The Supreme Court

Preserving Our Institutions

THE THIRD REPORT OF THE
CONTINUITY OF GOVERNMENT COMMISSION

THE CONTINUITY OF THE SUPREME COURT

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Introduction

When movies portray a fictional attack on Washington, D.C., the action scenes focus on how the president, the military, and the executive branch respond to that crisis. Left out of the script are the quieter, but no less essential, institutions of government. The Supreme Court (and the federal judiciary as a whole) is one of those institutions. It is true that the Supreme Court will not lead us into battle against our attackers or deliver a speech to comfort the nation, and in normal times, the Court operates on a slower timetable than the other branches. Nonetheless, the United States' constitutional fabric would be badly damaged if the Court were severely diminished or unable to function because of a terrorist attack. A nation stunned by an attack might also find itself without a final tribunal to resolve fundamental constitutional issues at a time of crisis.

The purpose of this paper is to lay out some of the difficulties that would follow an attack on the Court and make recommendations for reforms that would allow us to reconstitute the Court under some of the most difficult circumstances.

The Continuity of the Supreme Court

9/11 and the Continuity of Government Commission

After 9/11, every American now understands that there is a continuing threat of a massive terrorist attack on US soil. But 9/11 also should have been a wake-up call that terrorists may seek again to target our top government institutions and leaders. Although there have been substantial changes in government policy to prevent another 9/11 from occurring, little has been done to ensure that our basic institutions of Congress, the presidency, and the Supreme Court could be quickly and legitimately reconstituted after a catastrophic attack.

The AEI-Brookings Continuity of Government Commission was formed in 2002 to address these difficult questions. Under its original cochairs, former senator Alan Simpson and former White House legal counsel Lloyd Cutler, the commission issued two major reports: the first on the continuity of Congress and the second on presidential succession. With the death of Lloyd Cutler, former senator David Pryor took over the duties of cochair. The commission includes former government officials who have served at the highest level in all three branches of government.

As part of the process of issuing the reports on congressional continuity and presidential succession, the commission held formal hearings with testimony from current and former officials of the executive, legislative, and judicial branches, as well as from legal, constitutional, and institutional scholars. At this time, the commission does not have plans to issue a third formal report on the continuity of the Supreme Court. However, the executive director and senior counselors of the commission authored this piece to lay out the problems the United States might face if the Court were decimated by an attack and to propose some concrete solutions. While the commission did not engage in a formal process to produce a report on Supreme Court continuity, in the course of issuing the two previous reports, the commission did hear from witnesses directly on this subject. Members of Congress and congressional staff showed interest in our thoughts on this subject. In addition, the topic of Supreme Court continuity was the subject of private discussions and public symposia, and the issue of the Court was considered in relation to continuity in the legislative and executive branches. Most recently, John C. Fortier, Norman J. Ornstein, and Thomas E. Mann have sought the input of individual commissioners and important figures in the legal community who have served in the executive and judicial branches.

The analysis of the problem and the recommendations are the product of Fortier, Ornstein, and Mann alone, but our reflections are informed by our connection to these issues over the ten years since 9/11 and by the wise counsel we have sought from others.

Could It Happen? An Attack on the Supreme Court

On 9/11, the Supreme Court building was busy with activity. The Court was not in session, but the Judicial Conference of the United States was meeting in the building with Chief Justice William Rehnquist presiding. Attending the session were justices on the Supreme Court, the chief judges of the federal circuits from around the country, and other leaders of the federal judiciary.

At one point in the morning during the conference, an aide came to the chief justice's side and whisked him away to a secure location. The remaining judges in attendance at the conference would soon hear about three planes crashing into the World Trade Center and the Pentagon killing thousands of innocents. But they could not have immediately realized how close they were to the line of fire. As the fog of the attack cleared that day, Americans learned of a fourth plane, United 93, which had been delayed taking off from Newark International Airport. When the terrorists hijacked the plane and rounded up the passengers to the back of the plane, some of the passengers called their loved ones on their cell phones. Because of the delay in taking off, the passengers learned of the fate of the other hijacked airlines. They bravely stormed the cockpit, and the plane crashed in a field in Pennsylvania, killing everyone on board but sparing many lives on the ground and the additional tragedy that would have resulted from the plane reaching its intended target.

