

Solving the Congressional Continuity Dilemma

Analysis prepared by

Brian Baird – Member of Congress (WA-3, 1999-2011)

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Introduction:

If large numbers of House and Senate members perish in an attack, pandemic or other catastrophic event, the United States could face chaos and a constitutional crisis for which we are not prepared. This document begins by offering a brief summary of the current situation and dangers, then proposes a solution.

Succession Problems in Each Branch of Government

The House of Representatives: If an attack or pandemic caused the number of surviving House members to suddenly fall below the Constitution's requirement of a majority to form a quorum, it could take many months to fill the vacancies through special elections. So too, if targeted assassinations of a mob insurrection took the lives of even a relatively small number of House members, the political balance of power in the House could quickly be shifted from one party to another through violence.

The Constitution provides no other means than election for filling House vacancies, but the need for a functioning Congress would be immediate and holding special elections during such a crisis would be lengthy and fraught with risks and complications. Given that most of the legislative business of Congress requires that both the House and Senate must concur, without a functioning House quorum, or with a House substantially altered in its makeup through assassinations, much of the work of Congress could not or should not proceed under the Constitution.

The Senate: Unlike the House, under the Seventeenth Amendment, states can adopt mechanisms for filling Senate vacancies. All but five states have some provision for rapid replacement through gubernatorial appointment. In theory and practice, therefore, the Senate could substantially be

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replenished more rapidly than the House. But the states that do not provide for rapid senate replacements could well be left without any representation at all in House or Senate. There are also the risks that the political balance of the Senate could be profoundly impacted should Governors make partisan appointments.

In a closely divided Senate and House, as is currently the case, one can readily imagine that foreign or domestic terrorists could seek to alter the political balance of power in one or both chambers through targeted assassinations. Indeed, though one hates to put it in these terms, the current mechanisms for filling vacancies in the House and Senate are in some ways an invitation for extremists to seek to achieve their goals through violence. That is dangerous to say the least. Viable solutions can be implemented to resolve these vulnerabilities and it is long past time for the House and Senate to implement those solutions as quickly as possible.

Presidential Succession: The risks to the constitutional and political functioning of the Congress are compounded by the likelihood that the President and Vice President might also perish in an attack. Under the Presidential Succession Act of 1947, the Speaker of the House is third in line to become the President, followed by the President Pro Tempore of the Senate. If neither the Speaker nor President Pro Tempore can fill the void, succession next passes to the cabinet members, in order of the historical creation of the cabinet position.

It is important to note that, under the Succession act of 1947, cabinet members only fill the position of President temporarily until a “qualified and prior-entitled individual is able to act”. This means if either the House or Senate were able to elect a new Speaker or President Pro Tempore, that person would then replace the acting cabinet member. That cabinet member would be required to relinquish the temporary presidential position but would not be able to return to their prior cabinet post from which they resigned.

The Supreme Court: Given the complexity, ambiguities and political dynamics that could occur in the circumstances just described, it is possible, perhaps probable, that conflicts and constitutional challenges could easily arise at the worst possible time. Under ordinary circumstances, the nation would turn to the highest court to review and

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resolve such questions. However, if the same calamity that created the vacancies in Congress and the Presidency also struck members of the Court, there could be no Supreme Court available to offer a ruling. As for what plans exist to provide for continuity of the Court— there are none.

The Combined Risk To All Three Branches

Taken together, the current situation in the United States of America is that it is entirely possible we could lose the leadership and most members of all three branches of the federal government, but we have in place no certain, practical, and constitutionally valid mechanism for rapidly establishing continuity of any of those branches individually or all of them collectively.

