



The Continuity of Congress

The Continuity of Government Commission

APRIL 2022

A M E R I C A N E N T E R P R I S E I N S T I T U T E

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Executive Summary

The Continuity of Government Commission was originally formed after 9/11 to address how our key institutions can reconstitute themselves after a catastrophic attack. A new version of the commission, including previous members and new ones, who have experience in all three branches of government, met in 2021 and 2022 to consider continuity-of-government issues in light of the recent pandemic and other developments. In this report, the commission issues its recommendations on the continuity of Congress.

The core continuity problem for Congress is that if many members of the House of Representatives were killed in an attack or other catastrophe, the House would likely have no quorum and be unable to meet for months after the event. Unlike the Senate, the House can fill its vacancies only by special election, and those elections are likely to take months to conduct.

The key recommendation is for a constitutional amendment to allow for temporary replacements to be appointed to fill the seats of deceased members until special elections are held to elect a permanent replacement. With immediate successors to fill the

seats of deceased members of Congress, a Congress with nearly full representation could be reconstituted within days to work with the president to face the challenges of the present emergency.

The commission makes several other recommendations that deal with other continuity-of-Congress issues:

- Creating a limited provision for allowing remote proceedings when members of Congress cannot meet in person in Washington,
- Allowing temporary replacement members to fill in for incapacitated members in the extreme case when deceased and incapacitated members number more than a majority of the House or Senate, and
- Adopting procedures to ensure that a new Congress could commence, perhaps even remotely, if a catastrophic emergency prevented the regular opening of a new Congress.

Introductory Statement

The Continuity of Government Commission was first established in the early 2000s, after the attacks on September 11, 2001, brought gaps in the nation's continuity-of-government plans to the fore. In a series of public reports, the commission's first iteration recommended important reforms designed to strengthen the federal government's ability to weather a catastrophe that fundamentally threatened our constitutional system.¹

In the decade and a half since the first commission concluded its work, threats to the continuity of government have only grown more acute. The nature of such threats has also changed. Recent events such as the pandemic, disputed elections, and politically motivated violence against elected officials have exposed additional flaws in the federal government's continuity regime—flaws that our predecessors on the commission hardly could have addressed. As

recent developments have made clear, there is more work to be done.

This recognition led to the reestablishment of the Continuity of Government Commission in the fall of 2021. The commission brings together experts from the private sector, academia, and the highest reaches of government, and it is charged with proposing solutions to the most pressing continuity issues implicating the three branches of the federal government.

Our first report addresses the continuity of Congress. Its core proposal is a constitutional amendment containing four separate provisions aimed at resolving the core threats to the continuity of Congress. We believe these recommendations, if adopted, would help ensure that the nation's first branch of government can weather any contemporary emergency with its operations and institutional credibility intact.

2021–22 Continuity of Government Commission

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Recommendations

We recommend a constitutional amendment that would address four areas:

1. Vacancies in the House of Representatives resulting from the death of a member shall be filled immediately with temporary replacements who shall serve only until special elections are held.
 - (a) Those temporary appointments shall last only until a special election is held to fill the seat with a permanent representative who will serve until the end of the term.
 - (b) The preferred method for filling vacancies is for every member of the House of Representatives to designate a list of successors who would serve as a temporary replacement in the case of the member's death. Members designating their own successors would ensure that the replacement member would be most likely to carry on the representation of the deceased member.
 2. The House and the Senate shall each have the power to provide for emergency procedures whereby the bodies would allow remote forms of attendance and participation in the business of either house of Congress, subject to the following restrictions:
 - (a) That such procedures shall require that for any floor votes with remote participation, those votes shall meet the constitutional quorum requirement that a majority of the whole of each the House and Senate shall be present for proceedings (either in person or virtually);
 - (b) That the activation of any emergency procedures to this effect and the conduct of business shall be subject to advance public notification;
 - (c) That access to the House or the Senate (whether meeting in person or remotely) shall be available to all members of the body; and
 - (d) That remote voting will not be a substitute for voting on the floor, but be used only when members are physically unable to cast their votes in person for reasons established by each body.
 3. The House and the Senate shall each have the power to provide for the commencement of business at the start of a new Congress, and that power could include provisions for each chamber to remotely swear in new members and commence the business of a new Congress.
 4. Congress shall be authorized by law to provide for the temporary replacement of incapacitated members of Congress in the case that these incapacitated members affect the functioning of Congress. In every case, if a member can simply self-declare that they are not incapacitated, the incapacitated designation shall be removed.
- We also recommend a change to House rules:
- The commission recommends the repeal of parts of a House rule. In 2005, House Rule XX, clause 5 was amended to include emergency procedures under which the quorum of the House may be reduced

(potentially to a very small number) if only a few members of Congress remain alive and able after a catastrophic attack. The rule's stated aim was to allow

the House to operate under almost any circumstance. The commission believes the rule is both unconstitutional and unwise.

