

Continuity of Congress: Where We Are Eight Years after 9/11

The Problem: No Plan in Place

On September 11, 2001, United Flight 93 crashed in rural Pennsylvania, as hijackers were overpowered by passengers on the plane. Passengers were aware of attacks that day on the World Trade Center and the Pentagon because their flight took off nearly 30 minutes late. Had they not known of these other acts of terrorism, it is likely that their plane would have reached its hijackers' intended destination, now assumed to be the U.S. Capitol. An attack on the Capitol would have likely resulted in mass casualties among members of Congress. As dislocating as a terrorist attack on the Capitol would have been for the city of Washington, D.C., the impact on the legislative branch would have been devastating. As it stands, in the event of a catastrophic attack on Congress, one that kills or incapacitates many members of Congress, it would take many months for Congress to return to its normal state with representation for each state and district in the country. In short, there is no plan to immediately deal with mass vacancies in Congress.

The problems with the current system of congressional regeneration are twofold. First, because of difficulties in filling vacancies quickly and with no way to deal with mass incapacitation of members, it could be months or even years before the effects of an attack are erased by the elections of new members. Second, not only would Congress lack full representation following such an attack, it might also lack members to simply achieve a quorum and might not be able to act at all for several months after an attack, just at the time where great and steady leadership is required.

The House of Representatives would be more affected by a catastrophic attack on Congress, but the Senate is also affected in certain circumstances. For the House, in keeping with the view that the House is the more democratic of the two houses, vacancies are only filled by special election. Laws for holding those elections differ from state to state and sometimes depend on the timing of the vacancy, but in general these elections take several months to complete. The AEI-Brookings Continuity of Government Commission found that in elections to replace members who had died in office, four months was the average time of vacancy.

Senate vacancies are typically filled quickly, as the Seventeenth Amendment allows states to give their governors the power of making temporary appointments to fill vacancies until a special election is held to fill out the remainder of the term. Therefore, the Senate could have almost all of its vacancies filled shortly after a catastrophic attack.

But the Senate and the House are plagued by the prospect of large numbers of incapacitated members. At present, there is effectively no way to temporarily or permanently replace an incapacitated representative or senator until the term of the member expires and a new election is held.

The Constitution defines a quorum as a majority of members of each house of Congress. In other words, 218 members of the House of Representatives and 51 senators are needed for the House and Senate respectively to conduct business. Over the history of Congress, several precedents have arisen to define the quorum as a majority of members of each body rather than a majority of the whole number of seats. For example, if the House of Representatives had two vacancies and thus 433 members, these precedents set the quorum requirement at 217 members instead of 218. The Continuity of Government Commission found these precedents to be of dubious constitutionality. And the Commission has noted the difference between a relatively normal situation where there are only a few vacancies and the extreme case where hundreds of members of Congress are killed. In this latter catastrophic case, these questionable precedents would allow for a House of Representatives to operate with ten or twenty members of Congress, perhaps with all remaining members representing the same region, gender, or party. This would be in direct opposition to the framers of the Constitution's considered judgment that a very unrepresentative rump congress should not act as if it represented all of the people.

The Commission's Central Recommendation: A Constitutional Amendment

In its 2003 report on congressional continuity, the Commission recommended the passage of a constitutional amendment that, in the case of mass vacancies, would allow temporary appointments to the House to fill those vacancies until a special election could be held. The Commission also recommended that if a large number of representatives or senators became incapacitated, temporary appointments should be made to fill in for these members until they recover, die, or until Election Day. These measures would allow for a fully representative House and Senate to operate just days after an attack, filling in the gap of several months that exists under current law.

Congress: What Has Been Done

Congress has not adopted the Commission's recommendations, but instead has enacted more incremental measures which would not directly alleviate the consequences of a catastrophic attack.

Quick Special Elections

First, instead of filling vacancies immediately, as the Commission proposed, Congress passed legislation to attempt to increase the speed of special elections in the House in the case of mass vacancies. With the passage of the Continuity of Representation Act of 2005, federal law now requires states to hold elections within 49 days in the case of more than 100 House vacancies. The Commission supported states reviewing their laws to speed up their special elections. But the likelihood is that states will not be able to meet the 49-day deadline. And even if states do comply with the law, 49 days with hundreds of House vacancies would mean that either the House could not meet or that it would limp along in a small and unrepresentative way for 49 days in the immediate aftermath of an attack.

There are two reasons to doubt that states will comply with the 49-day requirement. First, only a few states that dispense with primaries for their special elections are able to hold elections this quickly. The need for time to find polling locations, print ballots, and mail out absentee ballots (especially to overseas voters) makes holding a snap election very difficult. Second, there is little evidence that states are changing their laws to require such quick elections, nor are they putting resources into the planning and training required to hold such elections.

Loosening the Quorum Requirement

As indicated above, the Constitution requires a majority of each House to conduct business. Instead of filling vacancies to achieve a quorum, the House has chosen to amend its rules to allow for a very small quorum in the case of mass vacancies or incapacitations.

First, it codified old precedent to provide that a quorum would not be a majority of the whole number of the House, but a majority of those “chosen, sworn and living.” For example, if only 31 members survived an attack, 16 could meet and conduct the business of the House, while the other 419 congressional districts were effectively unrepresented in the House.

Second, the House added a provision that allowed for an even smaller quorum in the case of incapacitated members. Essentially, after an attack and after a series of quorum calls and determinations, the Speaker could rule that the number needed for a quorum was the number that was able to show up in the House chamber. If four hundred members were hospitalized with inhalation anthrax, then the 35 members of Congress who could show up would be considered enough to do the business of the House.

Not only are these rules changes likely unconstitutional, they are also a bad idea. It does not serve the continuity of Congress to have a handful of members operating the House, when other solutions might bring a full complement of representatives.

Conclusion

Even eight years after 9/11, when we know that one of the planes on 9/11 was likely headed for the U.S. Capitol, we still face the prospect of a diminished Congress or no Congress at all in the aftermath of a catastrophic attack. One of the central critiques of a constitutional amendment to fill vacancies via temporary appointments is that it would violate the concept of a democratically elected Congress. However, a devastating attack would not offer us the luxury of a representative 435-member Congress with every member immediately chosen through democratic means. The chances of a catastrophic attack on Congress may be remote, but such an attack is possible. This possibility alone should be enough to require congressional action to ensure that mass vacancies could be quickly filled and that the American government would not be left in a paralyzed and vulnerable position for an extended period of time.