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Chair Bice, Ranking Member Kilmer, members of the subcommittee, thank you for inviting me to testify today on behalf of the Congressional Research Service.¹

You have asked me to provide an overview of continuity of Congress issues.

Following a brief overview of continuity efforts in Congress, I will discuss some of the policy issues related to congressional contingency planning, including the following:

- Policy challenges
- Congressional efforts to enhance its survival and ability to carry out its constitutional responsibilities
- Concerns about whether those efforts are sufficient, and the extent to which some problems related to congressional continuity may still be unresolved
- Potential matters to consider moving forward

Overview

The *continuity of Congress*—or the ability of the national legislature to carry out its constitutional and representational roles in the face of a wide variety of potential circumstances that could interrupt those activities—has been a subject of concern for almost 80 years. During this time, Congress has publicly addressed concerns through hearings, legislative consideration, and proposals to amend the Constitution. These occurred with some intensity at the dawn of the atomic age, from 1945 to the early 1960s, and again in the years following the terrorist attacks of September 11, 2001 (9/11).

Focusing on the latter period, challenges to congressional operations have been posed in the past two decades by a range of incidents. In addition to the 9/11 attacks, there have been interruptions due to anthrax contamination, violence against Members of Congress and their staffs,² the COVID-19 pandemic, weather-related events, routine changes in membership, and the unavailability of Members in closely divided chambers.³ All of these concerns motivate ongoing consideration of contingency planning options in Congress.⁴

In contemporary settings, contingency planning incorporates a broad array of planning processes and preparedness capacities, including government-wide planning, law enforcement support, basic emergency

¹ I would like to thank my CRS colleagues, including Jennifer E. Manning, Senior Research Librarian, and Tyler L. Wolanin, former Research Assistant, for extensive research assistance and support. Krista J. Faries, Editor, provided editorial assistance.

² CRS Report R41609, *Violence Against Members of Congress and Their Staff: Selected Examples and Congressional Responses*.

³ The potential use of nuclear weapons, which animated the greatest disquiet during the Cold War, has again become an issue of concern in the current period of contingency planning. See White House, *G7 Leaders' Statement on Ukraine*, Hiroshima, Japan, May 19, 2023, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/19/g7-leaders-statement-on-ukraine/>; and Jim Sciutto, "Exclusive: US Prepared 'Rigorously' for Potential Russian Nuclear Strike in Ukraine in Late 2022, Officials Say," *CNN*, March 9, 2024, <https://www.cnn.com/2024/03/09/politics/us-prepared-rigorously-potential-russian-nuclear-strike-ukraine/index.html>. See also S.Res. 268 and H.Res. 562, 118th Congress.

⁴ 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>; U.S. Congress, House Committee on Transportation and Infrastructure, Subcommittee on Economic Development, Public Buildings and Emergency Management, *Snow Disasters for Local, State and Federal Governments in the National Capital Region: Response and Recovery Partnerships with FEMA*, 111th Cong., 2nd sess., March 23, 2010 (Washington: GPO, 2010), <https://www.govinfo.gov/content/pkg/CHRG-111hhrg55670/html/CHRG-111hhrg55670.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*, 117th Cong., 2nd sess., April 22, 2022, <https://www.youtube.com/watch?v=AZ5E4ry1aLw>.

preparedness,⁵ and recovery plans leading to the resumption of normal operations. In Congress, contingency planning efforts have included

- new policies regarding the circumstances under which the House of Representatives and Senate might meet if the Capitol is unavailable;
- new policies for filling vacancies resulting from changes of membership to ensure congressional representation⁶ in the House; and
- new policies for the succession of congressional leadership in the House.

Much of the focus on Member availability arises from the possibility of vacancies in either chamber that might occur due to an attack or other interruption resulting in wide-scale death of Members. Also of concern is the potential absence of Members from the House or Senate due to injury, incapacitation, or disappearance. Of principle concern is the loss or lack of availability 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 majorities in the House and Senate, as have occurred 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 in the event of an incident. The extent to which some of these responses were successfully addressed is a matter of disagreement. There are ongoing concerns about what would happen in the event of substantial vacancy, disappearance, or incapacitation among sitting Members. There remains a perceived lack of widely accepted solutions that are viewed as reliable and sufficient to ensure that the House and Senate can continue to carry out their constitutional responsibilities following potential operational interruptions. This is due in part to competing ideas of the practicality of post-9/11 arrangements to rapidly replace House Members by special election following a substantial loss of Members, as well as concerns about the constitutionality of current House quorum procedures. Some note that a mass death incident would affect House operations more significantly than it would Senate operations, given that the House requires election of all of its Members while the Senate allows appointed Senators. However, 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. Finally, 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.

