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Continuity of Government: Current Federal Arrangements and the Future

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Summary

Continuity of government refers to the continued functioning of constitutional government under all circumstances. Arrangements for the continued operation of the federal government in the event of a national emergency or catastrophe are specified in law, policy, and plans, some of which are not public information, given their sensitive, contingent status. This report reviews the public record concerning federal continuity of government arrangements. It will be updated to reflect significant developments.

As a condition of office, the President swears or affirms a pledge to preserve, protect, and defend the Constitution of the United States, which also requires members of the Senate, the House of Representatives, and the individual state legislatures, as well as all executive and judicial officers of the United States and the several states, “to support this Constitution.”¹ Arguably, such provisions constitute a basis for these principal government officials, in their separate capacities, to contribute to policy and planning for the continued functioning of constitutional government under all circumstances. During the latter half of the 20th century, such preparations were conducted earnestly and elaboratively, particularly with the onset of the Cold War and the increasing prospect of nuclear attack upon the nation. Arrangements for the continued operation of the federal government in the event of a national emergency are specified in law, policy, and plans, some of which are not public information, given their sensitive, contingent status.

Background

While the Constitution prescribed some arrangements concerning succession to the presidency and the replacement of elected and appointed officials, widespread concern about the continued functioning of constitutional government under all circumstances probably did not arise prior to the assassination of President Abraham Lincoln on April 14, 1865. The assassination of the President was not totally unthinkable — an attempt had been made on the life of President Andrew Jackson in the Capitol rotunda on January 30, 1835 — but it was generally regarded as highly unlikely. However, in the aftermath

¹ See Article 2, Section 1, and Article 6.

of Lincoln's demise came the assassination of President James A. Garfield in 1881, the murder of President William McKinley in 1901, and the wounding of former President Theodore Roosevelt in 1912. Presidential protection by the U.S. Secret Service began informally and without statutory sanction in 1894.

In 1792, Congress had provided, in accordance with constitutional prescription, for succession to the presidency, when both the office of the President and the Vice President were vacant, by, first, the President pro tempore of the Senate or, next, the Speaker of the House of Representatives. In this constitutionally suspect arrangement, these legislative branch officials were to serve in an acting capacity, holding office only until a new President could be chosen.² Congress returned to the matter in 1886, establishing a line of succession relying upon the Cabinet, following the order of the establishment of the departments. Any Cabinet official coming to the presidency via this arrangement would have to possess the constitutional qualifications to hold the office, and would temporarily act as President by virtue of his Cabinet position, which he would retain, thus becoming a member of his own presidential Cabinet.³

During the Civil War, Secretary of State William Seward and Secretary of War Edwin Stanton created counterespionage organizations, but these were directed against spies and saboteurs rather than potential assassins of public officials. Similarly, during World War I, the Departments of Justice, the Navy, the Post Office, and War, among other entities, conducted intelligence operations and investigations to ferret out spies, saboteurs, and the disloyal, but life-threatening attacks upon government leaders by such enemies does not appear to have been a major concern. Submarine warfare and aerial bombardment, while effective new techniques in warfare, utilized limited technologies posing no major threat to the defense of the domestic territory of the United States or constitutional government.

The December 7, 1941, attack on Pearl Harbor by Japanese naval aircraft (and the American April 18, 1942, retaliatory bombing of Tokyo by aircraft under the command of Colonel James H. Doolittle) demonstrated that at least carrier-assisted bombers could reach the continental United States. Enemy long-range aircraft capabilities were indeterminate during the early months of the war.

The week after Pearl Harbor, the Secret Service presented the president with a long report of recommended changes to improve White House security. It proposed covering the skylights with sand and tin, camouflaging the house, painting the colonnade windows black, setting up machine-gun emplacements on the roof, and building an air raid shelter in a subbasement area of the new East Wing. The president rejected most of the suggestions, "with not a little annoyance," though he finally agreed to the construction of a temporary shelter in the Treasury Department, which would be accessed by a tunnel that would run under the street from the White House to the Treasury.⁴

² 1 Stat. 239.

³ 24 Stat. 1.

⁴ Doris Kearns Goodwin, *No Ordinary Time, Franklin and Eleanor Roosevelt: The Home Front in World War II* (New York: Simon and Schuster, 1994), p. 298.

Shortly after the conclusion of World War II, the United States found itself drifting into increasingly hostile relations with its former ally, the Soviet Union. As early as November 3, 1946, Soviet Foreign Minister V. M. Molotov attacked U.S. foreign policy in a United Nations General Assembly address. The American response included the 1947 inauguration of the Truman Doctrine for the containment of Soviet expansion and the Marshall Plan for European economic recovery, the 1948 launching of the Berlin airlift, and the 1949 creation of the North Atlantic Treaty Organization. The so-called Cold War took a dramatic turn in September 1949 when it was disclosed that an atomic explosion had occurred in the Soviet Union. Recognizing that the Soviets had the capability of producing atomic bombs, American military planners began to assess delivery capabilities. The development of jet-propelled bombers of increasingly longer range and their mid-air refueling, as well as intercontinental and submarine-based missiles carrying nuclear warheads, confirmed the reality of a possible nuclear attack upon the United States.

