

CONSTITUTIONAL CRISES

By Lloyd Cutler and Alan K. Simpson

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Sept. 11 exposed a weakness in our constitutional system that our framers could not have foreseen. If United Flight 93 had reached its likely target, the Capitol, instead of crashing in Pennsylvania, hundreds of members of Congress might have been killed. Congress would have been unable to function just at the time we need it most. We were fortunate to have been spared this additional disaster. But we should act to fill our constitutional gap. Continuity in Congress must be protected.

The constitutional method for filling vacancies in the House of Representatives in the wake of disaster is inadequate. The Constitution requires that a majority of members be present in order for the House to do any business. In the Senate, under the 17th Amendment, governors can fill vacancies almost immediately by making temporary appointments until special elections are held.

What if 300 House members had been killed on 9/11? Since any number less than 218 members would result in the lack of a quorum, the House would not have been able to function until replacements had been elected. Some century-old but constitutionally dubious House precedents interpret the quorum as a majority of living members, and under this reading a smaller group might have been allowed to proceed with business. But this would have posed a problem, too. Would we have wanted 50 or 80 House members, representing less

than a quarter of the country, deciding policy for the whole nation? If the president and vice president were also killed, would we want such a small number of surviving legislators to elect a new speaker who, under existing law, could bring about his own election as president?

There would have been a further complication if members of the House or Senate had been incapacitated by the attack. There is no constitutional mechanism to allow someone to step in for a member until he or she recovers. Congress would have had to limp along with many of its members unable to participate. In a world of biological and chemical warfare, it is possible we could wind up with a large number of very sick members unable to perform their duties and unable to be promptly replaced.

Of course, the president might step in and exercise emergency powers. But there is a constitutional question as to whether the president alone can declare martial law, and a functioning Congress would still be needed to respond to the crisis. Think of how Congress acted after 9/11 to authorize force in Afghanistan, make emergency appropriations for New York, and expand law enforcement powers. Would a president have taken these actions on his own, without some form of Congressional approval?

What ought to be done? A commission on the continuity of government, sponsored by the American Enterprise Institute and the Brookings Institution and headed by us, issued a report this week recommending a constitutional amendment to give Congress the power to provide legislation for the appointment of temporary replacements

to fill vacant seats in the House after a catastrophic attack and to temporarily fill seats in the House and Senate that are held by incapacitated members. Under this authority, vacancies would be filled quickly so that the House and Senate could proceed with a full membership after an attack. A temporary appointee would serve only until a special election was held to fill the vacancy or, in the case of an incapacitated member, until that member recovers, dies or the term of office ends.

As a rule, we are most reluctant to recommend changes to our Constitution. But in this case, there is no other way. If terrorists seek to sow fear among us about the legitimacy and responsiveness of our political system, our best response is to prepare our institutions to meet such a threat before it can become a reality.

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