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Senate Consideration of Presidential Nominations: Committee and Floor Procedure

Updated April 4, 2019

Congressional Research Service
https://crsreports.congress.gov
RL31980

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

Article II, Section 2, of the Constitution provides that the President shall appoint officers of the United States "by and with the Advice and Consent of the Senate." This report describes the process by which the Senate provides advice and consent on presidential nominations, including receipt and referral of nominations, committee practices, and floor procedure.

Committees play the central role in the process through investigations and hearings. Senate Rule XXXI provides that nominations shall be referred to appropriate committees "unless otherwise ordered." Most nominations are referred, although a Senate standing order provides that some "privileged" nominations to specified positions will not be referred unless requested by a Senator. The Senate rule concerning committee jurisdictions (Rule XXV) broadly defines issue areas for committees, and the same jurisdictional statements generally apply to nominations as well as legislation. A committee often gathers information about a nominee either before or instead of a formal hearing. A committee considering a nomination has four options. It can report the nomination to the Senate favorably, unfavorably, or without recommendation, or it can choose to take no action. It is more common for a committee to take no action on a nomination than to reject a nominee outright.

The Senate handles executive business, which includes both nominations and treaties, separately from its legislative business. All nominations reported from committee are listed on the *Executive Calendar*, a separate document from the *Calendar of Business*, which lists pending bills and resolutions. Generally speaking, the majority leader schedules floor consideration of nominations on the Calendar. Nominations are considered in "executive session," a parliamentary form of the Senate in session that has its own journal and, to some extent, its own rules of procedure.

The Senate can call up a nomination expeditiously, because a motion to enter executive session to consider a specific nomination on the Calendar is not debatable. This motion requires a majority of Senators present and voting, a quorum being present, for approval.

After a nomination has been called up, the question before the Senate is "will the Senate advise and consent to this nomination?" A majority of Senators voting is required to approve a nomination. However, Senate rules place no limit on how long a nomination may be debated, and ending consideration could require invoking cloture. On April 6, 2017, the Senate reinterpreted Rule XXII in order to allow cloture to be invoked on nominations to the Supreme Court by a majority of Senators voting. This expanded the results of similar actions taken by the Senate in November 2013, which changed the cloture vote requirement to a majority for nominations other than to the Supreme Court. After the 2013 decision, the number of nominations subjected to a cloture process increased.

On April 3, 2019, the Senate reinterpreted Rule XXII again. The Senate reduced, from 30 hours to 2 hours, the maximum time nominations can be considered after cloture has been invoked. This change applied to all executive branch nominations except to high-level positions such as heads of departments, and it applied to all judicial nominations except to the Supreme Court and the U.S. Circuit Court of Appeals. The full impact of this change is difficult to assess at this time, but it is likely to shorten the time between a cloture vote and a vote on the nomination. If Senators respond as they did to the last reinterpretation of the cloture rule, it might also increase the number of nominations subjected to a cloture process.

Nominations that are pending when the Senate adjourns *sine die* at the end of a session or recesses for more than 30 days are returned to the President unless the Senate, by unanimous consent, waives the rule requiring their return (Senate Rule XXXI, clause 6). If a nomination is returned, and the President still desires Senate consideration, he must submit a new nomination.

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Introduction

Article II, Section 2, of the Constitution provides that the President shall appoint officers of the United States "by and with the Advice and Consent of the Senate." The method by which the Senate provides advice and consent on presidential nominations, referred to broadly as the confirmation process, serves several purposes. First, largely through committee investigations and hearings, the confirmation process allows the Senate to examine the qualifications of nominees and any potential conflicts of interest. Second, Senators can influence policy through the confirmation process, either by rejecting nominees or by extracting promises from nominees before granting consent. Also, the Senate sometimes has delayed the confirmation process in order to increase its influence with the executive branch on unrelated matters.

Senate confirmation is required for several categories of government officials. Military appointments and promotions make up the majority of nominations, approximately 65,000 per two-year Congress, and most are confirmed routinely. Each Congress, the Senate also considers approximately 2,000 civilian nominations, and, again, many of them, such as appointments to or promotions in the Foreign Service, are routine. Civilian nominations considered by the Senate also include federal judges and specified officers in executive departments, independent agencies, and regulatory boards and commissions.

Many presidential appointees are confirmed routinely by the Senate. With tens of thousands of nominations each Congress, the Senate cannot possibly consider them all in detail. A regularized process facilitates quick action on thousands of government positions. The Senate may approve *en bloc* hundreds of nominations at a time, especially military appointments and promotions.

