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House Vacancies: Proposals for Filling Them After the Death or Injury of Large Numbers of Members, 2005-2006

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Summary

Since the September 11, 2001, terrorist attacks and the anthrax incidents that followed shortly afterward, there has been considerable interest inside and outside Congress in finding ways to ensure effective and representative operations of the House in the event of a terrorist or other kind of attack that could result in a large number of House vacancies. Several measures have been introduced as proposed constitutional amendments, federal statutes, and House and Senate rules changes. During the 109th Congress, H.R. 841, as passed in the House (329-68) on March 3, 2005, would require states to hold elections not later than 49 days after the Speaker of the House announces the vacancies in extraordinary circumstances. In the Senate, H.R. 841 placed on the Senate Legislative Calendar on March 19, 2005. On June 16, 2005, during consideration of the FY2006 legislative branch appropriations bill, the House Appropriations Committee adopted an amendment that is identical to the text of H.R. 841, as passed in the House. Subsequently, the committee reported the bill — H.R. 2985— as amended. As such, H.R. 2985 included as Title III, language providing for expedited special elections to the House under extraordinary circumstances. The House passed H.R. 2985 on June 22, 2005, after rejecting (143-268) an amendment to strike Title III of the bill. The next day, the Senate Appropriations Committee adopted a motion to strike Title III from H.R. 2985, as passed by the House. The spending measure was reported out of the committee by a voice vote. Three proposed constitutional amendments relating to congressional succession or continuity of Congress (H.J.Res. 26, H.J.Res. 49 and S.J.Res. 6) also have been introduced and referred to committee. .

Since the September 11, 2001 terrorist attacks and the anthrax incidents that happened shortly thereafter, debate on how best to preserve an effective and representative House of Representatives in time of crisis has continued. At issue are (1) how to quickly replace large numbers of Members who are killed or incapacitated in a catastrophic event without sacrificing a House kept close to the people; and (2) what vehicle to use, i.e., whether to amend the constitution, enact new federal law, or modify House rules.

Background

While the Constitution requires that vacancies in both the House and the Senate be filled by special election, it empowers state legislatures to provide for temporary appointments to the U.S. Senate by state governors until elections are held. House Members, on the other hand, have always been chosen in one way — by *direct election* of the people — and House vacancies have always been filled by special election. No provision has been made for temporary appointments to the U.S. House of Representatives.

Since September 11, 2001, proposals to amend the Constitution, enact federal law, and change House rules regarding vacancies have been introduced.¹ Eight such proposals were introduced in the House or Senate during the 108th Congress. Six of them would have amended the Constitution, to allow for the temporary appointment of individuals pre-designated by Members (H.J.Res. 77, H.J.Res. 83, and H.J.Res. 92); to allow state legislatures or governors to make temporary appointments (H.J.Res. 89); to authorize Congress to provide a temporary appointment process (H.J.Res. 90); or to authorize Congress to regulate temporarily filling vacancies by law (S.J.Res. 23). The remaining two measures were proposed federal laws. One (H.R. 2844) would have required the states to hold expedited special elections. The other (S. 1820), which was offered as implementing legislation for S.J.Res. 23, would have authorized states to develop mechanisms for temporarily filling vacancies in their congressional delegations if a prescribed number of Members were killed, incapacitated, or otherwise unable to discharge the duties of office. Many of these proposals were similar to others offered in the 107th Congress, or were revisions of earlier plans.²

Issues in Debate

Amending the Constitution. As previously stated, the Constitution requires that vacancies in the House be filled by special election; it makes no provision for temporary appointments to vacant seats in the House. Accordingly, if temporary appointments to the House are to be provided for, a constitutional amendment arguably would be the best way to avoid constitutional challenges. Supporters contend that amending the Constitution would demonstrate concurrence of the state legislatures because constitutional amendments are effective only upon ratification by three-fourths of those state bodies. They also point out that a constitutional amendment would treat the office of U.S. Representative like that of U.S. Senator and President of the United States, both of which have definitive replacement plans that are constitutionally based (17th and 25th Amendments).

¹ The time since the terrorists attacks is not the first period, however, in which Congress has considered the issue. For example, from the 1940s through 1962, more than 30 proposed constitutional amendments were introduced to provide for temporarily filling House vacancies or selecting successors in case of the disability of a significant number of Representatives.

² For further information on the proposals and other activity prior to the 109th Congress see CRS Report RL31394, *House Vacancies: Selected Proposals for Filling Them After a Catastrophic Loss of Members, 2001-2004* by Sula P. Richardson and Paul Rundquist.

On the other hand, critics argue that amending the Constitution is a cumbersome process; additional terrorist attacks could occur before the process was completed. Further, they contend that the office of U.S. Representative does have a constitutionally based replacement plan — “writs of election,” as set forth in Article I, Section 2, of the Constitution. They also note differences between the two houses of Congress. Unlike U.S. Senators³ and U.S. Presidents, U.S. Representatives have the distinction of having been chosen in but one way since the inception of their office — by direct election. In addition, they point out that the scope of the issues and constituencies for governors and U.S. Senators is, with rare exceptions, broader than it is for U.S. Representatives. (Governors and U.S. Senators are elected by voters in the entire state, while U.S. Representatives — except for those representing single district states — are elected by voters in their congressional districts.) Moreover, some political observers believe that a constitutional amendment is unnecessary, since change could be implemented through less extreme means, such as by enacting federal legislation or by modifying House rules.

