

**Ensuring Continuity of Congress**  
*Fordham Law School Rule of Law Clinic\**  
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Executive Summary of Recommendations

The Clinic recommends the following reforms to improve Congress's preparedness to continue functioning in the event of a catastrophe:

- (1) Upon their election to Congress, each member submits to the sergeant at arms of their respective chamber and the governor of their respective state a list of three individuals who could temporarily serve in their position if they should become incapacitated or die.
  - (a) Applies to senators who become incapacitated and members of the House who die or become incapacitated.
  - (b) Successors serve in Congress until the next general election or for six months, after which there must be a special election.
  - (c) Successors cannot run in the upcoming general or special election for the same position.
  - (d) This system only goes into effect when Congress moves to an elevated threat level as described in our third recommendation.
- (2) Adoption of a simple test for declaring members of Congress incapacitated.
  - (a) Define incapacity as the ability of members of Congress to choose to participate in a vote.
  - (b) Following an incapacity declaration, a member can return to their position by submitting an affidavit to their chamber's sergeant at arms.
  - (c) This process is only useable when Congress moves to an elevated threat level.
- (3) Adoption of a tiered emergency threat level system that modifies aspects of congressional rules based on the level of threat to the functioning of Congress:
  - (a) Threat Levels: **Level Three:** Normal readiness; **Level Two:** An imminent threat to the functioning of Congress at the Capitol Building. Congress could meet in an alternate location, function remotely, or allow proxy voting; **Level One:** A threat to the functioning of Congress that disrupts the ability to form a quorum for more than 24 hours. Congress could utilize the succession process proposed for replacing dead or incapacitated members. Members may also participate remotely if deemed necessary to ensure maximum representation.
  - (a) The power to declare and escalate emergencies would rest with a group consisting of the "Gang of Eight" members and the Senate president pro tempore.
  - (b) Congressional rules should be restored after 15 days from the time of the emergency level's escalation. If, after 15 days, Congress must remain in an elevated emergency state, then the available members of Congress should vote every 15 days on whether to remain at the elevated level, with a majority needed to continue at that level.

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## Introduction

Throughout its history, the United States Congress has never been prevented from functioning for an extended period of time or suddenly had its balance of power shifted by tragedy, though not without close calls. Notable brushes with catastrophe include the 1814 burning by the British of much of Washington, D.C., including the Capitol Building;<sup>1</sup> the Civil War battles that were fought within 35 miles of the city;<sup>2</sup> the 1918 influenza pandemic that kept many members of Congress away from Capitol Hill;<sup>3</sup> the proximity of Washington to Cuba during the Cuban Missile Crisis;<sup>4</sup> the targeting of the Capitol Building by the hijackers of United Airlines Flight 93 on September 11, 2001;<sup>5</sup> the 2017 shooting at a practice for the Congressional Baseball Game;<sup>6</sup> the limited ability to function at the beginning of the COVID-19 pandemic;<sup>7</sup> and, most recently, on January 6, 2021, when thousands of insurrectionists poured into the Capitol Building.<sup>8</sup>

In the event of certain catastrophes, Congress might need to declare certain members of Congress either incapacitated or dead and fill those vacancies quickly and in a manner that maintains the democratic legitimacy of Congress. However, there are currently no clear rules for declaring a sitting member incapacitated, which could hobble Congress's ability to function in a mass incapacity scenario. Furthermore, under the current quorum rules, a catastrophe resulting in mass death or incapacity could result in a few members of Congress passing legislation, raising questions about the legitimacy of those actions.

This report advances recommendations for reforms to ensure that Congress can continue functioning if many of its members die or become incapacitated or if its ability to function at the Capitol is challenged. Section I focuses on procedures for handling mass death or incapacity of members of Congress. Section II examines how to declare a member of Congress incapacitated. Section III considers how Congress could implement emergency protocols, especially operating beyond the physical walls of the Capitol Building. Each section concludes with the Clinic's proposal. The proposals call on Congress to: (1) establish a temporary replacement system for members of the House of Representatives and Senate; (2) establish a simple test for declaring its

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<sup>1</sup> *A Most Magnificent Ruin: The Burning of the Capitol During the War of 1812*, ARCHITECT OF THE CAPITOL (Aug. 22, 2012), <https://www.aoc.gov/explore-capitol-campus/blog/most-magnificent-ruin-burning-capitol-during-war-1812>.

<sup>2</sup> Dave Roos, *How the Union Defended Washington, D.C. During the Civil War*, HIST. (Jan. 10, 2022), <https://www.history.com/news/washington-dc-civil-war>.

<sup>3</sup> *What did Congress do during the 1918 flu pandemic?*, GOVTRACK (Apr. 2, 2020), <https://govtrackinsider.com/what-did-congress-do-during-the-1918-flu-pandemic-c0bd96ad2287>.

<sup>4</sup> Robert S. Norris, *The Cuban Missile Crisis: A Nuclear Order of Battle October/November 1962*, WILSON CTR. (Oct. 24, 2012), [https://www.wilsoncenter.org/sites/default/files/media/documents/event/2012\\_10\\_24\\_Norris\\_Cuban\\_Missile\\_Crisis\\_Nuclear\\_Order\\_of\\_Battle.pdf](https://www.wilsoncenter.org/sites/default/files/media/documents/event/2012_10_24_Norris_Cuban_Missile_Crisis_Nuclear_Order_of_Battle.pdf).

<sup>5</sup> Bill Sternberg, *What was Flight 93's target on 9/11?*, WASH. POST (Sept. 9, 2021), <https://www.washingtonpost.com/outlook/2021/09/09/flight-93-target-capitol/>.

