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The "Continuity of Government" Proposal- A Dangerous and Unnecessary Threat to Representative Rule

The COGC Proposal

The "Continuity of Government Commission" (COGC), spearheaded by the Brookings Institution and the American Enterprise Institute, recently issued proposals for the operation of Congress following a catastrophic terrorist attack. Specifically, COGC advocates a constitutional amendment calling for the appointment of individuals to the House of Representatives to fill the seats of dead or incapacitated members, a first in American history. An examination of the proposal reveals that it is both unnecessary and dangerous.

Note that COGC is "self-commissioned," its members being neither elected nor appointed by any government body. The biographies of the commissioners demonstrate that COGC is made up mostly of professional lobbyists. Of course COGC is well-intentioned, but the nation should know exactly who is trying to substitute their wisdom for that of James Madison, Alexander Hamilton, and other framers of the Constitution. I think most Americans would prefer that proposals to amend the Constitution come from elected lawmakers or grassroots efforts, not from think tanks and lobbyists.

One reading the COGC proposal cannot help but sense the familiar Washington conceit at work, a conceit that sees America as totally dependent on the workings of Capitol Hill. It is simply unthinkable to many in Washington that the American people might survive a period in which Congress did not pass any new laws. But the truth is that the federal state is not America. The American people have always been remarkably resilient in the face of emergencies, and individual states are far more equipped to deal with emergencies and fill congressional vacancies than COGC imagines.

COGC is Unnecessary

Every generation seems to labor under the delusion that it lives in the most dangerous and turbulent time in human history. COGC certainly proves this point. Its proposal provides

doomsday scenarios designed to make us believe that the threat of modern terrorism poses a much greater risk to our government institutions than ever existed in the past. Yet is Congress really more vulnerable than it was at the height of the Cold War, when a single Soviet missile could have destroyed Washington? Surely Congress faced greater danger in 1814, when the British army actually invaded Washington, routed the city, and burned down the White House! Somehow the republic survived those much more perilous times without a constitutional amendment calling for the emergency appointment of Representatives.

The scenarios offered by the commission, while theoretically possible, are highly unlikely to disable Congress. Remember, a majority of members assemble together in one place only rarely; even during votes most members are not on the floor together at the same time. Inauguration ceremonies and State of the Union addresses often bring together a majority of members in the same place, but simple precautions could be taken to keep a sufficient number away from such events. Even a direct terrorist attack on the Pentagon failed to disrupt the operation of the Department of Defense. The COGC proposal exaggerates the likelihood that a terrorist strike on Washington would incapacitate the House of Representatives, and exaggeration is a bad reason to amend the Constitution.

Existing Constitutional Provisions are Adequate

It is important to understand that the Constitution already provides the framework for Congress to function after a catastrophic event. Article I section 2 grants the governors of the various states authority to hold special elections to fill vacancies in the House of Representatives. Article I section 4 gives Congress the authority to designate the time, manner, and place of such special elections if states should fail to act expeditiously following a national emergency. As Hamilton explains in Federalist 59, the "time, place, and manner" clause was specifically designed to address the kind of extraordinary circumstances imagined by COGC. Hamilton characterized authority over federal elections as shared between the states and Congress, with neither being able to control the process entirely.

COGC posits that states could not hold special elections quickly enough after a terrorist act to guarantee the functioning of Congress. But even COGC reports that the average length of House vacancies, following the death of a member until the swearing in of a successor after a special election, is only 126 days. Certainly this period could be shortened given the urgency created by a terrorist attack. We should not amend the Constitution simply to avoid having a reduced congressional body for a month or two.

In fact, Congress often goes months without passing significant legislation, and takes long breaks in August and December. If anything, legislation passed in the aftermath of a terrorist event is likely to be based on emotion, not reason. The terrible Patriot Act, passed only one month after September 11th by a credulous Congress, is evidence of this.

Also, advances in technology can be used to reduce the risk of a disruption in congressional continuity following an emergency. Members already carry Blackberry devices to maintain communications even if cut off from their offices. Similar technology can be used to allow remote electronic voting by members. Congress should focus on contingency plans that utilize technology, not a constitutional amendment.

States have a wide variety of electronic and telephonic technology at their disposal to speed up the process of special elections. Consider that popular television shows hold votes that poll millions of Americans in a single night! Yet COGC ignores alternatives to standard voting and incorrectly assumes that states will be in disarray and unable to hold elections for months.

COGC is Dangerous because the House Must Be Elected

At its heart, the COGC proposal is fundamentally at odds with the right of the people always to elect their members of the House of Representatives. The House must be elected. Even "temporary" appointees would be unacceptable, because the laws passed would be permanent.

The problems with appointment of "representatives" are obvious. COGC calls for a general constitutional amendment that gives Congress wide power to make rules for filling vacancies "in the event that a substantial number of members are killed or incapacitated." Such an amendment would be unavoidably vague, open to broad interpretation and abuse. In defining terms like "vacancy," "substantial," and "incapacitated," Congress or the courts would be setting a dangerous precedent for a more elastic constitutional framework. Members of Congress simply cannot appoint their colleagues; the conflict of interest is glaring.

Alternate proposals allowing state governors to appoint representatives from a list of successors nominated by members are no better. The House of Representatives represents the people, not the states. Single states often exhibit wide variations in political makeup even among voters of the same party. Appointment by governors, even though the successors represent the dead

member's party choice, could change the ideological composition of Congress contrary to the will of the people. Furthermore, voters choose an individual candidate, not a panel. They should not be required to consider the qualifications of a candidate's potential successors.

COGC focuses on government legitimacy, arguing that a House of Representatives with only a handful of surviving members would not be seen as legitimate by the public. In fact the opposite is true: appointed "representatives" will never be seen as legitimate and in fact would not be legitimate. Without exception, every member of the House of Representatives has been elected by voters in the member's district. Madison states in Federalist 52 that "The definition of the right of suffrage is very justly regarded as a fundamental article of republican government." The very legitimacy of the House of Representatives is based on its constitutional status as the most directly accountable federal body.

The House passes numerous laws, often by voice vote, with very few members present. The legitimacy of those laws is not called into question. Even a House made up of only five elected members would have more legitimacy, as the living continuation of the only elected entity in government, than a House composed of five surviving members and 430 appointees. Furthermore, even a decimated House membership would have to pass legislation with the concurrence of the Senate, which could be restored to full strength immediately by state governors.

Consider a scenario COGC forgot to mention. Imagine a terrorist strike kills a majority of members of the House of Representatives. 200 members survive, and 235 are appointed by state governors on a "temporary basis." This new body considers a bill that drastically increases taxes to pay for emergency measures, while suspending civil liberties and imposing martial law. The bill passes, with 195 elected members opposed and all 235 appointed members in favor. Only 5 elected members support the measure. Would the electorate consider this legislation legitimate? Hardly. Yet this is the type of outcome we must expect under the COGC proposal.

Conclusion

To quote Professor Charles Rice, a distinguished Professor Emeritus at Notre Dame Law School: "When it is not necessary to amend the Constitution, it is necessary not to amend the Constitution." We must not allow the understandable fears and passions engendered by the events of September 11th to compel a rushed and grievous injury to our system of government.

The Constitution is our best ally in times of relative crisis; it is precisely during such times we should hold to it most dearly. Rather than amending the Constitution, Congress should be meeting to discuss how to preserve our existing institutions- including an elected House- in the event of a terrorist attack. The Constitution already provides us with the framework, while technology gives states the ability organize elections quickly. The COGC proposal not only makes a mountain out of a molehill, but also acutely threatens the delicate balance of federal power established in the Constitution.