

Continuity of Government  
Oral Testimony of  
The Honorable Brian Baird (WA3, 1999-2011)  
Delivered before the House Select Committee on Modernization of  
Congress  
April 6, 2022

Chairman Kilmer and Chairman Timmons, Distinguished Members of the committee,

Thank you for holding this hearing and giving us the opportunity to speak with you today. And thank you for recognizing the existential, importance of this topic. It is not hyperbole to say that if this hearing eventually leads to responsible action to remedy the continuity vulnerabilities that we will discuss, this may one day be recognized as one of the most important hearings in the history of the Congress. The matter is that serious.

As a bit of personal background, I first began to think about continuity of Congress seconds after witnessing the fireball explode at the Pentagon when the passenger jet struck it on the morning of September 11<sup>th</sup>. That evening, I began to study in detail what the consequences would be if the planned strike on the Capitol or some future attack managed to kill multiple members of Congress.

As I came to recognize, and as eventually outlined in the three volume reports of the first Continuity of Government Commission and now in the current 2022 Commission report, we were then, and we still are, woefully and dangerously unprepared for events that are quite easily imagined and, in fact, have actually taken place.

I fully understand that none of us wants to fully accept the reality of our own mortality from natural causes or accidents. And I also understand that we all wish we did not live in a world and time in which international actors or people within our own country might wish to kill or incapacitate

members of our government, including ourselves as members of Congress. But unpleasant as that is, multiple events in recent years demonstrate that it is reality and the risks are particularly acute today. We have been remarkably fortunate that as horrible as the events of Sept 11<sup>th</sup>, the anthrax attacks, two attempted assassinations of our colleagues, the ongoing COVID pandemic, and the attacks of January 6<sup>th</sup> were, they all could have been much worse.

Fortunately, the matter has been studied exhaustively for more than twenty years now, so the question is not really does something need to be done or really even what is it that needs to be done. We have good answers for both of those questions, as will be discussed today.

The more difficult question now is, “Will Congress have the will power, leadership, and wisdom to act.” The answer to that question is up to this committee and your colleagues.

As part of my testimony today I have included extensive written remarks. I offer that material as an addition to the full Commission Report, which I enthusiastically endorse.

While fully endorsing the Commission report, I do want to emphasize a few additional observations and suggestions for the Committee’s consideration.

In the aftermath of the 2001 terror attacks, our initial continuity of Congress focus was on ensuring that the House and Senate could be restored to functioning as rapidly as possible. That continues to be our emphasis today, but it is also important to consider two other elements – continuity of representation, and the legitimacy of the Congress.

For Congress to be a fully legitimate body, as intended and designed by the founders, we must ensure in our continuity measures that the fundamental principle of representative government is maintained for all states and people in the nation. That was the goal of the founders to begin with and it is just as essential today.

It is equally important that continuity provisions do not enable events, be they natural or the result of hostile actions, to substantially alter the political makeup of the institution as determined by the voters. Any mechanism that could allow something called a Congress to exist, but that might deprive significant numbers of our people or states representation in that Congress, or that could reward acts of violence that alter the political makeup of the institution, should not be sustained or enacted.

The recommendations we offer today meet both tests by ensuring nearly immediate replacement of deceased members of the House with temporary successors chosen by the incumbent to fill the responsibilities until elections can be held. That approach, better than all others we have considered, will assure not only that there is “a Congress” but that “the Congress” is truly a representative body and its political/ideological makeup cannot be arbitrarily or intentionally altered without elections.

Which brings me to the final point I will make in these remarks but I address in much greater detail in my written testimony. While the focus of the Commission Report is primarily on House continuity, I believe strongly that essentially the same mechanism recommended for the House should also apply to the Senate, for the same reasons just articulated. The good news is that the 17<sup>th</sup> Amendment already contains language allowing state legislatures to implement for replacement of U.S. Senators the very mechanism of member designated replacements that the Commission has recommended be implemented for continuity in the House.

Speaking personally, and not on behalf of the Commission, I believe state legislatures across the nation should follow this example as quickly as possible and enact appropriate measures to provide for temporary member designated replacements in the event an incumbent U.S. Senator dies in office.

One final note. By encouraging you and the rest of your colleagues in Congress and in state legislatures to support these changes, we are not only seeking to secure the continuity of the Congress itself. We are also trying to help protect your lives by reducing any incentive for adversaries to engage in violence as a way to alter our political system or composition.

With that I will conclude my prepared oral remarks but would invite the committee to also consider my accompanying written testimony for more detailed analysis of these and related issues.

Again, thank you for your leadership on this vital issue. I'm glad to address any questions you may have.

Submitted by

The Honorable Brian Baird

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Continuity of Government  
Extended Written Testimony of  
The Honorable Brian Baird (WA3, 1999-2011)  
Delivered before the House Select Committee on Modernization of Congress  
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**The Succinct Problem Statement of Congressional Continuity**

It is easy to be overwhelmed, both emotionally and cognitively, by the seriousness of the life and death issues that are inherent in continuity of Congress discussions and by the complexity of the constitutional, statutory, procedural, and other technical details that are involved.

