

# CRS Report for Congress

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## **House Vacancies: Proposed Constitutional Amendments for Filling Them Due to National Emergencies**

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Sula P. Richardson  
Analyst in American National Government  
Government and Finance Division

# House Vacancies: Proposed Constitutional Amendments for Filling Them Due to National Emergencies

## Summary

The September 11, 2001 terrorist attacks and concern about the possible use of nuclear, biological, chemical, and other weapons against the United States have led some Members to consider proposed constitutional amendments for filling House vacancies if a significant number of Members were unable to serve due to a national emergency. A privately-funded group created to focus on the continuity of government has recommended adoption of a constitutional amendment that would give Congress the authority to provide by law for temporary appointments to fill House vacancies after a catastrophic attack and to temporarily fill the seats of incapacitated House and Senate Members.

During the 107<sup>th</sup> Congress, proposed constitutional amendments — H.J.Res. 67, H.J.Res. 77, and S.J.Res. 30 — would have allowed temporary appointments to the House under prescribed circumstances. The proposals were not the first of their kind. For example, from 1945 through 1962, more than 30 proposed constitutional amendments were offered to provide for filling House vacancies in the event of a national emergency. During this period, hearings were held in the House and Senate, and three measures were passed in the Senate, but none passed in the House.

Supporters contend that such a constitutional amendment is necessary to ensure continuity of the legislative process and the effective representative operations of the House. Opponents argue that it would violate a basic principle of the House, whose Members have been *directly elected* by the people since its inception. Furthermore, opponents believe continued operations of the House could be effected by changing House rules, rather than by amending the U.S. Constitution. Representative Sensenbrenner has proposed another alternative to amending the Constitution. On July 24, 2003, he introduced a bill — H.R. 2844 — that would require states to hold special elections not later than 21 days after the vacancies are announced by the Speaker of the House in extraordinary circumstances.

This report will be updated as events warrant. A related document, CRS Report RL31394, discusses options proposed for temporarily filling multiple House vacancies that could occur due to injury or death of Members resulting from emergency situations. These include amending the Constitution to provide for temporary appointments to the House, enacting federal legislation to require the states to hold expedited special elections, changing House rules to allow for admitting “Emergency Delegates” to the Committee of the Whole, and changing House Rules to allow for “Interim Successors” pre-designated by Members.

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# House Vacancies: Proposed Constitutional Amendments for Filling Them Due to National Emergencies

The terrorist attacks of September 11, 2001 and recent bioterrorism incidents have caused some lawmakers to support amending the U.S. Constitution to allow the temporary appointment of Representatives under certain conditions. While the Constitution requires that vacancies in both houses be filled by special elections, it empowers state legislatures to provide for temporary appointments to the U.S. Senate by state governors until elections are held.<sup>1</sup> The laws of most states authorize governors to make temporary appointments to the U.S. Senate,<sup>2</sup> but not to the U.S. House of Representatives.

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

In June of 2003, a privately-funded group, the Continuity of Government Commission,<sup>3</sup> published a report on the continuity of Congress. In the report, the Commission recommended the adoption of a constitutional amendment giving Congress the authority to provide by law for temporary appointments to fill House vacancies resulting from a catastrophic attack, and to temporarily fill House and Senate seats held by incapacitated Members.<sup>4</sup>

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<sup>1</sup> Procedures governing vacancies in the Senate were initially established by Article I, Section 3 of the Constitution, as later amended by paragraph 2 of the 17<sup>th</sup> Amendment.

<sup>2</sup> Exceptions are Oregon and Wisconsin, where the governor is not permitted to make interim appointments and any Senate vacancy must be filled by special election. Oklahoma also requires that U.S. Senate vacancies be filled by special elections, with an exception: if the vacancy occurs after March 1 of any even-numbered year and the term expires the following year, no special election is held; rather, the governor is required to appoint the candidate elected in the regular general election to fill the unexpired term.

