

Would U.S. be ready for a repeat of 9/11?

U.S. has not ensured the continuity of government in the wake of a catastrophic attack, says James Ho

By James C. Ho



In the decade since 9/11, our nation has adopted countless measures — some controversial — to better protect ourselves against terrorism. But one task that should be entirely uncontroversial nevertheless remains undone. To this day, we still have not ensured the continuity of our government in the wake of a catastrophic terrorist attack.

This is a dangerous vulnerability that all but invites an attempt to decapitate the United States government.

For example, a terrorist attack could render Congress inoperative for up to four years.

If a terrorist attack kills a group of senators, the 17th Amendment provides a remedy. It allows a state legislature to authorize the governor to fill a vacancy in the Senate, by appointing a successor to serve until the next election. But what if a terrorist attack incapacitates — but does not kill — a group of senators? There would be no vacancy, so the 17th Amendment would be of no help. And if a majority of senators were left unable to perform their duties, the Senate could not operate.

Under current law, such an attack would incapacitate more than just the Senate. It would incapacitate the entire Congress. After all, Congress cannot act without Senate approval.

It takes two election cycles for voters to elect a majority of new senators. So Congress could be incapacitated for up to four years.

The House is likewise vulnerable. In fact, it lacks any mechanism for replacing members quickly in the event of death or incapacity.

Our nation ratified the 17th Amendment a century ago — before global terrorism, chemical and biological weapons, and other modern risks to our government.

We need a post-9/11 update. Just as we ratified the 25th Amendment shortly after the Kennedy assassination to solve succession problems in the executive branch, we must act now to give Congress the power to do the same in the legislative branch.

In 2004, the Senate Judiciary subcommittee on the Constitution, chaired by Sen. John Cornyn, approved by a bipartisan vote a constitutional amendment to address these concerns. But no further action has been taken.

Others have proposed that we simply tinker with the rules governing quorum. But such proposals are constitutionally dubious — not to mention disturbing to democratic values. Legislation enacted by only a small fraction of members (perhaps representing just one geographic corner or philosophical minority of the nation) would lack the democratic pedigree our people deserve.

Still others have suggested that, in the event of an incapacitated Congress, the country would simply be governed by martial law. But surely we should avoid that at all costs. And we can.

Our succession problems are not limited to Congress. The presidency is also vulnerable.

The Constitution already authorizes Congress to enact laws to ensure proper succession of the presidency in the event of death or incapacity. But the current statute needs work.

For example, constitutional scholars have hotly debated whether members of Congress — namely, the speaker of the House and the president pro tempore of the Senate — may serve in the line of succession. The last thing we need during a time of national crisis is constitutional ambiguity.

Moreover, constitutional or not, the current statute is unwise. If the vice president is unavailable and both congressional leaders decline to accept the presidency, the office devolves to a member of the Cabinet. But if the speaker disapproves of a subsequent action by that individual, the speaker can seize control of the office at that moment. This so-called “bumping” problem effectively subjugates the acting president to the speaker’s will — in violation of fundamental principles of separation of powers.

In addition, everyone in the line of succession lives and works in Washington. So a single attack could wipe out the entire line of succession — leaving no one to serve as president.

Any of these crises might have occurred on 9/11, but for the heroes of United Flight 93. That flight was apparently headed for Capitol Hill, when both houses of Congress were in session. A fifth flight was reportedly planned for the White House, but for the arrest of Zacarias Moussaoui.

Following a failed assassination attempt on Prime Minister Margaret Thatcher and leading members of her government in 1984, IRA terrorists issued a chilling threat: “Remember, we only have to be lucky once. You will have to be lucky always.” We should not have to rely on luck. We should plan for the unthinkable now — before our luck ever runs out.

James Ho is a partner with the law firm of Gibson, Dunn & Crutcher LLP and a member of the Continuity of Government Commission. His email address is JHo@gibsondunn.com.