Continuity of Congressional Representation: Background and Issues for Congress

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SUMMARY

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Continuity of Congressional Representation: Background and Issues for Congress

Challenges to congressional operations have been posed in the past by a range of incidents. These motivate ongoing consideration of contingency planning options in Congress. In Congress, contingency planning efforts include options for the succession of congressional leadership or for filling vacancies resulting from changes of membership to ensure congressional representation. Much of the focus on Member replacement arises from potential mass vacancies in either chamber that might occur due to an attack or other interruption that results in wide-scale death of Members or their absence from the House or Senate due to injury, incapacitation, or disappearance. Of principle concern is the loss or unavailability of enough Members that the House or Senate might not be able to form the quorum required by the Constitution to conduct business. Historically, the House and Senate have exercised long-standing practices when confronted with the death of an individual Member. Where those procedures are well established, matters related to the capacity or availability of a Member to serve have been addressed by the House and Senate only on an ad hoc, case-by-case basis.

In the years following the terrorist attacks of September 11, 2001 (9/11), the House and Senate established several administrative and legislative responses to better ensure their ongoing operations. Both chambers expanded authorities of leaders to convene beyond the chambers or to recess in response to emergencies. The House established a provisional quorum, and Congress passed legislation requiring special elections in extraordinary circumstances following substantial vacancies in the House. The extent to which these matters were successfully addressed is a matter of disagreement. This is due in part to competing ideas of the practicality of many special elections to rapidly replace House Members to restore the House to a fully operational condition, and the constitutionality of practices for establishing a quorum in the House.

Some observers argue that the continuity of Congress concerns can be remedied only by amending the Constitution to allow for the rapid replenishment of vacant seats in the event of a significant loss of membership in either chamber. Another, less well-developed, area of concern is that post-9/11 efforts, as well as constitutional proposals offered in the early years of the Cold War and following 9/11, may overemphasize solutions to congressional vacancies while underemphasizing the challenges when incumbents may be missing or unable to carry out the duties of their office while remaining sitting Members. In its deliberations, Congress might consider that replacing Members in what would undoubtedly be among the most trying times for the institution and the Republic could be extraordinarily challenging. Incomplete processes that do not provide a quorate House or Senate, or that do so through means seen as illegitimate or otherwise suspect by voters or others, could delay a return to routine operations or call into question any actions of Congress following reconstitution.

Even with the establishment and implementation of robust response and reconstitution policies, a reconstituted Congress in which substantial numbers of new Members come together with surviving Members in either chamber would likely present a variety of new challenges. These might include Member education, orientation, and socialization and an influx of new congressional staff or returning staff in new roles. Coupled with the likely need to respond to the cause of an interruption, these organizational factors might have implications for the capacity of either chamber to function in the same manner as they did before the interruption.

There are several policy considerations that Congress might engage in future deliberations about the continuity of Congress. These may be substantial challenges, but they are likely essential to the development of a robust policy that ensures congressional continuity. At a minimum, consideration of the issues of incapacity might include a definition of Member incapacity and a timetable in which to address matters of Members who are incapacitated, missing, or absent.

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Challenges to congressional operations have been posed in the past two decades by a range of incidents. These include the terrorist attacks of September 11, 2001 (9/11), interruptions due to anthrax contamination, violence against Members of Congress and their staffs, the COVID-19 pandemic, weather-related events, routine changes in membership, and the availability of sitting Members in closely divided chambers. These concerns motivate ongoing consideration of contingency planning options in Congress.[1] Some of the concerns considered in the past two decades echo similar concerns considered by Congress during the early years of the Cold War.[2]

In contemporary settings, contingency planning incorporates a broad array of planning processes and preparedness capacities, including law enforcement support, basic emergency preparedness, and recovery plans leading to the resumption of normal operations. In Congress, contingency planning efforts include the options for the succession of congressional leadership or for filling vacancies resulting from changes of membership to ensure congressional representation. Much of the focus on Member replacement arises from vacancies in either chamber that might occur due to an attack or other interruption resulting in wide-scale death of Members or their absence from the House or Senate due to injury, incapacitation, or disappearance. Of principle concern is the loss or unavailability of enough Members that the House or Senate might not be able to form the quorum required by the Constitution to conduct business.

More recently, concerns have been raised about the potential effects of individual vacancies that typically occur throughout the course of a Congress. Issues related to individual departures may arise due to the narrow party majorities in the House and Senate in the past few Congresses. Regardless of the reasons, it may be the case that following an incident in which Members of Congress are killed, incapacitated, or missing, a delay in seating new Members, or identifying sitting Members who might continue to serve, could adversely affect the ability of Congress to carry out its constitutional responsibilities.

In the years following the terrorist attacks of 9/11, the House and Senate established several administrative and operational responses to better ensure their ongoing operations. The extent to which these matters were successfully addressed is a matter of disagreement. It appears that the most significant challenges could come in response to a potential mass casualty incident in which substantial numbers of Members are killed, disappear, or are rendered incapacitated. Some note that concerns arising from a potential mass death scenario mostly affect the House, which requires election of all of its Members, but five states require special elections to fill Senate vacancies, accounting for as much as 10% of Senate membership. An incident resulting in mass incapacitation and disappearance could have similar effects on either chamber. Due to continued concerns about substantial vacancy, disappearance, or incapacitation of Members following a disruption, there remains among some observers a perceived lack of widely accepted solutions that are viewed as reliable and sufficient to ensure that the House and Senate can continue to

[1] See, generally, U.S. Congress, House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, *Continuity of Congress in the Wake of a Catastrophic Attack*, 111th Cong., 1st sess., July 23, 2009 (Washington: GPO, 2009), https://www.govinfo.gov/content/pkg/CHRG-111hhrg51227/html/CHRG-111hhrg51227.htm; and U.S. Congress, House Select Committee on the Modernization of Congress, *Congressional Continuity: Ensuring the First Branch Is Prepared in Times of Crisis*, hearings, 117th Cong., 2nd sess., April 22, 2022, https://www.youtube.com/watch?v=AZ5E4ry1aLw.

