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Comment

Assuring Continuity of Government

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I am a great admirer of Seth Barrett Tillman's work. There are few people who are so interested in, and knowledgeable about, the consequences of what most people unfortunately dismiss as the minutiae of constitutional procedure.¹ The problem he has now turned his attention to – how to assure a functioning Congress in case of catastrophic disasters – is extremely important, and his model statute provides the basis for what should be a continuing conversation.²

Tillman is not the first person to “spot the issue,” as it were. Thus, a joint commission created by the conservative American Enterprise Institute and the liberal Brookings Institution (“AEI-Brookings Commission”), was formed to address the issue of continuity in government following such disasters and published in 2003 a report aptly titled *Preserving Our Institutions*.³ Furthermore, Yale Law School professor Bruce Ackerman devotes a chapter vividly titled “If Washington Blows Up?” in his recently published book, *Before the Next Attack*, to the issue of continuity in government,⁴ and I engage the subject as well in a forthcoming book.⁵ Additionally, Texas Senator John Cornyn⁶ has proposed a constitutional amendment to deal with aspects of the problem, though serious consideration of the amendment has been stymied by a mixture of the relative “unsexiness” of the issue, in today's sound-bite and polarized polity, and the recalcitrance

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1. See e.g. Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3*, 83 Tex. L. Rev. 1373 (2005).

2. Seth Barrett Tillman, *Model Continuity of Congress Statute*, 4 Pierce L. Rev. 191 (2006) [hereinafter *Model Statute*].

3. Continuity of Government Commission, *Preserving Our Institutions – The First Report of the Continuity of Government Commission*, <http://www.continuityofgovernment.org/pdfs/FirstReport.pdf> (June 4, 2003).

4. Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in An Age of Terrorism* (Yale U. Press 2006).

5. Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)* (Oxford U. Press, forthcoming 2006).

6. Senator Cornyn has represented Texas from December 2, 2002 to present. *Biography of U.S. Senator John Cornyn*, http://cornyn.senate.gov/doc_archive/biography.pdf (accessed May 22, 2006).

of Representative James Sensenbrenner,⁷ the Republican chair of the House Judiciary Committee, who, to adopt retired United States Senator Alan K. Simpson's⁸ language, has "rudely" refused even to hold hearings on the amendment.⁹

What makes Tillman's proposal distinctive, and important, is that it presents a *statutory* solution to at least aspects of the problem. It is an audacious proposal well worth discussing at greater length than I have time for in preparing this brief comment. Before turning to the specifics of his proposal, though, it is worth spelling out the possible situation that underlies the concern displayed by an increasing number of thoughtful Americans about the issue of continuity in government. Consider, then, the following dilemma that could face us "the day after" a catastrophic disaster (most likely a terrorist attack).

Imagine that United Airlines flight 93 had in fact crashed into the United States Capitol, as apparently was the intention of the hijackers, and killed or disabled, say, 400 members of the House of Representatives and disabled, say, eighty senators. Note carefully the lack of parallelism in the preceding sentence. If eighty senators were killed, that would obviously be a catastrophe, but one from which the country, as a formal matter, could quickly recover. The reason is the Seventeenth Amendment, which allows state governors immediately to fill any Senate seat that becomes vacant.¹⁰ So, as a formal matter, the Senate could be back up to its full strength of one hundred within a very few days. The problem, so far as the Senate is concerned, is not with *dead* senators, but, rather, with significantly disabled ones. They would, presumably, retain their seats, as a formal matter, even though, by definition, they would be unable actually to show up and do the legislative work.

The Twenty-Fifth Amendment, proposed and ratified in the wake of John F. Kennedy's assassination, addresses the possibility of a disabled President and provides a careful procedure by which the incumbent can be relieved, temporarily or permanently, of the office in favor of his or her replacement, the person next in line, who will usually be the Vice President.¹¹ No such procedure is available with regard to disabled senators.

7. Representative Sensenbrenner has represented Wisconsin's 5th District from January 1979 to present. *Biography of Congressman James Sensenbrenner*, <http://www.house.gov/sensenbrenner/bio.htm> (accessed May 22, 2006).

8. Senator Simpson served his constituents in Wyoming from 1978 to 1997. *Biographical Directory of the U.S. Cong.*, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000429> (accessed May 22, 2006).

9. See Sen. Comm. on the Jud., *Ensuring the Continuity of the United States Government: A Proposed Constitutional Amendment to Guarantee a Functioning Congress*, 108th Cong. 9 (Jan. 27, 2004).

10. See U.S. Const. amend. XVII.

11. See U.S. Const. amend. XXV, § 1.

One consequence, as a technical matter, is the possible inability of the Senate to achieve a legal quorum, which is a majority of the (living) membership. Should fifty-one senators be in comas or otherwise disabled in hospitals, the Senate would be barred from meeting, at least if one is a textual purist. After all, Article 1, Section 5, Clause 1 explicitly states that “a Majority of each shall constitute a Quorum to do Business.”¹² A similar problem would be presented if hundreds of representatives were disabled. This possibility of disabled members of Congress, unable to function but whose existence would make impossible the legal functioning of either house of Congress under present quorum rules – a majority of their respective members – has sparked the concern for appropriate change.

Ironically, either house can always achieve a quorum even if it has been ravaged by a catastrophic attack that kills most of its members. Even if only three members survive, two of them would constitute a quorum of the living members. The problem in that instance is not formal, but, rather, political. No serious person could regard the decisions made by such a “rump” House or Senate as politically legitimate. As already noted, the Senate would be quickly reconstituted following a devastating attack, so there is no practical possibility of having to suffer the consequences of a three-person (or even sixty-person) Senate for more than a day or two. The House presents a far more serious problem, given that Article I, Section 2, Clause 4, also provides that “When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue *Writs of Election* to fill such Vacancies,”¹³ which clearly suggests that election is the exclusive path to membership in the House.