<sup>6</sup> Luke Mullins, *The Terrifying Story of the Congressional Baseball Shooting*, WASHINGTONIAN (May 28, 2018), <https://www.washingtonian.com/2018/05/28/terrifying-story-of-the-congressional-baseball-shooting-steve-scalise/>.

<sup>7</sup> Marci Harris et al., *Congressional Modernization Jump-Started by COVID-19*, BROOKINGS (June 18, 2020), <https://www.brookings.edu/blog/techtank/2020/06/18/congressional-modernization-jump-started-by-covid-19/>.

<sup>8</sup> Kat Lonsdorf et al., *A Timeline of How the Jan. 6 Attack Unfolded—Including Who Said What and When*, NPR (Jan. 5, 2022), <https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when>.

members incapacitated; and (3) formulate a tiered emergency system like DEFCON levels for nuclear readiness but for congressional readiness that would authorize a series of changes to Congress's traditional parliamentary procedures based on the severity of a threat to Congress's continuity.

## **I. Mass Death or Incapacity**

This section reviews some of the most notable attacks on the Capitol and other threats to members of Congress. Additionally, this section reviews the current procedures for mass death and incapacity and describes the Clinic's proposal for quickly filling House and Senate seats of dead or disabled members.

### **A. Historical Close Calls with Mass Death & Incapacity**

#### **1. Spanish Flu Pandemic**

In September 1918, the Spanish Flu swept through Washington, D.C. It killed at least three members of the House of Representatives.<sup>9</sup> These members' seats were vacant until after voters chose replacements in the next regularly scheduled elections, meaning constituents went unrepresented for months.<sup>10</sup> Furthermore, the pandemic temporarily incapacitated countless members of Congress, including Speaker Champ Clark and House Majority Leader Claude Kitchin.<sup>11</sup> During the pandemic's height, fewer than 50 members of the House were present to cast their votes, forcing the House to hold limited *pro forma* sessions. Moreover, although their official cause of death was not the Spanish Flu, seven senators died that year.<sup>12</sup>

#### **2. Puerto Rican Nationalist Party Shooting**

After Puerto Rico became an official territory of the United States in 1952, numerous Puerto Ricans joined the newly formed Puerto Rican Nationalist Party.<sup>13</sup> The PRNP aimed to liberate the new territory from the U.S.<sup>14</sup> On March 1, 1954, four members of the PRNP entered the visitor's gallery above the House chamber and opened fire on the members of Congress below. The shooters wounded five congressmen.<sup>15</sup>

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<sup>9</sup> Roos, *supra* note 2.

<sup>10</sup> *Whereas: Stories from the People's House*, U.S. HOUSE OF REPRESENTATIVES OFF. OF THE HISTORIAN (Dec. 17, 2018), <https://history.house.gov/Blog/2018/December/12-14-Flu/> [hereinafter *Stories from the People's House*].

<sup>11</sup> *Id.*

<sup>12</sup> Eric Ostermeier, *1918: The Year 7 U.S. Senators Died in Office*, SMART POL. (Apr. 1, 2020), <https://smartpolitics.lib.umn.edu/2020/04/01/1918-the-year-7-us-senators-died-in-office/>.

<sup>13</sup> *Id.*

<sup>14</sup> Doug Stanglin, *Six Decades Ago, Shots Rained Down on Congress*, USA TODAY (Oct. 22, 2014), <https://www.usatoday.com/story/news/nation/2014/10/22/congress-puerto-rico-nationalists-shooting/17721187/>.

<sup>15</sup> *Id.*

### 3. 9/11 and United Airlines Flight 93

On September 11, 2001, the passengers on United Airlines Flight 93 overthrew the Al Qaeda terrorists who had hijacked the plane.<sup>16</sup> The aircraft crashed into a field in rural Pennsylvania.<sup>17</sup> To this day, no one is certain of Flight 93's target, but the intelligence community has said the plane was probably heading for the Capitol or the White House.<sup>18</sup> Had the plane reached either of those buildings, the consequences would have been grave. Congress was in session and the White House had invited all members of Congress and their families to meet on the White House's South Lawn for the annual congressional picnic, although that event was scheduled for later in the day.<sup>19</sup> The 9/11 Commission reported a high probability that the Capitol was the hijackers' intended target.<sup>20</sup>

### 4. Contemporary Threats to Congress

#### a. 2017 Congressional Baseball Game Shooting

In 2017, as House Republicans practiced for the annual Congressional Baseball Game, a domestic terrorist opened fire at the representatives, severely injuring Majority Whip Steve Scalise and several staffers.<sup>21</sup> Without armed police officers already at the scene, there could have been more casualties.<sup>22</sup> During an April 2022 hearing before the House Select Committee on the Modernization of Congress, former Congressman Brian Baird said the shooting highlighted how the deaths of a relatively small number of House members could change the balance of power in the chamber. Baird also said that if just one senator was killed, the balance of power could change, which he noted could, among other things, impact the Supreme Court for a "lifetime."<sup>23</sup>

#### b. COVID-19 Pandemic

In 2020, the COVID-19 pandemic closed the Capitol to visitors, and many congressional offices moved to remote operations.<sup>24</sup> As of April 2022, at least 168 representatives and senators have been diagnosed with COVID-19 and three have died.<sup>25</sup> The COVID-19 pandemic once again put on full display the operational limitations of Congress.

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<sup>16</sup> Sternberg, *supra* note 5.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Laura Bush Recalls 9/11 Panic*, TODAY (May 4, 2010), <https://www.today.com/popculture/laura-bush-recalls-9-11-panic-wbna36943246>.

