

THE CONTINUITY OF CONGRESS

Extensions

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In the immediate aftermath of September 11th, our institutions of government acted swiftly, decisively, and through normal constitutional channels. But it might not have been so. In an interview aired on Al Jazeera in September, the 9/11 plotters revealed that the plane that crashed in Pennsylvania was headed for the Capitol building. United Flight 93 took off 40 minutes late on September 11th. It was this delay that allowed passengers to communicate with the outside world and learn that their hijackers were on a suicide mission. And it was the bravery of the passengers storming the cockpit that prevented an additional tragedy. Had the plane left on schedule, it might very well have slammed into the Capitol without notice to the many House members who were on the floor or in nearby offices. The result would not only have been a strike at the very symbol of our American democracy, but it might have sparked a constitutional crisis.

Why would such an attack have been so debilitating? Two reasons. First, the House of Representatives, unlike the Senate, does not allow for temporary appointments to fill vacancies until special elections are held. The only way to fill vacancies is by special elections, which take on average four months to complete. Second, both the House of Representatives and the Senate do not have a way to deal with large numbers of members alive, but incapacitated and unable to perform their duties. Either of these problems could result in a Congress unable to act because it failed to meet a quorum requirement or a decimated Congress with large parts of the country unrepresented. There are a number of ongoing efforts to address these problems, both inside and outside of Congress, including

the newly launched Continuity of Government Commission.

The Problem of Mass Vacancies in the House of Representatives

The problem of mass vacancies in the House of Representatives is rooted in our Constitution. The original Constitution vested the power of election of senators in state legislatures, but it also recognized that these legislatures would often be in recess, so it provided that governors could make temporary appointments to fill vacancies until the legislature could meet to elect a successor. The seventeenth amendment shifted the election of senators to the people, but the provision for governors making temporary appointments was carried over in that states were allowed to authorize their governors to make temporary appointments until special elections could be held. The relevant part of the seventeenth amendment reads: "When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies; provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

By contrast, the Constitution makes no provision for temporary appointments in the House. All vacancies are filled by special election. Article I, Sec 2, cl. 4 reads "when vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies."

State laws that govern special elections vary widely. Some states dispense with primaries for special elections. Others give the governor broad discretion on the timing of the election. The timing of the election is often affected by when in the course of the term the vacancy occurs. Some states do not fill vacant seats if they occur in the last six months of a term.

With such a variety in state laws, it is not surprising that in practice the time it takes to fill a vacancy is not uniform in the states. Looking back at all of the House vacancies since the 99th Congress, some vacant seats were filled in as little as two months, while others languished vacant for nearly a year. The average time to fill a vacancy in that period was 112 days. The average time to fill vacancies caused by death was 125 days.¹ In normal times, the House can function perfectly well with a handful of vacancies that last several months. But the problem of mass vacancies is particularly difficult because of the length of time it takes to hold special elections. While mass vacancies in the Senate could be filled almost immediately, they could not in the House.

The possibility of mass vacancies lasting for months runs up against the constitutional provision for a congressional quorum. Article I, sec 4 states that "a majority of each [house] shall constitute a quorum to do business." The plainest meaning of the constitutional quorum requirement is that a majority of all of the seats apportioned in the House of Representatives makes a quorum. Using this interpretation, a quorum would be made up of 218 of the 435 members of Congress. If fewer than 218 members were alive after an attack, there could be no quorum to do business. But the quorum question is not so simple. In the latter half of the nineteenth and early twentieth centuries, a series of rulings in the House led to the current interpretation that the quorum is a majority of those "chosen, sworn, and living." Using this more lenient standard, a large number of vacancies by itself could never prevent the House from forming a quorum. If 432 members were killed, the remaining three would constitute the House, and any two could form a quorum. And this majority of only two members might pass bills, vote to

override presidential vetoes, impeach a president. And the speaker of the House elected from this group might assume the presidency if the president and vice president were killed.