The process also allows for close scrutiny of candidates when necessary. Each year, a few hundred nominees to high-level positions are regularly subject to Senate investigations and public hearings. Most of these are routinely approved, while a small number of nominations are disputed and receive more attention from the media and Congress. Judicial nominations, particularly Supreme Court appointees, are generally subject to greater scrutiny than nominations to executive posts, partly because judges may serve for life.[1] Among the executive branch positions, nominees for policymaking positions are more likely to be examined closely, and are slightly less likely to be confirmed, than nominees for non-policy positions.[2]

There are several reasons that the Senate confirms a high percentage of nominations. Most nominations and promotions are not to policymaking positions and are of less interest to the Senate. In addition, some sentiment exists in the Senate that the selection of persons to fill executive branch positions is largely a presidential prerogative. Historically, the President has been granted wide latitude in the selection of his Cabinet and other high-ranking executive branch officials.[3]

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[1] For more information on the consideration of Supreme Court nominations, see CRS Report RL33225, *Supreme Court Nominations, 1789 to 2017: Actions by the Senate, the Judiciary Committee, and the President*, by Barry J. McMillion and Denis Steven Rutkus; CRS Report RL33247, *Supreme Court Nominations: Senate Floor Procedure and Practice, 1789-2011*, by Richard S. Beth and Betsy Palmer; CRS Report RL31989, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate*, by Barry J. McMillion and Denis Steven Rutkus; and CRS Report RL33118, *Speed of Presidential and Senate Actions on Supreme Court Nominations, 1900-2010*, by R. Sam Garrett and Denis Steven Rutkus.

[2] CRS Report 93-464, *Senate Action on Nominations to Policy Positions in the Executive Branch, 1981-1992*, by Rogelio Garcia. (For a copy of this out-of-print CRS report, congressional clients may contact Elizabeth Rybicki.)

[3] Joseph P. Harris, *The Advice and Consent of the Senate* (New York: Greenwood Press Publishers, 1968), p. 2; Richard Allan Baker, "Legislative Power Over Appointments and Confirmations," in Joel Silbey, ed., *Encyclopedia of*

Another important reason for the high percentage of confirmations is that Senators are often involved in the nomination stage. The President would prefer a smooth and fast confirmation process, so he may decide to consult with Senators prior to choosing a nominee. Senators most likely to be consulted, typically by White House congressional relations staff, are Senators from a nominee's home state, leaders of the committee of jurisdiction, and leaders of the President's party in the Senate. Senators of the President's party are sometimes invited to express opinions or even propose candidates for federal appointments in their own states.[4] There is a long-standing custom of "senatorial courtesy," whereby the Senate will sometimes decline to proceed on a nomination if a home-state Senator expresses opposition.[5] Positions subject to senatorial courtesy include U.S. attorneys, U.S. marshals, and U.S. district judges.

Over the past decade, Senators have expressed concerns over various aspects of the confirmation process, including the rate of confirmation for high-ranking executive branch positions and judgeships, as well as the speed of Senate action on routine nominations. When the Senate is controlled by the party of the President, this concern has often been raised as a complaint that minority party Senators are disputing a higher number of nominations, and have increasingly used their leverage under Senate proceedings to delay or even block their consideration.[6] These concerns have led the Senate to make several changes to the confirmation process since 2011. The changes are taken into account in the following description of the process and are described in detail in other CRS Reports.[7]

Receipt and Referral and "Privileged Nominations"

The President customarily sends nomination messages to the Senate in writing. Once received, nominations are numbered by the executive clerk and read on the floor. The clerk actually assigns numbers to the presidential messages, not to individual nominations, so a message listing several nominations would receive a single number. Except by unanimous consent, the Senate cannot vote on nominations the day they are received, and most are referred immediately to committees.

Senate Rule XXXI provides that nominations shall be referred to appropriate committees "unless otherwise ordered." A standing order of the Senate provides that some nominations to specified positions will not be referred unless a Senator requests referral.[8] Instead of being immediately

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the American Legislative System (New York: C. Scribner's Sons, 1994), vol. 3, p. 1616.

[4] "Report of the Task Force on the Confirmation Process," *Congressional Record*, vol. 138 (February 4, 1992), pp. 1348-1352.

[5] For more on senatorial courtesy and its history, see CRS Report RL34405, *Role of Home State Senators in the Selection of Lower Federal Court Judges*, by Barry J. McMillion and Denis Steven Rutkus and CRS Report RL31948, *Evolution of the Senate's Role in the Nomination and Confirmation Process: A Brief History*, by Betsy Palmer (available to congressional clients on request from the author).

[6] Sen. Bill Frist, "Judicial Nominations," *Congressional Record*, daily edition, vol. 149 (November 12, 2003), pp. S14528-S14529; Sen. Bill Frist, "Fulfilling Duty, Preserving Legacy: Nominee Confirmations," *Congressional Record*, daily edition, vol. 152 (December 6, 2006), p. S115999; Sen. Harry Reid, "Stopping Progress," *Congressional Record*, daily edition, October 31, 2009, pp. S10946-S10947; Sen. Harry Reid, "Rules Reform," *Congressional Record*, daily edition, vol. 159 (November 21, 2013), pp. S8414-S8415.