[2] Concerns about the use of nuclear weapons, which animated the greatest disquiet during the Cold War, have arisen again in the current period of contingency planning. See S.Res. 268 and H.Res. 562, 118th Cong.; and Jim Sciutto, "Exclusive: US Prepared 'Rigorously' for Potential Russian Nuclear Strike in Ukraine in Late 2022, Officials Say," CNN, March 8, 2024, https://www.cnn.com/2024/03/09/politics/us-prepared-rigorously-potential-russian-nuclear-strike-ukraine/index.html.

carry out their constitutional responsibilities following a wide variety of potential operational interruptions. This is due in part to competing ideas of the practicality and constitutionality of post-9/11 arrangements to rapidly replace House membership to achieve a fully operational House. Further, constitutional proposals offered during the Cold War and after 9/11 may overemphasize solutions to congressional vacancies while underemphasizing the challenges of seats where the incumbents may be missing or unable to carry out the duties of their office while remaining sitting Members.

Congressional Policy and Administrative Responses

During the years following the 9/11 attacks, several legislative and administrative efforts were made to address the challenges that could result from a variety of operational interruptions. Most discussion centered on the potential need to rapidly replace Members of the House to ensure the House could continue to operate until special or regular elections could be held. There were also some operational changes in the House and Senate. These include the following:

- House and Senate efforts to enhance existing emergency response capacities.
- House authority to install an acting Speaker pro tempore if the Office of Speaker is vacant.
- Changes to recess and convening authorities in the House and Senate.

House and Senate Emergency Planning

Administrative planning by congressional officials began pursuant to a joint bipartisan leadership directive to the U.S. Capitol Police Board. More than a year before the 9/11 attacks, the Board was directed by the leaders of the House and Senate to "develop and manage" a "comprehensive Legislative Branch emergency preparedness plan." To facilitate this effort, the board was to work "with the Attending Physician and the Chief, US Capitol Police [USCP], and in coordination with the Officers of the Senate and House"[3] to develop "an integrated architecture which will address all hazards which could impede the continuity of essential Legislative Branch functions." According to the directive, this integrated architecture was to include "at a minimum, emergency preparations, response, mitigation and stabilization activities, and recovery operations."[4]

Appointing a Speaker Pro Tempore

At the beginning of the 108th Congress (2003-2004), the House established a requirement in its rules that the Speaker deliver to the Clerk of the House a list of Members in the order in which each would serve as Speaker pro tempore in the event the Office of Speaker was vacant. A designated Member would "act as Speaker pro tempore until the election of a Speaker or a Speaker pro tempore. Pending such election, the Member acting as Speaker pro tempore may exercise such authorities of the Office of Speaker as may be necessary and appropriate to that end." The rule states that a vacancy in the speakership "may exist by reason of the physical inability of the Speaker to discharge the duties of the office."[5] The rule does not specify what

[3] House officers include the Clerk, Sergeant at Arms (HSAA), Chief Administrative Officer (CAO), and Chaplain. Senate officers include the Secretary of the Senate and the Sergeant at Arms and Doorkeeper (SSAA).

[4] Trent Lott (then Senate Majority Leader), J. Dennis Hastert (then Speaker of the House), Thomas A. Daschle (then Senate Minority Leader), and Richard A. Gephardt (then House Minority Leader), "Directive to the United States Capitol Police Board," September 6, 2000.

[5] House Rule I, cl. 8(b)(3).

might constitute "physical inability," but this appears to be the only instance in which the House identifies a specific manner of incapacity and specifies action that could change a role of a Member of the House in response to their potential incapacity.

In the event of a mass casualty event, it is not clear what actions the House might take if every Member on a Speaker's list is unavailable to assume the role of Speaker pro tempore.

Recess and Convening

The House and Senate adopted changes to their recess and convening authorities to permit emergency recesses. With the adoption by the House of H.Res. 5 establishing the rules for the 108th Congress, the Speaker and chair of the Committee of the Whole were granted emergency recess authority when either is notified of an imminent threat to the House's safety. Additionally, the Speaker was authorized to convene the House in a place at the seat of government other than the Hall of the House, when warranted, in his opinion, by the public interest.[6]

The Senate in 2004 adopted provisions authorizing the presiding officer of the Senate to suspend any proceeding of the Senate, including a roll call vote or a quorum call, and declare a recess or adjournment of the Senate whenever he or she has been notified of an imminent threat. When the Senate is out of session, the Majority and Minority Leaders, or their designees, acting jointly, may modify any order for the time or place of the convening of the Senate when, in their opinion, such action is warranted by intervening circumstances.[7]

Convening Away from the Seat of Government

During the 108th Congress, both chambers agreed to H.Con.Res. 1 regarding consent to assemble outside the seat of government. The measure authorized the Speaker of the House and the Majority Leader of the Senate, or their respective designees, acting jointly after consultation with the Minority Leader of the House and the Minority Leader of the Senate, to convene the House and Senate at a place outside the District of Columbia whenever, in their opinion, the public interest warranted it. Similar measures, each designated as H.Con.Res. 1, were introduced in the House at the beginning of the 109th-118th Congresses. These were adopted by the House and sent to the Senate, which took no further action.

