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June 2006

Model Continuity of Congress Statute

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Model Continuity of Congress Statute

SETH BARRETT TILLMAN*

An Act to Maintain the Continuity of Congress and the People's Representation in Government during a National Crisis[1]

Whereas an emergency arising from war, terrorism, the outbreak of disease, or for any other reason, may give rise to the death or to the unexplained absence of congressional members or to their inability to attend, thereby precluding a single house of Congress from reaching or maintaining a quorum, but leaving its sister house with a quorum;

Whereas a single house of Congress may validly exercise limited delegated legislative authority if its unicameral orders, resolutions, and votes are presented to the President and if its unicameral orders, resolutions, and votes are authorized by a prior statute expressly conferring delegated legislative authority;

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

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1. Authority for this statute can be found in the express text of the Constitution. *See* U.S. Const. art. I, § 7, cl. 3 (Orders, Resolutions, and Votes Clause); *id.* at art. II, § 3 (The President "may, on extraordinary occasions, convene both Houses, or either of them . . . ."); *see also* Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why* Hollingsworth v. Virginia *Was Rightly Decided, and Why* INS v. Chadha *Was Wrongly Reasoned*, 83 Tex. L. Rev. 1265 (2005); Gary Lawson, Comment, *Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas Under the Orders, Resolutions, and Votes Clause*, 83 Tex. L. Rev. 1373 (2005); Seth Barrett Tillman, Reply, *The Domain of Constitutional Delegations Under the Orders, Resolutions, and Votes Clause*, 83 Tex. L. Rev. 1389 (2005); *but see INS v. Chadha*, 462 U.S. 919, 956-57 (1983) (holding that Congress may not make binding legal relations absent bicameralism and presentment).

For the purposes of this Model Statute, *Chadha* is not controlling.

Although, the reasoning of *Chadha* arguably extends to actions taken pursuant to this Model Statute, the facts of any litigation arising from this Model Statute are substantially different from the facts of *Chadha*. Unlike *Chadha*, all orders, resolutions, and votes made pursuant to this Model Statute are presented. Any litigation arising under this Model Statute will permit lower courts to take a fresh look at *Chadha*'s bicameralism rationale apart from the presentment issues, which are not at play under the terms of this statute.

Section 1: If the President of the United States convenes[2] both houses of Congress, [*or if the two houses of Congress are required to convene under the authority of some constitutional provision, statute, or congressional resolution,*][3] and one house of Congress (the "absent house") fails to make a quorum within ten calendar days from the first day both houses were required to concurrently meet, but the other house (the "continuing house") reaches a quorum and organizes, this Act delegates to the continuing house the constitutional limit[4] of all delegable legislative power to the continuing house (1) until such time as the absent house sends a message[5] to the continuing house to the effect that the formerly absent house has a quorum, or (2) until ninety calendars days (the "ninety calendar day period") have elapsed following the latter of either (A) the end of the aforementioned ten calendar days period or (B) following the last proclamation of the President to convene or reconvene Congress taking effect during some prior ninety calendar day period. In every case, the continuing house's authority to legislate under this Act in the form of a single house order, resolution, or vote terminates with the end of the House's constitutional two-year term.[6]

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2. *See* U.S. Const. art. II, § 3. Under the procedures provided for, a continuing house has the power to augment the President's powers, but cannot contract presidential authority over his veto, absent veto override requiring the action of both houses. Thus, the President has strong incentives to use his convening power.

3. Italicized language within brackets is optional.

4. I am not recommending that the maximal limit be delegated. Instead, the purpose of the Model Statute is to instruct legislative draftsmen how that limit might be reached through constitutionally valid means should it be considered desirable. It would be entirely appropriate to delegate some subset of all delegable authority, keeping in mind that future conditions make it difficult to predict what authority a future lone-house might wish to or need to exercise in the service of the public good.

5. My view, based in part upon longstanding congressional practice, is that this message is not an order, resolution, or vote that is subject to presentment under U.S. Constitution, Article I, Section 7, Clause 3.

6. My first impression was that this provision might have a tendency, as a purely formal matter, to undermine filibuster empowering rules, and that these effects might be more pronounced at the end of a session, i.e., last-period effects. On reconsideration, I no longer believe this to be the case, although I should be glad to be instructed by experts with game theory expertise.

