

INSURANCE AGAINST THE ONCE UNTHINKABLE

National Journal

November 3, 2001

Insurance agents are pros at getting people to contemplate the unthinkable. Now, in the aftermath of September 11, one member of Congress has assumed the role of insurance agent for the Republic. "These are questions that were once unthinkable," Rep. Brian Baird, D-Wash., said in an interview last week. "They certainly could not have been contemplated by the Founders of our great country."

Remember that one of the four airplanes hijacked on the morning of September 11 crashed in Pennsylvania before it could hit its target, which may have been the U.S. Capitol. What if the Capitol had been destroyed and, with it, much of the membership of Congress? Nine of the 10 top leaders of the House and Senate were in the Capitol that morning.

"What could happen? How could we prepare for it?" Baird asks. "And how do we clarify exactly what would be done so that, if the American people were to turn on CNN and see that the Capitol had been hit and many members of the House and Senate had been killed, we would have a clear-cut answer for them that says, 'Your constitutional democratic Republic will persevere. These are the steps that will be taken to replace the members and rebuild the government.'"

It sounds like the stuff of fiction. In fact, in two of his novels, Tom Clancy imagined a hijacked airliner crashing into the Capitol during a presidential State of the Union address.

There is a line of succession to the presidency. But what about Congress's line of succession? That's not a problem in the Senate. The Constitution allows governors to "make temporary appointments until the people fill the vacancies by election." In every state except

Oregon, governors have the power to appoint new Senators immediately.

However, the Constitution requires that House vacancies be filled by special elections. No House member has ever served without being elected by the people. "We're very proud of that," Baird says. But special elections usually take three to six months to organize-with each state determining the timing and procedure for those elections.

Could the President simply govern without Congress? The Constitution is clear: No. As Baird points out, "There is no provision that authorizes the President to appropriate funds, unilaterally declare war, or choose a vice presidential [replacement] without [congressional] confirmation. The Framers wanted it that way."

Most rank-and-file House members were not in the Capitol building on the morning of September 11. Suppose they had been. Suppose an attack occurred during a joint session of Congress, such as the one President Bush addressed on September 20. How many House members would have to survive an attack to constitute a quorum?

The House rules say a quorum consists of "a majority of those members chosen, sworn, and living." So a handful of surviving House members, totally unrepresentative of the country, could take power and potentially create a good deal of mischief with the full authority of the Constitution, pending elections to replenish their ranks.

Baird's insurance policy aims to prevent that from happening. "What I've proposed is this," the Congressman says. "If a quarter or more of the membership of the House is killed or disabled and can't function, then the governors of those states would be authorized to appoint replacement members who would serve during a 90-day period, which would give us time for direct elections to take place."

-William Schneider

In order to do that, Congress would have to pass and the states would have to ratify a 28th amendment to the Constitution. Amending the Constitution is no small matter. An amendment must be approved by two-thirds of both houses of Congress and then ratified by three-quarters of the state legislatures.

Baird decided not to complicate the issue by defining what would constitute "incapacitation" of a House member. "Believe it or not," he points out, "there are no provisions in the House rules or in the Constitution for removing a member of the House due to disability. Indeed, members have served in the House who were comatose for extended periods of time." Baird's amendment leaves the definition of "incapacitation" to be resolved by enforcement legislation and by the courts.

His amendment also does not mention political parties. That is in deference to the Constitution itself, which has never included any reference to parties. His proposed amendment has more than 40 co-sponsors, who include both Democrats and Republicans. Why doesn't it have more? Debating such a measure carries the risk of further frightening voters and making Congress appear panicky.

Inaction carries a different kind of risk: The unthinkable could happen-again. "If fate is unkind to us," Baird says, "history will judge us on how well we ... prepared our nation to deal with the worst-case scenario." It's a scenario that Congress and the Republic may have only narrowly escaped-this time.

Baird recommends caution. He is urging Congress to pass his amendment now, but he notes that the states may choose to delay adoption in order to give the matter careful deliberation. But if the measure has passed Congress, the states would have an amendment in place that they could ratify quickly, if it is ever needed.