Respecting all those complexities, it is nevertheless possible and will likely be helpful to state and summarize the situation in the most succinct and direct way one can. Here, then, is the problem in its most stark terms:

*In the United States of America today, if even a single member or small group of members of the U.S. House or Senate are killed intentionally or die from natural causes, or if a catastrophic accident or hostile action leads to large numbers of losses, the political and policy implications of the resulting vacancies, and the manner in which replacements are chosen to fill those vacancies, can profoundly alter the political makeup of the Congress and resulting public policy.*

*In the House, the constitutional requirements of replacement only by direct election can leave Congressional districts without representation for protracted periods, change the balance of political power, alter who serves as Speaker, change the line of presidential succession, and prevent the body from achieving a constitutionally mandated quorum to legitimately conduct its business.*

*In the Senate, gubernatorial appointment of replacements, or protracted vacancies pending elections, can change the political makeup of the body, allow partisan political decisions by governors to overrule and effectively reverse the will of voters, alter or reverse public policies, change the line of succession to the presidency, affect confirmation of cabinet members and nominees to the Supreme Court, and potentially prevent the Senate from doing its business.*

*With our bicameral Congress, should either body become unable to function, most major responsibilities of the whole Congress would grind to a halt, including the ability to declare war,*

*raise revenue, authorize and appropriate spending, oversee administration activities, and countless other matters that would be of vital importance at a time of national crisis.*

*In addition to the issue of replacing members of Congress, it is also important, as the COVID pandemic has shown, to have rules and resources in place that allow Congress to work remotely in the event it is too dangerous or unwise to gather together in person.*

*Finally, though it is terribly unpleasant to contemplate, recent events indicate that we must also consider and have measures in place to deal with the possibility that attacks against members may come or be coordinated from within.*

*All these realities have been known for many years, but the threats have only increased while known and practical solutions have been ignored or resisted. That leaves our nation, the Congress, individual members of the House and Senate, and the broader free world extremely vulnerable. That vulnerability is exacerbated by shortcomings in Presidential and Judiciary continuity and by the interconnections of those institutions with Congressional continuity issues. In many ways, the failure to implement solutions to continuity of all three branches is an incentive and reward for hostile domestic or foreign adversaries to commit acts of murder and other forms of violent disruption against members of Congress and the institution.*

*Practical, valid solutions can be implemented to reduce these individual and institutional risks but thus far the Congress has been unwilling to seriously confront the risks or implement the known solutions. It is vital to put those solutions into place while it is possible to do so and before they are needed.*

### **Almost Every Other Important Institution in America Has Continuity Plans – But Not Congress**

It is or should be a general axiom of life and organizational practice that the more important a position is, the more necessary it is for all who fill that position to make arrangements for their replacement. So too, as the consequences of failure to make such preparations become more serious, the irresponsibility of inaction becomes all the more egregious.

To put our own government's continuity shortcomings into context, it is worth considering that apart from the Congress, the Presidency, and the Supreme Court - virtually every other significant institution in our nation has in place mechanisms for prompt and seamless replacements of leadership in the event of vacancies.

The U.S. Military has an endless chain of command and redundancies at every level of rank. It would be folly to do otherwise. Of lesser consequence but more familiar to many Americans, in the NFL there are at least two backups for nearly every position player. If the starting quarterback goes down, on the very next play a substitute has taken his place. In the corporate world, boards require well designed and clearly spelled out contingency plans to deal with vacancies. At a more personal level, all responsible parents designate loving and able caregivers who can take over responsibility for children in the event a tragedy strikes and claims the lives of the parents.

In addition to the fact that each of these examples illustrates the importance of continuity plans, two things must be emphasized. First, in none of these examples is it acceptable practice to simply leave the vacancies unfilled for protracted periods of time. Second, in none of the examples are adversaries or competitors given the authority to designate the replacements or surrogates.

We don't wait to fill vacancies in the military chain of command during wars, and neither do we let our adversaries choose to replace our military leaders with theirs - that would obviously be insanity. As parents we don't just leave our kids to fend for themselves till someone gets around to caring for them, nor do we choose people who might hate us to be guardians of our children. In football games, if the Bengals quarterback had been injured in the Superbowl, the Rams would not have been allowed to put one of their players in as a replacement (if that were allowed, "roughing the passer" would likely be a far more serious problem than could be deterred by a mere fifteen-yard penalty and an automatic first down).

These examples sound absurd because, in fact, they would be absurd. But if those examples are absurd, why then do so many accept without question the practice of waiting months to fill House vacancies or allowing governors from the opposite political party to replace deceased (even assassinated) senators with someone who the voters did not choose and who may be diametrically opposed to everything the deceased Senate predecessor stood for?

### **Precedent May Not Work As It Has In The Past**

Some argue that under normal circumstances it makes sense by default to stick with procedures that appear to have worked well or at least adequately for many years. Others will simply assume, without actually investigating the matter, that someone else must have already solved everything so there's no need to worry. But, if there is one striking lesson that emerges from the past two decades, the lesson should

be that we cannot assume what has worked in the past will continue to work in the future.

In each of the biggest failures, and tragedies, in recent history, those failures have happened because people, including policy makers, collectively assumed that things could go on as they always had. Because of that assumption, they did not recognize that situations can change suddenly and render established procedures ineffective or, worse, unintentionally designed to fail or be exploited in unexpected ways.

The attacks of 9/11 are one example with terrible consequences. When one reads the report of the 9/11 commission it is evident that red lights were flashing about unexpected threats from adversaries who might exploit unrecognized vulnerabilities in security systems and procedures. But the overriding inertial assumption that things would be just fine enabled the 9/11 attacks to largely succeed, and those attacks then led to disastrous wars in Afghanistan, Iraq and a host of other ramifications that are still playing out today and have profoundly harmed our nation and the world.

On the economic front, "The Great Recession" of 2007 was caused by multiple factors, but one essential ingredient was that people failed to appreciate that if certain conditions caused a failure of one institution or aspect of our financial sector, those same conditions might/would simultaneously cause comparable failures in other institutions and that combination would overwhelm any backstop or insurance that had not accounted for such simultaneous failures. This is admittedly an oversimplification of a complex event, but it is certainly not in error to state that many of those in charge at the time believed the existing requirements for financial coverage, mortgages and other loans were adequate to prevent or resolve any challenge. That assumption was obviously profoundly mistaken.

