S. HRG. 108–517

# ENSURING THE CONTINUITY OF THE UNITED STATES GOVERNMENT: A PROPOSED CONSTITUTIONAL AMENDMENT TO GUARANTEE A FUNCTIONING CONGRESS

## HEARING

BEFORE THE

## COMMITTEE ON THE JUDICIARY
## UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

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# ENSURING THE CONTINUITY OF THE UNITED STATES GOVERNMENT: A PROPOSED CONSTITUTIONAL AMENDMENT TO GUARANTEE A FUNCTIONING CONGRESS

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**TUESDAY, JANUARY 27, 2004**

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Committee met, pursuant to notice, at 9:35 a.m., in room SD–226, Dirksen Senate Office Building, Hon. John Cornyn presiding.

Present: Senators Cornyn, Craig, and Feingold.

## OPENING STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. This hearing of the Senate Committee on the Judiciary shall come to order. I want to start by thanking Chairman Hatch for scheduling this important hearing in the full Committee. Last fall, with his blessing, I chaired two Judiciary Committee hearings on the problems of continuity in Government with respect to both Houses of Congress, as well as the presidency.

On September 9, I chaired a hearing that looked at continuity problems facing Congress, and I was joined by my colleague, Senator Leahy. On September 16, I co-chaired a hearing with Senator Lott, Chairman of the Rules Committee, on problems with our presidential succession law. We were joined in that effort by a number of distinguished members, including Senators Dodd, Feingold, and DeWine.

On November 5, 2 months after those hearings took place, I introduced a constitutional amendment and implementing legislation. That proposal was designed to address the problems of continuity of Government facing both Houses of Congress, as identified by experts during both September hearings.

Today's hearing will begin the process of considering that constitutional amendment. In addition, today I will introduce implementing legislation, called the Continuity of Senate Act of 2004. This bill is cosponsored by Senators Lott and Dodd, and that, of course, is appropriate because the legislation is subject to the jurisdiction of the Senate Rules Committee. I will speak more on that in just a moment.

I want to begin my opening statement by thanking Senator Leahy and his staff for working with my office to put together today's important hearing, which is entitled "Ensuring the Con-

tinuity of the U.S. Government: A Proposed Constitutional Amendment to Guarantee a Functioning Congress."

Two days before the 2-year anniversary of 9/11, this Committee examined potential vulnerabilities of our constitutional system of government. As painful as it is to recall the events of September 11, it is a stark reminder of how close terrorists came that day to decapitating the U.S. Government.

Were it not for the late departure of United Airlines flight 93 and the ensuing heroism of its passengers, the Capitol Building might have been destroyed, potentially killing numerous Senators and Representatives, and perhaps even disabling Congress itself.

The American people simply must be able to rely upon a functioning Congress in the wake of a catastrophic terrorist attack. Although not in session year around, Congress no doubt would need to convene immediately in a time of crisis. In the days and weeks following September 11, Congress enacted numerous emergency laws and appropriations measures to stabilize our economy, to address the aftermath of the terrorist attacks, and to bolster national security.

Yet, today we lack the constitutional tools needed to ensure continuity of Congressional operations. Under our Constitution, a majority of each House of Congress is necessary in order to constitute a quorum to do business. After all, our Founders understood the need for a nationally-representative Congress, and rightly so.

That important commitment carries with it certain vulnerabilities, however. If a terrorist attack killed a majority of House members, Congress would be disabled until special elections were conducted around the country, a process that could take months, according to every election official who has contacted my office—time that we may not have. Moreover, if a majority of Representatives is incapacitated, the House would be shut down until the inauguration of a new Congress, a delay of potentially as long as 2 years.

The situation could be even more dire in the Senate. The 17th Amendment permits State legislatures to empower Governors to make immediate appointments to fill vacancies in the Senate, and every State, except Oregon and Wisconsin, has chosen to do so. Yet, the Constitution provides no mechanism for dealing with Senators who are incapacitated, but not killed. If a biological weapons attack incapacitated a majority of Senators, Congress could be shut down for 4 years.

Our Constitution does not prepare us for such dire consequences because our Founding Fathers could not have contemplated the horrors of 9/11. After all, they lived in a world free of weapons of mass destruction. They established a presidency to command an Army and Navy, but no Air Force. They structured our system of government specifically to disfavor standing armies.

Yet, the Founders, in their great wisdom, well understood that they could not predict everything that this new Nation might someday need, or what the future might someday hold. They wisely ratified the Constitution specifically because it included a built-in procedure for amendment or self-correction in Article V of the Constitution.

Accordingly, last November I introduced a constitutional amendment and accompanying legislation to ensure continuity of Congress in a manner consistent with the vision of the Founders. The amendment, Senate Joint Resolution 23, authorizes Congress to enact laws providing for Congressional succession, just as Article II of the Constitution authorizes laws providing for presidential succession.

The implementing legislation, S. 1820, authorizes each State to craft its own mechanism for filling vacancies and redressing incapacities in its Congressional delegation, just as the 17th Amendment authorizes States to decide how to fill vacancies in the Senate.

My proposed amendment authorizes the creation of special emergency procedures that would be available for 120 days, or longer if at least one-fourth of either House continues to remain vacant or occupied by incapacitated members.

Any appointment or election of a member of Congress made pursuant to such emergency powers would last for as long as the law would allow; that is, until expiration of the regular term of office or earlier, as Congress may allow. But the emergency procedures themselves would be available only for the period of time permitted under the proposed constitutional amendment.

Now, I recognize that some House members favor emergency interim appointments to ensure immediate continuity of House operations, while others prefer to rely solely on expedited special elections. My November proposal takes no side in that debate.

Some States, in order to expedite the conduct of special elections, may be prepared to adopt Internet voting, enact same-day registration laws, or abandon party primaries, while other States may be concerned that expedited special elections are undemocratic or will disenfranchise military voters. Under my approach, each State would make its own choice.

Moreover, today I will introduce new implementing legislation focused exclusively on the Senate, called the Continuity of the Senate Act of 2004, cosponsored by Senators Lott and Dodd. If House members decide to rely solely on special elections to cure continuity problems in their chamber, I will not do anything to stand in their way. By the same token, the House should not prevent Senators from resolving continuity problems in this chamber. This proposal gets the job done, while respecting the prerogatives of each House of Congress. It deserves to be enacted into law.

Twenty years ago, after nearly killing Prime Minister Margaret Thatcher and leading members of her government, IRA terrorists issued a chilling threat. They said, remember, we only have to be lucky once; you have to be lucky always. The American people should not have to rely on luck. They deserve a constitutional system of government that is failsafe and fool-proof. Nobody likes to plan for their own demise, but failure to do so is not an option. We must plan for the unthinkable now, before our luck ever runs out.

[The prepared statement of Senator Cornyn appears as a submission for the record.]

With that, I would like to recognize the Ranking Member of the Subcommittee on the Constitution, which I chair, Senator Feingold,

for any remarks he might make, and also to say thank you to Senator Craig for his attendance at this important hearing today.

Senator Feingold.

**STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN**

Senator FEINGOLD. Thank you, Mr. Chairman. First, let me welcome the witnesses, and especially my friend and former colleague, Senator Simpson. It was such a pleasure to serve with him.

It is good to see you again and I look forward to hearing from you again.

Mr. Chairman, I would like to commend you for your work on this issue. I appreciate your initiative and leadership. You and your staff have put a lot of thought and effort into this and I think it shows.

In the 2 years and 4 months since the attacks of September 11, we have been repeatedly reminded that there are terrorists working everyday to attack our country wherever it is most vulnerable. The threats we face are very real, and certainly a massive attack on the Federal Government would achieve many of the terrorists' goals.

Of course, our first duty as legislators is to do what we can to protect the American people, but we must also recognize the possibility of future terrorist attacks and plan for them.

Discussions about the continuity of Government and about various hypothetical scenarios that could occur in the wake of a catastrophic terrorist attack may seem to some abstract and far-fetched. But in the terrible event that any of these nightmare scenarios should come true, many lives depend on the ability of the legislative and executive branches to effectively respond.

As you know, Mr. Chairman, I approach all proposals to amend the Constitution with great caution. As the charter that provides the structure and basic rules for our entire system of Government, the Constitution strikes innumerable balances we must be wary of disrupting. Any changes in this fundamental structure can have far-reaching consequences, and constitutional amendments are immensely difficult to undo.

For this reason, whenever there is a proposal to amend the Constitution, I believe we should ask first whether the problem can be solved with legislation rather than a constitutional amendment. If any of the witnesses believe there are proposals other than a constitutional amendment that would adequately protect the continuity of our Government, and in particular the legislative branch, I would be particularly interested to hear them say so.

But I do recognize that there are some problems that probably can't be solved by legislation, and that providing for the continuity of Congress may well be one of them. Mass vacancies or incapacitations in the House or Senate could seriously obstruct Congress from responding to the crisis created by a catastrophic terrorist attack.

Today, we face the threat of attacks on a scale that would have been unimaginable not many years ago. And we know, historical events can sometimes alert us to vulnerabilities or flaws in our constitutional structure. The assassination of President Kennedy

led to the adoption of the 25th Amendment. It may well be that the attacks of September 11 should lead to the adoption of the 28th Amendment.

The goal of this amendment is unquestionably laudable and the structure it proposes may well prove to be the best option. A lot of hard work has already been done here and I look forward to working with you, Mr. Chairman, to find the best way to protect our democracy. I am grateful again to our panel and look forward to hearing from them.

Thank you, Mr. Chairman.

[The prepared statement of Senator Feingold appears as a submission for the record.]

Senator CORNYN. Thank you, Senator Feingold, for your comments.

Senator Craig, we would be pleased to hear any opening comments you might have.

## STATEMENT OF HON. LARRY CRAIG, A U.S. SENATOR FROM THE STATE OF IDAHO

Senator CRAIG. Mr. Chairman, I will be very brief. I have to chair another hearing in a few moments, but I am so pleased that our former colleague and my neighbor out West, Al Simpson, is here, along with his wife. We still gain on a regular basis the wisdom of Senator Simpson, often through the media. It causes us to pause and react.

But let me give for the record a personal experience that I think clearly recognizes what you are trying to do, Senator, with S.J. 23 and S. 1820. For those of us who were here on 9/11, it was obvious in a very short period of time how unprepared we were to handle an emergency of the kind that we were at that time involved in, or how impossible it would have become had this area or portions of this campus been struck by an aircraft of the magnitude that occurred at the Pentagon and/or certainly at the Trade Center.

I and others evacuated the Hill. I live on the Hill, so I went home and got on the phone and started calling around my State of Idaho to calm nerves and to give impressions of what was going on. Late in the afternoon, it became obvious to me that something needed to be done here as a core activity. I was then part of the elected leadership, but I was one rung below those who were evacuated to Virginia, to our undisclosed location.

But I happened to have had that phone number, so I and other leaders and other members, House and Senate, gathered at the Capitol Hill Police Station and we began to express our concern to the sequestered leaders how important it was that the Congress immediately in some form make an expression. We were encouraged to go home, not to assemble. We still did not yet know the magnitude of the threat that might have been ongoing.

Our leaders were sequestered and they did not feel or understand the emotion that was sweeping across the country at that time, I believe. We were watching television. They were not. We were calling home. They were not. Finally, I and others, Democrat and Republican, said no, we are not going home; we are going to assemble.

We were told by the leaders that they would be returning to the Capitol grounds at a certain hour to hold a press conference. We said, fine, we will meet you there. We did. You all saw that. You all saw us standing on the steps of the Capitol as our leaders came back and expressed their concern and what we would be doing in a public press conference. And, of course, then we all broke into a song of unity, our National prayer, "God Bless America."

That was probably, in that day, the most singly important thing that the Congress of the United States did for the psyche of the American people. It was played hour after hour for a good number of days following, just that simple act of the Congress standing on the steps of this Nation's Capitol singing this Nation's prayer. It was a statement of unity of a kind that could have been expressed no other way.

My expression here today is to suggest that a Congress that can be, if damaged, reconstituted very quickly is critical to the character, the strength, and the stability of this Nation, there is no question about it, because for days afterwards, if not for months, I received phone calls and letters of expression from people who had witnessed all of us collectively on the steps of the Capitol that day.

I then began to recognize how critically important it is that there be continuity, and that it be seen and heard and understood clearly by the American people because if, for instance, the worst would have happened, to see our Capitol struck would have been a phenomenally devastating blow on the psyche of the American people, let alone our systems of government.

So, anyway, I am pleased you are doing this work. I agree with Senator Feingold. I have always been extremely cautious in how we approach amending our Constitution, but you may well be right. This may be an area where we need to be clear, precise, and allow for this kind of continuity to go forward.

I thank you for your work, and to all of our panelists, thank you for coming today.

Senator CORNYN. Thank you, Senator Craig, for your comments.

We are fortunate to have before the Committee today a distinguished panel of witnesses. We have asked them to come here to discuss, as Senator Feingold stated, the need for a constitutional amendment to ensure continuity of Congressional operations in the wake of a catastrophic terrorist attack and to determine whether one particular proposed amendment, Senate Joint Resolution 23, fits the bill.

As others have alluded to, Senator Alan K. Simpson, of course, needs no introduction to this body or to this Committee, but I will give him a short one nonetheless. Senator Simpson served in the United States Senate from 1978 to 1997, acting as the Minority Whip for ten of those years. He was an active and distinguished member of this Committee, as well as the Finance Committee, the Environment and Public Works Committee, and the Special Committee on Aging. As a veteran who served in Germany during the final months of the Allied occupation, he chaired the Veterans Affairs Committee.

Before his election to the U.S. Senate, Mr. Simpson served in the Wyoming House of Representatives, rising to the office of Speaker

in 1977. Following his tenure in the U.S. Senate, Senator Simpson served as Director of the Institute of Politics at Harvard University's John F. Kennedy School of Government from 1998 to 2000. Today, he is a visiting lecturer at the University of Wyoming and a partner in a Washington-based government relations firm and a Denver-based law firm.

Of course, Senator Simpson co-chairs with Lloyd Cutler the Continuity of Government Commission, a bipartisan blue-ribbon commission of distinguished public servants established by the American Enterprise Institute and the Brookings Institution to examine the problems of continuity of all three branches of Government.

Senator Simpson keeps a very busy schedule. I know this because we wanted him to testify at our hearing last September. He wanted to, as well, but unfortunately we could not work out the timing. So I am thrilled that the timing has worked out today and I am pleased that he is here to share his expertise based on years of experience and careful study.

I am pleased to introduce from my home State of Texas Professor Sandy Levinson, of the University of Texas Law School, in Austin. Professor Levinson is the W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law and Professor of Government, and is an internationally recognized expert in constitutional law.

He is the author of numerous books and law review articles, including "Constitutional Faith: Written in Stone," and of particular relevance to today's topic a book entitled *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*.

He received his bachelor's degree from Duke, a Ph.D. from Harvard, and a law degree from Stanford.

Professor Howard Wasserman completes our panel. He is an assistant professor of law at Florida International University College of Law, in Miami, and previously served as a visiting assistant professor of law at Florida State University College of Law and a law clerk for Chief Judge James T. Giles, of the United States District Court for the Eastern District of Pennsylvania, and Jane R. Roth on the United States Court of Appeals for the Third Circuit.

A graduate of Northwestern Law School, Professor Wasserman has published numerous articles on the subject of continuity of government. He testified last September at the joint hearing of the Senate Judiciary and Rules Committees in favor of reforming the presidential succession law.

Professor, it is good to see you again, and thank you all for being here today.

Senator Simpson, if I may start with you, please, we would be happy to hear your opening statement.

## STATEMENT OF HON. ALAN K. SIMPSON, CO-CHAIRMAN, CONTINUITY OF GOVERNMENT COMMISSION, AND FORMER UNITED STATES SENATOR, CODY, WYOMING

Mr. SIMPSON. Well, thank you very much, Senator Cornyn. This is a treat to see my old friend, Russ Feingold. We served together, enjoyed each other's company, and our spouses, too. I always had great regard and respect for him.

I did not get the opportunity to serve with you, but I can tell you you are a leader especially on this issue, and I admire that very much. And Larry Craig, the Lion of the West, an old friend.

You said you were doing this with Orrin's blessing and, of course, we always needed that here in this chamber. Orrin would give his blessing to all of us. As he would say, would you please—no, I won't go into it.

[Laughter.]

Mr. SIMPSON. And then, of course, Pat Leahy and his staff whom I see today, and staff around the room; to all of you, greetings. I know what you are here for, to sort it all out and run back, all of you in the back there saying I heard Simpson and Sandy and Howard testify; I think they are all goofy. I know how it works, but listen carefully to this one because this is an important issue. This one will not go away.

So it is fun to come into the lion's den here, familiar surroundings, 18 years here in this Committee. And, of course, I am going to do something that I remember always doing. I ask that the full text of my remarks be entered into the record.

Senator CORNYN. Without objection.

Mr. SIMPSON. Isn't that wonderful the way I did that? We always used to do that from up there, but I wanted to get ahead and I have done that. Thank you, Senator.

My wife of 50 years is here. It is hard to believe that she would have stuck it out that long. She spent a few hours in this room, and she has been a great helpmate of mine. You cannot succeed in politics without a supportive spouse, so she is right there. Yes, she is. I brought her for defense purposes, because we left Washington undaunted and unindicted, and it was a wonderful experience. Now, I am going to take four more minutes. I know how this game works. I thank you.

The Continuity of Government Commission is a no-nonsense group. Let me just tell you quickly who is on it because you don't read the letterhead. Lloyd Cutler and I co-chair it: Phil Bobbit, Ken Duberstein, Tom Foley, Charles Fried, Newt Gingrich, Jamie Gorelick, Nick Katzenbach, Judge Robert Katzman, Lynn Martin, Kweisi Mfume, Bob Michel, Leon Panetta, and Donna Shalala.

We have held two full-day public hearings, heard testimony from all sorts of groups, didn't want to go really to a constitutional amendment, but found ourselves looking clearly back into it because of incapacitation and other issues.

