

Preserving Our Institutions

The First Report of the Continuity of Government Commission

PRESERVING OUR INSTITUTIONS

THE CONTINUITY OF CONGRESS

THE FIRST REPORT OF THE CONTINUITY OF GOVERNMENT COMMISSION

MAY 2003



Continuity *of* Government Commission

www.continuityofgovernment.org

The Continuity of Government Commission is deeply dedicated to ensuring that our three branches of government would be able to function after a catastrophic attack that killed or incapacitated large numbers of our legislators, executive branch officials, or judges. It was, of course, the attacks of September 11th that prodded us to consider how an attack on our leaders and institutions might debilitate our country just at the very time strong leadership and legitimate institutions were most needed. In the aftermath of September 11th, our nation was able to call on the statesmanship and resolve of public officials operating through normal constitutional channels. If the attack had been more horrible, we might not have been able to respond so effectively.

Our first report—Preserving Our Institutions: The Continuity of Congress—addresses the continuity of our first branch of government. The commission will issue subsequent reports on the continuity of the presidency and the Supreme Court. We chose to begin with Congress because it is the institution least able to reconstitute itself after a catastrophic attack. While some protections exist for reconstituting the presidency pursuant to the Presidential Succession Act, under our current constitutional framework, Congress would have a far more difficult time filling large numbers of its own vacancies after an attack. It might not function well or at all for many months. Ensuring the continuity of Congress is now a more pressing need than at any previous time in our history. According to two of the 9/11 plotters, the fourth plane that crashed in Pennsylvania was headed for the Capitol, and it is entirely conceivable that Congress will again be a target.

To understand the threat to Congress and consider proposed solutions, our commission has held two all-day hearings. We have consulted with current and former members of Congress as well as with legal, constitutional, and institutional scholars. We have also received testimony and counsel from other former public officials and many private citizens who are concerned about the vulnerability of Congress and who have made thoughtful proposals to ensure its continuity. All of the testimony, proposals, and background information, as well as this report, can be found on our website at www.continuityofgovernment.org.

It is surely not pleasant to contemplate the possibility of future catastrophic attacks on our governmental institutions, but the continuity of our government requires us to face this dire danger directly. We hope and pray that no such attack occurs, but it would be a derogation of civic duty and wholly irresponsible not to prepare now for such a contingency.

Sincerely and Respectfully Submitted,



Lloyd Cutler
Co-chairman



Alan Simpson
Co-chairman

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ACKNOWLEDGMENTS

This Commission is a joint project of the American Enterprise Institute (AEI) and the Brookings Institution. The first to identify and pursue these issues was our senior counselor, Norman Ornstein of AEI, who alerted the world to the vulnerability of Congress just two weeks after September 11th with a piece in *Roll Call*. Our other senior counselor, Thomas Mann of Brookings, and our executive director, John Fortier of AEI, became engaged in the issue at an early stage and along with Ornstein researched and wrote about continuity of government issues and were involved in the founding of the commission. The commission would not have functioned smoothly without our assistant director Caroline Rieger, who oversaw the day-to-day operations. Kimberly Spears, our research assistant, investigated a wide range of topics and was integrally involved in the editing of this report.

The commission is funded by the Carnegie Corporation of New York, the William and Flora Hewlett Foundation, the John D. and Catherine T. MacArthur Foundation and the David and Lucille Packard Foundation. We thank these institutions for their commitment to the public good at a time of great national trepidation.

AEI and Brookings, their staff, and their presidents Christopher DeMuth and Strobe Talbott, have steadfastly supported the commission. Before the formal creation of the commission, AEI and Brookings hosted a series of informal discussions on these issues, and received insightful comments from Walter Berns, Bill Clinger, Robert Dove, Robert Goldwin, Richard Hertling, Daniel Meyer, Eric Peterson, and Sula Richardson. Michael Davidson, Alton Frye, Michael Glennon, and Don Wolfensberger participated in these discussions as well, and contributed much more. They drafted proposals, presented testimony, and critiqued much of the commission's work. Bill Frenzel participated in an early forum on the continuity of Congress and provided us with thoughtful comments. Randy Moss testified before our commission and was a source of wisdom on many of the difficult legal and constitutional issues in this report.

The commission's work was greatly strengthened by parallel efforts on Capitol Hill. At the same time Norm Ornstein was writing about the conti-

nuity of Congress in the days just after September 11th, Congressman Brian Baird (D-WA) identified the issue and began drafting a solution. He introduced a constitutional amendment to allow governors to make temporary appointments to fill mass vacancies in the House. His persistent work on the issue generated further congressional interest. The Subcommittee on the Constitution of the House Judiciary Committee, under chairman Steve Chabot (R-OH) and ranking member Jerry Nadler (D-NY), held a hearing on the issue. The House Administration Committee and its chairman Bob Ney (R-OH) and ranking member Steny Hoyer (D-MD) held a hearing on how Congress would communicate and reconstitute itself after an attack. Bills to amend the Constitution were introduced by Senator Arlen Specter (R-PA) and Representative Zoe Lofgren (D-CA).

In the spring of 2002, the majority and minority leadership of the House of Representatives created a bipartisan working group to address continuity issues. Christopher Cox (R-CA) and Martin Frost (D-TX) chaired the effort. The working group held a series of weighty public and private hearings that addressed many aspects of the problem. They have issued initial recommendations and facilitated helpful House rules changes. We look forward to additional findings from the group.

Several members also testified before our commission at our first hearing: Cox, Baird, and Vic Snyder (D-AR). Representative James Langevin (D-RI) has identified how technology might aid Congress in communicating and functioning after an attack, and he testified at our second hearing.

The many individuals who contributed to the work of this commission have shared with us a variety of views, but it has been clear that they agree on the pressing need to strengthen Congress and ensure its continuity, even or especially, under the most grim circumstances.

Commissioner Biographies

Honorary Co-Chairmen

President Jimmy Carter
President Gerald R. Ford

Co-Chairmen

Lloyd Cutler is senior counsel and founding partner of Wilmer, Cutler & Pickering. He served as counsel to Presidents Jimmy Carter and Bill Clinton. Cutler also served as special counsel to the president on ratification of the Salt II Treaty (1970-1980); President's special representative for maritime resource and boundary negotiations with Canada (1977-1979); and senior consultant of the President's Commission on Strategic Forces (Scowcroft Commission, 1983-1984). Cutler founded and co-chaired the Lawyers' Committee on Civil Rights Under Law. He has served as chairman of the board of the Salzburg Seminar; co-chairman of the Committee on the Constitutional System; a member of the Council of the American Law Institute; a trustee emeritus of the Brookings Institution; and an honorary bencher of the Middle Temple.

Alan K. Simpson served in the United States Senate from 1978 to 1997, acting as Minority Whip for ten of those years. He was an active force on the Judiciary Committee, Finance Committee, Environment and Public Works Committee, and a Special Committee on Aging. He also served as chair of the Veteran Affairs Committee. He is currently a visiting lecturer at the University of Wyoming. Before his election to the Senate, Simpson served as Majority Whip and later Majority Floor Leader in the Wyoming House of Representatives. In 1977 he became Speaker of the Wyoming House of Representatives. Simpson served as director of the Institute of Politics at Harvard University's John F. Kennedy School of Government from 1998 to 2000.

Commission Members

Philip Chase Bobbitt is the A.W. Walker Centennial Chair in Law at the University of Texas School of Law. Bobbitt has served as Associate Counsel to the President, the Counselor on International Law at the State Department, Legal Counsel to the Senate Iran-Contra Committee, Director for Intelligence, Senior Director for Critical Infrastructure and Senior Director for Strategic Planning at the National Security Council. He serves on the Editorial Board of Johns Hopkins University's *Bioterrorism and Biosecurity: Biodefense Strategy, Practice, and Science*, as well as the

Advisory Board for Texas Tech's Center for Biodefense, Law, and Public Policy. Bobbitt is a former member of the Oxford University Modern History Faculty and the War Studies Department of Kings College, London.

Kenneth M. Duberstein served as President Ronald Reagan's Chief of Staff in 1988 and 1989, following his previous service as Deputy Chief of Staff. From 1981 to 1983 he served as both an Assistant and Deputy Assistant to the President for Legislative Affairs. His earlier government service included Deputy Under Secretary of Labor during the Ford Administration and Director of Congressional and Intergovernmental Affairs at the U.S. General Services Administration. He serves on the boards of several corporate and nonprofit organizations, including the Boeing Company, Fannie Mae, Kennedy Center for the Performing Arts as Vice Chairman, the Council on Foreign Relations, the Brookings Institution, and others. He is currently Chairman and Chief Executive Officer of the Duberstein Group.

Thomas Foley is a partner at Akin, Gump, Strauss, Hauer, & Feld, LLP. Ambassador Foley is currently the chairman of the Trilateral Commission. He served as the twenty-fifth U.S. ambassador to Japan from 1997 to 2001. Before taking up his diplomatic post, Foley served as the forty-ninth Speaker of the House of Representatives. He was elected to represent the state of Washington's fifth congressional district fifteen times, serving his constituents from January 1965 to December 1994. Foley served as Majority Leader from 1987 until his election as Speaker in 1989. From 1981 to 1987 he served as Majority Whip. Foley is currently a member of the Council on Foreign Relations. Before his appointment as ambassador, he served as chairman of the President's Foreign Intelligence Advisory Board.

Charles Fried is Professor of Law at Harvard Law School, where he has taught since 1961. From 1985 to 1989 he was Solicitor General of the United States and from 1995 to 1999 he was an Associate Justice of the Supreme Judicial Court of Massachusetts. He has taught courses on appellate advocacy, commercial law, constitutional law, contracts, criminal law, federal courts, labor law, torts, legal philosophy, and medical ethics. His major works include *Order and Law: Arguing the Reagan Revolution* (which has appeared in over a dozen collections); *Contract as Promise: A Theory of Contractual Obligation*; and *An Anatomy of Values*. He is a member of the National Academy of Sciences Institute of Medicine, the American Academy of Arts and Sciences, and the American Law Institute.

Newt Gingrich is a senior fellow at AEI and a visiting fellow at the Hoover Institution at Stanford University. He was named a distinguished visiting scholar at the National Defense University in 2001. He is also the chief executive officer of the Gingrich Group, an Atlanta-based consulting firm, and a political commentator and analyst for the Fox News Channel. Gingrich serves on the Board of Directors of the Juvenile Diabetes Research Foundation and the Wildlife Conservation Society and is a member of the Secretary of Defense's National Security Study Group. A member of Congress for twenty years and Speaker of the House from 1995 to 1999, Gingrich is credited as being the chief architect of the Contract with America, which led to the 1994 Republican congressional victory and the first GOP majority in forty years.

Jamie S. Gorelick is Vice Chair of Fannie Mae, which she joined in May 1997. Before joining Fannie Mae, Gorelick was Deputy Attorney General of the United States, a position she assumed in March 1994. From May 1993 until she joined the Justice Department, Gorelick served as General Counsel of the Department of Defense. From 1979 to 1980 she was Assistant to the Secretary and Counselor to the Deputy Secretary of Energy. In the private sector, from 1975 to 1979 and again from 1980 to 1993, Gorelick was a litigator in Washington, D.C. She served as President of the District of Columbia Bar from 1992 to 1993. She is a member of the Council on Foreign Relations and the American Law Institute. Gorelick currently serves on the Central Intelligence Agency's National Security Advisory Panel, as well as the President's Review of Intelligence.

Nicholas deB. Katzenbach served first as deputy U.S. Attorney General under President John F. Kennedy, then, under President Lyndon B. Johnson, as U.S. Attorney General (1964-66). In the Johnson Administration he also served as Under Secretary of State. Following his government service, Katzenbach served as Senior Vice President and General Counsel of IBM Corporation. He left IBM in 1986 to become a partner in Riker, Danzig, Scherer, Highland & Perretti until 1994. He practiced law in New Jersey and New York and taught law first at Yale Law School and then at the University of Chicago Law School. He has published (with Morton A. Kaplan) *The Political Foundations of International Law* (1961), as well as many articles for professional journals.

Robert A. Katzmann* is a United States Circuit Judge for the U.S. Court of Appeals for the Second Circuit. He is a political scientist and lawyer by training. After clerking on the U.S. Court of Appeals for the First Circuit, he joined the Brookings Institution Governmental Studies Program where he was a fellow and acting program director. He was the Walsh Professor of Government, Professor of Law, and Professor of Public Policy at Georgetown University; served as a public member of the Administrative Conference and as a director of the American Judicature Society; and was Vice Chair of the Committee on Government Organization and Separation of Powers of the ABA Section on Administrative Law. He served as special counsel to Senator Daniel Patrick Moynihan on the confirmation of Justice Ruth Bader Ginsburg. His many writings include *Courts and Congress* (1997). He is a founder of the Governance Institute.

Lynn Martin is chair of Deloitte & Touche's Council on the Advancement of Women and is an adviser to the accounting firm. She was the Secretary of Labor under President George H. W. Bush. Before serving as Secretary of Labor, she represented the sixteenth congressional district of Illinois in the U.S. House of Representatives from 1981 to 1991. She was the first woman to achieve an elective leadership post when she was chosen as Vice Chair of the House Republican Conference, a position she held for four years. During her ten-year tenure, Martin served on the House Rules Committee, the House Armed Services Committee, the House Budget Committee, the Committee on Public Works and Transportation, and the Committee on the District of Columbia.

Kweisi Mfume is President and CEO of the NAACP. He served as a U.S. Representative to

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Maryland's seventh congressional district for ten years. As a member of Congress, Mfume sat on the Banking and Financial Services Committee; held the ranking seat on the General Oversight and Investigations Subcommittee; served as a member of the Committee on Education; and as a senior member of the Small Business Committee. While in office, he was chosen to serve on, and later chaired, the Ethics Committee and the Joint Economic Committee of the House and Senate. Mfume was chairman of the Congressional Black Caucus and later chaired the CBC's Task Force on Affirmative Action. In his last term of Congress, the House Democratic Caucus appointed him Vice Chairman for Communications.

Robert H. Michel is Senior Advisor for Corporate and Governmental Affairs at Hogan & Hartson L.L.P. He served thirty-eight years in Congress as a Representative from Illinois. His first leadership position was Chairman of the Congressional Campaign Committee in 1972. He then served as Republican Party Whip from 1974 until 1980, when he was elected and served for fourteen years as House Minority Leader. Mr. Michel served for twenty-one years as a member of the House Appropriations Committee. Mr. Michel serves on the boards of BNFL, Inc., the Dirksen Leadership Center, Bradley University, and the Capitol Hill Club. He also serves as co-chair of the National Commission on Federal Election Reform. In 1989 Mr. Michel was presented with the Citizens Medal. In 1994, he was awarded the Presidential Medal of Freedom—our nation's highest civilian honor.

Leon Panetta is Director of the Leon and Sylvia Panetta Institute for Public Policy at California State University, Monterey Bay. Panetta served as White House Chief of Staff during the Clinton Administration from July 1994 to January 1997. Before assuming that role, he served as director of the Office of Management and Budget. Before his move to the White House, he was a U.S. Representative from California's sixteenth congressional district from 1977 to 1993, representing the Monterey Bay area. During his years in Congress, Panetta chaired several committees and subcommittees such as the House Committee on the Budget and the House Agriculture Committee's Subcommittee on Domestic Marketing, Consumer Relations, and Nutrition. His House tenure included four years as chairman of the Budget Committee.