Should the minority absent itself, no problem is caused; the majority still has a quorum. Can the majority shift control to the other house by intentionally absenting itself? Yes, but only if when doing so, they maintain majority control of a rump house without a quorum. *See infra* n. 14 and accompanying text (providing for twenty member Senate and forty member House). In the Senate, for example, this would require the absent majority to have no more than ten members on the floor and the minorities' *entire* membership (on the floor) to be no more than nine members. This would leave the majority with control of the presiding officer and the ability to send and shape messages to the sister house, but without a quorum (twenty members) under this statute. Of course, to pull this gambit off, the majority (pre-emergency) must generally outnumber the minority roughly nine to one. If the majority has such a healthy supermajority, the incentive to engage in gamesmanship is, I think, reduced to nil.

The real danger of the procedure provided for in this Model Statute is that in a chamber that actually lost the majority of its members, the rump house might leave the presiding officer in the control of the minority. In these circumstances, the chair might refuse to concede (by message) the loss of its quorum and pretend a sufficient number of its members remain alive, with a concomitant ability to

Neither the receipt of notice of a quorum from the absent house nor the end of the House's two year term nor the passing of the ninety calendar day period voids the continuing legal validity of any final orders, resolutions, or votes already in the possession of the President, such latter orders, resolutions, and votes, although not yet signed and not in-force, remain capable of coming into force either by the President's signature or in the absence of the President's signature by the passage of ten days (Sundays excepted) from presentment should both houses of Congress be in session on the tenth day following presentment.

Any order, resolution, or vote, although final, but not already presented to the President, is made void upon the continuing house's receipt of notice of a quorum from the absent house, the end of the House's two year term, or the passing of the ninety calendar day period.

Provided that: Congress may, by statute or by any order, resolution, or vote passed pursuant to this Act, vest jurisdiction, original or appellate, exclusive or concurrent, in any civil or in any other non-criminal matter, case, or controversy arising under this Act in the federal district courts, in the federal circuit courts, in the Supreme Court of the United States, in the United States bankruptcy courts, in any court presided over by a United States magistrate judge, in state or territorial or District of Columbia courts, in federal or state or territorial or District of Columbia administrative law judges or commissions, including the courts and administrative law judges and commissions of Puerto Rico and any United States possession or commonwealth, in any court organized by a sovereign or recognized Indian or Native American tribe, or in any United States military court or commission to the extent consistent with the Constitution of the United States;[7]

Provided that: Congress may, by statute or by any order, resolution, or vote passed pursuant to this Act, vest jurisdiction, original or appellate, exclusive or concurrent, in any criminal matter, case, or controversy arising under this Act in the federal district courts, in the federal circuit courts,

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organize in the near future. The presiding officer might do this as a negotiating tactic with the still intact house. The quid pro quo would be: I will concede the loss of my quorum if you do or enact X. This problem has a simple solution. The President should just reconvene Congress and thereby force both houses to organize or reorganize. If a house fails to do so, and if it fails to indicate by message that it has actually made a quorum and has actually organized, then the sister house can begin to legislate, and the absent house will lose its obstructionist bargaining chip. Compelling a house to reorganize in the event of a presidential proclamation to convene *may* require separate organic authority. *But see* Thomas Jefferson, *A Manual of Parliamentary Practice: for the Use of the Senate of the United States* § 51 – A Session (2d ed. 1812) ("*If* [Congress is] *convened by the President's proclamation, this must begin a new session, and of course determine the preceding one to have been a session.*") (italics in original).

