



Statement before the House Select Committee on the Modernization of Congress
Full Committee Hearing
On Congressional Continuity: Ensuring the First Branch Is Prepared in Times of Crisis

Ensuring the Continuity of Congress

Recommendations

DONNA SHALALA

Co-Chair, Continuity of Government Commission

April 6, 2022

The American Enterprise Institute (AEI) is a nonpartisan, nonprofit, 501(c)(3) educational organization and does not take institutional positions on any issues. The views expressed in this testimony are those of the author.

RECOMMENDATIONS TO ADDRESS THREATS TO CONTINUITY OF GOVERNMENT

Recommendation to Address the Core Problem of Mass Vacancies in the House of Representatives

If more than a majority of members of the House of Representatives were killed in an attack, Congress would not be able to function for several months, or alternatively some might try to operate the House unconstitutionally with a very small and unrepresentative number.

To address this core problem, our commission recommends a constitutional amendment to fill those vacancies immediately with temporary replacement members who would serve only until the time that special elections could be held.

With this provision, vacancies could be filled immediately, and the House of Representatives would be able to act with near full membership. Congress would assume its proper role in the political system during the crisis. States would still proceed in holding special elections to fill the vacancies, and once those special elections were held, the elected members would displace the temporary replacement members.

Some form of this amendment was the substance of three constitutional amendments that passed the Senate in the 1950s and 1960s, and was at the heart of this commission's earlier recommendations after 9/11.

Our commission in its current round of deliberations settled on the solution of providing for temporary replacement for all deaths resulting from death even if the number of deaths does not reach a high level. The reason for our commission's change in approach is the logistical difficulty of setting a threshold. After an attack, it might not be clear how many members had died, or the deaths might occur over an extended period of time. Filling all vacancies that result from death, even in the ordinary course of business, ensures that Congress will fill its vacancies in a mass casualty situation. It also would discourage attempts from outside actors to target groups of members from one political party with an aim of changing a majority or destabilizing the Congress.

Finally, on the method of selecting temporary replacements, the commission recommends that temporary replacements be drawn from a list provided by each sitting member. Using this method, the temporary replacements would most resemble the representatives who lost their lives in the catastrophe.

Recommendation to Address the Problem That Congress Cannot Meet

The Commission does not comment on the actions taken during the recent pandemic. But it notes that there could be some disaster in the future where everyone would agree that it is impossible to meet in person for extended periods of time.

To ensure that Congress could function during this crisis, the Commission recommends a constitutional amendment that would give Congress the power by law to provide for this scenario including the possibility of remote participation. However, this constitutional amendment would provide protections to ensure that remote floor proceedings would require the in-person and/or virtual presence of at least one half of each body (to meet the quorum requirement) and that members be provided notice and be guaranteed access to whatever mode of meeting that is envisioned in law.

Recommendation to Address the Problem of Incapacitated Members

In the extreme case when the numbers of deceased and incapacitated members exceed a majority of either chamber, temporary replacements will replace the incapacitated member. But any member deemed incapacitated shall be immediately reinstated if they self-declare that they are able.

Recommendation for the Start of the Congress

The House and the Senate shall each have the power to provide for the commencement of business at the start of a new Congress, and that power could include provisions for each chamber to remotely swear in new members and commence the business of a new Congress.

Recommendation for a Change to House Rules

The commission recommends the repeal of parts of a House rule. In 2005, House Rule XX, clause 5 was amended to include emergency procedures under which the quorum of the House may be reduced (potentially to a very small number) if only a few members of Congress remain alive and able after a catastrophic attack. The rule's stated aim was to allow the House to operate under almost any circumstance. The commission believes the rule is both unconstitutional and unwise.