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ENSURING THE CONTINUITY OF GOVERNMENT IN TIMES OF CRISIS: AN ANALYSIS OF THE ONGOING DEBATE IN CONGRESS

By James C. Ho*

Last September, two days before the two-year anniversary of the September 11 terrorist attacks on our Nation’s homeland, Senator John Cornyn, Chairman of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights, convened the first in a series of Senate Judiciary Committee hearings to examine potential vulnerabilities in our constitutional system of government. That first hearing focused on the real constitutional problems associated with ensuring the continuity of Congress.1 It was clear to many who observed that hearing that a constitutional amendment is needed to truly guarantee a functioning Congress in a time of crisis and ensure that the American people will never have to endure a period of martial law as the result of a terrorist attack.2

* Chief Counsel, Subcommittee on the Constitution, Civil Rights and Property Rights, Committee on the Judiciary, United States Senate, Senator John Cornyn, Chairman. This article is based on remarks delivered at the January 28, 2004, Catholic University Law Review Symposium entitled Ensuring the Continuity of Government in Times of Crisis. The author would like to thank Senator John Cornyn, without whom this issue would not be receiving the same public attention, and without whom this article would not have been written. He would also like to thank Joshua M. Sandler for his research and assistance, and Allyson N. Ho for her encouragement and advice. The views expressed here are those of the author alone.


The Constitution vests Congressional power not in individual members of Congress, but instead in the House of Representatives and the Senate as institutions. Only both houses, working together as institutions, can appropriate funds or enact legislation. Only the Senate, as a corporate body, can consent to nominations or treaties. Moreover, such powers can be exercised only in compliance with constitutional requirements. Article I, Section 5 of the Constitution specifically requires a "Majority of each [house]" in order to "constitute a Quorum to do Business." Accordingly, without a majority of its membership, Congress cannot act.

What if United Airlines Flight 93 had struck the Capitol building on September 11? And what if it had done so at the worst possible moment—perhaps during a roll call vote, when virtually every member of the House or Senate can be found on the floor of his or her respective chambers? Under the Seventeenth Amendment, states may empower their governors to immediately appoint new senators in case of vacancies, but the Constitution provides no immediate mechanism for filling vacancies in the House. The only remedy available is the holding of special elections—a process that takes several months to complete.

Or what if a majority of either the House or the Senate was not killed, but was simply incapacitated—perhaps as the result of another, more potent round of anthrax or ricin attacks? The problem could be even worse in a situation of mass incapacitations than in the event of mass vacancies, because the Constitution provides no remedy whatsoever—not even special elections—for redressing mass incapacitations in either chamber of Congress. That means no functional Congress for a potentially longer period of time. If a terrorist attack incapacitated, but did not kill, enough members of Congress, the only constitutional means of replacing them would be selecting new members at the next general election. And because only one-third of the Senate at most can be replenished at each biennial election, restoring a working Senate after a


4. Id. art. II, § 2, cl. 2.
5. Id. art. I, § 5.
6. Id. amend. XVII.
7. Id. art. I, § 2, cl. 4.
majority of senators has been incapacitated might take as long as four years.8

After that first hearing, Senators Cornyn and Trent Lott cochaired a joint hearing of the Senate Judiciary and Rules Committees9 on the defects in the Presidential Succession Act.10 Fortunately, the Constitution gives Congress ample authority to ensure the continuity of the Presidency—even as it is inadequate with respect to congressional continuity.11 Unfortunately, the current Presidential Succession Act, enacted in 1947,12 has long troubled the Nation’s top legal scholars across the political spectrum as both unconstitutional and unworkable.13 It is disturbing how many scenarios we can imagine in which we cannot answer one simple question: Who is the President?14

In his introductory remarks at the hearing, Senator Cornyn recounted a number of scenarios in which we cannot determine, with complete certainty and beyond all legal doubt, who the President is. For example:

The President and Vice President are both killed. Under current law, next in line to act as President is the Speaker of the House. Suppose, however, that the Speaker is a member of the party opposite the now-deceased President, and that the Secretary of State, acting out of party loyalty, asserts a competing claim to the Presidency. The Secretary argues that members of Congress are legislators and, thus, are not “officer[s]” who are constitutionally eligible to act as President.

8. See id. art. I, § 3, cl. 2.
11. See U.S. CONST. art. II, § 1, cl. 6; see also id. amends. XX, XXV.
Believe it or not, the Secretary has a strong case—in fact, he can cite for support the views of James Madison, the father of our Constitution, who argued this very point in 1792, as well as legal scholars on the left and right. Who is the President? Whose orders should be followed by our armed forces, by our intelligence agencies, and by our domestic law enforcement bureaus? If lawsuits are filed, will courts take the case? How long will they take to rule, how will they rule, and will their rulings be respected?¹⁵

Some might think and hope that in a moment of national tragedy, our political leaders in Washington, D.C. would find a way to work together. Remember, however, what happened following the assassination attempt against President Ronald Reagan on March 30, 1981. At a nationally televised White House press conference, just hours after a bullet struck President Reagan and threatened his life, Secretary of State Alexander Haig took over the podium to tell reporters, much to the chagrin of senior White House officials: "Constitutionally, you have the president, the vice president and the secretary of state in that order . . . . As of now,

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¹⁵ *Presidency Hearing*, supra note 10 (statement of Sen. John Cornyn), http://judiciary.senate.gov/member_statement.cfm?id=914&wit_id=2047 (alteration in original) (citation omitted); see also Letter from James Madison to Edmund Pendleton (Feb. 21, 1792), in 14 THE PAPERS OF JAMES MADISON 235-36 (Robert A. Rutland et al. eds., 1983). Madison stated:

On another point the Bill certainly errs. It provides that in case of a double vacancy, the Executive powers shall devolve on the Presidt. pro. tem. of the Senate & he failing, on the Speaker of the House of Reps. The objections to this arrangement are various. 1. It may be questioned whether these are officers, in the constitutional sense. 2. If officers whether both could be introduced. 3. As they are created by the Constitution, they would probably have been there designated if contemplated for such a service, instead of being left to Legislative selection. 4. Either they will retain their legislative stations, & and their incompatible functions will be blended; or the incompatibility will supersede those stations, & then those being the substratum of the adventitious functions, these must also fail. The Constitution says, Congs. may declare what officers &c. which seems to make it not an appointment or a translation; but an annexation of one office or trust to another office.