Donna E. Shalala served as Secretary of Health and Human Services in the Clinton Administration from 1993 to 2001. Before joining the Clinton Administration, Shalala served as Chancellor of the University of Wisconsin-Madison. She has taught political science at Syracuse University, Columbia, the City University of New York, and the University of Wisconsin-Madison. In the Carter Administration, she served as Assistant Secretary for Policy Development and Research, U.S. Department of Housing and Urban Development. She is currently a professor of Political Science and President of the University of Miami.

Senior Counselors

Norman J. Ornstein is a resident scholar at AEI. He also serves as an election analyst for CBS News. Ornstein writes regularly for *USA Today* as a member of its Board of Contributors and writes a column called "Congress Inside Out" for *Roll Call*. He co-directs the Transition

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Thomas E. Mann is the W. Averell Harriman Chair and Senior Fellow in Governance Studies at The Brookings Institution. Between 1987 and 1999 he was Director of Governmental Studies at Brookings. Before that, he was executive director of the American Political Science Association. Mann, a fellow of the American Academy of Arts and Sciences, is also working on projects dealing with campaign finance (in the U.S. and other countries) and election reform (including redistricting). His books include *Vital Statistics on Congress, 2001-2002*, with Norman J. Ornstein and Michael Malbin (2002); *The Permanent Campaign and Its Future*, with Norman J. Ornstein (2000); and *Inside the Campaign Finance Battle: Court Testimony on the New Reforms*, with Anthony Corrado and Trevor Potter (2003).

Executive Director

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Preface: The Continuity of Government

It is 11:30 A.M., inauguration day. Thousands await the noon hour when a new president will take the oath of office in the presence of members of Congress, the Supreme Court, family, and supporters. The outgoing president is meeting at the White House with his cabinet and top aides for a final farewell before attending the swearing in ceremony where the reins of power will switch hands. Television networks have their cameras trained on the West Front of the Capitol, beaming live coverage of the event into millions of homes around the world.

Suddenly the television screens go blank! Al Qaeda operatives have detonated a small nuclear device on Pennsylvania Avenue halfway between the White House and the Capitol. A one-mile-radius circle of Washington is destroyed. Everyone present at the Capitol, the White House, and in between is presumed dead, missing, or incapacitated. The death toll is horrific, the symbolic effect of the destruction of our national symbols is great, but even worse, the American people are asking who is in charge, and there is no clear answer.

The incoming president and vice president are surely dead, so the presidency passes through the line of succession to the Speaker of the House and then to the President Pro Tempore of the Senate. But both of them were at the inaugural ceremony, as protocol requires, so the presidency passes to the cabinet officers—but which cabinet? The president-elect never took office and never confirmed a cabinet. The presidency passes through the line of succession to the cabinet officers of the departing administration, assuming they have not resigned by January 20th, as is standard procedure, and assuming that they were not at the White House bidding farewell to the outgoing president. Perhaps the Secretary of Veterans Affairs, or another lesser-known cabinet member, was not in the area; then he or she would become president. Or maybe no one in the line of succession is alive, and a number of generals, undersecretaries, and governors claim that they are in charge.

Congress has been annihilated as well, with only a few members who did not attend the ceremony remaining. It will be many months before

Congress can function. Our Constitution requires a majority of each house of Congress to constitute a quorum to do business, and no such majority of the House or Senate exists. In addition, because of a series of past parliamentary rulings, there is confusion about whether there are enough members to proceed. The House's official interpretation of the quorum requirement is a majority of the living members, a proposition that scholars have questioned. Under this interpretation, if only five House members survive, a group of three might proceed with business and elect a new Speaker who would become president of the United States, bumping any cabinet member who had assumed the presidency and remaining in office for the rest of the four-year term.

Because the House of Representatives can fill vacancies only by special election, the House might go on for months with a membership of only five. On average, states take four months to hold special elections, and in the aftermath of a catastrophic attack, elections would likely take much longer. Under the Seventeenth Amendment governors can fill vacancies within days by temporary appointment, therefore the Senate would reconstitute itself much more quickly than the House.

Imagine in this chaotic situation that all these events are taking place without access to normal organization, procedure, and communication channels. The confusion might very well lead to a conflict over who would be president, Speaker of the House, or commander in chief, and a cloud of illegitimacy would likely hang over all government action. The institution that might resolve such disputes is the Supreme Court. However, it is likely that the entire Court would be killed in such an attack, leaving no final tribunal to appeal to for answers to questions about succession and legislative and executive action. A new court could be appointed by a new president and confirmed by a new Senate, but which president, which Senate, and how soon? Further, would we want the entire Supreme Court appointed for life tenure by a disputed or unelected president?

As terrible as the events of September 11th were, we were fortunate that in the aftermath, our government was able to function through normal constitutional channels. It almost was not so. In interviews broadcast on the Al-Jazeera network, the 9/11 plotters have claimed that the fourth plane, United Flight 93, was headed for the Capitol (see Appendix II). This fourth plane took off forty-one minutes late, which allowed the passengers to contact loved ones by cell phone and learn that their flight was on a suicide mission. Passengers stormed the cockpit, ultimately bringing down the plane and preventing it from hitting its target.

If United Flight 93 had departed on time and the hijackers had flown to Washington without interference, the plane might have hit the Capitol between 9:00 and 9:30 A.M. At nine o'clock the House met with Speaker J. Dennis Hastert (R-IL) presiding and recognized Representative Earl Blumenauer (D-OR), who spoke about the World Health Organization. Representative Tim Johnson (R-IL) took over the chair and recognized Representative Cass Ballenger (R-NC), who discussed the budget surplus. The chair then recognized Representative Peter DeFazio (D-OR), who talked about the Social Security Trust Fund. The floor was not heavily populated that Tuesday morning, with most business scheduled later that day, but there were still a number

of members on the floor and many others in leadership offices or in private meetings in the Capitol. How many members of the House were in the building that morning is difficult to calculate, but it is clear that many would have perished. Had the attacks occurred a little later in the day, the toll would have been even greater. What if the plane had hit the Capitol the week before, on September 6, 2001, when Mexican President Vicente Fox addressed a joint session of Congress with the vice president and the president's cabinet in attendance? What if the attack had been carried out during a major vote when almost all members were present?

The inauguration scenario described above is admittedly dire, but even less calamitous scenarios could plunge our constitutional government into chaos. Imagine a House of Representatives hit by an attack killing more than half the members and unable to reconstitute itself for months. Imagine any attack killing the president and vice president, subjecting us to a new president who had not been elected by the people. Imagine a biological attack that prevented Congress from convening for fear of spreading infectious agents. A few years ago, these were fanciful notions, the stuff of action movies and Tom Clancy novels. Now they are all too realistic.

The Continuity of the Three Branches of Government

The mission of the Continuity of Government Commission is to make recommendations to ensure the continuity of our three branches of government after a terrorist attack on Washington. While we hope and pray that the United States never faces such an attack, we believe it is imperative to plan for such a scenario. Given the events of September 11th, we must prepare for an orderly and legitimate succession of governance after a catastrophic event.

What are the problems of continuity associated with the three branches of government?

Congress. The greatest hole in our constitutional system is the possibility of an attack that would kill or injure many members of Congress, thereby preventing the branch from operating or alternatively, causing it to operate with such a small number that many people would question its legitimacy. The problem is acute in the House of Representatives. Because the House can only fill vacancies by special election, not by temporary appointment, it would take over four months to reconstitute the full membership of the House. In the interim, the House might be unable to meet its quorum requirement and would be unable to proceed with business. Alternatively, due to ambiguities regarding the definition of a quorum, a very small number of representatives might be able to conduct business for many months, possibly electing a Speaker who could become the president of the United States. A House consisting of only a few members would raise serious questions of legitimacy. Finally, it is possible that an attack, severely injuring but not killing large numbers of members, would threaten the continuity of both the House and the Senate. Because it is very difficult to replace incapacitated members, many House and Senate seats would remain effectively vacant until the next general election. If anyone doubts the importance of Congress in

times of crisis, it is helpful to recall that in the days after September 11th, Congress authorized the use of force in Afghanistan; appropriated funds for reconstruction of New York and for military preparations; and passed major legislation granting additional investigative powers and improving transportation security. In a future emergency, Congress might also be called upon to confirm a new vice president, to elect a Speaker of the House who might become president of the United States, or to confirm Supreme Court justices for lifetime appointments. In the event of a disaster that debilitated Congress, the vacuum could be filled by unilateral executive action—perhaps a benign form of martial law. The country might get by, but at a terrible cost to our democratic institutions.

The President. Presidential succession is the most visible aspect of continuity of government. Nothing is more important than having a credible and legitimate president leading the nation in the aftermath of a catastrophic attack. In this area, the country has some existing protection in the Constitution and in the Presidential Succession Act of 1947, which provide for the transfer of power to legitimate authorities. But the law defining presidential succession is by no means perfect, and there are a number of scenarios that would leave doubt as to who is president or elevate an obscure claimant to the office. There are at least seven significant issues with our presidential succession law that warrant attention. First, all figures in the current line of succession work and reside in the Washington, D.C. area. In the nightmare scenario of a nuclear attack, there is a possibility that everyone in the line of succession would be killed. Second, a number of constitutional scholars doubt that it is constitutional to have the Speaker of the House and the President Pro Tempore of the Senate in the line of succession, because they do not meet the constitutional definition of "Officers" of the United States. Third, regardless of its constitutionality, some question the wisdom of putting the President Pro Tempore of the Senate in the line of succession, because this largely honorific post is traditionally held by the longest serving senator of the majority party. Fourth, some suggest that congressional leaders of the president's party should be in the line of succession; the current law allows for a switch in party control of the presidency if the Speaker of the House or President Pro Tempore of the Senate is from a different party than the president. Fifth, the line of succession proceeds through the cabinet members in order of the dates of creation of the departments that they head. While several of the most significant departments are also the oldest, it may not make sense to rely simply on historical accident rather than an evaluation based on present circumstances in appointing a successor. For example, should the Secretary of the Interior be ahead of the Secretaries of Commerce, Energy, or Education? Sixth, if the line of succession passes to a cabinet member, the law allows for the House of Representatives to elect a new Speaker (or the Senate a new President Pro Tempore) who could bump the cabinet member and assume the presidency at any time. Seventh, the Twenty-fifth Amendment provides for several instances of presidential disability when the vice president can act as president, but it does not cover circumstances when the president is disabled and the vice presidency is vacant. In this case, the Presidential Succession Act allows congressional leaders and cabinet officers to act as president for a short time, but only if they resign their posts.

This commission will issue detailed recommendations on presidential succession later this year. The aim of the recommendations will be to ensure that there is a legitimate and expeditious transfer of power to individuals clearly designated in advance. It is not acceptable to face a situation when no one in the line of succession survives or when there are competing rivals for the presidency or a presidency that shifts numerous times from one individual to another.

The Supreme Court. The deliberative schedule of the Supreme Court of the United States is generally predictable and measurable over a period of months: from the time petitions are filed, to the time a case might be argued, to the time a decision would be delivered by the Court. There have been, however, extraordinary cases that require the Court's immediate attention. If such a case arose during a national crisis involving, for example, separation of powers issues or presidential succession issues, the Supreme Court might be needed to make a prompt ruling. Thus, the continuity of the Supreme Court during a period of crisis also deserves attention.

Congress has provided that a quorum of the Supreme Court is six justices. In the absence of a quorum, there are provisions for sending cases to the lower courts. Additionally, lower courts routinely rule on constitutional issues. If the entire Supreme Court were eliminated, however, there would be no final arbiter to resolve differences in the lower courts' opinions for a period of time. This situation could add to feelings of instability in the country. Moreover, the appointment process of an entirely new Court by a potentially un-elected president (serving in the line of succession) presents other issues that need to be addressed.

The Continuity of Government Commission will address succession in each branch of government. This first report focuses on the continuity of Congress, the biggest hole in our constitutional system. Our second and third reports will cover the presidency and the judiciary.

Continuity of Congress: The Problem

In the aftermath of an attack that killed or severely injured a large number of representatives and senators, there is a high probability that there would be no functioning Congress, or a Congress with such a small membership as to call into question the legitimacy of its actions. A catastrophic attack that killed many members would directly affect the House of Representatives because the Constitution effectively prevents the swift filling of vacancies in that body. An equally problematic scenario would be an attack that left many members incapacitated, which would affect both the House and Senate because neither chamber can easily replace living, but incapacitated, members until the next general election. The twin problems of mass death and incapacitation would threaten the functioning of Congress just at the time our country is most in need of strong leadership.

I. The Problem of Mass Vacancies

The House of Representatives would be severely affected by mass vacancies caused by a catastrophic attack. The difficulty is rooted in our Constitution, which prescribes different methods for filling vacancies in the House and Senate. For vacancies in the House of Representatives, ARTICLE 1, SECTION 2, CLAUSE 4, provides that "when vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies." A special election is the only method for filling House vacancies. By contrast, the Seventeenth Amendment, which governs vacancies in the Senate, provides that "when vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies; provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct." Because almost all state legislatures have given their governor the power to make temporary appointments until an election is held, Senate vacancies are, in practice, filled almost immediately by gubernatorial appointment.

The House of Representatives would have many seats vacant for a significant period of time in the aftermath of an attack because the process of filling vacancies by special election takes on average four months. In the 99th through the 107th Congress, the average time it took states to hold special elections to fill House vacancies caused by death was 126 days. Some of these vacancies were filled in as little as two and a half months, while others lasted for over nine months (see Appendix IV). Differences in state laws and the circumstances of the vacancy greatly affect the time it takes to hold a special election. Some states dispense with primaries for special elections. Others give the governor broad discretion on the timing of the election. The timing of the election is often affected by when in the course of the term the vacancy occurs. Some states do not fill vacant seats if they occur in the last six months of a term (see Appendix V).

There are good reasons for the length of time it takes to hold special elections. Candidates need a significant period of time to qualify for the ballot (e.g., by securing a number of signatures). Many states require political party primaries rather than allowing the parties to select their candidates directly. A real campaign requires time for candidates to communicate with voters, debates to take place, the media to scrutinize the candidates, etc. Finally, there are logistical limitations on setting up polling places and printing ballots.

How quickly could states hold special elections if they adopted new laws that expedited those elections? Under ideal circumstances, states that dispense with primaries and streamline their special election process might be able to complete one within two months. The commission estimates, however, that in the chaos after an attack, it would be difficult for even the most expedited elections to take place within three months. Not only might there be an initial period of confusion that would delay the election, but there is also no precedent for holding hundreds of special elections at the same time. One problem along these lines was identified by a House working group chaired by Representatives Christopher Cox (R-CA) and Martin Frost (D-TX)—there are a limited number of ballot printing companies, and they are not prepared to print ballots on a moment's notice for more than a few races at a time. There would be similar issues in setting up polling places.

Under the current constitutional arrangement, there is no effective way to begin filling House vacancies in less than three months after an attack. Given this limitation, how would an attack that kills hundreds of members affect the workings of Congress?

Mass Vacancies Could Prevent the House from Operating at All: The Quorum Requirement

Like any legislative body, the United States Congress has a quorum requirement, a provision to ensure that a minimum number of members is present for the consideration of important business. Without such a requirement, a few members might meet and pass legislation, even though the voting members would represent only a fraction of the American people. But Congress' quorum requirement is more rigid than those in other legislative bodies because it is embedded in the United States Constitution and cannot be

changed without a constitutional amendment. ART. 1, SEC. 5 provides that "…a Majority of each [House] shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide." It is clear from the text of the Constitution and subsequent precedents that once it is established that no quorum is present, the only actions that the House or Senate may take are to adjourn or to compel the attendance of absent members. No other business can be conducted.