Even aside from this extreme circumstance, imagine if 300 members were killed, or even 100. What if all but one state delegation were wiped out, or if an attack hit one of the party caucuses? These scenarios that would leave our House of Representatives skewed geographically or politically for a long period of time.

The Problem of Incapacitated Members of Congress

Perhaps an even more vexing problem than that of mass vacancies is the possibility that a large number of members would be so severely injured that they could not perform their duties. There is no established way for Congress to deal with large-scale incapacities, and as there would be no vacancy created by an incapacitated member, no temporary appointments could be made in the Senate, and no special elections could be held in the House. In addition, incapacity could cause the House and Senate to be unable to meet even its more lenient quorum requirement. If 218 members of the House were incapacitated, then a majority of the "chosen, sworn, and living" members would be impossible to achieve.

The problem of incapacity is more plausible now than it has ever been because of the existence of chemical and biological weapons. If anthrax had been dispersed secretly and more widely than in last year's episode, large numbers of members and their staffs might have contracted inhalation anthrax, and might have only returned to their duties after a lengthy recovery period. If United Flight 93 had hit the Capitol, many members might have spent months in burn units. Perhaps most frightening is the possibility of an infectious

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www.continuityofgovernment.org/pdfs/testimonynj020228update.pdf

disease, like small pox, which might infect individual members, but also might prevent the congress from coming together for fear of spreading the disease.

The problem of incapacity on a small scale is not unfamiliar to Congress. It is not uncommon for individual members miss votes and other activities because of illness and surgery. There have also been more serious cases when individual members have been unable to perform their duties for months or years at a time. It is not surprising that neither the House nor the Senate has official policy to deal with incapacity because both chambers can operate effectively with a handful of members missing and because of the potential for mischief and playing politics that the power to declare an incapacity might encourage.

There is only one recent case of Congress declaring a seat vacant because of incapacity. In 1980, Gladys Noon Spellman (D-MD) was campaigning for re-election when she suffered a heart attack four days before the election and fell into a coma. Her name remained on the ballot, and she was re-elected. When the new Congress opened in January, she was still in a coma. After several weeks, the House took up and passed H Res. 69, which declared the seat vacant because of her incapacity. A special election was then held to fill the seat.

Another relevant case occurred in the early 1970s when House Majority Leader, Hale Boggs (D-LA) and Congressmen Nicholas Begich (D-AK) were lost in a plane crash in Alaska shortly before the election. Their bodies were never found. Both men's names remained on the ballot, and they won re-election. When a court in Alaska declared them to be presumed dead, Congress passed a resolution declaring the seats vacant and Alaska and Louisiana held special elections to fill the vacancies.

These precedents are extremely narrow in scope. In both cases, the vacancy was declared

only after the members were re-elected and were unable to show up to take their seats in the next Congress. There are many instances, however, of members incapacitated for a significant period of time, who continued to serve without being able to perform their duties. Senator Carter Glass (D-VA) was absent for a number of years in the 1940s. In the early 1970s, Senator Karl Mundt (R-MT) was in a coma for a long period of time. He was stripped of his committee assignments, but he retained his seat until the end of his term.²

Efforts to Preserve the Continuity of Congress from the 1940s to the 1960s

For a period of about 15 years beginning in the late 1940s, the threat of nuclear war spurred Congress to consider measures to address the continuity problem. Over 30 constitutional amendments were introduced between 1946 and 1965. While there were differences among the specifics of the proposals, most gave governors the power to make temporary appointments to fill house vacancies when large numbers of vacancies occurred.