Id.; see also 2 ANNALS OF CONG. 1904 (1791).

Mr. Madison objected to the Chief Justice, as it would be blending the Judiciary and Executive. He objected to the President pro tem. of the Senate. He will be a Senator of some particular State, liable to be instructed by the State, and will still hold his office—thus he will hold two offices at once. He adverted to the other objections, which had been offered against the Secretary of State, and showed the compatibility of the two offices.

Id.
I am in control here, in the White House, pending return of the vice president."  

Senator Cornyn enumerated three other scenarios at the hearing:

[I]magine that, once again, the President and Vice President are killed, and the Speaker is a member of the opposite party. This time, however, the Speaker declines the opportunity to act as President—in a public-minded effort to prevent a change in party control of the White House as the result of a terrorist attack. And imagine that the President pro tempore of the Senate acts similarly. The Secretary of State thus becomes Acting President. In subsequent weeks, however, the Secretary takes a series of actions that upset the Speaker. The Speaker responds by asserting his right under the statute to take over as Acting President. The Secretary counters that he cannot constitutionally be removed from the White House by anyone other than a President or Vice President, because under the Constitution, he is entitled to act as President "until the disability [of the President or Vice President] be removed, or a President shall be elected." Confusion and litigation ensue. Who is the President?

Or imagine that the President, Vice President, and Speaker are all killed, along with numerous members of Congress—for example, as the result of an attack during the State of the Union address. The remaining members of the House—a small fraction of the entire membership, representing just a narrow geographic region of the country and a narrow portion of the ideological spectrum—claim that they can constitute a quorum, and then attempt to elect a new Speaker. That new Speaker then argues that he is Acting President. The Senate President pro tempore and the Secretary of State each assert competing claims that they are President. Who is the President?

Or finally, notice that the President, Vice President, Speaker, Senate President pro tempore, and the members of the Cabinet all live and work in the greater Washington, D.C. area. Now, imagine how easy it would be for a catastrophic terrorist attack on Washington to kill or incapacitate the entire line of

16. Fred Barbash, At White House, a Flurry over Who's in Charge, WASH. POST, Mar. 31, 1981, at A14. Recently, I watched an old movie entitled The Day Reagan Was Shot. THE DAY REAGAN WAS SHOT (Paramount Pictures 2001). It depicts the "incredible true story of a nation in chaos." However accurate or inaccurate the film may be, it certainly helps us imagine what might happen in the future. The film's lesson is simple: under our current laws and procedures, we are frighteningly close to becoming a "nation in chaos." Thanks to Bob Schiff, Democratic Chief Counsel of the Senate Subcommittee on the Constitution, for bringing this film to my attention.
succession to the Presidency, as well as the President himself. Who is the President?17

To be sure, fear of uncertainty about our ability to identify our Commander in Chief in moments of national crisis is not new. After all, the current version of the Presidential Succession Act has been on the books for some time. But such uncertainty, although always intolerable, is especially so in the aftermath of the 9/11 attacks. As Senator Cornyn has put it:

In every one of these scenarios, we do not know for sure who the President is—a chilling thought for all Americans. In an age of terrorism and a time of war, this is no longer mere fodder for Tom Clancy novels and episodes of “The West Wing.” These nightmare scenarios are serious concerns after 9/11. On that terrible day, federal officers ordered a dramatic evacuation of the White House, even shouting at White House staffers: “Run!” On that day, the Secret Service executed its emergency plan to protect and defend the line of Presidential succession—for the first time ever in American history, according to some reports. And in subsequent months, the President and Vice President were constantly kept separate,... precisely out of the fear that continuity of the Presidency might otherwise be in serious jeopardy.18

As these scenarios disturbingly illustrate, current law is plainly inadequate to ensure either a functioning Congress or a clear line of Presidential succession. Yet it is far from clear that there is sufficient political will in Congress to act. These issues can and should be nonpartisan. However, there is not, at least to date, a sufficient working majority to support the kinds of reforms necessary to truly ensure continuity of government in the wake of a catastrophic terrorist attack.


18. Id.; see also 60 Minutes II: President Bush Tells His 9/11 Story (CBS News television broadcast, Sept. 11, 2002), 2002 WL 7034533 (“[F]or the first time ever, the Secret Service executed the emergency plan to ensure the presidential line of succession. Agents swept up the 15 officials who stood to become president if the others were killed.”); Calvin Woodward, Washington Reels in Terror Attacks, AP ONLINE, Sept. 15, 2001, 2001 WL 27337197. The AP reported:

The Secret Service at first hustled West Wing staffers into the basement, then told them to leave the building—but to walk, not run. That changed in a matter of seconds. In a level voice, one plainclothes agent accompanying the stream of aides told them: “We don’t want you to walk anymore. Run. And if you have heels on and can’t run, take off your shoes. Run!”

Id.
This article analyzes the ongoing debate in Congress over proposed reforms to ensure continuity of government. Part I examines the extensive debate that has taken place thus far with respect to congressional operations. It explores the need for a constitutional amendment to solve continuity problems in the Congress. Part I then addresses objections that have been raised to the constitutional solutions recommended by members of both parties. Unlike the congressional debate over continuity of Congress, the debate over Presidential succession is still to come. Accordingly, Part II only briefly addresses the political constraints currently facing reform in that area.