The reason is clear; you have all stated that. 9/11 happened. It was not fiction, it was not a book. They will come again. The terrorism threat is not behind us. The President said at the State of the Union, "It is tempting to believe the danger is behind us. That hope is understandable, comforting, and false." That is exactly what it is.

The fourth plane, from all of the things we found through our investigation and the investigation of select committees, was headed for this Capitol, and the brave passengers took it down. The House was in session that morning. The Senators and House members were all over this campus, as Larry refers to it, and it is true.

The Capitol Dome is made of cast iron. If that baby had hit that dome, the stuff would have trickled through the whole area in a

molten form. I am not trying to be dramatic, so I will stop right there. But let me tell you that was real.

We identified these problems in our hearings. It would take months to fill vacancies in the House because you have to have a special election. The Senators can be replaced in 48 hours, and many of us have been, and the Governors do that. But it takes an average of over 4 months to fill vacant seats in the House of Representatives, and if there were more than 50-percent vacancies there would be no quorum.

They have a very lenient quorum rule in the House, which is something about "living," which is an interesting part of it. They could get a smaller group, but imagine what would happen if the New York delegation would be the only one that survived. That could happen.

There is the light. Anyway, I will come back to presidential succession in later hearings, but it is the issue of incapacitated members. They cannot be replaced by election because there is no vacancy. You can't replace a person who is incapacitated because they may come back. So that is really a problem.

We recommend the constitutional amendment. It would operate when there are many deaths, but if somebody can hear us over in the House, the word is "temporary." We are talking about temporary; everything is temporary here. It is just too long to go 45 days without having Congress in session.

The real difficulty for us is not here in this body; it is in the House of Representatives. I do respect them greatly and I know Chairman Sensenbrenner very well. He and I have worked together. I have had a very enjoyable relationship. But I can tell you if the argument is continued in the House that this is simply the People's House and the fact that every member of the House has been directly elected by the people and that if we do something with the Constitution it will injure the, quote, "character of the House," I will tell you what will destroy the character of the House—220 of them lying in an alley out here incapacitated with burns, or dead. That would really change the character of the House.

I would just say to you that I am astounded at the reaction in the House, especially the chairman, a member of my party. It is almost embarrassing. It is almost as if this commission were treated rudely. We have been treated rudely by the Chairman not listening to one shred of what we are saying, and no alternative procedures except one that keeps getting tossed out that you have defined. I hate to be that critical, but I will tell you I would be embarrassed.

And I will tell you another thing politicians don't like, and that is ridicule. And if something else happens in this country, they are going to come back and say where were you? Were you fast asleep? Why didn't you do something? You knew. Where were you? How could you?

That is all I have to say.

[The prepared statement of Mr. Simpson appears as a submission for the record.]

Senator CORNYN. Thank you, Senator Simpson.

Professor Levinson, we would be glad to hear your opening statement.

**STATEMENT OF SANFORD V. LEVINSON, W. ST. JOHN GARWOOD AND W. ST. JOHN GARWOOD, JR. CENTENNIAL CHAIR IN LAW, UNIVERSITY OF TEXAS LAW SCHOOL, AUSTIN, TEXAS**

Mr. LEVINSON. Thank you. I won't repeat everything that is in the written statement. I do want to express, though, both professional and personal honor and pleasure in being here. The professional satisfaction comes from what you mentioned; that is that constitutional amendment has been a long-term interest of mine. Indeed, I am co-teaching a seminar at the Yale Law School this semester on constitutional design. But there is also a distinct personal pleasure, not simply that you are the Senator from my home State, but that we are of different political parties, for this seems to be an issue that is without the slightest partisan tilt.

And I am delighted to have the opportunity to meet Senator Simpson, whom I have long admired for his candor, which was revealed this morning as well. Even though I have often disagreed with him politically, I am delighted to appear before you because I think this is an issue which really should bring all of us together as Americans and not as Democrats or Republicans.

I want to address the issue that Senator Feingold raised, which is the reluctance to amend the Constitution.

Senator Cornyn, you mentioned that I edited a book called *Responding to Imperfection*. That title comes from a letter written by George Washington to his nephew, Bushrod, who would later serve on the Supreme Court of the United States.

Washington, of course, was, to put it mildly, no minor figure either in terms of our history or obviously the particularity of the Constitution itself. He was the President of the Constitutional Convention. Without Washington's support, the Constitution never would have been ratified.

What he wrote to his nephew, though, was as follows, "The warmest friends and the best supporters the Constitution has do not contend that it is free from imperfections." Fortunately, when inevitable imperfections do manifest themselves, "there is a Constitutional door open. The People, (for it is with them to Judge) can, as they will have the advantage of experience on their Side, decide with as much propriety on the alterations and amendment which are necessary."

Should the point not already be clear enough, Washington went on to say that, "I do not think we are more inspired, have more wisdom, or possess more virtue, than those who will come after us."

I emphasize in my testimony the words "the advantage of experience." Experience was crucially important to the framing generation. One can find similar statements in the Federalist Papers written by Hamilton and Madison. And it dishonors the Framers of the Constitution, and it really dishonors the document they handed down to us to assume that they thought that they had drafted a perfect document and that there is nothing to learn from experience.

September 11 obviously should have served as the wake-up call that Senator Simpson mentioned, and it does seem to me the Constitution is grievously imperfect with regard to the kinds of contingencies that Senator Simpson mentioned.

The Constitution recognizes the possibility that there will be a vacancy in both the presidency and vice-presidency, and therefore the Constitution explicitly authorizes Congress to pass a succession in office act. I commend you also for your leadership in raising questions about the succession in office act. But not only is that not a topic before us this morning, it is also a topic that clearly can be resolved by legislation because the Constitution specifically authorizes Congress to do so.

We now recognize as a result of September 11 and the kinds of considerations raised by Senator Simpson and the project that he co-chairs that there are the same possible contingencies with Congress as there are with the presidency. And I believe that most constitutional specialists would agree that Congress does not have the authority simply to pass corrective legislation.

The Constitution very clearly says that succession to the House is by election and by no other means. That is not a problem with Senators, except in the altogether foreseeable contingency that you and Senator Simpson mention, which is incapacitated Senators. And then the 17th Amendment, I think, is really quite useless.

It seems to me, to take another term from the Constitution, that if a constitutional amendment is ever necessary and proper, it is in this instance where there is a contingency that we hope is remote, but it is certainly foreseeable. One buys insurance and writes wills even when one is young on the basis of what one hopes are remote contingencies, but it is irresponsible to assume they can never happen. We, I believe, know this can happen. The Constitution is deficient with regard to allowing us to respond with the kind of alacrity the country would need.

There is another consideration, if I can take literally 20 more seconds. I spell this out more in the written testimony. If Congress cannot function, it is not that nothing will happen; it is that inevitably what would arise is a presidential dictatorship, as happened arguably with Abraham Lincoln when Congress was not in session during the early days of the war.

It seems to me again that all Americans, regardless of party, regardless of whether they are liberal or conservative, must agree on the essential importance of a functioning Congress, and that this amendment is an important and necessary first step toward assuring that.

Thank you very, very much for inviting me and thank you very much for taking the lead on this issue.

[The prepared statement of Mr. Levinson appears as a submission for the record.]

Senator CORNYN. Thank you, Professor Levinson, for your testimony and your generous remarks.

Professor Wasserman, we would be pleased to have your opening statement.

**STATEMENT OF HOWARD M. WASSERMAN, ASSISTANT PROFESSOR, FLORIDA INTERNATIONAL UNIVERSITY COLLEGE OF LAW, MIAMI, FLORIDA**

Mr. WASSERMAN. Thank you, Chairman Cornyn, and thank you for inviting me to address this Committee and to participate in this distinguished panel.

What I referred to in my written statement as the Cornyn Plan—a combination of an amendment and some implementing legislation—is the exact proper approach to the question of continuity of Congress because it utilizes a short, broad, and very general constitutional amendment that vests in Congress the power to provide by law appropriate procedures in order to replace large numbers of incapacitated, disabled, or deceased members of both Houses of Congress, and thereby to ensure that we have a functioning Congress and a functioning Government, as that Government is imagined under a system of separation of powers.

What is important about the amendment is that it punts the entire issue to Congress to then deal with in its discretion through the ordinary legislative process. And it is that process which is far more deliberative and can be far more detailed where the real details and the real vagaries of constitutional continuity can be spelled out. So as you indicated in your opening remarks, even if there is a difference between the House and Senate as to what the proper procedure is, the amendment is still a good idea just to lay every possibility out on the table.

I would draw the Committee's particular attention to the absolute necessity of the amendment with regard to incapacitations or disabilities, because the Constitution nowhere mentions and nowhere provides any procedures for dealing with the disability of individual legislators.

This contrasts with Article II and the 25th Amendment which deal specifically with presidential disability and delegate to Congress power to deal with that situation. The triggering language in Article I, section 2, and the 17th Amendment as to Congress is "when vacancies happen," and in the absence of a vacancy there can be no election, there can be no appointment, and there can be no other procedure of any kind established to put a member in that seat.

The two leading Supreme Court decisions on the question of Congressional qualifications are *Powell* v. *McCormick* and *U.S. Limits* v. *Thornton*. Those two cases together can be understood as standing for a general rule that once a member has been chosen and qualifies, she must be sworn and seated.

Except for the very limited circumstance where a two-thirds super-majority of one House can expel that member, neither Congress nor the States has any power to prevent that member from taking her seat or from remaining in that seat for the duration of her term.

Put slightly differently, a member chosen and seated at the beginning of a Congress serves 2 or 6 years, depending on the House, unless and until she resigns, dies, or is expelled. Absent that vacancy, neither Congress nor the States presently has any constitutional power to fill that occupied seat even temporarily. The import of the amendment therefore would vest this power in Congress or, as under your legislation, to some delegatee of Congress.

The last point on this, though, is to emphasize that a pure reliance on expulsion is not the answer, for two reasons. Number one, at some level it seems unfair to expel a faithful public servant merely because she is incapacitated for what may be as short as a week or some relatively short period of time.

The broader problem is expulsion is simply procedurally impossible because it requires a two-thirds super-majority and there has to be a quorum in order to carry out the expulsion procedures. And if there can be no quorum to do ordinary business because of the number of incapacitated members, there cannot be a quorum to carry out the expulsions.

The last point I want to make actually focuses on the implementing legislation, and I discuss this further in my written statement. It is just to suggest the change that any implementing legislation make it mandatory that the States enact these procedures by changing the language "may enact" to "shall enact."

The one thing that we do need is some level of national uniformity and national certainty, and any delays by the States, even unintentional, in implementing and carrying out these procedures could threaten the ability of Congress either to function at all or to force Congress to function in a very small, skeletal, unrepresentative fashion. Congress can avoid that problem by requiring that the States implement and carry out these necessary procedures.

With that change, I express strong support for both elements of the Cornyn plan, and I urge this Committee and this Congress quickly to consider and enact both elements. Thank you again for the opportunity to address this panel.

[The prepared statement of Mr. Wasserman appears as a submission for the record.]

Senator CORNYN. Thank you very much, Professor Wasserman, and thanks to all of you for your opening statements. I know Senator Feingold and I each have some questions for you.

If I may start perhaps with Senator Simpson, 2 days after 9/11 Congress approved legislation expediting benefit payments to public safety officers who were killed or injured in the line of duty during the terrorist attacks. Three days after 9/11, Congress approved a $40 billion emergency supplemental appropriation bill for recovery from and response to the attacks, as well as legislation authorizing the use of military force.

A week later, Congress approved additional legislation both to stabilize and secure our airports and to provide compensation for the victims of 9/11. In subsequent weeks, Congress enacted several other bills and appropriations measures to bolster national security and upgrade our capabilities to combat terrorism.

Indeed, week seven, which was right about the time, I believe, of the prevailing House proposal for replacement of absent members or disabled members by virtue of expedited elections, Congress passed the USA PATRIOT Act to deter and punish terrorists in the United States and around the world, and enhance law enforcement and investigatory tools.

As my question suggests, we did a lot of things; this Congress did a lot of things in the aftermath, the 45 days after 9/11, which I believe were important to not only reassuring the country, but to providing for the victims and their families, as well as authorizing the President to use military force against those who played a role in the terrorist attacks.

Of course, unless we have a means of rapidly replacing killed or disabled members of the House, none of that could have happened.

Even under, I believe, the chairman's proposal, Chairman Sensenbrenner's proposal, it would be a 45-day election. And certainly a newly-elected member of the House would find it difficult to get to Washington and begin functioning as a fully effective member of Congress in such a short time.

But we have two bodies of the Congress, the House and the Senate. The House, as you noted in your comments, Senator Simpson, very jealously guards its prerogative to make provision for itself and is not particularly welcoming of the other body to do it for it.

I would if you could just perhaps, in your wisdom of 18 years in the Senate, provide any suggestions or other insight about how you might approach such apparently conflicting views on how the House ought to deal with succession.

Mr. SIMPSON. Well, Senator, you can see how helpful I have been already in that area. Sweeping things were done by the Congress in those days, within days. The American public was heartened by that. I am one of those people who lives in Cody, Wyoming, and said what are they going to do? And you did marvelous things, not just symbolism, but legislatively.

Imagine if those legislative acts had to wait 45 days for any of them to pass. I will tell you the American people would be offended. They would say who threw the sand in the gears? Who did this? And I will tell you we would know who did it. This cannot stand. You can't do this.

There is a lot of fine bipartisan support in the House, Congressman Baird, Democrats and Republicans alike over there who are ready to do something. I think of my old pal John, of the Judiciary Committee, and there are so many over there who would listen to us. I am just astounded that with all this fine bipartisan support—and I think, as I say, you could get it from John Conyers.

I will tell you what we need to do. We need to have the Chairman open his door and listen. We will bring the whole commission in. He has got a lot of pals here and a lot of fine Americans are here. I would like to have him see us and come. We have been rudely treated, and I think that is a shame. It isn't good.

When I had a situation with Tip O'Neill. I went to see him. He said, Simpson, what are you doing in here? I said here I am and I didn't bring any staff with me. I just dragged my own brains in here; now, if you will just listen. He would say, okay, I will listen. Then he would light a cigar and pull up his sleeves, and then 1 day he said, Simpson, I am going to do what you are suggesting, but if you tell anybody, you will never see that legislation again.

I never told my staff, I never told anybody. Days before the deadline, he put the immigration bill on the floor of the House and got torn to bits by Fritz Mondale and Gary Hart, who were both running for President, on an issue which was so hot with Hispanics, and so on. And I think he told Fritz or Gary, look, you run for President, I will run the House. And that was Tip.

So all I want is the same courtesy to sit and describe to the gentleman, whom I have enjoyed and have helped—I remember bringing him to a hearing once where he couldn't even get in. And I said to Peter Rodino, let Jim Sensenbrenner in this room. He said, no, I don't need to listen to anybody in the minority. I said, yes, you do; you can't run a shop like that. So Peter opened the door, and

I don't think Jim had ever been in that sacred chamber. If you can't do that kind of work, then the American people are appalled.

All I am saying is it is no time for rigidity and stubbornness and not listening, not on an issue like this. So that is what I would do, and I am sure that Jim's staff is sitting here scratching themselves, staring off into the East, wondering how in God's name Simpson could have erupted like this. So have old Jim invite us in and we will all come in and just sit around for a while and chew the fat.

Senator CORNYN. Professor Levinson, you heard both Senator Craig and Senator Feingold allude to a state of mind that I think a lot of members of Congress have when it comes to constitutional amendments, and I appreciate in your opening statement you directly took that on.

There is a tremendous reluctance in this body to deal with constitutional amendments. Of course, as Senator Feingold said, if this amendment does pass, it would be number 28. So we haven't been promiscuous in the way we have amended the Constitution by any means in this Nation's history. But I believe that this is one of those, and as you pointed out, one with bipartisan support, that in some ways is not thrilling enough to command a lot of attention. On the other hand, when you get a proposed constitutional amendment that does get people's blood up, it is hard to pass a constitutional amendment there, too.

I, for one, worry that if the people are unwilling to consider amending our Constitution that there are occasional Federal judges who are happy to do that through judicial decision. And I frankly prefer the former rather than the latter. Now, this is not one of them, probably, where a judge would assert him or herself, and certainly not until after we have already suffered a terrible loss.

Could you just expand a little bit on your point of view about how you think this Committee should approach constitutional amendments? Do you think there is any sort of objective line of demarkation between those kinds of amendments that are worthy of consideration and those that should not be considered, and why do you think this is one of them?

Mr. LEVINSON. Well, I should confess that I am one of those people who think that the United States Constitution is much too difficult to amend. One of the articles in the book *Responding to Imperfection*, by another Texan, Don Lutz, who teaches at the University of Houston, looked at the United States Constitution not only in comparison with about 35 or 40 national constitutions around the world, but also with the 50 State constitutions.

The United States Constitution is the most difficult to amend constitution in the world. That record had been held by the former Yugoslav Constitution, but we now hold it. This means, among other things—I think you are absolutely right—that a lot of amendment—what in other countries might have taken place through formal, self-conscious amendment—takes place not simply through judicial innovation, but also frankly through Congressional innovation and executive branch innovation because there is no good alternative.

I agree with you that if a matter is truly controversial, it really is next to impossible to amend the Constitution of the United States. But the point is that this ought not be controversial. I just

literally can't understand why somebody being presented not only with the abstract possibilities, but also the reality of September 11 would say, well, this just could never happen and I am opposed to amending the Constitution because it would lead to bad things.

I can see reasons to disagree about implementing legislation, on what procedures should be set up. I would have Congress take a much stronger role, for example, rather than simply leaving it to the States, for reasons that have already been indicated.

But it does seem to me that the history of constitutional amendment, at least, since the Progressive era has been that it is extremely difficult to get through amendments on issues that really divide the people politically.

But there have been a number of amendments—the 25th Amendment is a fine example where people realized there is a problem. The only thing worse than President Kennedy's assassination would have been if he had lingered. I think what provoked the 25th Amendment was the realization that we were totally unequipped to handle that possibility.