<sup>20</sup> *The Capitol Building as a Target*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/minute/Attack.htm>.

<sup>21</sup> Mullins, *supra* note 6.

<sup>22</sup> *Id.*

<sup>23</sup> Kelsey Snell & Barbara Sprunt, *What happens if half of Congress dies? Even Congress isn't sure.*, NPR (Apr. 7, 2022), <https://www.npr.org/2022/04/07/1091390349/what-happens-if-half-of-congress-dies-even-congress-isnt-sure>.

<sup>24</sup> Harris, *supra* note 7.

<sup>25</sup> *COVID-19 in Congress*, GOVTRACK (Apr. 13, 2022), <https://www.govtrack.us/covid-19>.

c. January 6, 2021

The January 6, 2021 attack prompted an evacuation of the Capitol and forced Congress to delay for nearly ten hours its business certifying the 2020 election.<sup>26</sup> During the riot, hundreds of people stormed into the Capitol, some seeking to harm members of Congress and the vice president, who had been serving in his capacity as president of the Senate.<sup>27</sup> The rioters made it into nearly all parts of the Capitol Building and numerous congressional offices.<sup>28</sup>

Congress will likely continue to face threats in the future. Weapons of mass destruction and cyber warfare are more accessible to countries and extremist groups than at any point in the past. Considering the close encounters Congress has weathered in conjunction with the threats of the modern era, it is essential for Congress to take immediate action to ensure it can persevere through a catastrophe.

## B. Flaws in Current Protocols

Congress's current protocols for replacing members during a mass vacancy or incapacity event would take too long to use and might not adequately protect Congress's democratic legitimacy.

### 1. Filling Vacancies

The process for filling vacancies in the House could take months and largely depends on the procedures in the state where a seat is based and during which session of Congress a vacancy occurs. If a vacancy occurs during the first session of Congress, the seat is added to the ballots of local or other special elections already occurring in the district.<sup>29</sup> If it occurs during the second session, the rules differ from state to state and typically depend on the time remaining between the vacancy and the next general election.<sup>30</sup> If a House seat becomes vacant within six months of the end of the session, some states allow the seat to remain vacant for the remainder of the term.<sup>31</sup>

When there are more than 100 vacancies in the House, the speaker can declare "extraordinary circumstances." If "extraordinary circumstances" are declared, governors of the states with vacancies in their House seats must issue writs of election to fill those vacancies by special election.<sup>32</sup> Special elections are then to be held within 49 days of the declaration unless another general or special election is already scheduled within 75 days of the declaration.<sup>33</sup> However, the current rule allows Congress to operate for nearly three months with a fraction of its standard

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<sup>26</sup> Lonsdorf, *supra* note 8.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Robert Longley, *How Vacancies in the U.S. Congress are Filled*, THOUGHT CO. (June 2, 2020), <https://www.thoughtco.com/how-vacancies-in-congress-are-filled-3322322>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> ELIZABETH RYBICKI, CONG. RSCH. SERV., VOTING AND QUORUM PROCEDURES IN THE HOUSE OF REPRESENTATIVES 14 (2020), <https://crsreports.congress.gov/product/pdf/RL/98-988>.

<sup>33</sup> 2 U.S.C. § 8.

membership.<sup>34</sup> During what could be this country’s darkest days, millions of Americans could be without any representation in Congress.

Vacancies in the Senate probably would not last for nearly as long as those in the House. All but five states have exercised the power in the Constitution’s 17<sup>th</sup> Amendment to allow their governors to fill Senate vacancies by appointment. Appointed senators serve until another election is held.<sup>35</sup> The five states that do not grant their governors appointment power require special elections, which are typically expedited, to fill vacancies.<sup>36</sup>

## 2. Quorum Requirement

The House of Representatives defines a quorum as a majority of living members.<sup>37</sup> Accordingly, a quorum would mean that 218 members are present during regular proceedings. However, legislation routinely passes in the House with fewer than 218 members present.<sup>38</sup> Through parliamentary mechanisms such as “unanimous consent”<sup>39</sup> and “voice votes,”<sup>40</sup> the House can pass legislation without the majority of members being in the chamber.<sup>41</sup> Congress is presumed to have a quorum present and maintains this presumption unless a member asks for a quorum call.<sup>42</sup> But any legislation passed by a small fraction of the required number of members might lead the public to question its legitimacy.

Following an “extraordinary circumstances” declaration, Clause 5 of Rule XX requires Congress to form a “provisional quorum” in order to operate. The House must take a series of steps to reach a provisional quorum. First, the speaker must recognize a motion to compel the attendance of missing members.<sup>43</sup> Next, the House must conduct a call or series of calls over 72 hours, not including time spent in recess.<sup>44</sup> The call is closed if the members fail to produce a quorum after 72 hours.<sup>45</sup> Subsequently, the speaker must receive a “Catastrophic Quorum Failure Report” from the sergeant at arms, and he or she must announce its contents to the House.<sup>46</sup> Finally, the speaker will conduct a 24-hour call of the House; if this 24-hour call fails to produce a traditional quorum, Congress can meet and conduct business under a provisional quorum.<sup>47</sup> The catastrophic quorum failure report must be updated each time the House reconvenes after an adjournment.<sup>48</sup> If enough members arrive to constitute a quorum of the whole number of the

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<sup>34</sup> RYBICKI, *supra* note 32, at 14.