What Is Needed - The Criteria To Be Met

The status quo is clearly unacceptable and must be remedied. Any proposed solution should be considered based on how well it meets the following criteria:

1. Vacancies should be filled rapidly so citizens have continued representation and the government can respond immediately in a constitutionally valid way to whatever crisis created the vacancies.
2. To ensure full representation, the quorum to do business should not be lowered to any level below the constitutional mandate of a majority of the full number of voting members in the House and Senators - those full numbers being 435 and 100 respectively.
3. Any solution to replace members through methods other than direct election should only apply in the event of the death or certified incapacity of the member who formerly filled the seat.
4. To the greatest degree possible any solution should replicate the political and ideological makeup of the two chambers as it existed prior to the crisis. It is undesirable and dangerous for terrorist attacks, calamitous events, or other circumstances to arbitrarily or intentionally change the political makeup that the voters chose in the regular election. (One might wish that under such circumstances no responsible individual would seek political advantage, but recent history and experience shows this is far from assured.)

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5. Replacements should be well qualified individuals who are familiar with the respective districts or states and, ideally, have experience in government and legislation. This will allow the institutions to resume functioning promptly and efficiently when new members are sworn in.
6. As soon as conditions allow for meaningful and fair elections to be safely held, seats should be filled by direct election.

The Solution Of Member Designated Replacements

To address each of the above criteria, it is recommended:

1. That House and Senate Rules immediately be modified, and then measures be taken to propose and ratify a corresponding constitutional amendment, to do the following:
 - A. Require and empower members of Congress, including both the House and Senate, to designate a confidential, rank ordered list of individuals who meet the requirements for service in the elected member's position.
 - B. That list shall be filed with the Secretary of State or other appropriate officer of each state and with the clerks of the House and Senate.
 - C. In the event of the elected member's death or certified incapacity, the said officer of their state shall contact the first person designated on the list and ask if they are able and willing to serve in the now vacant position until such time as a special election can be held.
 - D. If the individual is able and agrees to serve, the officer of the state shall announce publicly that person as the designated temporary Representative or Senator for the respective position.
 - E. If an individual on the list is unable or refuses to serve in office, the officer of the state shall contact the next person on the list and proceed in such a manner until the position is filled.
 - F. At such time as a so designated member is selected and is publicly announced, they will be sworn in to office as quickly as possible by the highest ranking elected official of their state and, thereafter, shall be afforded all the privileges and responsibilities of the position.

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G. If the designated successor should also perish or become incapacitated after taking office, the officer of the state shall return to the list filed by the original elected member to seek the next person in order to fill the seat.

H. As soon as practical and safe after vacancies occur, the states shall hold special elections for the purpose of electing Representatives or Senators until the regularly scheduled general election can be held.

Advantages Of This Process

A. This process ensures continuous and full representation in both the House and the Senate for all congressional districts and states in the nation. Without such a mechanism, many, possibly most, Americans could be without any representation in Congress at a terribly critical time until special elections or other procedures could fill vacancies.

B. The originally elected representative and senators are the persons the voters last chose to be their voice and act on their behalf in Congress. They are, therefore, in the best and most appropriate position to make this decision about their successor. They are most likely to select someone from their same party, thereby preserving the partisan balance of the Congress and preventing terrorists to alter the political outcomes of the election. They are most likely to select someone from a similar ideological perspective, thereby preserving the ideological makeup of the institutions. The elected member should also have a very strong awareness of which individuals have the knowledge, character and ability to best fill the position.

C. In contrast to appointments by a governor or legislature, allowing members to designate their own temporary successor does not concentrate replacement authority with any other individual or group that might not know the district as well or might be motivated to select replacements who are from a different party or ideology than the member initially chosen by the electorate.

D. This form of temporary designated replacement is far more rapid than the months that could be required for a special election. Replacing all vacancies quickly enables the entire House and Senate to be fully reconstituted and return to business almost immediately. That will be

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essential for the stability of our own nation and the free world in a time of such grave crisis.

E. Full, uniform and rapid replacement in both the House and Senate also obviates any extraconstitutional measures such as one body acting without concurrence of the other, dramatically reduced or provisional numbering of the House and Senate, lowering the number or percentage that constitutes a quorum to do business.

F. Replacing the Congress quickly preserves the check on the executive branch. Depending on the persons who becomes the President and Vice President, this congressional check and oversight could be of tremendous importance. That is why it was so fundamental in the Constitution from the outset and why it must be protected and preserved.