Under the most commonsense reading of this clause, the Constitution requires that a majority of the whole number of each house of Congress be present in order for that house to hold votes of substance. The authors of the Constitution knew how to express the difference between a majority of those present and a majority of the whole number, as they did in the clauses providing for impeachment trials and for the advice and consent of the Senate to treaties where two-thirds of the "members present" are required. The Framers' understanding of the clause as requiring a majority of the whole number of each body to constitute a quorum prevailed until the Civil War. Today, under this interpretation, if fewer than 218 members of the House of Representatives were alive, then Congress could not function until special elections filled enough vacancies to reach the constitutional quorum requirement. Mass vacancies would mean that no legislation could be passed, as all legislation requires the assent of both houses. No appropriations could be made; no declaration of war; no laws passed to assist in the gathering of intelligence or apprehension of terrorists. If the Speaker of the House was killed, the House could not elect a new Speaker—who would be the third person in the line of succession? If the president or vice president were killed, no new vice president could be confirmed, as the appointment of a new vice president requires the consent of both the House and Senate. Given the length of time it takes to hold special elections, Congress could not function in these important areas for months.

Mass Vacancies Could Call into Question the Legitimacy of Congress: Ambiguities in the Quorum Requirement Might Allow a Few Members to Act for the Whole Congress

In practice, the official interpretations by the House and the Senate of their quorum requirements have not been as stringent as the constitutional language would seem to require. Parliamentary rulings in the House and Senate, beginning during the Civil War, have defined the quorum more liberally than a majority of the members of each house. The quorum requirement in the House is now defined by precedent as a majority of the members who are "chosen, sworn *and living*."

The evolution of the interpretation of the quorum rule is a long and complicated story. In brief, the first change to the interpretation of the House quorum rule occurred in 1861 when there was a depleted House membership due to Southern secession. Speaker Galusha Grow noted that a "majority of all the possible Members of the House," could not be obtained. He ruled that

the quorum would consist of a majority of those legitimately chosen, which exempted the seats on the Southern states from the count. The Senate adopted the same rule in 1864 for similar reasons.

In 1868, the Senate modified its interpretation of the quorum rule to be a majority of those "duly chosen and sworn." The occasion of the change was post-war confusion surrounding new governments in the South and uncertainty about when the Southern states would be fully represented in Congress.

From 1879 to 1890, there were several instances when the Speaker expressed a personal opinion that the House quorum rule was a majority of those "chosen and living." It was not, however, until 1891 that Speaker Reed issued an official opinion to this effect. The occasion was a vote of minor importance. Because several members of the chamber had died, there would have been no quorum present if a majority of the whole number was counted, but there was a majority if one excepted the deceased members. Finally, in 1906, Speaker Cannon modified the interpretation of the quorum rule to be a "majority of those Members chosen, sworn, and living, whose membership has not been terminated by resignation or by action of the House." The addition of "sworn" paralleled the Senate's change of 1868. Again, the occasion for the change was a vote of minor importance. A few members had not yet been sworn in, and exclusion of their seats from the counting of the quorum meant that a quorum could be achieved for that vote. The current House interpretation of the quorum rule is a "majority of those Members chosen, sworn, and living, whose membership has not been terminated by resignation or by action of the House." The current Senate interpretation of the quorum rule is "a majority of the Senators duly chosen and sworn."

The most significant aspect of the current interpretation for the purposes of continuity of government is the provision that only a majority of the living members needs to be present for a vote rather than a majority of the whole number of seats. In the case of a few deaths in the House, the change in the number needed for the quorum would be insubstantial. (If 2 members of the 435 were dead the quorum requirement would be 217 instead of the 218 with no deaths and a full membership.) But in the case of a large number of deaths, the current interpretation of the quorum requirement would have serious consequences. On the one hand, it would ensure that the House could operate with a quorum even after a massive death toll. But at the same time, it would allow the House to operate with just a handful of members. Take, for example, an attack that kills all but nine members of Congress. Five of those nine would constitute a quorum, and that tiny, unrepresentative group could pass legislation out of the House. More troubling is the intersection of the Presidential Succession Act with an attack on Congress. In the case of the death of the president and vice president, a nine member House could then elect a new Speaker, who would become president of the United States for the remainder of the term. Many would question the legitimacy of that president and the actions of the House with a severely diminished membership.

The issue of the quorum is one of the most significant for a Congress after a catastrophic attack. A strict interpretation of the constitutional quorum requirement would mean that the House would be unable to act for many months

until sufficient vacancies were filled. A looser interpretation would mean that the House of Representatives might continue to function, but that very few members, representing a small portion of the country, could purport to take charge.

The most troubling aspect of the quorum rule is the confusion surrounding its interpretation and application. For example, if a small number of remaining members decided to forge ahead with legislative initiatives, and then six months later, a House replenished by special elections, challenged these initiatives, would these actions stand? If no one objected to the absence of a quorum, but it was clear that no quorum could be formed because of deaths and/or incapacities, would the actions of such a House be legitimate or subject to challenge? In the fog of an attack, the murky nature of the quorum requirement threatens to undermine confidence in the legitimacy of government actions.

Aside from the question of the proper interpretation of the quorum requirement, there are other quorum issues that might arise in the aftermath of an attack. The absence of a quorum is only noted if a member calls for a quorum—a call that any single member is entitled to make during any vote. Even if a strict interpretation of the quorum requirement were adopted, Congress could proceed if no one objected to the absence of a quorum. This is a sensible procedure for Congress during normal times, but it creates great uncertainty in a post-attack Congress. If only 100 members survived an attack, would someone object to the absence of a quorum with the hope of stopping all votes? Conversely, if only a few members survived, would they proceed without a quorum call and go on to do business as if they had a full quorum available?

Finally, there are several scenarios that would not affect the issue of calling a quorum, but would be troubling nonetheless. An attack that killed 200 members of the House of Representatives would not cripple the Congress, but it might drastically alter the political and geographical balance of the Congress. An attack might occur when one party caucus was meeting, effectively wiping out most of one party but not the other. It is also possible that an attack would hit when state or regional delegations were meeting, thus eliminating representation for a part of the country for many months.

II. The Problem of Incapacitated Members

In the past, there has been little concern about the long-term disability or incapacitation of members of Congress, and no provisions exist in rules, law, or the Constitution about defining incapacitation or replacing such members, temporarily or permanently, if they are unable to perform their duties for extended periods of time. This is partly because the Framers barely considered the consequences of incapacitation for any office. There is a fleeting mention in ART. 2, SEC. 1 that Congress could provide for officers who might act when the president was incapacitated. But none of our presidential succession acts have defined incapacity or dealt with it in a substantive way. It was only with the Twenty-fifth Amendment in 1965 that incapacity was seriously addressed. That amendment was not in place to deal with serious incapacity issues in the Garfield and Wilson presidencies, as well as a number of other lesser incidents. The question of incapacity was not considered at all for mem-

bers of Congress, as the loss, even for months or years, of one, two, or three members out of 100 or 435 would not be a debilitating event.

But the loss for weeks, months, or years of tens or hundreds of incapacitated lawmakers is another story. The secret creation of a bomb and radiation-proof bunker for Congress at the Greenbrier resort in West Virginia during the Cold War was based on the assumption that a nuclear attack on Washington would kill, not incapacitate most members of Congress. The objective then was assuring, with the notice available from the time missiles were launched in Siberia until they arrived in Washington, that Congress could evacuate the 200 miles or so to the Greenbrier. No contingency plans existed for an attack without notice, or one that caused not death, but widespread incapacitation.

The threat from terrorism is different. Not only could there be an attack—including a nuclear one—with no notice, but the threat of chemical and biological warfare, or exploding jet fuel, also makes widespread temporary incapacitation a more likely scenario, and perhaps a more vexing problem. In the event of multiple deaths, the Senate at least can quickly fill vacancies via gubernatorial appointments. But neither the House nor the Senate can fill vacancies due to temporary incapacitation. For incapacitated members, the relevant seats would be effectively vacant until the member recovers, resigns, or dies and is replaced, or until the next general election. In this case, the quorum problem looms larger, since even under the expansive definition of a majority of those lawmakers "chosen, sworn, and living," incapacitated members would be included in the definition but unable to help constitute the quorum. For example, if 220 members of the House of Representatives were alive but unable to perform their duties, there could be no quorum.

An Attack that Leaves Members of Congress Incapacitated

Because of the availability of chemical and biological agents, the possibility of mass incapacitation is real. A chemical attack might leave thousands in burn units or with respiratory and neurological injuries. If such an attack were centered on Congress, many members could be in hospital intensive care units for months. Or imagine if the anthrax attack on the Senate had been undetected and particles had dispersed widely through the ventilation system. Senators and their staffs might have survived the attack, but the recovery period would have been many months. More troubling is the possibility of an infectious disease such as smallpox. If even a few members of Congress contracted the disease, the members might choose not to convene for fear of spreading the disease. Finally, even a conventional attack might leave hundreds of members in hospitals or burn units—alive, but unable to perform their duties for a significant period of time.

How Incapacitation Affects Congress

When vacancies occur in Congress, there are established processes for filling them (special election in the House; gubernatorial appointment followed by special election in the Senate). When a member of Congress is alive but unable to perform his or her duties, there is no way to fill what is in effect a temporary vacancy. Under

normal circumstances, this does not pose a problem for the functioning of government. If a handful of Senators are incapacitated, the institution can function, short a few votes. But if there are large numbers of incapacitated members, the continuity of Congress is threatened. In the House of Representatives, no special election is called until a seat is declared vacant. Similarly, in the Senate, no gubernatorial appointment or special election can occur if there is no vacancy. Mass incapacitation brings with it all the problems that mass vacancies in the House of Representatives would, but it is worse in three respects. First, mass incapacitation affects both the House and the Senate. Second, the temporary vacancies caused by incapacitation would not be filled for an indefinite amount of time, only until the member recovers, resigns, dies, or the term of office ends. Third, mass incapacitation makes it virtually certain that Congress would be unable to reach its quorum requirement even under its most lenient interpretation.

Precedents for Members with Long Term Incapacity Remaining in Congress

Under normal circumstances, neither house of Congress attempts to determine the capacity of individual members. Many members have stayed in their elected positions for months or longer, while comatose or clearly unable to perform their duties. There has been only one recent case of a seat declared vacant while held by a living member—that of Representative Gladys Noon Spellman (D-MD). But the Spellman case is extraordinary. Spellman fell into a deep and irreversible coma on October 21, 1980, while campaigning for re-election. While incapacitated, she was re-elected by the people of her district. She was not sworn in when the new Congress commenced in January 1981, though her name appeared on the first rollcall. On February 23, 1981, the House passed H. Res. 80 declaring the seat vacant because of her "absence and continuing incapacity."

A somewhat similar case occurred in 1972 with House Majority Leader Hale Boggs (D-LA) and Representative Nicholas Begich (D-AK), when both were lost in a plane crash. Because the accident occurred close to the next election, their names remained on the ballot, and certificates of election were issued showing their electoral victory. While the bodies were never found, the seats were declared vacant after an Alaska court officially determined that they were presumed dead.

There have also been many cases of members of Congress who have been unable to perform their duties but have remained in office. Octogenarian Senator Carter Glass (D-VA) was absent for over four years in the 1940s. Similarly, the Republican Conference declared Senator Karl Mundt's (R-SD) committee slots vacant in February of 1972, but he remained formally in his Senate seat until the end of his term in 1972 despite suffering a severe stroke in late 1969 that left him unable to perform his senatorial duties. The only precedent for declaring a seat vacant because of incapacity is the Spellman case, and in that instance, the House only made the declaration when she was physically unable to attend her swearing in at the beginning of the next term. There has never been a case of a seat declared vacant due to incapacity during the current term of a sworn occupant.

The only other way that Congress could fill the seats of incapacitated members is by expelling the incapacitated member by a two-thirds vote. But this presumes that the remaining members of Congress were sufficient to constitute a quorum. It would also mean that incapacitated members would not return to their duties upon recovery. They would be supplanted by replacements.

Ignoring incapacity is understandable for a Congress operating during normal times. As with the vacancy provision, Congress would not cease functioning if a few members were unable to perform their duties. There is also the danger of abuse of an incapacity provision, with congressional leaders or governors tempted by political or other reasons to replace members by declaring them incapacitated.

Incapacitation could cause the House and/or Senate to stop functioning. It could also distort the membership of either body if 20 or 30 percent of the members were incapacitated. Finally, since widespread incapacitation could go on indefinitely, the effect on the legislative branch could continue for months or years.

Continuity of Congress: Recommendations

Since a catastrophic attack could prevent Congress from functioning or cause it to operate with a small, unrepresentative number, the Continuity of Government Commission finds the status quo unacceptable. There is a gaping hole in our constitutional fabric that would allow large numbers of vacancies in Congress to continue for a significant period of time. The threat of terrorism remains high, and it is clear that our governing institutions remain prime targets. It is an urgent matter to repair that constitutional hole.

It is essential that large numbers of congressional vacancies be filled shortly after they occur to ensure that in the event of a catastrophic attack, Congress can continue to function in a way that properly represents the American people. In our study, the commission consulted with current and former members of Congress as well as legal and constitutional scholars. We held two public meetings where we heard testimony from experts. In the course of our investigation, we explored a wide range of options short of a constitutional amendment to ameliorate or solve these problems. The commissioners share distaste for frivolous or unnecessary amendments to the Constitution. Unfortunately, because the Constitution dictates the way that vacancies are to be filled in the House and Senate, there is no way to establish a procedure to quickly fill mass vacancies without a constitutional amendment. The expeditious filling of vacancies cannot be accomplished through accelerated special elections or by altering the quorum requirement. There is simply no effective way, short of a constitutional amendment, to replace members of the House who die, or to temporarily replace members of Congress who are incapacitated.

Central Recommendation

A constitutional amendment to give Congress the power to provide by legislation for the appointment of temporary replacements to fill vacant seats in the House of Representatives after a catastrophic attack and to temporarily fill seats in the House of Representatives and Senate that are held by incapacitated members.

The commission recommends an amendment that adheres to the following principles:

When a large number of members are killed or incapacitated, temporary replacements shall be made immediately, to fill vacant seats and to stand in for incapacitated members. The cleanest constitutional solution for filling vacancies in the House of Representatives would be to adopt the same procedure the Senate has employed since the ratification of the Seventeenth Amendment: providing for the filling of all vacancies, even those occurring on a routine basis, with members appointed temporarily by the governor until a special election is held. It is not necessary for the continuity of Congress to fill routine vacancies, but it is essential to fill mass vacancies. Many current and former House members believe that temporary appointments should be made only in extraordinary circumstances to preserve the character of the House as the "people's house." The commission believes that a constitutional amendment should give Congress the power to provide by legislation for the filling of vacancies; to decide whether they need to be filled under routine or extraordinary circumstances; and to determine how many vacancies should trigger an emergency appointment procedure. Congress must act to fill mass vacancies, but it should be allowed the leeway to determine exactly when the power to fill vacancies would be exercised.

With its understandable sensitivity to the status of the House as an elected body, Congress may well determine that a provision for temporary appointments should only be triggered by a major emergency, leaving in place existing procedures for the replacement of lawmakers during ordinary times.

Temporary appointments, in cases of both vacancies and death, should be made by governors, or selected from a succession list drawn up in advance by the member who holds the seat, or some combination of these two methods. These methods for selecting temporary replacements would be swift, legitimate, and decisive—the three most important criteria for such a selection. The second method, a succession list drawn up in advance by the member who holds the seat, would alleviate concerns that temporary replacements might hold radically different views and party affiliation than the members they replaced.

In the case of incapacitated members, replacements should stand in for the incapacitated member until the member recovers, the member dies and the vacancy is filled, or until the end of the term. It is essential that members of Congress who are incapacitated be able to return to their posts when they recover. Incapacitation should not serve as a reason to oust legitimately elected representatives.