⁵ Basic emergency preparedness may be seen as a generic set of assessments and capacities that business or government might need to develop as part of their regular operations. These might include the development of risk assessments, emergency communications, evacuation, or shelter-in-place plans; staff accountability and safety; and a test, training, and exercise program to familiarize those who might be affected by an incident with emergency procedures and ensure the reliability of related plans.

⁶ Ideas of “congressional representation” are varied. Representation comes in many forms and might include constituent service and support, taking in public comment on pending issues by Members or committees, or providing the views of Members through various communications strategies, among others. These may be addressed by individual Members in their personal offices or by several Members in committee and floor settings in either chamber. Any of these approaches may be affected by potential interruptions of congressional operations. In today’s testimony, consideration of congressional representation focuses on past and potential future options to ensure that the membership of the House and Senate is sufficient and available to produce a quorum of Members who are able to meet, consider legislation, or conduct oversight and investigation in their respective floor and committee settings, as needed.

Policy Challenges

Engaging continuity of congressional representation appears to require working through a thicket of complex policy areas, institutional and interbranch challenges, and personal, family, and social issues, including, but not necessarily limited to, the following:

- Ensuring continuation of Congress’s constitutional duties generally, including lawmaking and representation
- Ensuring full congressional participation in the system of checks and balances, particularly in the initial and ongoing responses to the event that interrupts operations
- Designing policy approaches that thoroughly address the aftermath of a low-likelihood, high-consequence mass casualty event and ensure an expeditious return to routine operations
- Considering institutional and personal survival, family matters, and related feelings
- Navigating the politics of elevating continuity issues in an environment in which some argue that existing solutions are sufficient, while others regard them as insufficient or, in some cases, as unconstitutional
- Weighing the need to address continuity concerns against the need to address other, arguably more pressing, policy matters, particularly in an environment characterized in part by low public opinion of Congress⁷

These concerns and policy areas likely interact as Congress considers how to ensure its institutional survival and resiliency to carry out its constitutional responsibilities in the face of a variety of potential interruptions. 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. Further challenges arise from actions Congress and the House have taken in some areas following the 9/11 attacks.

Congressional Policy and Administrative Responses After 9/11

During the years immediately 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 Representatives to ensure the House could continue to operate until special or regular elections could be held. Before engaging the complex area of Member replacement, I will briefly summarize post-9/11 changes to enhance congressional preparedness, including

- 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; and
- changes to recess and convening authorities in the House and Senate.

⁷ See “Congress and the Public,” Gallup, <https://news.gallup.com/poll/1600/congress-public.aspx>; “Do Americans Approve or Disapprove of Congress?,” 538, <https://projects.fivethirtyeight.com/polls/approval/congress/>; “Do You Approve or Disapprove of the Way Congress Is Handling Its Job?,” Statista, <https://www.statista.com/statistics/207579/public-approval-rating-of-the-us-congress/>.

House and Senate Emergency Planning

More than a year before the 9/11 attacks, the United States Capitol Police Board⁸ 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”⁹ 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.”¹⁰

Detailed consideration of the wide range of emergency preparedness efforts of the House and Senate, the Board, and USCP is not publicly available and is arguably beyond the scope of today’s hearing. In the past 24 years, House and Senate officers, acting pursuant to the authorities established by each chamber, the Board, and the USCP have reportedly deployed or improved several capacities. These include emergency communications; evacuation and shelter-in-place plans; staff accountability and safety; and test, training, and exercise programs to familiarize Members, congressional staff, and visitors to congressional facilities with emergency response procedures and to ensure the reliability of those plans.

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.” The rule provided that 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.”¹¹ The rule does not specify what 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.