Looking specifically at Congressional vulnerability, the Congress narrowly avoided the loss of numerous members in 2017 when an assailant wielding a semi-automatic assault rifle began gunning down members of the Republican baseball team during an outdoor practice. In hindsight, it may be obvious that what seemed like an innocent baseball field could easily have become a killing zone, but it was only the result of uncommon, and as it turned out fortunate, circumstances that security officers were present that day and able to confront and help neutralize that gunman. On many prior days no such security was anywhere near either the Republican or the Democratic baseball practices.

More recently, the COVID virus has revealed a lack of preparedness to deal with how a pandemic might impede the functioning of Congress. So too, the January 6th assault again overwhelmed established procedures because nothing like that had ever



happened, so the preparation to deal with it was inadequate. The habitual assumption and precedent of a peaceful transition of power was shockingly disrupted, leaving the Capitol, the Congress, and the democracy incredibly and dangerously vulnerable.

In each case above, in hindsight one can see that what happened could have been foreseen, and in each case some people did foresee things. My own father, for example, asked me two days before he died of pulmonary fibrosis in February of 2001, if I worried that hijackers might one day fly planes into the twin towers. Seven months later they did just that. But in none of the above cases, was there sufficient preparation beforehand to prevent the disaster from happening and in each instance that lack of preparation was in significant part because people assumed that things would continue to go and work just fine as they always had.

Bringing this back to the topic at hand, all the above examples and many more should caution us that it can be a profoundly consequential mistake to assume that because Congress as a whole has continued to function under past circumstances, that means we can or should rest assured that we are prepared to deal with whatever might come along today. The fact is, we are not prepared.

### **The U.S. House of Representatives - Current Procedures for Replacement of Vacancies in the House and Flaws In That Approach**

Under the Constitution, the only way to fill vacancies in the House is through direct election. No one has ever served as a voting member of the U.S. House of Representatives without being directly elected. This fact is a source of justifiable pride for many who serve in the House, but it can also be an excuse for intransigence that creates multiple and significant vulnerabilities to the members themselves, to the House as an institution and to the nation.

### **The Constitutional Quorum Requirement**

The Constitution clearly states that “a Majority of each shall constitute a quorum to do Business”. In the current number of the House that means a quorum should be 218 members, i.e. one more than half of the 435 voting member, while in the Senate a quorum is just over one half of the 100 total members, i.e. 51.

In the normal course of every Congress, vacancies have occurred from time to time for a variety of reasons including death, resignations, appointments to other positions, criminal convictions, or other causes. Since the Civil War, such vacancies have been dealt with through a House rule, which is not in the Constitution, that effectively redefines the total number of members of the House and Senate not by the number of

possible voting seats but based on the number of members “Chosen, sworn and living.” This adjustment in the ‘provisional’ number of the “full” House and Senate, has the effect of also lowering the number considered to constitute a quorum.

For example, if, for whatever reasons, four seats become vacant in the House, the “provisional number of the House” would be lowered by four, to 431, thereby lowering the quorum number from 218 to 216. Similar adjustments are made in response to vacancies in the Senate.

Though perhaps not perfect, this process has previously served the Congress and the nation adequately well and has been largely accepted without question as each new generation of House and Senate members votes to approve the rules and procedures of their respective bodies without giving the matter much thought. It is important to note, however, that this downward adjustment in the modern era has never been done to such a degree that the ultimate number of those required to present for a quorum actually fell below the majority of the total possible voting seats.

But is this adjustment valid or wise when examined in detail and is it the only or the best way to deal with such vacancies? Simply put, the answer to each of those questions is NO.

#### The Risk of Catastrophic Losses and Failure to Achieve a Quorum

As the Continuity of Government commission studied in detail following the attacks of Sept 11, 2001, if enough members perished in a concerted terrorist or foreign power attack, highly lethal pandemic, natural disaster or other tragedy, the numbers of living members in one or both bodies could fall below that required to do business.

In a bicameral legislature, if one or both chambers cannot convene a quorum, much of the legislative activity would grind to a halt or, if continued, would be conducted in a way that is constitutionally questionable. That scenario would also leave many states without representation and could dramatically alter the political makeup of the institution without an election. None of those outcomes is desirable in times of acute national crisis nor are they necessary if an alternative approach is implemented.

#### House Rules Changes for Catastrophic Vacancies

Following the events of September 11, 2001, House rules were changed to stipulate that in the event of mass casualties in the House, an extended quorum call would be announced by the Speaker or a surviving designee of the Speaker, chosen from a secret rank ordered list previously created and filed with the Clerk of the House. Under this rule change, which supporters asserted follows from the “chosen, sworn, and living” of

the Civil War era, whomever responds to the extended quorum call would then be tallied and the total number of surviving respondents would be considered to comprise the new provisional number of the House.

This means in practice that no matter how many states or districts this left without any representation in the Congress, and regardless of how small the new provisional number of the House is counted to be, half of that reduced number would be deemed to constitute a quorum. From that, it also follows that if that markedly diminished quorum number is met, half of that quorum number would comprise a voting majority.

It is important to note that, contrary to the Constitution, in the current rules of the House, there is no specified minimum number of the House or of the resulting quorum.

It is impossible to imagine the framers or the members of the first Congress in 1789, who created a representative form of government, and who themselves repeatedly delayed the start of the very first Congress for lack of a true quorum, would have been pleased with or accepted this as a “solution” to congressional continuity.