In the days after 9/11, it became clear that the plane was headed for Washington, D.C., and that it was likely headed for the Capitol or the White House. Several years later, the 9/11 Commission confirmed this suspicion. There had been earlier plans to crash planes into the White House and the Capitol, but the final plan was for United 93 to hit the Capitol.

The findings of the 9/11 Commission confirm that al Qaeda was intent not only on killing Americans in a horrific spectacle, but also on attacking the very leaders and institutions of government that would be essential to responding to the attack. The real possibility of a renewed terrorist attack on our leaders and institutions drove the Continuity of Government Commission to formulate specific recommendations for Congress and the presidency and to provide a plan for how they could recover from such an attack.

Clearly al Qaeda targeted government institutions and leaders on 9/11. On the more specific question we have posed—could terrorists attack our Supreme Court?—the simple answer is yes. On 9/11, terrorists planned to fly an airplane into the Capitol, while many of the most important members of our judiciary sat in the Supreme Court building only a few hundred yards away.

Other kinds of attacks on the Court are unfortunately not hard to imagine. The most extreme type of attack would be a catastrophic nuclear or biological attack on Washington where almost all of our most important government leaders in the three branches live and work. This is the worst-case scenario for our government institutions with a crippled Congress, presidency, and Supreme Court.

But even attacks of a lesser scale could threaten the Court and other institutions all at once. At certain key events such as the inauguration and State of the Union address, the president, members of Congress, and multiple Supreme Court justices are in attendance, presenting a tempting target for our enemies.

And while the case of an attack on all three branches of government at once is particularly frightening, an attack aimed at one branch could still have a devastating impact. In several ways, the Court is a particularly vulnerable institution. The Supreme Court sits regularly with all nine members gathered feet away from each other in one room. There is no "line of succession" for the Court. Nor is there any custom like the one in the executive branch where at least one member of the line of succession stays away from important events like the State of the Union address. It would not make sense for the Court to have a justice stay away from its proceedings. The nature of the Court is for all of its members to meet as a body.

While we may wish it were not so, the Supreme Court is a government institution that could be a target of a terrorist attack. It is incumbent on US policymakers to continue efforts to protect the Court and its justices from an attack. But it is also important to think about steps to ensure continuity of the top tier of the judiciary were an attack to occur.

Problems Arising from an Attack on the Supreme Court

If a significant number of justices on the Supreme Court were killed or incapacitated, it could affect the ability of the Court and the judiciary as a whole to function.

Most obviously, if the entire Court were killed, there would be no Supreme Court until it could be reconstituted. No pending decisions could be issued, no cases could be heard, and no judgments could be made about which cases the Court would take in the future. The wheels of justice at the highest level would come to a halt.

Even in a case short of the ultimate disaster scenario, the Supreme Court cannot issue decisions when it operates with less than its statutory quorum requirement of six justices. Current law reads: "The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum."[1]

Problems of Public Acceptance and Legitimacy

In addition to the formal problems that might prevent the Supreme Court from acting, an attack on the Court raises the question of whether a diminished Court would be seen as legitimate by the public—either a Court that was missing members because of a terrorist attack, or a Court that was hastily reconstituted.

Several issues may arise. If the Supreme Court were seen as closely divided on many issues, as it is today, an attack that killed three members of one faction might dramatically tip the balance of the Court. If the Court then made landmark or pivotal decisions, the legitimacy of those decisions might come into question.

The reconstitution of the Court might raise its own questions of legitimacy. In particular, if a Court is needed to rule on important questions relating to the executive branch, and a president appoints several new justices through the recess-appointment process, the president could be seen as selecting the judges who would give a constitutional rubber stamp to his or her agenda.

Problems with the Long-Term Reconstitution of the Court

Even after the crisis has passed, there is the problem of the long-term reconstitution of the Court. If there were an interim Court or interim set of institutions to deal with the short- and medium-term consequences of a terrorist attack, there is still the prospect that one president could appoint all nine members of the Court and shape the Court for a generation or more.