I. PROPOSALS TO ENSURE CONTINUITY OF THE CONGRESS

On November 5, 2003, Senator Cornyn introduced a constitutional amendment and implementing legislation to ensure continuity of congressional operations.\(^9\) The amendment, Senate Joint Resolution 23, authorizes Congress to enact laws providing for congressional succession,\(^2\) just as Article II of the Constitution authorizes laws providing for Presidential succession.\(^2\) The implementing legislation, Senate bill 1820, authorizes each state to craft its own mechanisms for filling vacancies and addressing incapacities in its congressional delegations—just as the Seventeenth Amendment authorizes states to decide how to fill vacancies in the Senate.\(^2\) Under this bill’s approach, each state could choose appointments based on a predetermined list of successors, special elections, or some other mechanism for ensuring

20. S.J. Res. 23. The proposed amendment states:
The Congress may by law provide for the case of death or inability of Members of the House of Representatives, and the case of inability of Members of the Senate, in the event that one-fourth of either House are killed or incapacitated, declaring who shall serve until the disability is removed, or a new Member is elected. Any procedures established pursuant to such a law shall expire not later than 120 days after the death or inability of one-fourth of the House of Representatives or the Senate, but may be extended for additional 120-day periods if one-fourth of either the House of Representatives or the Senate remains vacant or occupied by members unable to serve.

22. Id. amend. XVII; S. 1820.
continuity of Congress.\footnote{23} On January 27, 2004, the Senate Judiciary Committee held a hearing on Senator Cornyn’s proposed constitutional amendment.\footnote{24} That same day, Senators Cornyn, Lott, and Christopher Dodd introduced new bipartisan implementing legislation, Senate bill 2031, entitled the Continuity of the Senate Act of 2004, which incorporates only those provisions of Senate bill 1820 that affect the Senate.\footnote{25} And in May, with the support of the ranking Democratic Senator Russ Feingold, the Senate Subcommittee on the Constitution approved Senate Joint Resolution 23, as amended, in a bipartisan vote.\footnote{26}

There also has been much activity on the House side, although of a different kind. Representatives Brian Baird, Zoe Lofgren, John Larson, and Dana Rohrabacher have all proposed constitutional amendments to ensure continuity of Congress.\footnote{27} But most attention has been focused on House bill 2844, introduced by Congressman James Sensenbrenner, Chairman of the House Judiciary Committee. That bill would require states to conduct expedited special elections in the event that a large number of members of the House is killed. At first, the bill would have required special elections to be held within twenty-one days of the catastrophic event.\footnote{28} The bill has since been amended to require expedited special elections within forty-five days.\footnote{29} The Committee on House Administration held hearings on the original bill on September 24, 2003,\footnote{30} and then reported the bill as amended on a party line vote on December 8, 2003.\footnote{31} The House Judiciary Committee subsequently reported the bill for the consideration of the entire House, again on a

\begin{footnotes}
\footnote{23}{See Cornyn, The Unthinkable, supra note 2.}
\footnote{25}{S. 2031, 108th Cong. (2004); S. 1820.}
\footnote{26}{See Subcomm. Meeting, supra note 20. In addition, Senator Christopher Dodd (D-CT) has also offered encouraging words. See 150 CONG. REC. S8645-86 (daily ed. July 22, 2004) (statement of Sen. Dodd).}
\footnote{28}{H.R. 2844, 108th Cong. (2003).}
\footnote{29}{Id.}
\end{footnotes}
party line vote. The House approved the bill, which now awaits consideration by the Senate.

Some supporters of a constitutional amendment warn, however, that special elections take months to conduct properly—time we may not have and too much time to go without a functioning Congress amid crisis. They also believe that special elections require more time than contemplated by either the original proposal introduced by Congressman Sensenbrenner or the amended bill. In other words, the period of time for special elections is both too short and too long, according to detractors of the Sensenbrenner proposal.

Twenty-one days (and even forty-five days) is too short, according to state and local elections officials. After all, it is one thing to plan for an election that has been scheduled months or even years in advance, but it is quite another to conduct an election from a standing start. It takes time to qualify the candidates, hire poll workers, prepare voter rolls and voting machines, reserve polling locations, conduct the actual election, and then determine and verify the election results. There is also the fear that expedited elections would effectively disenfranchise military and other absentee voters. Finally, giving voters and candidates just a few days or weeks to debate issues and examine qualifications presents serious concerns of democratic integrity.

Forty-five days may also be too long to wait for Congress to reconvene. Congress is not in session year-round, but it may need to convene immediately in a time of crisis. Recall the days and weeks immediately following 9/11. Two days after the attacks, Congress approved legislation expediting benefits for public safety officers killed or injured in the line of duty. Three days after 9/11, Congress

32. Id. pt. 2, at 10-11.
34. Consider, for example, the September 9 testimony of R. Doug Lewis, Executive Director of the Election Center (www.electioncenter.org). Congressional Continuity Hearing, supra note 1 (testimony of R. Doug Lewis, Executive Director of the Election Center), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2566.
35. See id. (testimony of Samuel F. Wright, Director of the Military Voting Rights Project at the National Defense Committee), http://judiciary.senate.gov/testimony.cfm?id=909&wit_id=2570, for the problems that House Resolution 2844 would present to the voting rights of military personnel serving abroad. The Defense Department recently called off, at least for now, an initiative to experiment with Internet voting by military personnel serving abroad, a project that might someday expedite voting processes for our servicemen. See Dan Keating, Pentagon Calls Off Voting by Internet, WASH. POST, Feb. 6, 2004, at A12.
appropriated $40 billion in emergency funds for recovery and response, and passed legislation authorizing the use of military force. A week later, Congress approved additional legislation to stabilize and secure our economy and airports, and provide compensation for the victims. And in subsequent weeks, Congress enacted other bills and appropriations measures to bolster national security and upgrade our capabilities to combat terrorism. Had the events of 9/11 unfolded differently, however, Congress could have been disabled, and this legislation might not have been enacted in a timely fashion. Indeed, it is widely believed that the terrorists who hijacked United Airlines Flight 93 would have struck the Capitol on September 11, but for a late departure and the ensuing heroism of its passengers.

