

ENSURING CONGRESSIONAL CONTINUITY

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WASHINGTON – It almost happened on September 11. Had Flight 93 crashed into the U.S. Capitol, even worse, had terrorists managed to place a nuclear weapon aboard that aircraft or the plane that hit the Pentagon, the result would have been an almost complete decapitation of government. Terrorists may well be planning another attack on Washington. Before that happens, policy-makers must make provisions for the legitimate expeditions and decisive transfer of power to maintain the constitutional extension of government authority and preserve the continuity of Congress. To that end, they should pay close attention to the recommendations to be released today by the Continuity of Government Commission.

This concern was first raised by former Democratic House Speaker Tom Foley and former Republican House Speaker Newt Gingrich, both of whom served on the commission. They were joined by, among others, Kenneth Duberstein, Leon Panetta and Jamie Gorelick. Lloyd Cutler and Alan Simpson served as the commission's co-chairs, and the project was sponsored jointly by the American Enterprise Institute and the Brookings Institution.

The commission recognized that a terrorist attack on Washington would paralyze the government at a time when decisive action is most needed and raise critical questions of legality when lines of authority are tenuous. If all of the commanders in chief in the line of succession were killed or incapacitated,

who would direct the military, and at which targets? Would the Joint Chiefs accept as lawful the orders of a civilian commander whose authority is uncertain? Legitimacy also looms large with congressional action, since while a quorum [understood as a majority of living representatives in the House] is required for legislative business, would Americans recognize as legitimate the actions of a Congress composed of only a handful of members?

The problem of continuity is most acute in the Congress, and in particular, the House of Representatives. Governors have the power to fill vacant Senate seats under the 17th Amendment, and so reconstituting that body would almost certainly take less time than reconstituting the House. Currently, vacant House seats can only be filled by special elections, which under the best circumstances can take months.

Reconstituting the presidency is also problematic, since, as the commission recognized, the 25th Amendment does not apply to the eventuality of a vacant vice presidency coupled with a disabled president. Moreover, the line of succession is based in chronology order is determined by the date that the department was created. That order must be reevaluated given the new nature of the threat. Sustained legitimacy seems most certain in the judiciary, since Congress has specified that six justices can serve as a quorum on the Supreme Court, and made allowances for sending cases back to lower courts.

To remedy the critical problem swiftly, legitimately, reconstituting the Congress, the commission recommends passage of a constitutional amendment empowering

the Congress to pass legislation providing for the appointment of replacements in the event of a catastrophic attack. Wisely, the commission favors a concise amendment, allowing members of Congress to discuss difficult issues such as: the qualifications of replacements; how they should be appointed; and the length of their service. The report proposes that the House use the 17th amendment as a model, giving state governors the authority to appoint temporary representatives until a special election is held.

The commission makes many other worthwhile recommendations for securing the stability of the state and the continuity of its government institutions. Lawmakers should make it a priority to enact those provisions.