We could handle assassination very easily. The Constitution provided for a successor. But the problem that you and Senator Simpson are focusing on we are unequipped to handle. It seems to me that there is a track record; that one can pass amendments dealing with these kinds of important issues that ought not divide us politically. It seems to me if the Constitution is ever worth amending, this is one of those situations.

Senator CORNYN. Thank you very much.

Professor Wasserman, some have suggested that no constitutional amendment is needed to deal with incapacitated members because members can sign a power of attorney or somehow designate someone to serve on their behalf if they were incapacitated.

In your view, would that solution work? Indeed, is it even constitutional? Would it be okay for me to sign a power of attorney and say if I am incapable of serving, then my wife or perhaps a friend or some constituent ought to be able to vote in the Senate on my behalf?

Mr. WASSERMAN. I don't believe so. I think the language is pretty clear as to both the House and the Senate as to how members can be chosen initially and as to how they can be placed in vacant seats. Other than election at the initial choosing and then election in a vacancy in the House and appointment for a vacancy in the Senate, I think that exhausts any possibilities.

I will say I think part of the resistance particularly in the House to the notion of appointments is a sense of distrust of Governors, the risk of partisanship in the making of the appointments. I think one workable idea—and again a constitutional amendment would be necessary as to the House, but one workable possibility to overcome the concerns of partisanship is to have each member draw up a list of preferred successors, and the appointment, under the 17th Amendment, by the Governor, if we can get a 28th amendment via the Governor with regard to the House, and have the appointment made from one of those preferred successors. So you have some sense of the popular imprimatur from the elected member on whoever her successor will be.

Number one, the appointing authority should be someone other than the successor. And, number two, it is absolutely the case that some amendment is necessary because the power simply to unilaterally select one's own successor is not allowed by anything in the text of the Constitution and frankly is an undemocratic concept.

Senator CORNYN. Senator Simpson, do you have any comments?

Mr. SIMPSON. The real key here is "temporary," "temporary preferred successors." This is the key, and the House doesn't seem to hear this that everything we are talking about is temporary. Do this maybe for 45 days. After 45 days, have whatever elections. I think Howard counseled me on that one before. The word here throughout is "temporary," "temporary," "temporary."

Mr. WASSERMAN. I agree. I omitted that word, but yes. I mean, any of these appointments, even Senate appointments, in the context of this worse-case scenario should be somewhat more limited in time.

Senator CORNYN. So I gather, Senator Simpson, it would be possible to meld both the current approach in the House, Chairman Sensenbrenner's approach to have a 45-day election period, and the approach that you propose of a temporary appointment to somehow have the best of both worlds, I guess, if I understand what you are saying.

Mr. SIMPSON. Well, we have thought of everything and had the hearings to produce that with this group of commissioners. And we just keep coming back to the absoluteness of a constitutional amendment, but there are ways to go about it.

One of the ones was that when you run, you designate a person on the ballot who, if there is a vacancy or incapacitation, that person will take over your office temporarily until the next direct election. That was discussed. A lot of those things have been discussed. We are not hard-nosed on it, but we don't like to get run down the track with tar on us, you know, and with feathers, too. That is not good.

Senator CORNYN. Well, as much of a challenge as it is to propose a temporary appointment, I wonder whether the idea of candidates designating a successor on the ballot would create other resistance. I was reminded when Professor Wasserman was talking about trying to depoliticize the selection of a temporary successor the old saw that you can't take politics out of politics.

It is kind of like when people talk about redistricting and say it is much too partisan, much too ugly, and we need to take the politics out of it, and while there are some interesting scholarly suggestions, I haven't seen one yet that would succeed in taking the politics out of redistricting.

But I believe from what we have heard this morning in your opening statements and the brief Q and I we have had, it sounds like we are all pretty much on the same page here. I do want to emphasize that in my conversation with Chairman Sensenbrenner, I have told him, out of courtesy and out of necessity, that certainly the House will do what the House chooses to do and that is their decision.

I do hope that regardless of what the ultimate decision in the House is that that does not stop us from getting as good a possible product as we can, because simply doing nothing, I believe, is not

an option. We will just have to work out those differences the best we can, respecting differing opinions, but also the fact that you have to live with the reality of the approach of people who disagree perhaps with the best approach to this issue.

Before we close, I would like to provide each one of you an opportunity to provide any concluding remarks that you might have, things that we have not discussed that should be discussed. Of course, the written testimony that you have provided will be made part of the record, without objection, and we will leave the record open for a period of time, Monday next at five p.m.. We will leave it open until then, so anyone who wishes to provide additional written materials may do so and those will be made a part of the record of this hearing.

Senator Simpson, I would be glad to hear you and Professor Levinson and Professor Wasserman on any concluding remarks you may have. Please proceed.

Mr. SIMPSON. A very dangerous thing, Senator, and I am going to limit it to one minute. I want to work with the House. We have had House members testify before our group. We have not had Chairman Sensenbrenner testify, nor present anything other than his own bill. I would hope that we could get together and talk. I think we need that.

I am not being compensated for this wonderful activity, and we have the AEI and the Brookings Institute sponsoring this commission. So if you don't like the right, you can accuse them, and if you don't like the left, you can accuse them. So we are working together. Our senior counselors are Norm Ornstein and Thomas Mann, so we get the best in those two fine people, and a fine executive director, John Fortier.

We are not interested in controversy. We are interested in reality. Everything now is reality television. The actuality is it happened, it happened. It is not some bubbled-headed dream that happened as we watched, and it can happen again. I think it is just like writing a will. You don't like writing a will because you think you are going to die after you sign it. So we are writing a will for America here and we won't die after we sign it.

The other thing that is so fascinating is if the goal of terrorism is to destroy our Government and we put something together like we have in mind, they will say you can't destroy those damn fools; they can reconstruct, they can come back quickly. I think people are forgetting that.

Senator CORNYN. Thank you.

Professor Levinson.

Mr. LEVINSON. I would like just to reiterate one point: Should this kind of catastrophe happen and Congress isn't able to function, the practical reality is not that nothing would happen, but that the President, for good reason in this kind of situation, would, in effect, seize power because the one thing we know under this sort of condition is that decisions would have to be made.

Anybody who believes, as I certainly do, that, to put it mildly, Congress plays an essential role in our constitutional system ought not tolerate the possibility of presidential dictatorship, even a benevolent one. I think that is one of the things that makes this amendment just so crucial.

Senator CORNYN. Professor Wasserman.

Mr. WASSERMAN. Whatever the general opposition or apprehension or hesitancy to enact constitutional amendments may be, I think the central purpose of Article V was to allow for amendments that dealt specifically with the structure of the Federal Government, and in particular the processes and procedures by which the Government selects the members who are going to serve in those offices. Those are the types of things that the Framers recognized. They didn't anticipate changes, and each generation would make procedural changes accordingly. This is precisely that type of procedural amendment that is absolutely anticipated by the Framers and which becomes a necessity in order to allow the Government to continue functioning as it is supposed to under the Constitution.

Senator CORNYN. Well, thanks to each of you for being here today and for arranging your schedules so that we could have this hearing. I think this has been very important, and while we seem to be at least here singing off the same sheet of music, we know that there will be a debate and that debate is important. But just as important as the debate, we need resolution and we need action. I especially want to thank you for coming here during such inclement weather. I am glad you weren't deterred.

Before we adjourn, I would also like to again express my thanks to the Chairman, Senator Hatch, and the ranking member, Senator Leahy, for their cooperation in this hearing. We will leave the record open, as I said, until five p.m. on Monday next, February 2, for members to submit documents into the record or to ask written questions of any of the witnesses.

With that, this hearing of the Senate Committee on the Judiciary is adjourned.

[Whereupon, at 10:41 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

# QUESTIONS AND ANSWERS

February 11, 2004

Honorable Patrick Leahy
United States Senate
Washington, D.C.

Dear Senator Leahy:

I am happy to try to answer the questions that you have directed at me. I shall go down your list of questions and answer accordingly:

1. Senator Cornyn has introduced the Continuity of Congress Act of 2003 (S.1820), which provides that one-fourth of the Senate will be considered killed or incapacitated if determined by either: (1) joint declaration of the Senate Majority and Minority Leaders; or (2) joint certification of the President and the governors of the several states.

    a. With regard to "incapacity:" (i) How should "incapacity" be defined?; (ii) what criteria should be used to determine incapacity?; and (iii) Are there threshold characteristics that must be present prior to such a determination?

    I am most certainly not a doctor, and I therefore hesitate to offer anything other than a "procedural answer" to this question. That is, it seems highly desirable both that some general standards be defined in advance (by people with professional expertise) and that the actual implementation of the standards be in the hands of a rigorously apolitical body of medical and psychological experts, chosen in advance. Normally, one would think that to be "incapacitated," one would have to be unable to function effectively for at least several weeks, if not months. In the grim circumstances that we are envisioning, though, we might want to have a shorter time horizon inasmuch as it might well be unacceptable if the House or Senate is unable to meet even for two or three weeks at a time of national emergency.

b. S.1820 provides a mechanism for the President and state governors to jointly determine a Senator to be incapacitated. Do you agree that concerns could arise if a President and state governor of the same party declared a Senator of an opposing party to be incapacitated?

I do indeed agree that "concerns could arise," though, of course, I would fervently hope that any partisan considerations would be put aside at a time of such emergency. I can see two immediate ways of forestalling any such concerns. First, if the non-partisan experts of whom I speak above are required to issue a "certificate of incapacity" prior to any such declaration by a Governor or President. A second possibility that I think also makes a great deal of sense is to say that in these special circumstances, a Governor would have to appoint a replacement—the more apt word for an "incapacitated" Senator would be "substitute"—from the same political party.

2. The Continuity of Congress Act of 2003 authorizes states to choose one of the following for replacing Senators in the event one-fourth of the Senate is killed or incapacitated: (1) appointment by the governor or legislature of the State; (2) appointment pursuant to a list of successors created by the incumbent Senate member; or (3) other procedures as the state legislature determines appropriate.

c. Why is "one-fourth" the appropriate trigger for a replacement mechanism?

I don't think there is any "magic number" with regard to deciding whether the crisis condition is met. It is a bit like figuring out the age of voting (or, for that matter, of eligibility to serve in the House or Senate). No one could argue that 25 or 30, respectively, is just the right age, but most people think that age requirements are a good thing and that the ones present in the Constitution make sense, all things considered. My own intuition as a citizen—and I don't think that there is really any lawyerly "expertise" on this—is that an attack that incapacitated 25 out of 100 Senators would count in anyone's book as a "catastrophe" that would trigger a special response. I can as easily imagine that some would want a lower threshold (say, 20%) as a higher one (say, 33%).

d. Do you agree that filling a Senate seat based on a list of successors created by the incumbent could appear anti-democratic?

It is hard to deny that it might "appear anti-democratic" if one believes that democracy requires elections and allows nothing else. But, of course, there is nothing particularly democratic about allowing governors to select successors

upon the occasion of the death of a Senator. If one argues that it is democratic because, after all, the Governor is an elected official, then one could as easily make the same argument with an incumbent-generated list. I am, therefore, not inclined to take this objection very seriously.

It was a privilege to testify before the Judiciary Committee, and I hope that these answers adequately respond to your excellent questions.

Sincerely,

Sanford Levinson
W. St. John Garwood and
W. St. John Garwood Jr.
Centennial Chair in Law,
University of Texas Law School;
Visiting Professor of Law,
Harvard Law School,
Visiting Lecturer,
Yale Law School

February 11, 2004

Honorable Russell Feingold
United States Senate
Washington D.C.

Dear Senator Feingold:

I am happy to try to answer the questions that you have directed at me. I shall go down your list of questions and answer accordingly:

1. Part of the proposed amendment deals with issues of continuity in the House of Representatives. As a matter of procedure and comity, do you think it would be more appropriate for the House to be the starting point for legislation or a constitutional amendment dealing with replacing its members?

As a matter of comity, I can well see why one might want to allow the House to initiate legislation with regard to procedures for replacing its members. With regard to the constitutional amendment, however, I believe, frankly, that the most important thing is to begin the process of putting into place a contingency plan with regard to the catastrophic possibilities that have triggered the work of the American Enterprise Institute-Brookings Institution commission co-chaired by former Senator Simpson and Lloyd Cutler. The important thing the proposed amendment would do is to authorize Congress to pass congressional equivalents of the presidential Succession in Office Act. Once the proposed amendment has been added to the Constitution, then one could address the degree to which comity should defer to the House. If, however, it is true, as Senator Simpson suggested, that relevant leaders of the House are simply unwilling to address the issue in a serious way, then I believe that serving the national interest takes precedence over comity to the House of Representatives.

2. The text of the amendment includes no restriction on the duration of the terms of members of Congress appointed under its authority. In other words, it is conceivable that implementing legislation could authorize a Representative to be appointed for the duration of a two-year term. Senator Simpson's testimony recommended that any accompanying legislation should include limitations on the length of service of the temporary appointees. Do you think the text of the amendment should specify that the election of new members shall be held as soon as possible, or perhaps even set a time limit for special elections?

I have no principled objection to specifying that elections "shall be held as soon as is reasonably possible," because I certainly think there is general assent to the proposition that elected representatives (and Senators) are an important part of our democratic process. I would be opposed to putting a time limit in the text of the amendment itself precisely because, by definition, we would be dealing with a catastrophic situation and there is just no telling what the "right" time limit would be. A possible compromise would be to say that special elections shall be held within, say, four months unless both the House and Senate pass resolutions stating that the continuing crisis is such that elections shall be postponed for another two to four months.

3. The two currently existing Constitutional provisions dealing with vacancies in Congress both delegate power directly to the States, rather than Congress. The 17th Amendment requires the States to issue writs of election to fill vacancies, and authorizes temporary appointments until elections can be held. Article I requires States to issue writs of election when vacancies occur in the House (Art. I, Sec. 2, Cl. 4). The proposed amendment, by contrast, would empower *Congress* to make provisions for mass vacancies or inabilities under the given circumstances.

a. Is there an advantage to the structure of the proposed amendment, in which Congress may by legislation exercise the power to fill vacancies?

I don't read the proposed amendment as authorizing Congress "to fill vacancies" itself (as, for example, by the Speaker appointing new members of the House or the President Pro Tem of the Senate naming new Senators). Rather, I believe that the proposed amendment authorizes Congress to pass legislation that is analogous to the presidential Succession in Office Act by setting out a set of clear procedures for succession in case of the envisioned catastrophe.

b. Do you see any advantage in an alternative structure in which states are instructed to provide for mass vacancy or inability, and Congress is authorized to make provisions only in the event the states fail to do so?

There is one obvious advantage, which is the greater legitimacy if state officials themselves have provided for the contingency. There is one obvious disadvantage, which is, to put it bluntly, that "responsible" states end up being held hostage to states that, for whatever reason, do not put a system in place. With regard to my (and Senator Cornyn's) home state of Texas, for example, the legislature meets only every two years. I have a hard time imaging that the Governor would call the legislature into a special session to address the

issues of continuity in government; I can also imagine such legislation simply being put at the back of the queue in the relatively short legislative session mandated by the Texas constitution. Thus, I think it is vitally important for Congress, acting under power to be granted to it under the proposed amendment, to pass enabling legislation as soon as possible that would provide relatively definite answer as to what happens in case of catastrophe. I would have no objection, and would probably support, a provision allowing states to "opt out" of the particular solution chosen by Congress *if* the state on its own put in place adequate substitute procedures.

4. Following are a few questions about the text of the amendment, and the scope of its authority.

a. The authority of the amendment is triggered upon the death of one-fourth of the House, or the incapacitation of one-fourth of either Chamber. Does this seem to you an appropriate cutoff? Why one-fourth, rather than a higher or lower number?

Senator Leahy asked a similar question, and I append my answer:

I don't think there is any "magic number" with regard to deciding whether the crisis condition is met. It is a bit like figuring out the age of voting (or, for that matter, of eligibility to serve in the House or Senate). No one could argue that 25 or 30, respectively, is just the right age, but most people think that age requirements are a good thing and that the ones present in the Constitution make sense, all things considered. My own intuition as a citizen—and I don't think that there is really any lawyerly "expertise" on this—is that an attack that incapacitated 25 out of 100 Senators would count in anyone's book as a "catastrophe" that would trigger a special response. I can as easily imagine that some would want a lower threshold (say, 20%) as a higher one (say, 33%).

b. If 25 Senators are incapacitated, triggering the amendment, and one replacement is appointed to fill the vacancy, would there still be authority to fill the remaining seats? Is this sufficiently clear from the text of the amendment?

This is an interesting question. I assume that anyone supporting such an amendment and implementing legislation would not require the crisis as being alleviated simply by the appointment of one Senator, leaving 24 vacancies (or incapacitations). Certainly the legislative history of the amendment should manifest some such view, and I can imagine a case for putting language in the amendment itself that makes it clear that the implementation procedures apply to each and every one of the dead or incapacitated members of the House and Senate so long as their death or incapacity is linked to the same "triggering event."

I gather than Senator Cornyn's view is that, under his amendment, anyone could utilize emergency succession procedures within 120 days of a triggering event (or more than 120 days if, after 120 days have passed, there is still one-fourth vacant/incapacitated). So once the procedure is triggered, on day one, any vacant seats can be filled through the emergency procedures for the next 120 days, even if, say, on the 119th day, there is only one remaining vacancy. This seems eminently sensible to me.

c. Would the authority of the amendment extend to seats that were vacant prior to the triggering event? If Congress (or a state, depending on the implementing legislation) attempted to fill not only the seats left vacant by a terrorist attack, but also a seat vacant before the attack, could its action be challenged as unconstitutional?

My own inclination would be to apply the emergency procedures to pre-existing vacancies. The easiest way to avoid any constitutional challenge, of course, would be to address this situation in the amendment itself.

d. If a triggering event occurred, would the scope of the authority extend to seats that became vacant after the event for unrelated reasons?

