

**Testimony of Thomas H. Neale, Congressional Research Service
Before the House of Representatives Judiciary Committee, Subcommittee on the
Constitution, Civil Rights, and Civil Liberties and the
Senate Judiciary Committee, Subcommittee on the Constitution
March 11, 2009**

Chairman Conyers, Chairman Feingold, my name is Thomas Neale. I am a member of the staff of the Government and Finance Division of the Congressional Research Service. Thank you for giving me the opportunity to testify this morning on the question of Senate vacancies, and the means by which they may be filled. I have prepared testimony in the form of my report, *Filling Senate Vacancies: Perspectives and Contemporary Developments*, which is available for inclusion in the record.

The presidential election of 2008 resulted, directly and indirectly, in the highest number of Senate vacancies within a short period in more than 60 years. The election of incumbent Senators as President and Vice President, combined with subsequent cabinet appointments, resulted in four Senate vacancies, in Colorado, Delaware, Illinois and New York, all states in which the governor is empowered to appoint a temporary replacement. Protracted controversies surrounding the replacement process in two of these states have drawn scrutiny and criticism of not only these particular circumstances, but of the temporary appointment process itself.

While the process of appointing temporary replacements to fill Senate vacancies has come under examination since the presidential election, the practice itself is as old as the Constitution, having been incorporated in the original document by the founders at the Constitutional Convention.

The practice was revised by the 17th Amendment, which became effective in 1913. The amendment's primary purpose was to substitute direct popular election of Senators for the original provision of election by state legislatures, but it also changed the requirements for filling Senate vacancies, by specifically directing the state governors to "issue writs of election to fill such [Senate] vacancies." At the same time, it preserved the appointment option by authorizing state legislatures to "empower the executive thereof (i.e., the state governor) to make temporary appointments until the people fill the vacancies by election as the legislature may direct." The record of congressional deliberations shows that the appointments provision was not controversial, but that, rather, the primary conflict centered on a proposal that would have eliminated the Article I Section 4 power of Congress to override state provisions regarding the "Times, Places, and Manner of holding Elections for Senators "

Since the 17th Amendment was ratified in 1913, the appointment by governors of interim Senators has remained the predominant practice in the states, with the appointees serving until a special election is held. State provisions differ as to when the special election should be scheduled, but appointed Senators generally serve well under two years, and their terms usually expire immediately upon certification of the special election results. At present 45 states follow some variation of this practice.

Most state governors have broad authority to fill Senate vacancies, provided the appointee meets constitutional requirements for the office, but here again, variations exist

in state practice. Four states seek to guarantee that a departed incumbent will be replaced by one of the same party, thus respecting the public's choice in the previous election. Arizona requires appointed Senators to be of the same political party as the prior incumbent, while Hawaii, Utah and Wyoming require the governor to choose a temporary Senator from a list of three names submitted by the previous incumbent's party apparatus. It should be noted that some legal commentators have questioned these provisions, suggesting that they place additional qualifications beyond the constitutional ones of age, citizenship and state residence at the time of election.

Over the 96 years since ratification of the 17th Amendment, 184 Senate vacancies have been filled by the appointment of 181 individuals -- three individuals have been appointed twice to fill Senate vacancies. This appointments process has generated relatively few controversies, prior to the present. Most of these centered on occasions when the incumbent state governor resigned after a Senate vacancy occurred, and was appointed to fill the vacancy by his successor. In almost all such instances, the governor-turned-appointed-Senator was defeated in the subsequent election.

At present three states -- Massachusetts, Oregon and Wisconsin -- do not permit gubernatorial appointments, requiring special elections to fill Senate vacancies. A fourth, Oklahoma, allows the governor to appoint only the winner of a special election, and then, only to fill out the expiring term. A fifth state, Alaska has passed both legislation and a referendum item providing for special elections, but the statute retained the governor's power to appoint in the interim, while the referendum eliminated it entirely. Given the conflict, the official reviser's notes cast doubt on the governor's appointment authority.

As the controversy surrounding gubernatorial appointments has grown since the 2008 presidential election, legislation that would curtail or eliminate the governor's appointment power has been introduced in the current sessions of no fewer than eight state legislatures: Colorado, Connecticut, Illinois, Iowa, Maryland, Minnesota, New York and Vermont.

A number of factors may suggest themselves to Congress as the committees consider Senate Joint Resolution 7 and House Joint Resolution 21. These may include, but will almost certainly not be limited to, arguments in favor of a more democratic means of filling vacancies compared with those of preserving a traditional state option; questions of the costs associated with special Senate elections, which would be borne by state and local governments; and, in the post-9-11 era, the comparative advisability of appointments as opposed to special elections in the event of an attack resulting in the death or incapacity of a large number of Senators.

I thank the chairmen and members of the committees for their attention and would be happy to respond to any questions.