

**CONTINUITY OF CONGRESS: PREPARING FOR
THE FUTURE BY LEARNING FROM THE PAST**

HEARING

BEFORE THE

SUBCOMMITTEE ON MODERNIZATION

OF THE

COMMITTEE ON HOUSE

ADMINISTRATION

HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTEENTH CONGRESS

SECOND SESSION

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SEPTEMBER 18, 2024
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September 18, 2024

SUBCOMMITTEE ON MODERNIZATION,
COMMITTEE ON HOUSE ADMINISTRATION,
HOUSE OF REPRESENTATIVES,
Washington, DC.

The Subcommittee met, pursuant to notice, at 12 p.m., in room 1310, Longworth House Office Building, Hon. Stephanie Bice [chair of the Subcommittee] presiding.

Present: Representatives Bice, Carey, Kilmer, and Morelle.

Also present: Representatives Timmons and Lee.

Staff present: Annemarie Cake, Professional Staff and Deputy Clerk; Marian Currinder, Senior Professional Staff; Alexander Deise, Parliamentarian; Derek Harley, Senior Advisor; Kristen Monterroso, Director of Operations and Legislative Clerk; Michael Platt, Staff Director; Jordan Wilson, Director of Member Services; Khalil Abboud, Minority Deputy Staff Director, Chief Counsel; Jamie Fleet, Minority Staff Director; Heather Painter, Minority Legislative Director; Owen Reilly, Minority Professional Staff; and Sean Wright, Minority Chief Counsel.

OPENING STATEMENT OF HON. STEPHANIE BICE, CHAIR- WOMAN OF THE SUBCOMMITTEE ON MODERNIZATION, A U.S. REPRESENTATIVE FROM OKLAHOMA

Chairwoman BICE. The Subcommittee on Modernization will come to order. I note that a quorum is present.

Without objection, the chair may declare a recess at any time.

The hearing record will remain open for 5 legislative days so Members may submit any materials they wish to be included therein.

Normally the Modernization Subcommittee holds its hearings in a roundtable format, but because so many of our colleagues have expressed an interest in joining today, we have moved up to the dais to make sure that there is enough room for everyone.

I want to start by saying, even though we are seated up here on the dais, we will stick with our usual discussion-oriented format to encourage more cohesive exchange of ideas and thoughts.

Today's hearing is about an incredibly important issue that most of us have avoided talking about, and there are good reasons for that. None of us want to think about disasters or catastrophic attacks, much less imagine ourselves as targets.

Anyone who has written a will knows that planning for the future that does not include you is a very tough exercise. When it

comes to Congress, we tend to take comfort in the fact that the institution has survived for over 200 years despite a Civil War, two devastating pandemics, the 9/11 terrorist attacks, and countless other threats.

It is easy to assume that, if Congress has lasted this long, the chances are it will continue to endure. As Members of Congress, we have a responsibility to examine and discuss these issues to make sure that we are not leaving things to chance.

Last Wednesday was the 23d anniversary of 9/11, and today we will look at the steps Congress took following the 9/11 attacks. Back then, Congress faced the extremely difficult task of addressing the question of continuity right on the heels of an unforeseen and devastating attack. The solutions they landed on were a thoughtful, good faith effort to thread a very complicated political and procedural needle.

As we all know, the threat environment has changed significantly since 9/11, and the margins between parties have become increasingly narrow. These and other factors suggest a need to discuss and better understand the actions Congress took after 9/11 to ensure they adequately protect Congress today.

Ranking Member Kilmer has spent a lot of time studying the issue and knows it better than most. I want to thank him for the work he has done to raise awareness and to encourage the Subcommittee on holding this hearing.

I think it is safe to say that most Members care deeply about the issue and that we would all benefit from reexamining what has changed since 9/11 and thinking through how to address the vulnerabilities that remain. I view this hearing as an opportunity to learn. There are different approaches to addressing the challenge of continuity, a constitutional amendment being one of them. As we all know, passing an amendment is a heavy lift that can take years and sometimes decades.

According to CRS, 40 constitutional amendments on the subject of continuity have been introduced since 1945, and none of them have passed. This track record in part explains why Congress landed where it did after 9/11. Given the very real challenges of passing an amendment, they opted to find another path forward.

This is not to say that we should not consider it, but I think it makes sense to also consider what we can do in the near term to help safeguard continuity. I am looking forward to learning more about some of those options today.

The bottom line is that everyone's tolerance for risk is different, and that is a big factor in whether and how we plan for the unthinkable. When it comes to planning for the unthinkable where Congress is concerned, we should be guided by our obligation to act in the best interests of the American people. In other words, our focus should be on Congress, not on ourselves as Members of Congress. Our role in this exercise is to ensure that the institution is capable of carrying out its constitutional obligations no matter the circumstances.

This is particularly important because Congress was created to speak for the American people. Article I of the Constitution establishes that the legislative branch is first among the co-equal branches for this very reason. If disaster strikes and Congress is

unprepared, we should expect that the executive branch will step in to fill the void. This would leave our constituents without a direct voice in Government in a time of crisis. While that is not a scenario any of us want to imagine, it is one that deserves thoughtful consideration, and I hope that this hearing today serves that purpose.

At this time, I would like to recognize the Ranking Member for the purpose of providing an opening statement.

[The prepared statement of Chairwoman Bice follows:]

**PREPARED STATEMENT OF HON. STEPHANIE BICE,
CHAIRWOMAN OF THE SUBCOMMITTEE ON MODERNIZATION**

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Anyone who has written a will knows that planning for the future that does not include you is a very tough exercise. When it comes to Congress, we tend to take comfort in the fact that the institution has survived for over 200 years despite a Civil War, two devastating pandemics, the 9/11 terrorist attacks, and countless other threats.

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I think it is safe to say that most Members care deeply about the issue and that we would all benefit from reexamining what has changed since 9/11 and thinking through how to address the vulnerabilities that remain. I view this hearing as an opportunity to learn. There are different approaches to addressing the challenge of continuity, a constitutional amendment being one of them. As we all know, passing an amendment is a heavy lift that can take years and sometimes decades.

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The bottom line is that everyone's tolerance for risk is different, and that is a big factor in whether and how we plan for the unthinkable. When it comes to planning for the unthinkable where Congress is concerned, we should be guided by our obligation to act in the best interests of the American people. In other words, our focus should be on Congress, not on ourselves as Members of Congress. Our role in this exercise is to ensure that the institution is capable of carrying out its constitutional obligations no matter the circumstances.

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Congress is unprepared, we should expect that the executive branch will step in to fill the void. This would leave our constituents without a direct voice in Government in a time of crisis. While that is not a scenario any of us want to imagine, it is one that deserves thoughtful consideration, and I hope that this hearing today serves that purpose.

OPENING STATEMENT OF HON. DEREK KILMER, RANKING MEMBER OF THE SUBCOMMITTEE ON MODERNIZATION, A U.S. REPRESENTATIVE FROM WASHINGTON

Mr. KILMER. All right. Thanks, Madam Chair. Thanks for hosting this hearing, and for our colleagues both on the Modernization Subcommittee and some who may be joining us from off of it, I appreciate their participation.

I also want to extend my sincere appreciation to all of our witnesses for taking the time to prepare and to join us for today.

In this role, I often ask my constituents what keeps you up at night, and there is plenty as Members that can keep us up at night, but one that certainly keeps me up at night is political violence and Congress' vulnerability to it. We explored this issue previously when I chaired the select committee on the Modernization of Congress, but we did not finish the job on this topic.

Part of our job is to think about the unthinkable. I want you to imagine another shooting at a Congressional Baseball Game practice or a bomb at the State of the Union or a party retreat or even if a plane goes down carrying a full State's delegation to a funeral. I know this is not a fun topic, but I also know that it is increasingly a necessary topic.

Just this past weekend, we experienced yet another credible attempt on former President Trump's life following the assassination attempt targeting him just a mere month ago. Last year, we learned that the U.S. Capitol Police tracked a 300 percent increase in threats against Members of Congress over the past 7 years.

The White House and the Senate have continuity plans. They are prepared because the Constitution was twice amended to ensure governing can continue if the President or Senators are killed or otherwise die while in office, as much as we pray that does not happen. Prayer is not a good strategy for continuity. The U.S. House of Representatives is not prepared.

Today we will learn more about how the House would function if a tragic event of this kind were to happen. In a nutshell, it would not. I am grateful to my colleague and friend, Congressman Brad Wenstrup, for serving on our first panel today. He has, unfortunately, had to think about this issue more than most. As many of you know, Brad was at the 2017 Congressional Baseball Game practice where a politically motivated gunman shot four people, including our colleague, Majority Leader Steve Scalise. A trained doctor, Brad rendered heroic medical assistance that day. I want to thank you for your leadership that day and for being here to share a Member's perspective on this important topic.

On our second panel, we will hear from former House Parliamentarian Tom Wickham. Tom was here during 9/11, where flight 93 was headed for the United States Capitol, thwarted by the heroic actions of those aboard.

That was the last time the House adopted continuity measures which included a quorum change and a requirement that States hold expeditious special elections within 49 days following a mass casualty event. Many election officials have indicated they would struggle to meet the 49-day requirement, a sentiment we heard echoed again last week at the elections hearing by our full Committee. In the event of many Members of Congress losing their lives, even 49 days is a really long time to have Americans without representation.

We will hear from Ms. Rebecca Gambler with the GAO who has been leading a related report as a result of a bipartisan request letter from our Committee and can speak to this aspect in greater detail.

Finally, I want to thank Eric Petersen with the Congressional Research Service for being here today, especially because he has been under the weather. Eric has near encyclopedic knowledge of the history of continuity efforts of our vulnerabilities as an institution and the various approaches to address this and the pros and cons dating from the atomic era into the modern era.

This hearing would have been incomplete without you, sir. I am glad you are here.

I am convinced that there are both constitutional and operational insufficiencies with the status quo. The status quo also creates a perverse incentive for political violence through targeted killings designed to switch the majority party in the House. This vulnerability is especially acute in the narrow majority margins we have seen in recent years. 8 years ago, there were 24 Members of Congress at the baseball practice; 24 is more than double the number needed to change the current majority composition of the U.S. House.

The select committee previously made an open recommendation to establish a joint committee to review House and Senate rules and other matters, assuring continuing representation and congressional operations for the American people. There are some who believe that this issue needs more study. Personally I do not think that. If that is the best we can do, let us at least do that, though.

As most of you know, I have introduced, along with Congressman Wenstrup, a bipartisan constitutional amendment to ensure the continuity of Congress. The amendment would require that House Members submit a list of five potential replacements when they are sworn in, one of whom would be appointed by the State's Governor if a sitting Member dies or is killed during their term to then serve temporarily just until a special election can be held.

I want to thank Brad and my former co-chair of the select committee, current co-chair of the Fixed Congress Caucus, William Timmons, who I think will be joining us today, and select committee alum Emanuel Cleaver for their participation on this effort.

Our amendment addresses two critical concerns. One, it ensures the continuity of the legislative branch during times of unprecedented crisis. If, God forbid, we saw a mass casualty event, it would be a national crisis. That would be a terrible time to see prolonged vacancies in the House. It would be a time when the House would have to act, and in our proposal, you would have temporary replacements who could do that.

Second, our amendment reduces the incentive for political violence, as temporary replacements would likely come from the same party as the original Representative.

If Congress fails to enact a sufficient continuity plan, the American people will be left wondering why in the world's leading democracy there was no plan to protect our most sacred democratic institutions.

Now, just a few days after the 23d anniversary of September 11 and now in the face of increasing threats on Members and ourselves, I am glad we are holding this hearing today and look forward to a productive discussion. My hope is through our work today we can better protect the U.S. House of Representatives against unspeakable threats and ensure the continuity of this great American experiment.

Thank you. I yield back.

[The prepared statement of Ranking Member Kilmer follows:]

**PREPARED STATEMENT OF RANKING MEMBER OF THE
SUBCOMMITTEE ON MODERNIZATION DEREK KILMER**

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Chairwoman BICE. Thank you.

At this time, I recognize the Ranking Member of the full Committee on House Administration, Mr. Morelle, for an opening statement.

OPENING STATEMENT OF HON. JOSEPH MORELLE, RANKING MEMBER OF THE COMMITTEE ON HOUSE ADMINISTRATION, A U.S. REPRESENTATIVE FROM NEW YORK

Mr. MORELLE. Thank you, Madam Chair.

Like you, I want to thank my colleague and dear friend on our Subcommittee, Ranking Member Derek Kilmer, for his work, his leadership on the important topic, continuity. Thank our witnesses, certainly Representative Wenstrup and all the folks that Mr. Kilmer identified. Thanks.

I know imagining disaster scenarios targeting our colleagues and ourselves is hard, bombs at the State of the Union or party conventions, assassins targeting just enough Members of the majority party to put them in the minority, and yet I think all of us, and certainly as the Ranking Member of this Committee that ensures— is intended to ensure that the House operates, and we need to be

prepared to ensure that Congress, our democracy can function in the face of all of the disasters we prefer not to think about.

Right now vacancies in Congress, as everyone knows, under the Constitution are filled through special elections. It is one of the remarkable things about the history of this House that everybody who has ever served in the House of Representatives owes that seat to an election by the people in their district.