Soon after a new Congress convenes, or at another time when a new Speaker is elected, the Speaker’s list is delivered to the Clerk and the delivery is announced on the House floor.¹² Since the adoption of the House rule, a Speaker’s list has been used once to designate a Speaker pro tempore following a vacancy in the Office of Speaker. In correspondence to the House at the time, the Acting Clerk noted that the designated Member’s name was the first on the list provided by the outgoing Speaker.¹³

⁸ The United States Capitol Police Board is composed of the Sergeants at Arms of the House and Senate and the Architect of the Capitol. The Chief of the United States Capitol Police has, since 2003, served as a nonvoting, ex officio member of the Board.

⁹ 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).

¹⁰ 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.

¹¹ House Rule I, cl. 8(b)(3).

¹² See “Announcement by the Speaker Pro Tempore” and “Recall Designee,” *Congressional Record*, daily edition, January 9, 2023, p. H74; and “Announcement by the Speaker,” and “Recall Designee,” *Congressional Record*, daily edition, October 25, 2023, p. H5053.

¹³ “Communication from the Clerk of the House,” *Congressional Record*, daily edition, vol. 169, part 162 (October 3, 2023), p. H4978.

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 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.¹⁴ Since then, the House has adjourned pursuant to the rule on seven occasions, the first on March 6, 2003,¹⁵ and the last two occasions on January 6, 2021.¹⁶ 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.¹⁷ It does not appear that this authority has been implemented since its adoption.

The Senate adopted a resolution 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 the presiding officer 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.¹⁸ While the Senate has adjourned on some occasions that the House adjourned pursuant to its emergency authorities, it cannot be determined that the Senate has adjourned explicitly on the authority of the resolution. Similarly, the authority under which the Senate convened away from its chamber in 2011 following an earthquake that affected Washington, DC, cannot be determined.¹⁹

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 during the 108th Congress. 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 Accountability and Replacement

The rapid identification of Members killed, incapacitated, or missing, and the implementation of established procedures to ensure a quorum of Members is available in each chamber, are linchpins in any effort by either chamber to recover and reconstitute following a mass casualty incident affecting the House or Senate. Historically, the chambers 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

¹⁴ House Rule I, cl. 12(b)(1).

¹⁵ "Recess," *Congressional Record*, daily edition, vol. 149, part 36 (March 6, 2003), p. H1649.

¹⁶ "Recess," *Congressional Record*, daily edition, vol. 167, part 4 (January 6, 2021), p. H85.

¹⁷ House Rule I, cl. 12(d).

¹⁸ S.Res. 296, 108th Congress, adopted February 3, 2004.

¹⁹ Chris Good, "Video of the Day: Senate Holds Session Outside Capitol," *The Atlantic*, August 24, 2011, <https://www.theatlantic.com/politics/archive/2011/08/video-of-the-day-senate-holds-session-outside-capitol/244093/>.

established,²⁰ 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 House, procedures to establish a provisional quorum were 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.

House Provisional Quorum

During the 109th Congress (2005-2006), the House formally codified long-standing House practice that a quorum is a majority of the Members elected, sworn, and living.²¹ In practice, the Speaker or Speaker pro tempore typically announces a revised whole number of the House following changes in the membership of the House.²² The House also adopted rules to establish a provisional quorum if catastrophic circumstances left a large number of Members missing, incapacitated, or incapable of attending House proceedings.²³ Under these rules, the House must hold two lengthy quorum calls and receive a report from the Sergeant at Arms (or designee) before a quorum will be determined based on the “provisional number of the House.”

Similar questions confronting the House may also arise in the Senate 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.”²⁴

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 that can be filled under existing procedures.²⁵ 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.²⁶

²⁰CRS In Focus IF12393, *Senators Who Die In Office: History and Current Practices*; and CRS Report RL34347, *Members of Congress Who Die in Office: Historic and Current Practices*.

²¹ 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.

²² For example, *Congressional Record*, daily edition, January 6, 2023, p. H49.

²³ House Rule XX, cl. 5(c).

²⁴ See U.S. House of Representatives, Asher C. Hinds, *Precedents of the U.S. House of Representatives*, vol. IV (Washington: GPO, 1907), pp. 64-65. The Senate has not approved any legislation concerning the matter of incapacitation of a large number of Senators.