#### The Implications of A Congress Continuing With Multiple Vacancies

It is important to appreciate what the resulting micro “House of Representatives” (which would in fact no longer be representative) would be able to do with the fractional majority, of a fractional quorum, made up of a fractional group of survivors.

Most notable among the functions would be election of a new Speaker, which, in a normal Congress is the first order of business upon convening. This is of profound consequence because under the Presidential Succession Act of 1947, the Speaker of the House is next after the Vice President in the line of Presidential succession. Thus, if the President and Vice President have perished along with the Speaker, under the reduced quorum provisions as few as a handful of surviving House members could effectively chose anyone at all they wanted as the new Speaker. The Constitution simply stipulates that the “House of Representatives shall chuse their Speaker and other Officers...”

Which means, just a few people, conceivable even some who have been covertly involved in creating the conditions that produced the casualties to begin with, could, without an election, select the Speaker who would then become the new President. If that possibility is not troubling enough, the new “President” would then, presumably, be granted access to the nuclear launch codes with virtually no checks on their authority, save for the minute number of survivors who chose the “Speaker” now “President” for the position to begin with.

It is inconceivable that such a process or outcome would have been condoned by the framers of the Constitution or that it can be considered a wise, prudent, or responsible course of action by the American people today.

Yet, that is precisely the situation today, at least according to the current Rules of the House of Representatives and the tradition of adjusting the quorum as a way to cope with vacancies.

#### The Time It Takes To Hold Elections

The diminution of the requisite quorum number was actually proposed initially as a temporary measure to allow something called a “Congress”, no matter how small or unrepresentative, to meet until special elections could be held to replace House members. We have already described in detail the problem with that diminished quorum, but we must also consider how long it might take to hold election to restore Congress to its true and intended size of 435 voting members.

Special elections for Congress, including a primary and general election, can take many months to accomplish even under normal circumstances. While legislation was enacted post 9/11 to require states to be able to complete both primary and general elections within a maximum total of 45 days of catastrophic losses, there is in fact no compelling evidence that this can or has been done.

The physical infrastructure and procedures necessary to actually conduct credible primary and general elections, particularly under crisis situations, simply do not exist at present and may in fact be impossible to implement in such a very short time period across all States and municipalities. In fact, nearly all special elections since enactment of that legislation have taken far longer than 45 days and, in several instances, it has been apparent that such elections were intentionally delayed for political purposes.

Further, if states or districts conduct special elections on different time frames, as is likely to happen after a catastrophic event, it is possible that each separate special election could change the makeup of the House and possibly alter the balance of power. This could easily create repeated and chaotic changes in critical positions such as the Speaker, Committee Chairs, Committee makeup etc. (This is especially consequential when, as mentioned before, one considers that under current law, the Speaker is third in the line of Presidential Succession)

All this must also be considered in light of the possibility that the same factors that created vacancies in the House could also afflict states and municipalities, thereby

rendering special elections even more difficult to conduct in a way that fairly enfranchises all eligible candidates and voters.

#### The Tasks That Must Be Done When Congress Cannot Meet

Even if it could be demonstrated that valid special elections can be held in 45 days or less, there is still the large and important question about what happens in the interim until such elections can be held.

Consider first that vacancies in the House or Senate deprive the affected states and districts the voice and representation of interests that is the bedrock of a democratic republic such as ours. Allowing the Congress to keep functioning and making decisions that impact the entire nation, perhaps to the advantage of some states or districts and the detriment of others, while many states or districts lack any representation at all, is clearly not consistent with the intent of the framers or the most basic tenet of our government.

We must also consider the kinds of issues that would arise and the kinds of decisions that have been and would need to be made following significant losses or even selected, targeted assassinations.

In the days immediately (not 45 days) after the September 11, 2001 attacks, Congress met to authorize the use of military force to pursue and punish the perpetrators, to revise the laws governing surveillance of suspected terrorists, to authorize support for survivors of the attacks, to appropriate special funds for military operations, to conduct an investigation into the attacks and a host of other important and urgent matters. Had many members been killed on that day, as easily could have happened, it would have been terribly unwise and impractical for all activities of the Congress to be suspended until special elections could fill all the vacancies.

#### The Danger of Changes In Political Power Due To Protracted Vacancies

As mentioned several times in this document, the requirement of direct elections to fill vacancies in the House also raises the possibility that the results of the most recent general election could effectively be altered, thereby changing the political balance within the House.

This can happen because non-random losses could be more acute among some states or within one party as compared to the other. While the election requirement for House replacements would at least allow voters to decide what comes next, until those elections could be held, the voting majority in the House could be much different than that intended by the voters in the past election.

In very real and troubling ways, this reality raises the possibility that accidents or natural disasters could alter the political makeup of the Congress. More troubling still, malevolent individuals or groups, including foreign powers, terrorist organizations, or even domestic insurgents, could seek to achieve through violence what they were unable to accomplish through elections.

### **The U.S. Senate - Current Procedures for Replacement of Vacancies in the Senate And Flaws In That Approach**

In offering the analysis of Senate replacement procedures that follows, I want to emphasize that this portion of my testimony reflects my personal assessment of the situation. The Commission Report itself, which we submit as a group to the committee today, and which I fully support and endorse, does not go into detail about the Senate procedures.

