

Maintaining Continuity in the House of Representatives: An Urgent Solution to an Urgent Problem

By

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What contingency arrangements should the House of Representatives adopt to ensure that it can continue to function if terrorist action or other crisis kills or incapacitates a number of members?*

An analysis of options should proceed from two premises:

First, as the Constitution provides, there is no substitute for an election to fill vacancies in the people's House.

Second, in devising an *interim procedure for temporary appointment* pending election of a successor, no one enjoys the degree of legitimacy earned by each member of the House in the most recent election in his or her constituency.

In the event of an emergency that kills or incapacitates members of Congress and pending election of a successor, existing constitutional authority should permit the House to vest in a member of Congress the power to designate an interim successor to perform the duties of the office temporarily.

1. Article 1, section 5 of the Constitution empowers each House to “determine the Rules of its Proceedings...”
2. That same section also authorizes each House to judge the “Qualifications of its own members...”
3. To provide for the kind of national crisis that would arise from an attack on the Capitol, potentially killing or disabling many members of Congress, 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.)
4. A rule making such a provision 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

* This argument follows closely the analysis offered by former Speakers Thomas S. Foley (D-Wash) and Newt Gingrich (R-Ga), “If Congress were Attacked,” *The Washington Post*, March 17, 2002, p. B10.

[†] Both the House and Senate have at times allowed members to convey their votes to a designated proxy for committee proceedings, although that practice has been constrained significantly in recent years.

constituency – and even those governors were elected on different issues and in a quite different context than individuals sent to Congress.

5. Empowering a Member to pre-designate a person to serve as the voters' temporary agent in such emergency circumstances would presumably remove concerns that gubernatorial appointments could alter the party balance in the Congress, a change that would violate the most recent preference expressed by the relevant constituency.
6. Presumably a member would feel more comfortable exercising this power than delegating it to a potentially unknown official of an unknown party specified categorically in a constitutional amendment.
7. If a member's designee were known publicly, the quality of that choice would add a dimension on which constituents could weigh 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.
8. 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. (Indeed, one might wish to consider such an arrangement for instances of incapacity other than those caused by a massive attack on the Congress.)
9. 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 potentially 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 pre-designated 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.

These points suggest a case for simplifying the approach to the possible death or disablement of large numbers of legislators through an attack on the Congress. Under this concept, there should be no need for a problematic threshold specifying a fraction of the membership to trigger the invocation of the option for interim appointees. However many members survive, they would be able to notify the pre-designated agents of any members killed or disabled to report for duty in Congress.

To illustrate the kind of rule that could incorporate the essential elements of this concept one might suggest the following:

“To maintain continuity in the operations of Congress in the event of an emergency resulting in the death or incapacity of members, and in exercise of its authority under Article I, section 5 of the United States Constitution, the House of Representatives authorizes and directs each Member to designate an individual to perform the duties of the Member's office on an interim basis, pending election of a successor or return to service of the Member.

- a. Each Member of the House of Representatives shall certify to the appropriate authority within the Member's home state and to the Clerk of the House of Representatives the name of such a designee for possible interim service.
- b. Each interim designee shall be a resident of the Member's home state who meets the qualifications for service in the House of Representatives.

- c. A designee called to serve temporarily in the House of Representatives shall enjoy the same powers, rights and privileges as the Member elected to the office.”

This draft does not resolve all issues that will need attention, but points the discussion in a somewhat different direction from ones previously considered. Note that adopting such a provision now could be reinforced by a suitable constitutional amendment confirming and reinforcing 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, for example:

Congress shall have power to regulate by rule or by law the filling of vacancies that may occur in the House of Representatives in the event of the death or disability of any Member.

Let us follow this logic a bit further. We all began worrying about the problem of House continuity in the context of a possible large-scale attack on the Capitol. On reflection one has to consider that the bad guys might go after softer, even more vulnerable targets that could also severely impair congressional functioning.

Suppose terrorists hit one of the Republican or Democratic members' retreats at Greenbrier or Homestead 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" ?

By 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 or California or Texas with less representation in the House 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 single 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; even under the best of circumstances, however, there will be a probable gap of months between the loss of a Member and election of a successor.

Unless the rule is comprehensive there is an exceedingly difficult issue of what threshold of catastrophe would trigger the appointment process. It may not be possible to resolve that question of a threshold in a clear and satisfactory way.

In sum: Adopting a House Rule Providing for each Member to pre-designate an interim successor
--is grounded in the House’s existing constitutional authority under Article I, section 5,
--offers maximum legitimacy to anyone called on to serve temporarily in such a capacity,
--could address both the danger of potentially catastrophic losses and the lesser contingency of an individual death or incapacity,
--affords time for the deliberation, passage and ratification of a confirming constitutional amendment,
--and is the only approach that meets an urgent problem with the necessary urgency.

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