



## Congressional Research Service

### Continuity of Congress: Proposals and Issues

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#### **Issue Definition**

The September 2001 terrorist attacks have again raised concerns about Congress's ability to act in the event of a catastrophic loss of membership. During the height of the Cold War, Congress considered, but did not approve, constitutional amendments to permit, pending special elections, temporary appointments of House Members to fill vacancies resulting from a disaster. As most state governors are permitted to appoint a Senator to fill a vacancy until the next regular election, the continuity of Senate operations has generally received less attention. There has also been interest in assuring Congress's ability to meet elsewhere than in the Capitol or by electronic means, if assembly in person were unsafe. Action was taken in the 107th Congress after the terrorist attacks to address some of these issues, and rules and practices have been modified at the start of the 108th Congress, but agreement on a comprehensive solution has yet to be reached.

#### **107th Congress Action**

On October 10, 2001, Representative Baird introduced H.J.Res. 67, a proposed constitutional amendment to permit state governors to make temporary appointments to the House if one-fourth of House Members were deceased or incapacitated. Similar, but not identical, proposals, were offered by Representative Lofgren (H.J.Res. 77, introduced December 5, 2001) and Senator Specter (S.J.Res. 30, introduced December 20, 2001). On February 28, 2002, the House Judiciary Subcommittee on the Constitution held hearings on the Baird proposal, but took no further action.

On December 13, 2001, Representative Langevin introduced H.R. 3481, to require the National Institutes of Standards and Technology to study the

feasibility of holding electronic sessions of Congress if Members were not able to convene in person. Arrangements have already been made to permit both houses to meet elsewhere in Washington if the Capitol could not be used. On May 1, 2002, the House Administration Committee held hearings on Langevin's proposal and related issues. In June 2002, Langevin introduced a modified proposal calling upon the General Accounting Office, the Library of Congress, and the National Academy of Sciences to collaborate on a study to determine the feasibility of conducting floor sessions through remote electronic connections. No further action was taken on either Langevin proposal. Relatedly, in August 2002, the Senate held an emergency preparedness drill in which it evacuated the Senate side of the Capitol and re-established chamber operations in specially outfitted space in the Hart Senate Office Building. A similar evacuation drill was held in the House on March 3, 2003.

In March 2002, Representatives Baird and Langevin wrote to Speaker Hastert and Minority Leader Gephardt, urging them to appoint a bipartisan House panel to study the continuity issue. Shortly thereafter, Representative Cox, the House Republican Policy Committee chairman, wrote to Minority Leader Gephardt suggesting a joint inquiry by the two party policy committees into the various continuity proposals.

On May 16, 2002, Representative Cox and Representative Frost, the chairman of the House Democratic Caucus, held the first of a series of meetings involving committee and party leaders from both parties, former Members of Congress, and outside experts to discuss additional steps to help ensure the continuity of congressional operations.

Representatives Cox and Frost later jointly sponsored H.Res. 559, a sense of the House resolution calling upon state legislatures to review existing statutes "so that, in the event of catastrophe, vacancies in the House of Representatives may be filled in a timely fashion." The resolution passed the House unanimously on October 2, 2002.

In the private sector, the American Enterprise Institute and the Brookings Institution created in the summer of 2002 an informal Commission on the Continuity of Government, headed by Lloyd Cutler, former White House counsel in the Carter and Clinton administrations, and former Senator Alan Simpson, with its members including former Speakers Thomas S. Foley and Newt Gingrich, to study issues related to the continuity of government. A commission report issued in May 2003 called for the enactment of a constitutional amendment to provide for the emergency appointment of replacement Members of the House in the event of a catastrophic loss of membership and to provide for both chambers the authority to establish procedures to deal with the temporary incapacity of Representatives and Senators.

### **108th Congress Action**

Both houses of Congress have taken some steps in the 108th Congress to help ensure continued operations in the event of a catastrophe. In the House, Representatives Cox and Frost, among others, submitted suggestions for changes in House Rules to minimize the threat to Congress's continuity posed by emergencies. Some of these suggestions were incorporated into H.Res. 5, agreed to January 7, 2003, adopting the

Rules of the House for the 108th Congress.

New rule language directs the Speaker to designate in writing a number of Members who would serve (in the order listed) as Speaker pro tempore in the event of the Speaker's death or disability, until a successor Speaker or Speaker pro tempore could be elected by the House. The new rule does not specify a minimum or maximum number of Members to be so designated. Other rules changes authorize the Speaker to recess the House at any time if he or she is informed of an imminent threat to Members' safety, and codifies in the rules the established House practice that a quorum is a majority of the members elected, sworn, and living.