Member Replacement

The rapid identification of Members killed, incapacitated, or missing, and the implementation of established procedures to ensure a quorum of Members in each chamber, are linchpins in any effort by either chamber to recover and reconstitute following a mass casualty incident. Historically, the House and Senate have exercised long-standing practices when confronted with the death of a Member. Where procedures regarding the death of a Member of Congress are well established,[8] matters related to the capacity or availability of a Member to serve have been addressed by the House and Senate only on an ad hoc, case-by-case basis.

[6] House Rule I, cl. 12(b)(1); cl. 12(d).

[7] S.Res. 296, 108th Cong.

[8] CRS Report RL34347, *Members of Congress Who Die in Office: Historic and Current Practices*.

In the House, a provisional quorum was incorporated into House rules, and legislation authorizing special elections in extraordinary circumstances was enacted to better equip the House to reconstitute its operations more quickly after an interruption that causes mass vacancies.[9]

Member Death

Prior to the 9/11 attacks, congressional practice regarding disruptions of membership in either chamber was dependent on the type of disruption. The confirmed death of an individual Member in either chamber creates an automatic vacancy, which could be filled under existing procedures.[10] In the House, the existence of a vacancy is communicated to the appropriate state, and a special election to fill the seat is held pursuant to state law. The laws of most states authorize governors to make temporary appointments to the Senate, with some exceptions.[11]

Incapacitated and Missing Members

The matter of incapacitation or missing Members has arisen infrequently before either chamber in the past century. In the House, it appears that the practice regarding an incapacitated Member is that the seat to which they were elected is formally declared vacant only if that person is reelected and does not appear to be seated for a new Congress due to incapacity or the presumption of death.[12]

In the Senate, illness and incapacity are sometimes addressed by the voluntary departure of ailing Senators from leadership and committee positions, and sometimes by Senate action to remove Senators from those positions.[13] The Senate has taken no action regarding an incapacitated Senator's seat. As a result, some incapacitated Senators have stayed in office for substantial periods of time.[14]

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[9] 2 U.S.C. 8(b).

[10] See, generally, CRS In Focus IF11722, *House of Representatives Vacancies: How Are They Filled?*; and CRS In Focus IF11907, *U.S. Senate Vacancies: How Are They Filled?*

[11] Exceptions include Kentucky, North Dakota, Rhode Island, Oregon, and Wisconsin, where the governor is not permitted to make interim appointments. Any Senate vacancy must be filled by general or special election depending on the timing of the vacancy and the specific law of each state. The governor of Connecticut may appoint an individual to fill a Senate vacancy from that state if it is one of 50 Senate vacancies. See Laws of Connecticut, Chapter 146, Section 9-211, https://www.cga.ct.gov/current/pub/chap_146.htm#sec_9-211.

[12] In the House, Rep. Gladys Noon Spellman of Maryland suffered cardiac arrest on October 21, 1980, and never regained consciousness. On February 24, 1981, the House adopted a resolution declaring a vacancy due to Spellman's "absence and continuing incapacity." H.Res. 80, 97th Cong. A new Member representing the district took office 210 days after Rep. Spellman was stricken. On October 16, 1972, Rep. Hale Boggs of Louisiana and Rep. Nick Begich of Alaska were lost in a plane crash in Alaska. Their bodies were never found. Rep. Begich's seat was declared vacant following the determination that he was presumed dead, and a new Representative was elected and took office 141 days after the plane crash. Rep. Boggs was declared presumed dead in a separate proceeding, but the seat he represented was declared vacant by the House on the first day of the 93rd Congress (1973-1974). H.Res. 1, 93rd Cong. Following a Louisiana special election, a new Representative took the seat 155 days after the accident.

[13] See U.S. Senate, "Earle C. Clements: A Featured Biography," https://www.senate.gov/senators/FeaturedBios/Featured_Bio_ClementsEarle.htm; S.Res. 261, 92nd Cong., "Making Certain Committee Assignments to Certain Members of the Minority"; S.Res. 492, "A Resolution Amending the Majority Party's Membership on the Select Committee on Ethics for the Remainder of the 110th Congress"; David Rogers and John Bresnahan, "Byrd Will Voluntarily Give Up Chairmanship," *Politico*, November 7, 2008, https://www.politico.com/story/2008/11/byrd-will-voluntarily-give-up-chairmanship-015409.

[14] Sen. Carter Glass of Virginia endured poor health for much of his life and was absent from the Senate beginning in the mid-winter of 1942. At the time of his death on May 28, 1946, he had been absent from the Senate for a period of at least 1,580 days. Similarly, Sen. Karl Mundt of South Dakota suffered a stroke on November 23, 1969, and did not (continued...)

While the duration of absence or incapacity might be acute following a mass casualty event, in current practice in both chambers, it appears that the only institutional tool currently available to address living, but absent, Members before the next general election may be expulsion from either chamber.

House Provisional Quorum

During the 109th Congress (2005-2006), the House adopted rules to establish a provisional quorum after catastrophic circumstances,[15] formally codifying long-standing House practice that a quorum is a majority of the Members elected, sworn, and living.[16] In practice, the Speaker or Speaker pro tempore typically announces a revised whole number of the House considering changes in the membership of the House.

