



# Constitutional Approaches to Continuity of Congressional Representation: Background and Issues for Congress

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## Summary

The terrorist attacks of September 11, 2001, subsequent biological incidents, and natural threats such as hurricanes or pandemic illness, have motivated consideration of contingency planning options in government and the private sector. In Congress, contingency planning includes the consideration of options for the succession of congressional leadership, or for filling multiple vacancies in either chamber that might occur due to wide-scale death of Members or their absence from Congress due to injury or incapacitation. Concerns have been expressed that current plans may be insufficient or raise constitutional issues.

Several proposed constitutional amendments to address the consequences of catastrophic losses of congressional membership have been introduced since the 2001 attacks, including H.J.Res. 52, introduced on May 20, 2009, to temporarily fill mass vacancies in the House and the Senate. Many of the proposals introduced since 2001 are similar to those introduced during the early years of the Cold War, between 1946 and 1962. In each era, the measures attempted to address two or more of the following issues: the conditions under which the vacancies would be filled, the number or percentage of vacancies needed to invoke implementation of the measure, and the duration of the temporary appointments.

This report will be updated as events warrant.

## **Contents**

Assuring Congressional Representation: Background .....	1
Continuity of Congress-Related Constitutional Amendments, 2001-2009 .....	5
111 <sup>th</sup> Congress .....	5
110 <sup>th</sup> Congress .....	5
109 <sup>th</sup> Congress .....	6
108 <sup>th</sup> Congress .....	6
107 <sup>th</sup> Congress .....	8
Cold War-Era Proposals, 1945-1963 .....	9
Analysis .....	10
Arguments in Support of Constitutional Proposals .....	11
Arguments in Opposition to Constitutional Proposals .....	11
Conclusion .....	12

## **Tables**

Table 1. Continuity of Congressional Representation: Measures Introduced to Amend the Constitution Since 2001 .....	13
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## **Contacts**

Author Contact Information .....	15
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## Assuring Congressional Representation: Background

The terrorist attacks of September 11, 2001, subsequent biological incidents, and natural threats such as hurricanes or pandemic illness, have motivated consideration of contingency planning options in the federal government<sup>1</sup> and the private sector.<sup>2</sup> Contingency planning incorporates a broad array of planning processes and preparedness capacities, including basic emergency preparedness<sup>3</sup> and recovery plans leading to the resumption of normal operations of an organization.

In Congress, contingency planning efforts include the consideration of options for the succession of congressional leadership,<sup>4</sup> or for filling multiple vacancies in either chamber that might occur due to wide-scale death of Members or their absence from Congress due to injury or incapacitation. Concerns have been expressed that following an incident in which many 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. Some efforts to incorporate Member replacement activities into legislative branch emergency preparedness planning<sup>5</sup> may raise constitutional issues.

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<sup>1</sup> CRS Report RS22674, *National Continuity Policy: A Brief Overview*, by (name redacted).

<sup>2</sup> CRS Report RL31873, *Banking and Financial Infrastructure Continuity: Pandemic Flu, Terrorism, and Other Challenges*, by (name redacted); Buffy Rojas, "Constellation Energy Exemplifies Planning Excellence," *Continuity Insights*, Sep./Oct. 2006, pp.13-16; Buffy Rojas, "Wal-Mart: Looking Beyond BCP Basics," *Continuity Insights*, Mar./Apr. 2006, pp. 10-13; Cole Emerson, *Planning for Manufacturing Operations*, Disaster Resource.com website, at [http://www.disaster-resource.com/cgi-bin/article\\_search.cgi?id=%27146%27](http://www.disaster-resource.com/cgi-bin/article_search.cgi?id=%27146%27); Securities Industry and Financial Markets Association (SIFMA), *Business Continuity Planning Rules*, available at [http://www.sifma.org/services/business\\_continuity/html/rules.html](http://www.sifma.org/services/business_continuity/html/rules.html); and AXA UK website, *Business Continuity Guide for Small Businesses*, available at <http://www.axa4business.co.uk/resources/files/BizContinuityGuideT1404.pdf>.

<sup>3</sup> Basic emergency preparedness may be seen as a generic set of capacities that business or government would need to develop as part of their regular operations. Capacities might include the development of evacuation or shelter-in-place plans; staff accountability and safety; and a test, training, and exercise program to assure the reliability of those plans.

