

Catholic University Law Review

Volume 53
Issue 4 *Summer 2004*

Article 3

2004

Introduction

Norman J. Ornstein

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Norman J. Ornstein, *Introduction*, 53 Cath. U. L. Rev. 945 (2004).
Available at: <https://scholarship.law.edu/lawreview/vol53/iss4/3>

This Symposium is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

THE CONTINUITY OF GOVERNMENT

INTRODUCTION

Norman J. Ornstein

It's a pleasure to be back at Catholic University. I spent thirteen years teaching here, and the drive over from my home was déjà vu all over again. Let me give you a brief summary of this issue with a little bit of a personal perspective. September 11, 2001 is one of those days just like the assassination of President Kennedy where everybody will remember in a crystalline fashion where they were and what they were doing. On the morning of September 11th, I was at Dulles Airport. I was on the jet-way boarding my flight when the second plane hit the World Trade Center and we were called off the jet-way as they cancelled the rest of the flights. When I checked in at the airport, airline employees speculated that some small plane was involved and that it must have just been an error. However, it later became clear that it was something very different.

I retrieved my car and began to drive downtown. After speaking with some of my co-workers, who said that I did not really want to head downtown, I decided to drive home. I then watched television for the rest of the day, like many other people. By the late afternoon, I had a blinding moment as we received more information about United Flight 93, the plane that crashed in the countryside in Pennsylvania. I thought to myself that that plane was probably headed for the Capitol dome, the symbol of American democracy. In fairly rapid-fire succession, I went through what would have happened had the Capitol been hit. After spending much time on Capitol Hill, I knew that the House was in session that morning. Morning session is not consumed with much official business, so many members are usually in the chamber voting on the Journal and other things, as well as attending meetings of committees of state delegations. On a beautiful fall day like September 11th, there would also be many members and visitors standing out on the steps of the Capitol holding press conferences, meeting with constituents, taking pictures and so on.

It became quite clear to me that we could have ended up with devastation in the Capitol including a House of Representatives that would fall short of the constitutional quorum of half its members. I also immediately recognized what that would mean. Members in the House may only be replaced by special election. A special election is a very lengthy process, which would have left us without a Congress for many months.

Over the next twenty-four hours, I watched the events unfold, including members of Congress gathering on the steps of the Capitol to sing "America the Beautiful," in an effort to reassure the country that we were bloodied but unbowed, that we had been shaken but the country was resolute and would respond to the attack. I thought about all the things that would have to be done, and how we would do them if we did not have a Congress.

Soon thereafter I wrote a column in *Roll Call*¹ on this issue and discovered that I had a kindred spirit. Brian Baird, a Representative from Washington State, had thought exactly the same things of the chaos on Capitol Hill that would ensue. In the following days, we also learned that while the Federal Government and the officials in charge had quickly evacuated the White House, the Old and New Executive Office Buildings, the Treasury Department and all the areas near the White House, no one bothered to call Capitol Hill and alert them. Instead, those on Capitol Hill basically milled around in great confusion. What we also learned was that the Judicial Conference of the United States was meeting that morning in the Supreme Court, and there assembled in one room were the Justices of the Supreme Court, all thirteen chief judges of the United States courts of appeals, and a substantial share of the leadership of the federal district courts. And the Supreme Court building is approximately one block or so from the Capitol. Much could have happened that day, which could have decapitated our constitutional system of government.

Congress' actions over the course of the next thirty, sixty, and ninety days were substantial: authorizing the use of military force and emergency appropriations to make sure that we could deal with the disasters emanating from the World Trade Center and the Pentagon; dealing with very important issues relating to civil liberties, as we move to round up other potential sleeper cells and suspects; and ultimately ensuring that the airline system was able to start back up again with some measure of security. These steps would have been taken by a decree of the executive branch, a form of martial law, if Congress no longer existed.

Subsequently, one comes to realize that there are things the Framers simply could never have anticipated. The age of terrorism is one of them. Perhaps the Cold War was another, but at least with the Cold War, we had some assurances that we could have continuity of government, as we knew that there would be some notice. Although the

1. Norman Ornstein, *What if Congress Were Obliterated? Good Question*, ROLL CALL, Oct. 4, 2001, LEXIS, News Library, Rollcl File.

danger was a nuclear blast or set of missiles targeted on Washington, D.C., we had a secret bunker for Congress down at The Greenbrier resort in West Virginia, which is only about 200 miles or so away from Washington. The premise behind The Greenbrier was that once the missiles were launched from Siberia, we'd have thirty to ninety minutes to evacuate people out of town and to secure the major leaders of our government, despite the fact that most members of Congress did not even know it existed. Today, we are faced with another set of circumstances, one in which you can have an attack with no notice and with devastating effects. As time passes, even more potent weapons of mass destruction may be aimed at our government. We have holes—holes in our constitutional fabric and holes in the law—because of what the Framers delegated to Congress. All of these holes need to be repaired.

Following these attacks, we teamed up with Lloyd Cutler and Tom Mann at the Brookings Institution and created a commission to try to highlight the issues and look for solutions for some of these problems. We realized very quickly that there are problems in all three branches of government that need to be resolved. These reforms may be accomplished through constitutional mechanisms, changes in law, or possibly through changes in regulations. We began to work systematically toward what ought to be done. The work we initiated should have been started immediately by Congress, but you can liken these sort of precautionary measures to drafting a will. Intelligent people go through all kinds sophisticated mental gymnastics to avoid confronting the prospects of their own demise or the very difficult issues that are associated with it, including family and others that emerge when you go to draft a will. As such, Congress found reasons not to grapple with this for a very long period of time. However, now we have members of Congress in both parties in the House of Representatives and the Senate engaged in this enterprise. They are primarily focused on the continuity of Congress, but are now moving very rapidly towards consideration of Presidential succession and with the problems of the judiciary—all problems that we will discuss later.

In closing, the question is not whether we will do something. I am convinced we will. The question is really: Would we do it before or after we have another kind of attack that leaves some elements of our constitutional system in tatters for a significant period of time? There are many interesting constitutional, legal, and moral issues that are raised when you begin to unravel the system we have in place to ensure that under the most dire of circumstances, our government can continue to function. These days, the dangers that we face have been transformed from the stuff in Tom Clancy novels to being real and tangible.

Accordingly, even if these are still thankfully remote prospects, it is important that we have a reasonable succession to the Presidency, a line in place and preparation for these worst case scenarios. We must have a Congress up and running rapidly, and we should also have arbitrators of this process, because inevitably, questions will be raised concerning who should be in charge, who actually is legitimate, and when can these individuals and/or agencies begin. The courts themselves become a very important element of this.

We will now explore in some detail all of these issues with a very remarkable group of people, legal scholars and political scientists. So let's start with Howard Wasserman, who is an Assistant Professor of Law at Florida International University. Mr. Wasserman testified in front of the Judiciary Committee with a committee hearing chaired by John Cornyn of Texas, who chaired the Constitution Subcommittee and who has taken a major leadership role on this issue.