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# **What Happens When a Senator Is Incapacitated?**

By [Jerry H. Goldfeder](#)



The hospitalization of Sen. John Fetterman for depression raises a host of questions. Of course our first reaction is to convey good wishes for a speedy recovery and acknowledge that mental health issues are as real as physical problems. Indeed, to appreciate the often-concealed suffering associated with such disease, one need only read the heart-stopping book, “Invisible Storm: A Soldier’s Memoir of Politics” by Jason Kander, the former Missouri Secretary of State and U.S. Senate candidate who dropped out of a sure-win Kansas City mayoral race when he finally recognized that his depression and PTSD had made his life unbearable. Fortunately we are a far cry from Sen. Tom Eagleton’s experience of being removed as George McGovern’s vice presidential running mate in 1972 when it was discovered that he had gotten electroshock treatment for depression. (By the way, after several years of therapy, Kander seems to be doing pretty well.)

Beyond any sympathy or empathy one might feel for the Pennsylvania senator is his hospitalization's political impact. Aside from the fact that his constituents' needs are being temporarily unmet by him (though I am sure his staff is working 24/7), there is the issue of whether his absence imperils the majority's effectiveness in the Senate. After all, neither Fetterman nor his physicians can predict how long he will be away from Washington. The good news is that the Democrats have a two-vote edge, so his course of treatment does not deprive them of a majority. But life being as unpredictable as it is, the majority party is only one heartbeat away from an evenly split Senate. Although Vice President Kamala Harris could then cast a tie-breaking vote, that would depend on Majority Leader Chuck Schumer's being able to count on his full caucus (remember Sens. Joe Manchin and Kyrsten Sinema?).

Unfortunately, Fetterman's situation is neither new nor unique: Sen. Tim Johnson from South Dakota was out for eight months after suffering a brain hemorrhage in 2006; Sen. Ben Ray Lujan from New Mexico had a stroke in 2022 and it took him a few months to recover; and former Vermont Sen. Patrick Leahy checked into the hospital last year when the Senate was 50-50. These are just a few of the recent examples. And, in that the Senate does not allow proxy voting (unlike the House during the pandemic), all members need to show up. John McCain, battling brain cancer at the time, had to appear personally in the Senate chamber to save Obamacare.

It is surprising that there is no current remedy. In an effort to jumpstart a discussion, however, I offer the following suggestion. A state should enact a statute that allows an ill senator to resign and have the governor appoint a temporary replacement. (Forty-six states already permit a governor to appoint an interim senator when there is a vacancy.) And once the senator recovers, the place-holder would resign and the governor would appoint the original senator to the seat. To make this work politically, the law would have to require the temporary senator to be of the same party as the ill senator. (Six states already compel governors to fill a Senate vacancy with someone of the same party.) Obviously all parties would have to act in good faith, and there would need to be structural safeguards to facilitate the process. In this regard I take my cue from the 25th Amendment to the U.S. Constitution as it relates to an incapacitated president.

According to the 25th Amendment, a temporarily disabled chief executive could relinquish the position for a time, allowing the vice president to become acting president. This has occurred in a few instances when presidents have undergone surgical or other medical procedures. If, on the other hand, the president doesn't recognize his disability, the vice president and a majority of the Cabinet can temporarily remove him. And if there are disagreements regarding the president's capacity, Congress has a determinative role. Until 1967 when the amendment was ratified, the country floundered under disabled presidents with no legal recourse. After being shot in 1881, President James Garfield was in a coma for 80 days before he died, and President Woodrow Wilson had a severe stroke in 1919 that laid him out for the last 18 months of his term. As a result of the painstaking work of the late Sen. Birch Bayh and bar leaders such as Fordham's Dean Emeritus John Feerick, the 25th Amendment addresses the problem of presidential disability.

It is time, therefore, to enact an analogous process for incapacitated senators (and perhaps House members as well). Clearly, it is not acceptable for Congress to be stalled or stymied by a member's illness and, moreover, it is not fair to their constituents. Whether my proposal ultimately becomes the preferred remedy (and, of course, it requires being fleshed out), the problem warrants study by the nation's bar associations, election lawyers and academics. I hope that Fetterman's absence is short-lived and he is able to fully resume his work soon. Even so, the issue is obviously one that is likely to recur. A solution is required.

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