Similar questions confronting the House may also arise if a sufficient number of Senators survive but are incapacitated, or if their whereabouts are unknown, and the Senate cannot meet with a quorum to do business. The Senate in 1864 resolved that a quorum in that chamber consists of a majority of the Senators duly chosen. In 1877, the Senate revised its rules, providing that a quorum should consist of a majority of Senators "duly chosen and sworn."[17]

House Special Elections in Extraordinary Circumstances

In addition to House rules changes, during the 109th Congress legislation was enacted to require states to hold special House elections when extraordinary circumstances cause mass vacancies in the House. The act, 2 U.S.C. 8(b), provides that extraordinary circumstances exist following an announcement by the Speaker of the House that vacancies in the chamber have exceeded 100 seats. States in which a vacancy exists in its House representation are then required to hold a special election within 49 days, subject to some exceptions.[18]

States are required to (1) make a determination of the candidates who will run in the special election not later than 10 days after the vacancy announcement by authorized political parties, or by any other method the state considers appropriate; (2) ensure that absentee ballots are transmitted to uniformed services voters and overseas voters not later than 15 days after the vacancy announcement; and (3) accept and process any otherwise valid ballot from an absent uniformed services voter or an overseas voter, as long as the ballot is received not later than 45 days after the state transmits the ballot to the voter.[19]

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return to the Senate. More than two years later, he was removed from committee assignments, but he remained a sitting Senator until his term ended, 1,137 days later, on January 3, 1973. "Elder Statesman," *Time*, February 19, 1945, and "Mundt, Ill, Taken Off Committees," *Chicago Tribune*," February 4, 1972, p. 17.

[15] House Rule XX, Cl. 5(c).

[16] House Rule XX, Cl. 5(c)(7)(B). In 1906, the House established the precedent that "a quorum consists of a majority of those Members chosen, sworn, and living, whose membership has not been terminated by resignation or by the action of the House." See U.S. Congress, House, Asher C. Hinds, *Precedents of the House of Representatives of the United States* (hereinafter, *Hinds*), vol. IV (Washington: GPO, 1907), p. 64.

[17] See *Hinds*, pp. 64-65. No action has been taken on the matter of incapacitation of a large number of Senators.

[18] The 49-day requirement would be waived if a regularly scheduled general election or another special election for the office involved is scheduled to be held within 75 days of the Speaker's announcement.

[19] See U.S. Congress, House, *Continuity in Representation Act of 2005, Report to Accompany H.R. 841*, 109th Cong., 1st sess., Part I (Washington: GPO, 2005), https://www.congress.gov/109/crpt/hrpt8/CRPT-109hrpt8.pdf; and U.S. Congress, House, *Report to Accompany H.R. 2985*, 109th Cong., 1st sess., H.Rept. 109-139.

Are Current Contingency Procedures Sufficient?

Current contingency procedures, including the provisional quorum and expedited special elections, have been controversial since their adoption, with various observers suggesting that they face a number of concerns. Regarding the provisional quorum, questions of constitutionality might arise. With special elections, concerns arise about the ability of states to hold special elections in extraordinary circumstances in time frames established by Congress. Some concerns might arise regarding the appointment of Speakers pro tempore in circumstances where none of the Members on the list are available. Finally, concerns might arise from underemphasis on the challenges posed by Member incapacity or disappearance following an incident.

Unresolved policy questions, combined with a lack of assurance that the interventions might ensure the continued operations of the House or Senate, might suggest to some that the interventions may have been insufficient to fully address the policy environment and better ensure the continuity of Congress and that reconsideration of existing interventions may need to occur.

Those who support the adjustment of the quorum and the enactment of law to require special elections in extraordinary circumstances believe those provisions afford the House sufficient institutional protections. Some critics argue that those actions are insufficient. The critics argue that holding special elections to seat new Representatives up to seven weeks after an announcement of extraordinary circumstances could deprive the nation of a functional, broadly representative legislative response at a time of great national challenge.[20]

During consideration of the measure regarding special elections, concern was expressed that a short period could affect the quality of the administration of a special election and could raise questions about how effectively all potential voters (including overseas and military voters in particular) could participate.[21] This arguably might raise concerns among the public about the adequacy of special elections or the legitimacy of actions taken by a Congress filled with people who arrived through atypical processes. Finally, the 49-day deadline specified in statute may be difficult to attain based in part on the duration of recent special elections.

House Special Elections Since 2002

Since September 28, 2002, which encompasses vacancies affecting the 108th Congress (2003-2004) to the present, 113 vacancies have occurred in the House of Representatives due to the

[20] Thomas E. Mann and Norman J. Ornstein, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track* (Oxford: Oxford University Press, 2006), pp. 200-207; and Avi Klein, "Death Wish," *Washington Monthly*, November 1, 2006, pp. 19-22.

[21] Other concerns included relatively short campaigns that might leave citizens unable to make informed decisions about candidates. In addition, if several states were attacked, or a natural occurrence caused widespread damage or necessitated quarantine measures, it might be difficult to hold elections in the time frame specified by the statute. See discussions in U.S. Congress, Senate Committee on the Judiciary, *Ensuring the Continuity of the United States Government: The Congress*, hearings, 108th Cong., 1st Sess., S.Hrg. 108-701, September 9, 2003 (Washington: GPO, 2003), pp. 22-24, 26-41, 86-100, https://www.govinfo.gov/content/pkg/CHRG-108shrg96926/html/CHRG-108shrg96926.htm. These concerns were revisited in a 2022 House hearing; see statement of Doug Lewis in U.S. Congress, House Select Committee on the Modernization of Congress, *Congressional Continuity: Ensuring the First Branch is Prepared in Times of Crisis*, hearings, 117th Cong., 2nd sess., April 6, 2022, https://www.youtube.com/watch?v=AZ5E4ry1aLw. A recent study provides maps of potential electoral vulnerabilities due to natural and human-made threats and states' capacities to respond. See National Council of State Legislatures, "Election Emergencies Happen," February 4, 2021, https://storymaps.arcgis.com/stories/5c12e057a6db45fa86968d1b01de5d5c.

death, resignation, or expulsion of a Member; 110 have been filled by special election.[22] The average period of vacancy between the outgoing Member's departure and the special election for these 110 contests is 136 days. Of the 110 special elections that have been held, Members were sworn into the House in an average of 145 days.