Obviously, this would create some changes, which makes it somewhat, you know, challenging to think about it. The notion of mass casualty events or disasters led several bipartisan Members of this Committee to write a letter to the Government Accountability Office requesting they examine how quickly States will be able to hold special elections following a mass casualty event. As Ranking Member Kilmer suggested, some local election officials have real concerns about how quickly they can do all of this.

The full Committee also voted unanimously for an amendment earlier this Congress directing the study that was talked about, and I think that is a positive bipartisan step to become better informed about the topic and to raise the specter of what we do.

As I understand, the previous select committee made a related recommendation to establish a joint committee of Members to ensure continuity in the face of the next potentially unforeseen crisis, modeled after prior legislation that was never enacted.

Convening today is really important. I want to again thank the Subcommittee chair for bringing us together and to think about this and to force us to really sort of spend some time. I look forward to discussion of the bipartisan constitutional amendment, H.J. Res. 118 as well, as one of the possible ways of addressing it.

Ensuring we get this right matters for a whole host of reasons. We need to maintain an uninterrupted legislative capacity during times of crisis as my friend, Mr. Kilmer, has talked about, especially if Congress is needed to address funding bills, to war authorizations, or other emergency legislation that we would need to respond to a crisis. The Constitution establishes the balance of power between the three branches. It is hard to imagine our Government functioning with one of those three branches incapacitated.

All of this, I think, and all Americans deserve representation as quickly as possible, even in emergency situations. It is a tough topic. It is also one that I suspect our Founders had never really seriously considered in their day and age, but it is one in the modern era we do have to consider as distasteful as it is. I think we can make important strides, and I think this conversation is certainly a way to do that.

Again, I want to thank Mr. Kilmer for his long commitment to this subject and, again, to the chair for bringing us together and continuing a dialog on an important subject.

Thank you all. With that, I yield back.

[The prepared statement of Ranking Member Morelle follows:]

**PREPARED STATEMENT OF RANKING MEMBER OF THE
COMMITTEE ON HOUSE ADMINISTRATION JOSEPH MORELLE**

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Again, I want to thank Mr. Kilmer for his long commitment to this subject and, again, to the chair for bringing us together and continuing a dialog on an important subject.

Chairwoman BICE. Thank you.

At this time, it is my delight to welcome our colleague, Dr. Brad Wenstrup, who has graciously agreed to join us today to share his experiences and thoughts about the topic of continuity, as he has experienced it firsthand.

With that, Dr. Wenstrup, the floor is yours.

**STATEMENT OF THE HON. BRAD R. WENSTRUP, A
REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO**

Mr. WENSTRUP. Well, thank you very much, Chairwoman Bice, Ranking Member Kilmer, the whole House Administration Committee for having me here today to testify and have the discussion, as you described it that way, on the topic of congressional continuity.

I am really grateful for this serious approach that this Committee has taken. If it takes a Committee to appoint a Committee to make a study to eventually get something done, let us do it now. Let us do it now because we have to. As has been said, it is not a pleasant topic to think about. It is incredibly serious, and it is serious and so important for the country.

You know, it has been 7 years since the shooting at the baseball field. You know, I have thought about this problem for some time, and I brought it up here and there during certain opportunities. I am really grateful that this is happening now. This is really important because not only, as it has been mentioned, can we take away the incentive for someone to act in a nefarious way, we are going to preserve the idea that all Americans will have a voice here in Congress virtually at all times.

I have always thought that, out of everything bad that happens, there is a chance to do something good, and I think that that opportunity is here and now. Again, I am very grateful for what is being done here by this Committee and that we are taking the time to deliberate and hopefully move forward to find the best response in case the unthinkable ever happens or the unthinkable that has happened has some success, some negative success.

This is not just a hypothetical situation we are dealing with today. You know, I first came to Congress, you know—since I came here, there has been a real up-tick in political violence against fellow Americans, against elected officials, increase in violent political rhetoric from elected and nonelected people and social media. You know, let us face it, we always talk about the increase of mental health needs in our country. We have a problem. Someone who may have mental health needs does not need to be incentivized toward taking bad action.

In recent years, we have seen the shooting of Congresswoman Gabby Giffords, anti-Semitic incidents sky rocket, assassination attempts on President Trump. According to a recent TIME article, one-third of Americans believe that violent action against the Government can be justified. John Lewis, a colleague, great American, he used to say “good trouble.” He did not have this in mind. This is not what he was talking about.

You know, June 14, 2017, I was on the baseball field with my colleagues practicing for the baseball game. A violent domestic terrorist attempted to assassinate Republican Members of Congress. He had names in his pocket, descriptions in his pocket. This was a clear assassination attempt, and he decided to use murder or assassination as a tool for a political change. He wanted to wipe out the Republican majority and change the balance of power in our Congress.

136 rounds were fired on that field at that confrontation. Sitting Members of Congress and their staff were seriously injured and required immediate medical intervention. What would have happened if Capitol Police were not there? He could have killed sitting Members. If he had achieved his goal and there were enough Members to tip the balance of power in one direction or another, he succeeded.

Let us take that opportunity away. He could have killed—you know, if someone is killed or incapacitated beyond the ability to serve, that is a problem.

There are too many what-if's in a situation like this because Congress has not fully considered the implications of a mass casualty event affecting Members and the impact it would have on the ability of our Congress to function in a time of need.

I think we need to take some next steps, a process that is a deterrent of a disaster, and I think that we can all stand resolute on this and clearly in a bipartisan fashion.

You know, we have plans in place for a President. We have seen that happen in the United States of America, but there is a plan in place for succession, and especially if there are multiple leaders that are killed or incapacitated beyond repair basically.

I am really proud to join Representatives Kilmer, Timmons, Cleaver in leading a proposed constitutional amendment that would establish a congressional continuity plan by requiring each newly elected Member to provide a list of at least five individuals who are qualified to serve in the Member's place in the event of that Member's death during the term, and if they were to pass away, the Governor of the State must select a replacement from that list within 10 days. We heard how long it takes for a special election.

I will just finish with this because I know my time has expired, and I appreciate it. You know, we heard it said, you know, hope is wonderful, but it is not a plan. Prayer is great, but it is not a plan. I just want people to think about, besides the baseball field and the other events, what would we have done on 9/11/2001 if the fourth plane hit the Capitol? We were in session that day.

I yield back.

[The prepared statement of Mr. Wenstrup follows:]

PREPARED STATEMENT OF THE HON. BRAD R. WENSTRUP

Well, thank you very much, Chairwoman Bice, Ranking Member Kilmer, the whole House Administration Committee for having me here today to testify and have the discussion, as you described it that way, on the topic of congressional continuity.

I am really grateful for this serious approach that this Committee has taken. If it takes a Committee to appoint a Committee to make a study to eventually get something done, let us do it now. Let us do it now because we have to. As has been said, it is not a pleasant topic to think about. It is incredibly serious, and it is serious and so important for the country.

You know, it has been 7 years since the shooting at the baseball field. You know, I have thought about this problem for some time, and I brought it up here and there during certain opportunities. I am really grateful that this is happening now. This is really important because not only, as it has been mentioned, can we take away the incentive for someone to act in a nefarious way, we are going to preserve the idea that all Americans will have a voice here in Congress virtually at all times.

I have always thought that, out of everything bad that happens, there is a chance to do something good, and I think that that opportunity is here and now. Again, I am very grateful for what is being done here by this Committee and that we are taking the time to deliberate and hopefully move forward to find the best response in case the unthinkable ever happens or the unthinkable that has happened has some success, some negative success.

This is not just a hypothetical situation we are dealing with today. You know, I first came to Congress, you know—since I came here, there has been a real up-tick in political violence against fellow Americans, against elected officials, increase in violent political rhetoric from elected and nonelected people and social media. You know, let us face it, we always talk about the increase of mental health needs in our country. We have a problem. Someone who may have mental health needs does not need to be incentivized toward taking bad action.

In recent years, we have seen the shooting of Congresswoman Gabby Giffords, anti-Semitic incidents sky rocket, assassination attempts on President Trump. According to a recent TIME article, one-third of Americans believe that violent action against the Government can be justified. John Lewis, a colleague, great American, he used to say "good trouble." He did not have this in mind. This is not what he was talking about.

You know, June 14, 2017, I was on the baseball field with my colleagues practicing for the baseball game. A violent domestic terrorist attempted to assassinate Republican Members of Congress. He had names in his pocket, descriptions in his pocket. This was a clear assassination attempt, and he decided to use murder or assassination as a tool for a political change. He wanted to wipe out the Republican majority and change the balance of power in our Congress.

136 rounds were fired on that field at that confrontation. Sitting Members of Congress and their staff were seriously injured and required immediate medical intervention. What would have happened if Capitol Police were not there? He could have killed sitting Members. If he had achieved his goal and there were enough Members to tip the balance of power in one direction or another, he succeeded.

Let us take that opportunity away. He could have killed—you know, if someone is killed or incapacitated beyond the ability to serve, that is a problem.

There are too many what-ifs in a situation like this because Congress has not fully considered the implications of a mass casualty event affecting Members and the impact it would have on the ability of our Congress to function in a time of need.

I think we need to take some next steps, a process that is a deterrent of a disaster, and I think that we can all stand resolute on this and clearly in a bipartisan fashion.

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Chairwoman BICE. Thank you, Dr. Wenstrup.

I also want to take a moment to express gratitude for your heroic efforts on the baseball field that day. There were Members of the Republican Conference that likely may not be with us today if it were not for the heroic efforts that you provided on the field. I want to show gratitude for that.

Mr. WENSTRUP. Thank you.

Chairwoman BICE. At this time, I will begin by recognizing myself for the purpose of asking a question and then recognize the Ranking Member and then our colleagues who might also have additional questions.

Let me begin, in 2018, a chartered train carrying Republican lawmakers collided with a garbage truck in Virginia, killing one person.

In 2020, the COVID pandemic forced Congress to go virtual. My classmate, Congressman-elect Luke Letlow, the late husband of Julia Letlow, died from complications before he was actually seated as a Member of Congress.

How do these events, in addition to more recent events like the recent assassination attempts of President Trump, put continuity in a new light?

Mr. WENSTRUP. Well, you know, you saw so many people with COVID dying, and, at first, we did not know who was dying and why they were dying necessarily. We have gradually learned who was more vulnerable than others, but at the same time, you know, we have people here with a lot of different medical conditions and

different ages. We saw, with COVID, that those were reasons for people to be affected and not necessarily live. We fared fairly well, fortunately, in Congress, but, there again, that is another situation where we could find ourselves with a huge, huge absence.

The train wreck, I can tell you, being on that as well, where we had a large number of Members of the House and Senate, if we had hit that truck in a different way, we would have derailed. We were fortunate we hit the back end of the truck, and it went spinning. Again, we lucked out. If we derailed, who knows how many people might have died.

You have to take all of these things in mind, and not only is it important how we posture ourselves and protect ourselves when we gather, and even individually, we have to think of what happens afterwards.

You know, as I look at the baseball field, if Capitol Police were not there, I mean, Steve Scalise took a bullet for all of us because that is the reason Capitol Police were there. If they were not there, this guy, I am telling you, walks into this field, he kills 20 or 30 Members of Congress and their staff in one morning changing the balance of power in the House of Representatives. I would contend that is an insurrection by one person, by one person.

You know what, we try to protect ourselves as best we can, and we have made changes, and we have tried to increase our security, but bad things happen. You can have all the security you want, that does not stop a pandemic.

Chairwoman BICE. Dr. Wenstrup, in my opening statement, I mentioned that there have been 45 proposed constitutional amendments to address the continuity issue and that none of them have actually been successful.

In your opinion, why is a constitutional amendment the sort of only option that you feel like would address this issue?

Mr. WENSTRUP. Well, our Founders made constitutional amendments tough for good reason, that it would take the will of a large group of people. I really do not know why all the other opportunities have not come together, but I cannot think of a time in history where the continuity of Government has been as threatened as it is today. I think that—I would hope that the American people and all Members of Congress, Senate, and the White House would have an understanding as to why this needs to take place, and we probably should not dawdle. I consider not having something in place a national security threat.

Chairwoman BICE. Thank you for that.

I would say Civil War times may have also been a time where there was certainly concern about continuity given, you know, the engagement, but I appreciate your comments there.

At this time, I want to—or now I am going to recognize the Ranking Member Kilmer for 5 minutes for questions.

Mr. KILMER. Thanks, Madam Chair.

I really thank you for being here. I want to thank you for showing up.

You just spoke to two situations that could have been a whole lot worse, right. The train derailment could have flipped the majority in the House for months and months. You know, you mentioned the baseball field, you know, only because Leader Scalise was a

Member of leadership was Capitol Police even present that day, and but for their presence, that could have been much worse.

I just think the perspective you bring to this conversation is really important, and I want to thank you for sharing that.

I also want to thank you for co-leading the constitutional amendment. I just want to give you a little bit of an opportunity to talk about why you decided to sign onto that proposal and what you see the benefits of it as.

Mr. WENSTRUP. Well, you know, as I reflected on in my opening statement, this concern of mine has been there since the shooting at the baseball field for sure. I mention it here for this Committee or that Committee and just in passing and, you know, I kind of kick myself for not taking action. I am extremely grateful to you for coming to me. You know, we know each other, and I think you know it would mean a lot to me that we take some action here.