<sup>3</sup> Organized in the fall of 2002, the Commission is a joint project of the American Enterprise Institute (AEI) and the Brookings Institution. It is funded by the Carnegie, Hewlett, Packard, and MacArthur Foundations. "The central issue that the commission will address is how Congress could function if a large number of members were killed or incapacitated." American Enterprise Institute (AEI), Continuity of Government Commission, [<http://www.aei.org/research/projectID.16/project.asp>], visited July 31, 2003.

<sup>4</sup> Continuity on Government Commission, "Summary of Central Recommendation," in its *Preserving Our Institutions*, First Report of the Continuity of Government Commission, May 2003 (Washington: American Enterprise Institute, 2003), p. 58.

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

During the 107<sup>th</sup> Congress, Representative Baird introduced a constitutional amendment that would have authorized governors to appoint persons temporarily to take the place of Representatives who had died or become incapacitated whenever 25% or more of Representatives were unable to perform their duties. Appointees generally would have been allowed to serve 90 days or less until a special election was held. Each special election would have been held at any time during the 90-day period beginning on the date of the individual's appointment. The proposal, H.J.Res. 67, provided (in part) that:

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.

H.J.Res. 67 was introduced on October 10, 2001, and referred to the House Judiciary Committee. The House Subcommittee on the Constitution held a hearing on February 28, 2002.<sup>5</sup> No further action on the measure was taken. The resolution had 86 cosponsors.

On December 20, 2001, Senator Specter introduced a similar proposal, S.J.Res. 30. It would have provided for the appointment of temporary Representatives by governors if 50% or more of Representatives died or were incapacitated. Further, it would have required that the appointee be of the same political party as the Member who had died or was incapacitated. The measure was referred to the Senate Committee on the Judiciary, Subcommittee on Constitution. No further action on the proposal was taken.<sup>6</sup>

A third proposed constitutional amendment, H.J.Res. 77, would have authorized Congress by law to provide for the temporary appointment of Representatives if 30% or more of House seats became vacant because of death or resignation. The proposal, which was introduced by Representative Lofgren on December 5, 2001, was referred to the House Committee on the Judiciary, Subcommittee on the Constitution. No further action on the measure was taken.<sup>6</sup>

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<sup>5</sup> Hearing transcript is available online at U.S. House of Representatives, Committee on the Judiciary, Subcommittee on the Constitution, *Hearings and Markups* [<http://www.house.gov/judiciary/constitution.htm>], visited July 30, 2003.

<sup>6</sup> While the hearings held by the House Subcommittee on the Constitution in February 2002, focused on H.J.Res. 67 some of the provisions and concepts in S.J.Res. 30 and in H.J.Res. 77 were discussed by some of the witnesses who testified.

## Pro/Con Arguments

**Arguments in Favor.** Supporters contend that the possibility of catastrophic losses in House membership warrants taking precautions to ensure that the House could continue to operate effectively during a national emergency. While no single proposal can address all of the difficulties that might arise at such a time, proponents of such measures assert that allowing for temporary appointments to the House would help to ensure each state's representation in that body, even if a significant number of Members were suddenly killed or incapacitated.

In addition, if areas other than the District of Columbia were attacked and severely damaged, it might be difficult to hold elections in a timely manner. Supporters of temporary appointments believe they would ensure that House membership would not be severely depleted in the weeks or even months that might be needed to schedule special elections. From their perspective, the appointments could also demonstrate the country's determination to continue a representative form of government, even in extraordinary times.

Finally, they argue that restricting the use of appointment authority and requiring a large number of vacancies to occur before the measures could be invoked would help to safeguard against using the measures in situations other than extreme emergencies.

**Arguments in Opposition.** Opponents argue that allowing governors to appoint Representatives temporarily would depart from the basic tenet of a House kept close to the people, where each Member has taken his seat only as a result of direct election by the voters in the Member's district. They maintain that such appointments might contribute to unrest or fear among the nation's citizens by casting doubt upon the government's ability to respond to crises. In addition, they point out that if such a process were ever to be invoked, two classes of Representatives would be created: those who became Members through the crucible of the electoral process, and those who were appointed.