The commission prefers a concise amendment that allows Congress to provide for many of the details of the temporary appointment procedure in legislation. A constitutional amendment can be comprehensive, laying out all the details of the temporary appointments procedure, or it can be concise, granting Congress the power to enact legislation to address the problem. The commission prefers a concise amendment that gives Congress the power to shape a legislative solution within broad boundaries laid out in the amendment. This approach has the advantage of keeping the Constitution free of minute detail, and it affords Congress the

opportunity to adjust the legislation as circumstances change. The commission prefers a short amendment that delegates to Congress the power to legislate a procedure for filling vacancies in either House when a significant number of members are killed or become incapacitated as a result of a natural disaster or an act of terrorism. This would enable Congress over time to adjust and improve the legislation it initially adopts, and to remedy procedures that experience proves to be impractical or unpopular. Such corrections are much easier to make by the legislative process than if the corrections require the adoption of another constitutional amendment.

The amendment and/or accompanying legislation must specify:

- exactly when the procedure for the emergency method of temporary appointments shall begin and end
- the qualifications of the temporary replacements
- the method of appointment
- limitations on the length of service of the temporary appointees

The Rationale for a Constitutional Amendment

The commission recommends a constitutional amendment to provide for the filling of large numbers of vacancies in the aftermath of a catastrophic attack. It was only after careful consideration of other alternatives that the commission decided to recommend a constitutional amendment. The United States Constitution is not the Napoleonic Code; it does not contain a copious list of particulars. Our Constitution is broadly written and meant to last for the ages without significant tinkering. The founding generation ratified the original Constitution and quickly added the first ten amendments that we call the Bill of Rights. After those initial amendments, we have only amended our Constitution seventeen times in more than 200 years. Such a history makes it incumbent on any legislator to consider alternatives short of amending the Constitution before embarking on such a rare course. Moreover, constitutional amendments are exceedingly difficult to enact, with the most common method being passage by a two-thirds majority of both houses of Congress and ratification by three-quarters of the states' legislatures. Constitutional amendments are also not desirable because they may have unintended effects (as in the case of Prohibition), which once realized are difficult to undo given the arduous nature of the amendment process.

Despite all of the disadvantages of a constitutional amendment, the commission favors one because it is the only solution that adequately addresses the problem of filling mass vacancies in Congress quickly after a catastrophic attack. Our survey of alternative approaches persuades us that no other option provides more than a partial and inadequate fix to the problem.

History of Attempts to Amend the Constitution to Provide for Temporary Appointments, 1947-1965

The idea of a constitutional amendment to provide for temporary appointments to fill House

vacancies has a history. From 1947 to 1965, during the Cold War, over thirty constitutional amendments were introduced in the House and Senate to give governors the power to make temporary appointments to fill vacant House seats when there were large numbers of vacancies. The House and Senate held several hearings on the subject, and several constitutional amendments passed the Senate. The concerns of that era were similar to today, but with some important differences. The primary fear then was of a massive nuclear strike from the Soviet Union that would kill a large number of House members. The problem of vacancies in the House today is more or less the same as it was during the Cold War, but there is a much greater likelihood of an attack incapacitating large numbers of members. Most of the proposed constitutional amendments in the earlier era dealt only with vacancies, and not with incapacity.

Three constitutional amendments passed the Senate by overwhelming margins. In 1954, a constitutional amendment introduced by Senator Knowland (R-CA) passed the Senate 70 to 1. The amendment granted governors the power to make temporary appointments to fill House vacancies when more than 145 seats of the House were vacant. The House took no action on the amendment. In 1955, a constitutional amendment introduced by Senator Kefauver (D-TN) passed the Senate 76 to 3. Again, the House took no action on the subject. The amendment granted governors the power to make temporary appointments to fill House vacancies when more than a majority of seats of the House were vacant. In 1960, the Senate passed S.J. Res. 39, a three-part constitutional amendment, by a vote of 70 to 18. The amendment provided for (1) District of Columbia voting in presidential elections; (2) eliminating the poll tax; and (3) granting governors the power to make temporary appointments to fill House vacancies when more than a majority of the seats were vacant. That year the House of Representatives passed the first provision of S.J. Res. 39 allowing for D.C. voting in presidential elections, which became the Twenty-third Amendment. The following Congress passed the second provision eliminating the poll tax, which became the Twenty-fourth Amendment. The House took no action on the third provision granting governors the power to make temporary appointments to fill vacancies.

The following is the amendment proposed by Senator Knowland, S.J. Res. 39 (1954) (for other such proposals see Appendix VI):

> SECTION 1. Whenever, in time of any national emergency or national disaster, the number of vacancies in the House of Representatives shall exceed one hundred and forty-five, the Speaker of the House of Representatives shall certify that fact to the President. In case there is no Speaker, or in the event of the inability of the Speaker to discharge the powers and duties of his office, such certification shall be made by the Clerk of the House of Representatives. Upon receipt of such certification, the President shall issue a proclamation declaring such fact. The executive authority of each State shall then have power to make temporary appointments to fill any vacancies in the representation of his State in the House of Representatives which may exist at any time within sixty days after the insurance of such a proclamation. Any person temporarily appointed to any such vacancy shall serve

until the people fill the vacancy by election as the legislature may direct.

SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Additional Measures Congress Should Consider

While a constitutional amendment to allow temporary appointments is the only effective way to fill mass vacancies expeditiously, there are other issues that Congress should address that would supplement an amendment and be very helpful in emergency circumstances.

Congress should consider changing its rules to ensure that it could be effectively reconvened after an attack. Congress could be in session, in recess, or in recess subject to being called back, when an attack occurs. In each of those cases, there should be a mechanism for calling Congress back into session if there is a catastrophic attack. In particular, Congress must consider the possibility that the leadership of both chambers who may be tasked with reconvening the House may not survive the attack. Another point of concern is the meeting place for Congress. The Constitution requires the consent of both houses of Congress to move its location. Congress should consider clarifying whether a change of location could be ratified after reconvening elsewhere. It should revisit and update a law passed in 1793 that authorizes the president to move Congress in times of grave danger.

Congress should consider providing in advance for the possibility of short-term appropriations for the executive branch if Congress is unable to meet. Congress should re-examine its procedures at the beginning of a new Congress to address the possibility that an attack at that time would disrupt the organization of Congress. Finally, both chambers should revisit their practices on inauguration day. They might consider keeping several designated members away from the ceremony. The Senate should also consider ways to confirm non-controversial cabinet appointments of a new president almost immediately following the swearing in of the president to ensure that the line of succession is preserved.

Several of these issues have already been addressed by a bipartisan congressional working group chaired by Representatives Christopher Cox (R-CA) and Martin Frost (D-TX) and were enacted into House rules for the 108th Congress. For example, the rules now allow the Speaker to reconvene the Congress to another location and provide for successors to do the same.

Most of these aforementioned considerations could be accomplished by amending the rules of the House and Senate. The implementation of these measures could begin immediately, before Congress passes and the states ratify a constitutional amendment to provide for the filling of mass vacancies. These changes do not address the central problem of a catastrophic attack causing mass vacancies and incapacitation of members of Congress, but they would be very helpful in reducing the confusion after an attack.

Alternatives to Constitutional Amendment Do Not Solve the Problem of Mass Vacancies

Why Expediting Special Elections is Helpful but not Sufficient

The commission considered the possibility of expediting special elections. The states have the power to alter their laws to hold special elections to fill vacancies more quickly. In addition, Congress could preempt state laws under the "times, places, and manner" power of ART. 1, SEC. 4. For example, Congress might pass a law that requires that all special elections be held within ninety days of a vacancy. While the states and Congress could pass laws to speed up elections, the commission does not believe that such laws would solve the central problem that threatens the continuity of Congress (i.e., mass vacancies in Congress caused by death or incapacity that last for a significant period of time). There is a lower limit as to how quickly elections could be held. The commission estimates that under ideal circumstances, states could hold elections within two months if they dispensed with party primaries and drastically accelerated other aspects of the campaign. After a catastrophic attack, with large numbers of special elections taking place simultaneously, the commission estimates that even the most expedited elections would take a minimum of three months. Three months is too long to continue without a functioning Congress. The president would act without a check, extraconstitutionally in some cases, until Congress reconstituted itself. In addition, there is the possibility that a Congress of greatly reduced size would act and that the vast majority of Americans could view this Congress as illegitimate. Shorter special election cycles would not eliminate any of these problems, but only slightly shorten their duration. Finally, the commission does not believe that expedited special elections are appropriate for every state. Some states dispense with primaries in special elections, but many do not. A severely shortened election is likely to provide little choice for the voters. Only the most well-known and well-funded candidates would be able to gain name recognition in an abbreviated campaign. The commission prefers that mass vacancies be filled quickly by temporary appointments and that special elections take place within 120 days, giving states the ability to hold primaries if they choose.

Several members of our commission served on the Ford-Carter National Commission on Election Reform. Lloyd Cutler and Robert Michel chaired the commission and Leon Panetta served as a member. Their service on the commission impressed upon them the importance of well-devised laws and procedures for election administration. States do not often have the occasion to revisit their laws respecting special elections to fill vacancies in Congress, but September 11th is a reason for doing so. The commission recommends that the states consider thoroughly their election procedures with special attention to how they would hold special elections in the aftermath of a terrorist attack, and revise their laws accordingly. Along these lines, the Cox-Frost working group recommended specifically a House resolution encouraging states to revisit their laws to provide for expedited special

elections. The House passed such a resolution in the fall of 2002. The commission supports this resolution, but it notes that it would have a small effect in reducing the length of vacancies and that the various states will come to different conclusions as to the manner and the length of time in which they will hold special elections.

Why Clarifying the Quorum Requirement is not a Solution

Many of the problems surrounding a post attack Congress involve the quorum requirement. After a catastrophic attack, the House of Representatives may be unable to assemble the "majority of the body" required by the Constitution, making it impossible to conduct business. After an attack there is also a question of legitimacy with regard to the quorum because the House and Senate interpret their requirement as a majority of the living members. This allows for the possibility of very few members proceeding with business if, for example, three of the five living members were present. Incapacity poses another concern for the quorum, as large numbers of disabled members might prevent the formation of a quorum of living members. There are some who suggest that the House and Senate might adopt rules that would make the quorum requirement more lenient, thus ensuring that there would never be the absence of a quorum and Congress could always proceed with business. For example, a quorum might consist of a majority of those living and not incapacitated.

The commission sees the value of clarifying the interpretation of the quorum requirement, but it does not believe that making the requirement more lenient will ensure the constitutional continuity of Congress; quite the opposite. A lenient quorum requirement might result in a small number of members acting as the whole Congress and calling into question the legitimacy of congressional actions. The reason that the quorum requirement poses a concern after a catastrophic attack is that a large number of members may be killed or incapacitated. The solution is to fill the vacancies so that Congress can proceed with a nearly full membership, not to lower the quorum threshold so the few remaining members can claim a quorum is present.

The commission does favor clarification of the quorum requirement, but not as a substitute for a constitutional amendment that would fill vacancies by temporary appointment. The commission is concerned that the current interpretation in House and Senate rulings that a majority of the living members constitutes a quorum does not square with the constitutional quorum requirement of a majority of the whole body. It would oppose an attempt to make the quorum even less stringent by exempting incapacitated members from the calculation of the quorum. Finally, the commission believes that the House and Senate should not be able to proceed without a quorum, even if no one objects, if it is clear that so many members are dead or incapacitated that a quorum could not be assembled. In normal times, when no one objects to the absence of a quorum, it is implied that a quorum could materialize if the matter were sufficiently important to members. However, after a catastrophic attack, there is no plausible argument that a majority could be assembled under any circumstances. Thus, it would pose a grave threat to legitimacy for either body to proceed with business on the fiction that such a majority could appear. Furthermore, if Congress were to proceed with no

one objecting to the absence of a quorum, then each member would be given the power of extortion over the others. At any time, one member, if his or her wishes were not fulfilled, could cause Congress to stop functioning by raising the objection that there was no quorum.

Why Changes to House Rules Alone Cannot Fill Vacancies

Some have suggested that temporary appointments to the House could be made by changes in House rules and that a constitutional amendment is not necessary. The commission has studied this argument, and believes that such an approach would be unconstitutional. In addition, the commission believes that it would be destabilizing to adopt an approach that would surely be challenged as unconstitutional after an attack at a time when we need clarity and legitimacy for Congress.

The argument for temporary appointments by House rules is as follows. The House could provide by rule that its current members supply a list of successors who would serve as temporary replacements for the members in case of a catastrophic attack. The argument rests on the fact that the courts have shown great deference to House rules because they are internal matters that do not concern the other branches of government. Further, even if the arrangement were of dubious constitutionality, no one would question it in the midst of such a grave emergency. The American people would be grateful that vacancies would be filled by a method that legitimately reflects the wishes of Congress before the attack. The difficulty with such an argument is twofold. First, the Constitution is very clear that there is only one method for filling vacancies in the House of Representatives—by special election. ART. 1, SEC. 2, CL. 4 provides that "when vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies." History is consistent with the Constitution, as no House vacancy has ever been filled by any other method since the adoption of the Constitution in 1789. While it is true that the Court grants great deference to the House and Senate in the rules they adopt to govern themselves, they have also been clear about the limits of such deference.

Advocates of deference to House rules often cite *U.S. v. Ballin* and this sweeping pronouncement regarding the determination of whether a quorum is present: "…within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just." The Court goes on to note that the House's power to make its own rules is "within the limits suggested, absolute and beyond the challenge of any other body or tribunal."[1] Both of these broad statements of support for the power of congressional rule making are, however, circumscribed by "limits," and it is the limits that are significant here. The limitations the Court noted are that Congress "may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained."[2] The Court was very clear that House rules could not violate constitutional restraints. The House could no more provide for the filling of vacancies by method other than special

1 *U.S. v. Ballin* 144 U.S. 1, 12 S.Ct.507, 36 L. Ed. 321.

2 Ibid.

elections than it could decide by House rule that less than a two-thirds vote is needed to override a presidential veto or pass a constitutional amendment.

Second, as for the argument that no one would question potentially extraconstitutional congressional procedures after a catastrophic event, as such procedures would allow the House to go forward, the commission believes that this process would undermine the legitimacy of Congress. It would open any congressional action to constitutional challenge at a time when the legitimacy of our institutions is paramount.

The commission does recommend that it is necessary to fill vacancies expeditiously with temporary appointments and that there is merit to the method of members indicating who would succeed them in the case of a catastrophe. The only way to effect this change, however, is by amending the Constitution.

Arguments against Temporary Appointments

The People's House: Appointments would Change the Democratic Character of the House

The most substantial argument against a constitutional amendment to allow temporary appointments to fill mass vacancies is that it would change the character of the House of Representatives. The House of Representatives is rightly called the "people's house," as it is the representative body closest to the people with elections held every two years. The democratic character of the House is also found in the fact that the people have elected every member of the House, while many Senators have been appointed.

The commission's recommended constitutional amendment is sensitive to preserving the character of the House in two ways.

First, in the case of mass vacancies, large portions of the country would be unrepresented for many months at a time when momentous decisions would be made. The House's fundamental character as the "people's house" rests primarily on the fact that it represents all the people, with each member representing a roughly equal number of people. The Senate, on the other hand, represents the people through the states. An individual senator from California represents over sixty times the number of people that are represented by a senator from Wyoming, a vast contrast to the equal representation of the House. If mass vacancies were not filled after a catastrophic attack, a few representatives representing only their constituents would act in the name of all the people. Mass vacancies distort the representative role of Congress. While the elected character of the House is extremely important, the principle that all the people should be equally represented is essential to its democratic character.

