

CONTINUITY IN REPRESENTATION ACT OF 2005

FEBRUARY 24, 2005.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. NEY, from the Committee on House Administration,
submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 841]

[Including cost estimate of the Congressional Budget Office]

The Committee on House Administration, to whom was referred the bill (H.R. 841) to require States to hold special elections to fill vacancies in the House of Representatives not later than 45 days after the vacancy is announced by the Speaker of the House of Representatives in extraordinary circumstances, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Continuity in Representation Act of 2005”.

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

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

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

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

“(b) SPECIAL RULES IN EXTRAORDINARY CIRCUMSTANCES.—

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

“(2) TIMING OF SPECIAL ELECTION.—A special election held under this subsection to fill a vacancy shall take place not later than 45 days after the Speaker of the House of Representatives announces that the vacancy exists, unless,

during the 75-day period which begins on the date of the announcement of the vacancy—

“(A) a regularly scheduled general election for the office involved is to be held; or

“(B) another special election for the office involved is to be held, pursuant to a writ for a special election issued by the chief executive of the State prior to the date of the announcement of the vacancy.

“(3) NOMINATIONS BY PARTIES.—If a special election is to be held under this subsection, the determination of the candidates who will run in such election shall be made—

“(A) by nominations made not later than 10 days after the Speaker announces that the vacancy exists by the political parties of the State that are authorized by State law to nominate candidates for the election; or

“(B) by any other method the State considers appropriate, including holding primary elections, that will ensure that the State will hold the special election within the deadline required under paragraph (2).

“(4) EXTRAORDINARY CIRCUMSTANCES.—

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

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

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

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

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

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

“(5) PROTECTING ABILITY OF ABSENT MILITARY AND OVERSEAS VOTERS TO PARTICIPATE IN SPECIAL ELECTIONS.—

“(A) DEADLINE FOR TRANSMITTAL OF ABSENTEE BALLOTS.—In conducting a special election held under this subsection to fill a vacancy in its representation, the State shall ensure to the greatest extent practicable (including through the use of electronic means) that absentee ballots for the election are transmitted to absent uniformed services voters and overseas voters (as such terms are defined in the Uniformed and Overseas Citizens Absentee Voting Act) not later than 15 days after the Speaker of the House of Representatives announces that the vacancy exists.

“(B) PERIOD FOR BALLOT TRANSIT TIME.—Notwithstanding the deadlines referred to in paragraphs (2) and (3), in the case of an individual who is an absent uniformed services voter or an overseas voter (as such terms are defined in the Uniformed and Overseas Citizens Absentee Voting Act), a State shall accept and process any otherwise valid ballot or other election material from the voter so long as the ballot or other material is received by the appropriate State election official not later than 45 days after the State transmits the ballot or other material to the voter.

“(6) APPLICATION TO DISTRICT OF COLUMBIA AND TERRITORIES.—This subsection shall apply—

“(A) to a Delegate or Resident Commissioner to the Congress in the same manner as it applies to a Member of the House of Representatives; and

“(B) to the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, Guam, and the United States Virgin Islands in the same manner as it applies to a State, except that a vacancy in the representation from any such jurisdiction in the House shall not be taken into account by the Speaker in determining whether vacancies in the representation from the States in the House exceed 100 for purposes of paragraph (4)(A).

“(7) RULE OF CONSTRUCTION REGARDING FEDERAL ELECTION LAWS.—Nothing in this subsection may be construed to affect the application to special elections under this subsection of any Federal law governing the administration of elec-

tions for Federal office (including any law providing for the enforcement of any such law), including, but not limited to, the following:

- “(A) The Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.), as amended.
- “(B) The Voting Accessibility for the Elderly and Handicapped Act (42 U.S.C. 1973ee et seq.), as amended.
- “(C) The Uniformed and Overseas Citizens Absentee Voting Act (42 U.S.C. 1973ff et seq.), as amended.
- “(D) The National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), as amended.
- “(E) The Americans With Disabilities Act of 1990 (42 U.S.C. 12101 et seq.), as amended.
- “(F) The Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.), as amended.
- “(G) The Help America Vote Act of 2002 (42 U.S.C. 15301 et seq.), as amended.”