In 1954, the Senate considered a proposal by Majority Leader William Knowland (R-CA) to give governors the power to make temporary appointments whenever the number of vacancies in the House exceeds 145. The full Senate voted 70-1 in favor of the proposal, but the House took no action. In 1955, the Senate, now under Democratic control, considered a proposal by Estes Kefauver (D-TN), which would have given governors the power to make temporary appointments to fill vacancies when there was a majority of vacancies in the House and Senate. In hearings before the

² The material on incapacitation draws heavily on Norman Ornstein's testimony before the subcommittee on the constitution of the House Judiciary Committee.

www.continuityofgovernment.org/pdfs/testimonynj020228.htm

Constitution Subcommittee of the Senate Judiciary Committee, C. Herman Pritchett, then chairman of the department of Political Science at the University of Chicago, testified in favor of the idea to allow governors to make temporary appointments to the House in all cases, not just emergency situations. The Senate passed the Kefauver constitutional amendment 76-3.

In 1960, the Senate passed a three-part amendment. Part I gave the District of Columbia the right to vote in a presidential election. Part II was a ban on poll taxes. Part III was a continuity provision of Senator Kefauver, which gave governors the power to make temporary appointments when the vacancies in the House exceeded a majority. The Senate passed the amendment 70-18. The House only took up the DC voting provision, which was ultimately passed by both chambers and went on to become the 23rd amendment. The next Congress passed constitutional amendment poll tax ban, which went on to become the 24th amendment. The House never voted on the third part, the continuity amendment. In 1961 under chairman Manuel Celler, the House held hearings on the subject, but no action was taken. After the early 1960s, the issue died out.³

Recent Efforts on Continuity of Congress

After September 11th, a number of people began to think about the consequences of a catastrophic attack on Congress. Norman Ornstein, my colleague at AEI, wrote the first opinion piece in *Roll Call* on October 4, 2001

³ See memo by former Senate Legal Counsel, Michael Davidson at www.continuityofgovernment.org/pdfs/memodavidson.pdf. See also the CRS Report RS21068, House Vacancies: Selected Proposals to Allow for Filling Them Due to National Emergencies by Sula Richardson.

and followed it up with a number of other pieces.⁴

At the same time, Congressman Brian Baird (D-WA) was formulating a draft proposal of a constitutional amendment. On October 10, 2001, Baird introduced H.J. Res. 67, to allow governors to make temporary appointments in the case where more than 25% of members were killed or incapacitated.

In early January, Ornstein and Thomas Mann of the Brookings Institution convened a working group of congressional and constitutional experts to discuss the issue. In February, the Constitution Subcommittee of the House Judiciary Committee held a hearing on Baird's constitutional amendment. In March, Congressman Baird circulated a letter among his colleagues and received 218 signatures calling for the leadership of both parties to convene a commission to study this issue. At a press conference, a number of members spoke in favor of this commission. In May, the House Administration Committee held a hearing on the possibility of an e-Congress with remote voting in emergency situations, based on a bill introduced by Congressman Jim Langevin (D-RI), which asked the National Institute of Standards and Technology to study such a possibility.

In late spring, the House Republican Policy Committee and the Democratic Caucus met jointly to discuss this issue. This meeting was the first in a series of public and private meetings involving members and staff that was chaired by Chris Cox (R-CA) and Martin Frost (D-TX). These meetings continue, and the group will offer recommendations on rules changes, legislative changes, and potential constitutional amendments.

Most recently, the American Enterprise Institute and the Brookings Institution joined

⁴ www.continuityofgovernment.org/pdfs/no011004.htm

forces to form the Continuity of Government Commission. Presidents Carter and Ford are honorary co-chairs, and Lloyd Cutler, former White House Counsel to Presidents Carter and Clinton, and former Republican Senator Alan Simpson chair the effort, which includes former speakers Thomas Foley and Newt Gingrich and others who have served in government at the highest level. On September 23rd, the commission met for the first time to hear testimony from expert witnesses. It will meet again on October 16th to begin the process of formulating recommendations. The Commission will issue a report on the continuity of Congress and of the Supreme Court in January, in time to present to the new Congress. A second phase of the commission will look at the presidential succession act. The Commission's website (www.continuityofgovernment.org) contains all of the relevant background information, testimony, proposals, and articles written on the subject.

