



## CRS Report for Congress

# Incapacity of a Member of the Senate

Jack Maskell  
Legislative Attorney  
American Law Division

### Summary

There is no specific protocol, procedure, or authority set out in the United States Constitution, federal law, or congressional rule for the Senate (or the House) to recognize “incapacity” of a sitting Member and thereby declare a “vacancy” in such office. Under the general practice in the Senate (as well as in the House), a personal “incapacity” of a sitting Member has not generated proceedings to declare the seat vacant, and *sitting* Members of the Senate (and the House) who have become incapacitated, and who have not resigned, have generally served out their terms of office. In one instance in the House, a *Member-elect* who was incapacitated and comatose, and thus could not present herself to take the oath of office (Gladys Noon Spellman, of Maryland), was found not likely to recover, and the House proceeded to declare her seat vacant after the beginning of the new Congress. However, no such precedent exists for a *sitting* Member of either House who has taken the oath of office, and a vacancy with respect to such a sitting Member would generally exist only by virtue of resignation, death, acceptance of an incompatible office, or expulsion.

Where “incapacity” of a sitting Member of Congress is concerned, there is no specific provision of the United States Constitution, of federal law, nor Rule of the Senate (or the House) that provides any particular procedure or designated practice. Clearly, when a Member of the Senate dies or resigns his or her office, a “vacancy” in the office is established that activates the procedures of the Seventeenth Amendment, that is, the “temporary appointment” of an interim Senator by the Governor of the State — when authorized by the State legislature — to occupy the office until a special or regularly scheduled statewide election is held to fill the term.<sup>1</sup>

The Senate, as well as the House, has broad constitutional authority concerning decisions about the standing qualifications, elections and returns, and conduct and

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<sup>1</sup> “[T]he Seventeenth Amendment permits a state, if it chooses, to forgo a special election in favor of a temporary appointment to the United States Senate....” *Rodriquez v. Popular Democratic Party*, 457 U.S. 1, 11 (1982). Generally, as to vacancies, see CRS Report 97-1009, *House and Senate Vacancies: How Are They Filled?* by Sula P. Richardson and Thomas H. Neale.

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behavior of its own Members, and it has the express constitutional authority to make the rules for its own proceedings.<sup>2</sup> Under the general practice and operations in the Senate (as well as in the House), personal “incapacity” of a sitting Member has not generated proceedings to declare the seat vacant. Several examples are often cited for this proposition, including the example of Senator Carter Glass of Virginia, who was apparently away from the Senate for four years before finally dying in 1946; the case of Senator Carl Mundt of South Dakota, who, after suffering a stroke in 1969, was reportedly absent from the Senate floor for almost three years prior to his decision not to run for reelection in 1972; and the more recent example of Representative John Grotberg of Illinois, who slipped into a five-week coma in January of 1986 from complications of cancer treatment and did not return to Congress for the rest of the session.<sup>3</sup>

Authority and decisions over internal procedural matters, organization and structures within the institution, and the determination and seating of those who are Members of the institution have been recognized to be within the exclusive purview of, and properly made by, the House or Senate, respectively, under the express constitutional authority of each House.<sup>4</sup> In a practical sense, therefore, because of the final authority over determining and seating those who are to be Members of the institution, it would be the particular House of Congress that would have to either declare or, at the least, recognize any such “vacancy” because of any “incapacity” before giving the oath of office and seating anyone presenting himself or herself as having been chosen to fill that seat.

**Congressional Precedents and Declaring Vacancies.** Each House of Congress may be said to be able to “create” a vacancy in office in its own body through an “expulsion” of a sitting Member (by a vote of two-thirds of the Members of the body

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<sup>2</sup> U.S. Constitution, Article I, Section 5, clauses 1 and 2: “Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members .... Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”

<sup>3</sup> *New York Times*, February 5, 1971, at 62, noting that Senate Republicans assigned Senator Percy to a Government Operations Committee post held by Senator Mundt who had been absent because of stroke since November of 1969; *Los Angeles Times*, August 10, 1986, at 14, “Can’t Be Forced to Resign; The Congressman is In a Coma — And Still In Office.”