The Court today is made up of justices appointed by five presidents: three Republicans and two Democrats. And the members of the Court have been appointed over the course of a twenty-five-year span. This means the Court is not a product of one party, one president, or even one point of time in history. If the Court were wiped out by a terrorist attack, the president who appointed the replacements would exercise power over the judiciary going forward for perhaps thirty years or more.

Other Duties of the Court

The chief justice has a special role as head of the entire federal judiciary, and individual justices perform other roles on the Court, which could be affected by an attack on the Court. The chief justice is in charge of the Executive Office of the Courts. He or she also performs other duties, including the appointment of sitting judges to the Foreign Intelligence Surveillance

[1] Number of Justices, Quorum, US Code 28 (2010) § 1

Act (FISA) courts and FISA review courts. Current law provides for a successor to the chief justice if he or she cannot perform the duties of the office. The most senior justice on the Court takes over those duties—if there are other justices.

Other duties of the court might be problematic. Each justice is in charge of hearing emergency appeals in designated circuits. The death or incapacitation of a justice or several justices could interrupt those roles.

Continuity of the Court: Less Needed Than for the Executive and Legislative Branches?

Despite the vulnerability of the Court, there are legitimate arguments as to why it is more important to reconstitute the presidency and Congress after a terrorist attack than to reconstitute the Supreme Court. And some would argue that the nature of the Court and the existing resources of the judiciary counsel against any reforms to our current system.

It is true that the time frame for reconstituting the Court is not as urgent as for the presidency or Congress. And the judiciary as a whole includes other courts that would function outside of Washington even if the Supreme Court were disabled. However, these characteristics of the judiciary should not be used as excuses to leave everything as it is. We are cognizant of the Court's slower timetable and the existence of other parts of the judiciary but believe that there are modest, incremental recommendations that would improve the odds of reconstituting a Supreme Court in the days, months, and even years after a devastating attack. And in a time of crisis, especially if real questions are raised about the constitutionality or legality of decisions made under pressure about presidential succession or by a hastily constituted rump Congress, the Court could be an essential institution to avoid a crisis of legitimacy.

What are the arguments that would caution against planning for the continuity of the Supreme Court after an attack?

The Court's Slow Timetable

First, in ordinary times the Court does not typically move on a quick timetable. And even more relevant to the issues we are discussing, it is not obvious that the Court would need to act immediately in the midst of a national security crisis.

For the presidency, the country needs an immediate answer to the question of who is acting as president after an attack. If the president is dead or grievously wounded, there must be a successor who can initiate immediate emergency actions in dealing with the aftermath of a catastrophe or strike back against foreign or domestic foes.

For the legislative branch, the Continuity of Government Commission has argued the need for a reconstituted, fully functioning, legitimate Congress days after an attack. In the several days, weeks, and months after 9/11, Congress authorized military action in Afghanistan; appropriated funds for military, homeland security, and rebuilding; created new institutions and legal powers for transportation security; and passed the Patriot Act. Congress does not need to act minutes after an attack, but a reconstituted Congress is essential in the weeks and months after an attack.

By contrast, an argument can be made that the Supreme Court is not as necessary for immediate action, even after an attack. The process of a typical court case reaching the Supreme Court is a long one. Ordinarily, when the Supreme Court agrees to hear a case, it is several months before oral arguments are made before the Court and several more months before the Court issues a decision. And this lengthy process does not include the course of cases in lower courts, which can add years to the time from when a case is first filed until the Supreme Court renders a judgment. Furthermore, many cases never reach the Supreme Court but are decided with finality by other federal courts. And even though there have often been some who push for Court action in the midst of an emergency, the Court has frequently decided these sorts of cases years later after the emergency has passed or receded. For example, a number of recent

and older cases dealing with military commissions were decided years after initial detainment.

The Judiciary Is a Decentralized Institution

Second, the whole institution of the judiciary is broader than the Supreme Court, and the judiciary is a decentralized institution with most judges sitting outside Washington, across all fifty states, so a diminished Supreme Court might be made up for by other federal courts that would survive the attack.