[7] CRS Report R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, by Maeve P. Carey; CRS Report R42996, *Changes to Senate Procedures at the Start of the 113th Congress Affecting the Operation of Cloture (S.Res. 15 and S.Res. 16)*, by Elizabeth Rybicki; CRS Report R43331, *Majority Cloture for Nominations: Implications and the "Nuclear" Proceedings of November 21, 2013*, by Valerie Heitshusen and CRS Report R44819, *Senate Proceedings Establishing Majority Cloture for Supreme Court Nominations: In Brief*, by Valerie Heitshusen.

[8] S.Res. 116, 112th Congress.

referred, the nominations are instead listed in a special section of the *Executive Calendar*, a document distributed daily to congressional offices and available online.[9] This section of the Calendar is titled "Privileged Nominations." After the chair of the committee with jurisdiction over a nomination has notified the executive clerk that biographical and financial information on the nominee has been received, this is indicated in the Calendar. After 10 days, the nomination is moved from the "Privileged Nominations" section of the Calendar and placed on the "Nominations" section with the same status as a nomination that had been reported by a committee. (See "Executive Calendar" below.) Importantly, at any time that the nomination is listed in the new section of the *Executive Calendar*, any Senator can request that a nomination be referred, and it is then sent to the appropriate committee of jurisdiction.[10]

Formally the presiding officer, but administratively the executive clerk's office, refers the nominations to committees according to the Senate's rules and precedents. The Senate rule concerning committee jurisdictions (Rule XXV) broadly defines issue areas for committees, and the same jurisdictional statements generally apply to nominations as well as legislation.[11] An executive department nomination can be expected to be referred to the committee with jurisdiction over legislation concerning that department or to the committee that handled the legislation creating the position. Judicial branch nominations, including judges, U.S. attorneys, and U.S. marshals, are under the jurisdiction of the Judiciary Committee. In some instances, the committee of jurisdiction for a nomination has been set in statute.[12]

The number of nominations referred to various committees differs considerably. The Committee on Armed Services, which handles all military appointments and promotions, receives the most. The two other committees with major confirmation responsibilities are the Committee on the Judiciary, with its jurisdiction over nominations in the judicial branch, and the Committee on Foreign Relations, which considers ambassadorial and other diplomatic appointments.

Occasionally, nominations are referred to more than one committee, either jointly or sequentially. A joint referral might occur when the jurisdictional claim of two committees is essentially equal. In such cases, both committees must report on the nomination before the whole Senate can act on it, unless the Senate discharges one or both committees. If two committees have unequal jurisdictional claims, then the nomination is more likely to be sequentially referred. In this case, the first committee must report the nomination before it is sequentially referred to the second committee. The second referral often is subject to a requirement that the committee report within a certain number of days. Typically, nominations are jointly or sequentially referred by unanimous consent. Sometimes the unanimous consent agreement applies to all future nominations to a position or category of positions.[13]

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[9] See CRS Report 98-438, *The Senate's Executive Calendar*, coordinated by Elizabeth Rybicki.

[10] For more information on the standing order, see CRS Report R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, by Maeve P. Carey.

[11] For a list of appointee positions requiring Senate confirmation and the committees to which they are referred, see CRS Report RL30959, *Presidential Appointee Positions Requiring Senate Confirmation and Committees Handling Nominations*, by Christopher M. Davis and Michael Greene.

[12] For example, nominations of two members of the Thrift Depositor Protection Oversight Board are referred to the Committee on Banking, Housing, and Urban Affairs (12 U.S.C. 1441a). Nominations of the U.S. Trade Representative and Deputy U.S. Trade Representative are referred to the Committee on Finance (19 U.S.C. 2171).

[13] See, for example, "Joint Referral of Department of Energy Nominations," *Congressional Record*, vol. 136 (June 28, 1990), pp. 16573-16574.

Committee Procedures

Written Rules

Most Senate committees that consider nominations have written rules concerning the process. Although committee rules vary, most contain standards concerning information to be gathered from a nominee. Many committees expect a biographical résumé and some kind of financial statement listing assets and liabilities. Some specify the terms under which financial statements will or will not be made public.

Committee rules also frequently contain timetables outlining the minimum layover required between committee actions. A common timing provision is a requirement that nominations be held for one or two weeks before the committee proceeds to a hearing or a vote, permitting Senators time to review a nomination before committee consideration. Other committee rules specifically mandate a delay between steps of the process, such as the receipt of pre-hearing information and the date of the hearing, or the distribution of hearing transcripts and the committee vote on the nomination. Some of the written rules also contain provisions for the rules to be waived by majority vote, by unanimous consent, or by the chair and the ranking minority Member.[14]

Investigations

Committees often gather and review information about a nominee either before or instead of a formal hearing. Because the executive branch acts first in selecting a nominee, congressional committees are sometimes able to rely partially on any field investigations and reports conducted by the Federal Bureau of Investigation (FBI). Records of FBI investigations are provided only to the White House, although a report or a summary of a report may be shared, with the President's authorization, with Senators on the relevant committee. The practices of the committees with regard to FBI materials vary. Some rarely if ever request them. On other committees, the chair and ranking Member review any FBI report or summary, but on some committees these materials are available to any Senator upon request. Committee staff usually do not review FBI materials.