<sup>35</sup> U.S. CONST. amend. XVII; THOMAS H. NEALE, CONG. RSCH. SERV., U.S. SENATE VACANCIES: CONTEMPORARY DEVELOPMENTS AND PERSPECTIVES 3-5 (2018), <https://sgp.fas.org/crs/misc/R44781.pdf>.

<sup>36</sup> NEALE, *supra* note 35, at 3-4.

<sup>37</sup> RYBICKI, *supra* note 32, at 14.

<sup>38</sup> *Id.* at 3.

<sup>39</sup> *Unanimous Consent*, POL. DICTIONARY, <https://politicaldictionary.com/words/unanimous-consent/>.

<sup>40</sup> *Part 11: Roll Call Votes, Voice Votes, and Unanimous Consent*, AMERICAN LEGION, <https://www.legion.org/legislative/thomas/17797/part-11-roll-call-votes-voice-votes-and-unanimous-consent>.

<sup>41</sup> *Id.*

<sup>42</sup> RYBICKI, *supra* note 32, at 7.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 15.

<sup>48</sup> *Id.*

House, then the provisional quorum would no longer be in effect. Perhaps most notably, Clause 5 of Rule XX enables Congress to form a provisional quorum with as few as 15 members.<sup>49</sup> The Continuity of Government Commission has called for repealing parts of this rule.<sup>50</sup> In their most recent report, the Commission stated that emergency procedures allowing the House to operate with so few members is both “unconstitutional and unwise.”<sup>51</sup>

### **3. Corporate Continuity Planning**

Though not perfectly analogous to politics, business leaders worldwide are increasingly adopting succession plans to ensure continuity regarding their leadership and long-term strategic aims. Companies across the business world, ranging in industries from healthcare to investment banking to consumer products, have invested heavily in creating contingency protocols and leadership training in case of a catastrophic event eliminating much of the company’s existing leadership. One study, which focused on succession planning in a healthcare system in Virginia, identified best practices for training up-and-coming leaders to continue with established goals and strategies for ensuring these planned successors would be ready to continue the work of the previous leadership immediately.<sup>52</sup> Additionally, leaders within the business world increasingly recognize the value of continuity, even amid a leadership transition.

#### **C. Past & Contemporary Proposals to Address Mass Death & Incapacity**

Events such as those highlighted in Part I.A underscore the pressing need for Congress to establish formal mechanisms to rapidly replace members in a democratically legitimate manner. No such mechanisms currently exist, and the current procedures could leave many Americans without full representation.<sup>53</sup> During the Cold War and, later, in the wake of 9/11, Congress debated many proposals for filling mass vacancies.<sup>54</sup>

##### **1. Cold War Era Proposals**

The 79<sup>th</sup> Congress (1945-47) through the 87<sup>th</sup> Congress (1961-63) introduced more than 30 proposed constitutional amendments seeking to enable the temporary filling of House vacancies. The Senate passed three proposals.<sup>55</sup> The first proposal authorized governors to make temporary appointments to the House after notification of 145 vacancies resulting from acts of violence during any national emergency or disaster.<sup>56</sup> The second proposal allowed a governor to fill vacancies in the House from their state with temporary appointees when vacancies exceeded

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<sup>49</sup> *Id.* at 7.

<sup>50</sup> CONTINUITY OF GOV’T COMM’N, THE CONTINUITY OF CONGRESS (2022), <https://www.aei.org/wp-content/uploads/2022/04/The-Continuity-of-Congress.pdf?x91208> [hereinafter CONTINUITY OF GOV’T COMM’N, CONTINUITY OF CONGRESS].

<sup>51</sup> *Id.* at 4.

<sup>52</sup> *Business Succession Planning: Cultivating Enduring Value*, Vols. 1-6, DELOITTE LLP (2015).

<sup>53</sup> CONG. RSCH. SERV., CONSTITUTIONAL APPROACHES TO CONTINUITY OF CONGRESSIONAL REPRESENTATION: BACKGROUND AND ISSUES FOR CONGRESS (2009), [https://www.everycrsreport.com/files/20090717\\_R40628\\_1b5721f520b2c93cdb14b8d5a21bb623717f0f6e.pdf](https://www.everycrsreport.com/files/20090717_R40628_1b5721f520b2c93cdb14b8d5a21bb623717f0f6e.pdf) [hereinafter CONG. RSCH. SERV., CONTINUITY OF CONGRESSIONAL REPRESENTATION].

<sup>54</sup> *Id.* at 9.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (citing S.J. Res. 39, 83rd Cong. (1954) (passed 70-1)).

100.<sup>57</sup> The third proposal authorized governors within 60 days to temporarily fill vacancies in the House until the state held a special election.<sup>58</sup> None of these proposed amendments left Congress.

## 2. Proposals Since 9/11

### a. Proposals in Congress

In 2007, a proposal by California Representative Dana Rohrabacher called for an alternate member to be elected simultaneously with all representatives and senators.<sup>59</sup> The alternate member would serve as acting representative or acting senator until a representative-elect or senator-elect qualified or a new member and alternate member were elected.<sup>60</sup>

In 2009, Washington Representative Brian Baird introduced a proposed constitutional amendment that called for members of both chambers to provide a list of three designees, ranked in order of preference, to replace them in Congress upon their death, incapacitation, or disappearance before the end of their term of office.<sup>61</sup> This list of designees could be revised as needed. If a designee filled a vacant seat, the state's executive authority would be required to call an election "as soon as possible."<sup>62</sup>

Opponents of these measures argue that existing laws and practices are sufficient to address exceptional circumstances.<sup>63</sup> Some warn that there are downsides of creating two categories of members: elected and appointed.<sup>64</sup> For example, Representative David Dreier, author of the 2005 modification to Clause 5 of Rule XX, proclaimed that "Congress is the 'People's House,' and its members can only be elected."<sup>65</sup>

### b. Continuity of Government Commission Proposals

In their original report published in May 2003 and their most recent report published in April 2022, the Continuity of Government Commission proposed several ways to resolve vulnerabilities created by Congress's lack of procedures to address mass vacancies and incapacities.