This is not to say that special elections are an inappropriate mechanism for ensuring continuity of Congress—it is just to say that special elections alone may not be enough to ensure a functioning Congress in the immediate wake of a catastrophic terrorist attack. In the event of mass vacancies, a constitutional amendment like Senate Joint Resolution 23 would enable the use of alternative mechanisms for reconstituting Congress immediately, thereby ensuring a nationally representative Congress during the time it takes to execute special elections. Moreover, a constitutional amendment is the only way to ensure continuity of Congress in the face of mass incapacitation. After all, the Constitution provides no mechanisms whatsoever for redressing mass incapacitations in the Congress.

The traditional method for amending the Constitution requires ratification by two-thirds of Congress and three-fourths of the states. It is obviously more difficult to enact a constitutional amendment than a statute. Therefore, it is particularly important for those who favor a

42. U.S. CONST. art. V. The Founders also provided for the use of constitutional conventions to propose amendments, id., but that mechanism has never been utilized to date.
constitutional amendment to understand the four major arguments employed against such efforts.

A. The Vision of the Founders

First, and perhaps most fundamental, is the argument that a constitutional amendment to ensure continuity of Congress offends the vision of the Founding Fathers. Under the Constitution, members of the House have always been elected directly by the people. This is not true of the Senate. Before the adoption of the Seventeenth Amendment, senators were never popularly elected. Moreover, under the Seventeenth Amendment, state legislatures may empower governors to make immediate appointments to fill vacancies in the Senate, and every state except Oklahoma, Oregon, Wisconsin, and Massachusetts has done so. This difference between the House and the Senate has been upheld by some as sacrosanct. They argue that we must never amend the

43. See, e.g., News Advisory, Congressman F. James Sensenbrenner, Jr., Statement upon Introduction of “Continuity of Representation Act,” http://www.house.gov/judiciary/news072403.htm (last visited Feb. 24, 2004). Congressman Sensenbrenner has been the most active congressional proponent of this view. In his release, he stated: Some are arguing for the adoption of a constitutional amendment that would allow for the appointment of replacement Members of the House of Representatives if large numbers of vacancies exist following a terrorist attack. Such an amendment would destroy the uninterrupted tradition that only Members duly elected by their local constituents should serve in the House. Even worse, such an amendment would take away the people’s right to chosen representation while ignoring the current mechanism for preserving continuity in government the Founders, in their wisdom, included in the Constitution, and which is the basis for the legislation I am introducing today.

Id.

44. See OKLA. STAT. ANN. tit. 26, § 12-101 (West Supp. 2004). Oklahoma law does provide for gubernatorial appointment to fill a U.S. Senate vacancy in certain limited situations. Specifically, if the vacancy is created near the end of the six-year Senate term, Oklahoma law requires the governor to immediately appoint the individual selected to serve in the U.S. Senate by the voters of that state at the next regularly scheduled general election. See id. § 12-101(b). Section (b) states: No special election shall be called if the vacancy occurs after March 1 of any even-numbered year if the term of the office expires the following year. In such case, the candidate elected to the office at the regular General Election shall be appointed by the Governor to fill the unexpired term.

Id.

45. See OR. REV. STAT. § 188.120 (2001).
46. See WIS. STAT. ANN. § 17.18 (West 2003).
47. The Massachusetts Legislature recently stripped its Governor of the power to fill Senate vacancies by appointment. See Scott S. Greenberger, Romney Veto Overridden, BOSTON GLOBE, July 31, 2004, at B1, LEXIS, News Library, Bglobe File.
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Constitution to depart from the tradition of exclusively elected membership in the House. 48

This is a fundamental, philosophical dispute. Some members uphold the original structure of our Constitution as absolute and unyielding, and are unwilling to depart from that structure no matter what the consequences. 49 Under this view, it would not matter that the House could not convene itself for months while states conducted special elections, nor would it matter that the House could not reconstitute itself for as long as two years (the time it might take to elect and inaugurate a new Congress) if a majority of representatives were incapacitated. (As noted earlier, the problem of incapacity is even worse in the Senate—if a majority of senators were incapacitated, the Senate would be disabled for as long as four years—because only one-third of the Senate can be replenished at every biennial election.)

I submit, however, that the competing view in favor of a constitutional amendment is no less faithful to the Founders—it simply understands the Founders’ vision differently. Senator Cornyn opened the January 27 hearing by noting that:

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. 50


49. See supra note 43.

50. Constitutional Amendment Hearing, supra note 24 (opening statement of Sen. Cornyn), http://judiciary.senate.gov/member_statement.cfm?id=1022&wit_id=2047. See generally U.S. CONST. art. II, § 2, cl. 1 (designating the President as “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States”); id. art. I, § 8 cls. 12-14 (empowering Congress to “raise and support Armies,” to “provide and maintain a Navy,” and to “make Rules for the Government and Regulation of the land and naval Forces”); id. cl. 12 (empowering Congress to “raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years”); THE DECLARATION OF INDEPENDENCE para. 13 (U.S. 1776) (complaining that King George III “has kept among us, in times of peace, standing armies, without the consent of our legislatures”); JOHN
Indeed, the Constitution has been previously amended to make fundamental institutional changes to the structure of government comparable to those being urged today. If we adhered strictly to the original constitutional framework, today the Senate would still be an appointive body rather than an elective body. Likewise, we would not have the Twenty-fifth Amendment, which provides the ability to appoint rather than elect our Vice President.