Almost all nominees are also asked by the Office of the Counsel to the President to complete an "Executive Personnel Financial Disclosure Report, SF-278," which is reviewed and certified by the relevant agency as well as the Director of the Office of Government Ethics. The documents are then forwarded to the relevant committee, along with opinion letters from ethics officers in the relevant agency and the director of the Office of Government Ethics. In contrast to FBI reports, financial disclosure forms are made public. All committees review financial disclosure reports and some make them available in committee offices to Members, staff, and the public.

To varying degrees, committees also conduct their own information-gathering exercises. Some committees, after reviewing responses to their standard questionnaire, might ask a nominee to complete a second questionnaire. Committees frequently require that written responses to these questionnaires be submitted before a hearing is scheduled. The Committee on the Judiciary sends form letters, sometimes called "blue slips," to Senators from a nominee's home state to determine whether they support the nomination.[15] The Committee on the Judiciary also has its own

[14] For more information on committee rules concerning nominations, see Table 3 in CRS Report R44901, *Senate Committee Rules in the 115th Congress: Key Provisions*, by Valerie Heitshusen.

[15] For more information, see CRS Report RL34405, *Role of Home State Senators in the Selection of Lower Federal Court Judges*, by Barry J. McMillion and Denis Steven Rutkus.

investigative staff. The Committee on Rules and Administration handles relatively few nominations and conducts its own investigations, sometimes with the assistance of the FBI or the Government Accountability Office (GAO).

It is not unusual for nominees to meet with committee staff prior to a hearing. High-level nominees may meet privately with Senators. Generally speaking, these meetings, sometimes initiated by the nominee, serve basically to acquaint the nominee with the Members and committee staff, and vice versa. They occasionally address substantive matters as well. A nominee also might meet with the committee's chief counsel to discuss the financial disclosure report and any potential conflict-of-interest issues.

Hearings

Historically, approximately half of all civilian appointees were confirmed without a hearing.[16] All committees that receive nominations do hold hearings on some nominations, and the likelihood of hearings varies with the importance of the position and the workload of the committee. The Committee on the Judiciary, for example, which receives a large number of nominations, does not usually hold hearings for U.S. attorneys, U.S. marshals, or members of part-time commissions. The Committee on Agriculture, Nutrition, and Forestry and the Committee on Energy and Natural Resources, on the other hand, typically hold hearings on most nominations that are referred to them. Committees often combine related nominations into a single hearing.

The length and nature of hearings varies. One or both home-state Senators will often introduce a nominee at a hearing. The nominee typically testifies at the hearing, and occasionally the committee will invite other witnesses, including Members of the House of Representatives, to testify as well. Some hearings function as routine welcomes, while others are directed at influencing the policy program of an appointee. In addition to policy views, hearings might address the nominee's qualifications and potential conflicts of interest. Senators also might take the opportunity to ask questions of particular concern to them or their constituents.

Committees sometimes send questions to nominees in advance of a hearing and ask for written responses. Nominees also might be asked to respond in writing to additional questions after a hearing. Especially for high-level positions, the nomination hearing may be only the first of many times an individual will be asked to testify before a committee. Therefore, the committee often gains a commitment from the nominee to be cooperative with future oversight activities of the committee.[17]

Hearings, under Senate Rule XXVI, are open to the public unless closed by majority vote for one of the reasons specified in the rule. Witness testimony is sometimes made available online through the website of the relevant committee and also through several commercial services, including Congressional Quarterly. Most committees print the hearings, although no rule requires it. The number of Senators necessary to constitute a quorum for the purpose of taking testimony varies from committee to committee, but it is usually smaller than a majority of the membership.[18]

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[16] The estimate excludes military appointees as well as civilian appointees usually submitted on lists to the Senate. Civilian nominations usually submitted on lists include appointments to, and promotions in, the Foreign Service, and prior to October 9, 2012 (when P.L. 112-166 took effect) appointments to, and promotions in, the National Oceanic and Atmospheric Administration and Public Health Service.

[17] Roger H. Davidson and Walter J. Oleszek, *Congress and Its Members*, 9th ed. (Washington: CQ Press, 2004), p. 324.

[18] For more details concerning hearings, see CRS Report 98-337, *Senate Committee Hearings: Scheduling and Notification*, by Valerie Heitshusen.

