

CONSTITUTION WOULD ALLOW MEMBERS TO NAME SUCCESSORS

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Roll Call

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What contingency arrangements should the House of Representatives adopt to ensure that it can continue to function if terrorist acts or another crisis kills or incapacitates a number of Members?

An analysis of options should proceed from two premises: First, there is no substitute for an election to fill vacancies in the people's House. Second, in devising an interim procedure for temporary appointment until an election can be held, no one else enjoys the degree of legitimacy earned by each Member of the House in the most recent election of his or her constituency.

Accepting that an emergency could kill or incapacitate Members of Congress, existing constitutional authority should permit the House to vest in Members the power to designate interim successors to perform the duties of the office temporarily, pending election of successors. Article I of the Constitution empowers each chamber to "determine the Rules of its Proceedings" and to judge the "Qualifications of its own members."

To provide for that kind of national crisis, it would be reasonable for the House to adopt a rule permitting temporary appointees to perform the functions of a dead or incapacitated Member until either a successor is elected or the Member recovers. (In the Senate the issue is less acute, since the Constitution permits state governors to fill a vacancy until a successor is elected.) Both the House and Senate have at times allowed Members to convey their votes to a designated proxy for committee proceedings - in the Senate the practice of paired voting, even for

absent Members, is also noteworthy - so the principle of using designees has a significant range of related precedents.

A rule of this nature would reflect the fact that, as the latest embodiment of the expressed will of each district constituency, the elected Member has the greatest standing and the highest legitimacy to choose his or her own temporary substitute. Except for the seven states with a single Congressional district, no governor has been elected by the same constituency - and even those governors were elected on different issues and in a quite different context than individuals sent to Congress.

A basic danger in gubernatorial appointments is that they could alter the party balance in Congress, a change that would violate the most recent preference expressed by the relevant constituency. Empowering a Member to pre-designate a person to serve as the voters' temporary agent in such emergency circumstances would remove those concerns. Moreover, a Member would presumably feel more comfortable exercising this power than delegating it to a potentially unknown official of an unknown party specified categorically in a constitutional amendment.

An added consideration is that if a Member's designee were known publicly, constituents could weigh the quality of that choice in gauging the Member's judgment. This factor could become part of a candidate's campaign rationale for election - adding a further justification to the claim of constituency involvement in the designation. In case of incapacity, rather than death, a Member could have greater confidence that a designee of his own choosing would yield the role once the elected Member recovered sufficiently to perform the duties of the office.

Dealing with this important danger through the rule-making power would provide an expeditious option for Congressional leaders to address the problem, rather than leaving an

urgent need to languish in the usually protracted processes of constitutional amendment. It would demonstrate an immediate responsiveness to the grave threat that is now widely perceived. And if the House itself accepted the qualifications of a predesignated agent, one doubts that the procedure could be challenged successfully on constitutional grounds. Indeed, the prospect of a challenge would probably not arise until and unless the calamity struck and interim appointees were called to duty, at which time the presumption would favor the House's judgment in the matter.

Under this concept, there should be no need for a problematic threshold specifying the necessary fraction of the membership dead or incapacitated to trigger the invocation of the option for interim appointees. However many Members survive, they would be able to notify the predesignated agents of any Members killed or disabled to report for duty in Congress.

Under the kind of rule contemplated here, invoking Article I, Section 5 of the Constitution, the House would direct each Member to designate an individual from the Member's home state to perform the duties of the office in the event of the Member's death or incapacity. The Member would certify the name of the interim designee to the appropriate authorities in the home state and to the Clerk of the House. The rule should make clear that the interim appointee, if called to service, would enjoy the same powers, rights and privileges as the Member elected to the office.

Adopting such a provision now could be reinforced by a suitable constitutional amendment confirming the House's authority to deal with vacancies on a strictly interim basis pending the required elections. Such an amendment could well be a variation of language drafted by professor Michael Glennon, specifying, for example, that

Congress has the power to provide for such interim appointments to the House by either rule or law.

Let us follow this logic a bit further. The problem of House continuity could well arise not from a large-scale attack on the Capitol, but from assaults on other, even more vulnerable targets where Members gather. Suppose terrorists hit one of the Republican or Democratic Members' retreats at Greenbrier (W.Va.) or the Homestead (Va.) or elsewhere? Suppose they attacked a caucus of some state delegation? Perhaps they might strike a particular committee. What if they went after the annual bipartisan "civility retreat"?

In killing or incapacitating only a few Members, the attack could alter the party balance in the House. It might also wipe out the representation of some small states entirely. Or targeting a large-state caucus could leave New York, California or Texas with less representation than much smaller states.

These considerations lead to the question of whether the wisest course is to craft a comprehensive House rule to cover all vacancies by interim appointment. After all, the Constitution now provides appointment authority for every Senate vacancy. Again, one stresses that any appointment arrangement must be drawn without prejudice to the requirement of election of a successor. States should be encouraged to expedite such elections as far as possible; under the best of circumstances, however, there will be a gap of months between the loss of a Member and election of a successor. For the House to proceed without a district being represented, particularly in the major actions likely to be required in a national emergency, seems to me a grave inequity to the voters in that district and a serious weakening of democratic values.

One must be clear that the choice here involves either a sacrifice of democratic principle by leaving constituents unrepresented at a time of crucial House deliberations or

representing those constituents through a suitable appointive mechanism until a successor is elected. Among the appointive options, the closest approximation to democratic values would be to base the appointment on the authority of the individual enjoying the freshest mandate and greatest legitimacy in the specific constituency, i.e. the Member most recently elected by those voters.

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