The Continuity of Congress

The Continuity of Government Commission

“Continuity of government” is a phrase that conjures underground bunkers in undisclosed locations, cabinet officials secreted away from major events to preserve the presidential line of succession, Tom Clancy novels, or the intrigue of foreign and domestic enemies plotting to disrupt the government.

But in reality, continuity-of-government planning transcends these flashy scenarios; it ultimately aims to preserve the very heart of effective representative government. In a dangerous world, pandemics, acts of foreign adversaries, terrorism, or natural disasters might rob us of the very democratic institutions that we take for granted. They might leave us in our greatest time of crisis without the legitimate democratic government institutions that would enable us to endure as a nation through calamity.

A catastrophic event’s effects are magnified if core government institutions are decimated and prevented from acting. Even worse, damaged institutions might be seen as illegitimate or might spur rival claims to power. Imagine a few scenarios: a Congress unable to act for months, leaving a president with no check or no aid in responding to a crisis. Competing individuals claiming the presidency or competing groups claiming to be the true Congress. A tiny, unrepresentative group acting as the Congress, without meeting the constitutional quorum requirements of a majority.

In each instance, the horror of the original emergency would give way to the prospect that our democratic institutions would be dramatically altered, unable to respond to the crisis, or worse, so damaged that their very legitimacy would be in question.

The Continuity of Government Commission originally convened to issue several reports on continuity of government, including its first report on continuity of Congress.² We have reconvened the commission

with some original members and new members to address continuity-of-Congress issues that have arisen in the intervening years.

The Continuity of Government Commission recommends a constitutional amendment that would allow for the appointment of a temporary member upon a member’s death, and that temporary appointment would last only until a special election was held to fill the seat with an elected representative.

Our earlier commission recommended filling House vacancies in the case of mass vacancies. Three proposed constitutional amendments that the Senate passed in the 1950s and 1960s also included this provision of temporary appointments in the case of mass vacancies. Our recent effort makes one notable change to this provision: We recommend filling all House vacancies caused by death, not only in the case of mass vacancies.

The key reason for recommending filling all House vacancies caused by death with temporary appointments is that the threshold for determining “mass vacancy” could be problematic or arbitrary. Should the procedure kick in if 100 members died or 200 or 218 (a majority of the full House)? While an amendment could draw an arbitrary line, the world in practice would be unlikely to reflect the clarity that this line implies.

What if a threshold were set at 218 members dead, but an attack kills 200, and over the next six months, many additional members die from injuries, while other vacant seats are eventually filled by special election? The number of active members of the House might fluctuate day-to-day, sometimes impinging on the quorum threshold, and other days not. Similarly, a severe pandemic that caused many deaths might occur throughout the Congress, with long stretches

when vacancies would not be filled immediately because deaths fell short of a threshold but other times when the threshold was briefly met. Any ambiguities or uncertainties in these cases would have to be determined by some entity, created by the House and Senate, and that, too, could create complications.

The commission recommends limiting the filling of temporary appointments to those caused by death. The commission does not favor replacements in the case of resignations or expulsions. The main reason for filling only vacancies caused by death is to limit opportunities for politically advantageous resignations or other gamesmanship. It is deaths in the House of Representatives that could lead to continuity issues, and our proposal deals with those vacancies.

Recommendation 1: Temporary Appointments Until Vacancies Are Filled Permanently by Special Election

Vacancies in the House of Representatives resulting from the death of a member shall be filled immediately with temporary replacements who shall serve only until special elections are held.

(a) Those temporary appointments shall last only until a special election is held to fill the seat with a permanent representative who will serve until the end of the term.

While our proposed constitutional amendment would provide for filling death-related vacancies by temporary appointments, these appointments would be limited and would last only until the state could hold a special election to select a permanent representative who would serve until the end of the term.

The commission agrees with many who emphasize the House's democratic character and thus maintain that the best way to fill a vacancy is to go to the people and hold a special election. But, as the special election process takes several months, filling vacancies by special election would leave seats vacant for months and threaten the continuity of Congress at key times when the nation is under grave threat. (See Appendix B.)

The key word here is "temporary." Special elections will still ultimately fill the vacancy; the people will speak to elect the successor member. But in the gap between the death of a sitting member and the people's selection of a new member, a temporary member will be in place to ensure the body's continuity.

The Method of Appointment for Temporary Replacement Members

(b) The preferred method for filling vacancies is for every member of the House of Representatives to designate a list of successors who would serve as a temporary replacement in the case of the member's death. Members designating their own successors would ensure that the replacement member would be most likely to carry on the representation of the deceased member.

Our earlier report was open to several methods of appointment. But our recommendation now is that successors shall be drawn from a list appointed by each House member, to ensure that the temporary successor is as similar as possible to the deceased member. A replacement member selected by a sitting member would likely represent the party, geography, ideology, or other characteristics important to the sitting member and thus would be more likely to reflect the desires of those who voted for that member.