PURPOSE OF THE LEGISLATION

H.R. 841, the Continuity in Representation Act of 2005, establishes a framework for conducting expedited special elections to fill House vacancies resulting from a catastrophic terrorist attack or other extraordinary circumstances. The purpose of H.R. 841 is to ensure that a functioning House of Representatives would be in place with the ability to operate effectively and with legitimacy in the wake of a potential catastrophic terrorist attack.

Ever since the terrible and fateful morning of September 11, 2001, the American people have become painfully aware of the destructive intent of our country’s terrorist enemies as well as the increasingly sophisticated and devastating methods by which they carry out their deadly work. The possibility that terrorists could detonate a nuclear, chemical, or biological weapon of mass destruction in our Nation’s capital—annihilating major portions of our federal government and potentially killing dozens or hundreds of Members of Congress—is one that we cannot ignore.

If such an attack were ever to occur, the presence of strong national leadership would be more important than ever. The American people would be desperately seeking reassurance that their government remained intact and retained the capability of acting vigorously in the nation’s defense. Therefore, it would be essential that a functioning Congress be in place with the ability to operate with legitimacy as soon as possible.

Any potential solution to this issue must take into account the fundamental role the House plays in our constitutional structure. When drafting the federal Constitution, our Founding Fathers designed the House to be the branch of government closest to the people. They believed the only way this objective could be accomplished was through frequent elections. Consequently, the Constitution—in Article I, Section 2, Clause 4—provides that vacancies in the House may be filled only through special elections. As a result, no Member has ever served in this House who was not first elected by the people he or she represents.

H.R. 841 presents a balanced and measured solution to this most complex and difficult matter. The Continuity in Representation Act of 2005 would ensure the continuing operation of the House during times of national crisis, while at the same time preserving the character of the House as an elected body. For this the reason, the Committee seeks to move the process forward by favorably reporting this important legislation.

SUMMARY OF THE LEGISLATION

H.R. 841, as introduced, is identical to H.R. 2844, the Continuity in Representation Act of 2004, which passed in the House last year by an overwhelming vote of 306–97. During the mark-up, Chairman Ney introduced an amendment in the nature of a substitute that maintains the structure and details of the introduced bill but contains a number of modifications to accommodate concerns raised by the minority and the states.

H.R. 841, as amended, provides for expedited special elections to be held in “extraordinary circumstances.” Specifically, this legislation requires that within 45 days of the Speaker of the House of Representatives announcing that more than 100 vacancies exist in the membership of the House, the executive authority of a State in which a House vacancy exists shall hold a special election to fill such vacancy. The majority opinion of state election officials appears to be that 45 days would provide sufficient time to plan and prepare for an expedited special election.

Under H.R. 841, as amended, the candidates running in expedited special elections would be selected either by political parties authorized by state law to nominate candidates—which would have up to 10 days following the Speaker’s announcement to nominate a candidate to run in the special election—or by other methods the state deems appropriate, including holding special elections, provided the state is otherwise able to meet the 45-day deadline for conducting the special elections. Thus, the states are given greater flexibility regarding the procedures by which candidates would be selected for expedited special elections.

H.R. 841, as amended, also provides that if a state is scheduled to hold a regularly scheduled general election or a previously scheduled special election within 75 days of the Speaker’s announcement of more than 100 vacancies, that state would not be required to schedule an expedited special election, thus in essence, affording a 30-day extension to such states. H.R. 841, as introduced, granted the 30-day extension only to states whose general election machinery was already in motion. H.R. 841, as amended, permits states that have scheduled special elections prior to the Speaker’s announcement to avail themselves of this extension as well.

H.R. 841, as amended, also protects the ability of military personnel and overseas citizens to fully participate in expedited special election by instructing that absentee ballots be transmitted to such voters within 15 days of the Speaker’s announcement and requiring that such absentee ballots be counted if received not later than 45 days after the state transmits them. In addition, the amendment clarifies that its expedited special election procedures are equally applicable to the representatives of the District of Columbia and the U.S. territories. Furthermore, H.R. 841, as amended, reiterates that federal voting and election laws would remain in effect for any expedited special elections.

Any legal action challenging the announcement of more than 100 vacancies made by the Speaker would have to be filed within two (2) days of the announcement in the United States District Court having jurisdiction over the congressional district whose seat has been declared to be vacant. Such a challenge would be heard by a

three-judge panel convened pursuant to 28 U.S.C. § 2284, and a copy of the complaint would need to be delivered to the Clerk of the House of Representatives. The executive authority of the relevant state would have the right to intervene either in support of or opposition to the challenge. A final decision by the panel would be required to be issued within three (3) days of the filing and would not be reviewable.