Reporting

A committee considering a nomination has four options. It may report the nomination to the Senate favorably, unfavorably, or without recommendation, or it may choose to take no action at all. It is more common for a committee to take no action on a nomination than to report unfavorably. Particularly for policymaking positions, committees sometimes report a nomination favorably, subject to the commitment of the nominee to testify before a Senate committee. Sometimes, committees choose to report a nomination without recommendation. Even if a majority of Senators on a committee do not agree that a nomination should be reported favorably, a majority might agree to report a nomination without a recommendation in order to permit a vote by the whole Senate.

The timing of a vote to report a nomination varies in accordance with committee rules and practice. Most committees do not vote to report a nomination on the same day that they hold a hearing, but instead wait until the next meeting of the committee. Senate Rule XXVI, clause 7(a)(1) requires that a quorum for making a recommendation on a nomination consist of a majority of the membership of the committee. In most cases, the number of Senators necessary to constitute a quorum for making a recommendation on a nomination to the Senate is the same that the committee requires for reporting a measure. Every committee reports a majority of nominations favorably.

Most of the time, committees do not formally present reports on nominations on the floor of the Senate. Instead, committee staff prepare the appropriate paperwork on behalf of the committee chair and file it with the clerk. The executive clerk then arranges for the nomination to be printed in the *Congressional Record* and placed on the *Executive Calendar*. If a report were presented on the floor, it would have to be done in executive session. Executive session and the *Executive Calendar* will be discussed in the next section. According to Senate Rule XXXI, the Senate cannot vote on a nomination the same day it is reported except by unanimous consent.[19]

Discharging a Committee from Consideration of a Nomination

It is fairly common for the Senate to discharge a committee from consideration of an unreported nomination by unanimous consent. This removes the nomination from the committee in order to allow the full Senate to consider it. When the Senate discharges a committee by unanimous consent, it is doing so with the support of the committee for the purposes of simplifying the process.

It is unusual for Senators to attempt to discharge a committee by motion or resolution, instead of by unanimous consent, and only a few attempts have ever been successful.[20] Senate Rule XVII does permit any Senator to submit a motion or resolution that a committee be discharged from the consideration of a subject referred to it. The discharge process, however, does not allow a simple majority to quickly initiate consideration of a nomination still in committee. It requires several steps and, most notably, a motion or resolution to discharge is debatable. This means that a

[19] The reference in the rule to a "day" refers to a calendar day, not a legislative day. See Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, 101st Cong., 2nd sess., S.Doc. 101-28 (Washington: GPO, 1992) (hereinafter *Riddick's Senate Procedure)*, p. 943. A legislative day begins the first time the Senate meets after an adjournment and ends when the Senate adjourns again. A legislative day is not necessarily a calendar day because the Senate does not always adjourn each calendar day.

[20] For a detailed description of the discharge process and the five instances since 1916 when discharge was successful, see CRS congressional distribution memorandum, "Discharging a Committee from Consideration of a Nomination: Current Procedure and Historical Practice," by Michael Greene and Elizabeth Rybicki (available to congressional clients on request from the authors).

cloture process may be necessary to discharge a committee. Cloture on a discharge motion or resolution requires the support of three-fifths of the Senate, usually 60 Senators, and several days.

Floor Procedures

The Senate handles executive business, which includes both nominations and treaties, separately from its legislative business. All nominations reported from committee, regardless of whether they were reported favorably, unfavorably, or without recommendation, are listed on the *Executive Calendar*, a separate document from the *Calendar of Business*, which lists pending bills and resolutions. Usually, the majority leader schedules the consideration of nominations on the Calendar. Nominations are considered in executive session, a parliamentary form of the Senate in session that has its own journal and, to some extent, its own rules of procedure.

Executive Calendar

After a committee reports a nomination or is discharged from considering it, the nomination is assigned a number by the executive clerk and placed on the *Executive Calendar*. Under a standing order of the Senate, certain nominations might also be placed in this status on the *Executive Calendar* after certain informational and time requirements are met.[21] The list of nominations in the *Executive Calendar* includes basic information such as the name and office of the nominee, the name of the previous holder of the office, and whether the committee reported the nomination favorably, unfavorably, or without recommendation. Long lists of routine nominations are printed in the *Congressional Record* and identified only by a short title in the *Executive Calendar*, such as "Foreign Service nominations (84) beginning John F. Aloia, and ending Paul G. Churchill." In addition to reported nominations and treaties, the *Executive Calendar* contains the text of any unanimous consent agreements concerning executive business.

The *Executive Calendar* is distributed to Senate personal offices and committee offices when there is business on it. It is also available online by following the link to "Calendars and Schedules" on the Virtual Reference Desk under the Reference tab of the Senate website (www.Senate.gov).[22]

Executive Session

Business on the *Executive Calendar*, which consists of nominations and treaties, is considered in executive session. In contrast, all measures and matters associated with lawmaking are considered in legislative session. Until 1929 executive sessions were also closed to the public, but now they are open unless ordered otherwise by the Senate.