The key point is that a method that reflects the sitting member's preferences for a temporary replacement is the best method of appointment.

Recommendation 2: Remote Attendance and Participation in an Emergency

The House and the Senate shall each have the power to provide for emergency procedures whereby the bodies would allow remote forms of attendance and participation in the business of either house of Congress, subject to the following restrictions:

- (a) *That such procedures shall require that for any floor votes with remote participation, those votes shall meet the constitutional quorum requirement that a majority of the whole of each the House and Senate shall be present for proceedings (either in person or virtually);*
- (b) *That the activation of any emergency procedures to this effect and the conduct of business shall be subject to advance public notification;*
- (c) *That access to the House or the Senate (whether meeting in person or remotely) shall be available to all members of the body; and*
- (d) *That remote voting will not be a substitute for voting on the floor, but be used only when members are physically unable to cast their votes in person for reasons established by each body.*

The commission believes that Congress needs to function during an emergency, that there are circumstances in which the physical presence of a quorum might be impossible, and that the Constitution should clearly reflect that the House and Senate shall have the ability to craft solutions to allow Congress to operate, subject to several important restrictions—number one among them that a quorum of the majority of the whole membership of the House or Senate be assembled to conduct business.

The commission does not comment on the right course of action during our current pandemic. It recognizes and reflects that opinions differ about the severity of the emergency and about potential reforms. The commission, however, does believe that the Congress could face situations when it is undeniably incapable of convening wholly or partly in person. And in such cases—when the functioning of Congress itself is at stake—it is most important to have constitutional clarity that the House and Senate have the ability to fashion remedies for continuity of Congress and that there be restrictions on the use of any meeting that is not in person to ensure that the Congress meet key tenets of legitimacy.

The commission appreciates the concern of many members of Congress that a provision for remote voting could be abused and become a routine substitute for meeting and voting in person. So provisions should be made to ensure that remote voting occurs only when there are established and credible emergency reasons for members not to be able to be physically present. And the commission also believes that committees should amend their own rules to enable remote meeting and voting, with parallel attention to quorum requirements and the understanding that this is not for routine absences from Washington.

Our commissioners have differing opinions on various methods of congressional voting and operations that are not in person. Some believe that such procedures should be the norm; others maintain that they should be reserved for emergencies. And there are a variety of opinions on what could have or should have been done during the COVID-19 pandemic.

But again, this commission's core principle is that Congress should be able to operate if it has sufficient members but meeting in person is impossible for all or part of the body. The alternative would be an extended period when Congress could not meet.

With the possibility of the House or Senate operating with some form of remote attendance comes certain provisions that ensure that alternative modes of operating in Congress follow key principles at the heart of Congress as an institution.

First, Congress shall not operate remotely in part or in whole without a quorum, which constitutionally is the majority of the whole body of the House or Senate. Just as this commission emphasizes that Congress after an attack should be able to meet only with a full majority quorum, any use of alternative meetings of Congress should also be subject to the quorum rule. The framers of our Constitution created a strong quorum of a majority of the whole of each body for both chambers to avoid rump parliaments or meetings of a few members of Congress without the presence of others.

Second, both the triggering of an alternative scenario and individual votes and actions of Congress by alternative means shall be scheduled with sufficient notice to all members and the public. In the ordinary

in-person meeting of Congress, members and senators have access to the floor. In the same way, advance notice of action will give members and the public confidence that they know about upcoming votes and how they might participate if not on the floor.

Third, modes of voting and participation must be open to members, just as they would be in the physical Congress. If either chamber of Congress were to implement remote attendance, it would have to ensure that all members have access—and that every method meets rigid tests for security of communication.

Recommendation 3: The Start of a Congress

The House and the Senate shall each have the power to provide for the commencement of business at the start of a new Congress, and that power could include provisions for each chamber to remotely swear in new members and commence the business of a new Congress.

A more vexing permutation of the earlier issue of a Congress unable to meet in person is the issue of an emergency that would prevent Congress from assembling at the start of a Congress.

The House and Senate assemble on January 3 at the beginning of each Congress. Each chamber swears in its new members. The House elects a Speaker and ultimately adopts new rules. And following a presidential election, both the House and the Senate meet on January 6 for the counting of electoral votes in the Congress.

If any of these actions were disrupted, a significant continuity-of-Congress issue could arise. What if no new members could be sworn in? What if Congress could not meet to count electoral votes? Would the inauguration of a new president on January 20 be affected?

As part of an authorization for the House and Senate to craft procedures for alternative meeting methods, it should be clarified that each chamber will have the power to make provisions for the start of a Congress. This is particularly important in the House, where new rules are enacted each Congress and the

rules of the previous Congress expire at the end of the Congress. At the start of a Congress, each chamber should have a set of procedures for opening the Congress that could address the opening of each house to ensure that new members are sworn in and that the early activities of each chamber take place.

