

Statement of
The Honorable John Cornyn

United States Senator
Texas
September 9, 2003

STATEMENT OF U.S. SEN. JOHN CORNYN
United States Senate
Committee on the Judiciary

Senator John Cornyn (R-TX), Chairman
Senate Subcommittee on the Constitution, Civil Rights and Property Rights

Ensuring the Continuity of the United States Government: The Congress

Tuesday, September 9, 2003, 10 a.m., Dirksen Senate Office Building Room 226

Two years ago, America suffered the most destructive act of terror in our history. Congress responded to that attack swiftly. The very next week, Congress appropriated funds to bolster national security, stabilize our economy, and provide for the families of the victims, and enacted legislation to secure our airports and authorize the use of military force. To date, however, Congress has failed to ensure that the vital institutions of our government will continue to operate on behalf of the American people should another attack occur.

Two years is too long. So this morning, we will consider what measures are necessary to guarantee continuity of Congress. Next Tuesday morning, I will co-chair a joint hearing with the chairman of the Rules Committee, Senator Lott, on long-needed reforms to the presidential succession statute. Future hearings on the continuity of government are also planned.

Congress cannot constitutionally act without a majority of its members. Article I, section 5 of the Constitution expressly provides that "a Majority of each [House] shall constitute a Quorum to do Business." Our Constitution is explicit on this point, because our Founders believed it fundamental to our representative form of government.

As Alexander Hamilton explained in Federalist 59, the Constitution empowers states to shut down Congress by refusing to send representatives. In fact, during the first Congress, neither the House nor the Senate were able to operate for an entire month, because a majority of Representatives and Senators failed to appear for duty. Both chambers waited until "a quorum, consisting of a majority of the whole number, [was] present."

This vulnerability was deliberate. As one delegate to the 1787 Constitutional Convention in Philadelphia urged his colleagues, "[i]n this extended Country, embracing so great a diversity of interests, it would be dangerous to the distant parts to allow a small number of members of the two Houses to make laws."

Congressional power exercised by just a handful of members is thus not only constitutionally dubious. It raises serious questions of democratic legitimacy as well. The Founders properly rejected the notion that a small body of members from one region of the nation might enact national legislation or confirm federal officials to govern the entire country.

This commitment to federalism and national representation has a cost, however. Under the Constitution's requirement of a majority for quorum, terrorists could shut Congress down, by killing or incapacitating a sufficient number of Representatives or Senators.

Our ability to ensure continuity of Congress under the current Constitution is woefully limited. States have power to allow their governors to appoint Senators in cases of vacancies, and 48 states have elected to do so. But the Constitution provides no immediate mechanism for filling vacancies in the House, nor for redressing incapacities in either chamber.

Vacancies in the House can be filled only by special election. That takes months to conduct, for reasons of mechanical feasibility, democratic integrity, and the rights of military and other absentee voters. What's more, incapacities cannot be addressed at all - and, although people often forget, this problem affects the Senate no less than the House. If 50 Senators were in the hospital and unable either to perform their duties or resign, they could not be replaced. The Senate could be unable to operate for up to two full election cycles - a four-year period.

Accordingly, the Continuity of Government Commission - a bipartisan panel of former Congressional leaders and government officials from across the political spectrum - unanimously endorsed a constitutional amendment to ensure continuity of Congress in cases of catastrophic attack. Just as the Twenty-Fifth Amendment ensures continuity of the Presidency, the proposed amendment would ensure continued Congressional operations following a terrorist attack.

The commission deserves respect and attention. Our hearing today will explore their recommendations and other proposals.

As we mourn the tragedy of September 11, we should also take some comfort in the fact that further attacks within our borders have been avoided thus far, in part because Congress has upgraded our ability to prosecute the war on terrorism and reorganized our federal government to bolster homeland security.

Had the events of September 11 unfolded differently, however, none of this legislation might have been enacted in timely fashion. United Airlines Flight 93 was likely headed for the Capitol. But for a late departure and the ensuing heroism of the passengers onboard, Congress might have been destroyed.

In an age of terrorism and a time of war, few things could be more important than ensuring that the United States government - the nation's most vital instrument of national security - is failsafe

and foolproof, against even the most devious and destructive of terrorist plots. Nobody likes to plan for their demise, but failure to do so is foolish and dangerous. We must begin the process of sending the message to terrorists that there is nothing they can do to stop the American government from securing freedom here and around the globe. Two years is too long, and the time to plan for the unthinkable is now.

And with that, I would turn the floor over to Senator Leahy, and then to Senator Hatch.