Again, I would be inclined to apply the emergency procedures and, again, I could easily see addressing this situation in the amendment itself. The *constitutional* emergency, after all, as distinguished from the "political" emergency, is the potential inability of the House or Senate to meet its quorum requirements or to have enough members to satisfy what might be called "legitimacy" needs with regard to the population at large. From this perspective, it really shouldn't matter what the particular cause of the vacancy is.

e. Are there any changes you would suggest to the text of the amendment as currently drafted?

I believe that the attraction of the amendment as currently drafted is its almost elegant simplicity, inasmuch as all it does it to authorize Congress to pass legislation that would apply for succession to positions in the House or Senate under the given contingency. As noted above, I could imagine adding language to address the questions you raise about pre-existing vacancies or vacancies that happen to occur for other reasons during the period of national emergency.

Answers to questions by Senator Feingold, page five

It was a privilege to testify before the Judiciary Committee, and I hope that these answers adequately respond to your excellent questions.

Sincerely,

Sanford Levinson
W. St. John Garwood and
W. St. John Garwood Jr.
Centennial Chair in Law,
University of Texas Law School,
Visiting Professor of Law,
Harvard Law School,
Visiting Lecturer,
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**Answers to Supplemental Questions**

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*Before the Senate Committee on the Judiciary*

*Regarding*

*Ensuring the Continuity of the United States Government: A Proposed Constitutional Amendment to Guarantee a Functioning Congress*

Tuesday, January 27, 2004

**Questions from Senator Leahy:**

**1) Senator Cornyn has introduced the Continuity of Congress Act of 2003 (S.1820), which provides that one-fourth of the Senate will be considered killed or incapacitated if determined by either: (1) joint declaration of the Senate Majority and Minority Leaders; or (2) joint certification of the President and the governors of the several states.**

**a) With regard to "incapacity:" (i) How should "incapacity" be defined?; (ii) what criteria should be used to determine incapacity?; and (iii) Are there threshold characteristics that must be present prior to such a determination?**

Incapacity should be defined as an inability to appear at Congress at the designated time and place and to perform the functions of a member of Congress, due to some physical or mental condition, injury, or disability.

Procedurally, each house should establish in advance a time and place at which all members must report (either physically or by telecommunications) following a triggering event, such as an attack on Congress. Anyone unable to appear at that time (or contact the appropriate sources) and perform legislative functions due to some injury or disability resulting from the triggering event may be deemed incapacitated according to some voting procedure.

**b) S.1820 provides a mechanism for the President and state governors to jointly determine a Senator to be incapacitated. Do you agree that concerns could arise if a President and state governor of the same party declared a Senator of the opposing party to be incapacitated?**

Political concerns perhaps could arise. But a member who has been declared incapacitated, by any source, ceases to be incapacitated and may resume her seat simply by declaring herself no longer incapacitated or disabled and able to return. That determination is unilateral and unreviewable by anyone within or without Congress. Thus, to the extent a President or governor attempted to play politics with the incapacity determination of a member of Congress from a rival political party, the member herself would hold the power to undo that determination immediately; neither the President, governor, or anyone within Congress would be able to challenge the return of that member.

**2) The Continuity of Congress Act of 2003 authorizes states to choose one of the following for replacing Senators in the event one-fourth of the Senate is killed or incapacitated: (1) appointment by the governor or legislature of the State; (2) appointment pursuant to a list of successors created by the incumbent Senate member; or (3) other procedures as the state legislature determines appropriate.**

**a) Why is "one-fourth" the appropriate trigger for a replacement mechanism?**

One-fourth of each house is the appropriate cut-off or trigger for the constitutional power under the amendment. The loss of one-fourth of members would leave a House of 327 members and a Senate of 75 members. Those bodies would remain large enough that, assuming all

remaining members are present, each house could obtain a quorum to do business even on a denominator of the whole of both houses. But the bodies would be small enough to demand the filling of vacant or incapacitated seats, since each would be unrepresentative in that skeletal from, perhaps politically, geographically, and ideologically different from the larger legislative bodies being replaced.

Using a higher number of vacancies or incapacitations as the trigger is problematic because it may bring one or both houses closer to the line of losing a whole-number quorum. Using a lower number as the trigger may mean too many appointments being made unnecessarily. Given the opposition of many in the House of Representatives to the idea of any temporary appointments to that body, a higher threshold (one that presumably would make the need for House appointments or the actual making of such appointments less likely and limited only to the most extreme of cases) is the wisest course.

**b) Do you agree that filling a Senate seat based on a list of successors created by the incumbent could appear anti-democratic?**

Appointment from a list of successors is anti-democratic if the appointment is made unilaterally by the regular holder of that seat. In other words, it would be undemocratic for a member of Congress to establish a list of successors and to have the first person on that list instantly assume the seat if the member is killed or disabled. Unilateral appointment of one's own successor, without some outside review of that choice (such as congressional confirmation of a vice presidential nominee), is unheard of within the federal government for any office and we should be reluctant to impose that scheme for congressional vacancies.

In fact, however, the best appointment scheme would combine gubernatorial appointment and incumbent predesignation—each incumbent member would prepare a list of three or five potential successors and the governor would appoint one of the people from that list. This plan provides the successor with the democratic imprimatur of the popularly elected legislator from that state or district; any appointee will be politically and ideologically similar to, and acceptable to, the elected member, and presumably, to the majority of the constituents. At the same time, having the governor make the formal appointment provides an independent approval on the appointee.

Predesignation would reduce the likelihood of a change in party control of a seat and of party control of one house of Congress through a large number of appointments. It also would reduce the likelihood of a governor of one party attempting to play politics with the appointment process. Finally, it would accord some public accountability if the names and backgrounds of potential appointees are known to the people prior to the emergency need for such appointees; unpopular or questionable potential appointees may be removed from the list at public insistence.

**Questions from Senator Feingold:**

**1) Part of the proposed amendment deals with issues of continuity in the House of Representatives. As a matter of procedure and comity, do you think it would be more appropriate for the House to be the starting point for legislation or a constitutional amendment dealing with replacing its members?**

The proposed constitutional amendment should be understood as dealing with issues of continuity of Congress as a whole; it therefore is perfectly appropriate for any amendment to begin in the Senate. First, an important aspect of the amendment deals with mass incapacitations or disabilities in the Senate, an issue not dealt with in the present Constitution and one that only can be handled through an amendment. Second, the Senate has a vested interest in ensuring continuity of the House of Representatives. Principles of bicameralism mean that a functioning Senate cannot accomplish anything legislative absent a functioning House. There would be no point in taking separate broad steps to guarantee Senate continuity without similarly guaranteeing House continuity. House continuity is not a parochial concern of the House alone; the continuity of Congress and the federal government as a whole depend on it.

This amendment therefore is as important for the Senate as the House. And because it would be unwise, and procedurally difficult, to attempt to pass multiple constitutional amendments to handle continuity in each house, it is appropriate for the Senate to initiate the process of drafting and passing an amendment that will enable continuity of Congress as a whole.

**2) The text of the amendment includes no restriction on the duration of the terms of members of Congress appointed under its authority. In other words, it is conceivable that implementing legislation could authorize a Representative to be appointed for the duration of a two-year term. Senator Simpson's testimony recommended that any accompanying legislation should include limitations on the length of service of the temporary appointees. Do you think the text of the amendment should specify that the election of new members shall be held as soon as possible, or perhaps even set a time limit for special elections?**

That is a detail that should be left to the enabling legislation and not included in the language of a constitutional amendment. The constitutional provision should be minimalist, containing only the grant of power to Congress to address the mass-vacancy or mass-incapacitation situation and establishing the scope of the circumstances that trigger that power (such as the critical mass of vacancies or incapacitations).

It is particularly unwise to designate a constitutional time limit for special elections, because elections may be subject to different circumstances. If regular biennial House elections were scheduled for seven months after an attack that creates mass vacancies, it would make no sense to compel states to hold numerous simultaneous special elections four months after the attack, then hold the regular elections three months after that. Any timing provision should specify, for example, that special elections should take place within 120 days, unless regular elections were forthcoming within a few months anyway. Moreover, the more severe the human damage to Congress, the more time for elections on a sliding scale may be necessary.

The level of thought and detail required to consider and address the many and varied factors of timing and severity should be left to the process of legislative deliberation and drafting, not the constitutional amendment process.

**3) The two currently existing Constitutional provisions dealing with vacancies in Congress both delegate power directly to the States, rather than Congress. The 17th Amendment requires the States to issue writs of election to fill vacancies, and authorizes temporary appointments until elections can be held. Article I requires States to issue writs of election when vacancies occur in the House (Art. I, Sec. 2, Cl. 4). The proposed amendment, by contrast, would empower *Congress* to make provisions for mass vacancies or inabilities under the given circumstances.**

**a) Is there an advantage to the structure of the proposed amendment, in which Congress may by legislation exercise the power to fill vacancies?**

By granting to Congress the power to establish appropriate procedures, the proposed amendment ensures the probability of necessary national uniformity of emergency replacement procedures. Alexander Hamilton in The Federalist No. 59 recognized the dangers of exclusive state control over procedures for populating or repopulating the government, lest the existence of the Union be placed entirely at the mercy of state legislatures. The mass-destruction scenario, threatening as it does the continuity of the national government, is the most obvious situation in which selection processes should be established from the top down, in order to ensure that procedures will be carried out and continuity achieved should the need arise. And if Congress elects to delegate its power to the states in the political service of federalism, as it would under both the Continuity of Congress Act and the Continuity of the Senate Act, that is a structural policy choice for Congress to make legislatively, rather than in the Constitution.

It should be noted that neither Article I, § 2 nor the Seventeenth Amendment leaves the states entirely free to act on their own. The states remain subject to the power of Congress to "at any time make or alter" the regulations as to the times, places, and manner of holding congressional elections. *See* U.S. CONST. art. I, § 4, cl.1. In delegating to Congress the first choice as to emergency selection processes (which will at least be carried out by the states), the Twenty-eighth Amendment follows the basic broad structure of the present Constitution.

**b) Do you see any advantage in an alternative structure in which states are instructed to provide for mass vacancy or inability, and Congress is authorized to make provisions only in the event the states fail to do so?**

No, if for no other reason than because we do not want the addition of a further step in the process of establishing selection procedures. The most streamlined approach is to accord power directly to Congress, with Congress then exercising its legislative discretion as to whether to choose its own procedures or delegate power further to the states.

I would reiterate the suggestion in my Prepared Testimony that, if Congress chooses to delegate power to the states, as in each of Sen. Cornyn's proposals, it be made mandatory on the states to enact appropriate procedures.

**4) Following are a few questions about the text of the amendment, and the scope of its authority.**

**a) The authority of the amendment is triggered upon the death of one-fourth of the House, or the incapacitation of one-fourth of either Chamber. Does this seem to you an appropriate cutoff? Why one-fourth, rather than a higher or lower number?**

One-fourth of each house is the appropriate cut-off or trigger for the constitutional power under the amendment. The loss of one-fourth of members would leave a House of 327 members and a Senate of 75 members. Those bodies would remain large enough that, assuming all remaining members are present, each house could obtain a quorum to do business even on a denominator of the whole of both houses. But the bodies would be small enough to demand the filling of vacant or incapacitated seats, since each would be unrepresentative in that skeletal from, perhaps politically, geographically, and ideologically different from the larger legislative bodies being replaced.

Using a higher number of vacancies or incapacitations as the trigger is problematic because it may bring one or both houses closer to the line of losing a whole-number quorum. Using a lower number as the trigger may mean too many appointments being made unnecessarily. Given the opposition of many in the House of Representatives to the idea of any temporary appointments to that body, a higher threshold (one that presumably would make the need for House appointments or the actual making of such appointments less likely and limited only to the most extreme of cases) is the wisest course.

**b) If 25 Senators are incapacitated, triggering the amendment, and one replacement is appointed to fill the vacancy, would there still be authority to fill the remaining seats? Is this sufficiently clear from the text of the amendment?**

The authority to make appointments to the other vacant or incapacitated seats remains. As I now read the amendment's language, the 120-day period clause means that Congress (or the delegatee of Congress' power) may fill all vacant or incapacitated seats during the (extendable) 120-day period following the point at which the threshold number of vacancies/incapacitations is reached.

In the situation suggested, when the twenty-fifth Senator became incapacitated, the constitutional power to replace all twenty-five incapacitated Senators was triggered and that power to replace those members remains active for the full 120-day period.

**c) Would the authority of the amendment extend to seats that were vacant prior to the triggering event? If Congress (or a state, depending on the implementing legislation) attempted to fill not only the seats left vacant by a terrorist attack, but also a seat vacant before the attack, could its action be challenged as unconstitutional?**

Yes. All of the seats that are vacant or incapacitated as part of the one-fourth, regardless of when a particular vacancy occurred, may be filled by the procedures established under this amendment.

**d) If a triggering event occurred, would the scope of the authority extend to seats that became vacant after the event for unrelated reasons?**

Yes, for the reasons discussed in (c).

Respectfully Submitted:

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SUBMISSIONS FOR THE RECORD

# JOHN CORNYN

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FOR IMMEDIATE RELEASE
January 27, 2004

## Opening Statement of Sen. John Cornyn

**Ensuring the Continuity of the United States Government:**
**A Proposed Constitutional Amendment to Guarantee a Functioning Congress**

Senator John Cornyn (R-TX), Chairman, Subcommittee on the Constitution

Tuesday, January 27, 2004, 9:30 a.m., Dirksen Senate Office Building Room 226

* * *

Two days before the two year anniversary of 9/11, this committee examined potential vulnerabilities in our constitutional system of government.

It was painful to recall the events of September 11, but a stark reminder of just how close terrorists came that day to successfully decapitating the United States government. Were it not for the late departure of United Airlines Flight 93 and the ensuing heroism of its passengers, the Capitol building might have been destroyed—potentially killing numerous senators and representatives, and perhaps even disabling Congress itself.

The American people must be able to rely on a functioning Congress in the wake of a catastrophic terrorist attack. Although not in session year-round, Congress may need to convene immediately in a time of crisis. In the days and weeks following September 11, Congress enacted numerous emergency laws and appropriations measures to stabilize our economy and bolster national security.

Yet we lack the constitutional tools needed to ensure continuity of Congressional operations.

Under our Constitution, a majority of each House of Congress is necessary in order to "constitute a Quorum to do Business." After all, our Founders understood the need for a nationally representative Congress, and rightly so.

That important commitment carries with it certain vulnerabilities, however.

If a terrorist attack killed a majority of House members, Congress would be disabled until special elections were conducted around the country – a process that takes months, according to every election official who has contacted my office – time we may not have. Moreover, if a majority of representatives is incapacitated, the House would be shut down until the inauguration of a new Congress – a delay of as long as *two years*.

The situation could be even more dire in the Senate. The Seventeenth Amendment permits state legislatures to empower governors to make immediate appointments to fill vacancies in the Senate, and every state except Oregon and Wisconsin has chosen to do so. Yet the Constitution provides no

*--More--*

mechanism whatsoever for dealing with Senators who are incapacitated, but not killed. If a biological weapons attack incapacitated a majority of Senators, Congress could be shut down for *four years*.

Our Constitution does not prepare us for such dire circumstances, because our Founders could not have contemplated the horrors of 9/11. After all, they lived in a world free of weapons of mass destruction. They established a Presidency to command an army and navy, but no air force. They structured our system of government specifically to disfavor standing armies.

Yet the Founders, in their great wisdom, well understood that they could not predict everything that this new nation might someday need, or what the future might someday hold. They wisely ratified the constitution specifically because it included a built-in procedure for amendment, in Article V of the Constitution.

Accordingly, last November, I introduced a constitutional amendment and accompanying legislation to ensure continuity of Congress, in a manner consistent with the vision of our Founders.

The amendment, Senate Joint Resolution 23, authorizes Congress to enact laws providing for Congressional succession — just as Article II of the Constitution authorizes laws providing for Presidential succession. The implementing legislation, S. 1820, authorizes each state to craft its own mechanism for filling vacancies and redressing incapacities in its congressional delegation — just as the Seventeenth Amendment authorizes states to decide how to fill vacancies in the Senate.

My proposed amendment authorizes the creation of special emergency procedures that would be available for 120 days, or longer if at least one-fourth of either House continues to remain vacant or occupied by incapacitated members. Any appointment or election of a member of Congress made pursuant to such emergency procedures would last for as long as the law would allow (that is, until the expiration of the regular term of office, or earlier as Congress may allow) – but the emergency procedures themselves would be available only for the period of time permitted under the proposed constitutional amendment.

I recognize that some House members favor emergency interim appointments to ensure immediate continuity of House operations, while others prefer to rely solely on expedited special elections. My November proposal takes no sides in this debate.

Some states, in order to expedite the conduct of special elections, may be prepared to adopt Internet voting, enact same-day registration laws, or abandon party primaries – while other states may be concerned that expedited special elections are undemocratic or will disenfranchise military voters. Under my approach, each state would make its own choice.

Moreover, today I will introduce new implementing legislation, focusing exclusively on the Senate, called the Continuity of the Senate Act of 2004. If House members decide to rely solely on special elections to cure continuity problems in their chamber, I will not stand in their way. By the same token, the House should not prevent Senators from resolving continuity issues in our chamber.

This proposal gets the job done, while respecting the prerogatives of each House of Congress. It deserves to be enacted into law.

Twenty years ago, after nearly killing Prime Minister Margaret Thatcher and leading members of her government, I.R.A. terrorists issued a chilling threat: "Remember, we only have to be lucky once. You have to be lucky always."

The American people should not have to rely on luck. They deserve a constitutional system of government that is failsafe and foolproof. Nobody likes to plan for his own demise, but failure to do so is not an option. We must plan for the unthinkable now – before our luck ever runs out.