²⁵ 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 17th Amendment, which provided state legislatures with the authority to grant temporary appointment authority to governors until an election can be held. See, generally, CRS In Focus IF11722, *House of Representatives Vacancies: How Are They Filled?*

²⁶ Exceptions include Kentucky, North Dakota, Rhode Island, Oregon, and Wisconsin, where the governor is not permitted to make interim appointments and any Senate vacancy must be filled by special election. See, generally, CRS In Focus IF11907, *U.S. Senate Vacancies: How Are They Filled?*

Incapacitated and Missing Members

The matter of incapacitation or missing Members has arisen infrequently before either chamber in the past century. In the House, the practice has been to remove an incapacitated Member only if that person is reelected and does not appear to be seated for a new Congress due to incapacity or presumed death. 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.²⁷ The Senate has taken no official, public action regarding an incapacitated Senator's seat. As a result, some incapacitated Senators have stayed in office for substantial periods of time. 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 absent Members before the next general election may be expulsion from either chamber. The following provides a brief summary of actions taken in response to incapacitation or disappearance of some Members of the House and Senate in the past century.

Incapacitated Members

In the House, Representative Gladys Noon Spellman of Maryland suffered cardiac arrest on October 21, 1980, and was left in what was determined to be an irreversible coma days before the general election in which she was reelected to the 97th Congress (1981-1982). On February 24, 1981, more than six weeks after the new Congress convened, the House adopted H.Res. 80,²⁸ declaring a vacancy in the Fifth Congressional District in the state of Maryland "because of the absence and continuing incapacity" of Spellman.²⁹ A new Member representing the district was subsequently elected and took office 210 days after Representative Spellman was stricken.

In the Senate, two examples show the challenges raised by incapacitation. Senator Carter Glass of Virginia was elected President pro tempore of the Senate in July 1941, and he served in the position until January 1945.³⁰ Senator Glass, who endured poor health for much of his life, was absent from the Senate beginning in the mid-winter of 1942, and he took the oath of office following reelection that year in his Lynchburg home. Until his death on May 28, 1946, he had been absent from the Senate for a period of at least 1,580 days. Suggestions from Virginia politicians and newspapers that Senator Glass resign were met with silence from Senator Glass and his wife.³¹

Similarly, Senator Karl Mundt of South Dakota suffered a stroke on November 23, 1969, and did not return to the Senate. More than two years later, he was removed from committee assignments. In response, his wife, who reportedly counseled against Senator Mundt's resignation soon after he fell ill,

²⁷ See United States Senate, "Earle C. Clements: A Featured Biography," https://www.senate.gov/senators/FeaturedBios/Featured_Bio_ClementsEarle.htm; S.Res. 261, 92nd Congress, "Making Certain Committee Assignments to Certain Members of the Minority"; "Mundt Assignments," in *CQ Almanac 1972*, 28th ed. (Washington, DC: Congressional Quarterly, 1973), <http://library.cqpress.com/cqalmanac/cqal72-125072>; S.Res. 27, 110th Congress, "A Resolution to Constitute the Majority Party's Membership on Certain Committees of the One Hundred Tenth Congress, or Until Their Successors Are Chosen"; S.Res. 492, 110th Congress, "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>.

²⁸ H.Res. 80, 97th Congress, "A Resolution Declaring a Vacancy in the Fifth Congressional District in the State of Maryland."

²⁹ "Declaring Vacancy in 97th Congress from Fifth Congressional District of Maryland," *Congressional Record*, vol. 127, February 24, 1981, pp. 2916-2918; "Compensation in Lieu of Salary to the Honorable Gladys Noon Spellman," *Congressional Record*, vol. 127, January 27, 1981, pp. 974-975; and *Congressional Record*, vol. 119, January 3, 1973, p. 12.

³⁰ Senator Glass's service as Senate President pro tempore fell within the period between 1888 and 1947 that the incumbent of the office was not in the line of presidential succession. See United States Senate, "Presidential Succession Act," <https://www.senate.gov/about/officers-staff/president-pro-tempore/presidential-succession-act.htm>.

³¹ "Elder Statesman," *Time*, February 19, 1945, <https://web.archive.org/web/20070930043110/http://www.time.com/time/magazine/article/0,9171,778330,00.html?iid=chix-sphere>.

suggested that he was improving and that she had received no warning of the Senate's action.³² Senator Mundt remained a sitting Senator until his term ended 1,137 days after he fell ill, on January 3, 1973.