7. *See* U.S. Const. art. III, § 2, cl. 1 ("The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . .").

in the Supreme Court of the United States, in state or territorial or District of Columbia courts, including the courts of Puerto Rico and any United States possession or commonwealth, in any court organized by a sovereign or recognized Indian or Native American tribe, and in any United States military court or commission to the extent consistent with the Constitution of the United States;

Provided that: No order, resolution, or vote of the continuing house may take effect prior to the time the President signs it, should he or she choose to sign it;

Provided that: No order, resolution, or vote of the continuing house may take effect prior to repassage by both houses pursuant to United States Constitution Article I, Section 7, Clause 3 should it be vetoed by the President;[8]

Provided that: No order, resolution, or vote of the continuing house may take effect prior to ten days (Sundays excepted) following presentment should the President choose not to sign it and should it have the force of law absent the President's signature;

Provided that: Every order, resolution, or vote passed pursuant to this Act will cease to have prospective legal effect no later[9] than sixty days following the date the absent house reaches a quorum and gives notice of such both to the continuing house and to the President of the United States, notwithstanding that the absent house giving notice to that effect may be a successor House or Senate. However, any vested rights, duties, or obligations that accrue prior to the aforementioned sixty-day automatic sunset may still be enforced by any party, and nothing in this provision terminates any court's jurisdiction or the jurisdiction of any administrative law judge or commission to hear or to continue to hear cases or controversies in such matters;

Every order, resolution, or vote passed pursuant to this Act will cease to have prospective legal effect no later than one hundred and twenty days following the date the order, resolution, or vote takes effect. However, any vested rights, duties, or obligations that accrue prior to the aforementioned

8. If Congress's intent is clear, federal constitutional law permits retroactive civil liability if enacted by a proper statute, embodying presentment and bicameralism. (Repassage of an order, resolution, or vote by two-thirds of *both* houses of Congress after presentment and a presidential veto is functionally analogous to a statute for this purpose. The substance would be the same, if not the form, although admittedly reasonable minds might disagree on this fine point.) Absent bicameralism, it is not altogether clear if an order, resolution, or vote could impose retroactive civil liability. Retroactive criminal liability is, in all events, impermissible, without regard to the legislative instrument chosen by Congress. *See* U.S. Const. art. I, § 9, cl. 3.

9. The continuing house is, of course, free to make orders, resolutions, or votes that have sunset provisions taking effect prior to this time. Likewise, the continuing house may create rights or obligation that, although they vest prior to sunset, cease to be judicially enforceable with the organization of the absent house.

one hundred and twenty-day automatic sunset may still be enforced by any party, and nothing in this provision terminates any court's jurisdiction or the jurisdiction of any administrative law judge or commission to hear or to continue to hear cases or controversies in such matters;

Provided that: If any provision of this Act is held to be unconstitutional, the remainder of this Act shall not be affected by the holding, but the continuing house may waive this requirement in any order, resolution, or vote passed pursuant to this Act;

Provided that: Should this Act or any provision thereof be determined to be unconstitutional, or should any order, resolution, or vote passed pursuant to this Act be held invalid for any reason, or should any Executive Branch official or private or public agent of the Executive Branch have acted beyond the scope of his or her authority under either this Act or under any order, resolution, or vote passed pursuant to this Act, no court, administrative law judge, or commission may impose any individual civil liability against any such Executive Branch official or private or public agent in his or her private capacity for any action taken pursuant to an order, resolution, or vote passed pursuant to this Act, notwithstanding the Executive Branch official or private or public agent having exceeded the scope of his or her legal authority, unless that Executive Branch official or private or public agent acted in subjective bad faith, and specifically intended the type of harm caused, and acted with knowledge of the illegality of his or her own acts at the time done, but the continuing house may waive this requirement in any order, resolution, or vote passed pursuant to this Act;

Provided that: In any conflict between this Act and any other act of Congress or treaty, without regard to the latter's date of enactment or ratification, this Act governs, but the continuing house may waive this requirement in any order, resolution, or vote passed pursuant to this Act;

Provided that: Any criminal defendant convicted for violation of any order, resolution, or vote passed pursuant to this Act shall not have access to federal habeas review of his conviction or sentence in any case where any Article III court, other than the Supreme Court of the United States, had jurisdiction to grant the relief sought or any substantively similar relief as an original matter or on direct appeal, notwithstanding the intentional, unintentional, or inadvertent waiver of such relief caused by either defendant's failure or defendant's counsel's failure to timely invoke the Article III court's jurisdiction, but the continuing house may waive this requirement in any order, resolution, or vote passed pursuant to this Act;[10]

10. This provision does not preclude (even as a default) federal habeas review of a defendant's conviction or sentence arising from proceedings before state courts, territorial courts, District of Co-

