

Testimony of  
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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 disabled. 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. 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).

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 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

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