The Commission's central recommendation in its first report was 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

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<sup>57</sup> *Id.* (citing S.J. Res. 8, 84th Cong. (1955) (passed 76-3)).

<sup>58</sup> *Id.* (citing S.J. Res. 39, 86th Cong. (1960) (passed 78-18)).

<sup>59</sup> Vanja Petrovic, *Rohrabacher Wants to Elect Alternate Lawmakers*, ORANGE CTY REG. (Oct. 4, 2007), <https://www.oregister.com/2007/10/04/rohrabacher-wants-to-elect-alternate-lawmakers/>.

<sup>60</sup> CONG. RSCH. SERV., CONTINUITY OF CONGRESSIONAL REPRESENTATION, *supra* note 53, at 6.

<sup>61</sup> *Id.* at 5.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Ensuring the Continuity of the United States Government: The Congress: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2003) (statement of Rep. David Dreier, Chairman, H. Comm. on Rules).



temporarily fill seats in the House of Representatives and Senate that are held by incapacitated members.”<sup>66</sup> The Commission’s initial report states that temporary replacements should be appointed by governors or selected from a succession list drawn up in advance by the member who holds the seat.<sup>67</sup> The Commission’s most recent report stated that the preferred method for filling vacancies is for every member of the House to designate a list of successors who would serve as a temporary replacement in the case of their death.<sup>68</sup>

#### **D. The Clinic’s Proposal for Replacing Dead or Incapacitated Members**

The Clinic recommends that Congress adopt a modified version of Representative Baird’s and the Continuity of Government’s proposed constitutional amendments.

Upon their election to the Senate or the House, each member should submit to the sergeant at arms of their respective chamber and the governor of their respective state a list of three individuals (Successor 1, Successor 2, and Successor 3) as a line of succession for their office. The successors on the lists for House seats would be eligible to serve in Congress when the elected member either dies or becomes incapacitated.<sup>69</sup> Because the 17<sup>th</sup> Amendment allows state legislatures to empower governors to appoint replacements to vacant Senate seats,<sup>70</sup> this system should only be used for senators who become incapacitated. If a member of Congress died or was declared incapacitated, the sergeant at arms should have 48 hours to contact the person the member listed as “Successor 1.” If Successor 1 was not able to take the position because of refusal or unavailability, then the position would go to “Successor 2” and then “Successor 3.” This system would only go into effect when Congress is at Threat Level One as declared pursuant to the process we recommend in Part III.C. Threat Level One would be reserved for the most serious threats to Congress’s continued functioning.

A successor should serve until the elected member’s inability ceases, the next general election, or for six months, after which there must be a special election. The successors should not be permitted to run in the upcoming general or special election for the same position. They may not run for that specific position until the following general election. This restriction would prevent members of Congress from using their succession lists to provide successors with an electoral advantage.

Whether the succession lists should be public or private is a challenging question. Some lawmakers and scholars recommend that the lists be public to deter flawed selections, which might include unqualified campaign donors or family members. Others argue that privacy is essential to obtaining buy-in from members of Congress. Therefore, we defer to Congress on this question. Regardless of the list’s public availability, this system would promote democratic legitimacy because a lawmaker would probably only pick individuals with similar ideologies.

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<sup>66</sup> CONTINUITY OF GOV’T COMM’N, PRESERVING OUR INSTITUTIONS: THE CONTINUITY OF CONGRESS (2003), [https://www.aei.org/wp-content/uploads/2011/10/20030605\\_FirstReport.pdf?x91208](https://www.aei.org/wp-content/uploads/2011/10/20030605_FirstReport.pdf?x91208).

<sup>67</sup> *Id.* at 58.

<sup>68</sup> *Id.*

<sup>69</sup> Suzanne Nelson, *Baird Formally Introduces Amendment*, ROLL CALL (Nov. 21, 2003), <https://rollcall.com/2003/11/21/baird-formally-introduces-amendment/>.

<sup>70</sup> U.S. CONST. amend. XVII.

## II. Declaring Incapacity

There is no specific protocol or procedure in the Constitution, federal law, or congressional rules for declaring a senator or representative incapacitated.<sup>71</sup> Although Congress does have the power to expel its members, it has never done so for medical reasons or incapacitation.<sup>72</sup> This section highlights examples of incapacity in the House and Senate and presents the Clinic's recommendation for a procedure to declare incapacities.

### A. Historical Examples of Incapacity in Congress

Senators and representatives who have become incapacitated and who have not resigned have generally served out their terms.<sup>73</sup> While individual incapacity is a lesser threat to democracy than mass incapacity, instances of individual incapacity in the House have left constituents without representation for months.<sup>74</sup> Likewise, instances of individual incapacity in the Senate have left entire states without full representation for years.<sup>75</sup>

#### 1. Incapacity in the House

Days before the 1980 election, Representative Gladys Noon Spellman of Maryland suffered a severe heart attack and went into a coma.<sup>76</sup> She subsequently won the election but could not be sworn into the new Congress because of her condition. On February 24, 1981, her seat was declared vacant, and Maryland held a special election to fill it. Spellman's replacement was elected 85 days after her seat was declared vacant, more than six months after she became incapacitated.