B. The Relationship Between the House and the Senate

Second, some argue that the Senate has no business meddling with any of the internal affairs of the House, including the reconstitution of its membership, even in a time of crisis. After all, there is an established tradition that each house defers to the other on matters such as its

As Professor Sanford Levinson testified at that same hearing:

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). Bushrod’s uncle was the man probably 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 [and then to ratify its remarkable handiwork]... “[T]he warmest friends and the best supporters the Constitution has, [wrote George Washington], 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 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 which need never be scrutinized or changed. Indeed, the very existence of Article V is the best testament to that belief.
respective internal rules and crafting the budget for the operation of each Chamber.\footnote{54}

However, an important functional difference exists between internal rules and internal budgets, on the one hand, and mechanisms to ensure continuity of House operations on the other hand. The rules and budget for each Chamber do not have any direct impact on the operations and constitutional responsibilities of the other. If one house is constitutionally disabled from functioning \textit{at all}, however, that severely impacts the functioning of the other house.\footnote{55} Moreover, there is no firm tradition of deferring to the other house on such matters as the composition of Congress. The House of Representatives initiated the constitutional amendment process that culminated in the Seventeenth Amendment,\footnote{56} while the Senate has approved three different constitutional amendments (in 1954,\footnote{57} 1955,\footnote{58} and 1960\footnote{59}) to address continuity problems in the House of Representatives.

Nevertheless, Senator Cornyn has taken two steps in hopes of achieving comity and reaching agreement with his colleagues in the House. First, his original November proposal did not take sides in the heated House debate over the use of emergency interim appointments versus reliance on special elections alone; his proposal would simply delegate to each state the power to make its own decision, consistent

\footnote{54. See id.}
\footnote{55. See, e.g., U.S. CONST. art. I, § 5 (requiring the consent of a majority of both houses before the legislative power of Congress can be exercised); see also Cornyn, A Republic, supra note 2.}
\footnote{56. Throughout the 1890s, substantial majorities of the House approved what is now the Seventeenth Amendment. Yet the Senate refused to permit the amendment even to reach a vote until 1911. See, e.g., GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES 93, 96-97, 100-15 (1938); JAMES L. SUNDBUIST, CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT 64 (rev. ed. 1992); Kris W. Kobach, Rethinking Article V: Term Limits and the 17th and 18th Amendments, 103 YALE L.J. 1971, 1976-80 (1994). The legislative history of the Seventeenth Amendment thus provides an interesting parallel to the ongoing debate over a constitutional amendment to ensure continuity of Congress.}
\footnote{57. S.J. Res. 39, 86th Cong. (1954), reprinted in CONTINUITY OF GOV'T COMM', supra note 2, app. VI, at 44-45. The Senate approved this resolution by a vote of seventy to one on June 4, 1954. CONTINUITY OF GOV'T COMM', supra note 2, app. VI, at 44.}
\footnote{58. S.J. Res. 8, 84th Cong. (1954), reprinted in CONTINUITY OF GOV'T COMM', supra note 2, app. VI, at 45. The Senate approved this resolution by a vote of seventy-six to three on May 19, 1955. CONTINUITY OF GOV'T COMM', supra note 2, app. VI, at 45.}
\footnote{59. S.J. Res. 39, 86th Cong. (1959), reprinted in CONTINUITY OF GOV'T COMM', supra note 2, app. VI, at 45-46. The Senate approved this resolution by a vote of seventy to eighteen on February 2, 1960. CONTINUITY OF GOV'T COMM', supra note 2, app. VI, at 45.}
with the Seventeenth Amendment. As Senator Cornyn explained in his opening remarks before the Senate Judiciary Committee on January 27:

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.

Senator Cornyn's second step toward reaching agreement with the House was the new implementing legislation, Senate bill 2031, introduced by Senator Cornyn on January 27, 2004, and cosponsored by Senators Dodd and Lott. That legislation was called the Continuity of the Senate Act of 2004, because it focused exclusively on the continuity problems uniquely facing the Senate. As Senator Cornyn stated: “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.”

C. The Length of Time Necessary to Amend the Constitution

The third argument against a constitutional amendment reasons that if we are truly concerned about ensuring continuity of government in the wake of a terrorist attack, we should focus on a solution that can be enacted immediately. That is, we should enact statutes, rather than constitutional amendments, because constitutional amendments require far too much time to ratify. This argument likewise is answerable.

61. Id.; see also Cornyn, The Unthinkable, supra note 2.
64. Id.; see also Cornyn, Let Each Decide, supra note 2.
65. See, e.g., Suzanne Nelson, Simpson Rips Judiciary Chairman on Continuity, ROLL CALL, Jan. 28, 2004, LEXIS, News Library, Rollcl File (“'I guess there's just an embarrassing lack of logic by the commission,' [House Judiciary Communications Director Jeff] Lungren added, because if fixing continuity is such a 'high priority,' a constitutional amendment isn't the way to go because it will take years.”).
Amendments to the Constitution need not take years to ratify. Certainly, nothing in Article V of the Constitution imposes a minimum temporal requirement. Moreover, as a matter of practice, many constitutional amendments have been ratified swiftly following their proposal by Congress. Nine of our amendments, for example, took less than a year for three-fourths of the states to ratify.