Because I believe there are sufficiently important and problematic issues with current Senate continuity procedures, I am conveying those concerns and my analysis separately here for the consideration of the Committee should it choose to address such matters now or in the future. Nothing I am suggesting contradicts the full Commission report. Rather, it should be considered an addition, again, based on my personal analysis. While I have great loyalty and respect for the commission and my fellow commissioners, my greater loyalty is to the well-being of the nation and I believe there are very troublesome, indeed potentially dangerous, issues with Senate continuity that must be addressed but are not included in the Commission report. I also believe that much the same solution as is recommended for the House can also be applied to the Senate. In fact, it may be much easier to implement those solutions because a constitutional mechanism for doing so is already in place.

### **Background**

Senate continuity measures derive from provisions of the 17<sup>th</sup> amendment to the Constitution which, when ratified in 1913, transferred the constitutionally designated power to choose senators from the state legislators (as was the practice originally specified in the Constitution) to a direct vote of the people in each state.

The Amendment reads:

*“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State*

*shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.*

*When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.*

*This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution."*

I want to emphasize from the outset that there is likely near unanimity among the American people in favor of direct, as opposed to legislative, election of Senators. Problems, however, arise from the second clause, which grants the executive of each state, the governors, the authority to make temporary replacements to fill vacancies unless the legislator specifies an alternative.

Presently forty-five states authorize governors to fill vacant U.S. Senate seats by direct appointment, with only seven of those states having a requirement that replacements must come from the same political party as the previous incumbent. In the remaining five states, Senate vacancies can be filled only by special elections. Requirements for when special elections or general elections will be used to fill vacancies vary across states, with some requiring special elections to be called while others allow replacements to occupy the seat until the next regularly scheduled general election.

I have prepared and offer below what I hope will be an instructive chart showing the current makeup of Senate Membership as of April 4, 2022, showing party affiliations of the Senators, the respective State Governors, and the Senate replacement provisions currently in place for each state.

Political Affiliations of Current Senators and Governors Plus Corresponding State Laws for Senate Replacements

State	Senate	Gov	Replacement
Alabama	R - R	R	Gov Choice
Alaska	R - R	R	Gov Choice
Arizona	D - D	R	Gov Choice - Same Party
Arkansas	R - R	R	Gov Choice
California	D - D	D	Gov Choice
Colorado	D - D	D	Gov Choice
Connecticut	D - D	D	Gov Choice
Delaware	D - D	D	Gov Choice
Florida	R - R	R	Gov Choice
Georgia	D - D	R	Gov Choice
Hawaii	D - D	D	Gov Choice - List of 3 same party
Idaho	R - R	R	Gov Choice
Illinois	D - D	D	Gov Choice
Indiana	R - R	R	Gov Choice
Iowa	R - R	R	Gov Choice
Kansas	R - R	D	Gov Choice
Kentucky	R - R	D	Gov Choice - Same Party
Louisiana	R - R	D	Gov Choice
Maine	R - I	D	Gov Choice
Maryland	D - D	R	Gov Choice - Same Party from party list
Massachusetts	D - D	R	Gov Choice
Michigan	D - D	D	Gov Choice
Minnesota	D - D	D	Gov Choice
Mississippi	R - R	R	Gov Choice
Missouri	R - R	R	Gov Choice
Montana	D - R	R	Gov Choice- Same Party
Nebraska	R - R	R	Gov Choice
Nevada	D - D	D	Gov Choice
New Hampshire	D - D	R	Gov Choice
New Jersey	D - D	D	Gov Choice
New Mexico	D - D	D	Gov Choice
New York	D - D	D	Gov Choice
North Carolina	R - R	D	Gov Choice - Same Party
North Dakota	R - R	R	No Temp - Special within 95 days
Ohio	D - R	R	Gov Choice
Oklahoma	R - R	R	No Temp - Special in odd # years
Oregon	D - D	D	No Temp Special if > 61 days out
Pennsylvania	D - R	D	Gov Choice
Rhode Island	D - D	D	No Temp Special Earliest possible
South Carolina	D - D	R	Gov Choice



South Dakota	R - R	R	Gov Choice
Tennessee	R - R	R	Gov Choice
Texas	R - R	R	Gov Choice
Utah	R - R	R	Gov Choice - List of 3 same party
Vermont	D - I	R	Gov Choice
Virginia	D - D	R	Gov Choice
Washington	D - D	D	Gov Choice
West Virginia	D - R	R	Gov Choice - Same party
Wisconsin	D - R	D	No Temp Special 62-77 days
Wyoming	R - R	R	Gov Choice - Same party

Note: If a member is Independent or a member of the DFL but caucuses with one party they are counted as a member of that party for purposes of this chart

**LEGEND**

States with divided Senate delegations

States with all Democratic Senators and a Republican Governor

State with all Republican Senators and a Democratic Governor

State in which a Governor could currently appoint at least one replacement from a party different than the deceased. **In total there are 11 Senators whose assassination or natural death could change the political balance of power through gubernatorial appointments.**

States in which vacancies are not filled by appointment but by special or regular election depending on when vacancy occurs. **In total there are now 10 Senators whose assassination or natural death could create vacancies that change the balance of power at least until an election can be held**

Sources of Information for this Table

Congressional Research Service Report Dated 8/21/2021 [https://www.everycrsreport.com/files/2021-08-20\\_IF11907\\_5e406f4711dbfd13ea3dee0b41a778b674690cc2.pdf](https://www.everycrsreport.com/files/2021-08-20_IF11907_5e406f4711dbfd13ea3dee0b41a778b674690cc2.pdf)

National Council on State Legislatures Data from 5/6/2021 <https://www.ncsl.org/research/elections-and-campaigns/vacancies-in-the-united-states-senate637302453.aspx>

(Note, changes may have been made or may yet to be made during the current legislative sessions in 2022. Such changes would not be reflected in this chart or the cited references.)