In October 1972, House Majority Leader Hale Boggs was campaigning in Alaska with Representative Nick Begich when their plane crashed in a still unknown location.<sup>77</sup> They were both presumed dead.<sup>78</sup> Both men won reelection in November, but in January, when neither could be sworn in to take their seats in the new Congress, their seats were declared vacant, and special elections were held to replace them.<sup>79</sup> Boggs' seat remained open for 76 days, and Begich's seat remained open for 62 days after being declared vacant, five months after the crash.<sup>80</sup>

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<sup>71</sup> CONG. RSCH. SERV., INCAPACITY OF A MEMBER OF CONGRESS (2011), [https://www.everycrsreport.com/files/20110118\\_RS22556\\_72b26d4e3e6b50f6434a8362521fc5b509bdeec8.pdf](https://www.everycrsreport.com/files/20110118_RS22556_72b26d4e3e6b50f6434a8362521fc5b509bdeec8.pdf) [hereinafter CONG. RSCH. SERV., INCAPACITY OF A MEMBER OF CONGRESS].

<sup>72</sup> *What If a Member of Congress is Severely Incapacitated and Cannot Perform the Duties of the Job?*, BIPARTISAN POL'Y CTR. (Mar. 26, 2020), <https://bipartisanpolicy.org/blog/what-if-a-member-of-congress-is-severely-incapacitated-and-cannot-perform-the-duties-of-the-job/>.

<sup>73</sup> *Id.*

<sup>74</sup> CONG. RSCH. SERV., INCAPACITY OF A MEMBER OF CONGRESS, *supra* note 71, at 4.

<sup>75</sup> *Id.* at 5.

<sup>76</sup> *Id.* at 4.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

## 2. Incapacity in the Senate

Even more prolonged periods have elapsed where constituents have been left without the representation of an able senator.<sup>81</sup> Senator Karl Mundt of South Dakota suffered a stroke in 1969 and never worked again. However, he refused to resign and technically remained a senator, though incapacitated, until 1973, when his term ended.<sup>82</sup> Though the Senate never expelled Mundt, he eventually lost his committee assignments.<sup>83</sup>

Another prominent example is Senator Carter Glass of Virginia, who suffered from various age-related illnesses starting in 1942 but refused to resign, despite requests to do so. He remained in the Senate and as a committee chairman, despite his incapacity, until he died in 1946.<sup>84</sup> Though these individual cases of senatorial incapacity did not threaten the functioning of the Senate, the quality of the representation that constituents received probably suffered.

### B. The Clinic's Proposal: A Simple Test for Declaring Members of Congress Incapacitated

The Clinic proposes defining incapacity as the ability of members of Congress to choose to participate in a vote.<sup>85</sup> For example, if a member of Congress is in a coma, they cannot vote or assert that they have chosen to miss a vote. If a member of Congress could not be in the Capitol to vote but could certify that they were choosing not to attend, then their conscious nonattendance would not rise to the level required for an incapacity declaration. A member of Congress should have five days to attest to their conscious choice regarding their attendance. Once an inability declaration took effect, the member's seat should be filled by using the succession system proposed in Part I.C.

A member of Congress declared incapacitated should be able to return to their powers and duties by submitting an affidavit to the sergeant at arms of their chamber. The affidavit would state that the member of Congress could, upon a call to quorum, be present in the Capitol Building. Upon submission of the affidavit, the powers of the temporary successor would end.

Although this inability declaration process might be worthy of consideration for non-emergency situations, in this report we only propose its use for when Congress has reached Threat Level One in the emergency preparedness system recommended in Part III.C.

## III. Triggering Continuity Protocols

Congress and the nation derive great benefit from lawmakers working in person at the Capitol. But in certain dire circumstances, it would be wise for Congress to function away from the

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<sup>81</sup> Ken Rudin, *What Happens When a Congressman Falls Ill?*, NPR (Dec. 14, 2006), <https://www.npr.org/templates/story/story.php?storyId=6625228>.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Janet Hook, *Senate Has a History of Lengthy Absences*, ORLANDO SENTINEL (Dec. 15, 2006), <https://www.orlandosentinel.com/news/os-xpm-2006-12-15-senate15-story.html>.

<sup>85</sup> This general approach was first suggested to the Clinic by Roy E. Brownell II. Cf. Video Interview with Roy E. Brownell II, Member, Continuity of Government Commission (Mar. 3, 2022).

Capitol Building. It is essential for Congress to develop a process for deciding when to meet at an alternate location or remotely. And the same system should provide ways to trigger other important continuity measures.

### **A. Historical Threats to Functioning at the Capitol and Contingency Planning**

During the War of 1812, British troops captured Washington, D.C., and burned much of it and the Capitol Building. Congress then held its meetings in another building, the Old Brick Capitol, as it became known.<sup>86</sup> Soon after, 157 of the 176 House members met in the Patent Office, one of the few buildings spared in all of Washington, D.C.<sup>87</sup> However, aside from the War of 1812, no other event has ever kept all members from being physically present at the Capitol.<sup>88</sup>

Under the pressures of the Cold War, in the late 1950s, the federal government started planning and constructing an emergency relocation bunker to house Congress in the event of a nuclear strike.<sup>89</sup> By 1962, workers completed construction on the massive underground bunker at the Greenbrier resort in West Virginia. Over the next 30 years, the bunker was kept stocked with supplies and 1,100 beds, with every member of Congress assigned to one.<sup>90</sup> In 1992, the bunker's existence became public after the *Washington Post* published an article about the facility.<sup>91</sup> As a result of that story, the government decommissioned the bunker.<sup>92</sup>