<sup>4</sup> Justice Joseph Story, *Commentaries on the Constitution*, Vol. II, § 835: “No person can doubt the propriety of the provision authorizing each house to determine the rules of its own proceedings. If the power did not exist, it would be utterly impractical to transact the business of the nation ....” *United States v. Ballin*, 144 U.S. 1, 5 (1892); *Nixon v. United States*, 506 U.S. 224 (1993). As to elections and final determinations as to who is a Member, Story noted “It is obvious that a power must be lodged somewhere to judge of the elections, returns, and qualifications of the members of each house composing the legislature; for otherwise there could be no certainty as to who were legitimately chosen members, and any intruder or usurper might claim a seat, and thus trample upon the rights and privileges and liberties of the people.” Story, *supra* at Volume I, § 833, p. 585. See, *Rouderbush v. Hartke*, 405 U.S. 15 (1972); *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929); *note Powell v. McCormack*, 395 U.S. 486 (1969). Luther Stearns Cushing notes in *Law and Practice of Legislative Assemblies* (1856), at 54-55, that the exclusive and final right to determine membership in a democratic legislative assembly “is so essential to the free election and independent existence of a legislative assembly, that it may be regarded as a necessary incident to every body of that description, which emanates directly from the people ....”

present and voting), or by an “exclusion” of a Member-elect from being seating as a Member of the House or Senate, because of a failure to meet the designated constitutional qualifications for office, or because of a failure to be “duly elected.”<sup>5</sup> There are other instances, however, when each House of Congress may be said to have recognized the existence of certain other “vacancies” in a congressional office and declared a seat “vacant” without a death, resignation, or expulsion of the sitting Member.<sup>6</sup>

*Incompatibilities.* One class of such findings concerns sitting Members, or Members-elect, who have accepted an office “incompatible” with congressional office and thereby are deemed to have vacated their congressional seat. Under the U.S. Constitution, at Article I, Section 6, clause 2, no person “holding any Office under the United States, shall be a Member of either House during his Continuance in Office.” The House and the Senate have thus in the past found a “vacancy” in the office of a Member of the House or Senate, respectively, who accepted an office under the United States, including a commission from the Militia, even when such Members did not tender any resignation from Congress.<sup>7</sup> In the Senate, the issue of whether a sitting Senator had by accepting a military commission “virtually resigned his seat in the Senate, ... it bec[oming] vacant at that time,” was eventually resolved by the factual conclusion that “his appointment while a Senator-elect did not preclude him from electing to accept the office of Senator by resigning the military office before the meeting of the Senate and his qualification.”<sup>8</sup> The acceptance or the holding of an office incompatible with a congressional office does not necessarily act as an “automatic” forfeiture of one’s seat, but rather appears to require some act on the part of the House or Senate, respectively, to formally recognize such incompatibility and declare a “vacancy,” which the House or Senate may or may not choose to do. The precedents have shown that the House or Senate may choose not to act upon such incompatibility.<sup>9</sup>

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<sup>5</sup> See *Powell v. McCormack*, *supra*. Note discussion of expulsions, as compared to exclusions, in CRS Report RL31382, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives*, by Jack Maskell, and CRS Report 90-299 (available from author), *Expulsion and Censure Actions Taken by the Full Senate Against Members*, by Jack Maskell.

<sup>6</sup> In the House of Representatives it has been noted: “Vacancies are caused by death, resignation, declination, withdrawal, or action of the House *in declaring a vacancy as existing* or causing one by expulsion.” *Constitution, Jefferson’s Manual, and Rules of the House of Representatives*, 108<sup>th</sup> Congress, H.Doc. 107-284, at § 17 (2003)(emphasis added).

<sup>7</sup> In the Seventh Congress, in 1803, for example, the House found that a Member from New York, Mr. John P. Van Ness, having accepted a commission in the militia, “has thereby forfeited his right to a seat as a Member of this House.” Mr. Van Ness did not voluntarily resign or leave congressional office, and in fact argued against the resolution, which eventually passed the House unanimously. 1 *Hinds’ Precedents of the U.S. House of Representatives*, at § 486, pp. 592-593. See also other cases declaring a seat “vacant” upon the acceptance of an office under Article I, Section 6, clause 2, 1 *Hinds’ Precedents*, §§ 487, 488, 489, 490, 500; *note also* § 504, finding that a resolution declaring a seat vacant need only a majority vote.

<sup>8</sup> *Id.* at pp .600-601, Senate Judiciary Committee Report of August 2, 1861, recommending the finding of a vacancy, but not acted upon by the Senate.

<sup>9</sup> 1 *Hinds’ Precedents*, *supra* at § 494, while the Report of the Judiciary Committee in 1898 found that by accepting military commissions several sitting Members had “vacated their seats,” and thus recommended a resolution finding their seats vacant, the House “declined to consider the  
(continued...) ”

The incompatibility questions arising expressly under the constitutional provision at Article I, Section 6, clause 2, raise issues of the stated “qualifications,” or express “disqualifications,” described in the Constitution, and thus apparently bear upon the authority of each House of Congress to judge the qualifications of its own Members under Article I, Section 5, clause 1. In addition to dealing with the specific incompatibility provision in the Constitution, however, there are *other* congressional precedents that have found that other offices, such as State or local elective or appointive offices, are inherently “incompatible” with congressional office. Such precedents indicate that in choosing another office, even if the Member involved does not expressly resign his congressional office, the institution of the House or Senate has the apparent authority to find that a “vacancy” in the congressional seat is created. In an early precedent, the House in 1792 received from a Member, Joshua Seney, a letter “stating his acceptance of an appointment in the judiciary department” of Maryland, “which disqualified him for a seat in the House,” and upon which the House then took action described as the House having “assumed or declared the seat vacant.”<sup>10</sup> In the case of a Member becoming a Governor, the House found an inherent incompatibility in the offices, and found that the Member vacated his congressional seat upon assuming the duties of Governor, regardless of the fact or intent of any resignation.<sup>11</sup>