Second, the commission considered but does not take a position on whether temporary appointments should be made to fill vacancies in the House under ordinary circumstances like the procedure currently in effect for the Senate. Instead, we note that it is essential that temporary appointments to fill vacancies in the House

be made in the case of mass vacancies. We recommend that a constitutional amendment should allow Congress to set the circumstances under which temporary appointments shall occur. Given the strong opinions of many members of Congress that appointments for routine vacancies would change the character of the "people's house," it is likely that Congress would choose to fill vacancies with appointments only in the extraordinary case of many vacancies at one time. Under this system, the several seats in the House of Representatives that become vacant each Congress would continue to be filled by special elections. The appointments system would be insurance against a catastrophic attack. The bottom line is that the commission favors putting the decision about the exact circumstances for filling vacancies in Congress's hands.

The Potential for Politicization and Changing the Partisan Balance of Power

During the commission's deliberations, we heard the concern that the appointment process would become politicized and the balance of political power would illegitimately shift from one party to another.

This concern is related to the question of who designates temporary appointments and what limitations are placed on those appointments. In the Senate, governors have nearly always appointed members of their own party as temporary replacements to fill vacant Senate seats. Consequently, when a governor is of the opposite party of the senator who vacated a seat, the seat switches from one party to the other, at least until a special election is held. House members fear a scenario in which a governor fills vacancies with members of his or her party. The likelihood of this is much greater in the House than in the Senate, as governors and senators have the same constituencies, but House members may represent parts of a state that are different from the dominant political makeup of the state. If for example, the entire California delegation was killed by a terrorist attack, the Democratic governor might appoint Democrats to all fifty-three seats, changing twenty seats from Republican to Democrat. Similarly, if the Texas delegation was killed in an attack, the Republican governor might appoint Republicans to all thirty-two seats, changing seventeen seats from Democrat to Republican.

The commission understands the concern about the change in partisan balance after an attack. It does not, however, recommend a requirement that a temporary appointee be of the same party as the member who vacated the seat. There are several reasons the commission does not recommend such action. First, in the event of a devastating attack, the commission feels that governors would not try to play politics in a time of national crisis. Second, the system of requiring appointments of a particular political party has not worked in practice. Certain government commissions require a specified number of members of each party to act as commissioners. In practice, these restrictions have been deliberately flouted. Appointees have declared themselves to be affiliated with one party to get the appointment even though their true allegiance is with the other party. Finally, ideology must also be considered. It would be easy for a governor to replace a liberal Democrat with a conservative one or a conservative Republican with a liberal

one, respecting party orientation but not the underlying views of the member who held the vacated seat. Further, a party provision would preclude those individuals who declare themselves to be independent from serving as a temporary appointee.

If the constitutional amendment, or implementing legislation, addresses the issue of the political party of potential appointees, the commission recommends a system where members of Congress draw up a list in advance of those who might be appointed as temporary successors. This was a familiar Cold War-era provision of states such as Delaware (see Appendix VII). Presumably, members of Congress would choose successors who shared their political views, and the resulting Congress would not shift in party or political philosophy. The commission, however, also supports a simple appointment of replacements by a governor because it believes that there would be little political gamesmanship in the crisis atmosphere of a catastrophic attack. A fuller discussion of the merits of these two types of appointments is found in a subsequent section on who should appoint temporary replacements.

Response to the Argument for a More Limited Constitutional Amendment Dealing Only with Vacancies Caused by Death not Incapacity

The commission recommends a constitutional amendment to address mass vacancies in the House and mass incapacitation in the House and Senate. Mass incapacitation affects both the House and the Senate, making it insufficient for the House to simply adopt the Senate's method for filling vacancies (i.e., gubernatorial appointments to fill vacancies). A constitutional amendment must address the temporary vacancies caused by severely injured representatives and senators unable to perform their duties.

The Form of a Constitutional Amendment

A constitutional amendment that is consistent with the commission's recommendations could take a number of forms. There are specific issues that must be remedied, but these issues could be addressed in the amendment itself or in legislative language that accompanies a more general amendment. The commission prefers that the amendment be concise, granting Congress the power within certain broad limits to legislate provisions for temporary appointments to fill vacancies.

The simplest amendment might take this form:

> Congress shall have the power to regulate by law the filling of vacancies that may occur in the House of Representatives and Senate in the event that a substantial number of members are killed or incapacitated (see also amendment proposal by Michael Glennon-Appendix VI).

Such an amendment would give Congress the power to legislatively handle many of the intricate problems of filling vacancies. In this case, the legislation would have to answer a number of questions: Who would make the appointments? What would be the threshold for a "substantial"

number of members? What constitutes incapacity and who decides when that incapacity is lifted? Would there be time limits on the appointments? Who would be eligible to be appointed?

At the other end of the spectrum is an amendment that lays out all the details in the amendment itself. For example, an amendment proposed by Norman Ornstein, senior counselor to the commission, reads as follows:

> Section 1. In the event of an emergency, the executive authority of each state shall determine the condition of its Representatives and Senators. If the offices of a majority of the Representatives apportioned to that state or of both of the Senators are vacant or occupied by members unable to discharge the powers and duties of their office, the executive authority of that state shall issue a proclamation to that effect. The proclamation shall be sent to the Speaker of the House, the president of the Senate and other officers that shall be specified by law. If within a […]-day period, executive authorities of the majority of states have issued such a proclamation, an emergency appointment authority shall commence, whereby the executive authority shall make temporary appointments to fill vacancies in the House of Representatives and make appointments of acting members to discharge the function of Representatives and Senators unable to perform their duties, while their disability persists. The emergency appointment authority shall remain in effect until the end of the next session.
>
> Section 2. In accordance with the emergency appointment procedure in this article, each member of the House of Representatives and each Senator shall designate in advance not fewer than 3 nor more than 7 emergency interim successors to the member's powers and duties. All designated interim successors shall meet the qualifications for the office so designated. Each member shall review and, as necessary, promptly revise the designations of emergency interim successors to insure that at all times there are at least 3 such qualified emergency interim successors. Members and Senators shall submit their lists of designated successors to the Speaker of the House, the president of the Senate and the executive authority of their state.
>
> Section 3. Upon commencement of the emergency authority provided for by this article, the Executive Authority of each State shall appoint Temporary Members to fill vacancies in the House of Representatives, selecting from the list of designated successors. For the period of their appointment, Temporary Members shall be members of the House of Representatives for all purposes under this Constitution, the laws made in pursuance thereof, and the rules of the House of Representatives. The appointment of a Temporary Member shall end upon the filling of the vacancy by election.
>
> Section 4. In the case of a vacancy in the House of Representatives under this article, the writ of election that shall issue under ART. 1 of this Constitution shall provide for the filling of the vacancy within [.....] days of its happening, except that if a regularly scheduled election for the office will be held during such period or [.....] days thereafter, no special election shall be held

and the member elected in such regularly scheduled general election shall fill the vacancy upon election.

Section 5. In the case of a Representative, who is unable to discharge his or her duties, the executive authority in each state shall, under the emergency authority of this article, appoint as an Acting Member an individual, selecting from the list of designated successors, to discharge the powers and duties of a Representative who is unable to discharge those functions. The appointment of an Acting Member shall end upon the transmission to the Speaker or other Officer designated by the House of Representatives an affirmation in writing by the member that no inability exists. Upon the transmission of the affirmation the member shall resume all the powers and duties of the Office.

Section 6. In the case of a Senator, who is unable to discharge his or her duties, the executive authority in each state shall, under the emergency authority of this article, appoint as an Acting Senator an individual, selecting from the list of designated successors, to discharge the powers and duties of a Senator who is unable to discharge those functions. The appointment of an Acting Senator shall end upon the transmission to the president of the Senate or other Officer designated by the Senate an affirmation in writing by the Senator that no inability exists. Upon the transmission of the affirmation the Senator shall resume all the powers and duties of the Office.

Finally, there are many possible amendments that would specify certain areas that Congress might fill in with legislation.

> Congress shall have the power to regulate by law the filling of vacancies that may occur in the House of Representatives and Senate in the event that a substantial number of members are killed or incapacitated. Provided that Congress shall not define a substantial number as less than 20 percent of either chamber, provided that incapacitated members shall be allowed to return to their seats upon proof of their fitness for office.

Forty-two years ago, one of our commissioners, Nicholas Katzenbach, then Assistant Attorney General, Office of Legal Counsel, testified before the House Judiciary Committee on several proposed constitutional amendments to provide for temporary appointments to fill House vacancies. In response to a question from a member of the committee, Katzenbach suggested the "possibility of a relatively short constitutional amendment enabling Congress by legislation to provide for various contingencies." The advantage of such an approach would be to "give a desirable flexibility within the constitutional framework determined to be correct and would not mean every time you had a problem of this kind you had a constitutional question. It would be capable of clarification by legislation."[3] The commission strongly agrees with these comments.

3 *Constitutional Amendments for Continuity of Representative Government During Emergency: Hearing on H.J. Res. 29, et al. Before Subcommittee No.2 of the House Committee on the Judiciary*, 87th Cong., 1st Sess. (1961), p.25.

Essential Elements for Temporary Appointments

Defining the Threshold

What should the threshold be for triggering an emergency procedure to allow for temporary appointments? Who should determine if the threshold is met? These two questions are significant because the commission believes that temporary appointments are essential under emergency conditions, but not in the event of routine vacancies.

The question of the threshold weighs two competing priorities. On the one hand, the threshold for vacancies should be sufficiently high to constitute an emergency where extraordinary means for ensuring the continuity of Congress are needed. On the other hand, the threshold should not be so high as to prevent Congress from functioning in a normal manner. The commission does not set a particular number of vacancies that triggers enactment of the emergency provisions, but it should fall between 15 and 50 percent of seats vacant. If more than 50 percent of the seats of one chamber are vacant, the quorum question looms large. Conversely, it should be larger than fifteen percent, as Congress could adequately function with even fairly significant numbers of vacancies. The commission supports a determination of the threshold not only on the basis of an absolute number of vacancies, but also by the determination that there have been significant numbers of vacancies in state delegations. For example, the temporary appointment provision might commence when a majority of the state delegations have each lost one quarter or one half of their membership.

Who should determine the threshold has been met? A number of constitutional amendments were proposed and three passed the Senate between 1947 and 1965. The amendments took different approaches as to who would count the deaths or incapacitations to determine if the threshold had been met. Who, for example, would determine that one-quarter of the membership of the House of Representatives was dead or incapacitated? There are a number of options: the remainder of Congress, an independent officer, an agency, the president, and the courts. Most of these options, however, have two serious drawbacks. First, the determination of an exact number may be extremely difficult. In the confusion after an attack, it might be difficult to identify the dead and the missing. Determination of incapacity could be even more subjective. It is possible that there would be a significant delay in determining that the emergency procedure for appointments would take effect, and the purpose of having such a procedure in the first place is to hasten the replenishment of Congress after an attack. Second, the one who is designated to determine if the threshold is met may be indisposed after an attack, particularly if it is a Washington figure or body. For example, if the remainder of Congress is to determine whether the threshold has been met, and an attack wipes out three-quarters of the members, then Congress itself may be incapable of meeting its quorum requirement to determine whether the threshold has been met. Or, under a looser quorum interpretation, a small number of members might be tasked with making that decision, therefore

raising questions of legitimacy. Another point for consideration is that any delegation of this function to the executive or judicial branches would raise separation of powers issues.

The commission recommends that governors survey their own state's delegation to determine if a sizable fraction of their state's representatives are dead or incapacitated. Once a number of governors, say a majority, make such a determination, then the emergency provision would be triggered. The commission recommends this approach for a variety of reasons. First, governors are not Washington-based figures and would likely survive an attack. If some do not survive, there are established lines of succession in the states. Second, it is much easier to determine if a fraction of a state delegation is dead or incapacitated than it would be to survey loss within the whole of Congress. Third, since this proposal requires a declaration by a number of governors, it would take the decision-making power out of one hand and limit the ability for political gamesmanship.

Who Should Make Temporary Appointments?

The commission has considered a number of options for who should make temporary appointments, two of which it favors. Either governors should make the appointments, or the appointments should be made from a list drawn up in advance by the member who vacates the seat. A third alternative is to combine the two methods. Governors would have a limited choice—they could appoint anyone on the list of successors drawn up by the member.

The commission's primary objective is that appointments be made swiftly, legitimately, and decisively. The commission received numerous suggestions on this matter, including many proposals submitted by concerned citizens through our website and through the results of a poll conducted by *Reader's Digest*. Some of the suggestions made intuitive sense, but we did not feel they met all three criteria. Examples include appointments made by a committee of state legislators who represent parts of the district of the vacated seat, or by the state legislatures, or the remainder of Congress. California, for example, has a provision for emergencies where the remaining members of the legislature appoint temporary replacements. These options allow for local input in the selection of a replacement member, but ultimately, they are unwieldy and may delay the appointment. State legislatures may not be in session. Legislatures can deadlock on a choice, as in the 19th century when state legislatures selected U.S. Senators. It would also be complicated to assemble a group of legislators representing the district. Each district would have a different number of people representing parts of the district. How much weight would the vote of each person be given?

The president or the courts could make the appointments, but the commission believes that due to the separation of powers, this would undermine the legitimacy of the selection. Furthermore, with the president and the Supreme Court also based in Washington, it would be imprudent to leave the appointment power in their hands.

The two options the commission recommends are gubernatorial appointment or appointment

from a list drawn up in advance by the member. Appointments of either type could be made quickly. They would be made by legitimate authority: by the highest ranking constitutional officer in the state or by the deceased or incapacitated member. Both of these methods of selection would also be decisive, as there would be no committee or body that would split its vote for a nominee. A combination of the two methods would also meet the commission's criteria.

How Long Should Appointments Last?

The commission respects the differences in the political cultures of states and the time it takes to fill vacancies by special election. In the case of temporary appointments to fill vacated seats, we believe that the appointment should last until the special election is held to fill the seat, but that the special election shall be held within 120 days of the vacancy. This 120-day window allows states to have primaries if they choose, but it emphasizes the importance of placing an elected member in the seat with dispatch.

In the case of temporary appointments that stand in for incapacitated members, the appointment should last until the member recovers, the member dies or resigns and a special election is held to fill the seat, or until the end of the term of office. Such a timeframe is warranted because the circumstances of incapacitation may vary widely and because the commission finds it is essential for the member to return to his or her seat if he or she recovers during the term.

Members Return From Incapacitation on Their Own Declaration

The commission recommends that members who are declared incapacitated shall return to their seats when they declare themselves fit to return to office. The commission believes that the best scenario is for original members to return to their seats if recovered.

Another option would be for an independent body to declare members incapacitated and then to declare them fit for office. But this option is unwieldy, subject to politicization and challenge, and potentially very slow. If we allow governors to declare members of Congress temporarily incapacitated, there should be a safeguard to members that they can return on their own declaration as soon as they are recovered.

Should Temporary Appointees be Eligible to Run Again?

The commission recommends that temporary appointees be able to seek the office they hold in a special election or in a future general election.

There is some concern that a temporary appointment will lead inevitably to the election of the temporary member. This would cut against the character of the House that all representatives are elected, for appointed members would have a leg up on others who would seek the seat. This incumbent advantage could be avoided if temporary appointments were barred from running in a special election or in the next general election for office. The commission opposes this

plan for several reasons. First, the evidence in appointments made to the Senate does not support the thesis that appointed members win elections. In fact, only fifty percent of senators appointed in recent years won subsequent special elections (see Appendix VIII). Second, it is an unwise precedent to limit within the Constitution the eligibility of certain individuals who meet all qualifications for office. Third, if temporary appointees were not eligible to run for office, some of the better candidates might not choose to serve as temporary appointments, thus depriving the nation of the best political leadership at the time it is needed most.