As someone who is—well, I guess we both are retiring from Congress after this term, and so maybe this can be our swan song where we do something good for the sake of the Nation, for the sake of this body, and for national security, and to maybe deter bad actors.

Mr. KILMER. I know the Chairwoman asked you about the choice of pursuing a constitutional amendment, and I think obviously one of the challenges is, you know, we are restricted by the current language of the Constitution to only replace Members through election. That automatically runs us into challenges with—and, again, we will hear from Secretaries of State or from the GAO who have talked to Secretaries of State that it just takes time to hold an election, right. You have to have people register as candidates. You have to print ballots. You know, when we talked as a full Committee last week, you know, do you want military members to be able to vote? Well, I do, right. That takes time.

I am just curious your take on the benefit of the constitutional amendment approach vis-à-vis other approaches.

Mr. WENSTRUP. Well, one, it really locks it in, and then also it shows that it has had very much bipartisan support. You know, one of the things I said too is, you know, we have a succession plan for the President and you go down to the Secretaries and everything else. They were not elected either, but they were someone that was selected by the sitting President who was elected, and that is what we are asking to do in the amendment. I think that was pretty thoughtful, is that the person that was elected is likely choosing someone similar to them, which would be representative of the people that elected the Member.

I think that is an important component, and I think that is why it is important to have that list in place. You know, we do it for the Speaker. We do it, you know, in other areas too, but what we are doing is saying, “This is a stop gap.” We are not saying, “You have that seat for the rest of the term,” or anything else. It is just until the special election goes through its ordinary process. We constitutionally are not trying to change the way States operate their elections, but at the same time, we are letting that State or that district have representation.

Mr. KILMER. Thanks so much.
I yield back.

Chairwoman BICE. Thank you.

At this time, I recognize Mr. Carey for 5 minutes for questions.

Mr. CAREY. I want to thank you, Madam Chair, for the opportunity.

Doctor, you know, I think Ohioans know your service. Obviously, you and Derek both leaving this institution, you know, really shows in a bipartisan way how the institutional knowledge of this body will lose a lot of the institutional knowledge.

I just want to—I appreciate all of your years of service and everything that you have done, not just from your time in Congress and your heroic efforts on the baseball field, but your military service and your commitment to take care of your young family. I do appreciate that.

Mr. WENSTRUP. Thank you.

Mr. CAREY. I just want to say, you know, this is an issue—you know, most people see many of us on TV shouting at the rain, but we are a body that can come together in a bipartisan way to get things done. I think what you see in this Subcommittee and I think what you see in the House Admin Committee, you see that we can work together to deliver solutions to the American public. I just wish that, on both sides, our colleagues would recognize that we can get along, and we can do the right things for the American public.

I do want to ask you a couple questions. What are your views on the select committee's recommendation for the joint committee to investigate these issues more fully and make recommendations on what we are doing and what we are speaking about today?

Mr. WENSTRUP. Well, beyond recommendation—I am pleased that you are doing it as I have said. I mean, this is fantastic, probably long overdue, but I am seeing serious conversations about a serious matter coming from both sides of the aisle, and I want you to drive on and keep going with this that I hope can result in a change in how our laws read, how our Constitution reads so that we are better able to serve the American people.

You know, we do not want someone to be able to take away the voice of Americans here in this body, you know. We are a democratic republic. We represent the people. They have selected us. If there is something that happens, then someone that we recommend should be able to fill in temporarily until the normal State process can take place.

Mr. CAREY. I think it is also important to—you know, I came in in a special election, and I know the process that it took. We had to have a primary. We had to have a general. Our primary was—I think the Congressman that had my seat before resigned, I believe it was the first part of the year—I am not sure when it was that Steve resigned. Our primary was done in August, and our general was done in November. We are able to do those. I know Ohio is not that way, but I think nationally we definitely need to do that.

Again, I just want to say thank you for being here today.

Madam Chair and Derek, thank you for having this Committee. This is an important issue and one that is thoughtful, one that I think we are going to get bipartisan support with.

With that, Madam Chair, I yield back.

Mr. WENSTRUP. I think you are doing great.

Mr. CAREY. Thank you, Brad.

Mr. WENSTRUP. Thank you.

Chairwoman BICE. Dr. Wenstrup, we appreciate your time this afternoon.

With that, we will introduce the second panel of witnesses.

Mr. WENSTRUP. Thank you.

Chairwoman BICE. Thank you.

For our second panel of witnesses, our first witness is Eric Petersen. Mr. Petersen is a specialist in American National Government in the Government and Finance Division of the Congressional Research Service, where he has worked for two decades.

In addition to continuity of Congress, his research areas include congressional administration and staffing, constituent service management, congressional executive relations, and Government contingency planning.

Welcome.

Our next witness is Tom Wickham. Mr. Wickham is the former House Parliamentarian and served as a nonpartisan House official for over 25 years.

In leading an office that reviewed every measure that came before the House, Mr. Wickham has command of a broad range of subject matters covering all aspects of Government policy. During numerous high-profile legislative events, he counseled Speakers of the House, Vice Presidents, and countless Members and Senators on their constitutional and statutory authorities.

Our final witness is Rebecca Gambler. Ms. Gambler is the director of Homeland Security and Justice at the Government Accountability Office. In addition to other issues, she leads GAO's work on a range of election issues, including voting equipment and voter registration and waiting times at polling places.

I want to say thank you to our second panel of witnesses for being with us today.

Please remember to press the button on the microphone in front of you so that the green light is on. When you begin to speak, the timer in front of you will turn green. After 4 minutes, the light will turn yellow. When the red light comes on, your 5 minutes has expired, and we would ask that you please kindly wrap up quickly.

At this time, I now recognize Mr. Petersen for 5 minutes of opening statements.

STATEMENTS OF ERIC PETERSEN, SPECIALIST IN AMERICAN NATIONAL GOVERNMENT, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS; THOMAS WICKHAM, JR., PRIVATE CITIZEN; AND REBECCA GAMBLER, DIRECTOR, HOMELAND SECURITY AND JUSTICE, U.S. GOVERNMENT ACCOUNTABILITY OFFICE.

STATEMENT OF ERIC PETERSEN

Mr. PETERSEN. Chair Bice, Ranking Member Kilmer, and Members of the Subcommittee. Apologies for the audio—

Chairwoman BICE. Can you make sure that your microphone is on?

Mr. PETERSEN. OK. Is this better?

Chairwoman BICE. Much better. Thank you.

Mr. PETERSEN. Chair Bice, Ranking Member Kilmer, Members of the Subcommittee, with apologies for the audio, thank you for inviting me to testify today on behalf of CRS.

The continuity of Congress, the ability of the national legislature to carry out its constitutional and representational roles in the face of a wide variety of potential interruptions of those activities has been a subject of concern for almost 80 years. Particular attention has been given to solutions at the dawn of the atomic age from 1945 to the early 1960's and again in the years following the terrorist attacks of September 11, 2001.

Focusing on that latter period, there have been several changes in light of continuity concerns. In my written testimony, there are discussions of House and Senate efforts to enhance existing emergency response capacities, House authority to install an acting Speaker pro tem if the Office of Speaker is vacant, and changes to recess and convening authorities in the House and Senate.

My oral remarks center on the challenges of Member availability. 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 can continue to serve could adversely affect the ability of Congress to carry out its constitutional responsibilities.

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 lynch pins in any effort by either Chamber to recover and reconstitute following a mass casualty or other incident affecting Members.

While procedures regarding the death of individual Members are well established, matters relating 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.

Despite post-9/11 efforts, 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.

This is due in part to competing ideas of the practicality of arrangements to replace House Members by special elections following a substantial loss of Members as well as concern about the constitutionality of current House provisional quorum procedures.

Some note that a mass death incident would affect House operations more significantly than it would Senate operations since the House requires election of all of its Members, while the Senate can appoint Senators. Five States require special elections to fill Senate vacancies, accounting for 10 percent of its Membership, and an incident resulting in substantial incapacitation or 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 underestimating the challenges of seats where the incumbents may be missing or unable to carry out their duties while still remaining sitting Members.

A fulsome consideration of policy approaches to addressing incapacity or disappearance might have the effect of producing incom-

plete policy—my mistake. The continued absence of a fulsome policy approach to addressing incapacity and disappearance issues might have the effect of producing incomplete policy responses.

In the event of a substantial number of missing or incapacitated Members following an interruption, the House may be 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. To better ensure the continuity of Congress, reconsideration of existing provision may need to occur.

I am a bit out of time, so I am just going to skip to the conclusions.

It appears, without regards 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 in the House.

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

There is more I will be happy to get to in the questions. For now, I want to thank you for inviting me to testify today, and I look forward to your questions.

[The prepared statement of Mr. Petersen follows:]

PREPARED STATEMENT OF ERIC PETERSEN



Congressional Research Service
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TESTIMONY

Statement of

R. Eric Petersen

Specialist in American National Government

Before

Committee on House Administration
Modernization Subcommittee
U.S. House of Representatives

Hearing on

**“Continuity of Congress: Preparing for the
Future by Learning from the Past”**

September 18, 2024

Congressional Research Service
7-5700
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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?hid=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-riddance-to-proxy-voting-in-the-house> (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 1. Continuity of Congressional Representation: Measures Introduced to Amend the Constitution Since 2001

Measure, Congress	Circumstances	Extent of Vacancy or Incapacity	Selecting Agents	Implementation	Duration of Appointment
H.J.Res. 118, 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 votes, 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.

Chairwoman BICE. Thank you, Mr. Petersen.
At this time, I recognize Mr. Wickham for 5 minutes.

STATEMENT OF THOMAS WICKHAM, JR.

Mr. WICKHAM. Thank you, Madam Chair. Thanks for having me here today.

My name is Tom Wickham, and I served in the Office of the House Parliamentarian from 1995 to 2021, including as Parliamentarian from 2012 to 2020.

I am honored to discuss the reflections on the rules changes that occurred following the terrorist attacks of 9/11 and the challenges and continuity of Government that face the House today. As a retired Parliamentarian of the House, I approach this topic not as an advocate or an academic but instead as a former practitioner sharing a perspective of an office dedicated to advising and guiding this institution. In terms of this narrow but critical vantage point, there is no better substitute for the guidance of the current Parliamentarian of the House, Jason Smith, and that wonderful team as the House seeks to engage on this important topic.

The House is fortunate to have a comprehensive history of the House's procedural action in response to 9/11 transcribed in the testimony of George R. Rogers before the select committee on Modernization on April 6, 2022, and the 2006 College of William and Mary Law Review article on the provisional quorum rule by John B. Williams.

The institutional mindset of the House after 9/11 was focused on preventing and preparing for another terrorist attack, and the institutional offices in the House carried out related operational and legislative activities. These activities ranged from the assignment of individual rubble whistles, like this one I have right here, the assignment of flashlights, gas masks to Members and staff, to mammoth investigative efforts by the 9/11 Commission, and legislative efforts to establish a Department of Homeland Security, which would be the largest Government reorganization since the National Security Act of 1947.

The central procedural organizing force in the House was the Continuity Task Force headed by Representative Chris Cox and Representative Martin Frost. Despite the weight of 9/11 and the urgency to ensure a continuity in preparation for another attack, the task force was not myopic or rushed and deliberated for 6 months on other historic catastrophic circumstances, including the House's response to the Civil War and to the flu epidemic of 1918.

The greatest challenge for that task force was the lack of a procedural foundation from which we could build upon with very scant procedural tools such as a single statement glued into Jefferson's manual that said that, due to the inherent authority of the chair, that a recess could be declared in the event of danger or a handshake agreement that no Members would raise a point of no quorum during an emergency because a quorum would be presumed.

With bipartisan spirit driving the task force, it became clear that the most difficult issue was that to deal with the constitutional quorum requirement in the event of a large amount of deaths or incapacitations. The Cox-Frost recommendations were divided, the

first submission being the least constitutionally intrusive group of recommendations. This foreshadowed the quorum requirement as a more constitutionally intrusive change that was worthy of greater scrutiny and not the basis of a recommendation from Cox-Frost.

What followed was a hearing, a rare hearing of the Committee on Rules with testimony from sitting the Parliamentarian, one of only three occurrences that I can remember, where the issue of the procedural provisional quorum was dived into.

Commenting and fast-forwarding today, in the sake of brevity, the House is fortunate that there is a stronger foundation for action than there was on the days immediately following 9/11.

As the House continues looking at this issue into 2025 and beyond, I hope we will be able to grasp the experience of the pandemic when looking at modern communication abilities or the decades of experience in the Homeland Security Department when defining catastrophic circumstances.

I will wrap up my testimony there and take questions at the appropriate time.

Thank you.

[The prepared statement of Mr. Wickham follows:]

PREPARED STATEMENT OF THOMAS WICKHAM, JR.

To: Members of the Modernization Subcommittee, Committee on House Administration
From: Tom Wickham, former House Parliamentarian, SVP, U.S. Chamber of Commerce
Date: September 18, 2024

Tom Wickham served in the Office of the House Parliamentarian from 1995-2021 including as Parliamentarian from 2012-2020.

I am honored to discuss reflections on the rules changes that occurred following the terrorist attacks of 9/11 and the challenges in continuity of government that face the House today. As a retired Parliamentarian of the House, I approach this topic not as an advocate or an academic but instead as a former practitioner sharing the perspective of an office dedicated to advising and guiding the institution. In terms of this narrow but critical vantage point, there is no substitute for the guidance of the current Parliamentarian of the House Jason Smith and that wonderful team as the House seeks to engage on this important topic.