Four (3.7%) of the special elections took place within the 49-day deadline established for special elections in extraordinary circumstances specified in statute.[23] In those cases, it appears that two Members announced their intentions to resign more than seven months and more than two months, respectively, before they departed office. The vacancy due to the resignation of another Member was filled in a special election that occurred at the same time as a scheduled general election for the next Congress soon after the outgoing Member resigned.

House Provisional Quorum Concerns

Supporters of the provisional quorum argue that the rule is essential to ensure that the House can meet with a quorum, even when many Members are dead or otherwise unavailable. Those who oppose current House practices regarding provisional quorum procedures argue that, contrary to long-standing House practice, quorum requirements are based on the number of seats in either chamber and not on the number of Members present to conduct business. Article I, Section 5, clause 1 of the Constitution states, in part, that "a majority of each [chamber] shall constitute a Quorum to do Business," but does not specify whether the majority is based on Members or the number of seats authorized for the chamber. Observers raising constitutional concerns believe that if more than half of the 435 seats in the House, or more than half of the 100 seats in the Senate, were vacant because the Members who held them were killed or were unable to serve because they were incapacitated or missing in the aftermath of an incident, any actions taken by the remaining Members in either chamber could be seen as potentially illegitimate and arguably unconstitutional.[24]

Actions in the House have attempted to enable the chamber to withstand a range of interruptions that could kill or incapacitate large numbers of Members, while supporting the principle that membership in the chamber is gained only through election by the people. In the Senate, most vacant seats could be replenished in a relatively brief period through appointments, assuming state-based authorities were available to make such appointments.

Speaker Pro Tempore Concerns

House Rule I, cl. 8(b)(3), requires the Speaker to designate in writing several Members who would serve as Speaker pro tempore in the event of vacancy in the Office of Speaker, or the incumbent's physical inability, until a successor Speaker or Speaker pro tempore could be elected by the House. Relying on established rules and past practices, it is arguable that a list of any number of potential Speakers Pro Tempore is sufficient, so long as at least one of those Members is available and able to serve after whatever incident disrupts the House. Arguably, the House

[22] The data include one occasion affecting the 9th District of North Carolina, where a vacancy resulted due to a notification from North Carolina that required a special election to resolve.

[23] 2 U.S.C. 8.

[24] American Enterprise Institute, *The Continuity of Congress*, April 2022, p. 9, https://www.aei.org/wp-content/uploads/2022/04/The-Continuity-of-Congress.pdf?x85095; and John Bryan Williams, "How to Survive a Terrorist Attack: The Constitution's Majority Quorum Requirement and the Continuity of Congress," *William and Mary Law Review*, vol. 48 (2006), pp. 1025-1090.

would designate the new Speaker pro tempore and continue to carry out its duties. If none of those on the list are available, the ability of the House to act may become more complicated.

When the speakership is vacant, the first order of business for the House is to elect a Speaker. This most typically occurs on the first day a Congress convenes. In contingent circumstances, if the House can identify a quorum composed of surviving, sitting Members, it might be the case that the House could elect a new Speaker or Speaker pro tempore, who could then execute the duties of the Office of Speaker, and the House could carry on with its business.

Less clear is what might happen if a quorum cannot be achieved and if the number of Members who appear in the House is less than the number of absences due to missing or incapacitated Members. In those circumstances, arguably the House could not conduct business, whether electing a new Speaker or considering legislation.

Member Incapacity and Missing Status: Incomplete Attention?

In post-9/11 efforts to consider the consequences on House and Senate membership, most of the attention has fallen on how to address vacancies caused by the death of a Member. This may be understandable, due to established practices regarding deceased members as well as the clarity provided to the House and Senate about a need to act when a Member dies. At the same time, a large number of incapacitated or missing Members could contribute to a potential delay in reestablishing a quorum to do business in either chamber. Further, a continued absence of consideration of policy approaches to address incapacity and disappearance might have the effect of producing incomplete policy responses. Consequently, in the event of a substantial number of missing or incapacitated Members following an interruption, the House and Senate may be left with no more effective a path to reconstituting their chambers and returning to more normal operations than that which is currently available.

As a result, some observers argue that the policies adopted or enacted since 2001 may not provide adequate protection against a sudden loss, whether permanent or of temporary or indeterminant duration, of membership in either chamber, and may raise constitutional and implementation concerns. They believe that these concerns can be remedied only by amending the Constitution to allow for the rapid replenishment of vacant seats in the event of a significant loss of membership in either chamber.