-30-

**http://cornyn.senate.gov**

**Public Laws Pertaining to the Terrorist Attacks Passed in the First Three Months after September 11, 2001**

| Week | Public Law No. |
|---|---|
| One (September 9-15, 2001) | No relevant legislation passed |
| Two (September 16-22, 2001) | P.L. 107-037, P.L. 107-038, P.L. 107-039, P.L. 107-040, P.L. 107-042 |
| Three (September 23-29, 2001) | No relevant legislation passed |
| Four (September 30-October 6, 2001) | P.L. 107-045 |
| Five (October 7-13, 2001) | No relevant legislation passed |
| Six (October 14-20, 2001) | P.L. 107-051 |
| Seven (October 21-27, 2001) | P.L. 107-056, P.L. 107-057 |
| Eight (October 28-31, November 1-3, 2001) | No relevant legislation passed |
| Nine (November 4-10, 2001) | No relevant legislation passed |
| Ten (November 11-17, 2001) | P.L. 107-067 |
| Eleven (November 18-24, 2001) | P.L. 107-071 |
| Twelve (November 25-30, December 1, 2001) | P.L. 107-076, P.L. 107-077 |
| Thirteen (December 2-8, 2001) | No relevant legislation passed |
| Fourteen (December 9-15, 2001) | P.L. 107-081 |

Week One (September 9-15, 2001)

No relevant legislation passed

Week Two (September 16-22, 2001)

P.L. 107-037 To provide for the expedited payment of certain benefits for a public safety officer who was killed or suffered a catastrophic injury as a direct and proximate result of a personal injury sustained in the line of duty in connection with the terrorist attacks of September 11, 2001. NOTE: Sept. 18, 2001 - [H.R. 2882]

P.L. 107-038 Making emergency supplemental appropriations for fiscal year 2001 for additional disaster assistance, for anti-terrorism initiatives, and for assistance in the recovery from the tragedy that occurred on September 11, 2001, and for other purposes. NOTE: Sept. 18, 2001 - [H.R. 2888]

P.L. 107-039 Expressing the sense of the Senate and House of Representatives regarding the terrorist attacks launched against the United States on September 11, 2001. NOTE: Sept. 18, 2001 - [S.J. Res. 22]

P.L. 107-040 To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States. NOTE: Sept. 18, 2001 - [S.J. Res. 23]

P.L. 107-042 To preserve the continued viability of the United States air transportation system. NOTE: Sept. 22, 2001 - [H.R. 2926]

Week Three (September 23-29, 2001)
No relevant legislation passed

Week Four (September 30-October 6, 2001)
P.L. 107-045 To amend the Immigration and Nationality Act to provide permanent authority for the admission of ``S" visa non-immigrants. NOTE: Oct. 1, 2001 - [S. 1424]

Week Five (October 7-13, 2001)
No relevant legislation passed

Week Six (October 14-20, 2001)
P.L. 107-051 Memorializing fallen firefighters by lowering the American flag to half-staff in honor of the National Fallen Firefighters Memorial Service in Emmitsburg, Maryland. NOTE: Oct. 16, 2001 - [H.J. Res. 42]

Week Seven (October 21-27, 2001)
P.L. 107-056 To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes. NOTE: Oct. 26, 2001 - [H.R. 3162]

P.L. 107-057 To authorize the President to exercise waivers of foreign assistance restrictions with respect to Pakistan through September 30, 2003, and for other purposes. NOTE: Oct. 27, 2001 - [S. 1465]

Week Eight (October 28-31, November 1-3, 2001)
No relevant legislation passed

Week Nine (November 4-10, 2001)
No relevant legislation passed

Week Ten (November 11-17, 2001)
P.L. 107-067 Making appropriations for the Treasury Department, the United States Postal Service, the Executive Office of the President, and certain Independent Agencies, for the fiscal year ending September 30, 2002, and for other purposes. NOTE: Nov. 12, 2001 - [H.R. 2590]

Week Eleven (November 18-24, 2001)

P.L. 107-071 To improve aviation security, and for other purposes. NOTE: Nov. 19, 2001 - [S. 1447]

Week Twelve (November 25-30, December 1, 2001)

P.L. 107-076 Making appropriations for Agriculture, Rural Development, Food and Drug Administration, and Related Agencies programs for the fiscal year ending September 30, 2002, and for other purposes. NOTE: Nov. 28, 2001 - [H.R. 2330]

P.L. 107-077 Making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 30, 2002, and for other purposes. NOTE: Nov. 28, 2001 - [H.R. 2500]

Week Thirteen (December 2-8, 2001)

No relevant legislation passed

Week Fourteen (December 9-15, 2001)

P.L. 107-081 To authorize the provision of educational and health care assistance to the women and children of Afghanistan. NOTE: Dec. 12, 2001 - [S. 1573]

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**Statement of U.S. Senator Russ Feingold**
***At the Senate Judiciary Committee Hearing on "Ensuring the Continuity of the United States Government: A Proposed Constitutional Amendment to Guarantee a Functioning Congress"***

**January 27, 2004**

Mr. Chairman, first, I'd like to commend you for your work on this issue. I appreciate your initiative and leadership; you and your staff have put a lot of thought and effort into this, and it shows.

In the two years and four months since the attacks of September 11th, we have been repeatedly reminded that there are terrorists working every day to attack our country wherever it is most vulnerable. The threats we face are very real, and certainly a massive attack on the federal government would achieve many of the terrorists' goals. Of course, our first duty as legislators is to do whatever is necessary to ensure the security of the American people. But we must also recognize the possibility of future terrorist attacks and plan for them.

Discussions about the continuity of government, and about various hypothetical scenarios that could occur in the wake of a catastrophic terrorist attack, may seem abstract and far-fetched. But in the terrible event that any of these nightmare scenarios should come true, many lives may depend on the ability of the legislative and executive branches to effectively respond.

As you know, I approach all proposals to amend the Constitution with great caution. As the charter that provides the structure and basic rules for our entire system of government, the Constitution strikes innumerable balances we must be wary of disrupting. Any changes in this fundamental structure can have far-reaching consequences, and constitutional amendments are immensely difficult to undo.

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For this reason, whenever there is a proposal to amend the Constitution, I believe we should ask first whether the problem can be solved with legislation, rather than a constitutional amendment. If any of the witnesses believe there are proposals other than a constitutional amendment that could adequately protect the continuity of our government, and in particular the legislative branch, I would be particularly interested to hear them say so.

But I do recognize that there are some problems that can't be solved by legislation, and the providing for the continuity of Congress may well be one of them. Mass vacancies or incapacitations in the House or Senate could seriously obstruct Congress from responding to the crisis created by a catastrophic terrorist attack. Today we face the threat of attacks on a scale that would have been unimaginable not many years ago, and as we know, historical events can sometimes alert us to vulnerabilities or flaws in our constitutional structure. The assassination of President Kennedy led to the adoption of the 25th Amendment. It may well be that the attacks of September 11th should lead to the adoption of a 28th Amendment.

The goal of this amendment is unquestionably laudable, and the structure it proposes may well prove to be the best option. A lot of hard work has already been done here, and I look forward to working further with you, Mr. Chairman, to find the best way to protect our democracy. I am grateful to our panel for being here, and I look forward to hearing their views.

Thank you, Mr. Chairman.

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February 9, 2004

The Honorable John Cornyn, R.-Texas
Chairman, Subcommittee on the Constitution, Civil Rights, and Property Rights
United States Senate
224 Dirksen Senate Office Building
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Dear Senator Cornyn:

I understand that on January 27th you chaired a Senate Judiciary Committee hearing on the need for a constitutional amendment to ensure continuity of Congress. With your permission, I would appreciate your allowing me to include the following written statement in support of your exemplary effort to redress a significant gap in our Constitution.

Most importantly, I wish to express my complete agreement with the unanimous conclusion of the Continuity of Government Commission that our current laws regarding the continuity of the Congress are inadequate and that a constitutional amendment is necessary to ensure the continuity of Congress. The need for such an amendment is obvious from the text and structure of the Constitution. In article I, section 2, the Constitution provides both that members of the House will serve for terms of two years and that "[w]hen vacancies happen in the Representation of any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." In the Seventeenth Amendment, the Constitution provides that senators, "elected by the people [of their State, shall have terms] for six years." It further provides that "[w]hen Vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies, *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct" (italics in original). The term "Vacancies" appears more than once in the Constitution, and its plain meaning throughout the Constitution is obvious: It is a straightforward term referring to a permanent opening arising in a Senate. The Constitution explicitly recognizes that each House has the power "to expel a Member," but otherwise provides nothing to redress incapacities in the House or Senate. Instead, the Constitution provides that state legislatures may prescribe the "Time, Place, and Manner of holding Elections for Senators and Representatives, . . . but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." The latter provision has been construed narrowly. Indeed, the Supreme Court in The Term Limits Case construed it further as not empowering either the States or the Congress to impose term limits on either representatives or senators. Nor does it empower either Congress or the States to shorten the terms of either representatives or senators. The lengths of the terms are fixed. They cannot be expanded, or contracted, except by constitutional amendment. In short, the Constitution does not provide either Congress or the States with the authority to specify the arrangements for replacing incapacitated representatives and senators.

In American history, there have been numerous instances in which members of Congress were

incapacitated because of serious illness. Until now, our solution to that dilemma has been uniform -- allowing seriously ill members of Congress to complete their terms, face re-election (and perhaps lose), resign voluntarily, or die in office. No one has seriously argued that because of poor health members of Congress may have their terms prematurely terminated.

There are at least three other constitutional difficulties if the Congress, under the Constitution as it presently provides, were to shorten the terms of incapacitated representatives and senators. The first difficulty is that such legislation would allow the terms of representatives to depend on the preferences of senators, the terms of senators to depend on the preferences of representatives, and the terms of members of Congress to depend on presidents' preferences. It is unimaginable that the Framers ever would have allowed such conflicts of interests. Indeed, they were especially sensitive to constraining, or avoiding, conflicts of interest in the distribution of power in the Constitution. This sensitivity is apparent throughout the Constitution. Note, for instance, the Framers did not empower the Senate to expel a member of the House or to judge the qualifications of someone to be seated in the House, and vice versa. I can find no source of authority indicating that the Framers were comfortable with the prospect of allowing one House, or the President, to be involved with the staffing of the other House. Second, neither Congress nor the States have the power to re-define the qualifications for service in the House or Senate. Curtailing the terms of incapacitated members of Congress is tantamount to an impermissible declaration of a new qualification -- the absence of any incapacitating condition -- in order for someone to continue to serve in the House or Senate. Third, if mere legislation could shorten or terminate the terms of otherwise qualified members of Congress, then it presumably could do the same to the terms designated within the Constitution for presidents or justices of the Supreme Court. The former legislation would presumably be based on a doctrine of necessity, but there is no such doctrine applicable to the election, appointment, or replacement of our highest ranking officials. The only way in which any of the terms set forth in the Constitution may be shortened (except by resignation, death, or expulsion) is by an amendment.

You have observed appropriately that agreeing on the magnitude of the problem with the continuity in Congress is easier than agreeing on a solution. Even so, I am inclined to believe that a constitutional amendment is the soundest solution for remedying the problems you have identified with the continuity of Congress. While I hope our nation will never have to make recourse to such an amendment, I agree with you and others that the Congress, and the States, ought to consider, and ratify, one as soon as possible.

If you have any questions or if I can be of service to you in any other way, please do not hesitate to let me know. In the meantime, I appreciate your allowing me to participate in this important dialogue.

Very truly yours,

Michael J. Gerhardt,
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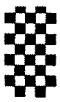

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February 2, 2004

Hon. John Cornyn
Chairman
Subcommittee on the Constitution, Civil Rights & Property Rights
Committee on the Judiciary
U.S. Senate
Washington, DC 20515

Dear Mr. Chairman:

This is in response to your request for my opinion concerning the power of Congress to enact legislation that would permit the selection of a substitute in the event an incumbent Senator is incapacitated.

As you may know, I testified before the Continuity of Government Commission on related issues and suggested that, absent a constitutional amendment, Congress could not enact legislation or adopt rules dealing with the problem of mass vacancy or incapacity in the House of Representatives. Similar considerations obtain here. The Constitution specifies how an individual can acquire the powers, rights, and privileges of membership in the House or Senate. The Constitution further specifies how an individual can acquire such rights, duties, and privileges in the event of a vacancy. It is fundamental that when the means set out in the Constitution is exclusive, neither Congress by law, nor one House by rule, may provide for an additional means not set out in the constitutional text. That the Constitution prescribes no procedure for dealing with incapacity in either House would suggest a similar conclusion: if a Senator or Representative is to be deprived of the powers, rights, and privileges of membership, that deprivation can likely be effected only pursuant a rule or law authorized by a constitutional amendment. Because of the urgency of this problem, the Constitution should, I testified, be amended to permit Congress to enact remedial legislation. Absent such an amendment, Congress almost surely lacks power either to enact legislation authorizing the selection of substitute Senators or otherwise to deal effectively with the problem of mass vacancy or incapacitation. Though in another context, the observation of Justice Robert Jackson in the *Steel Seizure Case*, 343 U.S. 579 (1952), seems apropos. The Framers, he wrote,

> knew what emergencies were, knew the pressures they engender for authoritative action....Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so....

Please let me know if I can be of further assistance.

Sincerely,

Michael J. Glennon
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News Release

# JUDICIARY COMMITTEE

*United States Senate • Senator Orrin Hatch, Chairman*

January 27, 2004 Contact: Margarita Tapia, 202/224-5225

**Statement of Chairman Orrin G. Hatch**
**Before the United States Senate Committee on the Judiciary**
**Hearing on**

## "ENSURING THE CONTINUITY OF THE UNITED STATES GOVERNMENT: A PROPOSED CONSTITUTIONAL AMENDMENT TO GUARANTEE A FUNCTIONING CONGRESS"

I want to thank Senator Cornyn for chairing this very important hearing before the Full Committee today. In September, 2003, we held two hearings in the Judiciary Committee. Our first hearing explored the continuity in Congress and the second hearing dealt with the continuity of the Presidency.

There is now good reason to believe that one of the airliners from the September 11th terrorist attack may have been headed for the White House and/or Capitol, but never made it to their targets. And also by chance, the President was out of Washington when the attacks happened, even though Congress was in session and most members and their staffs were in the Capitol or in the connecting office buildings. Thankfully, our country did not have to suffer a leadership crisis that would have arisen had President George Bush, Vice-President Dick Cheney, Speaker of the House Dennis Hastert, and then President pro tempore Senator Robert Byrd been killed in attacks on the White House and the Capitol. In addition, Secretary of State Colin Powell, who is next in line for Presidential succession, was out of the country.

Continuity in the House of Representatives raises some very important issues because if a horrific event caused mass casualties in the Congress, there is no way to quickly reconstitute the House of Representatives. The Constitution provides for the replacement of House members through the special election process, which on average could take four months. In the event of a catastrophic attack, elections could certainly take longer.

In the 99th through 107th Congress, the average time it took states to hold special elections to fill House vacancies caused by death was 126 days, or over 4 months. Some of these vacancies lasted as long as nine months. With this as a backdrop, it is particularly troubling that there is no precedent for holding dozens or hundreds of special elections at the same time.

The Seventeenth Amendment provides that Senate vacancies can be replaced by gubernatorial appointment until special elections can be held. But the truth of the matter is that ***neither*** body of Congress is prepared for the possibility of having a large number of incapacitated members.

One of the possible solutions to this dilemma is to look to the Constitution. Our Constitution gives us specific provisions for filling vacancies in the House and Senate, however, we do not have a procedure in place to fill mass vacancies without a constitutional amendment. A Constitutional amendment could give Congress the power to provide by legislation for the appointment of temporary replacements to fill vacant seats in the House of Representatives after a catastrophic attack and to temporarily fill seats in the House of Representatives and Senate that are held by incapacitated members.

The question of a Constitutional Amendment is a serious one to consider and I know that my colleagues in the Senate and House are always reluctant to amend the Constitution – as am I.

I also know that there appears to be strong agreement that we do have a problem and that current law is inadequate and does not ensure a functioning Congress.

And I agree that these are issues which will require considerable debate and a thorough examination of the possible options. Consideration of how our country and our governmental institutions would operate in the aftermath of an attack which caused mass vacancies in Congress present difficult questions my colleagues in the Congress and the American public must identify and resolve.

I thank the witnesses for appearing before us today and I look forward to hearing from both of you about these very important issues.

# # #

**Statement of Senator Patrick Leahy**
**Senate Committee on the Judiciary**
**Hearing on Ensuring the Continuity of the United States Government**
**January 27, 2004**

Ensuring the continuity of our Government is undoubtedly an important and serious matter. It was considered by the Founders who forged our national charter, the Constitution. They faced personal threats as well as threats to our governmental representatives in the earliest days in which they worked together to create this nation and its democratic institutions.

Proposed constitutional amendments are, likewise, very serious matters. Their proponents bear a heavy burden. Constitutional amendment has been rare since adoption of the Bill of Rights. It is only appropriate when there is a clear, pressing need that cannot be addressed by other means.

From the inception of our Republic, there have been concerns about the continuity of Congress, and numerous proposals for constitutional amendments have dotted our history. We have survived the burning of the Capitol, explosions, and shootings. We have seen war and nuclear threats.

The tragic events on September 11, 2001, have renewed attention to security. Each of us can recall where we were that morning. I was meeting with the Chief Justice and the Judicial Conference across the street at the Supreme Court building. Upon learning of the planes crashing into the World Trade Center in New York and the Pentagon, I returned to the Senate, our Senate offices and joined with others on the steps of the Capitol to show our resolve to continue working on behalf of the American people. I sensed then, and have become more convinced since, that the fourth plane, whose heroic passengers and crew forced it down in Pennsylvania, was also headed for Washington, and, most likely, for the Capitol building itself.

Following those attacks we experienced the still unsolved anthrax attack when letters addressed to Senator Dashcle and to me were laced with deadly anthrax spores and sent to our offices. The aftermath was one in which postal workers were killed, a number of staff were made sick, and the Senate office buildings were evacuated and closed for many weeks, and in some cases months, until they could be opened safely.

In those days, we joined together in bi-partisan efforts. I worked to review our laws to ensure that we are in the best position to fight terrorism, but also to preserve our democratic principles and our liberties. We were not deterred but doubled our efforts on behalf of the American people.