COMMITTEE CONSIDERATION OF THE LEGISLATION

INTRODUCTION AND REFERRAL

On Wednesday February 16, 2005, Mr. Sensenbrenner introduced H.R. 841, Continuity in Representation Act of 2005, which was referred to the Committee on House Administration.

HEARINGS

The Committee on House Administration did not hold hearings on H.R. 841. (In the 108th Congress, the Committee held a hearing on H.R. 841's predecessor, H.R. 2844.)

MARKUP

On Thursday February 17, 2005, the Committee met to mark up H.R. 841. The Committee favorably reported H.R. 841, as amended, by voice vote, a quorum being present.

MATTERS REQUIRED UNDER THE RULES OF THE HOUSE

COMMITTEE RECORD VOTES

Clause 3(b) of House rule XIII requires the results of each record vote on an amendment or motion to report, together with the names of those voting for and against, to be printed in the committee report.

Amendment to the amendment in the nature of a substitute

Offered by Ms. Millender-McDonald. The first vote during the mark-up came on an amendment to extend the amount of time during which expedited special elections must be held from 45 days to 60 days.

The amendment was rejected by voice vote.

Amendment in the nature of a substitute

Offered by Mr. Ney. The second vote during the markup came on the amendment in the nature of a substitute offered by Mr. Ney.

The amendment affords states greater flexibility in selecting candidates for expedited special elections, grants states with previously scheduled special elections the 30-day extension, and clarifies its applicability to representatives of D.C. and the U.S. territories.

The amendment was agreed to by voice vote.

Report favorably to the House

The Committee voted to report H.R. 841 favorably, as amended. The vote to report favorably was approved by voice vote.

COMMITTEE OVERSIGHT FINDINGS

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

GENERAL PERFORMANCE GOALS AND OBJECTIVES

The Committee states, with respect to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, that the goal and objective of H.R. 841 is to ensure that a functioning House of Representatives would be in place with the ability to operate with legitimacy in the wake of a catastrophic terrorist attack or other extraordinary circumstances.

CONSTITUTIONAL AUTHORITY

In compliance with clause 3(d)(1) of rule XIII, the Committee states that Article 1, Section 4 of the U.S. Constitution grants Congress the authority to make laws governing the time, place and manner of holding Federal elections.

FEDERAL MANDATES

The Committee states, with respect to section 423 of the Congressional Budget Act of 1974, that the bill does not include any significant Federal mandate.

PREEMPTION CLARIFICATION

Section 423 of the Congressional Budget Act of 1974 requires the report of any committee on a bill or joint resolution to include a committee statement on the extent to which the bill or joint resolution is intended to preempt state or local law. The Committee states that H.R. 841 preempts state and local laws regarding the timing of holding special elections to fill vacancies in the House of Representatives in the event of extraordinary circumstances, unless such state and local laws are otherwise consistent with the timeframes for holding expedited special elections set forth in H.R. 841.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 24, 2005.

Hon. ROBERT W. NEY,
*Chairman, Committee on House Administration,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 841, the Continuity in Representation Act of 2005.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Sarah Puro.

Sincerely,

DOUGLAS HOLTZ-EAKIN,
Director.

Enclosure.

H.R. 841—Continuity in Representation Act of 2005

Summary: H.R. 841 would provide for the continuity of the House of Representatives in the wake of a catastrophic event. The legislation would require states to hold special elections to fill vacancies in the House of Representatives within 45 days after an announcement by the Speaker of the House of “extraordinary circumstances”—effectively 100 or more vacancies in the House of Representatives. The bill also would provide for judicial review of challenges to the announcement of extraordinary circumstances. CBO estimates that enacting H.R. 841 would have no significant impact on the federal budget.

Section 4 of the Unfunded Mandates Reform Act (UMRA) excludes from the application of that act any legislative provisions that enforce the constitutional rights of individuals. CBO has determined that certain provisions of H.R. 841 would fall within that exclusion because it would protect the rights of overseas and military voters to cast a ballot. Other provisions of the bill contain no private-sector mandates as defined in UMRA. However, by requiring states to hold elections within 45 days of an announcement of “extraordinary circumstances,” H.R. 841 would contain an intergovernmental mandate as defined in UMRA. CBO estimates that the annual cost of the mandate over the next five years would not exceed the threshold established in that act (\$62 million in 2005, adjusted annually for inflation).