As we consider this chart and the current makeup of the Senate, it becomes apparent that with a closely divided Senate, as we now have, the death of a single member from states where governors are from the opposite party of the deceased would enable those governors to appoint members of their own party thereby changing the majority control of the Senate. Though one truly hates to acknowledge it, this condition may well create an invitation to violence as a means of achieving a political transformation. In light of recent events and the current climate, that possibility, though odious, cannot be denied.

It must also be recognized that the potential for profoundly consequential shifts in party control can just as easily occur from accidents or natural causes. On a regular basis many members of the House and Senate return to their districts on the same flight. So

too, when members of Congress attend their respective annual party retreats, they typically travel as group in busses or trains. This means the crash of a single plane, bus or train could easily take out significant numbers of House and Senate members.

Less dramatic, and more probable, with the average age of U.S. senators now at 63, and more than one out of four senators over 70 years old, there is a relatively high likelihood that in any two-year period at least one senator may die or become incapacitated from natural causes. Most recently, one of the youngest members of the Senate suffered a stroke that could easily have proven fatal, and in prior years several senators have sustained strokes that left them severely impaired. The COVID pandemic has only heightened the risks - killing a sitting member of the House, claiming one member elect, and striking many others with significant illness

Beyond the tragedy of the potential deaths or incapacities themselves, the 17<sup>th</sup> amendment and its flawed mechanism for replacements raise the very real specter that control of the Senate, and all that entails, could happen not only without an election but in direct contradiction to the prior election results.

This should not be a partisan issue because, in an evenly divided Senate, both sides are nearly equally vulnerable. If the current Senate majority were to be changed by the deaths of one or more members of that party, the initiatives of the President and his or her party could then all be blocked by the new Senate majority. What is more, that new majority could then more effectively block any Supreme Court or other federal court nominees, thereby changing the makeup of the courts for a lifetime. Conversely, if a member of the Senate perished from the party opposite the President, that would more easily enable the President to have his or her way without meaningful opposition from the minority party in the Senate.

This is not just dangerous - it is patently antidemocratic. The irony is that the 17<sup>th</sup> Amendment was intended to be a democratizing measure by taking power to choose senators from the relatively small numbers of state legislators and granting it instead to the totality of the voters through elections. But in its replacement provisions, the same amendment took all power back from the voters and vested it by default with a single individual in the form of the governor.

Placing that much power in the hands of one individual in each state, who can then wield that power to effectively overturn the results of an election and unilaterally appoint someone who may be antithetical to the expressed will of the voters, is contrary to virtually every democratic principle on which this nation was founded.

### Protracted Vacancies Until Special Senate Elections Can Be Held

While gubernatorial selection of replacements carries the problem of governors making potentially partisan political appointments, requiring Senate replacement solely by election provides no assurance that a vacancy caused by an assassination or other event will not alter the partisan makeup of the Senate as a whole. In an evenly divided Senate, if a seat that is held by the same party as the Vice President becomes vacant, the VP no longer assures their party of a tie breaking vote, thereby eliminating the advantage for the President's party. If two Senators from the same state and party perish, the majority control then shifts entirely.

Leaving seats open until elections can be held carries the additional shortcoming that for the duration of the period until the election is held and decided, the voice and voting power of the impacted state is diminished in the Senate by half, or if both Senators are killed, entirely silenced. This can leave tens of millions of Americans with no voice in the Senate. Again, this outcome is thoroughly inconsistent with the basic principle of our democratic republic – i.e. the principle of each individual and state having representation in Congress when decisions are made.

### Mass Casualties and Senate Replacements

The importance and impacts of even single losses of Senate should be reason enough to seek changes to continuity measures, but the problems are amplified in the case of multiple casualties.

The first problem of large Senate casualties would be the loss of a legitimate quorum. The Senate has followed the tradition of counting members who are “chosen, sworn and living”, which carries the problems that have already been articulated in this document in the opening section about the quorum. Those problems will not be reiterated here but they all apply.

Because there are substantial differences in how states replace Senate vacancies, in a mass casualty event it could well happen that states with more rapid replacement procedures could collectively restore the quorum and resume operations, while other states would be left out. This not only undermines the core principle of equal representation by all states in the Senate, it also, again, raises the potential for substantial partisan differences. For a variety of reasons, it is also likely that the losses of members might not be randomly or equally distributed. This increases the likelihood of certain states, regions, or ideological perspectives surviving while others perish.

### **What Is Needed - The Criteria To Be Met**

The status quo in both the House and the Senate is clearly unacceptable and must be remedied. The question then becomes, how do we evaluate what the various possible solutions should achieve?

To organize our thinking about this, it may help to consider the following criteria that can guide consideration of the status quo as well as any proposed remedy. It is important to emphasize here that the natural human tendency to apply a more jaundiced or critical eye toward a new system while accepting the status quo without question can be, for all the many reasons described in this document, especially dangerous in this context.

I believe a careful, systematic analysis of the current mechanisms versus proposed alternatives will clearly reveal the status quo to be profoundly flawed in and of itself and particularly so when compared objectively to the alternatives which will be proposed shortly. The following list enumerates some of the most salient criteria against which we should evaluate all possible continuity provisions.

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. This measure prohibits, or at least significantly reduces the possibility of someone trying to put in place a favored successor without an election. For that to happen, the person designating the successor would have to die, which is a stiff price for such manipulation.
4. All vacancies, including those that have been filled by temporary replacements, should be filled as soon as practical, and without any politically motivated delays, through direct election, be that a special election or a regularly scheduled election, depending on the time the vacancy occurs. This measure assures that the right to elect representatives or senators is in no way diminished from the status quo situation in which replacement must be elected. Voters should still be able to vote for the ultimate replacement just as rapidly as possible.