The House is fortunate to have a comprehensive history of the House's procedural action in response to 9/11 transcribed in the testimony of George R Rogers before the Select Committee on Modernization on April 6, 2022 and the 2006 College of William and Mary law review article on the provisional quorum rule by John B Williams. The institutional mindset of the House after 9/11 was focused on preventing and preparing for another terrorist attack and the institutional offices carried out related operational and legislative activities. These activities ranged from the assignment of individual "rubble whistles," flashlights, and gas masks to Members and staff to mammoth investigative efforts by the 9/11 Commission and legislative efforts to establish a Department of Homeland Security – which would be the largest government reorganization since the National Security Act of 1947.

The central procedural organizing force in the House was the continuity task force headed by Rep. Christopher Cox (R-CA) and Rep. Martin Frost (D-TX). Despite the weight of 9/11 and urgency to ensure continuity in preparation for another attack, the task force was not myopic or rushed and deliberated for six months on other historic "catastrophic circumstances" including the House's response to the Civil War and the flu influenza epidemic of 1918. The greatest challenge for this task force being the lack of a procedural foundation from which to build upon with scant procedural tools including a single statement glued into the Parliamentarian's Manual citing the "inherent authority of the chair" to declare a recess in the event of danger to the body and a pollyanna hope for unanimous consent or a handshake agreement that no attending Member would raise a point of no quorum as legislation was passed with a quorum being presumed.

With bipartisan spirit driving focus and collaboration, the great cleave in the Cox-Frost task force became how to deal with the constitutional quorum requirement in the event of large amounts of deaths or incapacitations. The quorum requirement, the responsibility to preserve the government, the House's history of elected membership, and the House's constitutional authority to make its own rules provided too complicated for the Cox-Frost task force to make a recommendation. The constitutional dividing line was marked by the Cox-Frost submission to the Record on November 14, 2002 of three draft rules characterized as the "least

constitutionally intrusive” group of recommendations. This foreshadowed a quorum-related change as a “more constitutionally intrusive” change that was worthy of greater scrutiny.

The importance to the institution of the “quorum issue” was highlighted by a hearing of the Committee on Rules chaired by Rep. David Dreier (R-CA) on April 29, 2004 featuring testimony from the sitting Parliamentarian Charles W. Johnson, III – one of only three such testimonial appearances by the Parliamentarian in memory. In his testimony on the provisional quorum discussion draft, Johnson emphasized the prudence of the House acting in advance of a crisis and that he did not have a clear answer to the constitutionality of the proposed rule but that the constitutional advisability of such a change could be “initially” determined by the House in its debate and vote on the rules change. The hearing included a step-by-step guide to the draft rule by then Deputy Parliamentarian John Sullivan which noted that the rule was anchored in constitutionally-prescribed motions to adjourn and motion to compel attendance. The rule also featured an extremely slow timeline to completion with frequent escape hatches, intermittent updates on the security situation from House officials, and that the provisional quorum would be eventually set by the attendance of the Members themselves. That testimony marked the final commentary from the Office of the Parliamentarian on the rule.

The House is fortunate in 2024 that there is a stronger foundation for action than existed in the years following 9/11. As it continues into 2025 and beyond, the House can review its rules with the experience of the pandemic and historical and constitutional guidance on its proxy voting machine. It can reevaluate the catalog of triggering catastrophic condition with decades of technical experience couched in a Department of Homeland Security. The House also has the opportunity to review the multiple time layovers in the provisional quorum rule to conform with modern communication abilities.

Chairwoman BICE. Thank you, Mr. Wickham.

Finally we have Rebecca Gambler with the GAO.

Ms. Gambler, you are recognized for 5 minutes for an opening statement.

STATEMENT OF REBECCA GAMBLER

Ms. GAMBLER. Good afternoon, Chairwoman Bice, Ranking Member Kilmer, and Members of the Subcommittee.

Thank you for the opportunity to testify at today’s hearing to discuss preliminary observations from GAO’s ongoing work on State capabilities to hold special elections in the event of mass vacancies in the U.S. House of Representatives.

All levels of Government share a responsibility in the U.S. election process, and the election system is highly decentralized. States are responsible for the administration of their own elections, as well as Federal elections. States regulate various aspects of elections, including registration procedures, absentee and early voting requirements, and election day procedures. They support local jurisdictions in administering elections.

The process for holding elections includes activities like registering voters, recruiting and training poll workers, selecting polling locations, transmitting absentee and vote-by-mail ballots, and setting up voting machines and voting booths.

In 2005, Congress passed a law that addresses holding special elections when the Speaker of the House announces that there are more than 100 vacancies in State Representation in the House. In such extraordinary circumstances, the law requires that States in which vacancies exist do several things, including holding a special election within 49 days.

Today I will summarize our preliminary observations on, one, State laws related to holding special elections to fill House vacan-

cies and how they compare with the Federal law to hold such elections; and, two, the perspectives of State election officials on the capabilities of and challenges facing States in holding special elections to fill House vacancies.

First, our preliminary analysis has identified nine States that have laws for holding special elections to fill House vacancies that adopt aspects of the Federal law for the State, such as those related to the 49-day timeframe. Our preliminary analysis also shows that 41 States do not appear to have laws that adopt the Federal law for their State.

Almost all of these States have provisions in State law that address holding special elections to fill vacancies in their Representation in the House.

Examples of the types of timing provisions in these laws include specifying the number of days within which States are required to hold the election or giving the Governor discretion to order an election within a specific timeframe.

Second, we surveyed State election officials in all 50 States to obtain their perspectives on holding special elections consistent with the Federal law. As of the beginning of this month, 27 States have responded to the survey. Based on our preliminary analysis of the survey results, 15 of the 27 officials who responded to the survey reported that they were not aware of the Federal law prior to hearing about our study.

In addition, in responding to our survey, State election officials identified a range of challenges related to holding special elections consistent with the Federal law.

For example, officials reported that it would be difficult to select candidates within the timeframes required by the law. Officials also noted challenges related to preparing and printing ballots, identifying polling places and poll works, and transmitting absentee ballots to military and overseas voters.

Officials also reported to us that the challenges they identified could affect the accuracy and availability of ballots, pamphlets, and other voting materials, public perceptions of the election, and voting access, such as whether voters have sufficient time to request absentee ballots.

However, based on our preliminary analysis, many State election officials reported to us that they believe they could hold a special election consistent with the requirements in the Federal law.

Additionally, they identified State practices that may help them hold such elections, such as some States assigning responsibility for candidate selection to political parties, which could be done relatively quickly under a special election.

We also heard that vote centers could help give State election officials flexibility in conducting an election on short notice. These are locations where ballots for all precincts in a local jurisdiction are available to all voters so that they can vote at any center of their choosing.

In closing, we are continuing our review of these topics. We plan to issue a final report in the coming months.

This concludes my prepared statement, and I would be pleased to answer any questions Members may have.

[The prepared statement of Ms. Gambler follows:]

PREPARED STATEMENT OF REBECCA GAMBLER



United States Government Accountability Office

Testimony
Before the Subcommittee on
Modernization, Committee on House
Administration, House of
Representatives

For Release on Delivery
Expected at 12:00 p.m. ET
Wednesday, September 18, 2024

ELECTIONS

**Preliminary Observations
on State Laws and
Perspectives on Holding
Special Elections to Fill
House Vacancies**

Statement of Rebecca Gambler, Director, Homeland
Security and Justice

GAO Highlights

Highlights of [GAO-24-107789](#), a testimony before the Subcommittee on Modernization, Committee on House Administration, House of Representatives

Why GAO Did This Study

The U.S. Constitution requires each state's governor to issue written orders for special elections to fill House vacancies. States are responsible for overseeing federal elections in their jurisdiction in accordance with state and federal laws.

In recent years, a growing number of threats have been made against members of Congress. In light of these threats and the COVID-19 pandemic, there has been increased interest in whether states are appropriately positioned to hold special elections to fill mass House vacancies.

This statement is based on GAO's ongoing review of state capabilities to hold such elections. It provides preliminary observations on (1) state laws related to holding special elections to fill House vacancies and (2) the perspectives of state election officials on the capabilities of, and challenges facing, states in holding special elections to fill House vacancies consistent with federal law.

To develop these preliminary observations, GAO analyzed laws in all 50 states related to holding special elections to fill House vacancies. In addition, GAO conducted a web survey of state election officials in all 50 states to obtain their perspectives on holding special elections consistent with federal law. As of the beginning of September 2024, 27 states have responded to the survey. GAO also reviewed relevant reports and interviewed subject matter experts from four organizations, selected based on their work on this topic.

View [GAO-24-107789](#). For more information, contact Rebecca Gambler at (202) 512-8777 or gambler@gao.gov.

September 18, 2024

ELECTIONS

Preliminary Observations on State Laws and Perspectives on Holding Special Elections to Fill House Vacancies

What GAO Found

Following the terrorist attacks on September 11, 2001, Congress passed and the President signed a law in 2005 that generally requires states to hold special elections within 49 days of the Speaker of the U.S. House of Representatives (House) announcing that there are more than 100 vacancies in the House. GAO's preliminary analysis identified nine states that have laws for holding special elections to fill House vacancies that adopt aspects of the federal law, such as those related to the 49-day time frame. In addition, almost all of the other 41 states have provisions in their laws that address holding special elections to fill vacancies in the House. Examples of the types of timing provisions in these laws include specifying the number of days within which states are required to hold the election or giving the governor discretion to order an election within a specific time frame.

U.S. Capitol Building, where the U.S. House of Representatives Assembles



Source: W.Scott McGill/stock.adobe.com | GAO-24-107789

GAO surveyed state election officials in all 50 states to obtain their perspectives on holding special elections consistent with the federal law. Based on GAO's preliminary analysis of the survey results, 15 of the 27 officials who responded to the survey so far reported that they were not aware of the federal law prior to hearing about GAO's study. In addition, officials identified a range of challenges related to holding special elections consistent with the federal law. For example, officials reported that it would be difficult to select candidates within the time frames required by the law. Officials also noted challenges related to preparing and printing ballots, identifying polling places and poll workers, and transmitting absentee ballots to uniformed services and overseas voters.

State election officials reported that the challenges they identified could affect the accuracy and availability of ballots, pamphlets, and other voting materials; public perceptions of the election; and voting access, such as whether voters have sufficient time to request absentee ballots. However, many officials noted that they would be able to hold special elections consistent with the federal law. Additionally, officials identified state practices that may help them hold such elections. For example, officials reported that in some cases, states assign responsibility for candidate selection to political parties and noted that this could be done relatively quickly under a special election.

United States Government Accountability Office

Chairwoman Bice, Ranking Member Kilmer, and Members of the Subcommittee:

Thank you for the opportunity to discuss preliminary observations from our ongoing work on state capabilities to hold special elections in the event of mass vacancies in the U.S. House of Representatives (House).

Following the terrorist attacks on September 11, 2001, Congress passed and the President signed a law in 2005 that generally requires states to hold special elections to fill House vacancies within 49 days of the Speaker of the House announcing that there are more than 100 vacancies in the House.¹ Under the statute, this is referred to as "extraordinary circumstances."²

In recent years, a growing number of threats have been made against members of Congress. In 2023, the Chief of the U.S. Capitol Police testified to the Committee on House Administration that, from 2017 to 2023, the number of such threats rose by about 400 percent.³ Other threats, such as those posed by pandemics, also have the potential to cause mass vacancies in the House. In light of these threats, there has been increased interest in whether states are appropriately positioned to hold special elections to fill mass House vacancies.

My statement today is based on our ongoing review of state capabilities to hold special elections to fill vacancies in the House consistent with federal law.⁴ Specifically, this statement provides preliminary observations on

¹See Legislative Branch Appropriations Act, 2006, Pub. L. No. 109-55, tit. III, § 301, 119 Stat. 565, 588 (2005) (pertinent portion codified at 2 U.S.C. § 8(b)). According to the law, the requirements related to holding special elections also apply to the District of Columbia and listed U.S. territories, but vacancies in these jurisdictions are not to be included by the Speaker in determining whether vacancies in state representation in the House exceed 100.

²2 U.S.C. § 8(b)(4)(A).

³J. Thomas Manger, Chief of Police, U.S. Capitol Police, *Looking Ahead Series: Oversight of the United States Capitol Police*, testimony before the Committee on House Administration, 118th Cong., 1st sess., May 16, 2023.

⁴Our review was requested by the Chairs and Ranking Members of the Committee on House Administration and its Subcommittees on Modernization, Elections, and Oversight.

1. state laws related to holding special elections to fill House vacancies and how they compare with the federal law to hold such elections in the event of extraordinary circumstances; and
2. the perspectives of state election officials on the capabilities of, and challenges facing, states in holding special elections to fill House vacancies consistent with federal law.