The Senate usually begins the day in legislative session and enters executive session either by a non-debatable motion or, far more often, by unanimous consent. Only if the Senate adjourned or recessed while in executive session would the next meeting automatically open in executive session. The motion to go into executive session can be offered at any time, is not debatable, and cannot be laid upon the table.

All business concerning nominations, including seemingly routine matters such as requests for joint referral or motions to print hearings, must be done in executive session. In practice, Senators

[21] S.Res. 116, 112th Congress. See discussion above under "Receipt and Referral," and CRS Report R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, by Maeve P. Carey.

[22] See also CRS Report 98-438, *The Senate's Executive Calendar*, coordinated by Elizabeth Rybicki.

often make such motions or unanimous consent requests "as if in executive session." These usually brief proceedings during a legislative session do not constitute an official executive session. In addition, at the start of each Congress, the Senate adopts a standing order, by unanimous consent, that allows the Senate to receive nominations from the President and for them to be referred to committees even on days when the Senate does not meet in executive session.

Taking Up a Nomination

The majority leader, by custom, makes most motions and requests that determine when or whether a nomination will be called up for consideration. For example, the majority leader may move or ask unanimous consent to "immediately proceed to executive session to consider the following nomination on the Executive Calendar...." By precedent, the motion to go into executive session to take up a specified nomination is not debatable.[23] The nomination itself, however, is debatable.

It is not in order for a Senator to move to consider a nomination that is not on the Calendar, and, except by unanimous consent, a nomination on the Calendar cannot be taken up until it has been on the Calendar at least one day (Rule XXXI, clause 1). A day for this purpose is a calendar day. In other words, a nomination reported and placed on the Calendar on a Monday can be considered on Tuesday, even if it is the same legislative day.[24]

If the Senate simply resolved into executive session, the business immediately pending would be the first item on the *Executive Calendar*. A motion to proceed to another matter on the Calendar would be debatable and subject to a filibuster. For this reason, the Senate does not begin consideration of executive business this way. Instead, the motion made to call up a nomination is a motion to proceed to executive session to consider that specific nomination. If the Senate is already in executive session, and the Leader wishes to call up a nomination, the Leader will first move that the Senate enter legislative session and then that the Senate enter executive session to take up the nomination. Both motions (to enter legislative session and to enter executive session) are not subject to debate and are decided by a simple majority. Typically they are approved by voice vote.

Consideration and Disposition

The question before the Senate when a nomination is taken up is "will the Senate advise and consent to this nomination?" The Senate can approve or reject a nomination.[25] A majority of Senators present and voting, a quorum being present, is required to approve a nomination.

According to Senate Rule XXXI, any Senator who voted with the majority on the nomination has the option of moving to reconsider a vote on the day of the vote or the next two days the Senate meets in executive session. Only one motion to reconsider is in order on each nomination, and often the motion to reconsider is laid upon the table, by unanimous consent, shortly after the vote

[23] *Riddick's Senate Procedure*, p. 941.

[24] The reference in Senate Rule XXXI, clause 1 to a "day" refers to a calendar day, not a legislative day. See *Riddick's Senate Procedure*, p. 943. See footnote 19 for a definition of a legislative day.

[25] In addition to approving and rejecting a nomination, the Senate has the option of sending a nomination back to a committee for further consideration. Although infrequently used, the motion to recommit is available and may allow a panel to reconsider its recommendation when information concerning a nominee comes to light after the committee has reported to the full Senate.

on the nomination. This action prevents any subsequent attempt to reconsider.[26] After the Senate acts on a nomination, the Secretary of the Senate attests to a resolution of confirmation or disapproval and transmits it to the White House.

Many nominations are brought up by unanimous consent and approved without objection; routine nominations often are grouped by unanimous consent in order to be brought up and approved together, or *en bloc*. A small proportion of nominations, generally to higher-level positions, may need more consideration. When there is debate on a nomination, the chair of the committee usually makes an opening speech. For positions within a state, Senators from the state may wish to speak on the nominee, particularly if they were involved in the selection process. Under Senate rules, there are no time limits on debate except when conducted under cloture or a unanimous consent agreement.

Cloture

Senate Rule XXII provides a means to bring debate on a nomination to a close, if necessary.[27] Under the terms of Rule XXII, at least 16 Senators sign a cloture motion to end debate on a pending nomination. The motion proposed is "to bring to a close the debate upon [the pending nomination]." A Senator can interrupt a Senator who is speaking to present a cloture motion. Cloture may be moved only on a question that is pending before the Senate; therefore, absent unanimous consent, the Senate must be in executive session and considering the nomination when the motion is filed. After the clerk reads the motion, the Senate returns to the business it was considering before the presentation of the motion.

Unless a unanimous consent agreement provides otherwise, the Senate does not vote on the cloture motion until the second day of session after the day it is presented; for example, if the motion was presented on a Monday, the Senate would act on it on Wednesday. One hour after the Senate has convened on the day the motion "ripened," the presiding officer can interrupt the proceedings during an executive session to present a cloture motion for a vote. If the Senate is in legislative session when the time arrives for voting on the cloture motion, it proceeds into executive session prior to taking action on the cloture petition.