Senate precedents show a similar determination or judgment by the Senate of an inherent incompatibility between the office of Governor of a State and United States Senator, and indicate the recognition of the authority of the institution of the Senate to make such a judgment (but which noted that a Senator-elect may continue to exercise the duties of Governor until he takes the oath of office as a Senator).<sup>12</sup>

*Failure to Appear To Take Oath of Office.* Vacancies have also been found when Members-elect have not appeared to take the oath of office and, because of their absence, were presumed to be dead. In the case of Representative Hale Boggs of Louisiana, for example, Representative Boggs’ plane was lost in Alaska on October 16, 1972, with Representative Nick Begich of Alaska, and two others, less than a month before the Representatives’ general elections. Under state election procedures, their names remained on the ballot in both states, and they both received the most votes in their respective general elections. In Alaska, a judicial inquiry was conducted and concluded that although neither the aircraft nor the bodies were ever found, the three Alaskan men were presumed to have died. No proceeding or finding was made in Louisiana, however, and

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<sup>9</sup> (...continued)

resolution.” *Id.* at pp. 620-621. See also VI *Cannon’s Precedents* §§ 60-61, concerning a Judiciary Committee report in 1916 with similar findings: “It follows that the seats of those Members of the House of Representatives who shall accept commissions in the National Guard of the various States under the act of Congress of June 3, 1916, will at once become vacant. The only action necessary would be to declare such vacancy by resolution as a matter of convenience and to aid the Speaker and others in discharging their public duties.” *Id.* at § 60, p. 67. The Report was “not acted upon by the House.” *Id.* at § 61, p. 67. See also 40 Op. Atty. Gen. 301, 303, December 23, 1943.

<sup>10</sup> 1 *Hinds’ Precedents*, *supra* at § 501.

<sup>11</sup> VI *Cannon’s Precedents*, *supra* at § 65, p. 78.

<sup>12</sup> Note cases of Senator-elect La Follette in 1906, 1 *Hinds’ Precedents*, *supra* at § 503; and Senator-elect Javits in 1957, *Deschler’s Precedents*, *supra* at Ch. 7, §13.1, p. 129.

no vacancy was declared in the office by the executive authority in Louisiana. At the beginning of the new Congress, on January 3, 1973, the House adopted a resolution taking note of the crash and the judicial findings in Alaska concerning the other three victims of the crash, and concluding that it is assumed from the evidence that Representative Boggs also died in the crash or its aftermath, and therefore, the House formally “determines that there is a vacancy in the Ninety-third Congress in the representation from the Second Congressional District in the State of Louisiana because of the absence of Representative-elect Boggs.”<sup>13</sup>

A precedent of potentially more relevance in declaring a “vacancy” exists in the House of Representatives that involved the indefinite, and apparently permanent, incapacity of a Member-elect. In the case of Representative Gladys Noon Spellman, the Member-elect’s physical inability to attend the session of Congress was at issue. Representative Spellman suffered a cardiac arrest while campaigning for re-election in October of 1980 and fell into a coma. Mrs. Spellman was then re-elected in November, but she remained in a deep coma at the beginning of the new Congress in January of 1981. By February of 1981, it was becoming apparent that Representative Spellman might never come out of the coma, and the Attending Physician to the United States Congress, on February 20, 1981, when requested by the Speaker of the House to make a determination, expressed the opinion to the Speaker of the House that upon his consultations and observances, “there is no likelihood that she will be able to serve out her term of office.”<sup>14</sup> The House then adopted a simple resolution, noting that “the most recent medical information provided to the Speaker indicates that there is no likelihood that Representative-elect Gladys Noon Spellman will recover sufficiently to be able to take the oath of office and serve as a Member of this House,” and then declaring a “vacancy” in the House from that congressional district,<sup>15</sup> triggering the vacancy provision for the State of Maryland.

In looking at these precedents, it is obvious that several features distinguish them from the situation and concerns regarding a sitting Member of either House who is deemed to be “incapacitated.” Initially, in the case of the acceptance of incompatible offices, the Members involved arguably took some specific voluntary action to, in effect, vacate their seats, which may be considered tantamount to, and was described in some precedents as, a “virtual resignation,” and the Senate or the House then recognized such actions by those Members in declaring the seats vacant. In the case of Representative Hale Boggs, the late Member was at the time of the declaration of a vacancy a Member-elect to the new Congress who, having not shown up to take the constitutionally required oath of office for the new Congress,<sup>16</sup> was presumed to be dead, and the vacancy based on that assumption was declared.