F. By establishing representation during the interim, special elections can then take place at a pace and in an environment that allows for more deliberate consideration by candidates and the voters.

G. With the full House and Senate rapidly reestablished, the succession of other positions, including the President, Vice President and cabinet members can also proceed with all due speed and with appropriate constitutional checks and balances.

H. One final, but tremendously important benefit. It is terrible to contemplate, but in light of recent events one must consider the possibility of politically motivated assassinations intended to alter the balance of power in favor of one party or another in Congress. Under current laws and procedures, it is entirely possible that killing a member from one party in the Senate could lead to replacement with someone from a different party and ideology. In the House, meanwhile, the deaths of a relatively few members could alter the majority until special elections could be held, possibly several months later. By providing for immediate replacements with individuals chosen by the elected Representative of Senator, it would not be possible to change the political balance through either targeted attacks or unfortunate natural events. That, in a way, is somewhat of an insurance policy that helps protect the lives of current members and preserve the integrity and continuity of the institution overall.

Establish the Rules Immediately – Then Ratify an Amendment

Many of the proposed changes should be formally established through an amendment to the Constitution and the process of drafting and ratifying that amendment should begin immediately. It is in the interest of the nation and all the states to approve such an amendment with all due speed.

However, as a practical matter, constitutional amendments can take a very long time to enact and, until that time, our nation would be left unnecessarily vulnerable to our adversaries or natural events. Knowing the potential risks and the many shortcomings of the status quo, it is unwise, possibly irresponsible, for Congress not to act immediately to put in place a remedy that could ensure its own continuity in a time of crisis.

Therefore, Congress should enact the proposal as a House and Senate rule initially, notify the states of its enactment, and proceed accordingly to prepare the requisite lists and procedures for replacements should the need arise. From there, work on the formal amendment can take place.

Other Necessary Measures

As noted above, Congress should start with assuring its own continuity, but it must also act quickly update and modify the Presidential Succession Act and ensure that its provisions align logically and seamlessly with congressional continuity. Congress should also establish a valid and rapid mechanism to ensure continuity of the Supreme Court following a crisis.

In addition, because it is possible that the same conditions that may create large numbers of vacancies in the Congress could also make it unsafe or unwise for Congress to convene in the Capitol. And, in fact it may be unsafe under certain conditions to physically convene in any other single place, Congress should implement procedures for conducting all of its functions remotely if necessary until such time as it is safe and prudent to gather in person.

If The Event Occurs

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As difficult as it may be to contemplate our own demise, we know the power and prevalence of weapons of mass destruction; we know that foreign, and possibly even domestic, terrorists wish to harm our government; and we also know now how disruptive a pandemic of even moderately lethality can be. All of that cannot, must not, be denied and we can never know if or when something catastrophic might occur.

We must ask, if suddenly the entire Capitol and its surroundings were vaporized by a nuclear armed hypersonic weapon or contaminated by a deadly bacteria or virus, what would happen next. We must also ask what would happen if a concerted attack focused exclusively on members of one party or another and thereby dramatically altered the makeup of one or both chambers.

The answer, if Congress enacts the proposed measures, is that even after a completely decapitating attack on the federal government, or after a selectively targeted terrorist assault or assassinations, the Congress of the United States of America, could return to full function within twenty-four hours. Not only would Congress reconvene, it would do so populated with wise and carefully chosen statesmen and women, selected by their predecessors, knowledgeable about the people and places they represent, and comparable in party and ideology to those who came before. If conditions allowed, they could convene together in a different but safe location. If conditions did not permit physical presence, they could convene remotely.

Imagine the power of that image, of that reality for our own citizens and for the free world. The very day after the worst event in American history, the Congress resumes to full function and Presidential and Vice Presidential successors are selected.

There would not be chaos or constitutional crisis in our government. The people of the United States of America would all have continued representation, they would have the same checks and balances envisioned by the framers and spelled out in the Constitution, and the federal government could then set immediately to deal with whatever is necessary to preserve our freedoms and our republic.