<sup>4</sup> House Rule I, cl. 8(b)(3), requires the Speaker to designate in writing a number of Members who would serve as Speaker pro tempore in the event of the Speaker's death or disability, until a successor Speaker or Speaker pro tempore could be elected by the House. Soon after a new Congress convenes, the Speaker's list is delivered to the Clerk, and the delivery is announced on the House floor. See "Recall Designee" and "Announcement by the Speaker Pro Tempore" *Congressional Record*, daily edition, Jan. 6, 2009, p. H24.

<sup>5</sup> Filling large numbers of vacant seats or addressing concerns related to incapacitated or missing Members are among several contingency planning challenges facing Congress. Through legislation, the House and Senate adopted changes to their recess and convening authorities to permit emergency recesses. At the beginning of the 108<sup>th</sup> Congress (2003-2004), the Speaker and chair of the Committee of the Whole were granted emergency recess authority. 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. See House Rule I, cl. 12. The Senate 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. See S.Res. 296, 108<sup>th</sup> Congress, adopted Feb 3, 2004. During the 108<sup>th</sup> 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 (continued...)

Prior to the September 2001 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.<sup>6</sup> 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.<sup>7</sup> Where procedures regarding the death of a Member of Congress are well established,<sup>8</sup> matters related to the capacity or availability of a Member to serve have been addressed by the House and Senate only on a case by case basis.<sup>9</sup> In instances of death or incapacitation, congressional practices appear to assume a membership disruption of one Member at a time, and do not address the potential implications of mass congressional casualties, or the perceived need to quickly reconvene Congress after an incident so it can continue to carry out its constitutional responsibilities.

While issues related to Members who are missing or incapacitated affect both chambers, concerns related to mass vacancies in membership appear to fall more heavily on the House, due to the requirement that its Members be selected only by election. As a consequence, questions have been raised about the ability of the House to meet constitutionally mandated quorum requirements to conduct business after an incident in which many Members may have been killed or injured, or go missing. In response, during the 109<sup>th</sup> Congress (2005-2006), the House adopted

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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 109<sup>th</sup>, 110<sup>th</sup>, and 111<sup>th</sup> Congresses. In the 109<sup>th</sup> and 110<sup>th</sup> Congresses, the measure was adopted by the House, sent to the Senate, and referred to the Committee on Rules and Administration. No further action was taken. In the 111<sup>th</sup> Congress, the measure has followed a similar course, and was referred to the Senate Committee on Rules and Administration on January 6, 2009. No further action has been taken as of the time of this writing. Administrative planning by congressional officials began pursuant to a joint bipartisan leadership directive directing the Capitol Police Board (comprising the Sergeants at Arms of the House and Senate and the Architect of the Capitol) 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, and in coordination with the Officers of the Senate and House” 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.” 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.

<sup>6</sup> House vacancies are addressed in the Constitution in Article I, Section 2, paragraph 4, which requires states to issue a writ of election to fill vacancies. Procedures governing vacancies in the Senate were initially established by Article I, Section 3, as later amended by paragraph 2 of the 17<sup>th</sup> Amendment, which provided state legislatures with the authority to grant temporary appointment authority to governors until an election can be held.

<sup>7</sup> Exceptions include Connecticut, Massachusetts, Oregon, and Wisconsin, where the governor is not permitted to make interim appointments, and any Senate vacancy must be filled by special election. In Oklahoma there is limited gubernatorial appointment authority; if the Senate vacancy occurs after March 1 of any even-numbered year and the term expires the following year, no special election is held; rather, the governor is required to appoint the candidate elected in the regular general election to fill the unexpired term.

<sup>8</sup> CRS Report RL34347, *Members of Congress Who Die in Office: Historic and Current Practices*, by (name redacted) and (name redacted).

<sup>9</sup> “Declaring Vacancy in 97<sup>th</sup> Congress from Fifth Congressional District of Maryland,” *Congressional Record*, vol. 127, Feb. 24, 1981, pp. 2916-2918; Compensation in Lieu of Salary to the Honorable Gladys Noon Spellman, *Congressional Record*, vol. 127, Jan 27, 1981, pp. 974-975; and *Congressional Record*, vol. 119, Jan 3, 1973, p. 12.

rules to establish a provisional quorum after catastrophic circumstances,<sup>10</sup> formally codifying longstanding House practice that a quorum is a majority of the Members elected, sworn, and living.<sup>11</sup> In practice, the Speaker or Speaker pro tempore now typically announces a revised whole number of the House in light of changes in the membership of the House,<sup>12</sup> but the question of whether a provisional quorum is constitutional has not been addressed.

