

CONGRESS MUST PASS A NEW
AMENDMENT TO ENSURE CONTINUITY
Sen. John Cornyn
Roll Call
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In the weeks and months following the Sept. 11, 2001, terrorist attacks, far-sighted Americans realized that another such attack could cripple Congress and trigger a constitutional crisis if a majority of the House or Senate were incapacitated.

This week, the Senate Judiciary subcommittee on the Constitution will debate and vote on a constitutional amendment that would deprive terrorists of that power by giving Congress the authority it needs to ensure continuity of Congressional operations. No one should amend the Constitution casually, but Members of both parties now recognize that an amendment is the only way to ensure continuity of government and protect the American people. Current law, to put it simply, is insufficient.

The problem of continuity has recently received attention in both Houses of Congress - which, nearly three years after 9/11, is welcome news.

Last month, the House approved legislation that would require expedited special elections in the event that more than 100 House Members are killed. The House legislation is controversial, to be sure: Detractors point out that alternative mechanisms are needed since special elections take time that we may not have, both to ensure a functional and thoughtful democratic process and to protect the voting rights of military men and women as well as other absentee voters. Supporters respond by insisting

that House tradition demands that seats be filled only by election.

What's most important, however, is that House Republicans and Democrats alike now recognize that current law is wholly inadequate.

Continuity of government is a problem for both houses of Congress: After all, neither the House nor the Senate can approve funds or enact legislation without the consent of the other body. Nevertheless, I believe each chamber should be primarily responsible for its own procedures for ensuring continuity: The Senate should defer on decisions affecting the House, and the House should do the same for the Senate.

The House legislation, however, addresses only one kind of continuity problem. What if large numbers of Representatives or Senators are not killed but rather incapacitated, perhaps by a biological or chemical attack, such as anthrax or ricin?

Experts in constitutional law from across the ideological spectrum, from Laurence Tribe to Ronald Rotunda, agree with the unanimous conclusion of the bipartisan Continuity of Government Commission: Only a constitutional amendment can ensure continuity of Congress in the wake of mass incapacitation. Without an amendment, terrorists could disable Congress for as long as four years - the time it would take to elect a new majority of Senators.

Accordingly, last November I introduced a constitutional amendment to authorize Congress to enact laws providing for Congressional succession. The amendment (S.J. Res. 23) is modeled

after Article II, which authorizes Congress to enact laws providing for presidential succession. And in January, I proposed implementing legislation to authorize each state to craft its own mechanism for redressing incapacities in their Senate delegations. The legislation (S. 2031) is modeled after the 17th Amendment, which gives each state similar powers with respect to Senate vacancies.

Importantly, the amendment neither favors nor disfavors any particular method for ensuring continuity of Congressional operations; it prefers neither special elections nor appointments. Rather, it simply authorizes Congress to enact continuity measures to deal with both mass incapacitation and mass death in the event of a catastrophic attack on Congress.

Some have suggested that, instead of a constitutional amendment, each chamber alter its quorum rules to allow an able-bodied minority to conduct the business of Congress in the event of mass incapacitation. But as the House Parliamentarian recently testified, such proposals present serious constitutional questions.

The Constitution explicitly states that only "a Majority of each [House] shall constitute a Quorum to do Business." And other provisions of the Constitution vest only specific powers in either a smaller group of Members - the power to adjourn, the power to compel the attendance of absent members - or Members who happen to be "present" in the chamber, such as the power to convict in impeachment trials, the power

to call for the yeas and nays, and the power to consent to treaties.

The Constitution's requirement for a quorum is no mere technicality. The founding fathers debated this provision and specifically recognized that "in this extended Country, embracing so great a diversity of interests, it would be dangerous to the distant parts to allow a small number of members of the two Houses to make laws." Indeed, our first Congress could not and did not commence its business for weeks, because neither chamber could generate "a quorum, consisting of a majority of the whole number."

Moreover, any attempt to reduce the quorum requirement would also offend the Constitution by impermissibly depriving elected officials of their seats in Congress. Members of Congress are elected and constitutionally entitled to serve either two-year or six-year terms - terms that can be shortened only by death, resignation or a two-thirds vote to expel a Member. To dilute the quorum requirement is to effectively treat incapacitated Members as non-Members, in violation of the Constitution.

The founding fathers, who lived in a world free of weapons of mass destruction, could not have contemplated the horrors of 9/11. They established a presidency to command an Army and Navy, but no Air Force - and certainly no Department of Homeland Security. They structured our system of government specifically to disfavor standing armies. And they wisely contemplated the need for amendments by specifically including Article V of the Constitution. Indeed, 27 amendments have been ratified since our nation's

founding, including two regarding presidential succession.

Following the assassination of President John F. Kennedy, Congress proposed, and three-fourths of the states ratified, the 25th Amendment to ensure continuity of the presidency - in part by authorizing for the first time the appointment of a vice president. In the wake of 9/11, and the disturbing discovery that terrorists currently possess the power to shut down our government, it is time once again to amend the Constitution to ensure a functioning Congress.

Sen. John Cornyn (R-Texas) is chairman of the Judiciary subcommittee on the Constitution, civil rights and property rights. He has chaired three hearings on continuity of government.