D. Statutory Alternatives for Addressing Mass Incapacities

The last argument disputes the need for a constitutional amendment, even to address the problem of mass incapacities in Congress. The Constitution specifically empowers Congress to deal with an incapacitated President, but provides no such power with respect to incapacities in the Congress. Nevertheless, statutory alternatives have been suggested to ensure a functioning Congress in the wake of mass incapacities.

1. Evading the Constitutional Quorum Requirement

The statutory alternative receiving the most serious consideration is a proposal to amend the quorum rules. Under this proposal, if a majority of members was incapacitated, a minority of senators or representatives could still constitute a quorum and exercise the constitutional functions of Congress, notwithstanding the Article I requirement that “a majority of each [house] shall constitute a Quorum to do Business.” Supporters of this proposal point out that House rules require only a majority of those members who are living. In other words, if a large number of representatives were killed, the numerical requirement for a quorum would be reduced accordingly. Therefore, some suggest further amending the House quorum rules to allow action provided a majority of non-incapacitated members is present.

66. U.S. CONST. art. V. Contrast, for example, the Constitution of the Commonwealth of Massachusetts, whose amendment procedure requires approval by two consecutive sessions of the State legislature, thereby effectively imposing a minimum temporal requirement. See MASS. CONST. amend. XLVIII.

67. They are the Eleventh (340 days), Twelfth (231 days), Thirteenth (309 days), Fifteenth (342 days), Seventeenth (330 days), Twentieth (327 days), Twenty-first (288 days), Twenty-third (285 days), and Twenty-sixth Amendments (100 days). See JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES 1789-1995 app. B (1996).

68. U.S. CONST. art. II, § 1, cl. 6.

69. Id. art. I, § 5, cl. 1.

This argument presents a number of problems. First, the proposed change to the quorum rules is almost certainly unconstitutional.\(^\text{71}\) The Supreme Court unanimously held in *United States v. Ballin* that internal house rules are invalid if they violate the Constitution.\(^\text{2}\) There is substantial evidence that the Founders intended to forbid either house of Congress from taking action without the participation of at least a majority of the entire body, even though they knew full well that Congress could be effectively shut down in the absence of a majority of either house.\(^\text{73}\)

At the Constitutional Convention, proponents and opponents of the quorum rule alike understood that by ensuring a minority of members could not exercise the powers of Congress, the majority quorum requirement effectively empowered states to shut down Congress by refusing to select and send representatives.\(^\text{74}\) Alexander Hamilton specifically acknowledged this possibility in *Federalist No. 59*.\(^\text{75}\) Indeed, at the beginning of the very first Congress, both houses struggled and were unable to begin operations for failure to reach quorum.\(^\text{76}\) Each

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\(^\text{72}\) 144 U.S. 1, 5 (1892).


\(^\text{74}\) See id. ("Col. Mason. [The quorum requirement] is a valuable & necessary part of the plan. In 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."); id. at 253 ("Mr. Elseworth [stated that it] would be a pleasing ground of confidence to the people that no law or burden could be imposed on them, by a few men."); id. at 251 ("Mr. Mercer was also for less than a majority. So great a number will put it in the power of a few by seceding at a critical moment to introduce convulsions, and endanger the Government.").

\(^\text{75}\) THE FEDERALIST NO. 59, at 307-08 (Alexander Hamilton) (Gideon ed., 2001) ("It may be alleged, that by declining the appointment of senators, they might at any time give a fatal blow to the union . . . . It is certainly true that the state legislatures, by forbearing the appointment of senators, may destroy the national government."). If the State legislatures were to be invested with an exclusive power of regulating these elections, every period of making them would be a delicate crisis in the national situation; which might issue in a dissolution of the union, if the leaders of a few of the most important states should have entered into a previous conspiracy to prevent an election.

\(^\text{76}\) 1 JOURNAL OF THE HOUSE OF REPRESENTATIVES (Gales & Seaton 1826) (1789) [hereinafter HOUSE JOURNAL], http://memory.loc.gov/ammem/amlaw/lwhjlink.html.
house steadfastly refused to act until meeting the required "majority of the whole number."  

Hence, according to the Founders, states could conspire to shut down Congress simply through refusing to send representatives, by virtue of the Constitution's quorum rules. On the same principle, terrorists can shut down Congress simply by killing or incapacitating enough representatives, also by virtue of the Constitution's quorum rules. In addition, during the Eighty-fourth Congress, the Senate considered and approved a constitutional amendment specifically providing that a majority of members of each house who are "chosen, sworn, and living" shall be sufficient to constitute a quorum to do business. This suggests that the Constitution did not otherwise allow such a lowering of the quorum requirement absent an amendment. Arguably, then, anything less than "a majority of the whole number" cannot exercise the constitutional power of the Congress.

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77. See id. In the House, only thirteen members attended the first day, March 4, 1789. Id. At that time, the entirety of the House was comprised of fifty-nine members representing eleven states. Rhode Island and North Carolina had not yet ratified the Constitution, so their collective six members were not counted as part of the House at that time. See U.S. CONST. art. I, § 2, cl. 3. The House thus adjourned, "a quorum of the whole number not being present." HOUSE JOURNAL, supra note 76. Over the next several weeks, on a daily basis, the House convened and adjourned for lack of quorum, until April 1, when the thirtieth member finally appeared. Id. It was only then that the House began to take action, "a quorum, consisting of a majority of the whole number, being present." Id. Similarly, in the Senate, only eight members attended the first day, March 4, 1789. JOURNAL OF THE FIRST SESSION OF THE SENATE, (Gales & Seaton 1820) (1789), http://memory.loc.gov/ammem/amlaw/lwsjlink.html#anchorl. At that time, the entirety of the Senate was comprised of twenty-two senators representing eleven states. Id. The Senate thus adjourned, "[t]he number not being sufficient to constitute a quorum." Id. Over the next several weeks, on a regular basis, the Senate convened and adjourned for lack of quorum, until April 6, when the twelfth senator finally appeared. Id. It was only then that the Senate began to take action, having established "a Quorum, consisting of a majority of the whole number of Senators of the United States." Id.