The Supreme Court is a Washington institution, but the federal court system is decentralized. In addition to nine justices on the Supreme Court, there are nearly two hundred federal circuit judges, over six hundred district court judges, and other federal judges with more specialized jurisdictions. Not only do federal judges sit in every state in the country, but the decisions of lower court judges are considered law without confirmation from a higher court. Many cases are never appealed to the Supreme Court, and of those that are appealed, the Supreme Court hears only a small fraction. In recent years, it has heard oral arguments in less than seventy-five cases a year and considers a small number of cases without hearing oral arguments. One argument against reform is that the current system of district and circuit courts would be unlikely to all be affected by a terrorist attack and that these lower courts could decide important cases in a timely manner.

Why a Supreme Court Might Be Needed to Act Quickly and Why Lower Courts Would Not Be Adequate in All Cases

Why We Need a Reconstituted Supreme Court Quickly

There are three scenarios in which a properly functioning Court would be necessary after a terrorist attack. First, the Court may be called upon to address fundamental questions related to the legitimacy of our institutions of government. Second, the Court could be called upon to rule on constitutional and legal questions arising from the government's response to terrorist attacks. Third, the Court's regular caseload could be greatly disrupted. Cases before the Court might be in limbo. Cases making their way through the system would be affected by the prospect of no appeal to a final tribunal or by a long delay before that forum could be sought for an appeal.

In the first scenario, a Court might be needed to rule on fundamental questions of succession and institutional legitimacy after an attack. The Continuity of Government Commission has identified numerous constitutional and legal ambiguities in the Constitution, laws, and practices that might arise after a catastrophic terrorist attack.

While the Presidential Succession Act provides clarity in many situations, a mass attack raises numerous questions. A few examples:

- Is the Presidential Succession Act itself constitutional? Many constitutional scholars believe it is not, and they focus in particular on the provision that congressional leaders are in the line of succession. James Madison and other Founding Fathers believed that the Constitution did not allow congressional leaders in the line of succession, and it poses numerous thorny separation-of-powers questions.

- What if everyone in the line of succession were killed by an attack with weapons of mass destruction? Who would be president?

- What if in the fog of war, a lower-level figure in the line of succession assumes the presidency, but later a person higher in the line of succession is found alive?

- What about cases of the incapacity of the president that arise when the vice president has been killed? In this case, a number of the specific provisions of the

Twenty-Fifth Amendment, designed to clarify issues of presidential incapacity, do not apply when the vice president is dead and the president incapacitated.

- More generally, what if there is a dispute about who is president, with two (or more) warring, or at least competing, individuals or camps claiming the office?

- In the case of Congress, could the House of Representatives continue to do business if it has just a few members and falls short of its majority quorum requirement and does not represent more than a handful of congressional districts across the country?

- What about the difficulty of determining quorums if there are large numbers of incapacitated members of Congress?

For all of these questions, a constitutional issue is also a crisis of legitimacy. The fog of war and decimation of our political institutions could lead to inaction, but it might also lead to conflict and doubts in the American people about the legitimacy of our leaders. In these cases, having a Supreme Court, and a Supreme Court that is legitimately constituted, could be critical to resolve adequately such a crisis. While in theory, lower courts could rule on some of these matters, the prospect of conflict among the circuits would deepen the confusion, not resolve it.

In the second scenario, the Court might be called to rule on the constitutionality and legality of important national security issues in the aftermath of an attack. Questions about the legitimacy of a declaration of war or authorization of force might arise, as well as questions about civil liberties and jurisdiction with respect to policies the government enacts after an attack. It is likely that the Court would not prevent the president or Congress from taking actions and that it would look back on these issues at a later date.

One can imagine other cases where there would be cause for the Court's timetable to be accelerated: the institution of martial law, the use of the military to put down domestic turmoil, or the suspension of habeas corpus.

Why Reliance on Lower Courts Might Not Be Adequate

Reliance on lower courts would be acceptable in some cases. But there may be immediate questions that need to be addressed where the prospect of circuit splits would not be acceptable. And the existing circuit splits even on matters not related to national security would begin to fester without a Court able to accept cases to resolve the most pressing splits.

Finally, if a Court were badly decimated, or even worse, if all of its members were killed, it would certainly take months if not years to have nine fully confirmed Supreme Court justices on the Court. Would parties be satisfied to have only a circuit court decision? Could we live with longstanding conflicts in the circuits?

