

http://judiciary.senate.gov/testimony.cfm?id=1022&wit_id=2919

Testimony
United States Senate Committee on the Judiciary
Ensuring the Continuity of the United States Government: A Proposed Constitutional Amendment to Guarantee a Functioning Congress
January 27, 2004

Prof. Sanford Levinson

W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law and Professor of Government ,
University of Texas Law School

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

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

But I also want to convey my particular pleasure at the fact that it was my home-state Senator, John Cornyn, who invited me to testify. As the Senator undoubtedly knows, I am a strong Democrat. In the current atmosphere of American politics, I would not ordinarily be singing Senator Cornyn’s praises nor, I suspect, would he be calling me as a witness. (My prior testimony before the Senate Judiciary Committee, on Sept. 4, 2001, was at the invitation of Senator Schumer, and I defended the propriety of senators taking into account the ideology of judicial nominees, a position that I know Senator Cornyn disagrees with.) But for me the very point of this morning’s session is to underscore the fact that the issue addressed by Senator Cornyn—the adequacy of our Constitution to meet the occurrence of a truly catastrophic loss of members of the Congress—is both of extreme importance and without a trace of partisan tilt.

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

I mentioned earlier that I had edited a book titled *Responding to Imperfection*. That title comes from a letter written by George Washington to his nephew Bushrod Washington (who would later become a distinguished member of the Supreme Court of the United States). **George Washington**, of course, was the single person most responsible for there being a new Constitution at all; he became president of the Constitutional Convention because **it was his unimpeachable stature that convinced doubters in the first place to support the Philadelphia Convention itself**. That same stature would help persuade the citizenry to ratify the Constitution. One would expect Washington to take special pride in the Constitution. No doubt he did, but accompanying justified pride was an ever timely reminder about the Constitution's limits as well. Thus it especially important that it was **Washington himself who wrote** that **"[t]he warmest friends and the best supporters the Constitution has do not contend that it is free from imperfections." Fortunately, when inevitable imperfections do manifest themselves, "there is a Constitutional door open. The People (for it is with them to Judge) can, as they will have the advantage of experience on their Side, decide with as much propriety on the alterations and amendment which are necessary."** **Should the point not already be clear enough, Washington went on to say that "I do not think we are more inspired, have more wisdom, or possess more virtue, than those who will come after us."** (Quoted in Levinson, *Responding to Imperfection*, p. 3, emphasis added.)

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

Everyone in this room—and across the Nation—experienced, in his and her own way, the catastrophe that we call "September 11." Fortunately, that did not include the destruction of the Capitol that may well have been the aim of the United Airlines flight that went down in Pennsylvania. But it would be foolish indeed to discount the possibility that something similar might happen in the future. (More likely, one suspects, is a bio-terror attack, but surely that is almost beside the point.) I had the privilege last year of attending a truly frightening event co-sponsored by the American Enterprise Institute and the Brookings Institution, which have been studying together the problem of "continuity in government." (My fellow witness, former Senator Simpson of Wyoming, is, of course, a co-chair of that commission.) What struck me, as a non-Washingtonian (who, however, now has a daughter working in Washington for the United States Department of Justice), was the near-certainty expressed by a number of the distinguished participants that Washington would be subject to a full-scale terrorist attack at some time in the foreseeable future. What in many ways was just as frightening was the demonstration—I believe beyond reasonable doubt—that the American political system was ill-designed to cope with such an attack if it did, for example, decimate the membership of the Congress. The framers of the Constitution, of course, envisioned the possibility that both the Presidency and Vice-presidency might become vacant and therefore empowered Congress to pass a Succession in Office Act. I strongly share Senator Cornyn's view that the present Act itself is gravely flawed and should be amended as soon as possible; it, too, contains elements of a ticking time bomb. Fortunately, correcting its deficiencies does not require a constitutional amendment. All it takes is congressional leadership, and I strongly commend Senator Cornyn for supplying that with regard to the Succession in Office Act as well as the proposed amendment.