Opponents also assert that temporary appointments could result in a change in the party control of Congress, if governors' appointees were of a party different from their predecessors'.<sup>7</sup> This shift could result in a change in the legislative agenda, and the actions of the short-term appointees could have long-term effects. In addition, they contend that procedural concerns about constituting a quorum in order to conduct legislative business could be resolved by modifying House rules, rather than by amending the Constitution.<sup>8</sup>

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<sup>7</sup> As introduced, H.J.Res. 67 did not require that appointees be of the same political party as their predecessors. State election laws providing for temporary Senate appointments indicate that four states — Alaska, Arizona, Hawaii, and Utah — require the governor to appoint someone of the same political party as the predecessor. Although it could be argued that such provisions constitute additional qualifications, they have not been challenged.

<sup>8</sup> House and Senate procedures now set a quorum at one-half plus one of the chamber's Members who are sworn and living. Both the House and the Senate could continue  
(continued...)

Proposed constitutional amendments such as those introduced during the 107<sup>th</sup> Congress also raise concerns about their conformity or conflict with current state election laws and affected parts of state constitutions. There could be additional problems in reaching agreement on what would constitute a Member's being declared "incapacitated" and who would make that determination. Finally, H.J.Res. 67 made no provision for Representatives who recovered from temporary incapacity to regain their seats without competing for them in special elections.

## Revisited Issue

The constitutional amendments proposed during the 107<sup>th</sup> Congress, were not the first of their kind. For example, from the 1940s through 1962, the issue of filling House vacancies in the event of a national emergency generated considerable interest among some Members of Congress. The "cold war," the Soviet Union's successful testing of the atomic bomb in September 1949, and subsequent claims that it might be stockpiling atomic weapons heightened the interest of some Members. More than 30 proposed constitutional amendments, which provided for temporarily filling House vacancies or selecting successors in case of the disability of a significant number of Representatives, were introduced from the 79<sup>th</sup> Congress (1945-1947) through the 87<sup>th</sup> Congress (1961-1963).<sup>9</sup> During that period, hearings were held in

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<sup>8</sup> (...continued)

functioning with a smaller number of surviving Members constituting a quorum, but incapacitated Members unable to attend could prevent a quorum from being established. Opponents of temporary appointments have argued that incapacitation questions could be handled by House or Senate rules without a constitutional amendment.

<sup>9</sup> The proposals are as follows: 79<sup>th</sup> Congress (1945-1947) — H.J.Res. 362; 80<sup>th</sup> Congress (1947-1949) — H.J.Res. 34, S.J.Res. 161; 81<sup>st</sup> Congress (1949-1951) — H.J.Res. 48; 82<sup>nd</sup> Congress (1951-1953) — H.J.Res. 155, H.J.Res. 166, S.J.Res. 59, S.J.Res. 75; 83<sup>rd</sup> Congress (1953-1955) — H.J.Res. 135, H.J.Res. 159, H.J.Res. 244, H.J.Res. 507, S.J.Res. 39, S.J.Res. 150; 84<sup>th</sup> Congress (1955-1957) — H.J.Res. 50, H.J.Res. 295, H.J.Res. 322, H.J.Res. 325, H.J.Res. 475, S.J.Res. 8; 85<sup>th</sup> Congress (1957-1959) — H.J.Res. 52, H.J.Res. 105, S.J.Res. 157; 86<sup>th</sup> Congress (1959-1961) — H.J.Res. 30, H.J.Res. 519, S.J.Res. 85; 87<sup>th</sup> Congress (1961-1963) — H.J.Res. 29, H.J.Res. 74, H.J.Res. 91, H.J.Res. 508, H.J.Res. 893, and S.J.Res. 123.

the House<sup>10</sup> and Senate.<sup>11</sup> On three occasions the Senate Committee on the Judiciary reported a proposal,<sup>12</sup> and three proposals were passed on the Senate floor.