Estimated cost to the Federal Government: CBO estimates that enacting H.R. 841 would have no significant impact on the federal budget over the next few years. Although the bill could affect the timing and amounts spent on Members’ salaries (which are classified as mandatory) and office expenses (which are subject to appropriation), CBO expects that any such impact is unlikely to occur and would be minor in any event.

Intergovernmental and private-sector mandates contained in the bill: H.R. 841 would require states to hold elections within 45 days after an announcement by the Speaker of the House that there are extraordinary circumstances—effectively 100 or more vacancies in the House of Representatives—unless a regularly scheduled general election would occur within 75 days. This intergovernmental mandate would require 40 states to adopt a quicker time frame

than they currently have for holding general elections in the event of a vacancy that does not coincide with a regularly scheduled election; some states also would need to amend their constitutions. Further, the bill likely would prohibit states from holding primaries—as required by law in some states—because the short time frame for the general election would logistically prohibit the holding of a primary.

Section 4 of the Unfunded Mandates Reform Act excludes from the application of that act any legislative provisions that enforce the constitutional rights of individuals. CBO has determined that section 2(5) of H.R. 841 would fall within that exclusion because it would protect the voting rights of citizens living overseas, including members of the armed forces. Therefore, CBO has not reviewed this section for mandates. Other provisions of the bill contain no private-sector mandates as defined in UMRA.

Estimated direct costs of the mandates to state and local governments: (Based on information from state and local election professionals, CBO estimates that the cost to run a special election ranges from \$200,000 to \$500,000 per district (in 2004 dollars), depending on the circumstances and location of the special election, the total number of special elections being held nationwide, and other factors. In the absence of the bill, states would hold elections and fill vacancies, but CBO estimates that the new requirements and short time frame required by the bill would likely generate significant additional costs for states. The likelihood is small that, over the next five years, events would occur triggering the provisions in H.R. 841; therefore, CBO estimates that the cost of mandates contained in the bill would not exceed the threshold established in UMRA (\$62 million in 2005, adjusted annually for inflation). Further, even in the event of extraordinary circumstances, it is unlikely that the additional requirements would generate extra costs to states that would exceed that threshold.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

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

SECTION 26 OF THE REVISED STATUTES OF THE UNITED STATES

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

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

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

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

(A) a regularly scheduled general election for the office involved is to be held; or

(B) another special election for the office involved is to be held, pursuant to a writ for a special election issued by the chief executive of the State prior to the date of the announcement of the vacancy.

(3) *NOMINATIONS BY PARTIES.*—If a special election is to be held under this subsection, the determination of the candidates who will run in such election shall be made—

(A) by nominations made not later than 10 days after the Speaker announces that the vacancy exists by the political parties of the State that are authorized by State law to nominate candidates for the election; or

(B) by any other method the State considers appropriate, including holding primary elections, that will ensure that the State will hold the special election within the deadline required under paragraph (2).

(4) *EXTRAORDINARY CIRCUMSTANCES.*—

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

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

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

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

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

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

(5) *PROTECTING ABILITY OF ABSENT MILITARY AND OVERSEAS VOTERS TO PARTICIPATE IN SPECIAL ELECTIONS.*—

(A) *DEADLINE FOR TRANSMITTAL OF ABSENTEE BALLOTS.*—In conducting a special election held under this subsection to fill a vacancy in its representation, the State

shall ensure to the greatest extent practicable (including through the use of electronic means) that absentee ballots for the election are transmitted to absent uniformed services voters and overseas voters (as such terms are defined in the Uniformed and Overseas Citizens Absentee Voting Act) not later than 15 days after the Speaker of the House of Representatives announces that the vacancy exists.

(B) PERIOD FOR BALLOT TRANSIT TIME.—Notwithstanding the deadlines referred to in paragraphs (2) and (3), in the case of an individual who is an absent uniformed services voter or an overseas voter (as such terms are defined in the Uniformed and Overseas Citizens Absentee Voting Act), a State shall accept and process any otherwise valid ballot or other election material from the voter so long as the ballot or other material is received by the appropriate State election official not later than 45 days after the State transmits the ballot or other material to the voter.