Existing Tools for Dealing with the Aftermath of an Attack on the Supreme Court

There are several tools available today to reconstitute a decimated Supreme Court. While this toolbox of solutions is appropriate in some circumstances, we believe it needs to be supplemented.

Inaction

Inaction might be an appropriate response to certain continuity scenarios. Take the case of an attack that kills three Supreme Court justices. Such an attack might dramatically shift the legal orientation of the Court. It might delay cases in the current docket. But our current system would deal with such a situation with its existing tools. Presumably, the Court could operate with a smaller number. A president might over time nominate and the Senate

might confirm three new Supreme Court justices. And the Court could continue to issue opinions and grant certiorari. Such an attack might give the president undue and unexpected influence over the composition of the Court, which could have major policy impact twenty or thirty years down the road. But presidents have appointed three justices before, and the Senate plays an important checking role on presidential appointment with its power of advice and consent, at a minimum holding public hearings and holding a vote.

Another instance where inaction might be part of the solution is allowing circuit courts to handle cases. There are still legally binding federal judicial decisions from circuit and district courts, and the absence of a functioning Supreme Court would not stop cases from going forward in the circuits. While we do not believe this adequately addresses the full range of cases a Supreme Court might take, it is certainly true that many individual cases could be adequately handled by the lower courts.

The Regular Appointment Process

The most obvious way to fill vacancies on the Supreme Court is through the regular appointment process, with the president nominating a justice and the Senate confirming the nominee. If the Court's membership were reduced below the statutory quorum requirement of six, the regular appointment process would not be the most effective way to fill the vacancy quickly, as the process of finding a nominee, vetting the nominee, and holding confirmation hearings and a vote would likely take several months.

The regular appointment process would certainly be the way to fill long-term vacancies. And, one could imagine a case where a president makes a recess appointment to allow the Court to get to six members and its statutory quorum, while at the same time starting the regular appointment process to fill one or more of the other vacancies. Only if there were no need for a working Supreme Court for a minimum of several months would the regular appointment process by itself ensure that the Court could operate.

The regular appointment process is not an option to fill a spot held by an incapacitated justice. Unless the justice resigned or were removed, there would be no vacancy to fill. In addition, the regular appointment process for multiple justices at once would likely drag out the confirmation process.

The Recess Appointment

Formally, there is no bar to a president appointing justices to the Supreme Court using a recess appointment. In fact, it has been done in a number of cases of justices who were later confirmed by the Senate. (For example, President Dwight D. Eisenhower appointed Chief Justice Earl Warren and associate justices William Brennan and Potter Stewart to the Court as recess appointees, only to subsequently submit them as regular appointments to be considered by the Senate.) And this power has been used for circuit and district judges even more frequently.

A recess appointment must be made by the president while the Senate is out of session. And the term of the appointment lasts until after the conclusion of the next session of Congress. In practice, this means that a recess appointment would last for somewhere from a few months to a year and a half. By contrast, a judicial appointment through the usual confirmation process would be for life (or for good behavior—essentially for life unless removed by the impeachment process).

In some circumstances, the recess appointment process might be helpful for reconstituting the Court. The recess appointment is quick. It does not require congressional approval or a drawn-out vetting or set of confirmation hearings. And, as the recess appointment is temporary, it would not shape the long-term future of the Court.

Say, for instance, that four members of the Court were killed. A recess appointment by the president, done in good faith and with informal consultation with the Congress, might quickly get the Court back to its quorum of six members and allow it to function quickly.

There are, however, several troubling aspects about the president using the recess appointment. Most importantly, if a president were expecting constitutional challenges to his legitimacy as president or to some of the actions he intends to take, then he might fill a Court with recess appointees who would be sympathetic to his point of view. He would appoint the Court that might then be called upon to be an independent check on the president.

A second, smaller problem would be that the power of recess appointments is available only if the Senate is in recess. If Congress were itself hit by an attack while in session, it would not be clear whether the president could make recess appointments unless the Senate was to adjourn. Or a Congress set against a president using the recess appointment power might choose not to adjourn.

Finally, as with the regular appointment process, a recess appointment could not fill the spot of an incapacitated judge; it could be used only when there is a vacancy.