To develop our preliminary observations, we identified and analyzed laws in all 50 states related to holding special elections to fill House vacancies and compared these laws with the federal law on filling vacancies in extraordinary circumstances.⁵ In addition, we conducted a web survey of state election officials in all 50 states to gather (1) information about their awareness of the federal law and (2) their perspectives on the challenges states might face in holding special elections to fill House vacancies consistent with the federal law and how state election administration practices might help states meet the time frames in the law. As of the beginning of September 2024, 27 states have responded to our survey, for a response rate of 54 percent.⁶ We also reviewed relevant documents (e.g., reports and Congressional testimony statements) and interviewed subject matter experts from four organizations, selected based on their work on this topic, to help augment state perspectives.⁷

We are conducting the work upon which this statement is based in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

Overview of State and Federal Election Administration

All levels of government share responsibility in the U.S. election process, and the election system is highly decentralized. States are responsible for the administration of their own elections as well as federal elections. Accordingly, states regulate various aspects of elections including, for example, registration procedures, absentee and early voting

⁵See 2 U.S.C. § 8(b).

⁶We sent our survey to state election officials on July 26, 2024.

⁷The selected organizations were the American Enterprise Institute, Bipartisan Policy Center, U.S. Election Assistance Commission, and National Conference of State Legislatures.

requirements, and Election Day procedures. States support local election jurisdictions in administering elections and oversee the conduct of elections in accordance with state and federal laws.

At the federal level, Congress's authority to regulate elections derives from various constitutional sources, depending on the type of election.⁸ Congress has passed federal legislation to address voter registration, voter identification, absentee voting for uniformed service members and overseas citizens, accessibility provisions for elderly individuals and people with disabilities, and prohibitions against discriminatory practices, among other issues. For example, the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), as amended, generally requires states to send absentee ballots to uniformed services and overseas voters at least 45 days before an election for a federal office.⁹

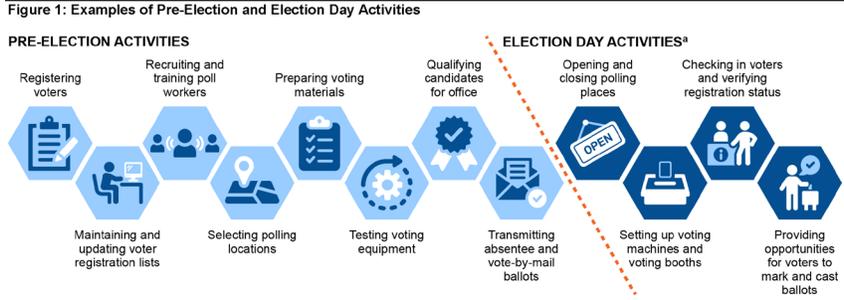
Process for Holding Elections

The process for holding elections includes pre-election and Election Day activities.¹⁰ Figure 1 shows examples of these activities.

⁸Congress's authority to regulate congressional elections derives primarily from Article I, Section 4, Clause 1 of the U.S. Constitution (known as the Elections Clause).

⁹The Military and Overseas Voter Empowerment Act, enacted in 2009, amended UOCAVA to establish new absentee ballot procedures, including the 45-day requirement, that states must follow in all federal elections. According to the act, if the chief state election official determines that the state is unable to meet the 45-day requirement due to an undue hardship, the official must request the Department of Defense to grant a waiver to the state for that election. Pub. L. No. 111-84, div. A, tit. V, subtit. H, 123 Stat. 2190, 2318-35, see 52 U.S.C. § 20302(a)(8)(A), (g).

¹⁰Election administration also includes post-election activities, such as securing equipment and ballots, transferring physical ballots or records of vote counts to a central location for counting, determining the outcome of the election, publishing unofficial results, certifying official election results, and performing recounts, if required.



Source: GAO analysis of elections-related reports, Icons-Studio/stock.adobe.com (icons) | GAO-24-107789

Notes: These examples are not presented in sequential order and do not constitute an all-inclusive list of election administration activities. In addition, certain pre-election activities may overlap with Election Day activities, such as in states that offer same-day voter registration, which allows any qualified resident of the state to register to vote and cast a ballot at the same time. Further, these activities may vary for states that have all-mail ballot or vote-by-mail elections. According to the National Conference of State Legislatures, as of January 2024, eight states allow all elections to be conducted entirely by mail, wherein ballots are automatically sent to every registered voter. These states may also provide options for in-person voting, both prior to and on Election Day.

^aElection Day activities also apply to early in-person voting, which allows registered voters to cast their vote in person before Election Day without providing an excuse, either at one specific location or at one of several locations.

Federal Time Frames for Filling House Vacancies in Extraordinary Circumstances

The Constitution requires each state's governor to issue written orders for special elections to fill House vacancies.¹¹ In 2005, Congress passed a law that addresses holding special elections when the Speaker of the House announces that there are more than 100 vacancies in state representation in the House.¹²

In such extraordinary circumstances,¹³ the law requires that states in which vacancies exist do the following:

- Hold a special election within 49 days, unless within 75 days after the Speaker's announcement that the vacancy exists, there is to be (a) a regularly scheduled general election for the same office or (b) another

¹¹U.S. Const. art. I, § 2, cl. 4.

¹²See 2 U.S.C. § 8(b).

¹³*Id.* § 8(b)(4)(A).

special election for the same office pursuant to a written order issued by the state's chief executive prior to the date of the Speaker's announcement.¹⁴

- Determine the candidates who will run by (a) political party nominations within 10 days of the Speaker's announcement that the vacancy exists or (b) any other method, including holding primary elections, that ensures states can meet the 49-day deadline for holding the special election.¹⁵
- Ensure to the greatest extent practicable that absentee ballots are transmitted to uniformed services and overseas voters within 15 days of the Speaker's announcement that the vacancy exists.¹⁶

State Laws for Holding Special Elections to Fill House Vacancies

Our preliminary analysis identified nine states—Arizona, California, Colorado, Georgia, Indiana, Nebraska, New Mexico, North Dakota, and South Dakota—that have laws for holding special elections to fill House vacancies in extraordinary circumstances. These state laws adopt aspects of the federal law, such as those related to the 49-day time frame and candidate nominations. Below are examples of state laws for holding special elections in the event that the Speaker of the House announces that there are more than 100 vacancies in the House.

- Arizona's state law generally requires a special election to fill a vacancy in the House to be held not more than 49 days after the declaration of the vacancy. There is an exception when a regularly scheduled general election or previously scheduled special general election is held within 75 days after the declaration of the vacancy.¹⁷
- Colorado's state law requires a special election to fill a vacancy in the House to be conducted on a Tuesday not more than 49 days after the declaration of the vacancy, unless a general election is to be held within 75 days of the declaration.¹⁸ In addition, the law requires political parties to nominate candidates no later than 10 days after the

¹⁴*Id.* § 8(b)(2).

¹⁵*Id.* § 8(b)(3).

¹⁶*Id.* § 8(b)(5)(A). The federal law also requires states to accept and process valid ballots or other election material from uniformed services and overseas voters so long as the ballot or other material is received by the appropriate state election official not later than 45 days from the date of transmittal. *Id.* § 8(b)(5)(B).

¹⁷Ariz. Rev. Stat. § 16-222(E).

¹⁸Colo. Rev. Stat. § 1-4-401.5(1).

declaration of the vacancy.¹⁹ It further provides the Secretary of State the authority to promulgate rules as may be necessary to administer and enforce any provision of the state law or to adjust statutory deadlines to ensure that a special election is held within the time required by the state law and the federal law.²⁰

Our preliminary analysis also shows that 41 states do not appear to have laws that adopt the federal law for their state. Almost all of these states have provisions in state law that address holding special elections to fill vacancies in their representation in the House.²¹ Below are examples of timing provisions in the laws for holding special elections to fill vacancies in the House, such as specifying the number of days within which to hold an election or giving the governor discretion to order an election within a specific time frame.

- Alaska's state law requires the governor to call a special primary election to be held not less than 60 and no more than 90 days after the vacancy occurs.²² Subsequently, the governor must call for a special election on the first Tuesday that is not a state holiday occurring not less than 60 days after the special primary election.²³
- Iowa's state law requires the governor to order a special election no later than 5 days from the date the vacancy exists with no less than 40 days' notice of the election if a vacancy occurs in the House when it is in session or will convene prior to the next general election.²⁴ In

¹⁹*Id.* § 1-4-401.5(2).

²⁰*Id.* § 1-4-401.5(4).

²¹GAO's preliminary analysis indicates that 49 states have provisions in state law that address holding a special election to fill vacancies in the House. This includes the 9 states that have laws that adopt and the 40 states that do not have laws that adopt 2 U.S.C. § 9(b). One state has not enacted any law we identified related to holding a special election to fill a House vacancy.

²²Alaska Stat. § 15.40.140.

²³*Id.* Alaska's law also states that, in an election year in which a candidate for that office is not regularly elected, if a vacancy occurs on a date not less than 60 nor more than 90 days before the primary election, the special primary election shall be held on the date of the primary election and the special election is to be held on the date of the general election. If the vacancy occurs on a date not less than 60 nor more than 90 days before the general election, the special primary election shall be held on the date of the general election and the special election shall be held on the first Tuesday that is not a state holiday occurring not less than 60 days after the special primary election. *Id.*

²⁴Iowa Code § 69.14.

addition, the special election must be held on a Tuesday and not be held the same day as a school election within the district.²⁵

- Delaware's state law gives the governor discretion on whether to appoint a day for holding a special election before the next general election after the House vacancy exists.²⁶ If the governor appoints a day for holding a special election, the governor must issue a written order of election to the State Department of Elections commanding the department to hold the election on the appointed day.²⁷ The written order must be delivered to the department at least 60 days before the day appointed for holding the election.²⁸

State Election Officials' Perspectives on Holding Special Elections Consistent with Federal Law

Reported Awareness of Federal Law on Filling House Vacancies

In our survey, we asked state election officials if, prior to hearing about our study, they were aware of the federal law that addresses holding special elections in the event of extraordinary circumstances. As of the beginning of September 2024, 27 state election officials provided responses. Our preliminary analysis indicates that 15 of these officials said that they had not been aware of the federal law. Ten respondents said they were already aware of it.²⁹ Eight of those 10 said they were aware of all three time frame requirements in the federal law related to holding a special election within 49 days, determining the candidates who

²⁵*Id.*

²⁶Del. Code Ann. tit. 15, § 7302.

²⁷*Id.* §§ 101(6), 7303.

²⁸*Id.* § 7303.

²⁹Additionally, two respondents answered "don't know" to our question asking if they were aware of 2 U.S.C. § 8(b) prior to hearing about our study.

will run,³⁰ and transmitting absentee ballots to uniformed services and overseas voters within 15 days.³¹

Perspectives on Challenges Related to Holding Special Elections Consistent with Federal Law

State election officials we surveyed and subject matter experts we interviewed from four organizations identified a range of challenges that states may face in holding special elections consistent with the requirements in federal law. Based on our preliminary analysis, below are examples of challenges they identified:

- **Selecting candidates.** One challenge that state election officials identified in their survey responses was about selecting candidates—that, in some cases, state laws and procedures do not currently allow for candidate selection that would meet the time frame for holding a special election required by federal law. For example, officials reported that because their states require primary or runoff elections, they would need to hold multiple elections in the 49-day window prescribed by federal law, and the state time frames for these elections might create challenges in meeting the federal time frame. According to representatives from one organization we interviewed, determining the candidates who will run is one of the most important parts of the election process because it drives the time frames for printing ballots and programming voting machines.
- **Preparing and printing ballots.** State election officials also reported challenges related to preparing and printing ballots in time to hold a special election consistent with federal law. For example, an official from an all-mail ballot state said it could take 45 days after candidates are certified before ballots are printed and mailed to voters, and another respondent noted that vendors may not be able to meet the needs of multiple jurisdictions all at once on short notice. In addition, representatives from one organization we interviewed said there may be supply chain issues with getting ballot paper stock, as few vendors create this type of paper and regular paper cannot be used. Representatives from another organization also told us that states had previously encountered shortages of ballot paper in regularly scheduled elections.

³⁰Candidates are to be determined by political party nomination within 10 days of the Speaker's vacancy announcement or by any other method that ensures the special election occurs within 49 days of such announcement. 2 U.S.C. § 8(b)(3).

³¹Two of the 10 respondents who reported that they were aware of the federal law prior to our study answered "Don't know" regarding their awareness of at least one of the three time frame requirements in the law.

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- **Identifying polling places and poll workers.** Another challenge state election officials noted in responding to our survey was related to identifying polling locations and poll workers. More specifically, officials reported that they would expect to encounter difficulties identifying suitable polling places and recruiting and training a sufficient number of poll workers. For example, state election officials noted that schools normally serve as polling places in their states, and regularly scheduled elections are accommodated in school calendars, but expedited special elections may not be similarly accommodated.
 - **Voting for uniformed services and overseas voters.** State election officials also noted challenges related to sending absentee ballots to these voters subject to the requirements in the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), particularly the requirement that these voters receive ballots at least 45 days before a federal election. For example, one official reported that meeting the 45-day requirement in UOCAVA would be difficult, as selecting candidates in time for ballot production "would be a very tight window of time." Another official reported that holding a special election consistent with the requirements in the federal law for filling House vacancies in extraordinary circumstances would only be possible if the federal law "overrides" the 45-day requirement in UOCAVA. Similarly, a third official said that they would not have enough time to hold an election in 49 days and still meet the requirements in UOCAVA.

State election officials we surveyed and experts we interviewed also identified time and resource challenges related to administering special elections consistent with federal law. These challenges include educating voters and programming and testing voting machines.