(6) APPLICATION TO DISTRICT OF COLUMBIA AND TERRITORIES.—This subsection shall apply—

(A) to a Delegate or Resident Commissioner to the Congress in the same manner as it applies to a Member of the House of Representatives; and

(B) to the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, Guam, and the United States Virgin Islands in the same manner as it applies to a State, except that a vacancy in the representation from any such jurisdiction in the House shall not be taken into account by the Speaker in determining whether vacancies in the representation from the States in the House exceed 100 for purposes of paragraph (4)(A).

(7) RULE OF CONSTRUCTION REGARDING FEDERAL ELECTION LAWS.—Nothing in this subsection may be construed to affect the application to special elections under this subsection of any Federal law governing the administration of elections for Federal office (including any law providing for the enforcement of any such law), including, but not limited to, the following:

(A) The Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.), as amended.

(B) The Voting Accessibility for the Elderly and Handicapped Act (42 U.S.C. 1973ee et seq.), as amended.

(C) The Uniformed and Overseas Citizens Absentee Voting Act (42 U.S.C. 1973ff et seq.), as amended.

(D) The National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), as amended.

(E) The Americans With Disabilities Act of 1990 (42 U.S.C. 12101 et seq.), as amended.

(F) The Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.), as amended.

(G) The Help America Vote Act of 2002 (42 U.S.C. 15301 et seq.), as amended.

MINORITY VIEWS OF RANKING MEMBER JUANITA
MILLENDER-McDONALD AND REPRESENTATIVE ROBERT
A. BRADY

H.R. 841, a bill to require States to hold special elections to fill vacancies in the House of Representatives in extraordinary circumstances, as reported with an amendment by the Committee on House Administration, differs only slightly from H.R. 2844, which passed the House in the 108th Congress and died in the Senate. It is a fatally flawed bill which compromises democracy and it deserves defeat again this year.

H.R. 841 contains a wish list of provisions which would set impractical deadlines, ignore the rights of candidates to run and of voters to participate in elections, and create confusion in the aftermath of a national catastrophe when the country needs the stability of established constitutional processes and the legitimacy of the rule of law.

H.R. 841 would require states to invent mechanisms to implement what may be radical changes in their own election laws and political structures. The bill creates a procedure that may be little more than a shell, calls it a "special election", and leaves states to pick up the pieces. What would happen if the states fail to do so? The bill does not say.

We want to stress that H.R. 841 has no partisan content. It is simply a poorly written piece of legislation. Congressional continuity, which encompasses other issues beyond the scope of this legislation, is not a partisan issue. No one gains advantage when hundreds of Members may be dead, incapacitated, or confined to hospitals or burn wards.

PRINCIPAL PROVISIONS

This legislation would exercise Congress' extraordinary powers under Article I, Section 4, Clause 1 of the Constitution to alter existing state laws which set the "Times, Places and Manner" of elections to the House of Representatives to change the way special elections to fill vacancies are conducted nationwide. The bill's provisions would take effect only under "extraordinary circumstances", which is defined by the legislation as being at any time after the Speaker of the House announces that the number of vacancies in the body exceeds 100.

By shortening the time frame for the conduct of such elections to a maximum of 45 days following the Speaker's declaration, the sponsors claim that the legislation would bring the House back to full strength following a catastrophe more rapidly than if existing state laws, which vary widely, were utilized.

Two major amendments sponsored by the Minority were accepted last year, one of them very reluctantly, on the House Floor. The first amendment, offered by Representatives Skelton and Maloney,

dealt with the time frame for getting ballots to overseas absentee and military voters; the other was adopted as the motion to recommit by Representative Watt after the Rules Committee refused to allow then-Ranking Member Larson to present it in the Committee of the Whole in the form of an amendment. This amendment was intended to protect major civil rights and voting rights laws, and laws to protect handicapped voters, from being gutted. Its compatibility with the bill's 45-day deadline remains unclear. Both provisions remain in the new bill.

60-DAY COMPROMISE REJECTED

The bill as currently designed probably cannot be improved enough to make it workable, but the Chairman accepted some ideas from the Minority to clarify legislative language before the February 17 markup. However, the Majority voted down our amendment to give the states greater flexibility by allowing a 60-day period for the conduct of the expedited special elections. This was an effort to find common ground after the House rejected a 75-day time frame offered last year by Representative Larson.