Enacting Federal Law Requiring Expedited Special Elections. Supporters of a federal statute instead of a constitutional amendment contend that in the event of mass House vacancies, Congress could exercise its constitutional authority to preempt state law regarding the “Times, Places, and Manner of Holding Elections”⁴ for the House and pass legislation that would require states to hold expedited special elections within a specified time frame.⁵ They assert that the legislation could amend current law,⁶ which leaves it to state law to determine when an election must be held to fill a House vacancy. Supporters note that current provisions for filling vacancies in the House in non-emergency situations would remain intact, and the expedited special elections provision would be triggered only in the event of a significant number of House vacancies due to a national emergency. Further, supporters argue that passing a federal statute is a far less cumbersome process than amending the Constitution. In addition, advocates believe that a statute providing for expedited special elections could minimize the length of time House membership would be severely depleted without violating the basic tenet of *elected* Representatives.

On the other hand, critics of this approach argue that it could result in campaign periods so short that citizens could not make reasoned, informed decisions about candidates and issues. Shorter campaign periods also could be problematic for state election officials, who, in keeping with their responsibility for administering elections, must handle filing deadlines, filing requirements, absentee ballots, ballot access, and other

³ Prior to 1913, when the 17th Amendment was adopted, U.S. Senators were elected by state legislatures.

⁴ U.S. Const. Art. I, § 4, cl. 1.

⁵ U.S. Congress, House Committee on the Judiciary, Subcommittee on the Constitution, *Temporary Filling of House of Representatives Vacancies During National Emergencies*, testimony and prepared statement of M. Miller Baker in hearings on H.J.Res. 67, 107th Cong., 2nd sess., Feb. 28, 2002 (Washington: GPO, 2002), p. 32. See also the Continuity of Government Commission’s website, “Don Wolfensberger’s Proposal for Statutory and Rules Changes to Deal with Mass Vacancies in the House of Representatives, February 18, 2002” at [<http://www.continuityofgovernment.org/pdfs/proposalwolfensberger.htm>], visited June 20, 2005.

⁶ 2 U.S.C., chap. 1, §. 8.

aspects of the election process. Moreover, if a number of states were attacked and severely damaged, it might be difficult to hold elections in a timely manner. Finally, more compressed campaign periods could put candidates who are not as well funded or as well known at a disadvantage.

109th Congress

Proposed Federal Law. On February 16, 2005, Representative James Sensenbrenner introduced H.R. 841.⁷ The bill would require expedited special elections to be held within 45 days of an announcement by the Speaker of the House that there are more than 100 vacancies in the House. (The proposal is similar to H.R. 2844, which the House passed, 306 to 97, on April 22, 2004. The measure was placed on the Senate calendar; no further action on it was taken.)

The House Administration Committee held a markup on H.R. 841 on February 17, 2005. The committee agreed to an amendment in the nature of a substitute offered by Representative Robert Ney, the committee chairman. Among other things, the Ney amendment added a provision giving states authority to set up their own candidate nominating processes, so long as the vacancies are filled within the prescribed time. It also added a section on the “Application to District of Columbia and Territories” (namely, that the measure applies to the District of Columbia and territories, but that vacancies in those jurisdictions shall not be taken into account by the Speaker in determining whether vacancies from the states in the House exceed 100). The committee rejected an amendment by Representative Juanita Millender-McDonald, the ranking minority member. It would have lengthened the timetable for holding the expedited elections to 60 days (rather than 45 days). The House Administration Committee reported H.R. 841 favorably, as amended (H.Rept. 109-8, part 1), on February 24, 2005.

On March 1, 2005, the House Rules Committee ordered by voice vote a special rule (H.Res. 125, H.Rept. 109-10) providing for the consideration of H.R. 841. The structured rule provided for the consideration of only two amendments: an amendment by Representative Millender-McDonald expanding from 45 to 60 days the period within which special elections must be held (amendment previously offered in House Administration Committee and defeated) and an amendment by Representative Jackson-Lee broadening the grounds upon which a legal challenge may be made against the expedited processes outlined in the bill. When the special rule (H.Res. 125) providing for consideration of H.R. 841 was brought up for floor action, Representative Tom Cole, the majority floor manager, moved to amend the rule to permit the offering of a “manager’s amendment” that would extend the 45-day timetable to 49 days, or seven full weeks. The Cole amendment was agreed to by voice vote, and the special rule was also later agreed to by voice vote.

During consideration of H.R. 841, Representative Ney offered the specified manager’s amendment which was agreed to by voice vote. The Millender-McDonald amendment to extend the 49-day to 60 days was defeated by a recorded vote of 192-229.

⁷ See also CRS Report RL32958, *Continuity of Congress: Proposed Federal Statutes for Expedited election to the house in Extraordinary Circumstances* by R. Eric Petersen and Sula P. Richardson.