In addition, officials we surveyed and experts we interviewed described the effects that the challenges they identified may have on special elections held to meet the requirements in federal law. For example:

- **Accuracy and availability of voting materials.** In responding to our survey, state election officials identified potential challenges with the accuracy and availability of voting materials, noting that with reduced time to prepare ballots and related materials, errors in the text of these materials may occur. An official also reported that errors may occur during the programming and testing of voting machines. In addition to these issues, officials reported that it may be difficult to produce some materials normally required by state law, such as translations of ballots and pamphlets, within the federal time frames.

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- **Public perceptions of the election.** State election officials reported a range of perspectives related to potential public perception of an expedited special election. For example, one official noted that an expedited special election would create an opportunity for false information to spread and that this could damage confidence in both the process and the results. Another official reported that the challenges they identified in our survey related to holding special elections under the federal law, such as selecting candidates, preparing and printing ballots, or identifying polling places and poll workers, could cast doubt on the election process and "result in a challenge to the legitimacy of the election." Another challenge officials noted in responding to our survey was that their state laws may have time frames for holding special elections that differ from the federal requirement, and one state official reported that diverging from state law may harm the credibility of an election.
 - **Voting access.** Another challenge state election officials identified in responding to our survey was related to voting access. For example, one official shared the perspective that there may not be enough time for overseas voters to apply for an absentee ballot. The same official noted, more broadly, that compressed timelines generally could "disenfranchise voters." Representatives from one organization we interviewed also noted that the shortened time frames may affect the number and location of available polling places and whether states would have enough time to prepare voting equipment accessibility mechanisms, such as audio assistance.

Perspectives on Practices That May Help States Hold Special Elections Consistent with Federal Law

Based on our preliminary analysis, notwithstanding the challenges they identified, many state election officials noted in their responses to the open-ended questions in our survey that they believed they could hold special elections consistent with the requirements in federal law. In addition, survey respondents and experts we interviewed identified several policies and practices that states either currently utilize or could adopt to help states meet the time frames in federal law for holding special elections in the event of extraordinary circumstances. For example:

- **Candidate selection practices.** State election officials reported that, in some cases, states have procedures for selecting candidates for special elections that could be completed faster than holding primaries. One official reported that their state could accommodate online candidate filing for the special election and that doing so means candidates could be selected in 8 business days. An official from a state where signatures are required to file for candidacy reported that

the required number of signatures in their state was relatively low, which could help the state meet the requirements in federal law. In addition, officials reported that, in some cases, states assign candidate selection responsibility to political parties and noted that this could be done relatively quickly under a special election.

- **Vote centers.** Experts we interviewed told us that vote centers, where ballots for all precincts in a local jurisdiction are available to all voters so that they can vote at any center of their choosing, could help give state election officials flexibility in conducting an election on short notice.³² One respondent to our survey of state election officials reported that their office could stand up vote centers within 49 days in their state. According to representatives from one organization, the use of vote centers might help reduce the number of voting locations election officials need to identify, reduce the number of voting machines that need to be programmed, and allow for printing ballots on demand.

We will complete our review of these topics and issue a final report in the coming months.

Chairwoman Bice, Ranking Member Kilmer, and Members of the Subcommittee, this completes my prepared statement. I would be pleased to respond to any questions that you may have at this time.

GAO Contact and Staff Acknowledgments

If you or your staff have any questions concerning this statement, please contact Rebecca Gambler, Director, Homeland Security and Justice, at (202) 512-8777 or gambler@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. In addition to the contact named above, Tom Jessor (Assistant Director), Johanna Wong (Analyst in Charge), Christine Catanzaro, Eric Hauswirth, Amanda Miller, Sasan J. "Jon" Najmi, Meghan Squires, Janet Temko-Blinder, Ian Toller-Clark, Mary Turgeon, Eamon Vahidi, Morning Washburn, and Christopher Zubowicz made key contributions to the testimony.

³²Various states provide local election jurisdictions the discretion to allow voters to cast their ballot at vote centers. Vote centers were previously used by some states during the COVID-19 pandemic to address election administration challenges. For further discussion of vote centers' use during the pandemic, see GAO, *2020 Elections: State and Local Perspectives on Election Administration during the COVID-19 Pandemic*, GAO-22-104731 (July 11, 2022).

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Chairwoman BICE. Thank you very much, Ms. Gambler.

We will now open it up for questions with the witnesses, beginning with myself and followed by Ranking Member Kilmer. Then we will alternate between Members.

Any Member wishing to be recognized should signal to the chair their interest in asking a question.

I now recognize myself for 5 minutes.

I want to start, Ms. Gambler, the GAO report that was presented preliminary was eye-opening to say the least, recognizing that there are States that did not even know that this 49-day requirement existed and the majority—the vast majority of States being unable to meet that requirement.

I want to talk about—there are nine States that have met the requirement. Can you talk a little bit about what they have done to ensure that they are meeting the Federal regulations that have been put forward? Are there special things that they did, any of them, individually?

Ms. GAMBLER. Sure. Thank you for the question, Chairwoman.

As I mentioned, there are nine States that we have preliminarily identified have integrated aspects of the Federal law 2 U.S.C. 8(b) into their State law. Many of those nine States have incorporated that timeframe provision, the 49-day timeframe provision.

Some of the States also incorporated other aspects of the law related to, example, transmission of ballots to military and overseas voters, as well as what is specified in 2 U.S.C. 8(b) regarding candidate selection.

There is a little bit of variability across the nine States, but there are nine States that address some aspect of the provision of Federal law that we are talking about in their State laws.

Chairwoman BICE. With so many States not—either not having knowledge of the Federal law or not adhering to it, what is the GAO doing to educate those States or encourage them to consider making changes to meet the 49-day requirement?

Ms. GAMBLER. Sure. Absolutely. One step we have taken, I have mentioned in my oral statement, is we have sent a survey to election officials in all 50 States to get their perspectives on both the challenges that would—that they might face in holding a special election—

Chairwoman BICE. We only received 27 responses. Is that right?

Ms. GAMBLER. We have received 27 responses thus far, and we will be continuing our work in this area, you know, going forward. We are hopeful at least on our part that our work in this area can help with that awareness piece.

Chairwoman BICE. Are you aware if any engagement by the Election Assistance Commission in doing some education and outreach on this law; is that something you may have discussed with them?

Ms. GAMBLER. Sure. We did meet with the Election Assistance Commission, the EAC, regarding our review. Certainly the EAC is a Federal entity that—whose mission is to provide resources to the election community, to States and local election jurisdictions, to help address all aspects of election administration. Certainly this could be an area for the EAC to help provide resources on.

Chairwoman BICE. Thank you.

Mr. Wickham, do you remember why the House has proposed temporary joint committee to study continuity issues and make recommendations, which was considered and passed in the House in 2003, did not get any tracks in the Senate?

Mr. WICKHAM. I do not recall that specifically with regard to that piece of legislation. It has been challenging in the past to schedule joint exercises, joint continuity exercises in the past because of the different schedules of the bodies, the different makeups of the bodies, and different plans for continuity.

It is not confined to that one specific piece of legislation, but joint efforts have been difficult.

Chairwoman BICE. Do you think it potentially could be because the Senate does have a continuity plan in place in a different manner, and it may not be as important to them to actually address this issue as it is for the House? Could that be one reason?

Mr. WICKHAM. It certainly could be one reason, and both Houses could have in place their own plans that they are confident in their feasibility.

Chairwoman BICE. Do you see that idea, which is the select committee—which the select committee recommended, as a punt or perhaps a potential way to examine these issues comprehensively? You know, we have not pushed forward with a constitutional amendment on this issue, more of an examination. Do you feel like we are sort of abdicating the responsibilities?

Mr. WICKHAM. No, I think it is the latter, that both bodies could benefit from a fresh review of these circumstances. As I said, the intensity following 9/11 was quite strong, and we worked 6 months with great intensity. A similar view with heightened intensity would benefit both Houses.

Chairwoman BICE. Thank you.

I recognize Ranking Member Kilmer for 5 minutes for questions.

Mr. KILMER. Thanks, Madam Chair.

Mr. Wickham, I am going to stick with you.

You heard Dr. Wenstrup's testimony about his concerns about either a mass casualty incident or an incident affecting a smaller number of Members but big enough to flip a majority.

Looking back 20 years now with hindsight, do you feel that the solutions that were offered back then fix the problem? Do you think they are sufficient, both operationally and constitutionally?

Mr. WICKHAM. The House, from a procedural perspective, judges the sufficiency in terms of Constitution by its debate and its vote on a specific rules change. In this case, that was the determination after 9/11 to put in place the quorum rules change and has been subsequently adopted. There is a notion of advisability that comes with those individual votes.

As I just said, it would behoove both the House and Senate to look at all their procedures and rules to deal with the changes in circumstances, especially the issue of increased political violence.

Mr. KILMER. OK. One thing I am struck by is, you know, you hear Ms. Gambler's comment. Even if the States could fill the—do a special election in 49 days, 49 days is a long time in the face of a national crisis, you know. You could reset the quorum. We pulled up from James Madison's notes—the initial requirement that a majority constitute a quorum to do business was because, and this

was his quote, “It would be a pleasing ground of confidence to the people that no law or burden could be imposed on them by a few men.”

Article I, section 2, of the Constitution sets out three basic requirements for the House, including that it consist of elected Representatives that meet age, citizenship, and residency requirements and that Representatives be apportioned among the States based on their populations.

That makes it hard for me to accept that a House compromised of a much smaller number that may have an entire State without Representation would be fitting under the Founders’ vision. Would you agree with that?

Mr. WICKHAM. I would just say that you are not alone in your concerns. From the very outset, the reason why the quorum change was not dealt with by the initial Cox-Frost Task Force was the challenges, the concerns about its constitutionality, one, and then, second, about where the line would be drawn with regard to the amount of Members that would carry on the House in the event of catastrophic condition.

This has been raised by a number of internal actors, Members of the House such as your predecessor, Mr. Baird, as well as outside groups.

Those are concerns that a number of parties have raised and ones that were considered by that Cox-Frost Task Force.

Mr. KILMER. Mr. Petersen, I am hoping you can weigh in here. You know, because you have studied this issue, you have talked to other experts on this topic, what are the biggest concerns that experts have raised about Congress’ ability to function in either of the circumstance of a mass casualty event or in a circumstance where fewer Members are killed or die but in a way that might flip a majority? What are we hearing from experts on that?

Mr. PETERSEN. The question of switching majorities is relatively new in the continuity space. It is relatively new in terms of public consideration. I will say that, since about 2001, I have been getting questions from congressional offices, wondering what happens if a Member, you know, enough Members change to—change the majority.

In practice, we do not have a lot of precedent. We have conjecture of variable quality, and it is probably one of those things that needs to be considered more systematically.

If you could remind me of the first part of your question.

Mr. KILMER. Just the potential either for a mass casualty event or flipping the majority.

Mr. PETERSEN. The potential for a mass casualty event has grown as an idea from something where lots of Members are dead or injured or incapacitated to one where just a few are. It is critical because the majorities are narrow, because it is difficult to have a vote, and things like this.

There, again, there is not anything greatly systematic in that discussion beyond the idea that it is a potential problem. We do not know the boundaries of it. It is governed, in part, by how robust majorities have or have not been in the past several years, but still no decision because we have not gotten to a point where—

Chairwoman BICE. Mr. Petersen—

Mr. PETERSEN [continuing]. it is necessary.

Chairwoman BICE.—if you could just try to wrap up, you are over time here. We want to be mindful of that.

Mr. PETERSEN. I am done.

Thank you.

Chairwoman BICE. OK.

Mr. KILMER. I yield back.

Chairwoman BICE. Thank you.

At this time, I recognize Ms. Lee for 5 minutes.

Ms. LEE. Thank you, Chairwoman Bice and Ranking Member Kilmer, for holding this important hearing.

Thank you to all of our witnesses for appearing here today.

Ensuring the continuity of Congress in a time of crisis is a sobering but critical task for us. In contrast to the Senate, as we have discussed today, the Constitution requires the House vacancies to be filled through special elections, thereby ensuring that the people decide who their elected Representatives are.

As chair of the Subcommittee on Elections, I am interested in ensuring that States are equipped and prepared to smoothly and expeditiously fill House vacancies through special elections in the event of the unthinkable.

Ms. Gambler I would like to return to your testimony. Thank you for the preliminary insights that you have shared with us from the GAO's ongoing review of State capabilities for holding special elections for House vacancies.

I would like to go back to the input you got from the survey from State election officials. Nine States have passed laws concerning special elections that mirror the Federal 49-day requirement, but it sounds like some of the States have been more successful there than others.

Would you explain, elaborate a little bit more on the types of procedures that the nine States who do mirror Federal law have adopted? What aspects of those laws have they been able to successfully implement?

Ms. GAMBLER. Absolutely, Congresswoman. Thank you for the question.

There is little bit of variation across those nine States. Generally, most of them have adopted into their State laws provisions addressing the 49-day timeframe that specified in 2 U.S.C. 8(b).

A few of the States have also addressed other aspects of 2 U.S.C. 8(b) which is the Federal law we are talking about, and those include provisions related to the candidate selection process and the transmission of ballots for military and overseas voters.

Ms. LEE. If you would, share with us the candidate selection process and how they have modified qualifying. You touched in your statement earlier on using political parties to help identify who the candidates are going to be.