Constitutional Amendment Should be Ratified in Two Years

The commission hopes that we never need to use the provisions of a constitutional amendment to allow Congress to reconstitute itself after an attack. It is, however, imperative to enact such an amendment expeditiously for two reasons. First, it is necessary to fill the hole in our constitutional fabric to ensure that the institution of Congress could continue after a catastrophic attack. Second, the enactment of an amendment would be a deterrent to an attack on Congress. Terrorists look for the weakest security link where they could inflict the most harm. We should pass an amendment to send the message that we have addressed issues in the continuity of government and that an attack on Congress would not produce chaos and inaction.

In modern times, it has become customary to add a proviso to constitutional amendments that they must be ratified by three-quarters of the states within seven years. Given the dangerous times we live in, the commission believes that a speedy ratification is essential. We propose that the states be given two years to ratify the amendment.

Conclusion

Congress is the first branch of government, its powers set out in ARTICLE 1 of the Constitution. It is the branch closest to the people. Yet, it is the most constitutionally vulnerable of the three branches to a massive disruption from a terrorist attack. Our current constitutional framework does not allow the House of Representatives to be reconstituted quickly after a large number of deaths. The only method for filling vacancies is by special election, which takes many months to complete. In addition, neither the Senate nor the House is prepared for the possibility of large numbers of their members to be alive, but severely incapacitated and unable to perform their duties. Either of these scenarios could result in no Congress in the months after an attack, or one that is unrepresentative and of questionable legitimacy. In addition, the continuity of the Congress and the presidency are intertwined because the Presidential Succession Act includes the Speaker of the House and the President Pro Tempore directly after the president and vice president in the line of succession. With a badly wounded Congress, it might mean that no Speaker or President Pro Tempore could step forward to fill the presidency, or it could mean that a Speaker or President Pro Tempore newly elected by a handful of members would assume the presidency at a time of crisis and serve the entire term. More problematic than any of these particular scenarios is the confusion that would occur after an attack and potential conflicts between competing leaders trying to fill a vacuum.

The commission believes that it is essential to address this problem. In formulating this report the commission consulted numerous experts and current and former officeholders. The exact details of a solution are less important than that the problem be addressed seriously and expeditiously. The only way to address the problem of restoring Congress after a catastrophic attack is to amend the Constitution to allow immediate temporary appointments to Congress until special elections can be held to fill vacancies or until matters of incapacitation can be resolved. It is our hope that such an emergency provision of the Constitution will never be utilized, but it is our best insurance against the chaotic aftermath of an attack. It serves as a warning to those who would seek to topple the United States that our institutions are stronger than those who would try to destroy them.

Appendix I

Commission-Sponsored Public Events

Inaugural Press Conference

Thursday, September 19, 2002
American Enterprise Institute
1150 Seventeenth Street, N.W.
Washington, D.C. 20036

Participants:
Lloyd Cutler, Wilmer, Cutler & Pickering
Thomas Foley, Akin, Gump, Strauss, Hauer & Feld, LLP
Thomas Mann, Brookings Institution
Norman Ornstein, American Enterprise Institute

First Commission Hearing

Monday, September 23, 2002
House Administration Committee
1310 Longworth House Office Building
Capitol Hill

Morning Session
Witnesses appearing before the commission:
Michael Davidson, former Senate Legal Counsel
James Duff, former Administrative Assistant to Chief Justice Rehnquist
John Fortier, American Enterprise Institute
Thomas Mann, Brookings Institution
Norman Ornstein, American Enterprise Institute

Afternoon Session
Witnesses appearing before the commission:
Representative Brian Baird (D-WA)
Representative Chris Cox (R-CA)
Norman Ornstein, American Enterprise Institute
Representative Vic Snyder (D-AR)

Second Commission Hearing

Wednesday, October 16, 2002
The Brookings Institution
1775 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Witnesses appearing before the commission:
Michael Davidson, former Senate Legal Counsel
John Fortier, American Enterprise Institute
Alton Frye, Council on Foreign Relations
Michael Glennon, The Fletcher School, Tufts University
Representative James Langevin (D-RI)
Thomas Mann, Brookings Institution
Randy Moss, Wilmer, Cutler & Pickering
Norman Ornstein, American Enterprise Institute
Donald Wolfensberger, Woodrow Wilson International Center for Scholars

Transcripts for all events are available at www.continuityofgovernment.org

Appendix II

The Capitol as a September 11th Target

From an interview regarding the plan for the September 11th attacks:

Mr. Yosri Fouda (Al-Jazeera):
"The White House was in the list, but then was later taken off the list for navigation reasons, according to Khalid Sheik Mohammed."

Kate Seeyle (NPR):
"And replaced by the U.S. Capitol, adds Fouda, the fourth target presumably of the hijacked jet that crashed in Pennsylvania."
Transcript: "Two Senior Al-Qaeda Leaders Give Interviews to Al-Jazeera," Morning Edition *(10:00 AM ET) National Public Radio, September 13, 2002.*

The two terrorist plotters [Khalid Sheikh Mohammed and Ramzi Binalshibh] reveal:
"The fourth target of the hijackers was Capitol Hill and not the White House. United Airlines flight 93 was heading for Congress when the passengers overpowered the terrorists and the plane crashed into the Pennsylvanian countryside."
Nick Fielding, "Masterminds of 9/11 reveal terror secrets," Sunday Times *(London), September 8, 2002, p. 1.*

"About three weeks before September 11, targets were assigned to four teams, with three of them bearing a code name: The U.S. Capitol was called 'The Faculty of Law;' the Pentagon became 'The Faculty of Fine Arts;' and the North Tower of the World Trade Center was code-named by Atta as 'The Faculty of Town Planning.'"
"Al-Jazeera Offers Accounts of 9/11 Planning," http://cnn.worldnews.printthis.cliability.com, September 12, 2002.

Appendix III

Relevant Constitutional Provisions

Constitutional provision for filling vacancies in the House of Representatives

Article 1, section 2, clause 4

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

Constitutional provision for filling vacancies in the Senate

Amendment XVII

Passed by Congress May 13, 1912.
Ratified April 8, 1913.

The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Constitutional provision for the Quorum requirement

Article 1, section 5, clause 1

Section 5. …and a Majority of each [House] shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

* Article I, section 3, of the Constitution was modified by the 17th Amendment.

Appendix IV

Special Elections in the Case of Death for the United States House of Representatives from the 99th to 107th Congress

Congress	Open Seat	Representative Who Died	Date of Vacancy	Primary Election[a]	General Election	Date Sworn In	Successor	Vacancy (days)
99	Louisiana 8th	Gillis W. Long	1/20/1985		3/30/1985	4/4/1985	Cathy Long	74
99	New York 6th	Joseph P. Addabbo	4/10/1986	5/13/1986[b]	6/10/1986	7/29/1986	Alton R. Waldon Jr.	110
100	California 5th	Sala Burton	2/1/1987	4/7/1987	6/2/1987	6/9/1987	Nancy Pelosi	128
100	Connecticut 4th	Stewart B. McKinney	5/7/1987	7/21/1987	8/18/1987	9/9/1987	Christopher Shays	125
100	Virginia 5th	Dan Daniel	1/23/1988		6/14/1988	6/21/1988	L. F. Payne	150
100	New Jersey 3rd	James J. Howard	3/25/1988	6/7/1988	11/8/1988	1/13/1989	Frank Pallone Jr.	284
100	Illinois 12th	Melvin Price	4/22/1988	3/15/1988[c]	8/9/1988	8/11/1988	Jerry F. Costello	111
100	Tennessee 2nd	John J. Duncan	6/21/1988		11/8/1988	1/3/1989	John J. Duncan Jr.	196
100	Alabama 3rd	Bill Nichols	12/13/1988	3/7/1989	4/4/1989	4/18/1989	Glen Browder	126
101	Florida 18th	Claude Pepper	5/30/1989	8/3/1989	8/29/1989	9/6/1989	Ileana Ros-Lehtinen	99
101	Texas 18th	Mickey Leland	8/7/1989		12/9/1989	1/23/1990	Craig Washington	169
101	Mississippi 5th	Larkin Smith	8/13/1989	10/3/1989	10/17/1989	10/24/1989	Gene Taylor	72
102	Massachusetts 1st	Silvio O. Conte	2/8/1991	4/30/1991	6/4/1991	6/18/1991	John Olver	130
103	Michigan 3rd	Paul B. Henry	7/31/1993	11/2/1993	12/7/1993	1/25/1994	Vernon J. Ehlers	178
103	Kentucky 2nd	William H. Natcher	3/29/1994		5/24/1994	5/26/1994	Ron Lewis	58
104	Missouri 8th	Bill Emerson	6/22/1996	(indep.)	11/5/1996	1/8/1997	Jo Ann Emerson	200
105	Texas 28th	Frank Tejada	1/30/1997	3/15/1997	4/12/1997	4/17/1997	Ciro D. Rodriguez	77
105	California 22nd	Walter H. Capps	10/28/1997	1/13/1998	3/10/1998	3/17/1998	Lois Capps	140
105	California 44th	Sonny Bono	1/5/1998		4/7/1998	4/21/1998	Mary Bono	106
105	New Mexico 1st	Steven Schiff	3/25/1998	4/13/1998[d]	6/23/1998	6/25/1998	Heather Wilson	92
106	California 42nd	George E. Brown Jr.	7/15/1999	9/21/1999	11/16/1999	11/18/1999	Joe Baca	126
107	California 32nd	Julian C. Dixon	12/8/2000	4/10/2001	6/5/2001	6/7/2001	Diane E. Watson	181
107	Virginia 4th	Norman Sisisky	3/29/2001	4/29/2001[e]	6/19/2001	6/26/2001	J. Randy Forbes	89
107	Massachusetts 9th	John Joseph Moakley	5/28/2001	9/11/2001	10/16/2001	10/23/2001	Stephen F. Lynch	148
107	South Carolina 2nd	Floyd Spence	8/16/2001	10/30/2001	12/18/2001	12/19/2001	Joe Wilson	125
107	Hawaii 2nd	Patsy T. Mink	9/28/2002		11/20/2002	1/7/2003	Ed Case[f]	101
average length of vacancy caused by death when special election was held								**126.4 days**

a If no primary date is given, the state held no primary or the information was unavailable. **b** No primary election was held, the candidates were selected by delegation. **c** Costello had already won the regularly scheduled primary before the death of Price. **d** Heather Wilson was nominated by convention. **e** Forbes was nominated by convention. **f** Case was not sworn into until after a second special election on January 4, 2003. Mink was elected to the 103rd Congress despite her death, but Case won the winner-takes-all election to fill the two years of Mink's term.

Appendix V

Time Requirements for Filling Congressional Vacancies According to State Laws

Alabama

Code of Ala. § 17-18-1 through 7

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe
- If Congress will not be in session prior to the next general election, no special election is held

Alaska

Alaska Stat. § 15.40.010 through 220

- A special general election must be held no less than 60 days, and no more than 90 days, after a vacancy occurs
- A special primary election must be held no less than 30 days after the vacancy occurs
- If the vacancy occurs less than 60 days before or is on or after the date of the primary election in general election years, no special election is held

Arizona

A.R.S. § 16-201, § 16-221 through 223, and § 16-342

- A special general election must be held no less than 110 days, and no more than 150 days, after the vacancy occurs
- A special primary election must be held no less than 75 days, and no more than 105 days, after the vacancy occurs
- If the vacancy occurs within 6 months of a regularly scheduled general election, no special election is held

Arkansas

A.C.A. § 7-7-105

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

California

Cal Elec Code § 10700

- A special election must occur no less than 112 days, and no more than 119 days, after the governor issues the writ of election
- The governor must issue the writ of election no later than 14 days after the vacancy occurs
- If the vacancy occurs within 180 days of a regularly scheduled election, the special election may coincide with that regularly scheduled election

In the event of a catastrophe – Cal Elec Code § 10733 (2003)

- A special election must occur no less than 56 days, and no more than 63 days, after the governor issues the writ of election
- If the vacancy occurs within 90 days of a regularly scheduled election, the special election may coincide with the regularly scheduled election

Colorado

C.R.S. 1-12-201 through 208

- A special election must occur no less than 75 days, and no more than 90 days, after the vacancy occurs
- If the vacancy occurs within 90 days of a regularly scheduled general election, no special election is held

Connecticut

Conn. Gen. Stat. § 9-211 through 224b and § 9-450

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

Delaware

15 Del. C. § 7103 through 7112 and 15 Del. C. § 7301 through 7306

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

Florida

Fla. Stat. § 100.111

- The governor fixes the date of a special first primary election, a special second primary election, and a special election with a minimum of 2 weeks between each election
- There is no specification as to when the governor must issue the writ of election after the vacancy occurs
- If Congress will not be in session prior to the next general election, the special election may coincide with the regularly scheduled election

Georgia

O.C.G.A. § 21-2-540 through 545

- A special election must be held no less than 30 days after the governor issues the writ of election
- The governor must issue the writ of election no later than 10 days after the vacancy occurs

Hawaii

HRS § 17-2

- A special election must be held no less than 60 days after the chief election officer issues the writ of election
- There is no specification as to when the chief election officer must issue the writ of election after the vacancy occurs

Idaho

Idaho Code § 34-106, § 34-106, and § 59-911

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

Illinois

10 ILCS 5/25-7

- A special general election must occur no more than 115 days after the governor issues the writ of election
- The governor must issue the writ of election no later than 5 days after the vacancy occurs
- If the vacancy occurs within 180 days of a regularly scheduled general election, no special election is held

Indiana

Burns Ind. Code Ann. § 3-10-8-1 through 9 and § 3-13-3-2

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe
- If the vacancy occurs less than 30 days before a regularly scheduled general election, no special election is held

Iowa

Iowa Code § 43.83 and § 69.14

- A special election must be held no less than 40 days after the governor issues the writ of election
- The governor must issue the writ of election no later than 5 days after the vacancy occurs
- If Congress will not be in session prior to the next general election, no special election is held

Kansas

K.S.A. § 25-3501 through 3505

- A special election must be held no less than 45 days, and no more than 60 days, after the governor issues the writ of election
- The governor must issue the writ of election no more than 5 days after the vacancy occurs
- If the vacancy occurs no less than 30 days, and no more than 90 days, before a regularly scheduled general or primary election, the special election coincides with the regularly scheduled election

Kentucky

KRS § 118.720

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

Louisiana

La. R.S. 18:1279

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

Maine

21-A M.R.S. § 366 and § 392

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe
- If the vacancy occurs while Congress is in session, the special election must be held "as soon as reasonably possible"
- If the vacancy occurs when Congress is not in session, the special election must be held before the next regular or called session

Maryland

Md. Ann. Code art. 33, § 8-710

- A special general election must be held no less than 72 days after the governor issues the writ of election
- A special primary election must be held no less than 36 days after the governor issues the writ of election
- The governor must issue the writ of election no later than 10 days after the vacancy occurs
- If the vacancy occurs less than 60 days before the regularly scheduled primary election, no special election must be held

Massachusetts

ALM GL ch. 54, § 140

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

Michigan

MCLS § 168.145, § 168.631, and § 168.633

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe
- There must be at least 20 days between the special primary election and the special general election
- If the vacancy occurs more than 30 days before a regularly scheduled general election, the special election may coincide with the regularly scheduled election

Minnesota

Minn. Stat. § 204D.17 through § 204D.27

- A special election must be held no more than 28 days after the governor issues the writ of election if Congress is in session
- A special primary election must be held no more than 14 days prior to the special general election
- The governor must issue the writ of election no more than 5 days after the vacancy occurs if Congress is in session
- If Congress will not be in session prior to the next general election, no special election is required

Mississippi

Miss. Code Ann. § 23-25-853

- A special election must be held no less than 40 days after the governor issues the writ of election
- The governor must issue the writ of election no more than 60 days after the vacancy occurs

Missouri

§ 105.030 R.S.Mo.