Missing Members

On October 16, 1972, Representative Hale Boggs of Louisiana, who served as House Majority Leader, and Representative Nick Begich of Alaska, were lost in a plane crash during a campaign swing through Alaska. Similar in timing to Representative Spellman's illness, the accident occurred close to the next general election, and both men were reelected. Their bodies were never found. Representative Begich's seat was declared vacant following the determination of an Alaska jury that he was presumed dead.³³ A special election was held, and a new Member for Alaska's at large seat was sworn in on March 6, 1973, 141 days after the plane crash. Representative Boggs was declared presumed dead by another Alaska jury,³⁴ but the seat he represented was declared vacant by the House on the first day of the 93rd Congress (1973-1974).³⁵ The Louisiana seat was filled by special election on March 20, 1973, 155 days after the accident.

House Special Elections in Extraordinary Circumstances

In addition to House rules changes, during the 109th Congress legislation was enacted to require states³⁶ to hold special House elections when extraordinary circumstances cause mass vacancies in the House. The act³⁷ 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.³⁸

Following announcement of mass vacancies by the Speaker, political parties authorized by state law to nominate candidates are required to make a determination of the candidates who will run in the special election not later than 10 days after the Speaker's vacancy announcement. This may also be accomplished by any other method the state considers appropriate. Affected states must 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. States must 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.³⁹

³² "Mundt, Ill, Taken Off Committees," *Chicago Tribune*, February 4, 1972, p. 17.

³³ "Panel Rules Begich Is 'Presumed Dead,'" *New York Times*, December 13, 1972.

³⁴ "Alaska Jury Declares Boggs Died on Flight," *New York Times*, February 8, 1973.

³⁵ H.Res. 1, 93rd Congress, "A Resolution Concerning the Vacancy in the 93d Congress in the Representation from the 2d Congressional District in the State of Louisiana Because of the Absence of Representative-Elect Hale Boggs."

³⁶ The measure also applies to the Delegates from District of Columbia, American Samoa, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands, and the Resident Commissioner of the Commonwealth of Puerto Rico, but the presence of those Members would not be counted by the House for purposes of establishing a quorum to do business.

³⁷ 2 U.S.C. 8(b).

³⁸ 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.

³⁹ 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 it requires the judiciary to provide a final decision within three days of the filing of such an action. The law makes a final decision nonreviewable. See U.S. Congress, House, *Continuity in Representation Act of 2005, Report to Accompany H.R. 841*, 109th Congress, 1st sess., H.Rept. 109-8, 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 (continued...)

Current Congressional Contingency Procedures: Questions of Sufficiency

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 challenges. Regarding the provisional quorum, questions of constitutionality 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 in which none of the Members on the list is available. Finally, concerns might arise from an apparent underemphasis on the challenges posed by Member incapacity or disappearance following an incident.

Unresolved policy questions, combined with a lack of assurance that current provisions can ensure the continued operations of the House or Senate, might suggest to some that they may have been insufficient to fully address the continuity policy environment. To better ensure the continuity of Congress, reconsideration of existing provisions 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.⁴⁰

During consideration of the legislation regarding special elections in extraordinary circumstances, concern was expressed that a 45-day period, as was then 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.⁴¹ 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 several states were attacked, or if 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.⁴² Any of these concerns 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

Congress, 1st sess., H.Rept. 109-139 (Washington: GPO, 2005), <https://www.congress.gov/congressional-report/109th-congress/house-report/139/1>.

⁴⁰ 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 2006, pp. 19-22.

⁴¹ 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>. Also, see CRS In Focus IF11642, *Absentee Voting for Uniformed Services and Overseas Citizens: Roles and Process, In Brief*, and CRS Report R46455, *COVID-19 and Other Election Emergencies: Frequently Asked Questions and Recent Policy Developments*.

⁴² 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*, hearings, 108th Cong., 1st Sess., S.Hrg. 108-701, September 9, 2003 (Washington: GPO, 2003), pp. 22-24, 26-41, and 86-100, <https://www.govinfo.gov/content/pkg/CHRG-108shrg96926/html/CHRG-108shrg96926.htm>.