In addition to rules changes, during the 109<sup>th</sup> Congress, legislation was enacted to require states<sup>13</sup> to hold special House elections when extraordinary circumstances cause mass vacancies in the House. The act<sup>14</sup> 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.<sup>15</sup> 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 the political parties authorized by state law to nominate candidates, or by any other method the state considers appropriate; (2) ensure to the greatest extent practicable that absentee ballots for the election are transmitted to absent uniformed services voters and overseas voters not later than 15 days after the Speaker announces that the vacancy exists; and (3) accept and process any otherwise valid ballot or other election material from an absent uniformed services voter or an overseas voter, as long as the ballot or other material is received by the appropriate state election official not later than 45 days after the state transmits the ballot to the voter.<sup>16</sup>

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<sup>10</sup> House Rule XX, Cl. 5(c).

<sup>11</sup> 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, *Hind’s Precedents of the House of Representatives of the United States*, vol. IV (Washington: GPO, 1907), p. 64.

<sup>12</sup> For example, *Congressional Record*, daily edition, Dec. 17, 2007, p. H15472; and Dec. 13, 2007, p. H15442.

<sup>13</sup> The measure also applies to the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, Guam, and the U.S. Virgin Islands, but the presence of those Members would not be counted by the House for purposes of establishing a quorum to do business.

<sup>14</sup> 2 U.S.C. 8(b).

<sup>15</sup> The 49-day requirement would be waived if, during the 75-day period beginning on the date of the vacancy announcement, a regularly scheduled general election or another special election for the office involved is scheduled to be held. During consideration of the measure, concern was expressed that a 45-day period, as then was proposed, 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. Other concerns included relatively short campaigns that could leave citizens unable to make reasoned, informed decisions about candidates and issues. For example, a more compressed campaign could put candidates who are not as well funded or as well known at a comparative disadvantage. In addition to those potential challenges, if a number of states were attacked, or a natural occurrence caused widespread damage or necessitated quarantine measures, it might also be difficult to hold elections in the time frame specified by the statute. See individual testimony, prepared statements and written submissions of Thad Hall, Doug R. Lewis, Cory G. Fong, and Curtis Gans, in U.S. Congress, Senate, Committee on the Judiciary, *Ensuring the Continuity of the United States Government: The Congress, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess., Sept. 9, 2003* (Washington: GPO, 2003), pp. 22-24, 26-41, 86-100, available at <http://a257.g.akamaitech.net/7/257/2422/28dec20041100/www.access.gpo.gov/congress/senate/pdf/108hr96926.pdf>.

<sup>16</sup> In addition, the statute sets forth requirements for judicial review of any action brought for declaratory or injunctive relief to challenge a vacancy announcement, and requires the judiciary to provide a final decision within three days of the filing of such an action. The law makes a final decision non-reviewable. See U.S. Congress, House, *Continuity in Representation Act of 2005, Report to accompany H.R. 841*, 109<sup>th</sup> Congress, 1<sup>st</sup> sess., H.Rept. 109-8, Part I (Washington: GPO, 2005), at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_reports&docid=f:hr008p1.109.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:hr008p1.109.pdf); and U.S. Congress, House, *Report to accompany H.R. 2985*, 109<sup>th</sup> Congress, 1<sup>st</sup> sess., H.Rept. 109-139 (Washington: GPO, 2005), at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_reports&](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&) (continued...)

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.<sup>17</sup> Others raise what they believe to be constitutional concerns related to provisional quorum rules.

Those who oppose current House practices regarding provisional quorum procedures argue that, contrary to longstanding 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 the 100 seats in the Senate, were vacant because the Members who held them were killed, or those members were unable to serve because they were incapacitated or missing in the aftermath of an incident, any actions taken by fewer than a majority of the remaining Members in either chamber could be seen as potentially illegitimate, and arguably unconstitutional.<sup>18</sup>

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),<sup>19</sup> but similar questions may 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.<sup>20</sup> As a consequence, some observers argue that the policies adopted or enacted since 2001 may not provide adequate protection against a sudden loss of membership in either chamber, and may raise constitutional and implementation concerns. They believe that these concerns can only be remedied by

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<sup>17</sup> 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,” *The Washington Monthly*, Nov 2006, pp. 19-22.

<sup>18</sup> 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; Bruce Ackerman, “If Washington Blows Up,” *The American Prospect*, Mar 2006, pp. 22-27; Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven: Yale University Press, 2006), pp. 142-155; and Mann and Ornstein, *The Broken Branch*, pp. 207-210.

