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THE CURRENT: Why does Congress need an independent 1/6 commission?

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(MUSIC)

PITA: You're listening to The Current, part of the Brookings Podcast Network. I'm your host, Adrianna Pita.

The House of Representatives voted Wednesday night to create an independent 9/11-style commission to investigate the January 6 insurrection and attack on the U.S. Capitol, with 35 Republicans voting in support of the measure.

With us to tell us more about the commission that would be established, and whether it will receive enough bipartisan support in the Senate to be created at all, is Molly Reynolds, a senior fellow in Governance Studies here at Brookings. Molly, thanks for talking to us today.

REYNOLDS: Thanks for having me.

PITA: Negotiations on the terms of the agreement were led by the chair and ranking member of the House Homeland Security committee, Democrat Thompson from Mississippi and Representative Katko from NY, and the final version seems to meet most Republican demands. Even just a week or two ago, Republican congressional leadership seemed to be staying relatively neutral, saying they wouldn't whip their votes, organize the votes of Republican House members in opposition. But then only in the last couple days did House and Senate minority leaders McCarthy and McConnell formally come out against it and really seem to put pressure on members to vote against it. What was it that changed, what led to this coalescing of opposition?

REYNOLDS: Yeah, so it's a good question and you're absolutely right that this commission proposal has been in the works for a couple of months, and that there are several things that Republicans, particularly in the House, had asked for to be included in the proposal that the Democrats compromised with them on. Republican congressional leaders were kind of well in the loop of what was what was being debated the whole time.

And I think that, why did we sort of see a little bit of a course change? Why do we see leader McCarthy and McConnell come out specifically against the proposal? I mean, I think there's a decent chance that they were always going to do that. It's really not in Republicans' electoral interests to keep this issue front-and-center in the way that having an independent commission investigating what happened at the Capitol on January 6 would. And I also think that as other Republican members have continued to say that what happened on January 6 wasn't necessarily a big deal. There's one Republican member who claimed, incredibly falsely last week that, if you didn't know it was January 6 the footage would look like just ordinary tourists at the Capitol, which clearly is a very wrong assessment of what happened. But I suspect also, particularly in the House, that McCarthy was starting to feel some pressure from some of his own members to take on a sort of a harder line against the proposal.

PITA: Thanks for that. The strength of a national commission like this, the effectiveness of its investigation and the subsequent recommendations that it makes really depends very much on it appearing as an independent organization, either bi- or non-partisan. Will the 35 Republican members who did vote in support of it be enough to convince at least 10 Republican senators that it is politically viable to support the commission in spite of the opposition of Senate Minority Leader McConnell?

REYNOLDS: I mean, that is the question of the hour. There were a lot of, in sort of the days and hours leading up to the vote in the House, there's a lot of speculation about just how many Republicans would vote for the proposal. I think 35 was kind of right in the middle of the estimates that that I had seen, and so I think it may be enough to help convince some senators, some Republican senators, to vote for the proposal. But Republican senators come at this from a number of different perspectives, and one thing that also may influence whether 10 Republican senators choose to vote for the proposal – not just McConnell has come out against it and many senate Republicans sort of follow what McConnell does – but also the fact that in the Senate, I think there is a sense that the Senate's own investigation of what happened on January 6, which is being led by two committees, I think there are a number of senators who feel like that is going reasonably well and may be sufficient.

I would argue that it's not, that there are a lot of reasons why we need an independent investigation that has a much broader, more comprehensive ability to look at all of the issues together: both what happened inside the Capitol, what happened outside the Capitol, what happened on the day of, what happened in the months, weeks, and years before the attack. I think we need something beyond what Congress can do itself, but I do think that one of the big questions, beyond the politics, is whether Republican senators feel like what is already happening in the Senate is sufficient.

PITA: Aside from just the existential question about whether the commission will exist at all, you and some colleagues at Lawfare pointed out that there are some structural challenges in the current plans for how the commission will be set up that may hinder its effectiveness. What can you tell us about some of those?

REYNOLDS: Sure, so, first thing I'll say is that the commission clearly and consciously is structured to be very similar to the 9/11 Commission, in its sort of bipartisan makeup, in the structure of how it would hire staff, how it's subpoena power, all of those things. So, there are a lot of ways in which it is meant to be the same as the 9/11 Commission, but there's one key difference, which is the deadline. So, as currently written, the January 6 commission proposal would have a deadline for the commission to produce a report at the end of this calendar year, so December 2021, which is not that far from now. And I think one concern that I have is that that is simply not enough time. The commission could get stood up, could then start to do its work, ask for an extension, which would require subsequent action by Congress; I think that's a possibility. But that is one concern.