Recommendation 4: Incapacitation in Mass-Casualty Situations

Congress shall be authorized by law to provide for the temporary replacement of incapacitated members of Congress in the case that these incapacitated members affect the functioning of Congress. In every case, if a member can simply self-declare that they are not incapacitated, the incapacitated designation shall be removed.

Imagine an attack or infectious disease that left many members of Congress incapacitated and unable to perform their duties. If that number plus the number of deaths were sufficiently high, a majority quorum of each chamber might not be achieved, and Congress would not be able to operate. This scenario might affect the functioning of the Senate and the House, as there is no constitutional way to replace sitting members of Congress short of expulsion from office.

The commission supports an amendment that would grant each house of Congress the power to declare members of the body incapacitated. This grant of power would exist only when the number of deaths and incapacitations exceeded 50 percent of the body and therefore threatened the achievement of the constitutional quorum requirement.

Each house could devise its own procedures, but the procedures would be applicable only in these extreme circumstances. Members declared incapacitated could be replaced by temporary appointments, subject to two restrictions:

1. If the incapacitated member self-declares that he or she is able to perform the duties of Congress, that member shall be immediately reinstated.

2. If the incapacitated member dies, the temporary replacement will leave office as soon as a special election is held to elect a more permanent replacement.

Recommendation 5: One Rule Change

The commission recommends the repeal of parts of a House rule. In 2005, House Rule XX, clause 5 was amended to include emergency procedures under which the quorum of the House may be reduced (potentially to a very small number) if only a few members of Congress remain alive and able after a catastrophic attack. The rule's stated aim was to allow the House to operate under almost any circumstance. The commission believes the rule is both unconstitutional and unwise.

As noted earlier, our commission strongly supports the clear language in the Constitution that a quorum is a majority of the whole number of the House and the Senate. The framers intended a high quorum requirement to ensure that a small number of members did not meet without the others to act as a chamber of Congress.

In contradiction to that constitutional provision, House Rule XX, clause 5 includes emergency

procedures under which the quorum of the House may be reduced if only a few members of Congress remain alive and able after a catastrophic attack. This rule was enacted in 2005 to allow the House to operate under almost any circumstance.

Aside from the constitutional issue, the commission, consistent with the framers' aims, believes the rule could lead to a dangerous and illegitimate outcome. Take, for example, a House of Representatives in which only 20 able members survive an attack. Under the current rule, 11 of those members could gather and exercise the full powers of the House. They could pass legislation, initiate spending bills, and initiate impeachment proceedings. Two-thirds of the small number who could show up could vote to override a presidential veto, two-thirds of that small number could vote to expel their fellow members of Congress, and in a most extreme case, those 11 members might elect a new Speaker of the House, who would then be second in the line of succession (behind the vice president) and might even become president with the death of the president and vice president.

Majorities of both parties have readopted this rule. While its stated aim is to ensure continuity of Congress, the rule's unconstitutionality and potential to create a small, unrepresentative, arguably illegitimate House undercuts this aim.

The rule should be repealed.

Appendix A. Excerpt from the First Report of the Continuity of Government Commission (2003)

The following is an excerpt from the first report of the Continuity of Government Commission.³

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. . . . 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.⁴ . . .

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. . . .

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 second 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*."⁵

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.

Appendix B. Past Special Elections

Table B1. Special Elections Due to Death in the US House of Representatives, 99th Congress–117th Congress

Congress	Open Seat	Representative Who Died	Date of Vacancy	Primary Election*	General Election	Date Sworn In	Successor	Vacancy (Days)	Notes
99	Louisiana 8th	Gillis W. Long	January 20, 1985	—	March 30, 1985	April 4, 1985	Cathy Long	74	
99	New York 6th	Joseph P. Addabbo	April 10, 1986	May 13, 1986	June 10, 1986	July 29, 1986	Alton R. Waldon Jr.	110	No primary election was held. The candidates were selected by delegation.
100	California 5th	Sala Burton	February 1, 1987	April 7, 1987	June 2, 1987	June 9, 1987	Nancy Pelosi	128	
100	Connecticut 4th	Stewart B. McKinney	May 7, 1987	July 21, 1987	August 18, 1987	September 9, 1987	Christopher Shays	125	
100	Virginia 5th	Dan Daniel	January 23, 1988	—	June 14, 1988	June 21, 1988	L. F. Payne	150	
100	New Jersey 3rd	James J. Howard	March 25, 1988	June 7, 1988	November 8, 1988	January 13, 1989	Frank Pallone Jr.	294	
100	Illinois 12th	Melvin Price	April 22, 1988	March 15, 1988	August 9, 1988	August 11, 1988	Jerry F. Costello	111	Costello had already won the regularly scheduled primary before Price's death.
100	Tennessee 2nd	John J. Duncan	June 21, 1988	—	November 8, 1988	January 3, 1989	John J. Duncan Jr.	196	
100	Alabama 3rd	Bill Nichols	December 13, 1988	March 7, 1989	April 4, 1989	April 18, 1989	Glen Browder	126	
101	Florida 18th	Claude Pepper	May 30, 1989	August 3, 1989	August 29, 1989	September 6, 1989	Ileana Ros-Lehtinen	99	
101	Texas 18th	Mickey Leland	August 7, 1989	—	December 9, 1989	January 23, 1990	Craig Washington	169	
101	Mississippi 5th	Larkin Smith	August 13, 1989	October 3, 1989	October 17, 1989	October 24, 1989	Gene Taylor	72	
102	Massachusetts 1st	Silvio O. Conte	February 8, 1991	April 30, 1991	June 4, 1991	June 18, 1991	John Oliver	130	
103	Michigan 3rd	Paul B. Henry	July 31, 1993	November 2, 1993	December 7, 1993	January 25, 1994	Vernon J. Ehlers	178	