In the wake of 9/11, Congress has divulged to the public that it has plans to relocate to an alternate location if terrorists struck the Capitol.<sup>93</sup> While the House has approved Fort McNair, the U.S. Army headquarters in Washington, D.C., as an alternative site where Congress could convene,<sup>94</sup> specific plans about how Congress would convene remain classified.<sup>95</sup> On February 3, 2004, Congress authorized the speaker of the House and the Senate majority leader, or their respective designees, to cooperate in convening the House and Senate at a place outside the District of Columbia whenever the public interest warranted it.<sup>96</sup>

Traditionally, members of Congress have had to be physically present to vote.<sup>97</sup> During the 1918 influenza pandemic, for example, “the House did not adopt a method of proxy voting or remote

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<sup>86</sup> JAMES M. GOODE, *CAPITAL LOSSES: A CULTURAL HISTORY OF WASHINGTON'S DESTROYED BUILDINGS* (2003).

<sup>87</sup> *Stories from the People's House*, *supra* note 10.

<sup>88</sup> Joel Achenbach, *In 1814, British Forces Burned the U.S. Capitol*, WASH. POST (Jan. 6, 2021), [www.washingtonpost.com/history/2021/01/06/british-burned-capitol-1814](http://www.washingtonpost.com/history/2021/01/06/british-burned-capitol-1814).

<sup>89</sup> *The Secret Bunker Congress Never Used*, NPR (Mar. 26, 2011), <https://www.npr.org/2011/03/26/134379296/the-secret-bunker-congress-never-used>.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Mark Preston, *Senate Meets at Fort McNair*, ROLL CALL (Jan. 20, 2004), [www.rollcall.com/2004/01/20/senate-meets-at-fort-mcNair](http://www.rollcall.com/2004/01/20/senate-meets-at-fort-mcNair).

<sup>94</sup> Norm Ornstein, *Congress Desperately Needs a Contingency Plan*, ATLANTIC (Mar. 13, 2020), [www.theatlantic.com/ideas/archive/2020/03/congress-needs-contingency-plan-right-now/607933](http://www.theatlantic.com/ideas/archive/2020/03/congress-needs-contingency-plan-right-now/607933).

<sup>95</sup> Achenbach, *supra* note 88.

<sup>96</sup> S. Res. 296, 108th Cong. (2004).

<sup>97</sup> MAJORITY STAFF OF H. COMM. ON RULES, 116th CONG., *EXAMINING VOTING OPTIONS DURING THE COVID-19 PANDEMIC 2-4* (2020).

voting by telegraph or correspondence” but used the procedure of unanimous consent.<sup>98</sup> Likewise, during the COVID-19 pandemic, Congress rejected a switch to remote voting. But on May 15, 2020, the House adopted temporary changes to their in-person voting requirements.<sup>99</sup> Under the rule change, a member can use a physically present proxy to vote on their behalf.<sup>100</sup> Since January 2022, 303 members (191 Democrats and 112 Republicans) of the 435 lawmakers in the House have cast at least one vote by a proxy.<sup>101</sup>

In response to the COVID-19 pandemic, a House Committee on Rules report from the majority staff stated that remote voting poses serious challenges involving security, transparency, and reliability and that there are notable constitutional questions based on the Constitution’s use of terms such as “meeting,” “assembly,” and “attendance.”<sup>102</sup> For some, the concern over allowing remote meetings is that it will be abused and that members of Congress meeting virtually will no longer embrace the informal aspects of lawmaking.<sup>103</sup> Executive Director of the Continuity of Government Commission John Fortier observed that Congress literally means “coming together,” and that it is often unrealized how much of what takes place in Congress requires in-person gathering.<sup>104</sup> “It is a much more complex place than just pushing a button one way or another on a roll call vote,” Fortier explained.<sup>105</sup> Much of how Congress gets things done is through informal conversations while in the Capitol Building.<sup>106</sup>

President Biden described the Capitol as the “citadel of liberty” in a 2021 speech regarding the January 6 Capitol Hill attack.<sup>107</sup> Others have similarly characterized it as a “temple of democracy.”<sup>108</sup> After all, the Constitution’s framers designed Congress to be where the people’s elected representatives gathered to share ideas, deliberate, compromise, build majorities, and decide how to represent a diverse country’s interests best. However, both the House and the Senate should adopt rules and procedures for a catastrophe that prevents Congress from safely functioning at the Capitol.

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<sup>98</sup> *Id.* at 2.

<sup>99</sup> H.R. Res. 965, 116th Cong. (2020); *see also* Katherine Tully-McManus, *Historic Rule Change OKs House Proxy Votes and Virtual Committees*, ROLL CALL (May 15, 2020), <https://rollcall.com/2020/05/15/historic-rule-change-oks-house-proxy-votes-and-virtual-committees/>.

<sup>100</sup> *Id.*

<sup>101</sup> Alan Fram & Aaron Kessler, *GOP Lawmakers Vote Remotely More Often After Initial Scorn*, ASSOCIATED PRESS (Apr. 20, 2022), <https://www.apnews.com/414cb594073bab735552c6918c308470>.

<sup>102</sup> MAJORITY STAFF OF H. COMM. ON RULES, *supra* note 97.

<sup>103</sup> A.B. Stoddard, *Proxy Voting is Abused, but Emergency Use is Reasonable*, REALCLEARPOLITICS (Mar. 29, 2022), [https://www.realclearpolitics.com/articles/2022/03/29/proxy\\_voting\\_is\\_abused\\_but\\_emergency\\_use\\_is\\_reasonable\\_147397](https://www.realclearpolitics.com/articles/2022/03/29/proxy_voting_is_abused_but_emergency_use_is_reasonable_147397).