In connection with the topics raised by this hearing today, I look forward to hearing from governors, State legislatures and our citizens about proposals to change the ways in which Senators and Representatives are elected or chosen. As we consider proposals to

amend our Constitution, we need to be cognizant of the constitutional guaranty of the right to vote that is the bedrock of our constitutional democracy. Throughout our history we have always acted to broaden the right to vote. Indeed, it is the 17th amendment, providing for direct election of Senators by the people in our States, that allows each of us to serve in the Senate today. Americans have made sure the Constitution protects the right to vote without regard to race or gender, prohibited discriminatory poll taxes and have included among eligible voters young adults.

I understand that in addition to Senator Cornyn's original proposal to direct the States to choose from among several mechanisms to replace both House and Senate members, he intends to introduce another proposal for our consideration focused exclusively on incapacities in the Senate. Of course, the 17th amendment, which provided for direct election of Senators, already provides for governors to make appointments to fill Senate vacancies that occur during a term. Whether the Constitution should be amended to address this issue is what we will be asked to consider. As currently framed, the proposal is not triggered until one-fourth of the Senate is affected.

That numerical trigger needs to be carefully considered as does the concept of "incapacity" and who and how "incapacity" is to be determined. We will want to consider what can be accomplished through statutes and through statutory clarification and how best to involve the States and the voters.

There are many important questions that must be resolved before we can move forward on proposed changes. I am pleased that we will be hearing from distinguished scholars on these issues, and I look forward to their testimony. I welcome the witnesses invited by Senator Cornyn and thank them for their testimony. I look forward to our studying this matter and helping develop a full record for the Committee and the Senate.

# # # # #

# TESTIMONY OF SANFORD LEVINSON, BEFORE THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES SENATE, JANUARY 27, 2004

My name is Sanford Levinson. I have, since 1975, taught American constitutional law, first at Princeton and then, since 1980, at the University of Texas Law School, where I hold the W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law. I am co-editor of a case book on constitutional law, *Processes of Constitutional Decisionmaking,* and I have written many other books and articles on one or another aspect of American constitutional law. More to the point, though, is that one of my special interests has been constitutional amendment itself. I have edited a book, *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press, 1995); I have also taught seminars on constitutional amendment at the University of Texas and Harvard law schools. During the spring semester of 2004 I will be co-teaching a seminar on "Constitutional Design" at the Yale Law School. From a professional point of view, therefore, it is a special honor and privilege to be testifying before this distinguished committee this morning about designing a Constitution adequate to the challenges presented by this new Millennium.

But I also want to convey my particular pleasure at the fact that it was my home-state Senator, John Cornyn, who invited me to testify. As the Senator undoubtedly knows, I am a strong Democrat. In the current atmosphere of American politics, I would

not ordinarily be singing Senator Cornyn's praises nor, I suspect, would he be calling me as a witness. (My prior testimony before the Senate Judiciary Committee, on Sept. 4, 2001, was at the invitation of Senator Schumer, and I defended the propriety of senators taking into account the ideology of judicial nominees, a position that I know Senator Cornyn disagrees with.) But for me the very point of this morning's session is to underscore the fact that the issue addressed by Senator Cornyn—the adequacy of our Constitution to meet the occurrence of a truly catastrophic loss of members of the Congress—is both of extreme importance and without a trace of partisan tilt.

I cannot think of an issue less subject to being analyzed in terms of a "Democratic" position or a "Republican" position, a "liberal" one or a "conservative" one. Truly we can address the issue as Americans united in finding the best solution to what can only be described as a "ticking time bomb," a metaphor based all-too-plausibly on the dangerous reality of the world we live in. I have no doubt that there will be disagreements about the details, particularly with regard to the implementing legislation also before the Senate and, I trust, to be the subject of other hearings. But, once again, I would hope that any disagreement is untainted by partisan politics.

I mentioned earlier that I had edited a book titled *Responding to Imperfection.* That title comes from a letter written by George Washington to his nephew Bushrod Washington (who would later become a distinguished member of the Supreme Court of the United States). George Washington, of course, was the single person most responsible for there being a new Constitution at all; he became president of the Constitutional Convention because it was his unimpeachable stature that convinced doubters in the first place to support the Philadelphia Convention itself. That same

stature would help persuade the citizenry to ratify the Constitution. One would expect Washington to take special pride in the Constitution. No doubt he did, but accompanying justified pride was an ever timely reminder about the Constitution's limits as well. Thus it especially important that it was Washington himself who wrote that "[t]he warmest friends and the best supporters the Constitution has do not contend that it is free from imperfections." Fortunately, when inevitable imperfections do manifest themselves, "there is a Constitutional door open. The People (for it is with them to Judge) can, as they will have *the advantage of experience* on their Side, decide with as much propriety on the alterations and amendment which are necessary." Should the point not already be clear enough, Washington went on to say that "I do not think we are more inspired, have more wisdom, or possess more virtue, than those who will come after us." (Quoted in Levinson, *Responding to Imperfection,* p. 3, emphasis added.)

I have emphasized the words "the advantage of experience," because it dishonors the memory of those we call the Founders, of whom Washington is surely one of the greatest, to believe that they in fact believed that they had struck off an absolutely perfect document that need never be scrutinized or changed. Indeed, the very existence of Article V is the best testament to that belief. One might well believe that amendments should be rare and that the burden of proof should be on those proposing them. But it rejects the very wisdom of Washington and other members of his generation to believe that amendment is unthinkable or even that an unrealistically high burden of proof should be placed on those who propose amendment. The proposed 28th Amendment is not only thinkable; it is, to borrow from a key phrase in the Constitution, absolutely "necessary and proper" inasmuch as it would contribute to maintaining the integrity of the

constitutional system itself. To maintain otherwise, frankly, I believe is to play the ostrich by putting one's head in the sand and hoping that things will turn out for the best.

Everyone in this room—and across the Nation—experienced, in his and her own way, the catastrophe that we call "September 11." Fortunately, that did not include the destruction of the Capitol that may well have been the aim of the United Airlines flight that went down in Pennsylvania. But it would be foolish indeed to discount the possibility that something similar might happen in the future. (More likely, one suspects, is a bio-terror attack, but surely that is almost beside the point.) I had the privilege last year of attending a truly frightening event co-sponsored by the American Enterprise Institute and the Brookings Institution, which have been studying together the problem of "continuity in government." (My fellow witness, former Senator Simpson of Wyoming, is, of course, a co-chair of that commission.) What struck me, as a non-Washingtonian (who, however, now has a daughter working in Washington for the United States Department of Justice), was the near-certainty expressed by a number of the distinguished participants that Washington *would* be subject to a full-scale terrorist attack at some time in the foreseeable future. What in many ways was just as frightening was the demonstration—I believe beyond reasonable doubt—that the American political system was ill-designed to cope with such an attack if it did, for example, decimate the membership of the Congress.

The framers of the Constitution, of course, envisioned the possibility that both the Presidency and Vice-presidency might become vacant and therefore empowered Congress to pass a Succession in Office Act. I strongly share Senator Cornyn's view that the present Act itself is gravely flawed and should be amended as soon as possible; it,

too, contains elements of a ticking time bomb. Fortunately, correcting its deficiencies does not require a constitutional amendment. All it takes is congressional leadership, and I strongly commend Senator Cornyn for supplying that with regard to the Succession in Office Act as well as the proposed amendment.

Why, with regard to succession in Congress, do we need an amendment instead of simple corrective legislation? The primary answer lies in Article I, Section 2, Clause 4, which specifies that that "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." This is universally read as prohibiting any other method of filling vacancies in the House than election, which obviously differs from the ability of governors to fill vacancies in the Senate through appointment. This emphasis on elections probably makes a great deal of sense in normal times. Alas, as Senator Simpson has demonstrated, it makes little sense when contemplating the kind of disaster that summons forth the proposed amendment that we are discussing. We must imagine, as difficult as it is to do so, circumstances where dozens—even hundreds—of vacancies are created simultaneously in the House.

It is, I presume, close to a "self-evident truth" that continuity in the government of the United States must be preserved under any and all foreseeable contingencies. It is especially important that such continuity be preserved with regard to the Congress, which is the branch of our political system most directly responsive to We the People of the United States. Obviously, the United States would need a strong Chief Executive in any such circumstances, but it is equally important that the United States would need a Congress fully capable of functioning. "Full capability" combines both political and

legal dimensions. Should, for example, an attack kill 125 members of the House, especially if they are from particular states or a single region, one might well doubt, as a political matter, that the House was "fully capable" of functioning. But no strictly constitutional problem would arise. Imagine, though, that an attack killed 218 members of the House. Then, as a constitutional matter, one might well argue that it could not function at all inasmuch as Article I, Section 5 requires that a majority of the membership of each House is necessary to perform its business. If one reads this as applying only to "living members," then there would be no problem, but this would then leave open the possibility of the House for a significant period of time being governed by a small minority "rump." In theory, it would allow a single survivor to possess all of the power enjoyed by the House in our system of government. There is, however, no such formal legal solution to the problem of *incapacitated*, rather than killed, members of the House or Senate. Should majorities of the living members be incapacitated, the quorum problem would be insoluble. And, note well, one would need quorums in *both* houses in order for Congress to function. Bills obviously need the assent of both House and Senate.

Should we, then, be faced with a Congress that is unable, for whatever reason, to function, it is almost a logical—and, most certainly, an empirical—truth that power would flow to what can only be called dictatorship by a presumably functioning Executive Branch. After all, imagine that the President believes that special laws are necessary in the wake of emergency. In our system, it is Congress that makes law. But if there is no effective Congress, then, I dare say, we would simply accept fiat rule by the President, the definition of dictatorial rule. As we are told with some frequency, "the

Constitution is not a suicide pact," and there would be few, I suspect, who would be sharply critical of a president who stepped into the breach and declared him- or herself to be a Roman-like dictator. Indeed, if one looks back at the history of the Lincoln Presidency, when he had to make awesome decisions during a time that Congress was not in session—and, because of the realities of travel in 1861, could not return to Washington for some weeks—he behaved more to preserve the Union than to honor every last jot and tittle of the Constitution with regard to the limits of presidential power or devotion to the prerogatives of Congress.

One can hope, obviously, that such presidential rule in the 21st century would be benevolent. But if there is any single message conveyed by the Founding Generation of the Constitution, it is the importance of preserving institutional checks and balances rather than relying on the hope that we will be governed by extraordinarily self-disciplined leaders. Most people believe that Lincoln is unique among our presidents in his capacity for such discipline. As Madison noted in *The Federalist,* it is precisely the fact that men (or women) are *not* angels—or even Lincolns--that makes it necessary both to form government in the first place and to place limits on what any given governmental official can do.

I trust that no one of any political party would lightly accept the possibility of presidential dictatorship. The proposal and ratification of the amendment before you would be at least a partial protection against such an ominous event. Concomitantly, to reject the necessity for such an amendment *is* to say that one would almost gladly accept the near certainty of presidential dictatorship should the state of emergency ever arise.

I can understand the appeal of elections as a means of providing for succession, especially in the House. Congress is important, after all, not only because it provides institutional checks on potential Executive over-reaching or because its judgment is necessary before proposals can be dignified with the name "law," but also because the electoral process makes it especially responsive to the people. It was, no doubt, the importance of maintaining such responsiveness that led the Framers to require that all members of the House be popularly elected, unlike the original system with the United States Senate or the process—gubernatorial appointment—that comes into play when a senatorial vacancy is present. Yet the 17th amendment, which eliminated legislative appointment of senators, is ample evidence of our belief that popular selection of political leaders is essential.

We should, however, be minded of the adage that the enemy of the good is the best. It would be a true tragedy if a fixation on what is in fact an unattainable best system—which we can all agree would be popular elections soon after the kind of catastrophe we are envisioning—prevents Congress from proposing, or the States from ratifying, what is in fact a truly good addition to the Constitution. It is, to quote the constitutional text yet once more, "absolutely necessary" to make sure that there is an alternative, under special (and terrible) conditions, to waiting around for many weeks and even months for special elections to take place in States that themselves might have suffered terrorist outrages. Having elections requires not only that state institutions operate effectively; it also, and just as importantly, requires candidates who can actively campaign and put their ideas in front of a focused electorate. Slap-dash elections in time of crisis could even be worse than no elections at all if, for example, many people could

not effectively vote because of institutional problems and the campaign, such as it was, took place in an atmosphere that prevented any serious discussion of the catastrophe that triggered the need for special election in the first place.

The amendment, of course, is remarkably simple: It only authorizes Congress to provide for a system to fill vacancies in both House and Senate that might arise in the event of catastrophic decimation of membership. For better and worse, it does not tackle the more difficult questions of how precisely such vacancies *should* be filled. Frankly, I can imagine no basis of opposition to the Amendment, since the alternative leaves us at the mercy of those who would try to destroy our Government.

One might, as I was initially tempted to do, view this as a problem only with regard to the House of Representatives, inasmuch as the very same 17th Amendment that requires popularly-elected senator authorizes states to authorize their own governors to appoint temporary successors who can serve in the Senate until a special election can be held to fill the vacancy on a more permanent basis. The universally accepted meaning of this part of the Amendment is that it applies if and only if there is a "vacancy" that occurs in one of three specific ways: death, resignation, or expulsion by the Senate itself. But the problem that presents itself to those who think of a catastrophic attack on our institutions as often involves *incapacity* as death. That is, one can imagine things ranging from physical injuries generating shock and disorientation to long-term comas and the like. The 17th Amendment does not speak to those possibilities.

I suppose that "clever lawyers"—and I use so-called scare quotes advisedly—might argue that a permanent incapacity acts as a "constructive vacancy" that licenses replacement by a state's governor. There are two major problems with this argument.

First, as suggested by the scare quotes themselves, most people—including, I dare say, most lawyers—would regard this as "too clever by half," since this just isn't what most people—including well-trained lawyers—think of as the condition of creating a "vacancy." It is the kind of "cleverness" that, for some people, gives lawyering a bad name. Secondly, and just as much to the point, many of the incapacities are likely to be temporary rather than permanent. Think, for example, only of President Reagan in the immediate day or two following his attempted assassination by John Hinckley.

So the most crucial question before us, with regard to the Senate, is to address the possibility that a significant number of senators could be *incapacitated* rather than killed. We might take a lesson here from the 25th Amendment. The Constitution speaks clearly as to what happens in the event of a president's death. It did not, however, significantly address the problem posed by presidential incapacity, a potential danger every bit as great as presidential death. Indeed, prior to the 25th Amendment, one could well argue that incapacity presented a *greater* threat than death. Just imagine, for example, that Lincoln or John F. Kennedy had *not* died immediately, but, instead, had lingered, as did Woodrow Wilson at the end of his presidency, in a stupor for months on end. It is, I am afraid, like whistling past the graveyard to ignore such possibilities.

Indeed, the institution of which I am most aware, the United States Supreme Court, has scarcely been immune from them. Emory Professor of History and Law David Garrow several years ago published a remarkable article in the *University of Chicago Law Review,* "Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment" (67 *U. Chicago Law Review* 995 (Fall 2000). One might argue that the difference in numbers makes the threat (or reality) of incapacity of a single senator less

dangerous than is the case with regard to a member of the Supreme Court. But, if anything, the threats to our political system posed by the incapacity of significant numbers of senators or representatives would be far greater. (And, for that matter, I trust that future attention of this committee might be focused on incapacitated judges as the result of a catastrophe, which might also require thinking of a constitutional amendment if the requirement of "good behavior" is viewed, as has been traditionally the case, as inapplicable to defects in mental or physical health.)

Thus there should be legislative mechanisms in place to allow for the *temporary* replacement of senators and representatives who become incapacitated by virtue of a systematic terrorist attack or other similar catastrophe. But such legislation requires constitutional amendment in order to legitimate it. Even if one can barely conceive of a legal argument that would allow, say, a state Governor to declare—though by what procedure, one is tempted to ask?—that a Senate seat had become permanently vacated because of incapacity, it is impossible to go the next step and allow the governor to fill that seat only until the senator in question had recovered--or should we say "until the Governor believes the former senator had recovered, regardless of the views of the former senator him or herself"? This is not only an absolutely untenable reading of the 17th Amendment; it is also a recipe for potentially disastrous acrimony. It is absolutely essential that there never be doubt about the legitimacy of our leaders, particularly in time of crisis, and this requires the clarity that can only be achieved first through the authorization of legislation by the proposed 28th Amendment and then the implementing legislation itself.

One must admit that there is hardly a public clamor for what I hope will become the 28th Amendment. Most Americans, I dare say, have never seriously considered the problem, not least, alas, because most political leaders have preferred to sweep the potential problem under the rug because it is too anxiety provoking to think about. I frankly do not recall a public a clamor in 1967, when the 25th Amendment was added to the Constitution, but, of course, the assassination of President Kennedy only four years before led some to reflect on how the only thing worse than his assassination might have been his lingering in a comatose state for months before expiring. What explains the 25th Amendment, I believe, was the leadership shown by Congress, particularly Senator Cornyn's distinguished predecessor, then-Senator Birch Bayh of Indiana. We are fortunate that Senator Cornyn is providing such leadership on this occasion, and I dearly hope that it will have the same success that Senator Bayh had some 37 years ago.

The proposed amendment is actually quite modest: It simply allows Congress to address the issue; for better or worse, it does not require a given solution at this point. Deciding on such a solution, of course, is no easy matter. I would welcome the opportunity to testify at a further date with regard to the details of possible implementing legislation. I will mention only what I think is the most serious potential problem with allowing governors an unrestricted discretion to fill vacant House seats: A single governor of a large state might be tempted to name only members of his or her political party to the vacancies, with potential destabilizing consequences at a time when it would be maximally necessary for us to recall—and to act upon—Jefferson's reminder than we *are* "all Democrats, all Republicans" united by a desire to serve our country. I believe that any succession procedure should contain safeguards against temptations to use a

national crisis for partisan advantage. My own preference would be to have each member of Congress deposit with the Governor a letter containing a short list of preferred successors, should the occasion ever arise, with the Governor required to choose from that list. No doubt there are other potential solutions, but Congress need never discuss any of them unless it first possesses authority to pass relevant legislation, and that authority would be provided by the Amendment.