Constitutional Approaches

Supporters of proposals to amend the Constitution to allow prearranged, temporary replenishment of congressional membership contend that the possibility of catastrophic losses in either chamber warrants taking precautions to ensure that Congress could continue to carry out its constitutional responsibilities and operate effectively during a national emergency.[25] Proponents of such measures assert that allowing for advance directives for filling vacancies in congressional membership could help to ensure each state's representation in Congress if a significant number of Members in either chamber were suddenly killed. From their perspective, establishing provisions for an expedited response before an incident occurs could also demonstrate the country's determination to continue a representative form of government, consonant with their interpretation of the constitutional requirements of a quorum in both chambers, even in extraordinary times. Further, providing for a predetermined mechanism to fill vacancies could

[25] Rachida Mecheri, Bryce Robins, and Benjamin Roth, "Ensuring Continuity of Congress," *Rule of Law Clinic*, vol. 3 (August 2022), https://ir.lawnet.fordham.edu/rule_of_law_clinic/3.

eliminate the need to hold special expedited House elections, as mandated by current law, under potentially difficult conditions.

Opponents of continuity planning through constitutional amendments argue that the current approaches to address congressional continuity—including rules changes in each chamber, statutory procedures to expedite election to fill large numbers of vacant seats in the House, and the ability to fill most vacant Senate seats by appointment—are sufficient.

Further, opponents could maintain that resorting to temporary appointments might contribute to unrest or fear among the nation's citizens by casting doubt upon Congress's ability to respond to crises. In addition, they might point out that if such an automatic Member replenishment process were ever to be invoked, it could create two classes of Members: those who became Members through the crucible of the electoral process, and those who were part of a cohort that was appointed. Under most proposals, a sudden shift in membership in either chamber could result in a change in the legislative agenda, or majority control, although the circumstance necessitating the use of temporary members would arguably determine the nature of work a newly replenished Congress might consider. Nevertheless, the actions of the short-term appointees could have long-term effects for national policy and Congress as an institution, and perceptions of the legitimacy of its actions among the people.

Finally, opponents could argue that allowing the temporary appointment of indirectly elected or appointed alternative Representatives would depart from the basic tenet of a House kept close to the people, where each Member has taken his seat only as a result of direct election by the voters in the Member's district.

Proposed Constitutional Amendments

Several proposed constitutional amendments to address the consequences of catastrophic losses of congressional membership have been introduced since the 9/11 attacks. During another period of uncertainty, 1946 to 1962, similar measures were proposed. In current times, the perceived need for such measures is based on the possibility that a range of disabling incursions target Congress or the Washington, DC, region or otherwise impair the ability of Congress to meet. Earlier, the emergence of the Cold War between the United States and its allies and the Soviet Union and its allies, the successful testing of an atomic bomb by the Soviets in September 1949, and subsequent claims that the Soviet Union might be stockpiling atomic weapons drew considerable interest among some Members of Congress to the issue of filling congressional vacancies in the event of a national emergency.

Proposed Amendment, 118th Congress

On March 7, 2024, Representative Derek Kilmer of Washington submitted H.J.Res. 118, proposing an amendment to the Constitution of the United States to temporarily fill vacancies in the House of Representatives to further the continuity of Congress.

The proposed amendment would require a newly elected Representative to provide the House with a list of at least five designees to take their place in the House if they die prior to the expiration of their term of office. Under the amendment, in the event of the death of a Representative, the state governor shall select an individual from the deceased Representative's list not later than 10 days after the Representative's death, and that individual would serve until another Representative is elected by special election. During their time in the House, an appointed individual shall be treated as a Representative in the House and shall submit a list of replacements in the event of their own death.

H.J.Res. 118 was referred to the House Committee on the Judiciary on March 7, 2024. No further action has been taken as of the time of this writing.

Post-9/11 Proposals, 2001-2009

From the 107th Congress (2001-2002) through the 111th Congress (2009-2010), 13 proposed constitutional amendments providing for temporarily filling House vacancies or selecting successors in case of the disability of a significant number of Representatives were introduced.[26] During that period, hearings were held in the House and Senate. On one occasion, the House Committee on the Judiciary adversely reported a proposal to the House, which was subsequently defeated on the House floor.[27] A summary of proposed constitutional amendments related to the continuity of Congress introduced since 2001 can be found in **Table 1**.

Cold War-Era Proposals, 1945-1963

More than 30 proposed constitutional amendments, which provided for temporarily filling House vacancies or selecting successors in case of the disability of a significant number of Representatives, were introduced from the 79th Congress (1945-1947) through the 87th Congress (1961-1963).[28] During that period, hearings were held in the House and Senate. On three occasions, proposals were passed on the Senate floor. One proposal was considered by the House, which struck continuity language before passing the rest of the proposed amendments.

The first proposal, S.J.Res. 39, was amended and passed by a vote of 70-1 on June 4, 1954.[29] It authorized governors to make temporary appointments to the House after notification of vacancies and "whenever by reason of the occurrence of acts of violence during any national emergency or national disaster, the total number of vacancies in the House of Representatives shall exceed one hundred and forty-five." The House took no action on the measure.

The second proposal, S.J.Res. 8, was passed by a vote of 76-3 on May 19, 1955.[30] It provided that when the number of vacancies in the House was greater than one-half of the authorized membership, for a period of 60 days a state governor would have authority to make temporary appointments to fill any vacancies in the representation from his state in the House of Representatives. S.J.Res. 8 was referred to the House Judiciary Committee; no further action was taken.

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[26] The proposals are as follows: 107th Cong. (2001-2002), H.J.Res. 67, H.J.Res. 77, and S.J.Res. 30; 108th Cong., 2003-2004, H.J.Res. 77, H.J.Res. 83, H.J.Res. 89, H.J.Res. 90, H.J.Res. 92, and S.J.Res. 23; 109th Cong. (2005-2006), H.J.Res. 26; 110th Cong. (2007-2008), H.J.Res. 56 and H.J.Res. 57; and 111th Cong. (2009-2010), H.J.Res. 52.