**Floor Votes.** From 1954 through 1960, the Senate passed by large margins three proposed constitutional amendments that provided for temporarily filling House vacancies due to a national emergency. The first proposal, S.J.Res. 39, was amended and passed by a vote of 70-1 on June 4, 1954.<sup>13</sup> It authorized governors to make temporary appointments to the House after notification of vacancies and “whenever by reason of the occurrence of acts of violence during any national emergency or national disaster, the total number of vacancies in the House of Representatives shall exceed one hundred and forty-five....” The House took no action on the measure.

The second proposal, S.J.Res. 8, was passed by a vote of 76-3 on May 19, 1955.<sup>14</sup> It provided that:

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.

S.J.Res. 8 was referred to the House Judiciary Committee; no further action was taken.

<sup>10</sup> U.S. Congress, House Committee on the Judiciary, Subcommittee No. 2, *Constitutional Amendments for Continuity of Representative Government During Emergency*, hearings on H.J.Res. 29, H.J.Res. 74, H.J.Res. 91, and H.J.Res. 508, 87<sup>th</sup> Cong., 1<sup>st</sup> sess., Aug. 23, 1961 (Washington, GPO, 1961).

<sup>11</sup> See (1) U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Constitutional Amendment, *Constitutional Amendments*, hearings on S.J.Res. 33, S.J.Res. 59, S.J.Res. 75, S.J.Res. 117, S.J.Res. 125, S.J.Res. 127, and S.J.Res. 145, 82<sup>nd</sup> Cong., 2<sup>nd</sup> sess., March 20, 26, June 27, 1952 (Washington: GPO, 1952); and (2) U.S. Congress, Senate Committee on Judiciary, Subcommittee on Constitutional Amendment, *Appointment of Representatives*, hearings on S.J.Res. 8, 84<sup>th</sup> Cong., 1<sup>st</sup> sess., March 15, 1955 (Washington, GPO, 1955).

<sup>12</sup> See (1) U.S. Congress, Senate Committee on the Judiciary, *Appointment of Representatives in Time of National Emergency*, report to accompany S.J.Res. 39, 83<sup>rd</sup> Cong., 2<sup>nd</sup> sess., S.Rept. 83-1459 (Washington: GPO, 1954); (2) U.S. Congress, Senate Committee on the Judiciary, *Appointment of Representatives*, report to accompany S.J.Res. 8, 84<sup>th</sup> Cong., 1<sup>st</sup> sess., S.Rept. 84-229 (Washington: GPO, 1955); and (3) U.S. Congress, Senate Committee on the Judiciary, *Appointment of Representatives*, report to accompany S.J.Res. 123, 87<sup>th</sup> Cong., 2<sup>nd</sup> sess., S.Rept. 87-1449 (Washington: GPO, 1962).

<sup>13</sup> “Proposed Amendment to the Constitution to Enable Congress to Function Effectively in Time of Emergency or Disaster,” Debate and Vote in the Senate on S.J.Res. 39, *Congressional Record*, vol. 100, June 4, 1954, pp. 7658-7669.

<sup>14</sup> “Filling of Temporary Vacancies in the Congress Caused by Disaster,” Debate and Vote in the Senate on S.J.Res. 8, *Congressional Record*, vol. 101, May 19, 1955, pp. 6625-6629.

