



Written Statement of
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of a Catastrophic Attack”

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Thank you Chairman Nadler, Ranking Member Sensenbrenner and Members of the Subcommittee for inviting me to testify before you on preserving the continuity of Congress after a terrorist attack. I am the executive director of the Continuity of Government Commission, a joint effort of the American Enterprise Institute and the Brookings Institute, now co-chaired by former senators Alan Simpson and David Pryor.

It has been nearly eight years since the horrific day of September 11, 2001. Even after the passage of time, the country cannot forget the magnitude of the attack that killed many innocent people and changed the way we think about our security.

But members of this chamber more than anyone know that the damage done on September 11th could have been even worse. There were three planes that struck their intended targets at the two towers of the World Trade Center and the Pentagon leaving nearly 3,000 innocent people dead. But there was also a fourth plane, United 93, which took off from Newark 42 minutes late. Because of the delay, the passengers on that flight, who were herded to the back of the plane, learned about the fate of the other three planes from cell phone conversations with their loved ones. They made the fateful decision to storm the cockpit. All of them lost their lives, but their heroic actions spared America the loss of many more lives and prevented the disruption of our constitutional institutions of government, and our ability to respond effectively to that terrorist attack.

The target of that fourth plane has been confirmed by the 9/11 Commission; it was headed toward Washington, D.C., and the hijackers planned to fly it into the Capitol. The aim was not only more death and destruction, but to debilitate the Congress and to throw into chaos our constitutional system.

The Legal and Constitutional Problems Facing Congress in Reconstituting Itself after a Catastrophic Terrorist Attack

Shortly after 9/11, two individuals began to think about what would have happened had the fourth plane reached its target and devastated the United States Congress. My colleague at the American Enterprise Institute, Norm Ornstein, thought this problem though two weeks after 9/11 in a *Roll Call* piece entitled “What if Congress Were Obliterated?” And inside the House, Representative Brian Baird had similar thoughts and conversations immediately after 9/11. These individuals have continued to work on these issues, and their efforts have spurred thoughtful and constructive debate by others. Our Commission is one example; in its early years, it was chaired by Senator Alan Simpson and former White House Counsel Lloyd Cutler, and it includes as its members many former public officials from all three branches of government. The purpose of the Commission is to make recommendations on how the institutions of government could reconstitute themselves after a terrorist attack. After many hearings of public testimony, the Commission issued its recommendations in a report in 2003 on the Continuity of Congress, which can be found on our website www.continuityofgovernment.org. Recently, the Commission issued a second report on our presidential succession system.

Our Commission, however, was only one institution studying this problem. Congress itself has studied this issue extensively with high level task forces, such as the House group chaired by Chris Cox and Martin Frost. And this committee and others in the House and Senate have held multiple hearings on the matter.

All of these investigations have come to a common understanding of the problem, even if not all agree on the solutions.

Here is a short summary of the consequences of a catastrophic terrorist attack that kills or incapacitates a large number of members of Congress. These problems center around two issues. First, how would House and Senate get back to full membership after such an attack? Second, how would the House and Senate get back to a point where they could operate constitutionally, legitimately, and practically, even if their full membership has not been restored? One aspect of this second question is how the House and Senate could meet their quorum requirements to conduct business, but the quorum is only one aspect of this larger question of restoring a legitimate Congress after an attack.

The House and the Senate would face this situation in very different ways, with the House having greater difficulties in reconstituting itself.