5. 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.)

6. Replacements should be well qualified individuals who are familiar with the respective districts or states and, ideally but not necessarily, have experience in government and legislation. This will allow the institutions to resume functioning promptly and efficiently when new members are sworn in.

To assist in evaluating various alternatives, the chart below includes the criteria above and several other considerations. Members or staff weighing the pros and cons of various alternatives may find this a useful way of comparing the options.

**Draft Criteria Grid For Evaluating Continuity Solutions**

Criteria	Current House	Current Senate	Proposal 1	Proposal 2	Proposal 3.
Only applies in the event of the death or sustained incapacity of the member					
Ensures the most rapid practical replacement and continued representation of all states and districts					
Protects the constitutional definition of a "majority" to achieve a quorum					
Protects the ability of citizens to elect their representatives					
Preserves and restores the political/ideological makeup as it was before the vacancies occurred					
Reduces the incentives or rewards for hostile actions					

against members or the institution					
Has a high likelihood of providing well qualified replacements prepared to serve					
Provides multiple levels of legitimate “backup” replacements					
Does not entrust one individual to appoint multiple replacements					
Allows Congress to meet remotely if it is unsafe or impractical to physically convene					
Assures that the political alignment of presidential succession is the same (it is hoped this will be addressed in the presidential continuity work					
Addresses Staff and support continuity as well as member continuity					
Other Considerations					

**The Preferred Solution for House Vacancies**

As described in the full Continuity of Government Commission report, the recommended solution for vacancies in the House is for all House vacancies created through the death of a sitting member to be filled by immediate appointment of a replacement previously designated by the elected member as part of a rank ordered list of successors filed with the Clerk of the House and the appropriate officials within the member’s respective state.

Without reiterating the specific wording of the Commission report, I have shared below a slightly different description, with the most notable difference being the inclusion of Senate replacements by a similar mechanism as that of the House. Again, I emphasize that this is my personal judgment and recommendation, not that of the Commission as a whole.

### **The Solution Of Member Designated Replacements**

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.

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.

### **The Preferred Solution for Senate Vacancies**

As with the House, I strongly believe the preferred solution is for is for all Senate vacancies created through the death of a sitting member to be filled by immediate appointment of a replacement previously designated by the elected member as part of a

rank ordered list of successors to be filed with the Clerk of the Senate and the appropriate officials within the member's respective state.

The pathway to implementing this solution is different from but easier than that for the House. Remember that the 17<sup>th</sup> Amendment contains this language

*That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.*

It is that language that has allowed the states to adopt the various and mechanisms and timeframes for replacement that we have been discussing. While we have identified how the present procedures are flawed, it is also possible that without having to further amend the Constitution, state legislatures have the power to change their U.S. Senate replacement procedures for the better. In so doing they could solve nearly all the problems we have been describing. Here is how that can happen.

Under the 17<sup>th</sup> Amendment, each state legislature can act to empower U.S. Senators to identify a sequential, rank ordered list of individuals who would temporarily fill the vacancy only in the event of the incumbent's death or incapacity and only until such time as special or regularly scheduled elections can be held. The executives of the states would be required to select replacements from those designated in order on such lists. For security purposes, the list of temporary replacements should be kept confidential and would be filed with the Secretary of State of each state and with the Clerk of the Senate, to be opened only on the death or certified incapacity of the incumbent.

These are the merits of this approach.

1. If all legislatures adopted this, every vacancy, be it of a single individual or a mass casualty situation, could be nearly instantaneously filled, thereby ensuring both the continuity of the institution and continued representation for all districts and states. This method also provides for continuity of the institution as a whole and ensures continued, virtually uninterrupted representation, regardless of whether the cause is a natural event, accident, or malevolent act.
2. This method is the most likely of all to preserve the will of the electorate because the voters chose the incumbents in the most recent Senate elections. Those elected House and Senate members, who voters authorized to make decisions on everything from tax policy to declarations of war, are in the most justifiable position to select their temporary replacements, but only if they perish or become incapacitated (this must not become an "easy way" to pass the office on to a relative or political crony). So too, because it will be their last official act, the incumbents will naturally be inclined to select temporary successors who share their essential ideological and political perspective.



3. Replacement members selected in this way would be more likely to have a sense of obligation to faithfully carry on the practices and positions of the incumbent, who had been initially chosen by the voters of the state or district. Without inserting the word or concept of political party into the Constitution, something that has never been and, in my opinion, should never be in the document, this proposal provides a mechanism for continuity of the political/ideological makeup resulting from the most recent election.
4. By ensuring that partisan or dramatic ideological shifts will not result from Senate or House vacancies, the promise of replacement by temporary incumbent selected successors substantially reduces the incentive for and gains to be had from terrorist acts, foreign aggression, assassination, or other actions intended to shift the balance of political power. If it is known that the loss of the incumbent will almost certainly result in a replacement of his or her choosing, and of similar ideology and party affiliation, there is much less to be gained politically from seeking to harm the incumbent.
5. This method is also likely to produce well qualified temporary successors because the incumbent should have personal knowledge of the qualifications and qualities of many possible temporary replacements. Further, the incumbent's personal legacy will be at stake so they will be motivated to identify individuals of character who will capably carry on the duties of the position and the example set by the incumbent.
6. This method reduces the potential for dramatic and recurring changes in partisan balance because if all states follow the practice there will be no or very few initial gaps left unfilled and when elections are held for replacements those elections can take place in a less hurried and more consistent timeframe across all the states.
7. By providing for member selected temporary replacements until special or regular elections can be held, this method preserves the rights of voters to express their preferences at the ballot box. Nothing in this proposal takes away or diminishes the rights of voters compared to any of the current procedures for filling vacancies. Special elections can still be held as quickly as practicably possible and just as rapidly as they would be if there were no temporary replacement in place.
8. This proposal very rapidly restores and maintains the full numbers of the House and Senate and their respective quorums at regular levels as intended by the framers without lowering the total number or the corresponding quorum below that proportion which was originally defined by the Constitution.