[27] H.J.Res. 83, 108th Cong., "Proposing an Amendment to the Constitution of the United States Regarding the Appointment of Individuals to Fill Vacancies in the House of Representatives."

[28] The proposals are as follows: 79th Congress (1945-1947), H.J.Res. 362; 80th Cong. (1947-1949), H.J.Res. 34 and S.J.Res. 161; 81st Cong. (1949-1951), H.J.Res. 48; 82nd Cong. (1951-1953), H.J.Res. 155, H.J.Res. 166, S.J.Res. 59, and S.J.Res. 75; 83rd Cong. (1953-1955), H.J.Res. 135, H.J.Res. 159, H.J.Res. 244, H.J.Res. 507, S.J.Res. 39, and S.J.Res. 150; 84th Cong. (1955-1957), H.J.Res. 50, H.J.Res. 295, H.J.Res. 322, H.J.Res. 325, H.J.Res. 475, and S.J.Res. 8; 85th Cong. (1957-1959), H.J.Res. 52, H.J.Res. 105, and S.J.Res. 157; 86th Cong. (1959-1961), H.J.Res. 30, H.J.Res. 519, S.J.Res. 39, and S.J.Res. 85; 87th Cong. (1961-1963), H.J.Res. 29, H.J.Res. 74, H.J.Res. 91, H.J.Res. 508, H.J.Res. 893, and S.J.Res. 123.

[29] "Proposed Amendment to the Constitution to Enable Congress to Function Effectively in Time of Emergency or Disaster," Debate and Vote in the Senate on S.J.Res. 39, *Congressional Record*, vol. 100, June 4, 1954, pp. 7658-7669.

[30] "Filling of Temporary Vacancies in the Congress Caused by Disaster," Debate and Vote in the Senate on S.J.Res. 8, *Congressional Record*, vol. 101, May 19, 1955, pp. 6625-6629.

The Senate passed a third proposed constitutional amendment, S.J.Res. 39, on February 2, 1960, by a vote of 70-18.[31] It authorized governors to fill vacancies in the House "on any date that the total number of vacancies ... exceeds half of the authorized membership." The governor's appointive authority would have been limited to 60 days, and the appointee would have served until a successor was elected in a special election. In House action on the measure, continuity provisions were struck, but other proposals in the legislation were passed.

Amendment Proposal Contents

Many of the constitutional proposals regarding the continuity of Congress introduced since 2001 and between 1946 and 1962 have been designed to address two or more of the following issues: the conditions under which congressional vacancies would be filled, the number or percentage of vacancies needed to invoke implementation, the selecting agents, and the duration of the temporary appointments.

Some proposals would have directed state legislatures to meet and select persons to take the place of such Senators or Representatives. Some of the earlier proposals required a notification procedure in which the President, the Speaker of the House, or some other specified official would be required first to declare that a national emergency or disaster existed and that a specified number of the seats in the House or Senate were vacant. Governors would then make temporary appointments until elections could be held. The notification process raised a number of questions related to the definition of terms and the establishment of procedures. To address those concerns, later measures would have authorized governors to make temporary appointments to the House when vacancies in the House exceeded half of the authorized membership. Some post-9/11 proposals limited the scope of potential appointees to those specified in advance by a Representative or those who were elected as an alternate representative.

While most proposed constitutional amendments addressed vacancies, only a few addressed disability, and it appears none addressed the status of missing Members. Of those proposed amendments that addressed disability, none appear to define disability or circumstances in which disability provisions could be established or applied. As with expectations related to the provisional quorum and expedited special election provisions, it is unclear how a constitutional amendment addressing conditions under which vacancies could be filled by temporary Members, but not absences due to disability or disappearance, would resolve challenges facing Congress.

Potential Considerations and Options for Congress

It appears that with regard to the consideration of the continuity of Congress, existing procedures and processes, as well as proposals to amend the Constitution, may be insufficient to address a mass casualty event affecting Members of the House and Senate. Some observers argue that the U.S. Capitol and Congress have been targeted in the past and that they continue to be targets of high social, political, and symbolic significance, so the need to engage congressional continuity planning is still necessary. If Congress believes that no further action is needed to ensure the continuity of congressional representation and operations, it might continue the status quo. Otherwise, Congress may explore additional statutory or constitutional approaches to address issues related to congressional representation and operations in contingent circumstances. In doing so, it would face consideration of the balance between the demands of representative government, on the one hand, and what some perceive as a need to assure that the legislative

[31] "Filling of Temporary Vacancies in the House of Representatives," *Congressional Record*, vol. 106, January 26, 1960-February 2, 1960, pp. 1320, 1380, 1515, 1528, 1598, 1619, 1715, 1744, 1749, and 1765.

branch maintains the capacity to quickly carry out its constitutional responsibilities in challenging circumstances, on the other.

Moving forward, Congress might consider that replacing Members in what would undoubtedly be among the most trying times for the institution and the Republic could be extraordinarily challenging. Incomplete processes that do not provide a quorate House or Senate, or that do so through means seen as illegitimate or otherwise suspect by voters or others, could delay a return to routine operations or call any actions of Congress following reconstitution into question.

Even with the establishment and implementation of robust response and reconstitution policies, a reconstituted Congress in which substantial numbers of new Members come together with surviving Members in either chamber would likely present a variety of new challenges. These might include Member education, orientation, and socialization and an influx of new congressional staff or returning staff in new roles. Coupled with the likelihood of responding to the cause of an interruption, these organizational factors might have implications for the capacity of either chamber to function in the same manner as it did before the interruption.