Proposals For Reform

The commission and the congressional task force will consider changes in the rules, the law and the constitution to address the issue of continuity.

By rule, the House and Senate could clarify the quorum standard and make it easier for the Congress to reconvene for an emergency session or in a different location. These changes, while helpful, would not allow for replacements to fill vacancies immediately or to fill in for incapacitated members.

The chief legislative proposals contemplate speeding up special elections. The House Task Force has proposed that all 50 states scrutinize their special election laws to see if they can be expedited to shorten the period of vacancy. If the states do not act, Congress could pre-empt state election laws under the authority given by the "times, places and manner" clause of the constitution. For example, federal law might

require that states hold special elections in no less than 90 days after a vacancy is created. The legislative approach addresses an aspect of the problem, the speed of special elections, but it has certain limitations. First, it is hard to hold an election in less than 60 days under ideal circumstances, and two months without a functioning Congress is still significant. Second, in order to hold elections in a short time frame, it would be necessary to dispense with primaries and compress other aspects of the electoral process, and such expedited procedures might not sit well with the political culture of some states. Third, in the aftermath of a catastrophic attack, there might be a significant delay in beginning the election process and other logistical problems with holding hundreds of unanticipated special elections.

Finally, there are a number of different proposals for constitutional amendments. The simplest is one that gives Congress the power to deal with the problem legislatively. This would provide the most flexibility for Congress to craft a solution and to amend it as circumstances change. On the other hand, it is not clear what such an amendment would authorize Congress to do by law. In addition, it delays solving the problem until future legislators take it up.

Another simple constitutional amendment would give governors the power to make temporary appointments in the House in ordinary circumstances, similar to the 17th amendment provisions for the Senate. The strengths of this proposal are its simplicity and that it has already been tried by the Senate. But there are two disadvantages. First, many members of Congress take pride in the fact that the House is the "people's house" and that no member has ever served without being elected. This proposal would violate the elective character of the House on a regular basis, as vacancies occur frequently. Second, the proposal addresses the issue of mass vacancies, but not incapacitation.

The most commonly proposed type of amendment allows for gubernatorial appointments if a large number of vacancies exists. The advantage of such a proposal is that it is similar to the 17th amendment procedure for the Senate, but it would take effect only in the direst emergencies. The disadvantages are its complexity and that it still violates the elective principle of the House, albeit only in emergencies. This type of constitutional amendment has a number of variants, which are worthwhile considering. How is such an amendment triggered? If it is by the death of a number of members, then what is the correct number and who would be responsible for certifying that the threshold had been reached. Should the amendment contain a provision that the temporary appointments should be of the same party as the deceased member? Should the temporary appointment be able to run in a special election?

Finally, there are two additional issues that might be addressed by constitutional amendment. First, the temporary replacement of incapacitated members. One option is an institution would declare members incapacitated and later judge if they had recovered. Another option is to allow seats to be declared temporarily vacant by a governor, but members could resume their seats when they declare they are recovered. Second, the possibility of current members designating their successors. A number of state legislatures have a procedure by which legislators are required to keep a list of their successors who would serve temporarily in the case of mass vacancies.

Conclusion

In the four months after September 11th, Congress passed measures to authorize the use of force in Afghanistan, appropriate funds for disaster relief, give law enforcement agencies greater powers, and create the Transportation Security Agency, among many others. Aside from the specific legislation, there was also a

sense of security that the three branches of government functioned in a normal manner. Had Congress been debilitated, none of this would have occurred. Some would argue rightly, that in such a circumstance, the president would step in and claim emergency powers. But while such action might be needed in the most dire instances, it is certainly not desirable. In the coming months, Congress will be presented with a number of options for preserving itself in the face of another attack. We can only hope that a serious debate will lead to concrete action to address these urgent issues.