Elaborate for us on how that candidate qualifying process has been adjusted in these nine States so that they can meet the 49-day timeline.

Ms. GAMBLER. Yes, thank you for the question.

We have not looked in detail at the—what the specific procedures would be for candidate selection in those nine States in particular. What I can say is that, for some of those nine States, they have

particularly adopted the timeframes that are specified in the Federal law that we are discussing related to identifying candidates.

It is really the timeframe piece that we are speaking about.

Ms. LEE. The other thing that you brought up specifically is the UOCAVA, our overseas voters, our overseas military voters. There are also provisions in Federal law that tell elections officials when those ballots need to be mailed, how long they need to be out there.

Did you discover that some of those provisions are inconsistent with a requirement that we fill these seats in 49 days?

Ms. GAMBLER. Yes, thank you. I think that is an important point. There are differences in the timeframes for the transmission of ballots to military and overseas voters between what is specified in 2 U.S.C. 8(b) and what is in UOCAVA.

2 U.S.C. 8(b) specifies that States are to transmit, to the greatest extent practicable, ballots to military and overseas citizens voters within 15 days of Speakers' announcements. In comparison to UOCAVA, the requirement is to transmit those absentee ballots within 45 days of election day.

There is a difference there between those two Federal requirements, and we did hear from the State election officials that responded to our survey that that could be a point of challenge for them in holding a special election.

Ms. LEE. You also mentioned some of the procurement and logistics issues that were raised in these surveys related to ballot preparation, ballot printing. Can you share with us a little bit more about the other logistical challenges that were identified for you?

Ms. GAMBLER. Absolutely. There is, of course, a relationship between candidate selection and ballot preparation. We heard in doing our work that the selection of candidates is obviously important so that ballots can then be printed and prepared.

We did hear from States that it could be challenging to prepare and print ballots on a compressed timeframe because of what their existing State laws and procedures are related to ballot preparation but then also issues related to things lining the availability of ballot paper, paper stock which is used for ballots. That was an area of concern identified as well.

Ms. LEE. Thank you.

Madam Chairman, I yield back.

Chairwoman BICE. Thank you, Ms. Lee.

At this time, I recognize Mr. Kilmer for 5 minutes for questions—I am sorry—Mr. Carey for 5 minutes for questions.

Mr. CAREY. Both Irish names, I guess, right?

Mr. Wickham, you are obviously still with the U.S. Chamber of Commerce?

Mr. WICKHAM. Yes, sir.

Mr. CAREY. I know you have a new colleague there, Rodney Davis.

Mr. WICKHAM. Yes, sir.

Mr. CAREY. Tell him the next time that the chamber comes before the Committee, we welcome him back to this Committee. We would love to have him here.

Mr. WICKHAM. I am sure he would love that also.

Mr. CAREY. I am not sure about that.

Because you have been in the position to advise Members in the past, what advice would you give to Members? I would ask the same thing from Rodney. What advice would you give to Members who want to move on this issue and do it? What can we be doing to get other Members excited about understanding about this issue?

This is not an issue that, believe me, I am letting my—you know, I am not letting my 5-year-old know that we are talking about this type of stuff. I mean, how can we convince other Members to get on board?

Mr. WICKHAM. I think some of the basic necessities of—I like to call it just a basic necessity of running one's life.

Mr. CAREY. Yes.

Mr. WICKHAM. Having a will, having a plan for contingencies, emergencies, that that is one way to appeal to other Members.

The second is to think about the issue in a way that is larger than themselves—

Mr. CAREY. Yes.

Mr. WICKHAM [continuing]. that they are Representatives of these constituents and those constituents deserve to have this part of that Representative responsibility filled.

Mr. CAREY. You know, it is something else that, you know, I was thinking about as we were—I was listening to everybody testify.

Thank you all for being here.

Mr. Petersen, I promise you I am not going to make you speak for 3 minutes on this.

One of the things that I thought about as we were talking about Members of Congress, but we all have State legislatures that are kind enough the same both. Hopefully this type of legislation can be the model, you know, for our State legislative bodies because, you know, in Ohio we have a full-time legislature. Very much, you know, this could be the same problem there, as well.

One other thing and this is really for all of you. What are some of the pros and cons of the approach that allows Members to be involved in the same way in choosing their own temporary replacements, you know, should something happen, what do you think, versus an approach where each State simply applies its procedures for temporarily replacing them?

What do you think are the pros and cons in that? Anybody? If not, I will have to pick one of you.

Why do not we let Mr. Petersen talk?

Mr. PETERSEN. A pro is there is some assurance that there is someone back there if the—if the suddenly unavailable Member is—needs replacement.

A con is that this person is likely unknown to the electorate in that district, is maybe not fully up to speed if they get here in trying circumstances, and may not be seen as a fully fledged Member if they are here by indirect selection, as opposed to direct election, and would need to get up to speed fairly quickly with how the institution works.

I am sure all of you are—have lived the experience of the rather steep learning curve around here. One or two Members per Congress coming in and enduring that in a nonconvening election, that

is OK; a hundred or more, you are probably looking at slowing down the institution a bit.

Mr. CAREY. You know, and I will tell you—I mean, as somebody that won a special election in a very short timeframe and then had to live through redistricting and had to represent 75 percent different constituency than I represented in first time I ran for office, it—there is, you know, there is a challenge to get out there and meet the voters, and I do—but anybody else, pros or cons? I only have 16 seconds.

If not, I yield back.

Chairwoman BICE. Thank you.

Thank you, Mr. Carey.

At this time, I recognize Mr. Timmons, the former Ranking Member of the Select Committee on Modernization of Congress, for 5 minutes for questions.

Mr. TIMMONS. Thank you, Madam Chairwoman. I appreciate you let meeting waive on, especially since I was not here at the beginning.

My team has prepared a remarkably good thing for me to read, and I am not going to read any of it.

We have been working on this for years, and I guess my first question to each of you is: Do you believe that a constitutional amendment is necessary to fully address the shortcomings of the current preparation the House has regarding continuity of Congress?

Let us start with Ms. Gambler.

Ms. GAMBLER. Thank you for the question.

GAO, within the scope of our current review, has not looked at this issue more broadly.

What we would say is that we hope our preliminary observations, as well as our ongoing work, can help inform Congress as you consider this issue.

Mr. TIMMONS. I anticipated that.

Mr. Wickham.

Mr. WICKHAM. I would just say that the constitutional amendment would provide the certainty in an area that has been filled with debate from its very beginning with regard to the quorum rule.

Mr. TIMMONS. I am unaware of an alternative solution. I tried to come up with some, and they involved court challenges to test untested theories. At the end of the day, it seems that this is the only solution in my mind.

Can you come up with a different solution to address our shortcomings as it relates to reconstituting Congress in the case of a mass casualty event, or is a constitutional amendment arguably the only path forward?

Mr. WICKHAM. I would not say it is the only path forward. As my predecessor, Mr. Johnson, advised that it is better, at least preferable, to have a response in place in advance of a crisis and that a more long-term solution with greater certainty, such as a constitutional amendment, could also be worked on at the same time.

Mr. TIMMONS. Thank you.

Mr. Petersen, do you believe a constitutional amendment is necessary to address this challenge?

Mr. PETERSEN. CRS does not take a position on that.

What I would suggest is that a constitutional amendment that focuses only on vacancies, that is, Members who have expired and are subject to special election, may not be sufficient if it does not include consideration for missing and incapacitated Members and some kind of policy and procedure for addressing those absences that may impair the quorum just as strongly as vacancies.

Mr. TIMMONS. My friend, Ranking Member Kilmer, and I worked on this at length, and we worked with Congressman Cleaver and Congressman Wenstrup. We have provided what we believe is—it threads the needle to address the concerns on a temporary basis. It, if adopted, would solve this problem. Maybe there is other ways to do it.

You know, a lot of things that we talked about was just the uncertainty surrounding this issue in and of itself creates an incentive structure or, you know, we live the crazy times. President Trump has been attempted to assassinated—to be assassinated twice, and I just heard reports that they found explosives at his rally.

I mean, you know, this is getting out of hand. Obviously, Leader Scalise knows, as well as anybody, that political violence can change Congress severely. I do think this is something that we need to take seriously and address.

Mr. Wickham, do you believe that the constitutional amendment as proposed would remove the uncertainty surrounding this and create a pathway to resolving, should such chaos ever occur?

Mr. WICKHAM. The two issues that were present from the very beginning were the constitutional arguments against the provisional quorum rule and the legitimacy that came from operating with less than a quorum, perhaps a very, some have argued, a very small number.

A constitutional amendment would by its very nature through completion—

Mr. TIMMONS. Solve the problem.

Mr. WICKHAM [continuing]. address that issue, and then, after that, it would just be a debate on the merits of the constitutional amendment.

Mr. TIMMONS. Last question. If adopted, functionally how it would work? You would get sworn in. Then you would give—who would you give—the Clerk's Office, the Parliamentarian—the list of Members to choose from in the event the triggering circumstances? I guess that is something that would have to be worked out.

Mr. WICKHAM. I will leave that to my successor, Mr. Smith, and his team.

Mr. TIMMONS. Fair enough.

Well, I appreciate you-all taking your time to come and discuss this very important issues.

Madam Chairwoman, I appreciate you letting me waive on.

With that, I yield back.

Chairwoman BICE. Thank you.

I want to say thank you for the witnesses for being with us this afternoon to discuss what I think is an incredibly important topic.

Members of the Subcommittee may have some additional questions for you and we ask that if you are provided those, you please respond in writing to those questions.

If there is no further business, I thank the Members for their participation this afternoon.

Without objection, the Committee stands adjourned.

[Whereupon, at 1:23 p.m., the Subcommittee was adjourned.]

QUESTIONS FOR THE RECORD



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MEMORANDUM

October 8, 2024

To: Committee on House Administration, Subcommittee on Modernization

From: R. Eric Petersen, Specialist in American National Government, epetersen@crs.loc.gov, 7-0643

Subject: **Continuity of Congress; Preparing for the Future by Learning from the Past: Questions for the Record**

This memorandum provides my responses to your questions for inclusion in the record of the Subcommittee's hearing entitled "Continuity of Congress; Preparing for the Future by Learning from the Past." Your questions are provided in bold.

If you have further questions or need other assistance, please feel free to contact me.

1) Can you describe as best you can how the House would function if – tomorrow – there was a mass casualty incident, with over 100 Members either dead, incapacitated, or missing? What about an incident affecting a smaller number of Members, but big enough to flip the majority?

When considering the operations of a complex organization like the House of Representatives, there are several known concerns, and likely a number of unknown concerns, that could affect the institution's response to a mass casualty incident affecting 100 or more Representatives. Focusing on the mass death of Members, which would create vacancies in the membership of the House, some of the response would depend in part on several known variables that would likely be considered, including the following:

- The House might need to determine the number of Representatives¹ affected by the incident. Arguably, the House could continue its work under its Rules, so long as it is able to identify a quorum of its Representatives. If the quorum is 218 or more, there would appear to be no procedural bar to continuing floor activities. Even with a quorum, some might raise concerns about the representativeness of a House missing a quarter or more of its Members. If fewer Representatives are available, then Rule XX, cl. 5, providing for a provisional quorum, could be implemented, and the House arguably could continue to conduct business when related procedures to establish the provisional quorum are accomplished. Concerns about the representativeness of a House missing more than a quarter of its Members might become acute for some observers. Those who contest the constitutionality of the provisional quorum might raise concerns about actions taken by

¹ The Delegates from District of Columbia, American Samoa, Guam, U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands, and the Resident Commissioner of the Commonwealth of Puerto Rico, would not be counted by the House for purposes of establishing a quorum to do business.

the House with a quorum of fewer than 218. Any actions taken by the House might be contested in the House, or through the courts.

- The House might need to determine the number and distribution of Representatives who are confirmed to be dead, and those who are missing or incapacitated. Under current House practices, actions taken in response to the death of a Member are more routine than those taken in response to a Member who is incapacitated or missing. An individual Member's death allows the House to notify the executive authority of the state or other jurisdiction, and for the state to call an election pursuant to its laws governing elections. If 101 or more vacancies in the House occur as the result of the deaths of Members, the Speaker could declare extraordinary circumstances pursuant to authority granted in 2 U.S.C. 8(b), and states with vacancies in House representation would generally be required to hold special elections within 49 days. Some question whether those special elections could occur within specified time frames.
- If the Speaker is among the Representatives killed or incapacitated, causing a vacancy in the Office of the Speaker, House Rule I, cl. 8(b)(3) could be applied to appoint a Speaker Pro Tempore. Following the establishment of a quorum, the House's first action would be the election of a new Speaker. When a Speaker Pro tempore was appointed pursuant to House Rule I, cl. 8(b)(3), in 2023, the House took no other action until a new Speaker was elected.
- The House might need to determine whether the incident affecting Representatives also affected the Capitol, and whether the House could meet in its chamber, or need to convene elsewhere.

Regarding the potential for a change in majority as the result of the death or absence of relatively few Members: A mid-Congress change of majority has never occurred in the House of Representatives. It might occur if a number of Members were killed. Surviving Members of the minority might offer a resolution vacating the speakership, and if successful, the majority control could change. The extent to which such a change might ripple through the House, affecting the status of House leadership beyond the Speaker, elected officers, or committee operations, membership, funding, and staffing, particularly in circumstances that could be trying for the House and the nation, is unclear. A mid-Congress majority change might raise the possibility that it could change again when special elections to fill vacancies are completed. There could be implications for the capacity of the House to carry out its lawmaking, oversight, and investigative responsibilities in circumstance where the chamber's majority might be unsettled.