(continued on the next page)

Table B1. Special Elections Due to Death in the US House of Representatives, 99th Congress–117th Congress (continued)

Congress	Open Seat	Representative Who Died	Date of Vacancy	Primary Election*	General Election	Date Sworn In	Successor	Vacancy (Days)	Notes
103	Kentucky 2nd	William H. Natcher	March 29, 1994	—	May 24, 1994	May 26, 1994	Ron Lewis	58	
104	Missouri 8th	Bill Emerson	June 22, 1996	(Independent)	November 5, 1996	January 8, 1997	Jo Ann Emerson	200	
105	Texas 28th	Frank Tejada	January 30, 1997	March 15, 1997	April 12, 1997	April 17, 1997	Ciro D. Rodriguez	77	
105	California 22nd	Walter H. Capps	October 28, 1997	January 13, 1998	March 10, 1998	March 17, 1998	Lois Capps	140	
105	California 44th	Sonny Bono	January 5, 1998	—	April 7, 1998	April 21, 1998	Mary Bono	106	
105	New Mexico 1st	Steven Schiff	March 25, 1998	April 13, 1998	June 23, 1998	June 25, 1998	Heather Wilson	92	Wilson was nominated by convention.
106	California 42nd	George E. Brown Jr.	July 15, 1999	September 21, 1999	November 16, 1999	November 18, 1999	Joe Baca	126	
107	California 32nd	Julian C. Dixon	December 8, 2000	April 10, 2001	June 5, 2001	June 7, 2001	Diane E. Watson	181	
107	Virginia 4th	Norman Sisisky	March 29, 2001	April 29, 2001	June 19, 2001	June 26, 2001	J. Randy Forbes	89	Forbes was nominated by convention.
107	Massachusetts 9th	John Joseph Moakley	May 28, 2001	September 11, 2001	October 16, 2001	October 23, 2001	Stephen F. Lynch	148	
107	South Carolina 2nd	Floyd Spence	August 16, 2001	October 30, 2001	December 18, 2001	December 19, 2001	Joe Wilson	125	
107	Hawaii 2nd	Patsy T. Mink	September 28, 2002	—	November 20, 2002	January 7, 2003	Ed Case	101	Case was not sworn in 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.

(continued on the next page)

Table B1. Special Elections Due to Death in the US House of Representatives, 99th Congress–117th Congress (continued)

Congress	Open Seat	Representative Who Died	Date of Vacancy	Primary Election*	General Election	Date Sworn In	Successor	Vacancy (Days)	Notes
108	California 5th	Robert T. Matsui	January 1, 2005	March 8, 2005	—	March 10, 2005	Doris O. Matsui	68	The vacancy lasted throughout the remainder of the session. In the 109th Congress, Matsui won enough votes to bypass a special election. (There was just a primary.)
110	Georgia 10th	Charlie Norwood	February 13, 2007	June 19, 2007	July 17, 2007	July 25, 2007	Paul C. Brown	162	In this election, the primary was referred to as the general, and the following election was referred to as the runoff.
110	California 37th	Juanita Millender-McDonald	April 21, 2007	June 26, 2007	August 21, 2007	September 4, 2007	Laura Richardson	136	
110	Ohio 5th	Paul Gillmor	September 5, 2007	November 6, 2007	December 11, 2007	December 13, 2007	Robert E. Latta	99	
110	Virginia 1st	Jo Ann Davis	October 6, 2007	November 10, 2007	December 11, 2007	December 13, 2007	Robert J. Wittman	68	There was no primary; Wittman was nominated by party convention.
110	Indiana 7th	Julia Carson	December 15, 2007	January 11, 2007	March 11, 2008	March 13, 2008	André Carson	89	There was no primary; Democratic caucus selected the candidate.
110	California 12th	Tom Lantos	February 11, 2008	April 8, 2008	—	April 10, 2008	Jackie Speier	59	The successor won enough votes to bypass a special election. (There was just a primary.)
110	Ohio 11th	Stephanie Tubbs Jones	August 20, 2008	October 14, 2008	November 18, 2008	November 19, 2008	Marcia L. Fudge	91	
111	Pennsylvania 12th	John P. Murtha	February 9, 2010	March 8, 2010	May 18, 2010	May 20, 2010	Mark S. Critz	100	Critz was nominated by Democratic committee.
112	New Jersey 10th	Donald M. Payne	March 6, 2012	June 5, 2012	November 6, 2012	November 15, 2012	Donald M. Payne Jr.	254	
113	Florida 13th	C. W. Bill Young	October 18, 2013	January 14, 2014	March 11, 2014	March 13, 2014	David W. Jolly	146	
114	Mississippi 1st	Alan Nunnelee	February 6, 2015	May 12, 2015	June 2, 2015	June 9, 2015	Trent Kelly	123	All parties participated in a special election, followed by a runoff.