The amendment which was offered in the Committee by Ranking Member Millender-McDonald would have introduced greater flexibility into the expedited process, to allow more overall time for the elections, and to give the states additional options on how to conduct them. 60 days is not a magic bullet, any more than 45 days is, but experience—as well as decades spent as candidates running for public office—teaches us to err on the side of flexibility, especially at a time of potential national crisis.

We anticipate that the 60-day proposal will be submitted again for a vote by the full House.

Proponents seeking a truncated time frame for this legislation have often sought to cite Doug Lewis, Executive Director of the Election Center, which represents the nation's voter registration and elections officials and administrators at the city, township, county and state levels. But he has not endorsed this bill and has said that 45 days is still too short and that a timeframe closer to 60 days would provide states with greater assurance of success. State and local election officials at election process forums over the last two years have raised questions about the time frame as well.

In testimony prepared before the Committee on House Administration on September 18, 2003, Mr. Lewis framed the debate as follows:

What is an election? Is it a date-certain event so that voters can vote, or is it more than that? Is an election in American democracy really a "process" that includes time for the identification of candidates, the ability of candidates to mount a campaign, to raise funds, to attract supporters, to inform the voters of what their choices are between the individual contestants, and then going to the polls to make that choice?

The point is this: if it is only an event, then we can structure an event in a short time frame and carry off the event as flawlessly as possible. If, however, you define it

in the broader “process” terms, then you have to allow the process time to work.

We agree that elections are a process which implements democracy. A longer time frame allows states more time to deal with the mechanics of elections, and allows the public more time to gain awareness of the candidates and the campaign.

After polling elections officials from around the country, Doug Lewis summarized the results:

While the responses indicated a variety of dates ranging from the shortest time period of 35 days (after determination of who the candidates will be) to a period of four months, it appears that elections administrators feel that they can conduct an election with as few as 45 days. However, the elections officials would be far more confident that the interests of democracy would be best served by having up to 60 days to get the elections organized and held. Each additional day beyond the 45-day minimum time frame creates greater confidence in the process. [Testimony of Doug Lewis before the Committee on House Administration, page 3.]

We also prefer to come down on the side of the interests of democracy. And our instincts as candidates tell us that 45-days is simply too short.

Since the intent of the bill is to fill vacancies in the House, we should not create artificial barriers to doing so. Nothing in the bill itself provides that a Member-elect would rush to the Floor to be sworn in at the end of 45-days, 60-days or any other such framework; states must correct their results, certify their returns, await receipt of absentee ballots and possibly recount ballots in close races. The 2004 Washington gubernatorial race demonstrates the possibilities for controversy and delay inherent in the election administration process.

No House can bind a future one, and the House can make its own judgments based on the totality of facts in any potential election contest based on a potential breach of the 45-day deadline. However, proponents should admit that if the states, for whatever reason, fail to comply with the bill’s statutory scheme, attempts to enforce it would defeat their ultimate objective of filling House seats.

NOMINATION OF CANDIDATES

Controversy has long surrounded provisions in paragraph 3 of the bill requiring that party nominees be selected within 10 days of the Speaker’s announcement. This provision had the effect of banning primaries to select nominees for the House and requiring that a party committee or related entity make the decision, an unnecessary restriction which did nothing to enhance the bill’s overall objective. Chairman Ney’s manager’s amendment, while not excising this language, pulled some of its teeth by allowing the states to consider having primaries and other options to nominate candidates. The 45-day overall deadline will only give them limited flexibility in that regard, however.

Some states already use a party-committee system to conduct special elections under normal circumstances. Many others conduct primary elections, and any system which cuts the electorate out of critical decisions would be anathema to voters in those states.

We feel strongly about this issue because there are some states in which the parties play a lesser roll in selecting candidates. The original bill would have gutted long-standing political traditions across the nation, such as primaries, at a time when a reconstituted Congress would need to renew its legitimacy from the American people.

PULLING THE TRIGGER

At the hearing before our Committee on November 19, 2003, questions arose about the operation of the trigger mechanism in the bill, which would be activated by the Speaker when the threshold exceeding 100 vacancies is reached. While the bill does not say so specifically, apparently provisions of House rules allowing a "Speaker pro tempore" designated from a list left by a deceased Speaker to pull the trigger would kick in.

There is a problem with this formulation. What would happen if all of the Members of the House were killed or incapacitated, leaving no one to pull the trigger?