<sup>19</sup> S.J.Res. 7, proposing an amendment to the Constitution relative to the election of Senators, has been introduced in the 111<sup>th</sup> Congress. The measure would require Senate vacancies to be filled by special election. If passed by Congress and ratified by the states, the Senate would be in a position similar to that of the House regarding challenges in filling mass vacancies in its membership. S.J.Res. 7 was introduced by Senator Russell D. Feingold on January 29, 2009. The measure was referred to the Committee on the Judiciary, which held hearings on March 11, 2009. No further action has been taken on the proposed amendment at the time of this writing.

<sup>20</sup> 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.” See *Hinds Precedents*, vol. IV, pp. 64-65. No action has been taken on the matter of incapacitation of a large number of Senators.

amending the Constitution to allow for the rapid replenishment of vacant seats in the event of a significant loss of membership in either chamber.

Several proposed constitutional amendments to address the consequences of catastrophic losses of congressional membership have been introduced since the 2001 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 terrorists could target Congress itself, or the Washington, DC, region. 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 it might be stockpiling atomic weapons, brought considerable interest to the issue of filling congressional vacancies in the event of a national emergency among some Members of Congress.

## **Continuity of Congress-Related Constitutional Amendments, 2001-2009**

### **111<sup>th</sup> Congress**

On May 20, 2009, Representative Brian Baird introduced H.J.Res. 52, proposing an amendment to the Constitution to temporarily fill mass vacancies in the House and the Senate. The measure, which was also introduced in the 110<sup>th</sup> Congress, would amend the Constitution to require individuals elected to the House or Senate to provide and revise a list of at least three designees, ranked in order of preference, to take their place in Congress if they die, become incapacitated, or disappear prior to the end of their term of office. Designees would be required to meet the qualifications of Representative or Senator, as appropriate. If “a catastrophe results in the death, incapacity, or disappearance of a significant number” of Members, the Speaker, Vice President, or President pro tempore would fill vacancies in their respective chambers with individuals from the most recent lists of designees provided (in the order provided on the list) by Members whose seats were vacant. Designees would be treated as Representatives or Senators in all respects, but would not be required to provide a list of designees of their own. If a designee fills a vacant seat in the House or Senate, the executive authority of the state involved would be required to call an election “as soon as possible” to have another Member chosen. The amendment requires Congress to establish by law criteria to determine whether a Member of Congress is dead, incapacitated, or has disappeared, and grants Congress the authority to enforce the proposed article through appropriate legislation. Among the matters that Congress could consider, if the amendment were passed and subsequently ratified by the states, is a statutory definition of a “significant number” of Members for purposes of implementing provisions of the proposed amendment.

### **110<sup>th</sup> Congress**

In the 110<sup>th</sup> Congress (2007-2008), two constitutional amendment proposals to provide for filling vacancies in the event of the catastrophic loss of Members were introduced. These were H.J.Res. 56 and H.J.Res. 57.

On October 4, 2007, Representative Brian Baird introduced H.J.Res. 56, proposing an amendment to the Constitution to temporarily fill mass vacancies in the House and the Senate.



The measure, which was reintroduced in the 111<sup>th</sup> Congress as H.J.Res. 52, would have amended the Constitution to require individuals elected to the House or Senate to provide and revise a list of at least three designees, ranked in order of preference, to take their place in Congress if they die, become incapacitated, or disappear prior to the end of their term of office.

The same day, Representative Dana Rohrabacher introduced H.J.Res. 57, proposing a constitutional amendment on congressional succession. The measure would have amended the Constitution to require the simultaneous election of an alternate member together with each Representative and Senator. If a Member died, resigned, or was expelled, or if at the beginning of the term, a Representative-elect or Senator-elect had died or failed to qualify for office, the alternate member would discharge the duties and powers of office as acting Representative or acting Senator until a Representative-elect or Senator-elect qualified, or a new Member and alternate member were elected. When either chamber declared that one of its Members was unable to discharge the powers and duties of their office, or if a Member transmitted to the Speaker or President pro tempore, as appropriate, that they were unable to discharge the powers and duties of their office, those responsibilities would be discharged by an alternate as acting Representative or acting Senator. Upon written declaration to the Speaker or President pro tempore, as appropriate, that an inability did not exist, the Member would immediately resume the powers and duties of their office. The measure provided that states could authorize by law the appointment of an acting Senator in the absence of a qualified alternate when there was a vacancy in the office of Senator. Alternates would be required to meet the qualifications of Representative or Senator, as appropriate, and each chamber could punish its alternates for disorderly behavior, or expel them with the concurrence of two-thirds of its Members. If the House or Senate were unable to establish a quorum for three days or more, the measure would permit either chamber to declare Members who had not recorded their presence to be unable to discharge the powers and duties of their offices. Those powers and duties would then have been discharged by the Member's alternate, until the Member recorded their presence. The amendment would have granted Congress the authority to enforce the proposed article through appropriate legislation.