<sup>104</sup> Nancy Scola, *Why is Congress Still Meeting in Person?*, POLITICO (Mar. 26, 2020),

<https://www.politico.com/news/magazine/2020/03/26/congress-virtual-remote-work-coronavirus-150362>.

<sup>105</sup> *Id.*

<sup>106</sup> Sean Higgins, *Congress Crisis: Pandemic Threatens Capitol Hill*, WASH. EXAMINER (Mar. 18, 2020), <https://www.washingtonexaminer.com/policy/economy/congress-crisis-pandemic-threatens-capitol-hill>.

<sup>107</sup> Kate Sullivan & Eric Bradner, *Biden Says U.S. Democracy Under ‘Unprecedented Assault’ and Calls on Trump to ‘Demand an End to this Siege,’* CNN (Jan. 6, 2021), <https://www.cnn.com/2021/01/06/politics/joe-biden-riots-capitol-speech/index.html>.

<sup>108</sup> Megan Goldman-Petri, *Is the U.S. Capitol a ‘temple of democracy’? Its authoritarian architecture suggests otherwise.*, CONVERSATION (Feb. 8, 2021), <https://theconversation.com/is-the-us-capitol-a-temple-of-democracy-its-authoritarian-architecture-suggests-otherwise-154144>.

In their 2022 report, the Continuity of Government Commission recommended creating a limited provision allowing remote proceedings when members of Congress cannot meet in person in Washington, D.C. The Commission said that enabling remote voting does not mean Congress would be normalizing its practice.<sup>109</sup> In the early days of the COVID-19 pandemic, former members of Congress and others took part in a mock remote hearing co-chaired by former Congressmen Brian Baird and Bob Inglis. The purpose was to test the viability of remote proceedings.<sup>110</sup>

It is possible that providing secure access to all members of Congress for their most sensitive business, such as intelligence briefings, could pose logistical challenges. However, during the COVID-19 pandemic, thousands of boards of education and municipalities conducted meetings remotely. While it requires significantly more security than local governing bodies, it seems unimaginable that Congress, with its resources, could not do the same for its 535 members.<sup>111</sup>

### **B. The Clinic’s Proposal: A Tiered Threat Level System**

The Clinic proposes the creation of a tiered emergency level system that modifies aspects of congressional rules based on the level of threat to the functioning of Congress. The power to declare and escalate such emergencies would rest solely in Congress and, particularly, with a group consisting of the “Gang of Eight” members and the Senate president pro tempore. The Gang of Eight consists of the party leaders in the House and Senate and the chairs and ranking members of the House and Senate Intelligence Committees.<sup>112</sup> We chose the Gang of Eight because the executive branch already provides them with highly sensitive intelligence information beyond what is provided to most members of Congress.<sup>113</sup>

These nine individuals would vote on emergency threat levels and decide the appropriate rule changes in response to the current crisis. A majority vote of the group should be required to escalate the threat level. During a threat to the continuity of Congress that warrants an escalation in the threat level, these individuals might be impacted, and, therefore, under our proposal, the group may vote on escalating the threat level with just five members present.

Notably, some members of Congress may be concerned that once an elevated threat level is reached, it will become challenging to de-escalate. Therefore, the Clinic proposes that congressional rules return to regular operation after 15 days from the time of the threat level’s

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<sup>109</sup> CONTINUITY OF GOV’T COMM’N, CONTINUITY OF CONGRESS *supra* note 50.

<sup>110</sup> Marci Harris, *Second “Mock” Hearing Convenes Experts to Discuss Remote Proceedings*, MEDIUM (Apr. 18, 2020), <https://medium.com/g21c/second-mock-hearing-convenes-experts-to-discuss-remote-proceedings-b9d9cd1a6f23>.

<sup>111</sup> John Burns, *Legally Speaking: The Pandemic Inspires New Rules for Conducting Virtual Meetings*, NJSBA (2021), <https://www.njsba.org/news-publications/school-leader/winter-2021-vol-51-no-4/legally-speaking-the-pandemic-inspires-new-rules-for-conducting-virtual-meetings/> (“The local public body shall use an electronic communications technology that is routinely used in academic, business and professional settings, and can be accessed by the public at no cost”).

<sup>112</sup> 50 U.S.C. § 3093(c)(2) (2020).

<sup>113</sup> Michelle Richardson, *Gang of Eight Members Want a Bigger Gang*, ACLU (Apr. 1, 2010), <https://www.aclu.org/blog/national-security/gang-eight-members-want-bigger-gang>.

escalation. If, after 15 days, Congress must remain in an elevated emergency state, then the majority of available members of Congress shall vote on whether to remain at the elevated level of threat for an additional 15 days. This process should repeat every 15 days until the threat level is returned to its lowest level.

Level Three would be the baseline and should be referred to as “Normal Readiness.” Level Two would be appropriate during an imminent threat to the functioning of Congress at the Capitol Building. Under Level Two, Congress may meet in an alternate location, such as a nearby state capitol building, function remotely, or vote by proxy. Level One would be invoked for the highest level of threat to congressional continuity and would occur when there is an active threat to the functioning of Congress that disrupts the ability to form a quorum for more than 24 hours. Upon elevating to Level One, Congress could utilize the succession process we propose for replacing dead or incapacitated members as well as the process for declaring incapacities.<sup>114</sup>

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<sup>114</sup> See *supra* Part I.D; Part II.B.