2) What about in an incident with Members in either scenario declared missing or incapacitated? You brought up this concern in the hearing as well.

The status of missing and incapacitated Members may be more complicated than determinations of vacancies due to the death of Members. Arriving at final determinations of the status of missing or incapacitated Members could be lengthy processes, since there are no clear, consistently applied House policy or procedures to address them. Following limited past practices for missing Members, the House might await state action, either in the state the Member represents, or in the place where the Member went missing. Absent a determination in state-level proceedings, the House might not act until after an intervening election in which the missing Member is not a candidate, or if they remain on the ballot, is reelected, and fails to appear for a quorum call in the subsequent Congress. The House has declared seats vacant at the end of that process.

Similarly, the matter of incapacitation is not readily resolvable. An incapacitated Member who is physically and mentally able to communicate their intentions might opt to stay in office and return when they are recovered. They might resign if treatment is likely to be enduring, or recovery is insufficient. The

House might engage the Member's medical team, family, staff, party, and state leadership, to determine the scope and potential extent of the incapacitation of a Member who could not advocate for themselves due to their incapacitation. Some sources might be challenging due to the confidentiality of medical treatment, the lack of technical expertise, or a deeply felt commitment to the injured Member. Previously, an incapacitated Member who could not communicate their intentions has retained their seat until the next Congress convenes. If they are reelected, and do not respond to a quorum call, past practice indicates that the House could then declare their former seat vacant. Following an event that were to happen tomorrow, it appears that the only authoritative action the House could take before the next election would be to hold a vote to expel an incapacitated Member. In the absence of established procedures, removing incapacitated Members could raise concerns, particularly if those decisions are seen to affect which party holds the majority, the extent of representation of particular states or regions of the country following an interruption of membership, or the wishes of the family or district from which they were elected.

In circumstances where the House has narrow majorities, it does not appear that missing status or incapacitation necessarily affects the majority as clearly as the potential death of Members might. If the Member is alive, they are sitting Members following House Rule and precedent that states a Member of the House must be elected, living, and sworn. This could extend the time an injured Member is unavailable, and potentially impair the House's ability to operate. The absence of missing and incapacitated Members might necessitate the rescheduling of votes when the majority is unable to field its full strength, or persuade some in the minority to agree to some majority proposals. If the number of dead Members plus those who are missing or incapacitated results in the enduring absence of a quorum, the provisional quorum rule might be implemented, but actions of the House taken in those circumstances could raise the same concerns as those described above.

3) In addition to commenting on how the House would function with Members incapacitated or missing, could you also, in your opinion, comment on how a constitutional amendment meant to ensure continuity could also best cover this situation?

As discussed above, the most likely outcome of a number of missing or incapacitated Members, like circumstances where several Members are killed, could be to slow down or stop work in the House. The variety of potential interruptions to congressional business have greatly expanded from the threat of atomic annihilation that motivated continuity proposals during the Cold War. In more modern thinking, terror attacks, bioweapons, cyberattack, pandemics, violence toward Members, and other concerns raise the possibility that Members going missing or enduring extended incapacitation are at least as imaginable as the mass death scenarios envisioned in most proposals to amend the constitution to ensure continuity of representation. To ensure that it maintains its ability to carry out its constitutional duties as a coequal governing branch, it might be necessary for the House and Senate to consider including procedures for responding to circumstances where many members are missing or incapacitated. This could be achieved through the development of definitions of disability or incapacity that specifically apply to a Member's congressional service, and establishment of processes to address missing or absent Members more expeditiously than has been done in the past.

Some of these efforts arguably could be accomplished through House and Senate rulemaking authority. Consideration of missing and incapacitated Members was only briefly considered in the years immediately following the September 11, 2001 (9/11) terrorist attacks before other policies were adopted. Some of the ideas discussed then (how to determine disability, who might make those determinations) might benefit from further examination considering more recent experiences. Since these issues potentially affect both House and Senate Members and operations, Congress might consider creating a joint committee, task force, or other mechanism to facilitate bicameral investigation and consideration of these and other issues related to the continuity of Congress.

Most proposed constitutional amendments addressed vacancies, and a few addressed disability or incapacity. It appears that none addressed the status of missing Members. Adding provisions related to

Members who are missing or incapacitated to proposed constitutional amendments addressing congressional vacancies might result in a more robust constitutional proposal better able to address more of the likely outcomes and consequences of an event that interrupts congressional membership and operations. A constitutional amendment might authorize Congress to establish by legislation or rule criteria to address policy definitions of missing and incapacitated status.

4) Since World War II, the executive branch has expanded in scope, size, and budget while Congress has remained relatively stagnant. If Congress were to experience a mass casualty event, and was reduced to fewer than, say, 100 Members, is the legislative branch at risk of being supplanted by the executive branch? Could the executive branch choose not to recognize Congress if it deems Congress incapable of fulfilling its constitutional responsibilities?

This scenario is an example of a low likelihood, high consequence occurrence. It is not clear how long the circumstances of very reduced membership in the House or Senate would stay in place under current contingency procedures. If most of its membership loss is due to death, the Senate is unlikely to remain inquorate for very long, assuming it is in session, due to its ability to seat most of its Members by appointment. Until or unless the provisions of House Rule XX, cl. 5 are found to be unconstitutional, the House arguably could adjust the provisional quorum to carry out its functions with a small number of Members, subject to the concerns already discussed.

To some extent, this is a question of division of governing labor, and whether one branch can expand its existing authority to respond to unexpected events. Whether it was President Lincoln in the Civil War, or President Franklin Roosevelt responding to the Great Depression, and the lead up to and prosecution of World War II, the executive has taken the apparent lead in response to serious, arguably existential national challenges. At the same time, the expansion of the "scope, size, and budget" of the executive branch has largely been a function of prior congressional approval and authorization of executive programs, departments, and agencies through legislation, and provision of appropriations to fund those efforts. The executive has no authority to authorize programs affecting people and policies outside its branch. It cannot appropriate funds to animate its department and agency activities, and has no constitutional authority to supplant, ignore, or deem Congress incapable of fulfilling its constitutional responsibilities. To do so would be to set aside a coequal branch of government, as well as the constitutional framework binding the two branches. Even with Congress in straitened circumstances, it has the obligation to authorize, fund, oversee and guide executive action. The executive arguably has the responsibility to discuss its decisions and efforts with Congress through formal and informal processes. The failure of the executive to do so could leave its decisions subject to judicial review, and its officials subject to public inquiry, congressional investigation, or impeachment and trial in Congress.

Subcommittee on Modernization Hearing**“Continuity of Congress: Preparing for the Future by Learning from the Past”**

September 18, 2024

Questions for the Record**Tom Wickham, U.S. Chamber of Commerce**

- 1) Now nearly 20 years after 9/11, how do you feel about the continuity solutions offered back then, with the benefit of hindsight? Do you think they are sufficient—operationally, and constitutionally? If not, how do you suggest Congress address remaining gaps and vulnerabilities?

The continuity solutions from the period immediately following 9/11 were the product of the Cox-Frost task force that deliberated for six months with the pressure of an unprecedented terrorist attack weighing on Members and staff and amidst vast legislative (a bill to establish a Department of Homeland Security) and investigative (9/11 Commission) efforts. In retrospect, the greatest challenge for the task force and the House was the lack of a foundation from which to build out procedural tools to address emerging terrorist threats. For example, in 2001, the House had no means to execute what may be considered a basic step now - declaring an emergency recess of its proceedings. With the report of the 9/11 Commission and the establishment of a Department of Homeland Security and the work of numerous independent groups, the growth in the homeland security space has been exponential. This creates an opportunity for partnerships for the House in reviewing and updating its continuity tools. A procedural review board led by current Parliamentarian Jason Smith and composed of House stakeholders and outside experts to address continuity-related issues would serve the House well.

In terms of the sufficiency of the current rules, a major question surrounds the constitutionality of the “provisional” quorum rule in clause 5(c) of rule XX. In addition to the commentary found in the [testimony](#) of George R Rogers before the Select Committee on Modernization on April 6, 2022, the 2006 College of William and Mary law review [article](#) on the provisional quorum rule by John B Williams, and the insight of Charles W. Johnson III and William McKay in their 2010 work *Parliament and Congress*, the guidance of former Parliamentarian John V. Sullivan warrants the House’s attention. Sullivan, in testimony submitted at the April 29, 2004 hearing of the Rules Committee, opined:

“One must question whether the constitutional latitude noted in the dictum in *Ballin* is wide enough for the House to set a smaller number than a majority of Members living and sworn to do business. In section 5 of article 1 of the Constitution, the founders addressed smaller-than-majority quorums. They specified two items of business that may be transacted by a smaller number than a majority of the House. Those two items are adjourning from day to day and compelling the attendance of

absentees. Whether a third item--an item like re-basing the whole number of the House in the wake of a catastrophe--validly may be added to that category without amending the Constitution is a very serious question.

The holding in *Ballin* validated Speaker Reed's noting the actual presence in the chamber of Members who chose only to lurk rather than to record their position or their presence. Speaker Reed did not find merely that the whereabouts of these Members were unknown. Rather, he found that they actually were in the chamber of the House observing the proceedings in person. The dictum in *Ballin* lends scant support for the proposition that methods of counting those present may extend beyond the most ordinary connotation of presence, to wit: physical attendance.”

I would encourage the House to review this prudent analysis offered by one of its most influential parliamentary thought leaders with three additional considerations: (1) the constitutional guidance provided by the courts on related challenges to the recent proxy voting rule in the House; (2) the legitimacy and operational advantages provided to the House acting in advance of an unknowable universe of circumstances; and (3) the historical weight of the House re-adopting the “provisional quorum” rule in every Congress since 2005.



October 7, 2024

The Honorable Derek Kilmer
Ranking Member
Committee on House Administration
Subcommittee on Modernization
House of Representatives

“Continuity of Congress” Hearing—Response to Question for the Record

Dear Mr. Ranking Member,

On September 18, 2024, I was pleased to testify before the Subcommittee on Modernization, Committee on House Administration, on the continuity of Congress. On September 27, 2024, I received your question for the record. The question and my response are enclosed. If you have any questions about this letter or need additional information, please contact me at (202) 512-8777 or gablerr@gao.gov.

Sincerely yours,

Rebecca Gambler, Director
Homeland Security and Justice

Enclosure

cc: Kristen Monterroso, kristen.monterroso@mail.house.gov

Subcommittee on Modernization Hearing
“Continuity of Congress: Preparing for the Future by Learning from the Past”
September 18, 2024

1. What are some of the effects that the challenges identified by state elections officials may have on special elections to fill House vacancies? What do you think the impact on voters will be in such a scenario?

State election officials we surveyed identified challenges related to holding special elections under the federal law that generally requires states to hold special elections within 49 days of the Speaker of the U.S. House of Representatives (House) announcing that there are more than 100 vacancies in the House.¹ Based on our preliminary analysis of survey responses we received as of the beginning of September 2024, these challenges include selecting candidates, preparing and printing ballots, identifying polling places and poll workers, and administering voting for uniformed and overseas voters.² Based on our preliminary analysis, these election officials, as well as subject matter experts we interviewed, described several effects that the challenges they identified may have on special elections held to meet the requirements in federal law, and the potential impact on voters.

For example, one effect state election officials identified in responding to our survey was the potential for problems with the accuracy and availability of voting materials, noting that with reduced time to prepare ballots and related materials, errors in the text of these materials may occur. An official also reported that errors may occur during the programming and testing of voting machines. In addition to these issues, officials reported that it may be difficult to produce some materials normally required by state law, such as translations of ballots and pamphlets, within the time frames for holding special elections under the federal law.

State election officials also reported a range of perspectives related to potential public perceptions of an expedited special election. For example, one official noted that an expedited special election would create an opportunity for false information to spread and that this could damage confidence in both the process and the results. Another official reported that the challenges they identified in our survey related to holding special elections under the federal law, such as selecting candidates, preparing and printing ballots, or identifying polling places and poll workers, could cast doubt on the election process and “result in a challenge to the legitimacy of the election.” Another challenge officials noted in responding to our survey was that their state laws may have time frames for holding special elections that differ from the federal requirements, and one state official reported that diverging from state law may harm the credibility of an election.

State election officials who responded to our survey also shared their observations related to voting access. For example, one official shared the perspective that there may not be enough time for overseas voters to apply for an absentee ballot. The same official noted, more broadly, that compressed timelines generally could “disenfranchise voters.” Representatives from one organization we interviewed also noted that the shortened time frames may affect the number and location of available polling places and whether states would have enough time to prepare voting equipment accessibility mechanisms, such as audio assistance for voters.

¹See Legislative Branch Appropriations Act, 2006, Pub. L. No. 109-55, tit. III, § 301, 119 Stat. 565, 588-90 (2005) (pertinent portion codified at 2 U.S.C. § 8(b)).

²GAO, *Elections: Preliminary Observations on State Laws and Perspectives on Holding Special Elections to Fill House Vacancies*, GAO-24-107789 (Washington, D.C.: Sept. 18, 2024).