Response to the possibility of nuclear attack took various forms. For the armed services, increasingly sophisticated detection and interception capability, and guaranteed counter-force response, were developed. Civil defense planning, preparations, and training for public officials, community leaders, and the American people were undertaken.⁵ New policies established, or actions taken, in support of the continuity of government at the federal level are less well known.

Two months after succeeding to the presidency upon the death of Franklin D. Roosevelt, Harry S. Truman sent a June 19, 1945, special message to Congress asking for a revision of the succession law. He noted that, in naming his Cabinet members, a President chose his successor, and concluded that, "I do not believe that in a democracy this power should rest with the Chief Executive."⁶ In the face of congressional failure to complete legislative action, he renewed his request in his January 14, 1946, State of the Union message⁷ and, again, in a February 5, 1947, letter to Senate and House leaders.⁸ Five months later, congressionally approved legislation came to the President's desk and was signed into law on July 18. It placed the President pro tempore of the Senate and the Speaker of the House in the line of succession after the Vice President and ahead of the Cabinet secretaries. To become acting President, the President pro tempore or the Speaker would be required to resign his congressional position and otherwise meet the

⁵ See Harry B. Yoshpe, *Our Missing Shield: The U.S. Civil Defense Program in Historical Perspective* (Washington: Federal Emergency Management Agency, 1981).

⁶ U.S. General Services Administration, National Archives and Records Service, Office of the Federal Register, *Public Papers of the Presidents of the United States: Harry S. Truman, 1945* (Washington: GPO, 1961), pp. 128-131.

⁷ U.S. General Services Administration, National Archives and Records Service, Office of the Federal Register, *Public Papers of the Presidents of the United States: Harry S. Truman, 1946* (Washington: GPO, 1962), p. 52.

⁸ U.S. General Services Administration, National Archives and Records Service, Office of the Federal Register, *Public Papers of the Presidents of the United States: Harry S. Truman, 1947* (Washington: GPO, 1963), pp. 122-123.

constitutional qualifications to hold the presidential office. The statute became effective on January 20, 1949.⁹

Continuity of government planning conducted in the context of civil defense preparations came under direct presidential purview in 1962 when President John F. Kennedy signed a series of executive orders assigning emergency preparedness functions to the Cabinet departments and selected agencies.¹⁰ These and subsequent related orders were consolidated and upgraded in E.O. 11490, issued in 1969,¹¹ which was upgraded by E.O. 12656 in 1988.¹² The details of the continuity of government plans and preparations produced pursuant to these directives are not public information, due to their sensitive, contingent status. It has been reported, however, that such arrangements do include the protection of the leaders of Congress and the justices of the Supreme Court.¹³ There were, as well, plans for relocating the President and Congress in operational facilities outside of the District of Columbia in the event of imminent nuclear attack.¹⁴

A series of presidential national security directives have also fostered continuity of government planning and preparations. The current authority in this series, Presidential Decision Directive 67 (PDD 67), was signed by President William Clinton on October 21, 1998, and relates to ensuring constitutional government, continuity of operations planning, and continuity of government operations. Federal agencies are required to develop Continuity of Operations Plans for Essential Operations that identify those requirements necessary to support the primary functions of the agencies, such as emergency communications, a chain of command, and delegation of authority. The full text of the directive remains security classified.

Current Arrangements

The Legislative Branch. The Constitution provides that in the event of vacancies in the representation from any state, the governor of the affected state shall issue writs of election to fill such vacancies or, in the case of a Senate vacancy, may, if so empowered by state law, make a temporary appointment until an election may be held, in accordance with state law. Plans exist for the protection of the leadership of Congress, evacuation from the seat of government being a primary action. Additional details of these plans and comparable plans of legislative branch agencies, such as the Congressional Budget Office, the General Accounting Office, and the Library of Congress, are not public information.

⁹ 61 Stat. 380; 3 U.S.C. 19.

¹⁰ See E.O. 10997-11005, E.O. 11051, and E.O. 11087-11095, 3 C.F.R., 1959-1963 Comp., pp. 540-572, 635-644, 722-749.

¹¹ 3 C.F.R., 1966-1970 Comp., pp. 820-861.

¹² 3 C.F.R., 1988 Comp., pp. 585-610.

¹³ See Edward Zuckerman, *The Day After World War III* (New York: Viking, 1984).

¹⁴ Ted Gup, "The Last Resort," *Washington Post Magazine*, May 31, 1992, pp. 11, 13-15, 24-27; Kenneth J. Cooper, "Hill Leaders 'Regret' Reports on Bomb Shelter Site," *Washington Post*, May 30, 1992, pp. A1, A9; Ted Gup, "The Doomsday Plan," *Time*, vol. 140, Aug. 10, 1992, pp. 32-39.