## **109<sup>th</sup> Congress**

In the 109<sup>th</sup> Congress (2005-2006), one proposed amendment on congressional succession was introduced. On February 17, 2005, Representative Dana Rohrabacher introduced H.J.Res. 26. The amendment would have required a candidate for election to the House or Senate to select, in rank order, three alternates who would stand for election with the candidate. If, after election, the Member died, the first ranked alternate would assume office in an acting capacity until a new Representative or Senator was elected. The amendment provided the Member the authority to declare his or her inability to discharge the duties of office, and for the three alternates, by majority vote, to declare their Member unable to discharge their duties. Finally, the proposed amendment made provisions under which a Member could vacate a declaration of inability and return to office.

## **108<sup>th</sup> Congress**

Six constitutional amendment proposals to provide for filling vacancies in the event of the catastrophic loss of Members were introduced during the 108<sup>th</sup> Congress (2003-2004). Five were introduced in the House, and one was introduced in the Senate. Only one measure, H.J.Res. 83, was considered in either chamber. On June 2, 2004, the House rejected H.J.Res. 83 by a vote of

63-353, the two-thirds needed for passage of a constitutional amendment not having been attained.

Representative Brian Baird proposed two constitutional amendments—H.J.Res. 77, introduced on November 19, 2003, and H.J.Res. 83, introduced on December 8, 2003—that would have allowed state governors to temporarily appoint an individual from a list of at least two successors pre-designated by a Representative to take the Member’s place if he or she died or became incapacitated. Under both proposals, a Representative-elect would present the list of successors to the chief executive of state prior to taking the oath of office.<sup>21</sup> If a majority of the whole membership of the House could not carry out its duties because of death or incapacity, or if the House adopted a resolution declaring the existence of extraordinary circumstances, which “threaten the ability of the House to represent the interests of the people,” the governors could appoint replacement Members within seven days after the deaths or disabilities had been certified. An appointee would serve until the incapacitated Member he or she was replacing regained ability to serve, or until a special election was held to fill the seat. Both H.J.Res. 77 and H.J.Res. 83 would have authorized Congress to enact “appropriate legislation” to enforce them, but they differed slightly in the language prescribing the means for determining whether a Member was dead or incapacitated.<sup>22</sup>

On March 11, 2004, Representative John Larson of Connecticut introduced H.J.Res. 89, a constitutional amendment that would have permitted temporary appointees to be chosen by the affected state legislatures or the chief executives of state. H.J.Res. 89 would have allowed less than a majority of the House to adopt a resolution declaring that a vacancy existed in the majority of the seats in the House. The legislature of each affected state would have five calendar days from the day after the House adopted such resolution to convene a special session for appointing individuals to temporarily fill the vacancies. The state legislature would then be required to appoint an individual to fill each vacancy within three calendar days from the date the legislature convened in special session. If the state legislature did not convene the special session or make the appointments within the time prescribed, the chief executive of state would appoint individuals to fill the vacancies. Appointees would be required to meet the constitutional qualifications for service as House Members and would be required to be members of the same political party as their predecessors. Further, appointees would serve until special elections were held to fill the House vacancies, but they would be prohibited from being candidates for election to the House during their temporary service. In addition, H.J.Res. 89 would have empowered Congress “by law to specify circumstances constituting when a vacancy happens in the Representation from any State in the House and to address the incapacity of Members of the House of Representatives.” As such, the proposal would have empowered Congress to enact legislation addressing the issue of incapacitation.

Representative Zoe Lofgren on March 11, 2004, introduced H.J.Res. 90, a proposed constitutional amendment that would have permitted Congress to enact legislation providing for the appointment of temporary Members of the House to serve during any period in which 30% or more of the House seats were vacant because of death or resignation.

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<sup>21</sup> After taking the oath of office, the Member could revise the list at any time during the Congress.

<sup>22</sup> H.J.Res. 83 provided that Congress could by law establish the criteria for determining whether a Member of the House or Senate was dead or incapacitated. H.J.Res. 77 would have allowed for “the adoption of rules by the House of Representatives to determine whether a Member was dead or incapacitated.” Provisions for enforcement through “appropriate legislation” could also have applied to the establishment of such criteria.