From this insight arises the proposal by the AEI-Brookings Commission that the Constitution be amended to provide a quick succession, similar to that available for the Senate, should a disaster wipe out hundreds of members of the House.¹⁴ Proposals range from the election or designation of “vice Representatives” who would automatically take over in case of disability or death to allowing gubernatorial appointment of replacements for representatives in precisely the same way that the Seventeenth Amendment made possible for the Senate.¹⁵ Bruce Ackerman has joined Tillman in offering a statutory proposal: Ackerman’s proposal would require the election of “vice Representatives” at the same time as the general election of members of the House.¹⁶ Presumably living well outside of Washing-

12. U.S. Const. art. I, § 5, cl. 1.

13. U.S. Const. art. I, § 2, cl. 4 (emphasis added).

14. Continuity of Government Commission, *supra* n. 3.

15. *Id.* at 28-29.

16. See Ackerman, *supra* n. 4, at 147-53.

ton, these vice Representatives would be able to take office very quickly following a catastrophic attack that killed hundreds of representatives.¹⁷

As already noted, the proposed constitutional amendment sponsored by Senator Cornyn, which offers the possibility of a comprehensive solution, is, at least at this time (April 2006) going nowhere.¹⁸ Congress is fiddling even against the possibility that Rome could potentially burn up. This is where the Tillman proposal comes in. He audaciously advocates that Congress pass a framework statute that in effect delegates to one house of Congress the power to pass binding legislation, at least for ninety days, if the other house is unable to achieve a quorum.¹⁹ Tillman recognizes the anomaly that either house could *always* have a quorum, even of only two members, if they are the only remaining living members. He addresses this by setting a *floor* of forty members of the House (who could represent a majority of seventy-nine living members) and twenty members of the Senate (out of a maximum of thirty-nine members) in order to constitute a legal quorum.²⁰

Tillman recognizes that the proposal raises fascinating constitutional questions about the ability in effect to suspend our *bicameral* legislative system for a *unicameral* one, though, of course, the President would be a vital participant in both proposing and then signing legislation.²¹ He is not, that is, suggesting a fully parliamentary system, even for a single day.

Not only bedrock constitutional structures of bicameralism, but also the *Chadha* case,²² seemingly defeat his proposal. As to *Chadha*, he simply states that it is “not controlling.”²³ I have no objection to that move. I am not a fan of the initial decision, and he makes a powerful case, simply by drafting the statute, that it is potentially absurd to stand on formal ceremony in the face of catastrophic events that call into question the capacity of the United States to continue governing itself through relatively democratic institutions. Surely it is better that we have one legislative house in action, able to deliberate and pass (or reject) presidential proposals, rather than, in effect, to dismiss the very possibility of any legislative participation because of the inability to meet the bicameralism requirement if one house is lacking a quorum. To insist on formal purity is in effect to welcome a presidential dictatorship, because the one thing that is unthinkable

17. *Id.* Ackerman’s proposal, however, does not speak to the problem of the disabled representative.

18. *See supra* n. 9 and accompanying text.

19. *Model Statute, supra* n. 2, at 192.

20. *Id.* at 196.

21. *Id.* at 194.

22. *INS v. Chadha*, 462 U.S. 919 (1983).

23. *Model Statute, supra* n. 2, at 191.

is that the Chief Executive would refrain from issuing fiat “legislation” while waiting months for both of the houses to reconstitute themselves.

As already noted, Tillman’s proposal would almost certainly eventuate in legislative rule by the Senate. Given the Seventeenth Amendment, so long as senators are killed instead of being disabled, there will almost always be not only a “Tillmanian” quorum of twenty, but also, significantly, a far higher number of senators available to meet. Governors would presumably move with alacrity to fill the vacant seats. A truly ravaged House, on the other hand, would be unable to meet even the modest Tillmanian quorum inasmuch as there is currently no procedure, save new elections, to fill House vacancies. But let us assume a House that indeed now consists only of forty members, with the remaining 395 having lost their lives in the catastrophic attack. There is no good reason to believe that such a rump House would be viewed as legitimate, especially if the forty survivors were overwhelmingly from one political party or one region of the country. The Senate, for all of its problems, including what I regard as the ludicrous principle of equal voting power that gives Wyoming or Vermont the same number of senators as California or Texas, is nonetheless far more likely to bounce back to relatively full strength *and* reflect the political and regional diversity of the country.

Thus I am inclined to require a far higher number than forty in order to legitimate the House as a co-participant in governance. I would prefer that at least one hundred representatives, from a cross-section of our vast country, be available. So long as one is thinking audaciously, which Tillman invites us to do, perhaps the solution to what might be termed a “subquorum House” is to “fold” these members of the House into the Senate and create a larger, quite possibly more representative, body that will serve as our “unicameral legislature” during the period of emergency or until the House reaches the proper number for a quorum. It is not unlikely, though, that Tillman would (properly) respond that such a proposal, unlike his own, would require an enabling amendment to the Constitution, whereas the value of his proposal, as already emphasized, is that it avoids that slough of despond. That may, of course, be correct.

In any event, whether or not Seth Barrett Tillman has delivered the “last word” on what a framework statute should look like, which is almost certainly not the case, he has given us a very valuable first cut at a precise delineation of what might work to preserve our “Republican Form of Government” even under extreme conditions. This is a signal act of good citizenship, as well as of careful lawyering. I hope that his proposal gets the attention that it deserves.