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 death, resignation, or expulsion of a Member; 112 have been filled (or are currently scheduled to be filled) by special election. In addition, on one occasion affecting the 9th District of North Carolina, a vacancy resulted due to a notification from North Carolina that required a special election to resolve.⁴³ The average period of vacancy between the outgoing Member's departure and the special election for these 112 contests is 136 days. Of the 109 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.⁴⁴ 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

Since adoption of adjustment of newer rules governing the quorum, the whole number of the House has been adjusted by only one or two Representatives at a time. Notionally, it could be used to establish a quorum of fewer than 218 Representatives and less than a majority of the 435 seats in the House. Those who oppose current House practices regarding the definition of a quorum 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 on the number of seats authorized for the chamber. The procedures for establishing a provisional quorum in the event of a mass casualty event have similarly been questioned on constitutional grounds. 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 could be seen as potentially illegitimate or unenforceable, and arguably unconstitutional.⁴⁵

⁴³ Data provided here exclude a possible gap in representation due to the lack of a certificate or election in the 22nd District of New York following the 2020 general election, in which no special election occurred and the Member was sworn in weeks after the convening of Congress.

⁴⁴ 2 U.S.C. 8.

⁴⁵ 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>; 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*, March 2006, pp. 22-27; Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven, CT: Yale University Press, 2006), pp. 142-155; and Mann and Ornstein, *The Broken Branch*, pp. 207-210.

Recent consideration of proxy voting, which was implemented by the House in response to the COVID-19 pandemic, may suggest that a physical quorum is necessary for the House to conduct business and vote on legislation. See Philip Wallach, "Good Riddance to Proxy Voting in the House," *The Hill*, December 20, 2022, <https://thehill.com/opinion/campaign/3777104-good-> (continued...)

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

The matter of the appointment of a Speaker pro tempore may also raise 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 would designate the new Speaker pro tempore and promptly elect a new Speaker (or Speaker pro tempore). 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 new Speaker. This most typically occurs on the first day a Congress convenes, with the election of a Speaker following a quorum call, with Representatives-elect voting. 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 if the number of Members who appear in the House is less than a majority of the whole number of the House due to missing or incapacitated Members. If the provisional quorum rule is implemented, then the House arguably could conduct business soon after an operational interruption, including electing a Speaker Pro Tempore, if necessary. But some might question the constitutionality of the provisional quorum, and if those concerns arose in the House, that could interfere with the ability of the House to elect a new Speaker or consider legislation. Alternatively, the constitutionality of the proceedings could be questioned after the enactment of legislation, which could have legal consequences for the applicability of those laws.

Death, Incapacity, and Missing Status: Incomplete Attention?

In post-9/11 efforts to consider the potential consequences of an interruption of 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.

riddance-to-proxy-voting-in-the-house/; and *Texas v. Garland*, No. 5:23-CV-034-H (U.S. District Court, Northern District of Texas, Lubbock Division 2024).

As a result, 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—whether permanent, temporary, or of indeterminant duration—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 to Continuity of Congress

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.⁴⁶ 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. 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.

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 might 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. Under most proposals, a sudden shift in membership in either chamber could result in a change in the legislative agenda or in 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 for Congress as an institution.

Finally, opponents 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 their seat only as a result of direct election by the voters in the Member's district.

⁴⁶ 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; American Enterprise Institute, *The Continuity of Congress*, April 2022, <https://www.aei.org/wp-content/uploads/2022/04/The-Continuity-of-Congress.pdf?x85095>; and The Brookings Institution and American Enterprise Institute, *Preserving Our Institutions: The First Report of the Continuity of Government Commission*, Continuity of Government Commission, May 1, 2003, <https://www.brookings.edu/articles/preserving-our-institutions-the-first-report-of-the-continuity-of-government-commission/>.

Continuity of Congress: Proposed Constitutional Amendments

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, from 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 might 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—who meet the qualifications to serve in the House—who could take their place in the event they die prior to the expiration of their term of office. In the event of the death of a Representative, the chief executive of the State shall select an individual from the deceased Representative’s list not later than 10 days after the Representative’s death, and the Speaker of the House shall immediately fill the vacancy with that individual. The appointed individual would serve until another Representative is elected to fill the vacancy by special election. During their time in the House, an appointed individual shall be treated as a Representative in the House, and that individual would also submit a list of people who could replace them in the event of their 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, which provided for temporarily filling House vacancies or selecting successors in case of the disability of a significant number of Representatives, were introduced.⁴⁷ During that period, hearings were held in the House and Senate.⁴⁸ On one occasion, the House Committee on the Judiciary adversely reported a proposal to the House, and the proposal was subsequently defeated on the House floor.⁴⁹ A summary of proposed constitutional amendments related to the continuity of Congress can be found in **Table 1**.