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

Montana

Mont. Code Anno., § 13-25-203

- A special general election must be held no less than 75 days, and no more than 90 days, after a vacancy occurs
- If the vacancy occurs within 150 days of a regularly scheduled primary election or between the primary and general elections in odd numbered years, the special election coincides with the regularly scheduled primary or general election
- If the vacancy occurs between the regularly scheduled primary and the general election in even numbered years, the candidate elected to the office for the succeeding full term shall immediately take office

Nebraska

R.R.S. Neb. § 32-564

- A special general election must be held no less than 48 days, and no more than 58 days, after the governor issues the writ of election
- A special primary election must be held no less than 20 days, and no more than 30 days, after the governor issues the writ of election
- There is no specification as to when the governor must issue the writ of election after the vacancy occurs
- If Congress will not be in session prior to the next general election, no special election is held

Nevada

The state code does not specifically address vacancies in the U.S. House of Representatives

- If a vacancy occurs in the House of Representatives, the state defers to U.S. Constitution Article 1, Section 2
- The governor shall issue a writ of election

New Hampshire

RSA § 661:6

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

New Jersey

N.J. Stat. § 19:27-6

- A special general election must be held no less than 111 days, and no more than 123 days, after the governor issues the writ of election

- A special primary election must be held no less than 65 days, and no more than 71 days, after the governor issues the writ of election
- There is no specification as to when the governor must issue the writ of election after the vacancy occurs
- If the vacancy occurs within 65 days prior to the day for holding the next primary election for the general election, the special election coincides with the regularly scheduled election

New Mexico

N.M. Stat. Ann. § 1-15-18.1

- A special election must be held no less than 84 days, and no more than 91 days, after a vacancy occurs
- Each qualified political party may nominate a candidate to fill the vacancy at least 56 days preceding the special election
- The governor must issue the writ of election 10 days after the vacancy occurs
- If the vacancy occurs between the regularly scheduled primary and the general election, the special election coincides with the regularly scheduled election

New York

NY CLS Pub O § 42

- A special election must be held no less than 30 days, and no more than 40 days, after the governor issues the writ of election
- There is no specification as to when the governor must issue the writ of election after the vacancy occurs
- If the vacancy occurs after the first day of July of the last year of the term of office, no special election is held

North Carolina

N.C. Gen. Stat. § 163-13

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

North Dakota

N.D. Cent. Code § 54-07-01

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

Ohio

ORC Ann. 3521.03

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe
- A special primary election must be held no less than 15 days prior to the special general election

Oklahoma

26 Okl. St. § 12-101

- The governor must issue the writ of election no more than 30 days after the vacancy occurs
- If the vacancy occurs after March 1 of an even numbered year, no special election is held, but the candidate elected to the office for the succeeding full term shall be appointed by the Governor to fill the unexpired term

Oregon

ORS § 188.120

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe
- If the vacancy occurs after the 62nd day before the general election but on or before the general election, and if the term of that office is not regularly filled at that election,

the special election is held as soon as practicable after the general election

Pennsylvania

25 P.S. § 2777

- A special election must be held no less than 60 days after the governor issues the writ of election
- The governor must issue the writ of election no more than 10 days after the vacancy occurs
- If Congress will not be in session prior to the next general election, no special election is held

Rhode Island

R.I. Gen. Laws § 17-4-8

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe
- If the vacancy occurs between April 1 and October 1 in an even year, the special election may coincide with the next regularly scheduled general election

South Carolina

S.C. Code Ann. § 7-13-190

- A special election must be held on the 18th Tuesday after a vacancy occurs
- A special primary election must be held on the 11th Tuesday after a vacancy occurs
- A special runoff primary must be held on the 13th Tuesday after a vacancy occurs
- If the 18th Tuesday after the vacancy occurs is within 60 days of a regularly scheduled general election, the special election coincides with the regularly scheduled election

South Dakota

S.D. Codified Laws § 12-11-1

- A special election must be held no less than 80 days, and no more than 90 days, after a vacancy occurs
- The governor must issue the writ of election no later than 10 days after the vacancy occurs
- If the vacancy occurs within 6 months of a regularly scheduled primary or general election, the special election coincides with the regularly scheduled election

Tennessee

Tenn. Code Ann. § 2-14-102 and § 2-16-101

- A special general election must be held no less than 100 days, and no more than 107 days, after the governor issues the writ of election
- A special primary election must be held no less than 55 days, and no more than 60 days, after the governor issues the writ of election
- The governor must issue the writ of election no later than 10 days after the vacancy occurs
- If the vacancy occurs within 30 days of a regularly scheduled primary or general election, the special election may coincide with the regularly scheduled election

Texas

Tex. Elec. Code § 203.001 through 005 and § 204.021

- A special general election must be held no less than 36 days, and no more than 50 days, after the governor issues the writ of election
- There is no specification as to when the governor must issue the writ of election after the vacancy occurs

Utah

Utah Code Ann. § 20A-1-502

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

Vermont

17 V.S.A. § 2352 and § 2621

- A special general election must be held no more than 3 months after a vacancy occurs
- A special primary election must be held no less than 40 days, and no more than 46 days, prior to the date of the special general election
- If the vacancy occurs within 6 months of a regularly scheduled general election, the special election may coincide with the regularly scheduled election

Virginia

Va. Code Ann. § 24.2-209

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

Washington

Rev. Code Wash. (ARCW) § 29.68.080

- A special general election must be held no less than 90 days after the governor issues the writ of election
- A special primary election must be held no less than 30 days before the special general election
- The governor must issue the writ of election no later than 10 days after the vacancy occurs
- If the vacancy occurs within 6 months of a regularly scheduled general election and before the second Friday following the close of the filing period for that general election, the special primary and general elections coincide with the regularly scheduled election

West Virginia

W. Va. Code § 3-10-1 through 4

- A special general election must be held no less than 30 days, and no more than 75 days, after the governor issues the writ of election
- The governor must issue the writ of election no later than 10 days after the vacancy occurs

Wisconsin

Wis. Stat. § 8.50

- A special election must be held no less than 62 days, and no more than 77 days, after the chief election officer issues the writ of election
- If a primary election is required, it must be held 28 days before the special election
- There is no specification as to when the chief election officer must issue the writ of election after the vacancy occurs
- If the vacancy occurs between the second Tuesday in May and the second Tuesday in July in an even numbered year, the special primary and general elections shall be filled at the regularly scheduled election

Wyoming

Wyo. Stat. § 22-18-103 through 105

- A special general election must be held no more than 40 days after a vacancy occurs
- The governor must issue the writ of election no later than 5 days after the vacancy occurs
- If the vacancy occurs within 6 months of a regularly scheduled general election, the vacancy shall be filled at the regularly scheduled general election

Appendix VI

Text of Proposed Constitutional Amendments

Proposal by: Senator Knowland
S.J. Res. 39 (1954)

Proposing an amendment to the Constitution giving governors the power to make temporary appointments for vacancies that exist within sixty days after a proclamation from the President, certified by the Speaker, stating that there are more than 145 vacancies in the House of Representatives. Temporary appointees would serve until their seats were filled by election. This amendment passed the Senate by a vote of 70-1 on June 4, 1954.

86th Congress — 1st Session
S.J. Res. 39

IN THE SENATE
OF THE UNITED STATES
FEBRUARY 6, 1953

Mr. KNOWLAND introduced the following joint resolution; which was read and referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to enable the Congress, in aid of the common defense, to function effectively in time of emergency or disaster

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:

Article—

SECTION 1. Whenever, in time of any national emergency or national disaster, the number of vacancies in the House of Representatives shall exceed one hundred and forty-five, the Speaker of the House of Representatives shall certify that fact to the President. In case there is no Speaker, or in the event of the inability of the Speaker to discharge the powers and duties of his office, such certification shall be made by the Clerk of the House of Representatives. Upon receipt of such certification, the President shall issue a proclamation declaring such fact. The executive authority of each State shall then have power to make temporary appointments to fill any vacan-

cies in the representation of his State in the House of Representatives which may exist at any time within sixty days after the insurance of such a proclamation. Any person temporarily appointed to any such vacancy shall serve until the people fill the vacancy by election as the legislature may direct.

SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Proposal by: Senator Kefauver
S.J. Res. 8 (1955)

Proposing an amendment to the Constitution giving governors the power to make temporary appointments when there is more than a majority of vacancies in either House. Temporary appointees would serve until their seats were filled by election. This amendment passed the Senate by a vote of 76-3 on May 19, 1955.

84TH CONGRESS — 1ST SESSION
S.J. RES. 8

IN THE SENATE OF
THE UNITED STATES
JANUARY 6, 1954

Mr. KEFAUVER introduced the following joint resolution; which was read and referred to the Committee on the Judiciary

JOINT RESOLUTION

To amend the Constitution to authorize governors to fill temporary vacancies in the Congress caused by a disaster.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That in the event of a disaster that causes more than a majority of vacancies in the representation of the several States in the Senate and in the House of Representatives the executives thereof shall make temporary appointments to fill such vacancies, until the people of the States shall fill them by election. Pending such appointments, a majority of Members of each House duly chosen, sworn, and living shall constitute a quorum to do business.

Article—

SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Proposal by: Senator Kefauver
S.J. Res. 39 (1960)

Proposing an amendment to the Constitution giving governors the power to make temporary appointments when the total number of vacancies in the House of Representatives exceeds half of its membership. Following this occurrence, the governor has sixty days to make his appointments that will ultimately be filled by election. This amendment passed the Senate by a vote of 70-18 on February 2, 1960.

86TH CONGRESS — 1ST SESSION
S.J. RES. 39

IN THE SENATE
OF THE UNITED STATES
JANUARY 29, 1959

Mr. KEFAUVER, and Mr. DODD, introduced the following joint resolution; which was read and referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing to authorize Governors to fill temporary vacancies in the House of Representatives, to abolish tax and property qualifications for electors in Federal elections etc.

[Relevant Section]

On any date that the total number of vacancies in the House of Representatives exceeds half of the authorized membership thereof, and for a period of sixty days thereafter, the executive authority of each State shall have power to make temporary appointments to fill any vacancies, including those happening during such period, in the representation from his State in the House of Representatives. Any person temporarily appointed to fill any such vacancy shall serve until the people fill the vacancy by election as provided for by article I, section 2, of the Constitution.

Proposal by: Representative Baird
H.J. Res. 67 (2001)

Proposing an amendment to the Constitution of the United States regarding the appointment of individuals to serve as Members of the House of Representatives in the event that one quarter of the Members are unable to serve at any time because of death or incapacity.

107TH CONGRESS — 1ST SESSION
H. J. RES. 67

IN THE HOUSE OF REPRESENTATIVES
OCTOBER 10, 2001

Mr. BAIRD introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States regarding the appointment of individuals to serve as Members of the House of Representatives in the event a significant number of Members are unable to serve at any time because of a national emergency.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:

Article—

SECTION 1. If at any time 25 percent or more of the members of the House of Representatives are unable to carry out their duties because of death or incapacity, each Governor of a State represented by a member who has died or

become incapacitated shall appoint an otherwise qualified individual to take the place of the member as soon as practicable (but in no event later than 7 days) after the member's death or incapacity has been certified.

SECTION 2. An individual appointed to take the place of a member of the House of Representatives under section 1 shall serve until a member is elected to fill the vacancy resulting from the death or incapacity. A member shall be elected to fill the vacancy in a special election to be held at any time during the 90-day period which begins on the date the individual is appointed under section 1, in accordance with the applicable laws regarding special elections in the State involved, except that if a regularly scheduled general election for the office will be held during such period or 30 days thereafter, no special election shall be held and the member elected in such regularly scheduled general election shall fill the vacancy upon election. An individual appointed under section 1 may be a candidate in such a special election or in such a regularly scheduled general election.

SECTION 3. During the period of an individual's appointment under section 1, the individual shall be treated as a Member of the House of Representatives for purposes of all laws, rules, and regulations.

SECTION 4. Congress shall have the power to enforce this article through appropriate legislation.

Proposal by: Representative Lofgren
H.J. Res. 77 (2001)

Proposing an amendment to the Constitution regarding the appointment of individuals to serve as Members of the House of Representatives in the event that thirty percent or more of the Members are vacant because of death or resignation. Congress is ultimately empowered to provide for temporary appointments by law, rather than a provision in the Constitution, to fill vacant seats.

107TH CONGRESS — 1ST SESSION
H. J. RES. 77

IN THE HOUSE OF REPRESENTATIVES
DECEMBER 5, 2001

Ms. LOFGREN introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States regarding the appointment of individuals to serve as Members of the House of Representatives when, in a national emergency, a significant number of Members are unable to serve.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution

when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:

Article—

SECTION 1. Congress may by law provide for the appointment of temporary members of the House of Representatives to serve during any period in which 30 percent or more of the seats of the House of Representatives are vacant due to death or resignation.

SECTION 2. Any temporary member appointed pursuant to a law enacted to carry out this article shall serve until a member is elected to fill the vacancy in accordance with the applicable laws regarding special elections in the State involved.

Proposal by: Senator Specter
S.J. Res. 30 (2001)

Proposing an amendment to the Constitution of the United States regarding the appointment of individuals to serve as Members of the House of Representatives in the event that half of the Members are unable to serve at any time because of death or incapacity.

107TH CONGRESS — 1ST SESSION
S. J. RES. 30

IN THE SENATE
OF THE UNITED STATES
DECEMBER 20
(legislative day, DECEMBER 18), 2001

Mr. SPECTER introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States regarding the appointment of individuals to serve as Members of the House of Representatives in the event a significant number of Members are unable to serve at any time because of death or incapacity.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within 7 years after the date of its submission by the Congress:

Article—

SECTION 1. If at any time 50 percent or more of the Members of the House of Representatives are unable to carry out their duties because of death or incapacity, each Governor of a State represented by a Member who has died or become incapacitated shall appoint a qualified individual to take the place of the Member as soon as practicable, but no later than 7 days, after the Member's death or incapacity has been certified.

An individual appointed to take the place of a Member of the House of Representatives under this section shall be a member of the same political party as the Member of the House of Representatives who is being replaced.

SECTION 2. An individual appointed to take the place of a Member of the House of Representatives under section 1 shall serve until an indi-

vidual is elected to fill the vacancy resulting from the former Member's death or incapacity.

A Member shall be elected to fill the vacancy in a special election to be held at any time during the 90-day period which begins on the date the individual is appointed under section 1, in accordance with the applicable election laws of the State involved. However, if a regularly scheduled general election for the office will be held during such 90-day period, or 30 days thereafter, no special election shall be held and the Member elected in such regularly scheduled general election shall fill the vacancy upon election.

An individual appointed under section 1 may be a candidate in such a special election or in such a regularly scheduled general election.

SECTION 3. During the period of an individual's appointment under section 1, the individual shall have all the powers and duties of a Member of the House of Representatives.

SECTION 4. Congress shall have the power to enforce this article by appropriate legislation.

