

## **HOW TO RESURRECT CONGRESS AFTER A DEBILITATING ATTACK**

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Late on the afternoon of Sept. 11, about 100 shaken House members gathered at Capitol Police headquarters for a conference call with their two top leaders, under guard at a military bunker in Virginia. The subject: whether the House should formally reconvene inside the Capitol that night in a show of resolve after the terrorist attacks.

After a spirited discussion, Speaker J. Dennis Hastert, R-Ill., and Minority Leader Richard A. Gephardt, D-Mo., decided that a brief and heavily guarded appearance by House members and senators on the Capitol steps was the safer and more symbolically appropriate course. But for Rep. Brian Baird of Vancouver, Wash., the discussion raised this question: What would have happened had the Capitol been attacked that night, killing or disabling scores of lawmakers on the House floor instead?

It was not an academic concern. Although U.S. airspace had been shut down soon after hijacked airliners struck the World Trade Center and Pentagon, by that evening at least two international flights scheduled to fly to the United States were not yet accounted for. As a result, national security officials and Capitol Police could not guarantee to Hastert and Gephardt that the Capitol was out of danger.

And when Baird asked colleagues about the procedure for keeping Congress operating after suffering heavy casualties, he did not get a clear answer. That uncertainty prompted the second-term Democrat to make the creation of a straightforward response to that question his top priority. He has since been joined by several academics who are convinced that the 18<sup>th</sup> century constitutional system of filling

congressional vacancies needs to be updated to handle 21st century threats.

Half a year after the attacks, the idea of creating a quicker means for filling House seats after a catastrophe is being taken seriously by a growing number of lawmakers. In the first months after the attacks, the topic did not generate much discussion outside of opinion pages in newspapers and the occasional think tank forum. Now, members of the House Republican and Democratic leaderships are expected to meet this spring to discuss options. Some of those options would require changing only House rules; others would require changing federal law; others would require a constitutional amendment. (Box, pp. 902-903)

In addition, 218 House members have signed a letter asking Hastert and Gephardt to create a task force of House and Senate members to discuss the issue. And prominent former members of Congress, including the two previous Speakers, Thomas S. Foley, D-Wash. (1965-95), and Newt Gingrich, R-Ga. (1979-99), have added their voices to the chorus of legal experts and constitutional scholars who say lawmakers should address the situation. (CQ Weekly, p. 791)

The problem, all agree, is that the sole method for filling a House vacancy, set out in Article I of the Constitution, is a special election. If a terrorist strike destroyed the Capitol while Congress was in session - or if Washington were victim to a nuclear, chemical or biological attack - the Senate could be reconstituted quickly because the 17th Amendment gives governors the power to fill Senate vacancies, generally until the next regular election. The House, however, could be effectively shut down for months in a time of extreme national emergency until enough special elections were held to repopulate the chamber.

"People recognize that even though Sept. 11 is now six months ago, the potential for other actions is still there," said Baird.

House Republican Policy Committee Chairman Christopher Cox of California, whom Hastert has asked to take the lead on the issue for the GOP leadership, agreed. "This is something that was not on anyone's radar screen pre-Sept. 11," he said, but since then the momentum to address the issue has become "significant."

Cox has sent a letter to Gephardt, who heads the House Democratic Policy Committee, proposing that the two policy panels work together to propose changes. A meeting has not been scheduled but seems to be inevitable, given that Gephardt has voiced his support for addressing the issue. "I'm sure we would welcome the opportunity" to hold a joint meeting of the policy committees, said Gephardt spokeswoman Kori Bernards.

Hastert and Gephardt have yet to respond to Baird's letter seeking creation of a task force. But Cox, who signed the letter, said he has talked to Hastert Chief of Staff Scott Palmer about the problems with the current system of House succession.

"I know the Speaker is supportive" of dealing with the issue, Cox said. Because of the sense of uncertainty and vulnerability all members of Congress have experienced since Sept. 11, Cox said, "there is a sense of reality" to the discussion that did not exist before.

### Doomsday Scenarios

There have been other developments that have added to the growing urgency of the debate.

Closest to home, Congress last October was one of the targets of an anthrax attack. In addition, proliferation experts have long believed that some nuclear weapons may be missing from the Russian arsenal. President Bush has accused Iran, Iraq and North Korea of trying to create weapons of mass destruction. And there are reports that Osama bin Laden's al Qaeda network, the government's suspect in the Sept. 11 attacks,

is trying to develop chemical or biological weapons of its own. (Background, CQ Weekly, pp. 316, 229)

"We live in a time of relatively available weapons of mass destruction and people who despise our country," said Baird. "The possibility that one of those groups could obtain a weapon of mass destruction is, I think, fairly high."

The danger of a devastating attack has prompted the Bush administration to create a team of senior officials and station them at a pair of secret locations outside Washington. The procedure is designed to ensure that the executive branch, at least, could function uninterrupted despite a catastrophe. (CQ Weekly, p. 630)

A Cold War bunker built for Congress in West Virginia was decommissioned a decade ago. To improve the chances for continuity in the legislative branch, former House members and constitutional scholars say, there must be at least a plan for filling House vacancies quickly.