There are several policy considerations that Congress might engage in future deliberations about the continuity of Congress. Among these is work to establish policy definitions of incapacity and missing status. As described, these are significant challenges, but likely essential to the development of a robust policy that best ensures congressional continuity. Consideration of the issues of incapacity might include a definition of incapacity and a timetable in which to determine the status and availability of Members who are missing.

Regarding incapacity, there are medical, legal, and other policy definitions and related processes of determination, some of which vary by state. None of these appear well suited to adaptation to the unique needs of Congress to rapidly reconvene following an incident. In congressional hearings, during discussions among officials who might participate in such determinations, there was little agreement as to how an incapacity definition might be developed for Congress or which entities might be responsible for making determinations.[32] Among the things Congress might consider are conditions or circumstances of temporary or permanent incapacity and mechanisms to declare the end of temporary incapacity. In addition to working through options about which entities or officials might be involved in deciding incapacity, it might be necessary to consider who might engage those entities if a Member is unable to personally participate in the process, and by what process they might be selected and made known to the House or Senate.

Missing status appears to be governed by state laws, which vary. The House or Senate might consider developing policies and practices applicable to Members' missing status that incorporate state procedures, or they might consider developing standards that apply solely to a missing Member's seat in Congress.

[32] U.S. Congress, House Committee on Rules, *Continuity of Congress: An Examination of the Existing Quorum Requirements and the Mass Incapacitation of Members*, 108th Cong., 2nd sess., April 29, 2004 (Washington: GPO, 2004), pp. 95-383.

Table 1. Continuity of Congressional Representation: Measures Introduced to Amend the Constitution Since 2001

Measure, Congress	Circumstances	Extent of Vacancy or Incapacity	Selecting Agents	Implementation	Duration of Appointment
H.J.Res. 118, 118th Congress	Death of a Representative	One	New Representative designates at least five successors	If Representative dies, state chief executive chooses someone on the list	Until new Representative is chosen in special election
H.J.Res. 52, 111th Congress H.J.Res. 56, 110th Congress	Death, incapacity, or disappearance of a significant number of Members in either chamber	"Significant number" and "incapacity" are not defined	Congressional candidates choose three designees who stand for election with the candidates	The Speaker, Vice President, or President Pro Tempore would fill vacancies in their respective chambers with ranked individuals from the most recent list of designees provided	Until a special election is held to elect a new Member in the case of a vacancy, or until a declaration that a Member's inability no longer exists, or until a Member records his presence in the chamber
H.J.Res. 57, 110th Congress	A Member who dies, resigns, is expelled, or is declared by his chamber to be unable to discharge his office; or a Member-elect who fails to qualify	One Member or Member-elect	An alternate elected with each Representative and Senator	When an individual vacancy occurs, or when either chamber is unable to establish a quorum for three days	Until a special election is held to elect a new Member
H.J.Res. 26, 109th Congress	Death or inability of Member to discharge the powers and duties of office	Unspecified, but provisions applied to individual Members	Three ranked alternates elected with each Representative and Senator	Death of a Member: The first alternate would become the acting member until a new Member is elected Incapacity: The Member, or the three alternates by majority vote, could declare the Member's inability	Unspecified, but a Member could revoke a declaration of inability and return to office

Measure, Congress	Circumstances	Extent of Vacancy or Incapacity	Selecting Agents	Implementation	Duration of Appointment
H.J.Res. 77 and H.J.Res. 83, 108th Congress	Death or incapacity of a majority of the House membership, or declaration by the House of extraordinary circumstances	Death or incapacity of a majority of the House membership	Representatives-elect provide state governors with a list of at least two potential successors	Governors appoint replacement members following House action	Until a special election is held to elect a new Representative
H.J.Res. 89, 108th Congress	Unspecified	Vacancy in the majority of the number of seats in the House	State legislatures or governors	State legislatures or governors appoint a replacement Member	Until a special or general election, as provided by state law
H.J.Res. 90, 108th Congress H.J.Res. 77, 107th Congress	30% vacancy in House due to death or resignation	30% vacancy in House due to death or resignation	Unspecified	Would authorize Congress to enact legislation for the temporary appointment of Representatives	Unspecified
H.J.Res. 92, 108th Congress	A Member who dies or is unable to serve in Congress	One Member or Member-elect	Three to five potential temporary successors specified by congressional candidates	Upon the death of a Member or declaration of inability, established by the Member or by the three alternates by majority vote	Until a special election is held to elect a new Member or until declaration by the Member that the inability has resolved
S.J.Res. 23, 108th Congress	25% of either chamber deceased or incapacitated	25% of either chamber deceased or incapacitated	Congress would declare who would serve until disabled Members recovered or new Members were elected	Unspecified	120 days, with an additional period of 120 days if 25% of the seats in either chamber remained vacant or occupied by incapacitated Members
H.J.Res. 67, 107th Congress	Death or incapacity of 25% or more of the House membership	Death or incapacity of a majority of the House membership	Governors	Unspecified	90 days until a special election is held to elect a new Representative

Measure, Congress	Circumstances	Extent of Vacancy or Incapacity	Selecting Agents	Implementation	Duration of Appointment
S.J.Res. 30, 107th Congress	Death or incapacity of 50% or more of the House membership	Death or incapacity of a majority of the House membership	Governors	Appointee would be required to be of the same political party as the Member being replaced	Unspecified

Source: Individual measures, as noted.

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