

Testimony of  
**Hon. Alan Simpson**

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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 months.

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.