78. See discussion supra notes 74-75.

79. See S.J. Res. 8, 84th Cong. (1954), reprinted in CONTINUITY OF GOV'T COMM'N, supra note 2, app. VI, at 45.

80. United States v. Ballin, 144 U.S. 1, 7-8 (1892). The Court has twice unanimously expressed this view, by holding that "a majority of those present may act, provided those present constitute a majority of the whole number . . . . [A] major part of the whole is necessary to constitute a quorum, and a majority of the quorum may act." Id. (quoting Brown v. District of Columbia, 127 U.S. 579, 586 (1888)); see also 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 832 (1833). This section states:

The propriety of establishing a rule for a quorum for the despatch of business is equally clear; since otherwise the concerns of the nation might be decided by a very small number of the members of each body . . . . [B]y requiring a majority for a quorum, [the United States] has secured the public from any hazard of
To be sure, the current rules and precedents of each house provide for a quorum based not on a majority of the whole house, but instead based on a majority of those members sworn, chosen, and living, who have neither resigned their office, nor been removed from it by expulsion.\textsuperscript{81} The current quorum rules thus do not require a majority of the total number of authorized seats,\textsuperscript{82} but instead require only a majority of the current membership. In other words, each house may exclude all vacant seats from the calculation. They may ignore seats that are not filled by a sworn, chosen, and living member, and they also may ignore seats vacated due to resignation or expulsion.

There is a big difference, however, between the current rules and precedents for defining quorum, on the one hand, and the proposal to change the rules to exclude incapacitated members from the total number needed to determine a quorum, on the other hand. As the House Parliamentarian recently testified before the House Rules Committee, the House enjoys a certain amount of discretion and flexibility to determine what “a Majority of [the House]” means.\textsuperscript{83} Congress can decide that a quorum requires a majority of the membership, and exclude seats that are vacant, as expressly provided under the current rules of the House. In short, one can plausibly argue that “a Majority of each [house]” means either a majority of the whole number of seats, or a majority of the membership, thus excluding vacant seats.\textsuperscript{84} Under this theory, Congress can pick the definition it prefers.

\textsuperscript{81} See supra note 70.

\textsuperscript{82} The composition of the Senate is fixed by the Constitution itself. See U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State . . . .”). The composition of the House is constrained by the Constitution, although the actual whole number is ultimately determined by an act of Congress. See id. amend. XIV, § 2 (“Representatives shall be apportioned among the several States according to their respective numbers . . . .”); id. art I, § 2, cl. 3 (“The actual Enumeration shall be made . . . within every subsequent Term of ten Years, in such Manner as they shall by Law direct.”); id. (“The Number of Representatives shall not exceed one for every thirty thousand . . . .”); id. (“[E]ach State shall have at Least one Representative . . . .”); Act of Aug. 8, 1911, ch. 5 §§ 1-2, 37 Stat. 13, 14 (fixing the composition of the House of Representatives at 435 members).


\textsuperscript{84} See U.S. CONST. art. I, § 5, cl. 1.
What is not plausible, however, is the claim that Congress can exclude members altogether in determining the presence of a quorum. The Constitution is explicit when it provides that only "a Majority of each [house] shall constitute a Quorum to do Business."\(^8\) Additionally, other provisions of the Constitution explicitly vest specific powers either in a smaller group of members, as with the power to adjourn and the power to compel the attendance of absent members,\(^6\) or in members who happen to be "present" in the chamber, as with the power to convict in impeachment trials,\(^7\) the power to call for the yeas and nays,\(^8\) and the power to consent to treaties.\(^9\) All other powers of the House or Senate, however, can be exercised only by "a majority of each [house]."\(^10\) Any attempt to enact legislation, approve appropriations, or consent to nominations or treaties on the basis of a quorum smaller than a majority of the membership of the House thus contradicts these constitutional provisions.

Any attempt to reduce the quorum requirement would also offend the Constitution by effectively depriving elected officials of their seat in Congress. Members of the Congress are elected and constitutionally entitled to serve either two-year or six-year terms—terms that can be shortened only by death, resignation, or a two-thirds vote to expel a member.\(^9\) To dilute the quorum requirement is to effectively treat incapacitated members as non-members, in violation of the Constitution.

In addition to these constitutional problems, the enactment of legislation by a smaller body is hardly desirable as a prudential matter. It was certainly undesirable to the drafters of the Constitution. The Founders were clearly committed to a nationally representative Congress, and they specifically objected to the enactment of national legislation by a geographic minority as antidemocratic.\(^9\)

Finally, a change to the quorum rule would not guarantee a functioning Congress in every event. If every single member in either chamber were incapacitated, there would be no members available to make use of such a rule.

\(^8\) Id.
\(^6\) Id.
\(^7\) Id. § 3, cl. 6.
\(^8\) Id. § 5, cl. 3.
\(^9\) Id. art. II, § 2, cl. 2.
\(^10\) Id. art. I, § 5, cl. 1.
\(^9\) Id. §§ 2, cl. 1, 3, cl. 1, 5, cl. 2; see infra note 100.
\(^9\) See supra notes 74-75.
2. Power of Attorney

Some have proposed using power of attorney arrangements to deal with incapacities. Under this approach, members of Congress sign agreements to empower someone else to assume their office in case they become unable to discharge their duties. But even if members were willing to sign such agreements, it remains unclear whether these arrangements would be either constitutional or fair. On the constitutional front, if a President cannot sign a power of attorney transferring his power to sign legislation, and a member of Congress cannot delegate his power to vote for legislation, as has long been believed, how can a member of Congress constitutionally delegate his power to resign from office? And as to fairness, if a biological or chemical attack incapacitated a senator for his entire first year in office, but no more, it would be unfair to deprive the senator of his office when he may be able to serve for the remainder of his term.