During the Floor debate on April 22, 2004 on H.R. 2844, Representative Dreier, one of that bill's lead sponsors, attempted to respond to this question as posed by Representative Watson. However, in doing so he raised more questions than he answered. He said "* * * it would be up to the people to come together and make the determination as the rebuilding process begins." [Congressional Record, p H2331]. How? Isn't the purpose of this bill supposedly to facilitate the return of representative government, the kind the Constitution gives to us? It is the responsibility of Congress to anticipate and find solutions to problems when it enacts laws, not to rely on some vague national town meeting if the bill fails to work. This is yet another example of how the bill's sponsors have not thought it through.

The Manager's amendment does address a different problem with the trigger, raised by the Minority. As originally written, the bill would have cancelled ongoing special elections once the trigger point was reached. With candidates perhaps already chosen and campaigns already in progress under state laws, it would have forced new campaigns to begin under provisions of the Federal statute, possibly with new candidates and certainly with chaos. It is easy to imagine such a scenario if a catastrophe created many vacancies in the House, but still fewer than 101.

The chief executive authorities of states must, under the Constitution, issue writs of election to fill these vacancies under terms of state law. Imagine a scenario where Members may be suffering from radiation poisoning or severe burns, with fatalities occurring over a period of time. It might be some time before 101 vacancies were reached, in stages.

The new provision would clarify that any special elections which are already in progress to fill vacancies at the time that the threshold is reached could continue, under a new 75-day deadline following the Speaker's announcement. Only vacancies not declared

until after the triggering would fall totally under the Federal provisions. We would have preferred to allow the pre-trigger special elections to proceed to their normal conclusion under state law, but the clarification is superior to the original language in the bill.

The Manager's amendment would also allow expedited special elections under the Federal statute to fill the seats of the four delegates to the House and the resident commissioner of Puerto Rico, if those seats were vacant at the time the 101-Member threshold was reached. This provision was suggested by our colleague from the District of Columbia, Eleanor Holmes Norton, during the Floor debate last year, and the bill's sponsors have accepted language by Ranking Member Millender-McDonald to implement it.

The delegates and resident commissioner are not Members of the House elected from states, and their presence or absence would have no effect on the whole number of the House or its ability to achieve a quorum. The Speaker does not take formal notice of vacancies in these positions under the House rules. However, allowing their constituencies to participate in expedited elections could help ensure that new delegates might appear more quickly to serve as a voice, if not a vote, in the repopulating House of Representatives. How the exercise of this provision might affect these unique constituencies in practice is unclear, as it is for congressional seats generally.

ABSENTEE VOTING

In a provision retained from the last Congress, the bill urges, but does not require, states to ensure to the greatest extent practicable, including through use of electronic means, that absentee ballots are transmitted not later than 15 days after the Speaker declares that the 101-vacancy threshold has been reached. It also requires states to accept and process such ballots if received not later than 45 days after the state transmits the ballot.

Some questions have arisen about whether these time frames, like the overall time frame imagined in the bill, are adequate. Greater protection would be afforded to the rights of Americans residing abroad, including military and diplomatic personnel, with a longer overall special election deadline.

UNFUNDED MANDATE

This legislation imposes an unfunded mandate upon the states. It does so because the bill's principal purpose is to impose a uniform special election system on the states following a catastrophe, which the states are then left to cope with somehow.

Special elections to fill vacancies occur in every Congress, under provisions of state law. There is one going on right now for the late Representative Bob Matsui's seat in California. But if special elections occur outside the time frame and structure of elections for other offices which have already been planned, states incur additional costs. Some states allow special elections to be timed to coincide with other regularly-scheduled events, such as primaries, to reduce costs. Others choose not to use primaries to pick special election nominees, a choice acceptable to the voters in states where the legislatures have enacted that practice.

The new Federal mandate, according to a report of the Congressional Budget Office printed in the last Congress' committee report on H.R. 2844 (H. Rpt. 108-404, part 1) of December 8, 2003, would require 40 states to adopt a quicker time frame than they already have for holding special elections which do not coincide with a regularly scheduled election, and some states would need to amend their state constitutions.

CBO estimates that the cost to run a special election is between \$200,000 and \$500,000 per district in 2004 dollars. CBO also estimates that the overall additional costs generated by the bill might not exceed \$60 million beyond what would normally be spent. We are concerned that the price tag might be higher, depending on the particular catastrophic circumstances which trigger provisions of the bill. How those extra costs might be spread around the country is, of course, a complete unknown.