According to Rule XXII, the presiding officer first directs the clerk to call the roll to ascertain that a quorum is present, although this requirement is often waived by unanimous consent. Senators then vote either yea or nay on the question: "Is it the sense of the Senate that the debate shall be brought to a close?"

In April 2017, the Senate reinterpreted Rule XXII in order to allow cloture to be invoked on all nominations by a majority of Senators voting (a quorum being present), including Supreme Court justice nominations.[28] This expanded the results of similar actions taken by the Senate in

[26] Senate Rule XXXI requires that the Secretary of the Senate wait until the time for moving to reconsider has expired before sending notice to the President; in practice, however, notice is usually sent immediately, permitted by unanimous consent. If notice has already been sent to the President, a motion to reconsider is accompanied by a request to the President to return the nomination. If the President does not comply with the request, the Senate cannot reconsider the nomination (*Riddick's Senate Procedure*, p. 948).

[27] Although Senate rules have permitted cloture to be moved on nominations since 1949, cloture was not sought on a judicial nomination until 1968 or on an executive branch nomination until 1980. For data on the nominations subjected to cloture attempts through the reinterpretation of the cloture rule in 2013, see CRS Report RL32878, *Cloture Attempts on Nominations: Data and Historical Development Through November 20, 2013*, by Richard S. Beth, Elizabeth Rybicki, and Michael Greene.

[28] *Congressional Record*, daily edition, vol. 163 (April 6, 2017), pp. S2388-S2390.

November 2013, which changed the cloture vote requirement to a majority for nominations *except* to the Supreme Court.[29]

Once cloture is invoked, for most nominations there can be a maximum of two hours of post-cloture consideration. The two hour maximum includes debate as well as any actions taken while the nomination is formally pending, including quorum calls.[30] If cloture is invoked on nominations to the highest ranking executive branch positions, or on nominations to the Supreme Court or the U.S. Circuit Court of Appeals, then the maximum time for consideration after cloture is invoked is 30 hours (see **Table 1**). Under the rule, the 2 or 30 hours is floor time spent considering the nomination in the Senate, not simply the passage of time. Thus, for time to count against the 2 or 30-hour maximum, the Senate must be in session and the question must be pending. Time spent in recess or adjournment does not count, and if the Senate were to take up other business by unanimous consent, the time spent on that other business also would not count against the post-cloture time.

Table 1. Maximum Number of Hours of Post-Cloture Consideration of Nominations

Pursuant to a Reinterpretation of Senate Rules on April 3, 2019

Nomination	Maximum Consideration
U.S. district courts and all other judicial positions except the U.S. Supreme Court and the U.S. Circuit Court of Appeals	2 hours
All executive branch positions except 21 high level positions	2 hours
21 high level executive branch positions, including the head of each executive department[a]	30 hours
The U.S. Supreme Court and the U.S. Circuit Court of Appeals	30 hours

Source: *Congressional Record*, daily edition, vol. 165 (April 3, 2019), pp. S2220 and S2225.

a. The decision excluded positions "at level I of the Executive Schedule under section 5312 of title 5, United States Code," which, in addition to the 15 heads of departments (14 Secretaries and the Attorney General), includes the United States Trade Representative, the Director of the Office of Management and Budget, the Commissioner of Social Security, the Director of National Drug Control Policy, the Chairman of the Board of Governors of the Federal Reserve System, and the Director of National Intelligence.

Holds

A hold is a request by a Senator to his or her party leader to prevent or delay action on a nomination or a bill. Holds are not mentioned in the rules or precedents of the Senate, and they are enforced only through the agenda decisions of party leaders. A standing order of the Senate aims to ensure that any Senator who places a hold on any matter (including a nomination) make public his or her objection to the matter.[31]

[29] *Congressional Record*, daily edition, vol. 159 (November 21, 2013), pp. S8417-S8418. See also CRS Report R43331, Majority Cloture for Nominations: Implications and the "Nuclear" Proceedings of November 21, 2013, by Valerie Heitshusen and CRS Report R44819, *Senate Proceedings Establishing Majority Cloture for Supreme Court Nominations: In Brief*, by Valerie Heitshusen.

[30] For full details on the cloture process, see CRS Report RL30360, *Filibusters and Cloture in the Senate*, by Valerie Heitshusen and Richard S. Beth.

[31] The standing order can be found in S.Res. 28 of the 112th Congress. For more information concerning holds, see CRS Report R43563, *"Holds" in the Senate*, by Mark J. Oleszek. For more information concerning the history, types, and potency of holds, see CRS Report RL31685, *Proposals to Reform "Holds" in the Senate*, by Walter J. Oleszek.