In addition, both houses agreed to H.Con.Res. 1, which would allow designees of the Speaker and the Senate majority leader to call Congress into session in the event of the death or disability of either leader.

At the President's State of the Union Address, one cabinet member traditionally does not attend in order to safeguard the line of presidential succession. For what appears to be the first time, several Members of Congress did not attend the January 28, 2003 address to safeguard the continuity of Congress: Senator Stevens, the President pro tempore, Senators Bayh and Fitzgerald, and Representative Blunt, the House majority whip.

A number of legislative proposals as well as proposed constitutional amendments have been introduced in the 108th Congress directed at congressional continuity issues.

**Constitutional Amendments.** H.J.Res. 77 and H.J.Res. 83, both introduced by Representative Baird, were referred to the House Committee on the Judiciary. They provide that, prior to taking the oath of office, a Representative-elect is to present to the chief executive of his or her state, a list of not less than two nominees (qualified to serve in the House under the Constitution) to take the individual's place in the event that the Member died or became incapacitated prior to the expiration of the term just commencing. Thereafter, if a majority of the whole membership of the House becomes unable to carry out their duties owing to death or incapacity, or if the House adopts a resolution declaring that extraordinary circumstances exist which "threaten the ability of the House to represent the interests of the people," state chief executives would appoint replacement Members within seven days after the deaths or disabilities have been certified. A new Member appointed under this procedure would serve until an incapacitated Member is again able to serve, or until a special election can be held in the state to fill the seat.

Although the first three sections of the proposed amendment deal with filling the seats of House Members only, section four of the amendment grants expanded legislative authority to both chambers. Under that section, the House and Senate would, by law, be able to establish the criteria for determining whether a Member of either chamber was dead or incapacitated.

S.J.Res. 23, introduced by Senator Cornyn on November 5, 2003, proposes to give Congress authority -- in the event 25 % of either chamber were killed or disabled -- to enact legislation governing procedures for

determining the inability of a Senator or Representative, or to determine the deaths of Members of the House. The Senate was excluded from this latter provision because, in the event of the deaths of Senators, the Constitution already provides for the appointment of replacements, or the calling of a special election, as each state determines. The constitutional amendment sets a 120-day period during which such emergency procedures would be in effect, with the possibility that the emergency period could be extended for an additional 120-days if 25 % of the seats in either chamber remained vacant or were filled by incapacitated Members.

On March 11, 2004, Representative Larson introduced a proposed constitutional amendment, H.J.Res. 89, which addressed both the issue of temporary appointments to fill extraordinary vacancies and the issue of Member disability. Minority views submitted to H.Rept. 108-404, part 1, to accompany H.R. 2844, discussed below, indicated that Representative Larson would shortly introduce such a proposal. The proposed Larson constitutional amendment would allow less than a majority of the House of Representatives to declare that a vacancy existed in a majority of the seats in the House. Pursuant to such declaration, replacement Members could be appointed by (1) the legislatures of the affected States, summoned into special session if necessary or, (2) the state governor, if the state legislature failed to appoint replacement Members within three days of the start of their special sessions. An individual appointed under these provisions must (1) meet the constitutional requirements for service in the House; (2) be from the same political party as the Member whose seat was vacant; and (3) would be ineligible to be a candidate in the immediately following election. The appointment process would apply to vacancies existing on the date the House first declared that a majority of seats were vacant and to those seats that might become vacant during the 20 days following such declaration. Appointed Members would serve until special elections are held. Additionally, Congress would be authorized to enact legislation to "specify circumstances constituting when a vacancy happens in the Representation from any State in the House of Representatives, and to address the incapacity of Members of the House of Representatives."

Also on March 11, 2004, Representative Lofgren introduced H.J.Res. 90, a proposed constitutional amendment that revises her proposal from the 107th Congress. If more than 30 % of House seats were vacant at any time due to death or resignation, a temporary appointment process which Congress would be authorized to enact would be triggered. Replacement Members appointed pursuant to this law would serve until special elections (conducted under the laws of each particular State) to fill a vacancy were held, or until the appointed Members had served for a period of six months from the date their temporary service began.