None of these things is easy to talk about. As one of the participants—himself a member of the House of Representatives—in the AEI-Brookings lunch last year commented, no one enjoys thinking about the possibility of his or her death, let alone the kind of mass death that was experienced on September 11. But this does not stop most of us, even when quite young, from drawing up wills or buying insurance, because we recognize the responsibility that we have to our children and family to provide a stable "succession," as it were, after our sadly inevitable deaths. This is especially the case, I might add, if we die not at the end of long and fruitful lives, but, rather, as the result of accidents or other entirely unexpected events. So it is with members of the House and Senate. You daily must wrestle with awesome (and sometimes awful) issues. This is one of those issues. The one happy thing that can be said, though, is that this is also one of those issues that have no partisan dimension. I hope that Congress responds quickly to what can now be recognized as a truly serious "imperfection" in our present Constitution.

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28 January 2004

U.S. Senate Subcommittee on the Constitution, Civil Rights & Property Rights
U.S. Senator John Cornyn, Chairman
Dirksen Senate Office Building, Room 139
Washington, D.C.

RE: *Continuity of Congress* & S.J. RES. 23

Dear Senator Cornyn:

You have asked me to comment on S.J. RES. 23, which proposes an amendment to the Constitution of the United States that authorizes Congress to deal with the situation in which one-fourth or more of the Members of either the House of Representatives or the Senate are killed or incapacitated.

The Continuity of Government Commission, a nonpartisan project of the American Enterprise Institute and the Brookings Institution, is co-chaired by Lloyd Cutler (former Counsel to Presidents Carter and Clinton), and Alan Simpson (former U.S. Senator). This Commission's first Report addressed the problem of insuring the continuity of the Legislative Branch of government in the event of a terrorist attack. It concluded:

> The *only way* to address the problem of restoring Congress after a catastrophic attack is *to amend the Constitution* to allow immediate temporary appointments to Congress until special elections can be held to fill vacancies or until matters of incapacitation can be resolved. It is our hope that such an emergency provision of the Constitution will never be utilized, but it is our best insurance against the chaotic aftermath of an attack. It serves as a warning to those who would seek to topple the United States that our institutions are stronger than those who would try to destroy them.[1]

In my opinion, this conclusion is, frankly, obvious. Our Constitution requires that a majority

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[1] First Report of the Continuity of Government Commission (May 2003) at 31 (emphasis added).

of each House is necessary to constitute a quorum to engage in legislative business.[2] It is unthinkable that a significant number of legislative members would be killed or incapacitated in a short time, but the terrorism attacks of September 11, 2001 were unthinkable and yet they happened. If Congress lacks a majority, it cannot act.

The war of terrorism, unlike our previous wars since the Civil War, has reached the continental United States. The targets of September 11, 2001 included the seat of Government. We should not be surprised if terrorists seek to kill or maim our legislative leaders, just as they have tried to terrorize ordinary civilians, leaders in the Executive Branch,[3] or members of the judicial branch.[4]

The attack might come in a series of sniper attacks on individual legislators when they are dispersed around the United States meeting with constituents or campaigning; it might come with a biological or chemical attack in the House or Senate, such as the anthrax attacks of 2001; it might come at a meeting of the Republican or Democratic caucuses. Recall that in May of 2001, there was a private retreat attended by forty-two of the Senate's fifty Democrats in Farmington, Pennsylvania.[5] If terrorists had attacked that meeting, it would have been a catastrophic loss for the Senate and the nation.

The whole point of terrorism is to strike terror, and incapacitating a large number of legislative officials would meet that goal because it would be more difficult for the legislature to do what legislatures have to do — enact legislation to deal with new problems, approve budgets, confirm judges, and calm the population who will know that, no matter what happens, the government is still running and the line of succession, from the President to the Vice President to the Speaker of the House, etc. is clear.

The Constitution does authorize state legislators to grant their chief executives the power to make appointments to fill temporary vacancies in the U.S. Senate.[6] All but two states have implemented this power to fill Senatorial vacancies, but this authorization does not guarantee that

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[2] U.S. Constitution, Article I, §5, cl. 1.

[3] Former Secretary of State Madeline Albright requested and received federal protection after she left the government. The Pentagon attack might have killed the Secretary of Defense.

[4] The judge who have presided over the World Trade Center bombing still requires protection by federal marshals.

[5] Neil A. Lewis, *Washington Talk: Democrats Readying for Judicial Fight*, NEW YORK TIMES, May 1, 2001, § A, p. 19.

[6] U.S. Constitution, Amendment 17, cl. 2. There is no comparable provision for Representatives.

vacancies will be filled promptly or uniformly, and it does not authorize the Senate to conduct business in the absence of a quorum. The Constitution also does not provide for any authority to deal with the situation where a Senator, or a large number of Senators, are incapacitated — perhaps because of a chemical attack — but not killed. I do not see how legislation (in the absence of this Constitutional amendment) could deal with the problem of Senators who are incapacitated when the Constitution does specifically focus on the problem of vacant Senator seats and provides only one solution, and that solution does not deal with what we now anticipate in the wake of 9/11.

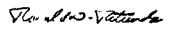
As for the House, the Constitution provides only one procedure to deal with vacancies — a new election.[7] The Constitution gives the national legislature and the state legislatures no power to deal with the incapacities of one or more Representatives.

I support S.J. RES. 23 because it deals with a problem that is, in today's climate, just as serious as the problem that the 25th Amendment solved in 1967 as to the President. At that time, 9/11 was unthinkable. Now, we must think about the unthinkable. Emergency appointments of legislative officials will allow democratic elections to take place with no pre-imposed artificial time line that is not appropriate to the circumstances. In the absence of a Constitutional Amendment that authorizes Congress to enact the appropriate legislation, any legislation to deprive a sitting Senator or Representative from his or her six-year or two-year term (albeit a legislator who is incapacitated) would be unconstitutional. Congress only has those powers that the Constitution grants to it, either expressly or impliedly, and the Constitution has not given Congress the power to create a framework to deal with the implications of a terrorist act that incapacitates Senators and Representatives.

S.J. 23 is an appropriate response because it does not freeze a particular solution. Instead, it authorizes Congress to deal with the problem by appropriate legislation that may be changed from time to time.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Ronald D. Rotunda

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[7] U.S. Constitution, Article I, § 2, cl. 4.

**Memorandum** January 30, 2004

**TO:** Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Property Rights
Attention: James Ho

**FROM:** Paul Rundquist
Specialist in American National Government
Government and Finance Division

**SUBJECT:** Congressional Continuity: Procedures Concerning Quorums, Vacancies, and Incapacity of Members

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This memorandum briefly responds to your question concerning the continuity of Congress in the event of catastrophic events that would cause many deaths among Members of Congress and significant levels of disability among the survivors.

## Quorums

Both the House and Senate operate under the presumption that a quorum is always present, unless some formal action (such as a demand for a roll-call vote) discloses its absence. In both chambers, a quorum is a majority of the Members duly chosen, sworn, and living. Thus, the number required for a quorum is automatically reduced in the event of the death of one or more Members.

It should be noted that both the House and Senate have acted without the apparent presence of a quorum on many occasions. If the vote on a measure is taken by voice vote and no Representative or Senator objects to that vote in that chamber on the grounds that a quorum is not present, the vote is valid. In the event that large numbers of Members were killed or disabled in a catastrophe, the Members present (assuming this number to be less than the established quorum) would retain the authority to act, so long as no point of order were raised by one of the Members present. During the influenza epidemic of 1918, for example, large numbers of Members left Washington while Congress was still in session. Party leaders publicly appealed to rank-and-file Members to refrain from raising quorum points of order so that both chambers could continue their legislative work. Other examples of legislative work in the absence of a physical quorum could be cited as well.

## Filling Vacancies

Three states (Oklahoma, Oregon, and Wisconsin) require special elections to be held to fill a Senate vacancy. In all other states, vacancies are filled by gubernatorial appointment until the next regular congressional election at which time an election will be held to fill the vacancy for the remainder of the term. In the event of a catastrophic number of deaths, Senate membership could be readily reconstituted by appointments from state governors.[1]

In the House, vacancies in membership may be filled only by election. State laws currently set whatever timetables exist for holding special elections to fill House vacancies. In some states, the governor has absolute discretion on the speed with which special elections are held, and may combine a general election with a special House election to fill the remainder of a term. In the states which do set a timetable, the speed with which special elections are held varies dramatically. In the 107th Congress, the House agreed to a non-binding resolution calling upon the states to pass legislation to hold special elections more promptly. A proposal (H.R. 2844) has been reported this Congress from two committees in the House that would set a timetable of 45 days for holding special elections for the House if catastrophic events left 100 or more seats vacant in the House.

## Member Disability

Once a Representative or Senator has presented credentials and taken the oath of office, expulsion appears to be the only means available to the House or Senate to remove a Member from his or her seat. Several House examples from the past 30 years illustrate this point. In 1972, Representatives Nick Begich and Hale Boggs were missing and presumed lost after a plane crash in Alaska during the election campaign that year. When the new Congress convened the following January, the seats of Begich and Boggs (both of whom had been re-elected to the House) were declared vacant. Similarly, Representative Gladys Noon Spellman suffered a heart attack and fell into a coma during the 1980 election campaign. She was re-elected to the House, but did not take the oath of office and the House, by resolution, declared the seat vacant in February 1981. In both these cases, the resolution declaring the vacancy was passed by a simple majority. Since Begich, Boggs, and Spellman had not taken the oath of office at the beginning the new Congress, it was not necessary to act on a resolution expelling them from membership.

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[1] In an attempt to reduce the risk of catastrophic loss of Members, Senate Majority Leader Mansfield established in 1968 (after Senate attendance at the funeral for Robert Kennedy) a policy that is still followed under which no more than 12 Senators are permitted on the same aircraft when traveling on Senate business. "Congressmen Shaken in Airplane Mishap," *Roll Call*, Nov. 8, 1973, p. 3. The account in *Roll Call* is contradicted in the oral history interview of former Senate parliamentarian, Floyd Riddick. Riddick asserts that the Mansfield rule came into effect after the all but two Senators flew in two planes to the 1971 funeral of Richard Russell in Georgia. Fog was so thick on the ground that, after three aborted attempts to land, the planes diverted to an Air Force base in South Carolina and the Senators were connected to the funeral by television. Floyd Riddick interview transcript, www.senate.gov/artandhistory/history, pp. 480-481, visited January 30, 2004.

Different circumstances applied in the case of Representative John Grotberg. Grotberg took the oath of office in January 1985. In January 1986, before the second session of the Congress began, Grotberg suffered a heart seizure during surgery and was severely incapacitated. No action was undertaken to deprive him of his seat. He was renominated in the Illinois Republican primary in March 1986, but shortly thereafter, declared his intention not to seek re-election to the House. He did not participate in House sessions from January 1986 until his death in November 1986.

The Senate has also experienced the lengthy incapacity of certain of its Members, but has taken no formal action to remove them from their seats. For example, Senator Charles Sumner, the victim of a severe assault on the floor of the Senate in 1859, was absent from the chamber for nearly three years. There were long absences by Senators Carter Glass and Robert F. Wagner in the 1940s, and by Senator Karl Mundt in the 1970s. Although the Senate Republican Conference acted to remove Mundt from his committee leadership positions, no attempt was made to remove him from his seat in the Senate, and no action was attempted against Senators Glass or Wagner. Glass remained in the Senate until his death in 1946, and Wagner resigned because of ill-health in 1949.

It would appear that the only avenue available in either chamber to remove an incapacitated or disabled Member would be through expulsion. In the cases of expulsion over the years in both chambers, expulsion has been used exclusively for violations of law or codes of conduct by sitting Members, and not as a means of removing living but incapacitated Members from their seats to permit their replacement.

Several states have adopted laws permitting state legislators (or party leaders) to designate individuals as replacements for them, in the event of temporary or permanent disability. It is not clear whether a federal statute granting such authority to a sitting Member of the House or Senate would be consistent with the Constitution. It would certainly be unprecedented. Just as it was necessary to amend the Constitution to provide a mechanism for dealing with presidential disability, it might be necessary to amend the Constitution to provide explicit authority to the House and Senate to set up procedures governing temporary or permanent Member disability and related issues.

If I can be of any further assistance in this matter, please call me at x76939.

**Testimony of Alan K. Simpson**
**Co-Chairman**
**Continuity of Government Commission**

Senate Cornyn, Senator Leahy, other members of the Judiciary Committee, it is a privilege to join you today to discuss this vitally important topic of congressional continuity. The Committee should be commended for taking a leading role in the Senate on the issue of continuity of Congress. As a co-chairman of the Continuity of Government Commission, I, along with my co-chair Lloyd Cutler and the other distinguished commission members, have thought through what would have occurred had terrorists leveled a catastrophic attack on the Congress. After considering many alternatives, our Commission recommended a constitutional amendment that would allow for temporary appointments to fill vacancies in the House and to stand in for incapacitated Senators and House members when there were very large numbers of members dead or incapacitated. The type of amendment we recommended is consistent with the amendment that Senator Cornyn has introduced and that we are considering here today. Let me express my gratitude to Senator Cornyn, not only for this thoughtful amendment, but also for all of his work on the issue.

**Essential Problems with Our Current System**

The Continuity of Government Commission has identified two key concerns about congressional continuity. First we must address mass vacancies in the House of Representatives. Second we should consider mass incapacitation in both the House and Senate.

**I. Mass Vacancies**

The Senate already has the constitutional means for filling vacancies in that body in the event of a death, resignation, or expulsion. The Seventeenth Amendment, which governs vacancies in the Senate, provides that "when vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies; provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct." Because almost all state legislatures have given their governor the power to make temporary appointments until an election is held, Senate vacancies are, in practice, filled almost immediately by gubernatorial appointment. In the House of Representatives, however, vacancies can be filled by only one method. ARTICLE 1, SECTION 2, CLAUSE 4 provides that "when vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies." Currently, a special election is the only process for constitutionally filling House vacancies.

On average, filling the seats of deceased members takes over four months. But the time for elections varies significantly from state to state. Some states, such as Virginia, have special elections in two and a half months, in part, because they choose not to have a primary. Other states with primaries, and some with runoffs, would have a very difficult time completing special elections in less than four months. Under a disaster scenario, it is likely that it would take longer than usual to have an election, as there would be hundreds of unexpected elections nationwide,

competing for limited ballot printing companies and securing polling sites. Time would also be needed for printing mailing and receiving absentee ballots, and more time still to allow our overseas military and other voters to participate. There would also have to be time for new voters to register and for the candidates to have a reasonable period of time to get out their messages, get to know voters and debate each other. And in a catastrophic situation, there might well be factors that complicate holding elections, such as a postal system compromised by anthrax attacks, power outages, communications or travel problems, etc. Our commission has estimated that even if states streamlined their current election procedures, it would be difficult to hold such elections in three months if a state chose not to have a primary election, or four months if it did. The likely result of an attack killing many members of the House of Representatives is that the seats of the deceased members would remain vacant for three to four months or possibly longer.

**II. Why Mass Vacancies Matter – The Quorum Requirement**

Like most legislative bodies, both branches of Congress have a quorum requirement, a provision setting the minimum number of members allowed to do business. Without such a requirement, a few members might meet and pass legislation, even though the voting members would represent only a fraction of the American people. Congress' quorum requirement is found in the Constitution and cannot be changed without a constitutional amendment. ART. 1, SEC. 5 provides 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, in such Manner, and under such Penalties as each House may provide." If more than a majority of members of the House were killed, calling a quorum should technically be impossible. Mass vacancies would mean that no legislation could be passed, as all legislation requires the assent of both houses. No appropriations could be made; no declaration of war; no laws passed to assist in the gathering of intelligence or apprehension of terrorists. If the Speaker of the House was killed, the House could not elect a new Speaker—who would be the third person in the line of presidential succession? If the president or vice president were killed, no new vice president could be confirmed, as the appointment of a new vice president requires the consent of both the House and Senate. Given the length of time it takes to hold special elections, Congress could not function in these important areas for months.

In practice, parliamentary rulings in the House and Senate, beginning during the Civil War, have defined the quorum more liberally than a majority of the members of each house. The quorum requirement in the House is now defined by precedent as a majority of the members who are "chosen, sworn *and living*." The most significant aspect of the current interpretation for the purposes of continuity of government is the provision that only a majority of the living members needs to be present for a vote rather than a majority of the whole number of seats. In the case of a large number of deaths, the current interpretation of the quorum requirement would have serious consequences. On the one hand, it would ensure that the House could operate with a quorum even after a massive death toll. But at the same time, it would allow the House to operate with just a handful of members—calling into question the legitimacy of any legislation passed.

One very troubling scenario is an attack that killed the president, vice president, congressional leaders and significant fraction of the Congress, say at a state of the union address. Assume that 400 House members were killed including the speaker. Under our current presidential succession act, the remaining 35 members, operating under the lenient quorum rule, could elect a new speaker, who could bump any member of the cabinet who had succeeded to the presidency, and this Speaker, elected by a few House members would become the president of the United States for the rest of the term.

The issue of the quorum is one of the most significant for a Congress after a catastrophic attack. A strict interpretation of the constitutional quorum requirement would mean that the House would be unable to act for many months until sufficient vacancies were filled. A looser interpretation would mean that the House of Representatives might continue to function, but that very few members, representing a small portion of the country, could purport to take charge.

There are several scenarios that would not affect the issue of calling a quorum, but would be troubling nonetheless. An attack that killed 200 members of the House of Representatives would not cripple the Congress, but it might drastically alter the political and geographical balance of the Congress. An attack might occur when one party caucus was meeting, effectively wiping out most of one party but not the other. It is also possible that an attack would hit when state or regional delegations were meeting, thus eliminating representation for a part of the country for many months.