On April 2, 2004, Representative Dana Rohrabacher introduced H.J.Res. 92, a proposed constitutional amendment that would have authorized candidates in the general election for the House and Senate to publicly designate no fewer than three and no more than five ranked potential temporary successors (i.e., “Acting Representatives or Acting Senators”). In the event of the Member’s death, a successor would serve in an acting capacity until a new Member was elected. In the event of incapacity, the highest ranked successor would assume office until the Member declared an end to his inability.

Senator John Cornyn proposed another constitutional amendment—S.J.Res. 23—on November 5, 2003. It would have authorized Congress to enact law(s) providing procedures to address the death or inability of Representatives to serve and the inability of Senators to serve,<sup>23</sup> if one-fourth of either house were killed or incapacitated. Congress would declare who would serve in place of the deceased and incapacitated Members until the disabled Members regained ability to serve or new Members were elected. Procedures established would have been in effect for 120 days, but that time frame could have been extended (for additional 120-day periods) if one-fourth of the seats in either house remained vacant or occupied by incapacitated Members.

## **107<sup>th</sup> Congress**

During the 107<sup>th</sup> Congress (2001-2002), three constitutional amendment proposals to provide for filling vacancies in the event of the catastrophic loss of Members were introduced. These were H.J.Res. 67, H.J.Res. 77, and S.J.Res. 30.

Representative Brian Baird introduced H.J.Res. 67 on October 10, 2001. The measure provided for a constitutional amendment that would have authorized governors to appoint persons temporarily to take the place of Representatives who had died or become incapacitated whenever 25% or more of Representatives were unable to perform their duties.<sup>24</sup> Appointees generally would have been allowed to serve 90 days or less until a special election was held. The House Judiciary Committee’s Subcommittee on the Constitution held a hearing on February 28, 2002.<sup>25</sup> No further action on the measure was taken.

On December 20, 2001, Senator Arlen Specter introduced a similar proposal, S.J.Res. 30. It would have provided for the appointment of temporary Representatives by governors if 50% or more of Representatives died or were incapacitated.<sup>26</sup> Further, it would have required that the appointee be of the same political party as the Member who had died or was incapacitated. The measure was referred to the Senate Committee on the Judiciary, Subcommittee on Constitution. No further action was taken on the proposal.<sup>27</sup>

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<sup>23</sup> The 17<sup>th</sup> Amendment of the Constitution already provides for special elections or appointments (as determined by each state) to fill vacant Senate seats, but no provision is made for de facto vacancies due to the inability of Senators to serve.

<sup>24</sup> The question of who determines that a Member is unable to perform their duties was not addressed.

<sup>25</sup> U.S. Congress, House Committee on the Judiciary, Subcommittee on the Constitution, Temporary Filling of House of Representatives Vacancies During National Emergencies, hearing on H.J.Res. 67, 107<sup>th</sup> Cong., 2<sup>nd</sup> sess. (Washington: GPO, 2002).

<sup>26</sup> The question of who determines that a Member is unable to perform their duties was not addressed.

<sup>27</sup> While the hearings held by the House Subcommittee on the Constitution in February 2002 focused on H.J.Res. 67, some of the provisions and concepts in S.J.Res. 30 and in H.J.Res. 77 were discussed by some of the witnesses who testified.

A third proposed constitutional amendment, H.J.Res. 77, introduced by Representative Zoe Lofgren on December 5, 2001, would have authorized Congress to provide by law for the temporary appointment of Representatives if 30% or more of House seats became vacant because of death or resignation.

## 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 79<sup>th</sup> Congress (1945-1947) through the 87<sup>th</sup> Congress (1961-1963).<sup>28</sup> During that period, hearings were held in the House<sup>29</sup> and Senate.<sup>30</sup> On three occasions, the Senate Committee on the Judiciary reported a proposal,<sup>31</sup> and three proposals were passed on the Senate floor.

From 1954 through 1960, the Senate passed by large margins three proposed constitutional amendments that provided for temporarily filling House vacancies due to a national emergency. The first proposal, S.J.Res. 39, was amended and passed by a vote of 70-1 on June 4, 1954.<sup>32</sup> 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.<sup>33</sup>

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

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

<sup>29</sup> U.S. Congress, House Committee on the Judiciary, Subcommittee No. 2, Constitutional Amendments for Continuity of Representative Government During Emergency, hearings on H.J.Res. 29, H.J.Res. 74, H.J.Res. 91, and H.J.Res. 508, 87<sup>th</sup> Cong., 1<sup>st</sup> sess. (Washington, GPO, 1961).