The Constitution was designed to guarantee that the executive branch would be unable to run the federal government by itself, congressional experts point out. Even in the kind of crisis that would be created by the obliteration of Washington, they say, Congress still would retain the power of the purse - so both halves of Congress would need to function in order to appropriate the money required to keep the executive branch running, as well as to rebuild after or retaliate against an attack on the Capitol.

In addition, under the 25th Amendment, the House and the Senate must vote to confirm anyone picked by the president to fill a vice presidential vacancy.

Even setting a new location for meetings of Congress if the Capitol were destroyed would require votes by the House and the Senate,

noted Norman J. Ornstein, a resident scholar at the American Enterprise Institute. If a new location were not chosen, the Senate could not meet to confirm presidential nominees or ratify treaties.

"This is not in competition with the executive branch," said Alton Frye, director of the Program on Congress and U.S. Foreign Policy at the Council on Foreign Relations, who has been working with Ornstein on the issue. "This is a vital supplement to make sure that the executive branch will have a congressional partner to work with."

The problem would arise if the House were unable to muster a quorum, or a majority of people who have been elected to and sworn in by the House. With all 435 seats filled, a quorum is 218. In theory, even if only a few lawmakers survived an attack, a majority of them could conduct the House's business.

But if a large number of House members survived but were incapacitated or too ill to go to work, it might prove impractical to obtain a quorum, Ornstein said. Even if survivors could assemble a quorum, he said, it would be wrong for the country if that meant a small percentage of the membership elected to a Congress made crucial decisions for the entire House for an extended period.

"Nobody wants to confront the possibility of their own demise. The natural impulse is to say, 'Well, let's wait until something happens,'" Ornstein said. "If we wait until something happens, we could have a huge crisis of governance on our hands."

### Options and Opposition

To Baird and Cox, the need for faster replacement of House members in a crisis ultimately will require a constitutional change.

In October, Baird introduced a resolution (H J Res 67) proposing a constitutional amendment

under which governors would have to name temporary replacements for House members killed or unable to perform their duties. The replacements could serve for no more than 90 days, during which a special election would have to be held to fill the vacancy for the remainder of the Congress.

The House Judiciary Subcommittee on the Constitution held a hearing on the Baird proposal and others Feb. 28. Chairman Steve Chabot, R-Ohio, said he is still pondering the questions raised by that discussion and has no plans for additional hearings at the moment.

While Baird has won praise from Ornstein and others for being first out of the box with a plan, lawmakers and analysts say it does not address all of the concerns about such a situation.

There is, for example, the issue of partisan balance after governors appoint new House members. Even in a cataclysm that might kill hundreds of lawmakers, many members are so concerned about partisan battles that they want to make sure neither party would end up with a stronger margin in a post-disaster House.

"We have a certain political composition between Democrats and Republicans and independents now, that the people selected, and . . . it would probably be sensible to have that composition continued on that temporary basis again until the people could have special elections," Gephardt said at a March 22 news conference.

To address that issue, Sen. Arlen Specter, R-Pa., has introduced a resolution (S J Res 30) proposing a constitutional amendment similar to Baird's, but requiring governors to appoint interim House members of the same party as the members they would replace.

In addition, others are concerned that allowing governors to appoint House members would

violate that chamber's 214-year history as the only branch of the federal government whose members always have been directly elected. (Presidents are chosen by the Electoral College; federal judges by presidents with the Senate's consent. Senators were chosen by state legislatures until the 17th Amendment was ratified in 1913.) And since a constitutional amendment could take years to ratify, they say an interim arrangement is needed to cover any emergencies in the meantime.

To address those concerns, Foley and Gingrich say a change in House rules - to be backed up later by a constitutional amendment - could allow House members to designate their temporary successors until special elections are held.

The other concern, raised by some lawmakers and legal experts whenever constitutional changes are discussed, is that it is inappropriate to amend the Constitution unless no other remedy will suffice. "We should always be very deliberate and very cautious before we amend the Constitution," Chabot said, and legislation or a change in House rules "would probably be the more prudent way to deal with the issue."

Charles Tiefer, a professor at the University of Baltimore School of Law who testified at Chabot's hearing, agreed. "Constitutional amendments tend to be hard to adopt," he said, and "are inflexible because there's no way afterwards to adjust them."

While the problem of House succession is a legitimate one, Tiefer said, there have been too many other movements of late to amend the Constitution - including the 1990s proposals to require a balanced budget and impose term limits on Congress - that faded after a rush of initial support.

Baird and Cox, however, believe the House succession issue cannot be solved permanently

without a constitutional amendment because no other solution can cover all of the potential scenarios in which a faster method of succession might be needed.

Others who support a constitutional change conceded it would be a hard sell at a time when few outside Washington are paying attention. "There's not a groundswell of interest in pushing for a constitutional amendment," said James A. Thurber, director of the Center for Congressional and Presidential Studies at American University. "It's certainly not a grass-roots issue."

But Thurber says now is the time to start calling attention to the issue. "God help us if we have the problem," Thurber said. "But if we do, let's anticipate it and do something about it."

