definition presented here and its guiding scenario contemplates the possibility that a catastrophic event need not affect the entire House in order to jeopardize

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<sup>20</sup> CAL. CONST. Art. II, § 15.

representation of the people. Consideration should also be given to situations that affect the representation in the House of a particular state or territory. If all of the seats in a delegation or a substantial portion of the seats in a delegation suddenly become vacant, there should be a remedy to fill these vacancies with expedited special elections.

*Vacancy is defined as the death or disappearance of a Representative or Delegate of Congress.*

Vacancy must be defined in terms of death of a Representative or the disappearance of a Representative who is presumed dead. On the subject of incapacity, we agree that in order to fill a vacancy in the House or Senate due to incapacity, an amendment to the Constitution would be required. We believe, however, that absent an objective definition of incapacitation and a procedure to determine its applicability, it is premature to create a solution, when the problem cannot yet be defined. Thus, with regard to incapacitation, until the medical profession and legislators can agree upon a definition, we do not believe that it is feasible or prudent to develop solutions in an as yet indeterminate subject area. This is a rich area for study and debate, and there must not be a rush to judgment. There can be no doubt that the Constitution should not be amended in this particular area without greater study as to how to define and resolve incapacity.

*The executive authority of each State or Territory, within seven days of a vacancy, should issue writs of election to fill vacant seats and such special elections should take place within 56 calendar days thereafter. If a vacancy occurs in close proximity to an already scheduled election the special election can be consolidated with the already scheduled election. Absentee ballots for uniformed services and overseas voters should be transmitted by a State or Territory no later than 15 days after the writ of election has been issued; valid ballots should be counted by the State or Territory if received or post marked on or before the date of the election.*

The remedy of expedited special elections will assure that the House is able to reconstruct itself in a fairly short period of time. The state of California's recently enacted statute, "Vacancies in Congressional Offices Caused by Catastrophe," is an example of the ability of states to create a legislative remedy to the situation, without amending the Constitution. Also, we must not forget that California's October 2003 gubernatorial recall election has proven that expedited elections do not necessarily mean that problems at the polls will ensue.

With the status of today's communication and technology, seven days is a reasonable period of time to determine the status of an individual legislator following a catastrophic event. To determine a reasonable time in which a special election can be conducted, the Standing Committee surveyed existing state statutes on special elections -- whose time frames range between 28 and 180 days, the majority of which fall within a 40 to 90 day period. Given the circumstances under which the proposed provisions would be triggered, the Standing Committee opted for the shortest, most reasonable time frame in order to reconstitute Congress quickly.

The voices of our military serving and citizens living abroad must not be lost in any expedited special election process. Absentee ballots for uniformed services and overseas voters should be transmitted by States and Territories no later than 15 days after the writ of election has been

issued. Today's technology allows for many other methods of ballot transmittal than traditional mail -- ballots can now be transmitted via facsimile, e-mail or even downloaded from the Internet. The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) also allows for the use of a federal write-in absentee ballot, a universal ballot that may be used by UOCAVA citizens who have applied in a timely manner, but have not received the requested absentee ballot.<sup>21</sup> There have been complaints in previous election cycles that overseas and military mail service has greatly delayed the return of ballots, thus disenfranchising an important segment of our population. The Pentagon and the postal service is currently in the process of developing a method of handling ballots to ensure priority delivery.<sup>22</sup> Technology, the existence of a federal write-in ballot, and a more efficient overseas mail system provide for the ability to set a deadline that ballots must be post marked or received by the date of the election in order to be counted. The return and counting of military and overseas ballots has always been a sensitive issue. It is unfair to penalize men and women in the armed forces and their families by not counting ballots mailed in a timely fashion, but received too late to be counted, especially when the late receipt is not the voter's fault. Thus, faced with the delicate balance between the need for an expedited election and the need to ensure that all absentee ballots, cast in a timely fashion, are counted, we believe that our proposed solution is reasonable and equitable. The many methods now available to overseas and military voters to receive and return an absentee ballot, coupled with priority handling of overseas ballots, should ensure that overseas absentee ballots that are at least postmarked by the day of the election will be returned in time to be counted. Allowing any later time frame would make the process too unwieldy and might potentially have the effect of allowing individuals to vote after receiving news of election day results.

*Congress should incorporate a provision into each appropriations bill or continuing resolution for continued funding in the event of a catastrophe and a quorum cannot be met.*

There is a legitimate concern that in the event of a catastrophic event, there may be a need in the immediate days after the event for ongoing funding of certain programs and government functions or funding for new initiatives. The solution to this problem is for Congress to incorporate a provision into each appropriations bill or continuing resolution for continued funding in the event of a catastrophe. The executive power of the President can also be used in instances of extreme emergency if necessary.

## Conclusion

Vacancies in our elective offices of government must be addressed through a fair and efficient process. The best methods to reconstitute our government after a catastrophic event are not easily discernable. As evidenced by the current debate, there is no simple answer and there should be no rush to judgment. There is a valid statutory remedy to the solution: large-scale vacancies in the House resulting from a catastrophic event should be filled by expedited special elections. We obviously do not live in the same world as our founding fathers, but we should respect our constitutional heritage and give heed to the fact that the Constitution has only been amended 27 times in the last 215 years. Amendments to the Constitution should only be

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<sup>21</sup> 42 U.S.C. § 1973ff-2 (2003).

<sup>22</sup> Dan Keating, *Pentagon to Try and Fix War Zone Voting Woes*, Washington Post, April 30, 2004, at A27.

proposed in the most urgent or incontrovertible situations, as a remedy of last resort, not the first course of action.

Respectfully Submitted,

William B. Canfield, III  
Chair

August 2004

## GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations

Submitting Entity: Standing Committee on Election Law

Submitted By: William B. Canfield, III, Chair

1. Summary of Recommendation(s).

This recommendation urges that Congress, the states and territories enact special election procedures for filling vacancies in the United States House of Representatives in the event of a catastrophe.

2. Approval by Submitting Entity.

Approved by the Standing Committee on Election Law on 6 May 2004.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

n/a.

5. What urgency exists which requires action at this meeting of the House?

Following the events of September 11, the issue of continuity of government has been raised. Currently in both houses of Congress this is ongoing debate regarding the ability of Congress to reconstitute itself in the event of a major disaster or catastrophe. Action at this meeting of the House will allow the Association to participate in the ongoing and subsequent debates in Congress, the states and territories.

6. Status of Legislation. (If applicable.)

H.R. 2844, calling for special elections in the event of a catastrophe, was adopted by the House of Representatives on 22 April 2004. It was placed on the calendar of the Senate on 26 April 2004. There is currently no companion bill in the Senate.

7. Cost to the Association. (Both direct and indirect costs.)

n/a

8. Disclosure of Interest. (If applicable.)

n/a

9. Referrals.

In late May 2004, this Report and Recommendation was referred to the Chairs and staff of the Sections of Administrative Law and Regulatory Practice, Business Law, Individual Rights and Responsibilities, State and Local Government Law, the Division for Government and Public Sector Lawyers, and the Standing Committee on Law and National Security.

10. Contact Person. (Prior to the meeting.)

Elizabeth M. Yang, Director  
Standing Committee on Election Law  
American Bar Association  
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Washington, DC 20005  
202/662-1692

11. Contact Person. (Who will present the report to the House.)

William B. Canfield, III, Chair  
Williams & Jensen  
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