Representative Rohrabacher introduced H.J.Res. 92 on April 2, 2004, a proposed constitutional amendment permitting pre-designation of replacement Representatives and Senators who would serve in the event of Member death or disability. Candidates for the House and Senate would be encouraged to identify, prior to their election, a number of designated potential replacements. In the event of a Member's death, a replacement would succeed to the seat, based on their rank order on the original Member's list. A majority of the potential replacements could also act to notify the House or Senate of a Member's disability, and (in rank order) the replacement would serve as Acting Representative for the duration of the

disability. The elected Member may also announce his or her disability personally in writing and may also reclaim his or her seat by written declaration. The proposed amendment repeals part of the 17th Amendment granting state legislatures authority to grant governors appointment power to the Senate, and the proposal also would grant Congress the authority to enact appropriate legislation pursuant to the new procedures.

**Legislative Proposals.** The most extensive action in the House has occurred on H.R. 2844, a bill introduced by Representative Sensenbrenner on July 24, 2003, and referred to the Committee on House Administration and, sequentially, to the Committee on the Judiciary. The bill proposes to set a timetable for expedited special elections in the event of a catastrophic loss of membership in the House of Representatives. The House Administration Committee held hearings on the bill on September 24, 2003, receiving testimony from five Members of Congress, various state election officials, and expert witnesses from the Woodrow Wilson International Center for Scholars, the Brookings Institution, and the American Enterprise Institute.

At the House Administration Committee markup on November 19, 2003, the committee agreed to an amendment in the nature of a substitute offered by Representative Ney, the committee chairman. Most significantly, the Ney amendment lengthened the timetable for holding special elections from the 21-day schedule set in the bill as introduced to 45 days. The measure was reported by a 4-3 vote. The report of the committee (H.Rept. 108-404, part 1) was issued on December 8, 2003. The Committee on the Judiciary held no separate hearings on the measure, relying on testimony it received on proposed constitutional amendments in the 107th Congress and testimony taken by the Cox-Frost task force. The committee reported the measure on January 21, 2004, and the report (H.Rept. 108-404, part 2) was filed on January 28, 2004.

A bill, S. 1820, introduced by Senator Cornyn on November 5, 2003, would authorize the states to take emergency action to fill vacant seats of Members or replace incapacitated Members if 25 % of the House or Senate were dead or incapacitated. The emergency procedures would be triggered through two mechanisms. The Speaker and the House minority leader, or their designees, could jointly declare that one-fourth of the House Members had been killed or incapacitated. Alternatively, state governors could individually certify that one or more of the state's congressional delegation had been killed or incapacitated and the President of the United States had declared that he had received a sufficient number of certifications from State governors to determine that one-fourth of the Senators or Representatives had been killed or incapacitated.

The Cornyn bill authorizes the states to enact legislation providing for filling House vacancies by special election or by appointment by the governor or state legislature, by appointment from a list of potential successors submitted by the incumbent Member, or by such other procedures as the state legislature determines to be appropriate. Under each of the latter three options, a subsequent special election would be required. With regard to Senate vacancies, the bill provides for appointment by the governor or legislature of the state, appointment from a list of successors submitted by the incumbent Senator, or such other procedures as the state determines. The Cornyn bill does not appear to contemplate the holding of special elections to fill a Senate vacancy, although Oregon, Wisconsin and, in some

circumstances, Oklahoma require special elections to fill vacancies.

Another Cornyn measure, S. 2031, introduced January 27, 2004, addresses only the issue of senatorial incapacity. Under procedures set in the bill, if the Senate finds itself without a quorum, the majority and minority leaders (or their designees) may jointly announce their finding that the absence of a quorum was caused by the inability of Senators to discharge the powers and duties of the office. In that event, procedures which the bill authorizes states to enact into law would be triggered permitting the replacement of Senators unable to serve.

**Related Proposals.** Not directly related to the issue of congressional continuity is H.R. 415, introduced by Representative Alcee Hastings on January 28, 2003. The bill calls for a congressional-executive commission to study and recommend possible changes in the size of the House of Representatives and the method by which Members are elected. Although the bill makes no reference to the issues of special elections, appointments, and Member incapacity, the commission might study these questions if it were set up.

On July 25, 2003, Representative Langevin introduced H.R. 2948, a revised version of his electronic Congress proposal of the 107th Congress. The current bill would direct the Comptroller General to enter into arrangements with the National Academy of Sciences and the Librarian of Congress to study and evaluate a study on the feasibility and costs of implementing an emergency electronic communications system for Congress to ensure the continuity of the operations of Congress during an emergency, and for other purposes.

### **Current Situation**

Officially, the House could continue to conduct business when large numbers of seats were vacant, so long as more than one-half of the living Members were present. Although it would be constitutionally permissible for the House to act in such circumstances, there might be strong concern about the legitimacy and public acceptance of measures passed by a House missing a substantial percentage of its normal membership.