The Senate

When vacancies occur in the Senate, in the vast majority of cases, they are filled quickly by gubernatorial appointments. The Seventeenth Amendment gives state legislatures the ability to empower their governors to make temporary appointments to fill Senate vacancies. Those temporary appointees serve until a special election is held to fill out the remainder of the term. By tradition and with the guidance of court cases, the length of that appointment cannot extend much beyond two years. States often schedule special elections at the time of the next general election. Almost all states have given their governors the power to fill vacancies. There are five or six exceptions. Wisconsin and Oregon have had a long standing practice not to fill Senate vacancies with appointments. Instead, they allow the Senate seat to sit vacant until they hold a special election. Oklahoma has allowed appointments in certain circumstances, but in others the law directs leaving the seat vacant until a special election is held, depending on the timing of the vacancy. And in the last five years, Alaska, Massachusetts and Connecticut have changed their laws, and they no longer provide for governors to make temporary appointments to fill vacancies. They too leave the Senate seat vacant until a special election is completed.

The upshot of this gubernatorial power to fill Senate vacancies is that seats do not remain vacant long. If one imagines a catastrophic attack that kills all or nearly all of the senators, the Senate could quickly reconstitute itself. Governors in most of the states would make temporary appointments within days. And the Senate would have nearly full membership quickly.

The Senate and the House are each governed by a constitutional clause that requires a majority of the body to be present to conduct business. With governors making temporary appointments to the Senate, a quorum would be achieved quickly.

The House

The House has one chief difference with the Senate that makes its reconstitution after an attack much more difficult and lengthy. There is no provision for filling House vacancies with appointments. The Constitution provides only one way for House vacancies to be filled: special elections. When a House vacancy occurs, the seat remains vacant, typically for several months, as the state conducts a special election to fill the vacancy.

In normal circumstances, the only downside to this arrangement is that the district has no one to represent its interests during this period. The House itself is not adversely affected, as it can conduct its business effectively with 434 or 433 members as well as it could with the full membership of 435.

But in the case of a catastrophic attack with hundreds of members killed, the House itself would not be able to reconstitute itself for months. In our original report, we found that House vacancies created by the death of a member took over four months to fill. Many state laws allow for vacancies of longer duration, and some do not fill the vacancy at all if it occurs in an election year.

The most likely outcome of a catastrophic attack on the House killing many members would be a House not repopulated for many months. There would also be a serious question whether the House could conduct any business because it would be short of its constitutional quorum requirement of a majority of the body.

Incapacitation

One additional factor which would complicate the reconstitution of the House and Senate is incapacitation of members of Congress. There is no provision for removing or otherwise dealing with a sworn member of Congress who is alive, but becomes incapacitated and unable to perform his or her duties.

In ordinary times, the Senate or the House might have an individual member or two who might not be able to vote, to show up on the floor, or who could have an extended period of illness. These individual cases may affect occasional votes, but they do not affect the functioning of the House or Senate.

But in the case of a catastrophic attack, a significant number of incapacitations would be likely and would greatly complicate the House and Senate reconstituting themselves.

Imagine an attack on the Senate kills twenty senators, and gravely wounds the rest. Most of the twenty vacant Senate seats could be filled quickly by gubernatorial appointments. But the eighty senators who were gravely injured could not show up for work, but could

also not be replaced by gubernatorial appointment or even by a special election. As these seats are not vacant, there is no mechanism to fill the seats.

In addition to the problem of replenishing the membership of the Senate, there is the additional problem of the Senate meeting its constitutional quorum requirement of a majority of the body. If the Senate could not meet its quorum requirement, it could not conduct business at all. In theory, this situation could last for a very long time, until the incapacitated senators recovered, resigned, died, or their terms expired.

The House would face a similar problem. If many of its members were incapacitated, states could not begin the process of filling vacancies. The House would be left with a few members and the possibility that it could not meet its quorum requirement.

Why It Matters that the House and Senate Reconstitute Themselves Quickly and Legitimately

This committee does not need a lecture about the importance of Congress in our constitutional system. It is in everyone's interest for Congress to function as the Constitution intends as quickly as possible. But let me list a few simple points as to why it we should not be without a regularly functioning Congress in the immediate aftermath of an attack.

-After 9/11 Congress passed many pieces of significant legislation directly relating to the attack: the authorization of force in Afghanistan, as well as measures to save sectors of our economy, to appropriate funds, and to improve our ability to protect against and detect future attacks.