Shifting Jurisdiction of Minor Powers of the Chief Justice and the Court When the Supreme Court Is Short of a Quorum

In current law, two minor provisions exist for dealing with situations when the Court is short of its quorum. First, if the Court lacks a quorum in the relatively rare instance where a case has been appealed directly from a district court to the Supreme Court, the chief justice has the power to send that case to the appropriate circuit either before the whole court or a panel of that court. This power was used, for example, in the 1945 case *US v. Aluminum Co. of America,* due to several Supreme Court justices disqualifying themselves from hearing the case.

A second avenue exists for the Court to deal with the lack of a quorum. If a majority of the qualified justices believes that the Court will not be able to decide the case in the following term, then this majority can vote to have the Supreme Court's result be equivalent to a split 4-4 decision, which would affirm the judgment of the lower court.

Both of these powers are limited. They can only be used in very specific situations, and they do not result in a decision of the Court per se, but in shifting the case to another jurisdiction or deferring to the decision of another lower court.

These powers might be useful in limited circumstances for a diminished Court, but only certain cases would fall into this category. And one great weakness of this power is that it is the power to direct another court to make a decision, and as such none of the surviving Supreme Court justices would participate in the decision directly. Another court would have say, with the blessing of the chief justice or a majority of surviving justices.

Even though these powers of the chief justice and the Court are limited, however, some modest amendments to these powers might provide more flexibility for deciding cases when there is a Supreme Court that lacks a quorum due to the death or incapacitation of several of its members. The text of these two provisions is found at 28 U.S.C. § 2109:

> If a case brought to the Supreme Court by direct appeal from a district court cannot be heard and determined because of the absence of a quorum of qualified justices, the Chief Justice of the United States may order it remitted to the court of appeals for the circuit including the district in which the case arose, to be heard and determined by that court either sitting en banc or specially constituted and composed of the three circuit judges senior in commission who are able to sit, as such order may direct. The decision of such court shall be final and conclusive. In the event of the disqualification or disability of one or more of such circuit judges, such court shall be filled as provided in chapter 15 of this title. In any other case brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of the opinion that the case cannot be heard and determined at

> the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.

Broad Scenarios That Need to Be Addressed

We recommend modest reforms to the current arsenal of tools to deal with the possibility of a Supreme Court diminished by an attack. There are three broad time frames to consider:

First, the need for immediate justice before a Supreme Court: In an important subset of cases and scenarios, there is the need for a judicial tribunal that can decide the most important cases and resolve splits among circuits. In this section, we address two distinct scenarios: (1) all members of the Court have been killed; and (2) more than three members of the Court have been killed or incapacitated and the Court is short of its statutory quorum requirement of six. (This scenario would allow a Supreme Court to operate in the first weeks to several months after an attack.)

Second, the need for medium-term justice: Tools for reconstituting a Court in the period of time from two months to two years after an attack should be implemented.

Third, the long-term reconstitution of the Court: There should be ways to ensure that the long-term reconstitution of the Court after an attack discourages one president from shaping the Court for a generation.

The Three Tools

To accomplish these ends, we recommend three tools that the Court, Congress, and the president might use in these emergency situations. Then we make recommendations as to how these tools might be used in specific situations.

Tool 1: Amend and slightly broaden the chief justice and other justices' existing power.

The chief justices and other justices should be given the power to redirect cases to other courts by adding the ability to redirect cases to an emergency interim court when the Supreme Court lacks a quorum due to deaths and incapacitation on the Court.

In particular, allow the surviving members of the Supreme Court, if short of a quorum, to redirect cases to an emergency interim court. Limit this power to cases where the vacancies are caused by multiple deaths and incapacitations, not in the case of ordinary recusals for conflicts of interest.