Temporary or permanent incapacity of House Members raises other questions. If many Members were incapacitated and unable to attend floor sessions, the House could be denied the quorum required to conduct business. House procedures do not now provide mechanisms to judge incapacity of Members or to act to remedy problems caused by incapacity, once a Member has taken the oath of office. The only avenue now open to the House would seemingly be to expel an incapacitated Member, thereby creating a vacancy that could be filled by special election. (Many states, by contrast, permit state legislators to designate successors who would serve in the event of a catastrophic loss of state legislative members.)

Senate operations could also be affected were large numbers of its Members killed or incapacitated by a catastrophic event. The governors of most states can now appoint Senators to fill vacancies caused by death, resignation, or expulsion. (The exceptions are Oregon, Wisconsin, and, in certain circumstances, Oklahoma.) The Senate, like the House, has no

established procedure to deal with large numbers of incapacitated Members whose absence might prevent the establishment of a quorum.

Although steps have been taken to permit each house or both houses of Congress to meet elsewhere in Washington, or to meet away from the seat of government, concern has been expressed that, in an emergency, many Members may be unable to travel to the location where Congress had assembled. It might also be thought unsafe to have Congress meeting in one place. Discussions have focused on the possibility of convening either or both houses by electronic means, but practical considerations and constitutional objections to such action have been raised.

## **Policy Analysis**

Most of the currently proposed constitutional amendments would provide limited authority for state governors to make appointments to fill vacant seats and to fill the seats of House Members declared to be incapacitated when substantial numbers of House seats were vacant or held by incapacitated Members.

Supporters of the various plans claim that a constitutional amendment is needed so the House can be reconstituted quickly at its normal operating size. They point to the constitutional amendment establishing procedures for determining presidential disability and suggest the need to establish similar procedures for the House.

Opponents claim that the proposed constitutional amendments would fundamentally alter the House. Historically, the House has consisted only of elected Members, "delegates fresh from the people," in Alexander Hamilton's words. Temporary appointments might create two classes of Members, appointed and elected, and might also change the party composition of the House.

Supporters cite the need for a process to determine Member incapacity, especially after recent terrorist attacks. They fear that another attack could leave many Members alive but unable (permanently or temporarily) to discharge their duties. Opponents say existing procedures are sufficient, or that new House procedures (not a constitutional amendment) could better address Member incapacity. None of the proposed amendments addresses senatorial incapacity.

Many of the proposed constitutional amendments authorize Congress (by later law) to define incapacity and to set up a mechanism for declaring House Members incapacitated. Some claim that passing a later law would give Congress time to work out a suitable incapacity determination process, especially to address the difficult issue of differentiating between "temporary" and "permanent" incapacity. Others point to the detailed presidential incapacity process outlined in the 25th Amendment and want a similarly detailed process in any proposed constitutional amendment.

Related to these issues is that of holding special elections. Although Congress has the constitutional authority to pass legislation directing a uniform timetable by which states must hold special elections, it has never done so. H.Con.Res 559 of the 107th Congress called upon the states to act

on their own to set a faster timetable. The Sensenbrenner bill of the 108th Congress takes Congress's authority to regulate the time and manner of elections for federal office to impose, for the first time, a national timetable for holding special elections to the House in the face of a catastrophic loss of membership.

There has been some discussion about alternatives for convening Congress in times of crisis. Terrorist attacks might render the Capitol unusable for unpredictable amounts of time. Contingency plans exist for convening both chambers away from the Capitol in Washington. By concurrent resolution in the 108th Congress, House and Senate leaders have been authorized, at their discretion, to call Congress into session at sites outside Washington.

Some concern remains that convening Congress in person may be unsafe or unwise, and suggest electronic sessions. Of course, some congressional committees have already begun to hold electronic hearings. Proposals by Representative Langevin in the 107th and 108th Congresses have called for studies on the feasibility of convening Congress electronically. Some claim, however, that holding electronic floor sessions may require a constitutional amendment. Article 1 of the Constitution, as modified by the 20th Amendment, provides that "Congress shall assemble at least once in every year." It is doubtful that the framers of the Constitution, or the drafters of the amendment, considered any form of assembly other than meeting in person.

## **Legislation**

### **107th Congress.**

#### H.Res. 559 (Cox)

Introduced September 26, 2002; referred to the House Administration Committee. Agreed to by the House, October 2, 2002.

#### H.J.Res. 67 (Baird)

Introduced October 10, 2001; referred to the House Judiciary Committee. Hearing held by Subcommittee on the Constitution, February 28, 2002.