The Senate passed the third proposed constitutional amendment, S.J.Res. 39, on February 2, 1960, by a vote of 70-18.<sup>15</sup> It authorized governors to fill vacancies in the House “on any date that the total number of vacancies ... exceeds half of the authorized membership.” The governor’s appointive authority would have been limited to 60 days, and the appointee would have served until a successor was elected in a special election. The bill was amended on the Senate floor to include two additional provisions: one pertained to granting the District of Columbia electoral votes in national elections and non-voting delegate(s) to the House; the other eliminated the poll tax or other property qualification as a prerequisite for voting in federal elections. The three-amendment package was sent to the House, where the anti-poll tax and House emergency appointment provisions were deleted and the District of Columbia suffrage provision was modified (H.J.Res. 757). The House substituted the language of H.J.Res. 757 into the Senate measure and passed it by voice vote on June 14, 1960. The Senate adopted (by voice vote) the House version of S.J.Res. 39 without further amendment. S.J.Res. 39, granting three electoral votes for the District of Columbia in presidential elections, was ratified by the states on March 29, 1961.

## Policy Options

Many of the proposals introduced between 1945 and 1962 were aimed at addressing two or more of the following issues: the conditions under which the vacancies would be filled, the number or percentage of vacancies needed to invoke implementation of the measure, and the duration of the temporary appointments. For example, some of the earlier proposals would have directed state legislatures “to meet and select from their number a person or persons to take the place of such Representative or Representatives.” The measures also stipulated that this procedure would go into effect only if a majority of the House were unable to perform their duties.

A number of the earlier proposals required a notification procedure in which the President, the Speaker of the House, or some other specified official would be required first to declare that a national emergency or disaster existed and that a majority of the seats in the House were vacant. Governors would then make temporary appointments until elections could be held. The notification process, however, raised a number of definitional and procedural questions, e.g., what is a national disaster and who would determine when it occurs? Consequently, some sponsors deleted the notification provisions and terms deemed problematic (e.g., defining a national disaster) from the text of their proposals. They introduced measures that authorized governors to make temporary appointments to the House “on any date that the total number of vacancies in the House exceeded half of the authorized membership.” The supposition made was that the sudden occurrence of an inordinate number of House vacancies would result only from a national emergency or disaster.

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<sup>15</sup> “Filling of Temporary Vacancies in the House of Representatives,” *Congressional Record*, vol. 106, Jan. 26, 1960-Feb. 2, 1960, pp. 1320,1380,1515,1528,1598,1619, 1715,1744,1749, 1765.

Under most of the measures, the term of the appointees would have been limited to 60 to 90 days, by which time an election was to have been held. In some of the earlier proposals (where the individual would have been selected by the legislature), however, the person selected would have served for the remainder of the term of the Representative he succeeded. The number or percentage of vacancies required to invoke the emergency measure typically was one-half, one-third, or one-fourth of the House membership.

Many of the current issues raised and arguments offered in support of or in opposition to the temporary appointment of Representatives are the same as those made approximately 50 years ago. The events of September 11, 2001, have altered the equation, however. There is concern that the advent of suicidal terrorists who are independent of national governments and, thus, are not deterred from using weapons of mass destruction because of the possible consequences for their own people, may make the use of these weapons more likely in the future.

### **Alternatives to Amending the Constitution**

Congress might propose a constitutional amendment such as H.J.Res. 67, H.J.Res. 77, or S.J.Res. 30, which were introduced during the 107<sup>th</sup> Congress. The resolutions would have provided for temporary appointments to the House under extraordinary circumstances. It also has been noted however, that apart from a constitutional amendment, state governments could act relatively quickly, using their emergency powers to hold special elections in the event of a catastrophe in Congress. Alternatively, Congress could pass legislation requiring states to hold special elections to fill House vacancies within a specified, shorter interval under emergency conditions.<sup>16</sup> Representative Sensenbrenner introduced such a bill, H.R. 2844, on July 24, 2003. It would require states to hold special elections not later than 21 days after the vacancies are announced by the Speaker of the House in extraordinary circumstances. The bill has been referred to the House Committee on House Administration. In addition, as noted above, the House could provide for conducting business with a reduced membership through rule changes.

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<sup>16</sup> For further detail on these and other types of proposals for filling House vacancies in the event of a national emergency, see CRS Report RL31394, *House Vacancies: Proposals for Filling Them After a Catastrophic Loss of Members*, by Sula P. Richardson.