<sup>30</sup> U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Constitutional Amendment, Constitutional Amendments, hearings on S.J.Res. 33, S.J.Res. 59, S.J.Res. 75, S.J.Res. 117, S.J.Res. 125, S.J.Res. 127, and S.J.Res. 145, 82<sup>nd</sup> Cong., 2<sup>nd</sup> sess. (Washington: GPO, 1952); and U.S. Congress, Senate Committee on Judiciary, Subcommittee on Constitutional Amendment, Appointment of Representatives, hearings on S.J.Res. 8, 84<sup>th</sup> Cong., 1<sup>st</sup> sess. (Washington, GPO, 1955).

<sup>31</sup> U.S. Congress, Senate Committee on the Judiciary, Appointment of Representatives in Time of National Emergency, report to accompany S.J.Res. 39, S.Rept. 83-1459, 83<sup>rd</sup> Cong., 2<sup>nd</sup> sess. (Washington: GPO, 1954); U.S. Congress, Senate Committee on the Judiciary, Appointment of Representatives, report to accompany S.J.Res. 8, S.Rept. 84-229, 84<sup>th</sup> Cong., 1<sup>st</sup> sess. (Washington: GPO, 1955); and U.S. Congress, Senate Committee on the Judiciary, Appointment of Representatives, report to accompany S.J.Res. 123, S.Rept. 87-1449, 87<sup>th</sup> Cong., 2<sup>nd</sup> sess. (Washington: GPO, 1962).

<sup>32</sup> “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.

<sup>33</sup> “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.

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.

The Senate passed the third proposed constitutional amendment, S.J.Res. 39, on February 2, 1960, by a vote of 70-18.<sup>34</sup> 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.<sup>35</sup>

## Analysis

Many of the proposals introduced since 2001 and between 1946 and 1962 have been designed to address two or more of the following issues: the conditions under which the vacancies would be filled, the number or percentage of vacancies needed to invoke implementation of the measure, the selecting agents, and the duration of the temporary appointments. For example, some proposals would have directed state legislatures to meet and select persons to take the place of such Senators or Representatives.<sup>36</sup> The measures also stipulated that this procedure would go into effect only if a majority of the House or Senate were unable to perform their duties.<sup>37</sup> 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.<sup>38</sup> Governors would then make temporary appointments until elections could be held.<sup>39</sup> The notification process raised a number of questions related to the definition of terms and the establishment of procedures. For example “national disaster” was not specified, and it was not always clear who would determine when it occurred. To address those concerns, later measures would have authorized governors to make temporary appointments to the House when vacancies

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<sup>34</sup> “Filling of Temporary Vacancies in the House of Representatives,” *Congressional Record*, vol. 106, Jan. 26, 1960-Feb. 2, 1960, pp. 1320,1380,1515,1528,1598,1619, 1715,1744,1749, 1765.

<sup>35</sup> The bill was amended on the Senate floor to include two additional provisions: one pertained to granting the District of Columbia electoral votes in national elections and non-voting delegate(s) to the House; the other eliminated the poll tax or other property qualifications as a prerequisite for voting in federal elections. The three-amendment package was sent to the House, where the anti-poll tax and House emergency appointment provisions were deleted and the District of Columbia suffrage provision was modified (H.J.Res. 757). The House amended S.J.Res. 39 by substituting the language of H.J.Res. 757, and passed it by voice vote on June 14, 1960. The Senate adopted (by voice vote) the House version of S.J.Res. 39 without further amendment. S.J.Res. 39, granting three electoral votes for the District of Columbia in presidential elections, was ratified by the states on March 29, 1961, and became the 23<sup>rd</sup> Amendment to the Constitution.

<sup>36</sup> H.J.Res. 89 (108<sup>th</sup> Congress), introduced Mar. 11, 2004; and S.J.Res. 46 (79<sup>th</sup> Congress), introduced May 29, 1946.

<sup>37</sup> *Ibid.*, and H.J.Res. 34 (80<sup>th</sup> Congress), introduced Jan. 3, 1947.

<sup>38</sup> The number or percentage of vacancies required to invoke an emergency measure typically was one-half, one-third, or one-fourth of the membership of either chamber. For examples, see H.J.Res. 90 (108<sup>th</sup> Congress), introduced Mar. 11, 2004; S.J.Res. 23 (108<sup>th</sup> Congress), introduced Nov. 5, 2003; and H.J.Res. 519 (86<sup>th</sup> Congress), introduced Sept. 4, 1959.