(continued on the next page)

Table B1. Special Elections Due to Death in the US House of Representatives, 99th Congress–117th Congress (continued)

Congress	Open Seat	Representative Who Died	Date of Vacancy	Primary Election*	General Election	Date Sworn In	Successor	Vacancy (Days)	Notes
114	Hawaii 1st	Mark Takai	July 20, 2016	—	November 8, 2016	November 14, 2016	Colleen Hanabusa	117	There was no primary; all parties ran on the same ballot in the general election.
115	New York 25th	Louise Slaughter	March 16, 2018	—	November 6, 2018	November 13, 2018	Joseph D. Morelle	242	There was no primary held for the special election. The general special election occurred on November 6, the same date as a separate election for the subsequent term. Nominees for special elections are selected by the parties in the counties that comprise the congressional district. There are no primaries.
116	North Carolina 3rd	Walter B. Jones	February 10, 2019	July 9, 2019	September 10, 2019	September 17, 2019	Gregory F. Murphy	219	No Republican achieved the necessary 30 percent vote threshold in the April 9, 2019, primary. A Republican runoff was then set for July 9, 2019.
116	Maryland 7th	Elijah E. Cummings	October 17, 2019	February 4, 2020	April 28, 2020	May 5, 2020	Kweisi Mfume	201	
116	Georgia 5th	John R. Lewis	July 17, 2020	September 29, 2020	December 1, 2020	December 3, 2020	Kwanza Hall	139	There was a jungle primary, and the general election was a runoff.
117	Louisiana 5th	Representative-elect Luke Letlow	January 3, 2021	March 20, 2021	—	April 14, 2021	Julia Letlow	101	There was a jungle primary; the general election was canceled.
117	Texas 6th	Ron Wright	February 7, 2021	May 1, 2021	July 27, 2021	July 30, 2021	Jake Elizey	173	There was a nonpartisan blanket primary.
117	Florida 20th	Alcee L. Hastings	April 6, 2021	November 2, 2021	January 11, 2022	January 18, 2022	Sheila Cherfilus-McCormick	287	
							Average	136.5	

Note: * If no primary date is given, the state held no primary or the information was unavailable.

Source: Continuity of Government Commission, *Preserving Our Institutions: The Continuity of Congress*, American Enterprise Institute and Brookings Institution, May 2003, Appendix IV, https://www.aei.org/wp-content/uploads/2011/10/20030605_FirstReport.pdf; and US House of Representatives, History, Art & Archives, “Vacancies & Successors, 1997 to Present,” <https://history.house.gov/Institution/Vacancies-Successors/Vacancies-Successors/>.

Appendix C. Relevant Constitutional Provisions

The following is an excerpt from the first report of the Continuity of Government Commission (2003).⁶

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.

Appendix D. Text of House Rule XX, Clause 5

5. (a) In the absence of a quorum, a majority comprising at least 15 Members, which may include the Speaker, may compel the attendance of absent Members.
- (b) Subject to clause 7(b) a majority described in paragraph (a) may order the Sergeant-at-Arms to send officers appointed by the Sergeant-at-Arms to arrest those Members for whom no sufficient excuse is made and shall secure and retain their attendance. The House shall determine on what condition they shall be discharged. Unless the House otherwise directs, the Members who voluntarily appear shall be admitted immediately to the Hall of the House and shall report their names to the Clerk to be entered on the Journal as present.
- (c) (1) If the House should be without a quorum due to catastrophic circumstances, then—
- (A) until there appear in the House a sufficient number of Representatives to constitute a quorum among the whole number of the House, a quorum in the House shall be determined based upon the provisional number of the House; and
- (B) the provisional number of the House, as of the close of the call of the House described in subparagraph (3)(C), shall be the number of Representatives responding to that call of the House.
- (2) If a Representative counted in determining the provisional number of the House thereafter ceases to be a Representative, or if a Representative not counted in determining the provisional number of the House thereafter appears in the House, the provisional number of the House shall be adjusted accordingly.
- (3) For the purposes of subparagraph (1), the House shall be considered to be without a quorum due to catastrophic circumstances if, after a motion under paragraph (a) has been disposed of and without intervening adjournment, each of the following occurs in the stated sequence:
- (A) A call of the House (or a series of calls of the House) is closed after aggregating a period in excess of 72 hours (excluding time the House is in recess) without producing a quorum.
- (B) The Speaker—
- (i) with the Majority Leader and the Minority Leader (or their respective designees), receives from the Sergeant-at-Arms (or a designee) a catastrophic quorum failure report, as described in subparagraph (4);
- (ii) consults with the Majority Leader and the Minority Leader (or their respective designees) on the content of that report; and
- (iii) announces the content of that report to the House.