But we also need to look at the costs in another way. What is the cost to democracy from passing this bill? The costs are profound. This bill would deprive the public of the benefits of a full and open campaign, with opportunities to register to vote, meet the candidates, observe political debates, learn about the issues in the media, and receive and read literature about the candidates. In states which were forced to abandon their party primaries because of lack of time caused by the 45-day deadline, the public could not choose its own candidates. That function would fall to a party entity of some kind; a committee, caucus or convention. In many districts, which lack two-party competition, the choice at this level would dictate the final outcome of the pro forma election which would follow. Candidates might not have sufficient time to be able to make the political and personal decisions required to offer themselves as candidates.

Not every person who would make a good Member of Congress is an instant candidate just waiting to run. Starting a campaign requires consulting friends and family, weighing finances, assessing staff, gauging support from other political figures and organizations, and establishing a campaign committee with the ability to operate within the Byzantine framework of today's campaign finance laws. And some who may wish to run might not be able to if petition signatures were required to get on the ballot, or money had to be raised to pay filing fees or meet other qualifications which might be disrupted by the deadlines in the legislation.

The public may suffer because of lack of time to manage the election competently and fairly. There are significant problems with voter registration lists, voting by felons, voting with provisional ballots, transmitting, receiving and counting absentee ballots, and staffing the polls with voting machines and election workers even under the best of circumstances in normal elections. After a catastrophe, we can add a potential breakdown in communications systems and other infrastructure, including transportation, along with potential inability to order voting machines and ballots.

CONTINUITY DESERVES BROADER DEBATE

The Minority has made a good faith attempt to mitigate the most serious problems in this bill, but we remain hamstrung by the con-

cept of national uniformity in the conduct of special elections to the House, and by the Majority's insistence on the 45-day rule.

We do not oppose the idea of Federal legislation expediting House special election processes in the states, or encouraging the states to do so themselves by modifying their laws and state constitutions. On the contrary, we encourage constructive action at both levels of government and believe that public debate on broader issues of continuity of government should be encouraged, through public forums and other means. We want to especially thank the Continuity of Government Commission, organized by the Brookings Institution and the American Enterprise Institute, for their hearings, reports and other efforts to enhance the public debate.

During last year's debate on this bill, opponents were unfairly attacked with misleading criticism and misrepresentation of the various proposals for constitutional amendments, which were intended to plug gaps in the bill or to address related continuity of government issues.

We make this observation as Members who voted against both Representative Baird's constitutional amendment providing temporary appointments to the House, and Representative Dreier's constitutional amendment approved on January 4, 2005—the one masquerading as a House rule—which gives a House without a quorum all sorts of extraordinary powers which the Framers of the Constitution explicitly prohibited it from exercising. The failure to allow separate consideration of this outrageous “provisional quorum” proposal was an example of how the Majority was willing to start off the new Congress by preventing free and open debate and amendment even on matters of the most immense institutional and historical significance.

We urge our colleagues not to rush H.R. 841 through the House again, and to allow an open amendment process. We saw what happened last year, when the Senate refused to consider the legislation. Passing essentially the same bill and making the process partisan risks getting the same result—nothing.

We have heard complaints from some that the Senate should have deferred to the House last year—and should do so now—because this bill affects only House elections. We believe that this argument is spurious and merely reflects the disappointment of the Majority leadership in the House in not being able to bully the other chamber.

H.R. 841 affects the structure and functioning of the entire government, which impacts directly on the Senate and the constituents senators represent, as well as the executive branch and judiciary. The failure of the legislation last year ultimately validated the constitutional structure set up by the Framers, which requires that Congress can, by law, change state laws governing Federal elections, and denies to either chamber of Congress alone the dangerous power to dictate conditions for the conduct of elections to fill its seats. The constitutional system of checks and balances forced this legislation to undergo scrutiny outside the House which it could not survive.

The core problem remains. This bill's rigid deadlines are tailor-made to foster confusion and litigation at a time of future national

crisis, when the American people will need to renew the legitimacy of their elected representatives in the House. In its zeal to expedite process, H.R. 841 compromises democracy and should not become law.

JUANITA MILLENDER-MCDONALD.
ROBERT A. BRADY.