-In the absence of Congress, the president might act unilaterally without the check of the Congress.

-A president acting with the backing of Congress will be on stronger ground with the American people and with our friends and adversaries abroad.

-The president of the United States might not be the president that was elected. In the aftermath of a catastrophic attack, it is possible that the president, vice president and others in the line of succession have been killed. The new president might be unknown to the American people, inexperienced, and would greatly benefit from the presence of Congress to reassure the American people that our constitutional system is functioning.

-Our Presidential Succession Act has leaders of Congress in the line of succession. If the House and Senate leaders had been killed, but Congress could not meet to select successors, then no new Speaker or Senate President Pro Tempore could be selected to assume the presidency. Or if the House or Senate were to act with very few members using a more flexible definition of the quorum, they could elect a leader who would

become president, but who would have little legitimacy. Imagine, for example, that twenty members of the House survive an attack, which also kills the president and vice president. These twenty members might select one of their own to be the Speaker of the House, and that Speaker could then ascend to the presidency for the duration of the term.

It is for these reasons and others that our Commission strongly believed that the House and Senate must be reconstituted quickly and legitimately. We would not want to face the aftermath of a catastrophic terrorist attack with no Congress, or a House or Senate so small and unrepresentative as to be illegitimate in the eyes of the Constitution and the American people. And we do not believe that it is okay for this condition to persist for months. The real action occurs in the two or three months after a catastrophic attack. Congress should not be absent or deformed in the period it is most needed.

Options:

The Continuity of Government Commission's Recommendations

The Commission studied the problems laid out above and aimed to find a solution that would allow Congress to reconstitute itself quickly (within days or at most weeks) and legitimately. Our central recommendation was that we must pass a constitutional amendment that would apply to extraordinary circumstances when there were large numbers of members dead or incapacitated. This constitutional amendment would allow for temporary appointments to be made to fill vacant seats until special elections could be held. And it would also allow for appointments to be made to fill in for incapacitated members, and those appointments would last until the member recovered, the member died, or a regularly scheduled election occurred.

With such appointments, both the House and the Senate would have nearly full membership, representing the whole country within days of an attack. The appointments would be temporary, and as soon as special elections could be held, the newly elected members would replace these temporary figures. The Congress could act in the greatest time of need, clearly meeting its quorum requirement, and with a membership that represented the whole country.

The Commission supports several options for appointments. Governors could make appointments. Appointments could be made from an ordered list of successors supplied by each member of Congress. Or governors could pick from among successors on such a list. The goal is to make the appointment quickly and legitimately so that each district and state in the country has adequate representation in a short period of time.

What Has Been Done

The recommendation of our Commission has not been adopted. Two measures have been adopted that pertain to congressional continuity, but they are inadequate to address the central issue of the continuity of Congress after an attack.

First, Congress passed the Continuity in Representation Act, which requires states to hold quick special elections if there are a large number of vacancies in the House. States would hold these elections in 49 days.

Second, the House has amended its rules to redefine the quorum that is required to do business which allows the House to operate with a very small number of members if there are significant numbers of deaths or incapacitated members.

Why Expedited Special Elections Are Not the Answer

The Commission supports the idea that states should reexamine their laws for filling House vacancies and consider conducting them on a more expedited basis. But the legislation passed requiring a 49-day election is unworkable. In the aftermath of an attack, almost all states will not be able to hold elections in this shortened timeframe. At the same time that 49 days is too short to hold elections, it is also too long a period to be without a Congress with full membership. A functioning Congress is needed in the weeks and first two or three months after a catastrophic attack.

Almost no states hold special elections for sudden vacancies in the timeframe contemplated for the legislation. And there is good reason why elections would be hard to hold so quickly. Polling sites need to be secured, machines calibrated, and ballots printed. Candidates have to qualify for the ballot. In most states, the people get to speak in primary elections as well as a general election. Absentee ballots need to be mailed out and returned, not only to local residents, but to overseas voters. And finally, there has to be some time for a campaign in which voters get to know the candidates. Merely holding an election without sufficient time for voters to digest the choices is treating an election as a formality.