- (C) A further call of the House (or a series of calls of the House) is closed after aggregating a period in excess of 24 hours (excluding time the House is in recess) without producing a quorum.
- (4) (A) For purposes of subparagraph (3), a catastrophic quorum failure report is a report advising that the inability of the House to establish a quorum is attributable to catastrophic circumstances involving natural disaster, attack, contagion, or similar calamity rendering Representatives incapable of attending the proceedings of the House.
- (B) Such report shall specify the following:
- (i) The number of vacancies in the House and the names of former Representatives whose seats are vacant.
 - (ii) The names of Representatives considered incapacitated.
 - (iii) The names of Representatives not incapacitated but otherwise incapable of attending the proceedings of the House.
 - (iv) The names of Representatives unaccounted for.
- (C) Such report shall be prepared on the basis of the most authoritative information available after consultation with the Attending Physician to the Congress and the Clerk (or their respective designees) and pertinent public health and law enforcement officials.
- (D) Such report shall be updated every legislative day for the duration of any proceedings under or in reliance on this paragraph. The Speaker shall make such updates available to the House.
- (5) An announcement by the Speaker under subparagraph (3)(B)(iii) shall not be subject to appeal.
- (6) Subparagraph (1) does not apply to a proposal to create a vacancy in the representation from any State in respect of a Representative not incapacitated but otherwise incapable of attending the proceedings of the House.
- (7) For purposes of this paragraph:
- (A) The term “provisional number of the House” means the number of Representatives upon which a quorum will be computed in the House until Representatives sufficient in number to constitute a quorum among the whole number of the House appear in the House.
 - (B) The term “whole number of the House” means the number of Representatives chosen, sworn, and living whose membership in the House has not been terminated by resignation or by the action of the House.
- (d) Upon the death, resignation, expulsion, disqualification, removal, or swearing of Member, the whole number of the House shall be adjusted accordingly. The Speaker shall announce the adjustment to the House. Such an announcement shall not be subject to appeal. In the case of a death, the Speaker may lay before the House such documentation from Federal, State, or local officials as the Speaker deems pertinent.⁷

Acknowledgments

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Commissioner Biographies

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2021–22 Continuity of Government Commission

Co-Chairs

Arthur B. Culvahouse Jr. is of counsel to the international law firm O'Melveny & Myers, which he chaired from 2000 to 2012. He has also had several stints in public service, having most recently served as the United States ambassador to Australia from 2019 to 2021. He previously served as White House counsel during the last two years of the Reagan administration. Additionally, both President Donald Trump and the late Sen. John McCain (R-AZ) tapped Culvahouse to vet their vice presidential candidates.

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Commissioners

Katherine Archuleta is the founding partner of Dimension Strategies, a consulting firm based in Denver, Colorado, that advises clients on workforce, economic development, education, and environmental issues, among others. She also recently cofounded the Latina Initiative, a nonpartisan, non-profit organization dedicated to engaging Latina voters through digital messaging campaigns that reflect

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Mike Bishop is the president of American General Counsel, a law firm he founded in 2019 that provides general counsel and other services to companies and business executives. He previously served as a member of the US House of Representatives, representing Michigan's 8th Congressional District from 2015 to 2019, and as the majority leader of the Michigan Senate from 2007 to 2011. While in the US Congress, Bishop served on the House Committee on the Judiciary, the House Committee on Ways and Means, and the House Committee on Education and the Workforce.

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Jean Bordewich is a program officer for US democracy at the William and Flora Hewlett Foundation, where she manages a portfolio of grants related to strengthening US democracy, in particular the institution of Congress. Bordewich previously spent more than 20 years as a congressional staff member, including a five-year stint as staff director of the US Senate Committee on Rules and Administration. She also served three terms as a councilwoman in New York's Hudson Valley and served as chief of staff and campaign director for a member of the US House of Representatives.

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Reb Brownell writes and lectures about Congress and the separation of powers and has contributed to a number of books and scholarly publications related to the presidency, the vice presidency, and sports history. He previously served as deputy chief of staff and counsel to Sen. Mitch McConnell (R-KY), as a senior adviser for Senate affairs at the US Department of State, at the US Agency for International Development, and on the staffs of three US Senate committees and the staff of a member of Parliament in the British House of Commons.