<sup>39</sup> H.J.Res. 155 (82<sup>nd</sup> Congress), introduced Feb. 6, 1951, and S.J.Res. 59, introduced Apr. 9, 1951. Under most of the measures, the term of the appointees would have been limited to 60 to 90 days, by which time an election was to have been held. In some of the earlier proposals, the individual would have been selected by the legislature; however, the person selected would have served for the remainder of the term of the Representative he succeeded.

in the House exceeded half of the authorized membership.<sup>40</sup> Some post-2001 proposals limited the scope of potential appointees to those specified in advance by a Representative or those who were elected in their own right as an alternate representative.<sup>41</sup> **Table 1** provides a summary of measures introduced since 2001.

## **Arguments in Support of Constitutional Proposals**

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. While no single proposal can address all of the challenges that might arise at a time of national or international crisis, 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, missing, or incapacitated. 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 eliminate the need to hold special expedited House elections, as mandated by current law, under potentially difficult conditions.

## **Arguments in Opposition to Constitutional Proposals**

Opponents of continuity planning through constitutional amendments could 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 seats in the House, and the ability to fill most Senate seats by appointment, are sufficient. They could argue that the changes were far less cumbersome to implement than amending the Constitution, and that an amendment might not afford a better assurance of congressional continuity than existing practices. Further, opponents could maintain that resorting to temporary appointments might contribute to unrest or fear among the nation's citizens by casting doubt upon the government'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.<sup>42</sup> 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.

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

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<sup>40</sup> S.J.Res. 157 (85<sup>th</sup> Congress), introduced Feb. 26, 1958.

<sup>41</sup> H.J.Res. 57 (110<sup>th</sup> Congress), introduced Oct. 4, 2007; and H.J.Res. 92 (108<sup>th</sup> Congress), introduced Apr. 2, 2004.

<sup>42</sup> While the appointment of Senators is fairly routine, there is no precedent in either chamber for the sudden mass replenishment of as many seats as may be envisioned in H.J.Res. 52 (111<sup>th</sup> Congress).

the people, where each Member has taken his seat only as a result of direct election by the voters in the Member's district.

## **Conclusion**

Recent arguments in favor of, or in opposition to, amending the Constitution to provide for the temporary appointment of Senators or Representatives are similar to those made during the early years of the Cold War. The events of September 11, 2001, and actions taken in response, however, may have altered the circumstances under which those issues are considered. Some concern has been expressed that the advent of suicidal terrorists who are independent of national governments and, thus, may not be deterred from using weapons of mass destruction (WMD) because of the possible consequences for their own people, may make the use of these weapons more likely in the future. On the other hand, the lack of state support, or the challenges of acquiring or improvising a WMD, and then delivering it to a target that affects significant numbers of Members of Congress, might prove beyond the capacity of a terrorist adversary. At the same time, some observers argue that the United States Capitol and Congress have been targeted in the past, and that they continue to be targets of high social, political, and symbolic significance.

If Congress believes that no action is needed to ensure the continuity of congressional representation, it might continue the status quo. Otherwise, Congress may explore additional statutory or constitutional approaches to address issues related to congressional representation 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 branch maintains the capacity to quickly carry out its constitutional responsibilities in challenging circumstances on the other. It may also take into account the extent to which further consideration of these issues might be necessary, or whether developing additional plans for continuity of representation would better prepare Congress to withstand potential interruptions.

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

<b>Measure, Congress</b>	<b>Circumstances</b>	<b>Extent of Vacancy or Incapacity</b>	<b>Selecting Agents</b>	<b>Implementation</b>	<b>Duration of Appointment</b>
H.J.Res. 52 111 <sup>th</sup> Congress  H.J.Res. 56 110 <sup>th</sup> 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 if a Member records his presence in the chamber
H.J.Res. 57 110 <sup>th</sup> Congress	A member who dies, resigns, is expelled or 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. 26 109 <sup>th</sup> 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
H.J.Res. 77 and H.J.Res. 83 108 <sup>th</sup> 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 89 108 <sup>th</sup> 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



Measure, Congress	Circumstances	Extent of Vacancy or Incapacity	Selecting Agents	Implementation	Duration of Appointment
H.J.Res. 90 108 <sup>th</sup> 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 providing for the temporary appointment of Representatives	Unspecified
H.J.Res. 77 107 <sup>th</sup> Congress					
H.J.Res. 92 108 <sup>th</sup> 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, which could be established by the Member, or the three alternates by majority vote	Until a special election is held to elect a new Member, or declaration by a Member that the inability has resolved
S.J.Res. 23 108 <sup>th</sup> 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. 67 107 <sup>th</sup> 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 or less until a special election is held to elect a new Representative
S.J.Res. 30 107 <sup>th</sup> 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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