This slight broadening of the powers of the chief justice and remaining Court members could be accomplished by small amendments to 28 U.S.C. § 2109. An example of such an amended text follows, with the amendment in bold:

> If a case brought to the Supreme Court by direct appeal from a district court cannot be heard and determined because of the absence of a quorum of qualified justices, the Chief Justice of the United States may order it remitted to the court of appeals for the circuit including the district in which the case arose, to be heard and determined by that court either sitting en banc or specially constituted and composed of the three circuit judges senior in commission who are able to sit, as such order may direct. The decision of such court shall be final and conclusive. In the event of the disqualification or disability of one or more of such circuit judges, such court shall be filled as provided in chapter 15 of this title. **If the absence of a quorum is due to the death or incapacitation of more than three judges, and not due to judicial recusals, a majority of the surviving and able Justices may remit the appeal to an emergency interim court. Decisions of the Interim Emergency Court shall be eligible for appeal to the Supreme Court once it has achieved a quorum.** In any other case brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified

> justices, if a majority of the qualified justices shall be of the opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.

Tool 2: Provide by law for the creation of an emergency interim court.

An emergency interim court could come into being only if the Supreme Court lacked a quorum due to death and incapacitation of its members. Cases would be directed to this court by a majority vote of surviving members of the Supreme Court.

If no Supreme Court justices survive, an alternate method for directing cases should be specified. Options include allowing the emergency interim court to decide which cases it will take, or Congress could specify in law the creation of an additional review court of three members that will decide which cases go to the emergency court.

As an emergency interim court, it would stand as an appellate court above the circuits. But it would still be an inferior court to the Supreme Court. When the Supreme Court is reconstituted and able to hear cases, decisions of the emergency interim court could be appealed to the Supreme Court. This emergency interim court should exist only if the Supreme Court lacks a statutory quorum and should cease to exist when the Supreme Court achieves its quorum.

Tool 3: Define the composition of the emergency interim court.

Congress should provide in law for the composition of the emergency interim court. We recommend either two alternatives: (1) a court consisting of the remaining Supreme Court justices and all the chief judges of the circuit courts; or (2) a court drawn from a pool of judges. The pool will include sitting federal judges originally appointed to the bench by the current and several previous presidents. The president shall select sitting judges for the pool, and the Senate will confirm their status in the pool. Judges for the emergency interim court will be selected by the president seeking the advice of the Senate and preferably in pairs of judges with consultation with the majority and minority parties in the Senate. The Senate would confirm judges for service in this pool.

An Emergency Interim Court Made Up of the Remaining Supreme Court Justices and the Chief Judges of the Circuits

How would this arrangement work? If the quorum of the court ever dropped below six because of death or incapacitation of multiple justices, then an emergency court consisting of the remaining justices on the Supreme Court and all the chief judges of the circuit courts would convene to form an emergency interim court. That court could hear cases on appeal from circuit or district courts. The remaining members of the Supreme Court could direct cases in its current docket to the emergency interim court.

The advantage of this arrangement is that it is simple, could be quickly constituted, would allow the surviving members of the court to sit on the emergency court, and would draw on the most senior and experienced leaders of the federal judiciary.

There are two disadvantages of this selection process. First, the court could be an unwieldy size with as many as eighteen or nineteen judges, and this size would dilute the votes of the surviving Supreme Court justices who sit on the panel. Second, a vast majority of chief judges of the circuits at any time could have been appointed by a single president or by presidents of one political party, leading some political actors to question its impartiality.

An Emergency Interim Court Selected from a Pool

In advance of any crisis, Congress would by law specify the creation of a pool of sitting judges. Judges could be selected from this pool for service

on the emergency interim court. The pool would include all the chief judges of the circuits, along with retired Supreme Court justices. In addition, other sitting judges would be added to the pool using the following procedure:

> At the beginning of each Congress, the president of the United States would make two appointments to the pool of judges. The president would select currently sitting judges who have served on the federal bench for a minimum of six years. He would select one judge himself in consultation with the Senate leader of his own party, and the other in consultation with the Senate leader of the other party. The Senate would be sent this pair of nominations and would vote on the confirmation of these judges to sit in the pool.
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> The president's consultation with leaders of both parties would be highly desirable and recommended but would be advisory and would not limit the president's formal appointment power. Judges who sit in this pool would continue to sit in the pool until they resign from active service on the federal bench.
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> If an emergency occurs when the number of justices on the Court drops below six due to the death or incapacitation of justices, the emergency interim court would be established. The court would include in its membership the remaining justices of the Supreme Court, but the court would have a minimum of six judges, and the remaining judges would be selected from the pool in the following manner:
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> Judges appointed from the pool to the interim court would be appointed in pairs with the president consulting with the majority and minority leadership of the Senate. Alternatively, appointments to the interim court could be made from the pool by the unanimous agreement of the surviving Supreme Court justices. (If the justices cannot reach a unanimous agreement, pairs of judges could be selected randomly from the pool.)
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> Pairs of judges would be appointed until the minimum number of six judges is reached. For example, if only two Supreme Court justices survive, then two pairs of judges would be selected.
>
> If at the end of this selection process there is an even number of judges, an additional judge would be selected at random from the pool to achieve an odd number on the emergency interim court. The chief judge of this emergency interim court would be the most senior surviving Supreme Court justice.
>
> If no Supreme Court justices survived, then three pairs of Republican- and Democratic-appointed judges would be selected at random, with a seventh judge also selected randomly from the pool. In this case, the judges would select their own chief justice, with the judge with the most service on the federal bench serving as chief judge in the event that the judges could not reach agreement.

We are comfortable with either method of constituting an emergency interim court of appeals. Either way, the tools we recommend creating are simple:

1. Modestly broadening the existing powers of the Court to redirect a case to an emergency interim court if it lacks a quorum

2. Providing by law a pool of judges for the interim court with judicial experience and bipartisan balance

3. Defining by law an emergency interim court

In the months after the attack, these tools can be used to ensure that a small number of urgent or important cases reach an emergency interim court for a decision and are not left in limbo, or with several circuit courts issuing possibly contradictory, or at least different, opinions.

Medium- and Long-Term Reconstitution of the Supreme Court

Our argument so far has stressed the need for a supreme judicial tribunal to be able to operate in the weeks and months after an attack has decimated the Supreme Court and perhaps other institutions.

We have also noted that there are some longer-term difficulties. In particular, there is the danger that one president might appoint all nine replacements for a Court destroyed by a terrorist attack and that that president would put a stamp on the Court's judicial philosophy that would last for decades.

As troubling as this prospect appears, we have reached the conclusion that any permanent institutional changes to limit the president's ability to make lifetime appointments would be too drastic a change to our constitutional framework. Instead of formal institutional recommendations, we urge that the president, Senate, and other political actors act in the spirit of the seriousness of the crisis and not seek to turn a terrorist attack to political advantage.

We also note that the system already contains certain limitations. A Senate would not have to confirm a president's choices. It could reject choices, and it also might slow down the selection process by confirming only a certain number of justices in a president's term.

The president might also rely on the power to make recess appointments, but as these appointments would last for only a limited period of time, the short- and medium-term benefit that a president would get by making a recess appointment without the consent of the Senate would be balanced by the possibility that the president would not then get to make a lifetime appointment to the Court.

In a nutshell, we believe that the statesmanship of leaders at the time of the crisis and the existing checks on presidential appointments would most likely limit the ability of one president to appoint nine ideologically similar justices who would serve for decades.

Conclusion

The prospect of an attack on the Supreme Court and other institutions of government is sobering. The Continuity of Government Commission has identified recommendations to ensure that the presidential succession system functions to produce a legitimate president in a timely fashion and that Congress can continue to operate even shortly after a catastrophic terrorist attack. The reconstitution of the Supreme Court is not as urgent a matter as reconstituting the legislative and executive branches, but it is a matter that cannot be ignored.

At least in limited circumstances, the Supreme Court would be called upon to resolve important constitutional questions arising out of an attack on our institutions, to adjudicate the legality and constitutionality of actions taken by the executive and legislative branches in response to an attack, and to deal with the flow of cases before the Court in the term that an attack occurs.

In these limited circumstances, we believe that reforms are needed to ensure that a Court can operate within weeks of an attack. For this reason, we endorse several modest revisions of existing powers of the Court already defined in statute.

The remaining justices of the Court, if short of a quorum to operate, shall direct cases to an emergency interim court, on which remaining justices would sit along with other sitting federal judges selected either from the chief judges of the circuits or by a process that aims to produce a court from a pool with a broadly representative sample of experienced federal judges. We also believe that changes in the constitutional appointment power of the president and advice and consent role of the Senate are unwarranted.

Congress should consider legislating on these matters today, not in the fog of war following an attack.

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