#### H.J.Res. 77 (Lofgren)

Introduced December 5, 2001; referred to the House Judiciary Committee

#### H.R. 3481 (Langevin)

Introduced December 13, 2001; referred to the House Administration Committee and, additionally, to the Committee on Science.

#### H.R. 5007 (Langevin)

Introduced June 24, 2002; referred to the House Administration Committee.

#### S.J.Res. 30 (Specter)

Introduced December 20, 2001; referred to the Senate Judiciary Committee.

### **108th Congress.**



H.Res. 5 (DeLay)  
Introduced and agreed to January 7, 2003.

H.Con.Res. 1 (DeLay)  
Introduced and agreed to in the House, January 7, 2003.  
Agreed to in the Senate, February 13, 2003.

H.J.Res. 77 (Baird)  
Introduced November 19, 2003; referred to the House Judiciary Committee.

H.J.Res. 83 (Baird)  
Introduced December 8, 2003; referred to the House Judiciary Committee.

H.J.Res. 89 (Larson)  
Introduced March 11, 2004; referred to the House Judiciary Committee.

H.J.Res. 90 (Lofgren)  
Introduced March 11, 2004; referred to the House Judiciary Committee.

H.J.Res. 92 (Rohrabacher)  
Introduced April 2, 2004; referred to the House Judiciary Committee.

H.R. 415 (Hastings)  
Introduced January 28, 2003; referred to the House Judiciary Committee.

H.R. 2844 (Sensenbrenner)  
Introduced July 24, 2003; referred to the House Administration Committee and sequentially to the House Judiciary Committee.  
House Administration Committee hearing held on September 24, 2003.  
Reported, amended, by House Administration Committee on November 19, 2003. Report from the House Administration Committee (H.Rept. 108-404, part 1) filed December 8, 2003.  
Reported, amended, by the House Judiciary Committee January 21, 2004. Report from the House Judiciary Committee (H.Rept. 108-404, part 2) filed January 28, 2004.

H.R. 2948 (Langevin)  
Introduced July 25, 2003; referred to the Committee on House Administration.

S.J.Res. 23 (Cornyn)  
Introduced November 5, 2003; referred to the Senate Judiciary Committee.

S. 1820 (Cornyn)  
Introduced November 5, 2003; referred to the Committee on Rules and Administration.

S. 2030 (Cornyn)  
Introduced January 27, 2004; referred to the Committee on Rules and Administration.

**Additional Reading**

Continuity of Government Commission, *The Continuity of Congress: First Report of the Continuity of Government Commission*, Washington: The Commission, 2003.

Thomas S. Foley and Newt Gingrich, "If Congress Were Attacked," *Washington Post*, March 17, 2002, p. B9.

Amy Keller, "E-Congress: Possible? Yes. Likely? No," *Roll Call*, November 5, 2001, pp. A1, A22.

Suzanne Nelson, "Rules Changes Aim to Help House Deal with Attack," *Roll Call*, January 9, 2003, p. 1.

Norman J. Ornstein, "Amendment to Constitution Requires Sense of Urgency," *Roll Call*, September 19, 2002, p. 8.

\_\_\_\_\_. "Worst Case Scenarios Demand the House's Immediate Attention," *Roll Call*, November 8, 2001, p. 8.

Ben Pershing and Susan Crabtree, "House Weighs Disaster Plans: Cox Offers Bipartisan Study," *Roll Call*, March 21, 2002, pp. 1, 28.

J.H. Snider, "Planning for the Worst," *Federal Computer Week*, October 15, 2001, p. 36.

Representative Vic Snyder, "Guest Observer: Ornstein Is Wrong: House Members Should Never Be Appointed," *Roll Call*, November 19, 2001, p. 8.

## **CRS Products**

[CRS Report RL31594](#). *Congressional Continuity of Operations (COOP): An Overview of Concepts and Challenges*, by R. Eric Petersen and Jeffrey W. Seifert.

[CRS Report RS21089](#). *Continuity of Government: Current Federal Arrangements and the Future*, by Harold C. Relyea.

CRS Electronic Briefing Book. *Terrorism*. Page on "[Continuity of Government in a Severe Emergency: Frequently Asked Questions](#)," by Harold C. Relyea.

[CRS Report RS21140](#). *Electronic Congress: Proposals and Issues*, by Jeffrey W. Seifert and R. Eric Petersen.

[CRS Report 97-1009\(pdf\)](#). *House and Senate Vacancies: How Are They Filled?*, by Thomas H. Neale.

[CRS Report RL31394\(pdf\)](#). *House Vacancies: Selected Proposals for Filling Them After a Catastrophic Loss of Members*, by Sula P. Richardson.