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

It is, I presume, close to a “self-evident truth” that continuity in the government of the United States must be preserved under any and all foreseeable contingencies. It is especially important that such continuity be preserved with regard to the Congress, which is the branch of our political system most directly responsive to We the People of the United States. Obviously, the United States would need a strong Chief Executive in any such circumstances, but it is equally important that the United States would need a Congress fully capable of functioning. “Full capability” combines both political and legal dimensions. Should, for example, an attack kill 125 members of the House, especially if they are from particular states or a single region, one might well doubt, as a political matter, that the House was “fully capable” of functioning. But no strictly constitutional problem would arise. Imagine, though, that an attack killed 218 members of the House. Then, as a constitutional matter, one might well argue that it could not function at all inasmuch as Article I, Section 5 requires that a majority of the membership of each House is necessary to perform its business. If one reads this as applying only to “living members,” then there would be no problem, but this would then leave open the possibility of the House for a significant period of time being governed by a small minority “rump.” In theory, it would allow a single survivor to possess all of the power enjoyed by the House in our system of government. There is, however, no such formal legal solution to the problem of incapacitated, rather than killed, members of the House or Senate. Should majorities of the living members be incapacitated, the quorum problem would be insoluble. And, note well, one would need quorums in both houses in order for Congress to function. Bills obviously need the assent of both House and Senate.

Should we, then, be faced with a Congress that is unable, for whatever reason, to function, it is almost a logical—and, most certainly, an empirical—truth that power would flow to what can only be called dictatorship by a presumably functioning Executive Branch. After all, imagine that the President believes that special laws are necessary in the wake of emergency. In our system, it is Congress that makes law. But if there is no effective Congress, then, I dare say, we would simply accept fiat rule by the President, the definition of dictatorial rule. As we are told with some frequency, “the Constitution is not a suicide pact,” and there would be few, I suspect, who would be sharply critical of a president who stepped into the breach and declared him- or herself to be a Roman-like dictator. Indeed, if one looks back at the history of the Lincoln Presidency, when he had to make awesome decisions during a time that Congress was not in session—and, because of the realities of travel in 1861, could not return to Washington for some weeks—he behaved more to preserve the Union than to honor every last jot and tittle of the Constitution with regard to the limits of presidential power or devotion to the prerogatives of Congress.

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

do.

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

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

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

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

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

I suppose that “clever lawyers”—and I use so-called scare quotes advisedly—might argue that a permanent incapacity acts as a “constructive vacancy” that licenses replacement by a state’s governor. There are two major problems with this argument. First, as suggested by the scare quotes themselves, most people—including, I dare say, most lawyers—would regard this as “too clever by half,” since this just isn’t what most people—including well-trained lawyers—think of as the condition of creating a “vacancy.” It is the kind of “cleverness” that, for some people, gives lawyering a bad name.

Secondly, and just as much to the point, many of the incapacities are likely to be temporary rather than permanent. Think, for example, only of President Reagan in the immediate day or two following his attempted assassination by John Hinckley.

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

Indeed, the institution of which I am most aware, the United States Supreme Court, has scarcely been immune from them. Emory Professor of History and Law David Garrow several years ago published a remarkable article in the University of Chicago Law Review, "Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment" (67 U. Chicago Law Review 995 (Fall 2000)). One might argue that the difference in numbers makes the threat (or reality) of incapacity of a single senator less dangerous than is the case with regard to a member of the Supreme Court. But, if anything, the threats to our political system posed by the incapacity of significant numbers of senators or representatives would be far greater. (And, for that matter, I trust that future attention of this committee might be focused on incapacitated judges as the result of a catastrophe, which might also require thinking of a constitutional amendment if the requirement of "good behavior" is viewed, as has been traditionally the case, as inapplicable to defects in mental or physical health.)

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

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

The proposed amendment is actually quite modest: It simply allows Congress to address the issue; for better or worse, it does not require a given solution at this point. Deciding on such a solution, of course, is no easy matter. I would welcome the opportunity to testify at a further date with regard to

the details of possible implementing legislation. I will mention only what I think is the most serious potential problem with allowing governors an unrestricted discretion to fill vacant House seats: A single governor of a large state might be tempted to name only members of his or her political party to the vacancies, with potential destabilizing consequences at a time when it would be maximally necessary for us to recall—and to act upon—Jefferson’s reminder that we are “all Democrats, all Republicans” united by a desire to serve our country. I believe that any succession procedure should contain safeguards against temptations to use a national crisis for partisan advantage. My own preference would be to have each member of Congress deposit with the Governor a letter containing a short list of preferred successors, should the occasion ever arise, with the Governor required to choose from that list. No doubt there are other potential solutions, but Congress need never discuss any of them unless it first possesses authority to pass relevant legislation, and that authority would be provided by the Amendment.

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