Provided that: For the purposes of determining a quorum sufficient to pass an order, resolution, or vote pursuant to this Act, the whole membership of a house may be calculated to include already qualified members [*and members-elect*],[11] then living, not yet either expelled, disqualified, or removed, and not having resigned,[12] and, a majority of the whole number of members includes a majority of those aforementioned members [*(but not members-elect)*][13] if they are in the physical presence of the presiding officer on the floor of the house or otherwise capable of participating in legislative business or senate executive business by artificial means although not physically present on the floor of the house, or determined to be present in any other way consistent with the orders, resolutions, or rules of that house, or any joint or concurrent resolutions or rules, or any federal statute, not otherwise inconsistent with the Constitution of the United States; but in no event shall a quorum of the House be determined to be present in the absence of forty qualified members, and in no event shall a quorum of the Senate be determined to be present in the absence of twenty qualified members.[14] Nothing herein requires any presiding officer

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lumbia courts, sovereign or recognized Indian or Native American tribal courts, or before United States military courts or commissions. Generally, the only exception to this outcome would be where the prisoner waived the right to remove (non-federal) criminal proceedings into a lower federal court. *See e.g.* 28 U.S.C. §§ 1442 (2006) (permitting removal by federal civil officers), 1442a (2006) (permitting removal by members of the United States armed forces). Where the defendant was convicted or sentenced by an Article III court, other than the Supreme Court of the United States, this provision precludes, as a default, federal habeas review.

11. *See supra* n. 3. There are good reasons to exclude members-elect from the calculation of the size of the membership and the quorum. First, the inclusion of members-elect makes reaching a quorum more, rather than less, difficult. Moreover, it is not clear, as a matter of settled judicial determination, that the presiding officer may constitutionally seize members-elect as he or she can seize absent qualified members. *See* U.S. Const. art. I, § 5 cl. 1. My view is that the matter should be settled by practice under each house's rule-making authority.

12. The provision is not inconsistent with U.S. Constitution Article I, Section 5, Clause 1. The practice approved of here was substantially similar to the one enforced by Congress's presiding officers during the Civil War to the universal acclaim of the loyal war-wearied nation. No attack on the constitutional validity of any statute passed by such a "weak" quorum was ever successfully prosecuted. *Cf.* Floyd M. Riddick & Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, Sen. Doc. No. 101-28, at 1039 (101st Cong. 2d Sess. 1992) ("A quorum shall consist of a majority of the Senators duly chosen and sworn."); *Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States One Hundred and Eighth Congress*, H.R. Doc. No. 107-284, at 801-02 (Charles W. Johnson ed., 2d Sess. 2003) ("Upon the death, resignation, expulsion, disqualification, or removal of a Member, the whole number of the House shall be adjusted accordingly.").

13. *See supra* nn. 3 & 11.

14. When the First Congress initially met, a House quorum was (no more than) a mere thirty of fifty nine (constitutionally authorized) members; a Senate quorum was (no more than) a mere twelve of twenty two (constitutionally authorized) members. *See* U.S. Const. art. I, §§ 2-3, 5. *But see The Federalist No. 59*, 308 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (noting incorrectly that "a quorum of the [Senate] is to consist of sixteen members"). The First Congress met prior to ratification by North Carolina (constitutionally authorized five House members and two Senators subject to ratification) and Rhode-Island and Providence Plantations (constitutionally authorized

to question or ascertain the presence of a quorum absent a motion to that effect by a member. Nothing herein upsets any presumptions created by the Constitution of the United States, custom, precedent, order, rule, resolution of either or both houses, or statute, or based upon any determination founded upon the presiding officer's inherent or customary authority permitting a presiding officer to assume the presence of a quorum.