9. This provision also avoids the complexities of trying to determine a fixed "cutoff" level or number of losses necessary to trigger different replacement procedures. It is impossible to anticipate all the variations in continuity circumstances so a single fixed criterion is an unwise and impractical standard. Replacing all vacancies caused by death is the more practical and sound solution.
10. Perhaps the most important benefit of all is that even in the most catastrophic of events, such as a concentrated attack on the Capitol that kills all or nearly all members of Congress, well qualified successors could rapidly be identified for every fallen member of the body, thereby enabling the entire Congress to be restored in less than 24 hours. This is an incredibly powerful reassurance not only to the American people but to the free world. It ensures that our representative democracy and our system of checks and balances will be restored and maintained even in the most dire of circumstances.

### **Examples Of Similar Provisions in State Level Continuity**

The risks of the status quo and the benefits of the proposed alternative should be sufficient to make the case for the proposed solutions, but we can also find reassurance in the fact that very similar provisions are already in place in a number of states.

The National Council of State Legislatures has reviewed continuity provisions in every state <https://www.ncsl.org/research/about-state-legislatures/emergency-interim-succession-acts.aspx>, revealing that some mechanism of temporary replacements exists in multiple states.

For example, Alabama's continuity statute reads,

*"Ala. Code §29-3-4*

Each legislator shall designate emergency interim successors to his powers and duties and specify their order of succession. Each legislator shall review and, as necessary, promptly revise the designations of emergency interim successors to his powers and duties to insure that at all times there are at least three such qualified emergency interim successors.(Acts 1961, No. 875, p. 1371, §4.)"

Louisiana also provides for similar replacement

*La. Rev. Stat. §24:64.*

Each legislator shall designate a panel of not less than three nor more than seven emergency interim successors to his powers and duties. Each legislator shall review and, as necessary, promptly revise such panel of emergency interim successors to his powers and duties to insure that at all times there are at least three such qualified

emergency interim successors on said panel. Such panels and all revisions thereof shall be filed in the office of the secretary of state.

Oklahoma has a comparable provision.

*Okla. Stat. §63-686.4.*

Each legislator shall designate not fewer than three nor more than seven emergency interim successors to his powers and duties and specify their order of succession. Each legislator shall review and, as necessary, promptly revise the designations of emergency interim successors to his powers and duties to insure that at all times there are at least three such qualified emergency interim successors.

Laws 1959, p. 215, § 4; Laws 1963, c. 340, § 4, emerg. eff. June 24, 1963

We often talk in our country about the states being the laboratories of the republic. In this case, at least some of the states have been far ahead of Congress in finding cures for the problems of succession. The Congress would do well to learn from those measures and implement them as quickly as possible.

Under the 17<sup>th</sup> Amendment, States already have a right to choose whether or not opt for this solution as a replacement process for U.S. Senators, but if they choose not to do so, they should make that choice knowing they are exposing themselves and the nation to all of the machinations, politics, and autocratic power usurpations described above.

Legislators and, most importantly, the voters in every state should recognize that it is in their best interest to provide for rapid replacements that ensure the will of the voters is maintained and that the state will have continued representation in both the Senate and House as decisions of major consequence are made in Congress. Legislators and voters should also be aware that by failing to address the problems of partisan gubernatorial Senate replacements, they may be exposing their own elected senators (and, we must add, potentially, if you think about it, their governors as well) to an elevated personal risk.

**Establish the Rules Immediately – Then Ratify an Amendment**

It is in the interest of the nation, all the states and of the citizens themselves that the proposed recommendations be implemented as quickly as possible. The reality, however, is that many of the proposed changes, particularly those regarding temporary House replacements, should ultimately be formally established through an amendment to the Constitution. 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 at least a provisional remedy that could ensure its own continuity in a time of crisis.

Therefore, it is recommended that 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.

Finally, in order for Congress to function, a certain number of critical staff positions, e.g. parliamentarians, clerks, etc. must also be provided. Therefore, a comprehensive continuity initiative should establish mechanisms for designating, training, supporting and compensating staff who could, if needed, fill in immediately and seamlessly if necessary.

### **If An Event Occurs**

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 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 of temporary member designated replacements (to serve only if the member dies or becomes incapacitated through unexpected events), 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 and legitimate function with complete representation and a comparable political makeup within twenty-four hours.

Not only would Congress reconvene, it would do so populated with mostly 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 extraordinary resiliency in continuity for our own citizens and for the free world. The very day after the worst event in American history, the Congress could resume to full function.

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.

### **Gut Check**

Before concluding, it is worth pausing for a moment to reflect on the values and motives that should guide our thinking and decision making when it comes to continuity of government and representation. If anyone reading this has evaluated the merits of this discussion and these proposals primarily or reflexively on a partisan calculation of "How will this affect my political party or power?", they should, as my long-deceased mother used to say, "Have their heads examined."

Tragedies and crises must not be opportunities for political gamesmanship or to circumvent the will of the people. The only legitimate metric to guide our decision making must be this question "What is in the best interest of the nation as a whole and what is most consistent with the principles of a constitutional democratic republic?"

Brian Baird, April 6, 2022