Proposal by: Norman J. Ornstein
Resident Scholar, American Enterprise Institute

A constitutional amendment that grants governors the power to make temporary appointments to fill vacant house seats when a majority of the nation's governors determine that a majority of the state's representatives or both Senators are dead or incapacitated. In the case of vacancies, Governors would make temporary appointments that would last until a special election could be held. In the case of incapacitated members, Governors would make interim appointments who would serve until the incapacitated member recovers. Governors shall select temporary and interim members from a list of designated successors drawn up by each individual member.

JOINT RESOLUTION

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification.

SECTION 1. In the event of an emergency, the executive authority of each state shall determine the condition of its Representatives and Senators. If the offices of a majority of the Representatives apportioned to that state or of both of the Senators are vacant or occupied by members unable to discharge the powers and duties of their office, the executive authority of that state shall issue a proclamation to that effect. The proclamation shall be sent to the Speaker of the House, the president of the Senate and other officers that shall be specified by law. If within a […]-day period, executive authorities of the majority of states have issued such a proclamation, an emergency appointment authority shall commence, whereby the executive authority shall make temporary appointments to fill vacancies in the House of Representatives and make appointments of acting members to discharge the function of Representatives and Senators unable to perform

their duties, while their disability persists. The emergency appointment authority shall remain in effect until the end of the next session.

SECTION 2. In accordance with the emergency appointment procedure in this article, each member of the House of Representatives and each Senator shall designate in advance not fewer than 3 nor more than 7 emergency interim successors to the member's powers and duties. All designated interim successors shall meet the qualifications for the office so designated. Each member shall review and, as necessary, promptly revise the designations of emergency interim successors to insure that at all times there are at least 3 such qualified emergency interim successors. Members and Senators shall submit their lists of designated successors to the Speaker of the House, the president of the Senate and the executive authority of their state.

SECTION 3. Upon commencement of the emergency authority provided for by this article, the Executive Authority of each State shall appoint Temporary Members to fill vacancies in the House of Representatives, selecting from the list of designated successors. For the period of their appointment, Temporary Members shall be members of the House of Representatives for all purposes under this Constitution, the laws made in pursuance thereof, and the rules of the House of Representatives. The appointment of a temporary Member shall end upon the filling of the vacancy by election.

SECTION 4. In the case of a vacancy in the House of Representatives under this article, the writ of election that shall issue under Article I of this Constitution shall provide for the filling of the vacancy within [.....] days of its happening, except that if a regularly scheduled election for the office will be held during such period or [.....] days thereafter, no special election shall be held and the member elected in such regularly scheduled general election shall fill the vacancy upon election.

SECTION 5. In the case of a Representative, who is unable to discharge his or her duties, the executive authority in each state shall, under the emergency authority of this article, appoint as an Acting Member an individual, selecting from the list of designated successors, to discharge the powers and duties of a Representative who is unable to discharge those functions. The appointment of an Acting Member shall end upon the transmission to the Speaker or other Officer designated by the House of Representatives an affirmation in writing by the member that no inability exists. Upon the transmission of the affirmation the member shall resume all the powers and duties of the Office.

SECTION 6. In the case of a Senator, who is unable to discharge his or her duties, the executive authority in each state shall, under the emergency authority of this article, appoint as an Acting Senator an individual, selecting from the list of designated successors, to discharge the powers and duties of a Senator who is unable to discharge those functions. The appointment of an Acting Senator shall end upon the transmission to the president of the Senate or other Officer designated by the Senate an affirmation in writing by the Senator that no inability exists. Upon the transmission of the affirmation the Senator shall resume all the powers and duties of the Office.

Proposal by: Michael Davidson
Former Senate Legal Counsel

An amendment changing the House vacancy procedure to one very similar to the Senate's; however, it limits the temporary appointments to 60 days. The legislature of each state may allow the executive to make the temporary appointments if a vacancy does occur.

JOINT RESOLUTION

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification.

SECTION 1. When vacancies in the House of Representatives happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

SECTION 2. The legislature of any state may empower the executive thereof to make temporary appointments of Members of the House of Representatives until the people fill the vacancies by election as the legislature may direct; Provided, That a temporary appointment shall not last longer than ninety days or until an election to fill the vacancy, whichever is sooner.

Proposal by: Michael Glennon
Professor of International Law, The Fletcher School, Tufts University

A constitutional amendment that would allow Congress, by use of legislation, to regulate the filling of vacancies in House of Representatives when a substantial number of members are killed or incapacitated.

JOINT RESOLUTION

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification.

Congress shall have power to regulate by law the filling of vacancies that may occur in the House of Representatives in the event that a substantial number of members are killed or incapacitated.

Appendix VII

Examples of Emergency Vacancy Provisions as Legislated by States

Listed below are three different methods that states use to address vacancies in their legislatures. Both Delaware and California have procedures to deal with mass vacancies in emergency situations. State legislators in Delaware designate a list of successors in advance. In California, the remaining members of the legislature fill the vacancies. North Dakota's normal method for filling vacancies would also operate in an emergency situation. In this case, local party committees are responsible for filling the vacancies.

Delaware

Del. Const. art XVII, § 1 (2002)

§ 1. Continuity of state and local governmental operations in periods of emergency resulting from disasters caused by enemy attack

The General Assembly, in order to insure continuity of State and local governmental operations in periods of emergency resulting from disasters caused by enemy attack, shall have the power and the immediate duty (1) to provide for prompt and temporary succession to the powers and duties of public offices whose succession is not otherwise provided for in this Constitution, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices, and (2) to adopt such other measures as may be necessary and proper for insuring the continuity of governmental operations. In the exercise of the powers hereby conferred the General Assembly shall in all respects conform to the requirements of this Constitution except to the extent that in the judgment of the General Assembly so to do would be impracticable or would admit of undue delay.

29 Del. C. § 7802 (2002)

§ 7802. Statement of policy

Because of the existing possibility of attack upon the United States of unprecedented size and destructiveness, and in order, in the event of such an attack, to assure continuity of government through legally constituted leader-

ship, authority and responsibility in offices of the government of the State and its political subdivisions; to provide for the effective operation of governments during an emergency; and to facilitate the early resumption of functions temporarily suspended, it is found and declared to be necessary to provide for emergency interim succession to governmental offices of this State and its political subdivisions in the event the incumbents thereof (and their deputies, assistants or other subordinate officers authorized, pursuant to law, to exercise all of the powers and discharge the duties of such offices hereinafter referred to as deputies) are unavailable to perform the duties and functions of such offices.

29 Del. C. § 7803 (2002)

§ 7803. Definitions

Unless otherwise clearly required by the context, as used in this chapter:

(1) "Unavailable" means either that a vacancy in office exists and there is no deputy authorized to exercise all of the powers and discharge the duties of the office, or that the lawful incumbent of the office (including any deputy exercising the powers and discharging the duties of an office because of a vacancy) and the lawful incumbent's duly authorized deputy are absent or unable to exercise the powers and discharge the duties of the office.

(2) "Emergency interim successor" means a person designated pursuant to this chapter, in the event the officer is unavailable, to exercise the powers and discharge the duties of an office until a successor is appointed or elected and qualified as may be provided by the Constitution, statutes, charters and ordinances or until the lawful incumbent is able to resume the exercise of the powers and discharge the duties of the office.

(3) "Office" includes all state and local offices, the powers and duties of which are defined by the Constitution, statutes, charters and ordinances, except the office of Governor and except those in the General Assembly and the judiciary.
(4) "Attack" means any attack or series of attacks by an enemy of the United States causing, or which may cause, substantial damage or injury to civilian property or persons in the United States in any manner by sabotage or by the use of bombs, missiles, shellfire or atomic, radiological, chemical, bacteriological or biological means or other weapons or processes.

(5) "Political subdivision" includes counties, cities, towns, districts, authorities and other public corporations and entities whether organized and existing under charter or general law.

29 Del. C. § 7804 (2002)

§ 7804. Emergency interim successors for state officers

All state officers, subject to such regulations as the Governor (or other official authorized under the Constitution to exercise the powers and discharge the duties of the office of Governor) may issue, shall, upon approval of this chapter, in addition to any deputy authorized pursuant to law to exercise all of the powers and discharge the duties of the office, designate by title emergency interim successors and specify their order of succession. The officer shall review and revise as necessary designations made pursuant to this chapter to insure their current status. The

officer will designate a sufficient number of such emergency interim successors so that there will be not less than 3 nor more than 7 such deputies or emergency interim successors or any combination thereof, at any time. In the event that any state officer is unavailable following an attack, and in the event the officer's deputy, if any, is also unavailable, the said powers of the officer's office shall be exercised and said duties of the officer's office shall be discharged by the officer's designated emergency interim successors in the order specified. Such emergency interim successors shall exercise said powers and discharge said duties only until such time as the Governor under the Constitution or authority other than this chapter (or other official authorized under the Constitution to exercise the powers and discharge the duties of the office of Governor) may, where a vacancy exists, appoint a successor to fill the vacancy or until a successor is otherwise appointed, or elected and qualified as provided by law, or an officer (or the officer's deputy or a preceding named emergency interim successor) becomes available to exercise or resume the exercise of the powers and discharge the duties of the office.

29 Del. C. § 7807 (2002)

§ 7807. Formalities of taking office

At the time of their designation, emergency interim successors shall take such oath as may be required for them to exercise the powers and discharge the duties of the office to which they may succeed. Notwithstanding any other law, no person, as a prerequisite to the exercise of the powers or discharge of the duties of an office to which such person succeeds, shall be required to comply with any other law relative to taking office.

29 Del. C. § 7808 (2002)

§ 7808. Period in which authority may be exercised

Officials authorized to act as emergency interim successors are empowered to exercise the powers and discharge the duties of an office as herein authorized only after an attack upon the United States, as defined herein, has occurred. The General Assembly by concurrent resolution, may at any time terminate the authority of said emergency interim successors to exercise the powers and discharge the duties of office as herein provided.

29 Del. C. § 7809 (2002)

§ 7809. Removal of designees

Until such time as the persons designated as emergency interim successors are authorized to exercise the powers and discharge the duties of an office in accordance with this chapter, including § 7808 of this title, said persons shall serve in their designated capacities at the pleasure of the designating authority and may be removed or replaced by said designating authority at any time, with or without cause.

29 Del. C. § 7810 (2002)

§ 7810. Disputes

Any dispute concerning a question of fact arising under this chapter with respect to an office in the executive branch of the state government shall be adjudicated by the Governor (or other official authorized under the Constitution to exercise the powers and discharge the duties of the office of Governor) and the decision shall be final.

California

Cal Const, Art IV § 21 (2003)

§ 21. Preservation of government during emergency

To meet the needs resulting from war-caused or enemy-caused disaster in California, the Legislature may provide for:

(a) Filling the offices of members of the Legislature should at least one fifth of the membership of either house be killed, missing, or disabled, until they are able to perform their duties or successors are elected.

(b) Filling the office of Governor should the Governor be killed, missing, or disabled, until the Governor or the successor designated in this Constitution is able to perform the duties of the office of Governor or a successor is elected.

(c) Convening the Legislature.

(d) Holding elections to fill offices that are elective under this Constitution and that are either vacant or occupied by persons not elected thereto.

(e) Selecting a temporary seat of state or county government.

Cal Gov Code § 9004

§ 9004. Filling vacancies caused by war or enemy-caused disaster; Procedure

When the Legislature convenes or is convened in regular or extraordinary session during or following a war or enemy-caused disaster and vacancies exist to the extent of one-fifth or more of the membership of either house caused by such disaster, either by death, disability or inability to serve, the vacancies shall be temporarily filled as provided in this section. The remaining members of the house in which the vacancies exist, regardless of whether they constitute a quorum of the entire membership thereof, shall by a majority vote of such members appoint a qualified person as a pro tempore member to fill each such vacancy. The Chief Clerk of the Assembly and the Secretary of the Senate or the persons designated to perform their duties, as the case may be, shall certify a statement of each such appointment to the Secretary of State, who shall thereupon issue commissions to such appointees designating them as pro tempore members of the house by which they were appointed.

The appointments shall be so made that each assembly or senatorial district in which a vacancy exists shall be represented, if possible, by a pro tempore member who is a resident of that district and a registered elector of the same political party as of the date of the disaster as the last duly elected member from such district.

Where an elected member is temporarily disabled or unable to serve, such elected member shall resume his office when able, and the pro tempore member appointed in his place under this section shall cease to serve. In other cases, each pro tempore member appointed under this section shall serve until the next election of a member to such office as provided by law.

North Dakota

N.D. Const. Art. 4, § 11

§ 11. The legislative assembly may provide by law a procedure to fill vacancies occurring in either house of the legislative assembly.

N.D. Cent. Code, § 16.1-13-10 (2002)

§ 16.1-13-10. Vacancy existing in office of member of legislative assembly

If a vacancy in the office of a member of the legislative assembly occurs, the county auditor of the county in which the former member resides or resided shall notify the chairman of the legislative council of the vacancy. The county auditor need not notify the chairman of the legislative council of the resignation of a member of the legislative assembly when the resignation was made under section 44-02-02.

Upon receiving notification of a vacancy, the chairman of the legislative council shall notify the district committee of the political party that the former member represented in the district in which the vacancy exists. The district committee shall hold a meeting within twenty-one days after receiving the notification and select an individual to fill the vacancy. If the former member was elected as an independent candidate or if the district committee does not make an appointment within twenty-one days after receiving the notice from the chairman of the legislative council, the chairman of the legislative council shall appoint a resident of the district to fill the vacancy. If eight hundred twenty-eight days or more remain until the expiration of the term of office for that office, the individual appointed to fill the vacancy shall serve until a successor is elected at the next general election to serve for the remainder of the term of office for that office.

Appendix VIII

Initial Election Rates for Senators Following a Gubernatorial Appointment

Year	Number of Appointed Senators Seeking Election	Total Elected	Percent Elected
1986	1	0	0.0
1988	1	0	0.0
1990	1	1	100.0
1992	2	1	50.0
1994	1	0	0.0
2000	2	2	100.0
totals	**8**	**4**	**50.0**

From 1986 through 2000, 8 senators who were appointed to fill vacancies in the Senate ran in the next election. Fifty percent of them won.

Summary of Central Recommendation

PROBLEM: If there were mass vacancies in the House of Representatives or large numbers of incapacitated members of the House or Senate, Congress would be unable to function for many months, leaving a vacuum in constitutional legislative authority. The Constitution provides only one method, a special election, for filling House vacancies. These elections take many months to hold while the seat remains vacant. If there were hundreds of House vacancies, the House might be unable to meet its constitutional quorum requirement of one-half the membership and would be unable to transact business. An alternative scenario, under a lenient quorum interpretation, would be the House continuing to operate with a small number of representatives—leaving most of the country unrepresented. The Constitution also does not provide an effective way for filling temporary vacancies that occur when members are incapacitated. With the real dangers of biological weapons, both the Senate and the House could be crippled if a large number of members were very sick and unable to perform their duties. The continuity of Congress also affects the presidency, as leaders of Congress are in the line of presidential succession. If the House of Representatives, decimated after an attack, elected a new Speaker, that Speaker could become president for the remainder of the term.

RECOMMENDATION: A constitutional amendment to give Congress the power to provide by legislation for the appointment of temporary replacements to fill vacant seats in the House of Representatives after a catastrophic attack and to temporarily fill seats in the House of Representatives and Senate that are held by incapacitated members. The commission recommends an amendment of a general nature that allows Congress to address the details through implementing legislation. It believes it is essential for such a procedure to operate under emergency circumstances if many members of Congress were dead or incapacitated, but the commission leaves Congress to decide the exact circumstances under which the procedure will take effect. It recommends that temporary representatives be appointed by governors or from a list of successors drawn up in advance by each representative or senator. Given the severe consequences of an attack on Congress, the commission believes that the amendment should be adopted within a two-year period.

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