3. No Statutory Authority to Replace Incapacitated Members

The Constitution clearly establishes two-year terms for members of the House and six-year terms for members of the Senate. There are only three ways in which those terms of office can be cut short: the Constitution expressly empowers two-thirds of each house to expel a member, and any member can, of course, die or resign while in office. Absent death, resignation, or expulsion, however, every member possesses what amounts to a de facto constitutional right to his office.

93. Sensenbrenner, supra note 43.
94. See id.
95. See Relation of the President to the Executive Departments, 7 Op. Att'y Gen. 453, 465 (1855) [hereinafter Attorney General Opinion].
96. See Presidential Succession and Delegation in Case of Disability, 5 Op. Off. Legal Counsel 91, 94 (1981) ("[N]ondelegable functions of the President" include "[t]he power to approve or return legislation pursuant to Article I, § 7, clauses 2 and 3."); see also Attorney General Opinion, supra note 95, at 465 (1855) ("[T]he President] approves or disapproves of bills which have passed both Houses of Congress: that is a personal act of the President, like the vote of a Senator or Representatives in Congress, not capable of performance by a Head of Department or any other person.").
97. See Attorney General Opinion, supra note 95, at 465 ("[T]he vote of a Senator or Representatives in Congress . . . [is] not capable of performance by . . . any other person.").
98. See U.S. CONST. art. I, §§ 2, 3.
99. Id. § 5, cl. 2.
100. Professor Howard Wasserman's testimony demonstrates this point: 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. McCormack, 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
Absent death, resignation, or expulsion, the power to enact legislation to provide continuity of Congress under both Article I and the Seventeenth Amendment is unavailable because these provisions apply only in the case of vacancies.\textsuperscript{101} Congressional or state legislation depriving a duly elected member of his or her seat would almost certainly violate the text and structure of the Constitution, as articulated in Supreme Court cases like \textit{Powell v. McCormack} and \textit{U.S. Term Limits, Inc. v. Thornton}.\textsuperscript{102}

II. PROPOSALS TO ENSURE CONTINUITY OF THE PRESIDENCY

I would just point out two aspects of potential congressional action on the Presidential succession front. Senator Cornyn, Senator Mike DeWine, Representative Christopher Cox, Representative Brad Sherman, and others have proposed changes to the Presidential Succession Act or other reforms to our system of Presidential succession.\textsuperscript{103} All of these bills have at least one thing in common: they are statutory, not constitutional proposals. Although some may argue that a constitutional amendment is, in fact, needed to solve Presidential succession problems,\textsuperscript{104} just as one is needed to ensure adequate continuity of congressional operations,\textsuperscript{105} there is even less political will for an amendment regarding the Presidency.\textsuperscript{106} Though some have noted weaknesses and defects in the Twenty-fifth Amendment, the

\textsuperscript{101} See \textit{Continuity of Gov't Comm'n}, supra note 2, at 11-12.

\textsuperscript{102} \textit{Powell}, 395 U.S. at 550; \textit{U.S. Term Limits}, 514 U.S. at 783.


\textsuperscript{104} See, e.g., Baker, supra note 13.

\textsuperscript{105} \textit{Continuity of Gov't Comm'n}, supra note 2, at 31.

\textsuperscript{106} See Calabresi, supra note 13, at 156.
authorization of congressional legislation to deal with Presidential succession in Article II should be sufficient.¹⁰⁷

Finally, although constitutional scholars across the political spectrum have long challenged various aspects of the current Presidential Succession Act as unconstitutional, particularly the placement of the Speaker of the House of Representatives and the President pro tempore of the Senate at the front of the Presidential succession line,¹⁰⁸ to date there has not been political interest in changing that law.¹⁰⁹ This may be because a political party usually does not willingly give up power. But because we are currently in a situation of unified government (with the same party controlling both the White House and a majority of both the House and the Senate), perhaps we are now operating in an era in which both the Speaker and the Senate President pro tempore would at least consider giving up their place in the Presidential succession line.

III. CONCLUSION

These are just the thoughts of one observer of the congressional debate over continuity of government. It is a great honor to be a part of that debate, and to be a part of this symposium. In the post-9/11 world, after all, these issues could not be more important. As Senator Cornyn stated before the Senate Judiciary Committee:

Twenty years ago, after nearly killing Prime Minister Margaret Thatcher and leading members of her government, IRA 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 fail-safe 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.¹¹₀

¹⁰⁷. Amar & Amar, supra note 13, at 128-29 (discussing difficulties of the Twenty-fifth Amendment); see also Calabresi, supra note 13, at 175.

¹⁰⁸. See sources cited supra note 13.


The Irish Republican Army claimed responsibility for the bomb that wrecked the Grand Hotel in Brighton, killing at least three people, injuring a Cabinet Minister and coming close to killing Prime Minister Margaret Thatcher and leading members of her Government . . . . Millions of breakfast-time television viewers saw the popular Minister of Trade, Norman Tebbit, bloody and moaning
in agony, pulled from the rubble of the ocean resort hotel where he had been buried for four hours, and the Prime Minister, who barely escaped injury, vowing grim-faced at her Conservative Party's conference that "all attempts to destroy democracy by terrorism will fail." The I.R.A. seemed to be promising more trouble to come. "Today we were unlucky," it said, "but remember, we only have to be lucky once. You have to be lucky always. Give Ireland peace, and there will be no war."

*Id.* Thanks to Curtis Gannon for reminding me of this chilling quote.