**III. Mass Incapacitation**

While the problem of mass vacancies most severely affects the House of Representatives, mass incapacitation of members has serious implications for both houses of Congress. No provisions exist in rules, law, or the Constitution about defining incapacitation or replacing such members, temporarily or permanently, if they are unable to perform their duties for extended periods of time. For incapacitated members, the relevant seats would be effectively vacant until the member recovers resigns, or dies and is replaced, or until the next general election. When there are only a few members incapacitated, this does not affect the functioning of either house of Congress. But if there were mass incapacitations, the quorum problem looms larger, since even under the expansive definition of a majority of those lawmakers "chosen, sworn, and living," incapacitated members would be included in the definition but unable to help constitute the quorum. For example, if 220 members of the House of Representatives were alive but unable to perform their duties, there could be no quorum.

It is completely possible, if not more likely, that an attack on Congress would leave mass incapacitation. The effects of mass incapacitation brings with it all the same concerns as mass vacancies in the House, but pose special problems that cannot be corrected legislatively. In the House of Representatives, no special election is called until a seat is declared vacant. Similarly, in the Senate, no gubernatorial appointment or special election can occur if there is no vacancy. These seats would effectively remain vacant, without any means for filling them. Mass incapacitation makes it virtually certain that Congress would be unable to reach its quorum requirement even under its most lenient interpretation. This is a serious problem that must be addressed. And the only way to address incapacitation is through a constitutional amendment.

**Recommendations-How to Fix the Holes**

Since a catastrophic attack could prevent Congress from functioning or cause it to operate with a small, unrepresentative number, the status quo is unacceptable. The threat of terrorism remains high, and it is clear that our governing institutions remain prime targets. It is essential that large numbers of congressional vacancies be filled shortly after they occur to ensure that in the event of a catastrophic attack, Congress can continue to function in a way that properly represents the American people. Because the Constitution dictates the way that vacancies are to be filled in the House and Senate, there is no way to establish a procedure to quickly fill mass vacancies without a constitutional amendment. The expeditious filling of vacancies cannot be accomplished through accelerated special elections or by altering the quorum requirement. There is simply no effective way, short of a constitutional amendment, to replace members of the House who die, or to temporarily replace members of Congress who are incapacitated.

In our report released last June, the commission makes a recommendation that a constitutional amendment be passed to provide for filling mass vacancies. Senator Cornyn has presented excellent ideas for such an amendment. We feel that any amendment passed should adhere to the following principles.

1. When a large number of members are killed or incapacitated, temporary replacements shall be made immediately, to fill vacant seats and to stand in for incapacitated members.

2. Temporary appointments, in cases of both vacancies and death, should be made by governors, or selected from a succession list drawn up in advance by the member who holds the seat, or some combination of these two methods.

3. In the case of incapacitated members, replacements should stand in for the incapacitated member until the member recovers, the member dies and the vacancy is filled, or until the end of the term.

4. An amendment should be concise and allow Congress to provide for many of the details of the temporary appointment procedure in legislation.

Any accompanying legislation should contain the following:

1. exactly when the procedure for the emergency method of temporary appointments shall begin and end

2. the qualifications of the temporary replacements

3. the method of appointment

4. limitations on the length of service of the temporary appointees.

It was only after careful consideration of other alternatives that the commission decided to recommend a constitutional amendment. Despite the disadvantages of attempting to pass an

amendment, the commission favors one because it is the only solution that adequately addresses the problem of filling mass vacancies in Congress quickly after a catastrophic attack. Our survey of alternative approaches persuaded us that no other option provides more than a partial and inadequate fix to the problem.

The chief alternative to a constitutional amendment being considered in the Congress is one to expedite special elections. Our commission agrees that some degree of speeding up special elections would be helpful, but it is not a substitute for temporary appointments who could fill seats almost immediately after a catastrophic attack.

Legislation introduced in the House by the chairman of the Judiciary Committee would require that all states hold special elections within 45 days after an attack killing 100 or more members. The timeframe on this amendment is both too short and too long at the same time. It is too short a time to realistically hold elections. But, even if 45 day elections were possible, that is too long a period to be without a functioning Congress after an attack. In all likelihood, if that legislation is passed into law and we were faced with a catastrophic attack, states would not be able to meet the 45-day deadline, and we would be without a normal functioning congress for three or four moths.

During this period without a Congress, the president would act without a check, perhaps extraconstitutionally. In addition, there is the possibility that in the interim a Congress of greatly reduced size would act and that the vast majority of Americans could view this Congress as illegitimate. Shorter special election cycles would not eliminate these problems, but only slightly shorten their duration. Temporary appointments would allow the House and Senate to reconstitute themselves very quickly after an attack and for special elections to go forward as quickly as possible.

Some who disagree that a constitutional amendment is the only way to remedy the problems of continuity argue an amendment to allow temporary appointments to fill mass vacancies would change the character of the House of Representatives. They argue that no member of the House of Representatives has ever been appointed and that the ultimate uniqueness of the House lies in its elective nature. I would suggest however, that first, in the case of mass vacancies, large portions of the country would be unrepresented for many months at a time when momentous decisions would be made. The House's fundamental character as the "people's house" rests primarily on the fact that it represents all the people, with each member representing a roughly equal number of people. If mass vacancies were not filled after a catastrophic attack, a few representatives representing only their constituents would act in the name of all the people. Mass vacancies distort the representative role of Congress. While the elected character of the House is extremely important, the principle that all the people should be represented is essential to its democratic character.

Second, without a functioning Congress, the executive branch would essentially go unchecked. As vital as elections are to American democracy, a system of check and balances is just as fundamental. There is no way, in the wake of a catastrophic attack that decimates Congress, for a president to act to protect the nation without taking extraconstitutional measures. While I recognize the importance of protecting historical aspects of representation, it seems totally

irresponsible and unethical to knowingly set up a system that could only lead to unconstitutional behavior. At the very time when this nation would need to rely on the strengths of its institutions, Americans would be calling into question the legitimacy of its leaders.

The Cornyn amendment would allow Congress, by legislation, to fix the two problems of mass vacancies in the House and mass incapacitation in the House and Senate. Without an amendment, the only way for the House to fill its vacancies is by special election, which will take a long time. Without an amendment, there would be no possibility of temporary appointments standing in for incapacitated Representatives or Senators, as there would be no vacancy to fill, and no constitutional provision to allow for a member of Congress to step aside and return to his or her seat.

I would hope that the Senate will take very seriously its own preservation by ensuring that mass incapacitation will not lead to paralysis. I would also urge you not to shy away from the question of mass vacancies and incapacitation in the House. It is not merely a House matter. If the House is unable to function, the Senate would also not be able to act. The president would have no check, and the people would effectively have no representation in either body of Congress.

As for the specifics, there are certainly details in this matter that still need to be ironed out, and this body is where the discussion begins. This subject deserves serious and immediate debate in the public forum and in Congress. We can no longer assume that we are invincible; we must act swiftly and responsibly to preserve our institutions.

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January 29, 2004

Via Fax: 202-228-2856

Senator John Cornyn,
Chairman,
Senate Subcommittee on the Constitution, Civil Rights and Property Rights
Senate Committee on the Judiciary
U.S. Senate
Washington, D.C.

Dear Senator Cornyn:

I am strongly inclined to agree with the witnesses at the recent hearing (http://judiciary.senate.gov/hearing.cfm?id=1022) that a Senator's six-year term is constitutionally inviolate and probably could not be terminated by congressional legislation providing for the selection of a substitute in the event of an incumbent's incapacitation.

The matter is therefore one that ought to be dealt with by constitutional amendment — and sooner rather than later. For, even if the contrary view were ultimately found to have merit, this clearly is not the sort of question whose resolution we can afford to leave up in the air. If and when we are unfortunate enough to experience a catastrophe of the kind that would bring these issues to the fore, the last thing the nation would need or could afford would be a cloud of doubt overhanging the measures Congress might have enacted to provide for the case of a Senator's incapacitation — or, indeed, for any of the other eventualities as to which the Constitution is either silent or speaks ambiguously and whose smooth operation would be required to assure that a terrorist-triggered or other catastrophic event does not leave us with an even arguable discontinuity in government.

Yours truly,

Laurence Tribe

Laurence H. Tribe

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Senator John Cornyn
Chairman
Subcommittee on the Constitution, Civil Rights and Property Rights
U.S. Senate Committee on the Judiciary

January 29, 2004

Dear Senator Cornyn:

I understand that questions have been raised about whether Congress could statutorily provide for successors in the event that a Senator is incapacitated but not killed. As a constitutional law professor, I think that the answer is "no." Such a provision would require a constitutional amendment.

Under the Seventeenth Amendment, each Senator is the person who was "elected by the people [of a State], for six years." The one exception is that when "vacancies happen," they may be filled by an election, and temporary appointments may be made until the election takes place. But temporary incapacitation doesn't cause a "vacancy." The office remains occupied even though its occupant is temporarily unable to fulfill his duties.

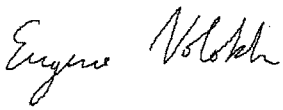
If it were otherwise—if incapacitation did create a vacancy—then whenever a Senator became ill, he would *have to* forfeit his office. After all, "When vacancies happen in the representation of any State in the Senate, the executive authority of such State *shall* issue writs of election to fill such vacancies" (or make a temporary appointment that lasts until the next election). So when a Governor hears that a Senator has become seriously ill, he would be *obligated* to issue a writ of election and possibly to appoint a temporary Senator who will sit until the next election, even if the Senator is expected to quickly recover. The duly elected Senator would thus have to vacate his office, because of an obviously temporary, but briefly incapacitating, medical condition.

Moreover, even if incapacitation did create a vacancy, the Seventeenth Amendment would only provide for the incapacitated Senator being *permanently* replaced by his substitute—the substitute, after all, would serve "until the people fill the vacanc[y] by election." So if a Senator were incapacitated, the Governor made a substitute appointment, and then the Senator again be-

came capable of performing his duties, the Senator would be unable to resume his office. The substitute, after all, would be serving in that office until the next election.

So for Congress to provide for successors for temporarily incapacitated Senators, a constitutional amendment would be required. Simple legislation would not suffice.

Sincerely Yours,



Eugene Volokh

**Prepared Testimony of**

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*Before the Senate Committee on the Judiciary*

*Regarding*

*Ensuring the Continuity of the United States Government: A Proposed Constitutional Amendment to Guarantee a Functioning Congress*

Tuesday, January 27, 2004

Chairman Cornyn and members of the Committee on the Judiciary: Thank you for allowing me the opportunity to submit my written comments to the Committee in support of S.J. Res. 23, a proposed amendment to the Constitution, and S. 1820, the Continuity of Congress Act of 2003 (collectively the "Cornyn Plan").

I am an Assistant Professor of Law at Florida International University College of Law and I write in my personal capacity as a legal scholar and as an interested citizen. I have spent a great deal of time during the past two years studying, writing, and speaking about the issue of continuity of the federal government, including Congress, in the context of the new reality created by the terrorist attacks of September 11, 2001.

The Cornyn Plan is by far the most comprehensive and detailed approach to continuity of Congress since the tragedy of September 11 placed the issue of mass congressional vacancies or incapacitations on the agenda. The Plan takes the correct approach in utilizing a short, broad constitutional grant of power to Congress to address the catastrophic attack scenario and to establish appropriate procedures to ensure the continuity of Congress. This punts the entire issue of congressional continuity to Congress to address in a wholesale, uniform manner in a single, more detailed statute and/or set of congressional rules. In this way, we ensure that no small details of the multi-faceted question of legislative continuity fall through the cracks.

**S.J. Res. 23**

The proposed constitutional amendment vests in Congress broad power to provide by law for the event of a catastrophic attack that kills a substantial portion of House or incapacitates a substantial portion of either House, with Congress by law declaring who shall serve in those seats. The power-grant is properly expansive. It delegates to

Congress (or to another authority of Congress' choosing) discretion to establish the most structurally sound and effective processes to handle both mass-vacancies and the potentially more difficult and problematic even of mass-incapacitations.

The problem of mass-incapacitations is of special concern and the power to establish procedures for mass-incapacitations must be established explicitly in a constitutional amendment. Neither Congress nor the several states has any power to do anything about incapacitated members in either the Senate or House a constitutional provision expressly granting the power to do so. The Seventeenth Amendment empowers states to make appointments only when vacancies happen in the representation of a state, not when a member becomes disabled. *See* U.S. Const. amend. XVII. Similarly, states can hold elections to fill House seats only when vacancies occur, not when a representative is deemed disable. *See* U.S. Const. art. I, § 2, cl.4. The fact that an otherwise chosen, living, and sworn member of either house is unable to function for some period does not render the seat vacant, so the state power to fill vacancies, in whatever manner, is not triggered. Similarly, disability does not trigger the state power to hold elections to fill the seat.

The broad understanding we can derive from the Supreme Court's decisions in *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779 (1995) and *Powell v. McCormick*, 395 U.S. 486 (1969), is that once a chosen Member has met the enumerated constitutional qualifications for that house, she must be seated. No new qualifications or requirements can be imposed on her ability to assume the seat. Once an individual is seated at the beginning of one Congress, she holds that seat for six years in the Senate, *see* U.S. Const. art. I, § 3, cl.1, or two years in the House, *see id.* § 2, cl.1, unless and until she dies,

resigns, is expelled from Congress by 2/3 supermajority vote, *see id.* § 5, cl.2, or the term of office ends. There is no mechanism for Congress or states to remove or replace a chosen, sworn, and living member of either house of Congress. Put somewhat differently, with the limited exception of expulsion, neither Congress nor states presently has any constitutional power to fill an occupied seat prior to the end of the applicable two- or six-year period. This amendment is necessary to grant that power.

**S.1820**

The Continuity of Congress Act of 2003 obviously has been drafted with the understanding that repopulating Congress in the aftermath of a large-scale attack is a two-step process: 1) selection of temporary members by some expedited means to bring both houses back to full working capacity, followed as to vacant seats by 2) the holding of elections to choose members according to preferred procedures. Elections for both houses should take place soon after the attack, but not so soon as to make it impossible for the People and the candidates to engage in the conversation, discussion, and deliberation that makes the decision-making step of casting votes meaningful and legitimate. The first step, whatever procedure is utilized, brings new members into Congress on a temporary basis until those special elections can be held. The Act also recognizes that some expedited means of temporarily replacing incapacitated members is necessary for both the House and Senate.

I commend the drafters of the Act for keeping appointments, whether gubernatorial or legislative, on the table as one option for filling vacant or incapacitated seats in the House of Representatives, with vacancies to be filled more permanently via expedited special elections within approximately four months. States should be

especially aware of the option codified in §§ 2(a)(2)(C) and 2(b)(2)C) establishing gubernatorial appointments drawn from a list of successors named in advance by the occupant of a House or Senate seat; this procedure combines the speed of appointment by a state official with the benefit of a democratic imprimatur on the successor; whomever is appointed has been approved in advance by the elected occupant of the seat and thus should continue to be politically, geographically, and ideologically representative of the voters represented by that member.[1] I believe that a scheme of appointments-followed-by-elections is the only workable solution to legislative continuity in both the House and Senate; the procedure fills vacant or incapacitated seats in an expedited manner and allows for substantively meaningful elections subsequent to the appointment. I hope states would avail themselves of that procedural option.

My only suggested change to S.1820 would make it mandatory, rather than permissive, for every state to enact some procedure for filling seats in the event of mass-destruction of Congress. This is true both for dealing with House vacancies and incapacitations in both the House and Senate. This would require that the phrase "may enact" be changed to "shall enact" in §§ 2(a)(1) and 2(b)(1). Alexander Hamilton recognized the danger of leaving to the several states exclusive control over procedures for populating the national government, the risk being that states could "at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs. *See* THE FEDERALIST No. 59, at 331 (Alexander Hamilton).

[1] In fact, I would suggest that every state adopt that procedure for all appointments. The state should require every member of its congressional delegation to pre-designate for the governor a list of possible successors; all appointments, including ordinary Senate appointments under the Seventeenth Amendment, then must be made by the governor from among those on the list.

Obviously, the fear that states will neglect to provide for officials in the federal government is not the same as it was in 1787. But any recalcitrance on the part of even a few states in establishing appropriate procedures for this emergency poses a substantial risk. In the ordinary course of events, it is a state's choice whether to ensure itself of its full congressional representation by acting expeditiously to fill vacancies or to deprive itself it of full representation by failing to do so. Since the 99th Congress, the average amount of time until an election is held for vacant House seats has been 126 days, a somewhat lengthy period of time for the People of a district to be without representation in Congress. Such delays reflect the choice of the state government and the People and, although not ideal, are acceptable.

Importantly, however, delays in the ordinary course have not threatened the ability of Congress, and thus the federal government, to function. On the other hand, much more is at stake in the mass-vacancy scenario. If enough States neglect to establish and execute appropriate expedited selection procedures, it may leave both the House and Senate with a large number of vacant or temporarily empty seats and a small number of able members for an extended period of time. This either deprives one or both houses of the ability to attain a quorum to do business altogether or forces one or both houses to operate on a quorum based on available living members, a small, skeletal, potentially unrepresentative body that may be a poor repository of the public interest.

The mass-destruction scenario demands some degree of nationwide procedural uniformity to ensure that all vacant or incapacitated seats are filled and both houses brought back to full working capacity in an expedited manner. The sponsors of this bill have strong policy and political reasons for delegating to the states responsibility for

choosing selection procedures, rather than imposing a single procedure on the states. But having delegated the power, the only way to ensure the necessary nationwide uniformity and to ensure that all seats in both houses are filled is to require that every state exercise the power that has been delegated to it and establish appropriate procedures.

**Conclusion**

The Cornyn Plan is by far the most comprehensive and detailed plan for continuity of Congress. With the few changes I have suggested, I applaud the drafters and express strong support for both the proposed amendment and the Continuity of Congress Act of 2003. I urge this Committee and this Congress to proceed quickly and to enact both elements of the Plan.

Thank you again for the opportunity to present my views for the Committee Record. I wish this body every success in its efforts.

Respectfully Submitted

Howard M. Wasserman
FIU College of Law

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