Section 2: On the motion of any member desiring a quorum call, no presiding officer may determine that any member is dead, or that the member's absence is unexplained, or that any member is unable to attend should the presiding officer receive a timely written signed notarized (or in lieu of notarization, sealed, certified, acknowledged, or otherwise under the penalty of perjury) notice from the member (i) stating that the member has voluntarily chosen to absent himself from the meeting; and (ii) stating where the member is to be found during the course of the remaining congressional session. The inability of the presiding officer or his agent to find the absent member at the location stated therein rebuts any presumption that the document is authentic. Notice is timely should the presiding officer be in actual or constructive possession of it prior to any quorum call. Notwithstanding any statute or order, resolution, or rule of that house, or joint or concurrent rule or resolution[15] to the contrary, any member who has transmitted the notice described in this section may not be paid or receive any salary or any other financial or non-financial perquisite of congressional office, including salaries for staff, for the time period in which

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one House member and two Senators subject to ratification). *See The World Almanac and Book of Facts 1998*, at 514 (Robert Famighetti ed., 1997).

15. The phrase "order, resolution, or vote" is a term of art. It refers to single-house or bicameral congressional instruments having the force of law because they were authorized or ratified by a prior or subsequent statute. Orders, resolutions, or votes having the force of law are passed pursuant to U.S. Constitution Article I, Section 7, Clause 3, and like statutes, they are presented to the President.

On the other hand, if the terms "order" or "resolution" are used in any other context, they generally refer to single-house or bicameral congressional instruments passed under each house's rule-making authority. *See* U.S. Const. art. I, § 5, cl. 2.

There is some ambiguity with regard to the meaning of "joint resolution." The term is sometimes used to mean no more than a statute, although customarily joint resolutions (functioning as statutes) are of limited purpose and effect, and are titled differently from statutes. *See* Lawrence E. Filson, *The Legislative Drafter's Desk Reference* 352 (Congressional Quarterly Inc. 1992) ("The title of a joint resolution customarily begins with a verb in its gerundive form rather than its infinitive form -- 'Providing for' or 'Authorizing', for example, instead of 'To provide for' or 'To authorize' as in the case of a bill . . . ."). In the *Model*, "joint resolution" is not used in this bill-substitute sense, although unfortunately this seems to have become the prevailing usage. *See e.g.* Edwin Meese III et al., *The Heritage Guide to the Constitution* 92 (2005) (describing current usage). Rather, I use "joint resolution" synonymously with "concurrent resolution," a resolution of both houses, but not intended to be a statute, and, for that reason, not presented to the President. For example, a resolution of the two houses proposing a constitutional amendment is usually called a "joint resolution." And no one with a drop of common sense would confuse such an instrument with a statute.

the member remains absent. Notwithstanding any statute or order, resolution, or rule of that house, or joint or concurrent rule or resolution to the contrary, any member who has transmitted the notice described in this section may not be paid or receive during the time period in which the member remains absent any money, salary, pension, or other financial benefit out of the treasury of the United States or any arm or agency of the United States government, the government of the District of Columbia, the government of Puerto Rico, or the government of any territory, or United States possession, or commonwealth, or arm or agency thereof. In the absence of receipt of the described notice, a presiding officer has discretion to make a good faith determination based upon the totality of the circumstances to the effect that an absent member is presumed dead and to adjust the whole number of members and the quorum of the house accordingly.[16]

Section 3: This Act shall take effect on the date of its enactment.

Section 4: A matter, case, or controversy arises under this Act if it arises under this Act or if it arises under any order, resolution, or vote passed pursuant to this Act.

Section 5: For the purpose of passing an order, resolution, or vote pursuant to this Act in the House, in the absence of the Speaker, the Speaker pro tem, and all other elected House officers provided for by statute or order, resolution or rule of the House or joint or concurrent rule or resolution to preside in the absence of the Speaker or Speaker pro tem, the senior most member present, measured by continuous years of service in the House, shall preside, but if two or more persons shall have equal terms of service, the oldest such member shall preside, but in every such case where the presiding officer is the senior most member and presides by operation of this statute, a vote of the majority of members present, a quorum being present, may choose the presiding officer.

Section 6: For the purpose of passing an order, resolution, or vote pursuant to this Act in the Senate, in the absence of the Vice President, the Senate President pro tem, and all other elected Senate officers provided for by statute or order, resolution or rule of the Senate or joint or concurrent rule or resolution to preside in the absence of the Vice President or Senate

16. A presiding officer having determined that a member is dead may seek permission from the house to contact the governor of the State of the dead member for the purpose of having the governor make a temporary appointment to the Senate and/or to set in motion that State's election processes. A presiding officer may not need permission to that effect from the house's members if such contacts are already provided for under the rules of that house or by custom.