The Executive Branch. The Constitution provides that, in the event of the death of the President, the Vice President shall become President. In the event of vacancies in the offices of both the President and the Vice President, statutory law prescribes the line of succession, beginning with the Speaker of the House of Representatives, followed by the President pro tempore of the Senate, and the members of the traditional Cabinet, beginning with the Secretary of State and extending to the other comparable positions in the order of their statutory creation. Since December 2001, President Bush has signed several executive orders prescribing the line of succession within the departments in the event that a Cabinet secretary is killed or incapacitated.¹⁵ Federal departments and agencies have been assigned emergency preparedness responsibilities, including planning for the continuity of government. Aspects of these plans include evacuation of the President and other principal executive officials to locales outside of the seat of government and, in some cases, their relocation at secondary or satellite management centers where they shall continue to perform their administrative responsibilities. Various aspects of emergency or crisis coordination may be conducted by the National Security Council, the Federal Emergency Management Agency, the Department of Defense, the recently established Homeland Security Council and Department of Homeland Security, and federal financial management entities.

The Judicial Branch. The Constitution establishes the Supreme Court of the United States and prescribes the statutory creation of inferior federal courts, but is silent regarding the continued functioning of the federal judiciary during or after an incapacitating catastrophe. Plans exist for the protection of the justices of the Supreme Court, but the details of these plans are not public information. In locales of the United States where federal courts could not function due to an emergency, the President might temporarily declare martial law and vest minimal trial court authority in military tribunals convened by commanding officers in the field dispatched to enforce federal law.¹⁶

The Future

Shortly after the September 11 terrorist attacks, political scientist Norman Ornstein questioned the adequacy of constitutional arrangements concerning the continuity of Congress in the event that many or most of its Members were lost as a result of similar such terrorist action. “A literal reading of the Constitution,” he wrote, “would cast doubt on whether Congress could even convene under those circumstances.” However, noting that, since the Civil War era, both houses of Congress had defined a working quorum “not as a majority of the overall membership of the House and the Senate but as a majority of those duly chosen, sworn and living,” Ornstein thought the situation might be complicated and made more problematic “if there were a substantial number of Members alive but incapacitated.” Moreover, he commented, even if these difficulties were overcome, “for Congress to operate under those circumstances for long — passing sweeping anti-terrorist laws, emergency appropriations and economic recovery measures — would tax its

¹⁵ See, for example, E.O. 13241-E.O. 13247, *Federal Register*, vol. 66, Dec. 21, 2001, pp. 66258-66272.

¹⁶ See 10 U.S.C. 332.

legitimacy, particularly if there were much greater partisan and regional differences among the surviving (and ambulatory) lawmakers than existed in the full House.”¹⁷

His solution — “to create a small, short-term task force of constitutional scholars and former lawmakers” to make recommendations — was realized with the Continuity of Government Commission, jointly created by the American Enterprise Institute and the Brookings Institution. In June 2003, this panel called for a constitutional amendment to give Congress the power to provide legislatively for the appointment of temporary replacements to fill vacant House seats after a catastrophic attack and to fill temporarily House and Senate seats that are held by incapacitated members. Other proposals included rules changes to ensure that Congress could be effectively reconvened after an attack, and to provide in advance for short-term appropriations for the executive branch if Congress is unable to meet.¹⁸

Although the 108th Congress, on February 13, 2003, had authorized (H.Con.Res. 1) members of the House and the Senate to assemble at a location outside of the District of Columbia whenever “the public interest shall warrant it,” further action on continuity matters was not immediate. Several measures were introduced, but only a few came to a vote. The House sought (H.Con.Res. 190) to establish a temporary joint committee to study and make recommendations concerning the continuity and authority of Congress during times of crisis. Later, it approved, on a 306-97 vote, legislation (H.R. 2844, as amended) to require the states to hold special elections to fill vacancies in the House not later than 45 days after the vacancies are announced by the Speaker in extraordinary circumstances. On June 2, however, it rejected, on a 353-63 vote, a proposed constitutional amendment (H.J.Res. 83) authorizing the temporary appointment of House Members, from a pre-established list, as a safeguard against the loss of a majority of Members due to death or incapacity. Senator John Cornyn, chairman of the Subcommittee on the Constitution, held a September 16 hearing on the findings and recommendations of the Continuity of Congress Commission and related proposals. He also introduced a bill (S. 1820) to authorize the states to implement such mechanisms as necessary to ensure the continuity of Congress in the event that one-fourth of either house are killed or incapacitated, and a proposed amendment to the Constitution (S.J.Res. 23) authorizing Congress to provide, by law, for the case of death or inability of members of either house in the event that one-fourth of the members of either house are killed or incapacitated, by declaring who shall serve until the disability is removed. The 108th Congress adjourned, however, with little progress on continuity matters.

¹⁷ Norman Ornstein, “What If Congress Were Obliterated? Good Question,” *Roll Call*, vol. 47, Oct. 4, 2001, p. 10.

¹⁸ Continuity of Government Commission, *Preserving Our Institutions: The Continuity of Congress* (Washington: May 2003), pp. 14, 18.