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<sup>13</sup> H.Res. 1, 93<sup>rd</sup> Congress, 119 *Congressional Record* 15-16, January 3, 1973. See also Washington Post, November 9, 1972, at A25; Washington Star, December 7, 1972, at A16; Washington Post, December 8, 1972, at A7; New York Times, December 13, 1972, at 48; 2 *Deschler’s Precedents*, Ch. 8, § 9.5; *Congressional Quarterly, Congress and the Nation*, Volume III, 1969-1972, at 24.

<sup>14</sup> 127 *Congressional Record* 2917, February 24, 1981.

<sup>15</sup> H.Res. 80, 97<sup>th</sup> Congress, 127 *Congressional Record* 2916 - 2917, February 24, 1981.

<sup>16</sup> Article VI, clause 3.

In the case of the incapacity of Representative Spellman, there was no indication or finding that Mrs. Spellman was not “duly elected” by her constituents, nor was there any finding that she had not met the other three standing qualifications for office, that of “age,” “citizenship,” and “inhabitaney” in the state from where elected. Similarly, no express constitutional nor inherent disqualification was cited, and thus, in light of *Powell v. McCormack*, it would appear the action of the House in 1981 could not be fairly characterized as an “exclusion” of a Member-elect. However, Mrs. Spellman was at the time of the House action a Member-elect to the new Congress, and was deemed not likely to “recover sufficiently to be able to take the oath of office and serve as a Member....” If the decision were one taken merely and strictly on the basis of an inability, incapacity, or impossibility of taking the required oath of office, as opposed to a finding of a general incapacity to perform the functions of the office, then it is possible that this precedent distinguishes incapacities of Members-elect prior to taking (and which prevents them from taking) the constitutionally required oath of office, from those incapacities occurring with respect to a sitting Member of the Senate or the House.<sup>17</sup> A sitting Member of the Senate or the House (who has taken the oath of office and is not merely a Member-elect), who is alive, and who has not resigned or voluntarily accepted an incompatible office, would thus under current precedents appear to be removable only under the “expulsion” authority of each House.<sup>18</sup>

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<sup>17</sup> There may be some argument that the decision of the House in the matter regarding Representative Spellman was not necessarily based entirely and *exclusively* on the inability to take the oath of office, but arguably also on the very real likelihood of Mrs. Spellman not being able to carry out the duties of office, that is, as stated in the resolution, to “serve as a Member.” H.Res. 80, 97<sup>th</sup> Congress, *supra*. The House apparently recognizes *temporary* incapacities of Members-elect who can not attend the beginning of the session of Congress for swearing in because of illness or injury, by authorizing the Speaker, or “another than the Speaker,” to administer the oath of office to the Member-elect “away from the House” (*Deschler’s Precedents, supra* at Ch. 2, § 5, p. 117), and the Senate has also authorized administration of the oath to an absent Senator-elect in his home State on “rare occasions.” *Deschler’s Precedents, supra* at Ch. 2, § 5.24, p. 129. Based on such an interpretation of the House’s Spellman precedent, it would be argued that a seemingly permanent incapacity could create a similar “impossibility” of performing one’s congressional functions, a state of facts of which the institution may also take cognizance, although there has been no precedent in support of this argument with respect to a sitting Member of Congress.

<sup>18</sup> Although an expulsion is generally in the nature of a discipline or punishment of a Member of the Senate, the power to expel has been recognized, first and foremost, as an action based on the self-preservation interests of the Senate (or the House), that is, for the protection of the institution, its Members and its proceedings. Cushing, *supra*, at 250-251, 257-259, 268-270; Story, *supra* at § 835. As discussed in *Deschler’s Precedents*, such proceedings are “rooted in the judgment of the House as to what was necessary or appropriate for it to do to assure the integrity of its legislative performance and its institutional acceptability to the people at large as a serious and responsible instrument of government.” *Deschler’s Precedents, supra* at 174, citing *Powell v. McCormack*, 395 F2d 577, McGowan concurring, at 607 (D.C.Cir. 1968), *rev’d on other grounds*, 395 U.S. 486 (1969). There are no specific “grounds” for an expulsion designated in the Constitution. *Note* Bowman and Bowman, “Article I, Section 5: Congress’ Power to Expel — An Exercise in Self-Restraint,” at 29 *Syracuse Law Review*, 1071, 1089-1090 (1977). Because of the infamy of being an expelled Member, however, and the fact that it requires a 2/3rds approval, expulsions are rare (not occurring in the Senate since the Civil War era), and the act of expulsion of a disabled or incapacitated Member is unlikely.