President pro tem, the senior most member present, measured by continuous years of service in the Senate, shall preside, but if two or more persons shall have equal terms of service, the oldest such member shall preside, but in every such case where the presiding officer is the senior most member and presides by operation of this statute, a vote of the majority of members present, a quorum being present, may choose the presiding officer.

Section 7: All orders, resolution, or votes passed pursuant to this Act may be authenticated by the presiding officer of each house or by the chief legislative officer of each house, the Secretary and the Clerk, or should either be absent, by an assistant Secretary or Clerk, or their designees. All orders, resolution, or votes passed pursuant to this Act shall be authenticated by the presiding officer of each house passing or concurring in the measure. No order, resolution, or vote passed pursuant to this Act shall be held to be void should either or both chief legislative officers fail to authenticate it. Any order, resolution, or vote passed pursuant to this Act which is authenticated both by the presiding officer or officers of the house or houses passing or concurring in the measure and by the chief legislative officer or officers of the house or houses passing or concurring in the measure, or their assistants or designees, raises a presumption, conclusive upon the courts of the United States and upon administrative law judges and upon commissions, to the greatest extent permitted by the Constitution of the United States, to the effect that all constitutionally mandated procedural requirements have been complied with, but the continuing house may waive this presumption in any order, resolution, or vote passed pursuant to this Act.

Section 8: Passing or concurring in an order, resolution, or vote pursuant to this Act waives the right of that house or that house's successor, to the greatest extent permitted by the Constitution of the United States, to contest the constitutionality or the validity of the measure either on non-delegation grounds or for being *ultra vires* in litigation before any court, administrative law judge, or commission, but the continuing house may waive this requirement in any order, resolution, or vote passed pursuant to this Act.

Authentication of an order, resolution, or vote passed pursuant to this Act by the presiding officer of a house which did not pass or concur in the measure waives the right of that house or that house's successor, to the greatest extent permitted by the Constitution of the United States, to contest the constitutionality or the validity of the measure either on non-delegation grounds or for being *ultra vires* in litigation before any court, administrative law judge, or commission, but the continuing house may

waive this requirement in any order, resolution, or vote passed pursuant to this Act.

Should the President of the United States sign an order, resolution, or vote passed pursuant to this Act, his signature waives his right, and the right of the Executive Branch, and the right of any successor in office, including any Acting President, to the greatest extent permitted by the Constitution of the United States, to contest the constitutionality or the validity of the measure either on non-delegation grounds or for being *ultra vires* in litigation before any court, administrative law judge, or commission, but the continuing house may waive this requirement in any order, resolution, or vote passed pursuant to this Act.

Section 9: Neither this Act nor any provision of this Act may be amended, altered, changed, modified, repealed, suspended, or nullified by any order, resolution, or vote passed pursuant to this Act.[17] In any conflict between this Act and any order, resolution, or vote passed pursuant to this Act, this Act governs. No order, resolution, or vote passed pursuant to this Act may delegate any legislative authority, power, or privileges to either or both houses, including any committee or subcommittee, or to any member, or to any elected or appointed legislative officer, or to any officer that could be removed from office either by any legislative instrument not requiring presentment to the President or by the direct or indirect authority of any elected or appointed legislative officer.

17. *But cf. The Queen on the Application of Jackson v. H.M. Attorney General*, [2005] EWHC 94 (QBD (admin) 2005) (upholding application of the Parliament Act of 1949), *aff'd*, [2005] EWCA CIV 126 (Eng. Ct. App.), *aff'd*, [2005] UKHL 56 (U.K House of Lords). It appears that the Law Lords have permitted subsidiary single-house legislation to substantively alter the terms of the prior statutory delegation. Were this (untoward) result permitted under the *Model*, the statutory limitations on single-house action within the *Model* could be set aside by a subsequent order, resolution, or vote. My own view is that Section 9 is unnecessary. The courts should reach exactly the same result by operation of the Supremacy Clause. *See* U.S. Const. art. VI, § 2. Rather, Section 9 is included in an abundance of caution.