

## **AFTER SEPT. 11, JUDICIARY RETHINKS THE UNTHINKABLE**

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At 9:30 a.m. Sept. 11, Chief Justice William H. Rehnquist convened a semiannual meeting of the federal judiciary's internal policymaking body, the Judicial Conference. With him at the Supreme Court were 26 judges, including the chief judges of all 13 circuit courts. In New York, the World Trade Center was burning.

Just nine minutes into the meeting, judges heard a sound like a distant door slamming -- the attack on the Pentagon. Supreme Court security personnel, clearly agitated, began shuttling in with notes for Rehnquist, until, at 10:15, he announced an evacuation -- and was promptly escorted to a prearranged secure location, according to participants in the meeting.

The other judges had to fend for themselves. Supreme Court police told them to leave, and soon they were wandering the sidewalks of Capitol Hill. Some were driven to their hometowns later by court-supplied vans. And some have mused about what might have happened if the hijacked United Airlines flight bound for Washington had not crashed in Pennsylvania.

"Most of us were fatalists," a federal judge said. "If the plane had come, we'd have all been blown up and someone would pick up the pieces later on."

With officials of the executive branch taking turns working at secret secure locations -- in case a "shadow government" is needed to carry on should Washington be wiped out -- and Congress discussing proposals to replenish the House if its members are killed, judges, too, have been obliged to think the unthinkable since Sept. 11.

"We have a continuity plan, and everyone is even more aware of the need for such plans since September 11th," Supreme Court spokeswoman Kathy Arberg said.

But despite what some consider a close call at the court Sept. 11, the view among judges is that the security situation at the federal judiciary is different from, and in some ways more favorable than, that of the other two branches of government.

Although an attack on the Supreme Court when some or all of the nine justices were there could decapitate the judiciary, the decentralization of the lower courts renders them relatively invulnerable to a Doomsday scenario, judges say.

"We wonder about the necessity" of being part of the shadow government, Justice Anthony M. Kennedy, who was the only other justice at the court Sept. 11, told a House subcommittee March 13. "All . . . district and circuit judges are courts of general jurisdiction and can issue writs under the All Writs Act. So we are already dispersed nationwide," he said.

The Supreme Court treats its continuity plan as a closely guarded secret. Time magazine reported in 1992 that during the Cold War the justices were allotted quarters along with the president and the Cabinet at a vast underground complex dug into a mountain near Berryville, Va.

Whatever it is, the court's plan for the ultimate catastrophe was apparently not activated Sept. 11. Indeed, instead of moving the Supreme Court out of town, three justices -- Sandra Day O'Connor, Antonin Scalia and Stephen G. Breyer -- who were traveling overseas at the time, were brought back with the help of federal officials.

As if to demonstrate that the institution was up and running Sept. 11, the court managed to vote on the Ohio attorney general's urgent request for an order permitting the state to put

a convicted murderer to death. And when the majority voted to uphold a stay of execution, Rehnquist wrote a dissenting opinion, joined by Scalia and Clarence Thomas, that was published Sept. 12.

"Sept. 11 was not a continuity plan," Arberg said. "That was more of an emergency evacuation."

When anthrax spores contaminated the court mailroom in October, the court activated emergency plans and moved its operations to the E. Barrett Prettyman U.S. Courthouse, home of the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. District Court.

The disruption in the mail delayed the court's paper flow, and court officials had to scramble to ensure that there were enough cases available for the term. All court mail is now irradiated in Ohio.

"There is still a mail lag," Kennedy told the House subcommittee. "Even things that are mailed today take longer to get to us than they did before."

Federal law provides that the senior associate justice -- currently John Paul Stevens -- may stand in for the chief justice if he or she is unable to serve.

More broadly, it takes a quorum of six justices for the Supreme Court to act on a case. Under the law, if the court were -- for any reason -- reduced to five or fewer qualified members in a particular case, and if a majority of the remaining justices agree that the court could not be restored to full strength by the next term, the lower court's ruling is automatically affirmed.

Thus, if the court were left with five or fewer members, it could not resume normal functioning until at least six seats were filled. That could take place, pretty straightforwardly, as the Constitution prescribes: The president

would have to nominate new members, and the Senate would have to confirm them.

And even if the Senate and the president were eliminated along with the court, there is little doubt as to how the justices could be replaced: Governors would pick senators to serve until the next election. And whoever steps into the presidency -- either the vice president or someone lower on the list of successors set by federal law -- would nominate justices for the consideration of the new, temporary Senate.

It is also possible, constitutional lawyers say, that without a Senate in place, the president could make recess appointments on the theory that the Senate's destruction is tantamount to adjournment.

The lower federal courts conduct business in about 600 buildings around the country. There are 94 district courts, with 592 active judges, and 13 circuit courts, with 147 active judges. The circuit courts have central offices, but in most cases the judges maintain chambers scattered around each multistate judicial circuit. Circuit courts usually sit as three-judge panels.

A recent Congressional Research Service report refers to a section of the U.S. Code that provides "in locales of the United States where federal courts could not function due to an emergency, the president might temporarily declare martial law and vest trial court authority in military tribunals convened by commanding officers in the field dispatched to enforce federal law."

But federal judges say the main terrorism fear facing them is a long-standing one -- that a court could be targeted as a consequence of holding a trial of terrorists.

"Acts against us are likely to be acts of retaliation in connection with a particularly high-profile case," a lower-court judge said. "An attack on the Supreme Court would be someone trying to make an institutional

statement."

Several judges are under round-the-clock protection by U.S. marshals because of various threats, according to Richard Carelli, a spokesman for the Administrative Office of the U.S. Courts. Carelli noted that the Administrative Office is creating a continuity plan of its own.

The Judicial Conference is pressing a request for an immediate infusion of \$240 million to blast-proof the windows at courthouses around the country. But the White House has said the money is not available.