⁴⁷ The proposals are as follows: 107th Congress (2001-2002), H.J.Res. 67, H.J.Res. 77, and S.J.Res. 30; 108th Congress, 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 Congress (2005-2006), H.J.Res. 26; 110th Congress (2007-2008), H.J.Res. 56, and H.J.Res. 57; and 111th Congress (2009-2010), H.J.Res. 52.

⁴⁸ 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, 107th Cong., 2nd sess. (Washington: GPO, 2002); U.S. Congress, Senate Committee on the Judiciary, *Ensuring the Continuity of the United States Government: The Congress*, 108th Cong., 1st Sess., S.Hrg 108-701, September 9, 2003 (Washington: GPO, 2003), <https://www.govinfo.gov/content/pkg/CHRG-108shrg96926/html/CHRG-108shrg96926.htm>.

⁴⁹ H.J.Res. 83, 108th Congress, “Proposing an Amendment to the Constitution of the United States Regarding the Appointment of Individuals to Fill Vacancies in the House of Representatives.”

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).⁵⁰ During that period, hearings were held in the House⁵¹ and Senate.⁵² On three occasions, the Senate Committee on the Judiciary reported a proposal,⁵³ 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, 1954.⁵⁴ 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, 1955.⁵⁵ 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.

The Senate passed a third proposed constitutional amendment, S.J.Res. 39, on February 2, 1960, by a vote of 70-18.⁵⁶ 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

⁵⁰ The proposals are as follows: 79th Congress (1945-1947), H.J.Res. 362; 80th Congress (1947-1949), H.J.Res. 34 and S.J.Res. 161; 81st Congress (1949-1951), H.J.Res. 48; 82nd Congress (1951-1953), H.J.Res. 155, H.J.Res. 166, S.J.Res. 59, and S.J.Res. 75; 83rd Congress (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 Congress (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 Congress (1957-1959), H.J.Res. 52, H.J.Res. 105, and S.J.Res. 157; 86th Congress (1959-1961), H.J.Res. 30, H.J.Res. 519, S.J.Res. 39, and S.J.Res. 85; 87th 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. The information provided here from proposed constitutional amendments focuses on mechanisms to address temporary vacancies in the House and Senate. The proposed amendments may have also contained other provisions that are not considered here, including mechanisms to address executive branch continuity, changes to the terms of Members of Congress, and other matters.

⁵¹ 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, 87th Cong., 1st sess. (Washington: GPO, 1961).

⁵² 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, 82nd Cong., 2nd 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, 84th Cong., 1st sess. (Washington: GPO, 1955).

⁵³ 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, 83rd Cong., 2nd 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, 84th Cong., 1st 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, 87th Cong., 2nd sess. (Washington: GPO, 1962).

⁵⁴ “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.

⁵⁵ “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.

⁵⁶ “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.

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.⁵⁷

Amendment Proposal Contents

Many of the constitutional 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 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 to select persons to take the place of such Senators or Representatives.⁵⁸ 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.⁵⁹ 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.⁶⁰ Governors would then make temporary appointments until elections could be held.⁶¹ The notification process proposals raised a number of questions related to the definition of terms and the establishment of procedures. For example, a definition of “national disaster” was not specified, and it was not always clear who would determine when a national disaster had occurred. 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.⁶² Some post-2001 proposals limited the scope of potential appointees to those specified in advance by a Representative or those who were elected as an alternate representative.⁶³

Most proposed constitutional amendments addressed vacancies, and a few addressed disability. It appears that none addressed the status of missing Members. Of those proposed amendments that addressed disability, none appear to define disability or the 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.

⁵⁷ 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 23rd Amendment to the Constitution.

⁵⁸ H.J.Res. 89 (108th Congress), introduced March 11, 2004; and S.J.Res. 46 (79th Congress), introduced May 29, 1946.