The Jackson-Lee amendment to broaden the grounds on which legal challenges to the expedited elections could be made was similarly defeated by a vote of 183-239.

Representative Baird of Washington offered a motion to strike the enacting clause of the bill, a parliamentary motion which, if successful, would have defeated the measure by eliminating the language that gave the bill its legal authority. Representative Baird and Representative Rohrabacher spoke briefly about their view that the bill did not go far enough to ensure the continuity of House operations. They endorsed proposals to amend the Constitution to permit the temporary appointment of acting Representatives to fill House vacancies immediately, rather than waiting possibly for nearly two months until the full House membership could be reconstituted. Representative Baird, after speaking in favor of changes in the Constitution, withdrew his motion before it could come to a vote.

Representative Conyers, the ranking minority member on the Judiciary Committee, offered a motion to recommit which directed the addition of language to the bill requiring states to establish equitable means for the allocation of voting machines to all precincts. The Conyers amendment sought to prevent long lines and voting delays in precincts to which an inadequate number of voting machines had been assigned. The Conyers motion was defeated by a vote of 196-223. The bill passed by a vote of 329-68 after the House vitiated by unanimous consent the voice vote passage of the bill. The House took that action after it was brought to the Speaker pro tempore's attention that Representative Miller-McDonald had been seeking recognition to demand a yea-and-nay vote but had not been recognized to offer that motion.⁸

In the Senate, H.R. 841 was not referred to committee but was placed on the Senate Legislative Calendar on March 19, 2005. During the House Appropriations Committee's consideration of its version of the FY2006 legislative branch appropriations bill, Chairman Jerry Lewis offered an amendment that is identical to the text of H.R. 841, as passed in the House. The amendment reportedly was offered at the request of Speaker Hastert.⁹ On June 16, 2005, the committee adopted the amendment (by voice vote) and reported the bill, as amended. Consequently, as reported from committee, the bill — the Legislative Branch Appropriations, FY2006 (H.R. 2985)—included as Title III, language that would provide for expedited special elections to the House in the event of mass vacancies due to extraordinary circumstances. On June 22, 2005, during debate on H.R. 2985, Representative Brian Baird offered an amendment (H.Amdt. 338) to strike Title III of the bill; the amendment was rejected (143-268). That same day, H.R. 2985 was passed in the House by a vote of 330-82. In the Senate on the following day, during a markup session, the Senate Appropriations Committee adopted (by voice vote) a motion offered by Senator Robert Byrd to strike Title III from H.R. 2985, as passed in the House. The spending measure was reported out of the committee by a voice vote.

⁸ The full debate on the special rule and on H.R. 841 can be found in the *Congressional Record* (daily edition), vol. 151, 109th Cong., 1st sess., March 3, 2005, pp. H948-H971.

⁹ Jonathan Allen, "Legislative Branch Appropriations: House Uses Must-Pass Bill as Insurance for Congressional Continuity," *CQ Today*, June 16, 2005 [<http://www.cq.com>], visited June 16, 2005.

Proposed Constitutional Amendments. On February 17, 2005, two proposed constitutional amendments relating to congressional succession or continuity of Congress were introduced. Representative Dana Rohrabacher introduced H.J.Res. 26, a proposed amendment to the Constitution that would require the election of a Representative along with three “Alternate Representatives,” selected and ranked in order by the Representative. It would also require the election of a Senator along with three “Alternate Senators,” selected and ranked in order by the Senator. In the event of the death or incapacitation of the Representative or Senator, his or her legislative duties and powers would be assumed by the highest ranked alternate, according to the specified ranked order of the alternates. The alternate Representative or Senator would serve as “Acting Representative” or “Acting Senator” until the election of a new Representative and three alternates, or the election of a new Senator and three alternates. The proposal, which is similar to H.J.Res. 92 introduced by Representative Rohrabacher during the 108th Congress, was referred to the House Committee on the Judiciary.

Senator John Cornyn proposed another constitutional amendment, which was introduced on February 17, 2005, as S.J.Res. 6. The proposed amendment would authorize Congress to enact law to:

provide for the case of death or inability of Members of the House of Representatives, and the case of inability of Members of the Senate, in the event that one-fourth of either House are killed or incapacitated, declaring who shall serve until the disability is removed, or a new Member is elected. Any procedures established pursuant to such a law shall expire not later than 120 days after the death or inability of one-fourth of the House of Representatives or the Senate, but may be extended for additional 120-day periods if one-fourth of either the House of Representatives or the Senate remains vacant or occupied by members unable to serve.

The proposal, which is similar to S.J.Res. 23, introduced by Senator Cornyn during the 108th Congress, has been referred to the Senate Committee on the Judiciary.

The third proposed constitutional amendment related to congressional succession was introduced on May 12, 2005, by Representative Zoe Lofgren. H.J.Res. 49 would authorize Congress, upon the approval of two-thirds of each house, to enact legislation providing for temporary appointments to the House when, in a national emergency “30 percent or more of the seats of the House of Representatives are vacant due to death, resignation or incapacity.” As of this writing, the proposed constitutional amendments have been referred to committee.