Then a second concern has to do with kind of the expertise that commissioners are expected to have. There's a list in the proposal itself. There are many important topical areas that I think we would want folks who are charged with investigating the events of January 6 to have, including law enforcement cybersecurity, civil rights, that sort of thing, but notably absent from that list is explicit expertise in the inner workings of Congress and the congressional bureaucracy. And we know from all of the reporting that's come out so far of the hearings that Congress itself has done, a lot of the really operational issues that I think a commission will need to look into require pretty detailed knowledge of how things really work on Capitol Hill: how is the United States Capitol police organized; who reports to who; what is the involvement of the House and Senate sergeants-at-arms in making various decisions; what decisions require sign off from congressional leaders, which ones don't. There's a lot of really kind of in-the-weeds, inside-baseball knowledge that I think is going to be really important if a commission is to do good and comprehensive work.

It's possible to address some of these concerns with good, careful, quality staffing of the commission. We've seen staffing emerge as kind of one of the potential, at least one of the arguments that some Republicans currently in the Senate are making. Again, it's not clear that the language of the bill that the setup for staffing is any different than the one that was used for the 9/11 Commission, but I do think that, because really holding itself accountable is a huge part of what Congress needs to be doing right now, and if it's going to authorize a commission, it needs to authorize a commission that can hold Congress itself accountable for, not just for decisions that may have been made on January 6 itself, but for months and years of decisions prior to January 6 that may have laid the groundwork for the failures that we saw operationally on the day itself. And so, I think that having that kind of expertise in the commission, ideally in some of the members, but certainly in key staff people is incredibly important.

PITA: The 9/11 Commission is looked to as a model for this sort of investigation, not only for the power of the recommendations that it made but, for the way that established an official cohesive narrative of everything that happened in the run-up to that terror attack. And that narrative cohesion is really very much at the heart of a lot of the political fractures in this country. Like you mentioned Representative Clyde's comments, among other people's, comparing the attackers to tourists when there's plenty of photo and video footage not only of the attack itself for all of us to see but of him, helping barricade the doors of the House floor. You talked about this type of investigation needs more than what Congress can do itself, so if the Senate doesn't pass this commission, what are the other options to creating an effective investigation?

REYNOLDS: Yeah, so Congress does have a number of other ways that it could attempt to continue to uncover what happened on January 6 and before January 6 to make possible what happened on the day itself. And I appreciate you sort of bringing up this feature of the 9/11 Commission that one of the strengths that it is seen to have had is to try and create this cohesive narrative. I think that is also one of the biggest challenges. Even if this commission does get stood up, that you have members of Congress, many Americans, who simply don't believe that President Biden was the legitimate winner of the election, who question, again, the facts of what happened on January 6. So that's sort of challenge is going to be with us even if the commission gets stood up.

But if the commission doesn't get stood up, if the Senate does not pass the legislation, Democrats in Congress, who lead both chambers, have some options. They could continue moving kind of in the way they have been right now, which is to have a number of regular congressional committees. So mentioned in the Senate this effort is being led primarily by two committees, in the House there are kind of more committees that have been involved: the Oversight Committee, the Appropriations Committee, particularly the subcommittee with jurisdiction over the legislative branch budget. So, we have seen a number of committees have had hearings with different witnesses, with different lenses into what happened on January 6. Folks from the Capitol police, not from the Capitol police, the district's police chief has appeared, that sort of thing.

So, one option would be to continue to use the existing committee process. The advantage there is that that process is already ongoing in some ways. It would not require any new organizational structure. One disadvantage to continuing to use many committees is that they each, again, have a little bit of different visibility into the issues, based on which parts of what happened are in their jurisdiction. So that can create somewhat of a fragmented investigation. You can kind of manage those tensions in some ways, but it needs to be done carefully. You can sort of look in some ways to, particularly the first Trump impeachment inquiry, where different committees had different roles in that process but it's pretty clearly prescribed and coordinated by the speaker.

Another option would be to create some sort of select or special committee, in the vein, folks have mentioned, of the special committee in the House that investigated the attack in Benghazi. That again has some advantages in that it would create one focal point. It also has some disadvantages in that you would need organizationally to stand up something new, you would need to negotiate sometimes tricky committee boundaries, you would, if you were Democrats and you were creating a new special committee, Republicans would have to pick their members of that committee, which could be a huge flashpoint as opposed to having existing Republicans on existing committees.

So, there are some options, but again, I think that they are, in important ways, suboptimal to having some sort of independent commission. And not just for that kind of inside-baseball reasons that I've just described about Congress and how it works, but also because, again, some of what happened on January 6 and kind of getting to the bottom of that that is going to require asking hard questions about the U.S. Congress itself and about how its bureaucracy is organized. And I think that there are advantages to having an independent body ask and try to answer some of those questions, have it be an independent body that is well-informed, has expertise in the way Congress actually works, but Congress, I think, really could use some outside fact-finding in this case.

PITA: Alright. Well, Molly, thanks very much for talking to us and explaining this today.

REYNOLDS: Thanks for having me.