The only way for states to meet the 49-day mandate would be for them to dispense with primary elections, which many states are loath to do.

As it stands today, almost no states have modified their laws to comply with the federal mandate of holding elections in 49 days. As far as I know, no states practice holding expedited elections. The likelihood is that special elections would take a minimum of two or three months after an attack, too long to go without Congress.

The Redefinition of the Quorum Is Unconstitutional, against the Intent of the Framers of the Constitution, and Dangerous in the Time of Turmoil Surrounding an Attack

The other change that has been made since 9/11 has been to redefine in House rules what constitutes a quorum to do business.

The constitutional language on the quorum is clear. A majority of each house shall constitute a quorum to do business. When the framers debated this question, their intentions were explicit. They did not want a small number of members, representing a small fraction of the country, meeting and acting as the Congress. They considered both lower and higher thresholds for the quorum, but settled on a majority of the seats in each House as necessary to achieve a quorum.

During the Civil War and in several precedents afterwards, the House began to chip away at this original definition of the quorum. The House came to define the quorum as a majority of those chosen, sworn and living. In other words, if there are 435 members in the House, the quorum is 218. If, however, there are two vacancies, then the majority of those in the House is 217.

Since 9/11, the House has codified this precedent in its rules.

The appeal of such a rule is obvious. No matter how many members of Congress have died, there is still the possibility of achieving a quorum by rounding up a majority of those still living. If 100 members are alive, then 51 is a quorum. If 15 remain, then 8 is a quorum.

But this is an arrangement that treats the quorum as a mere formality, not as a basis for legitimacy as the framers intended. A House of Representatives made up of ten members is no House at all. It is wholly unrepresentative. The remaining members could all be from the same state, political party or gender. Nearly the entire country would have no one representing their districts—all at the time where the most important decisions are being made.

The answer seems to be that continuity of Congress is preserved if some semblance of Congress is preserved, no matter how small, how unrepresentative and how illegitimate it is.

In addition to this simple change in House rules, the House has further amended its rules to deal with incapacitated members. A majority of chosen, sworn, and living members would not yield a quorum to do business if many members were alive, but unable to come to the floor of the House due to incapacitation.

The further rules change, through a series of assessments and decisions by the remaining members, allows for incapacitated members to be ignored in the counting that determines if a quorum is present. Essentially, after an attack and a several-day waiting period, a

determination could be made that a small number of members is alive and able to perform their duties, and from this number a majority would constitute a quorum. Imagine an attack that severely wounds 400 members, perhaps an attack involving infectious agents. A determination could be made that only 35 members are able to come to the floor, and that a quorum for business is eighteen members. Those eighteen members could act at the House of Representatives conceivably for up to two years or until the end of the terms of the incapacitated members.

Conclusion

The danger of a catastrophic attack on Congress is real. It might have happened on 9/11.

To allow for Congress to reconstitute itself quickly and legitimately after an attack, temporary appointments to fill vacancies and to fill in for incapacitated members are needed. These appointees could fill the gap in time until special elections could be held. And it would allow for a fully representative Congress to be present when the most important decisions following an attack are being made.

The alternatives enacted by Congress are insufficient. The provision to hold quick special elections is not likely to work in practice. And a period of 49 days or two or three months with most of the seats of the House vacant is not an acceptable situation when the input of Congress into vital decisions is needed.

The attempt to redefine the quorum is unconstitutional. And as a policy matter, it falls into the trap that the framers tried to avoid. It would allow a small number of members, representing a small portion of the country, to make legislative decisions and to elect leaders who would be in the line of presidential succession. Such a Congress would lack legitimacy in the eyes of the Constitution and the American people.