Donna Edwards is a *Washington Post* contributing columnist who regularly provides political commentary on NBC, MSNBC, and Fox. She previously served as a member of the US House of Representatives, representing Maryland's 4th Congressional District from 2008 to 2017. Notably, Edwards is the first African American woman to be elected to Congress from Maryland. While in Congress, Edwards served on the House Committee on Ethics; the House Committee on Science, Space, and Technology; and the House Committee on Transportation and Infrastructure. Earlier in her career, she worked as a project engineer at NASA and at various organizations in the nonprofit sector.

James Ho is a United States circuit judge of the United States Court of Appeals for the Fifth Circuit. Before joining the bench in 2018, Ho was a partner in the Dallas office of the international law firm Gibson, Dunn & Crutcher, where he also served as co-chair of the appellate and constitutional law practice group. Ho previously served as the fourth solicitor general of Texas from 2008 to 2010, chief counsel to the Senate Judiciary Subcommittees on the Constitution and Immigration, a lawyer in the Office of Legal Counsel and the Civil Rights Division at the US Department of Justice, and a law clerk to Justice Clarence Thomas. He was appointed to the Continuity of Government Commission in 2008 and continues to serve in an advisory role today.

Greg Jacob is a partner in the Washington, DC, office of O'Melveny & Myers, where he specializes in labor and employment matters. Jacob previously served as deputy assistant to the president and counsel to Vice President Mike Pence from 2020 to 2021, as solicitor of labor from 2007 to 2009, as a domestic policy staffer in the Bush White House, and in the Office of Legal Counsel at the US Department of Justice.

Elsie Scott is the founding director of the Ronald W. Walters Leadership and Public Policy Center, a Howard University-affiliated center serving as a focal point for research and publications on policy issues affecting the global Black community. She previously

served as president and CEO of the Congressional Black Caucus Foundation, executive director of the National Organization of Black Law Enforcement Executives, and deputy commissioner of training for the New York City Police Department.

Alan Simpson (ex officio) represented Wyoming in the US Senate from 1979 to 1997, serving as Senate majority whip from 1985 to 1987 and Senate minority whip from 1987 to 1995. Since leaving office, Simpson has served as co-chair of the National Commission on Fiscal Responsibility and Reform, a member of the Iraq Study Group, and a practicing lawyer and law professor in Wyoming.

Recently Deceased

Two of our commissioners passed away during our recent deliberations:

Ken Duberstein, chief of staff to Ronald Reagan

Judge Robert Katzmann of the Second Circuit Court of Appeals

Commission Staff

John C. Fortier is a senior fellow at the American Enterprise Institute and executive director of the Continuity of Government Commission. He also served as executive director of the first iteration of the Continuity of Government Commission from 2002 to 2011. Before rejoining AEI in 2020, Fortier was director of governmental studies at the Bipartisan Policy Center and the principal contributor to the AEI-Brookings Election Reform Project. He has taught at Kenyon College, the University of Pennsylvania, the University of Delaware, Boston College, and Harvard University.

Norman J. Ornstein is a senior fellow emeritus at the American Enterprise Institute and an adviser to the Continuity of Government Commission. He is also board chair of the Campaign Legal Center and cohost of AEI's Election Watch series. Ornstein previously served as a senior counselor to the first

Continuity of Government Commission, as codirector of the AEI-Brookings Election Reform Project, and on the faculties of the Catholic University of America and Johns Hopkins University.

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Notes

1. Continuity of Government Commission, *Preserving Our Institutions: The Continuity of Congress*, American Enterprise Institute and Brookings Institution, May 2003, https://www.aei.org/wp-content/uploads/2011/10/20030605_FirstReport.pdf; Continuity of Government Commission, *Preserving Our Institutions: The Continuity of the Presidency*, American Enterprise Institute and Brookings Institution, June 2009, <https://www.aei.org/research-products/book/preserving-our-institutions/>; and Continuity of Government Commission, *Preserving Our Institutions: The Continuity of the Supreme Court*, American Enterprise Institute and Brookings Institution, October 2011, <https://www.aei.org/research-products/report/preserving-our-institutions-the-continuity-of-the-supreme-court/>.
2. Continuity of Government Commission, *Preserving Our Institutions: The Continuity of Congress*.
3. Continuity of Government Commission, *Preserving Our Institutions: The Continuity of Congress*, 6–10.
4. We provide updated numbers in Appendix B.
5. These precedents have been supplemented by a House rule that contemplates reducing the quorum requirement to below a majority in emergencies, a rule we discuss later in this report.
6. Continuity of Government Commission, *Preserving Our Institutions: The Continuity of Congress*, 35.
7. Cheryl L. Johnson, *Rules of the House of Representatives: One Hundred Seventeenth Congress*, February 2, 2021, 34, <https://rules.house.gov/sites/democrats.rules.house.gov/files/117-House-Rules-Clerk.pdf>.

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