⁵⁹ *Ibid.*, and H.J.Res. 34 (80th Congress), introduced January 3, 1947.

⁶⁰ 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 (108th Congress), introduced March 11, 2004; S.J.Res. 23 (108th Congress), introduced November 5, 2003; and H.J.Res. 519 (86th Congress), introduced September 4, 1959.

⁶¹ H.J.Res. 155 (82nd Congress), introduced February 6, 1951, and S.J.Res. 59, introduced April 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.

⁶² S.J.Res. 157 (85th Congress), introduced February 26, 1958.

⁶³ H.J.Res. 57 (110th Congress), introduced October 4, 2007; and H.J.Res. 92 (108th Congress), introduced April 2, 2004.

Potential Considerations and Options for Congress

In conclusion, 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 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, so the need to engage congressional continuity planning is still necessary.

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 administrative 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.

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 could 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 the need for Member education, orientation, and socialization on a large scale, given the influx of new congressional staff or returning staff in new roles. Coupled with the likelihood that Congress will need to respond to the cause of the interruption, these organizational factors may have implications for the capacity of either chamber to function 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.” At a minimum, consideration of the issues of incapacity might include a definition of incapacity and a timetable in which to determine the resolution of Members who are missing.

With regard to incapacity, there are existing medical, legal, and other policy definitions and related processes of determination in various professional settings, some of which vary by profession or state. However, none of these definitions and processes appear well suited to be adapted 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.⁶⁴ Among the things Congress might consider are the conditions or circumstances of temporary or permanent incapacity and mechanisms to declare the end of temporary incapacity. It might be necessary to consider whether incapacity questions might affect Member qualifications set in the Constitution,⁶⁵ or whether the House and

⁶⁴ 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.

⁶⁵ The Constitution sets qualifications for Representatives in Article I, Section 2: a Representative must be 25 years of age or older, a citizen of the United States for seven years, and resident in the state from which they are elected. Article I, Section 3, sets qualifications for Senators: a Senator must be 30 years of age or older, a citizen of the United States for nine years, and resident in the state from which they are elected.

Senate have sufficient constitutional authority to make incapacity determinations under Article I, Section 5.⁶⁶ 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 those entities 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.

Finally, it appears that issues related to the continuity of Congress may transcend typical authority structures and committee jurisdictional lines in each chamber. Since the interrelated challenges of congressional continuity appear to be a problem with implications for the House and the Senate, Congress might consider creating a joint committee, task force, or other mechanism to facilitate bicameral investigation and consideration of congressional continuity issues.⁶⁷

Thank you again for inviting me to testify today. I look forward to your questions.

⁶⁶ Article I, Section 5, states that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members."

⁶⁷ In the 116th Congress (2019-2020), the House Select Committee on Modernization recommended a similar body to "identify lessons learned during the COVID-19 pandemic and recommend continuity of Congress improvements." In the 117th Congress (2021-2022), the committee recommended creating a joint committee to "review House and Senate rules and other matters to ensure continuing representation and congressional operations...." See U.S. Congress, House Select Committee on the Modernization of Congress, *Recommendations to Improve Continuity of Government and Congressional Operations*, H.Rept. 116-560, 116th Cong., 2nd sess., October 16, 2022 (Washington: GPO, 2022), p. 6; and U.S. Congress, House Select Committee on the Modernization of Congress, *Recommendations to Strengthen Congressional Oversight Capacity, Improve District Operations, Modernize Congressional Office Operations, Modernize the Legislative Process, and Examine Congressional Continuity*, 117th Cong., 2nd sess., December 21, 2022, H.Rept. 117-657, pp. 16-17, <https://www.govinfo.gov/content/pkg/CRPT-117hrpt657/pdf/CRPT-117hrpt657.pdf>.

Table I. 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, 118 th 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, 111 th Congress H.J.Res. 56, 110 th 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, 110 th 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, 109 th 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 th 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

Measure, Congress	Circumstances	Extent of Vacancy or Incapacity	Selecting Agents	Implementation	Duration of Appointment
H.J.Res. 89, 108 th 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, 108 th Congress H.J.Res. 77, 107 th 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, 108 th 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, 108 th 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 th 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
S.J.Res. 30, 107 th 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.