Senators have placed holds on nominations for a number of reasons. One common purpose is to give a Senator more time to review a nomination or to consult with the nominee. Senators may also place holds because they disagree with the policy positions of the nominee. Senators have also admitted to using holds in order to gain concessions from the executive branch on matters not directly related to the nomination.

The Senate precedents reducing the threshold necessary to invoke cloture on nominations, and the recent precedent reducing the time necessary for a cloture process, could affect the practice of holds. In some sense, holds are connected to the Senate traditions of mutual deference, since they may have originated as requests for more time to examine a pending nomination or bill. The effectiveness of a hold, however, ultimately has been grounded in the power of the Senator placing the hold to filibuster the nomination and the difficulty of invoking cloture to overcome a filibuster. Invoking cloture is now easier because the support of fewer Senators is necessary, and in most cases, the floor time required for a cloture process is less. The large number of nominations submitted by the President for Senate consideration, however, might still lead Senators to seek unanimous consent to quickly approve nominations.

Reduced Post-Cloture Time on Nominations: Some Possible Implications

On April 3, 2019, the Senate reinterpreted Senate Rule XXII to reduce, from 30 hours to 2 hours, the maximum time allowed for consideration of most nominations after cloture is invoked. The Senate took this step by reversing two rulings by the Presiding Officer. The first vote established that "postcloture time under rule XXII for all executive branch nominations other than a position at level 1 of the Executive Schedule under section 5312 of title 5 of the United States Code is 2 hours."[32] On the second vote, the Senate established that "postcloture time under rule XXII for all judicial nominations, other than circuit courts or Supreme Court of the United States, is 2 hours"[33] (see **Table 1**).

It is uncommon for the Senate to reverse a decision by the Presiding Officer.[34] Any Senator can attempt to reverse a ruling by making an appeal, and except in specific cases,[35] appeals are decided by majority vote. In most circumstances, however, appeals are debatable, and therefore supermajority support (through a cloture process) is typically necessary to reach a vote to reverse a decision of the Presiding Officer. In the April 3 proceedings, however, the appeal was raised

[32] The Majority Leader made a point of order that such executive branch nominations were subject to two hours of post-cloture consideration. The Presiding Officer did not sustain the point of order. The Majority Leader appealed the ruling of the Chair, and the Senate voted 51-48 to reverse the ruling. *Congressional Record*, daily edition, vol. 165 (April 3, 2019), p. S2220.

[33] The Majority Leader made a point of order that such judicial branch nominations were subject to two hours of post-cloture consideration. The Presiding Officer did not sustain the point of order. The Majority Leader appealed the ruling of the Chair, and the Senate voted 51-48 to reverse the ruling. *Congressional Record*, daily edition, vol. 165 (April 3, 2019), p. S2225.

[34] Since 1965, the Senate has reversed a decision of the Presiding Officer 36 times. CRS identified reversals through a search of roll call votes, and it is possible (although unlikely) that other reversals occurred without a roll call vote on any associated question. For more information, see CRS congressional distribution memorandum, "Senate Decisions Reversing a Ruling of the Presiding Officer, 1965-March 31, 2017," by Elizabeth Rybicki and Valerie Heitshusen (available to congressional clients on request from the authors).

[35] For example, a limited number of appeals (e.g., in relation to certain points of order under the Congressional Budget Act) require a three-fifths vote to reverse a ruling of the chair. Other appeals are decided by a majority. For more information, see CRS Report 98-306, *Points of Order, Rulings, and Appeals in the Senate*, by Valerie Heitshusen.

after cloture had been invoked. Senate Rule XXII states that after a successful cloture vote, "appeals from the decision of the Presiding Officer, shall be decided without debate."[36] Therefore, when the Majority Leader appealed the rulings of the Presiding Officer, the questions on whether the ruling should stand as the judgment of the Senate received a vote without an opportunity for extended debate. The Senate voted that the ruling should not stand, and thereby upheld instead the position of the Majority Leader.

The future impact of these decisions on the nominations process is difficult to assess. The immediate and obvious expected impact is that the time between a cloture vote and a confirmation vote will decrease. In recent years, a vote to confirm a nominee has typically occurred the day after cloture was invoked (or on the next day of Senate session). Usually, Senators did not spend all of the time between the votes debating the nomination. Instead, Senators typically debated the nomination for some time post-cloture, but also usually entered into unanimous consent agreements that affected when the vote would occur. For example, it became common in recent Congresses for the Senate to agree, by unanimous consent, to consider the time the Senate spent in adjournment or recesses (e.g., overnight) to count as post-cloture time. The cloture rule affected the time of the vote set by unanimous consent: the rule provided for up to 30 hours of consideration of the nomination, and the Senate would agree to vote on the nomination a day later—reflecting the approximate time that the Senate could have debated the nomination under the rule. Assuming the Senate continues to establish times for voting on nominations by unanimous consent, those negotiations will be affected by the reinterpretation of the rule.

In the absence of a unanimous consent agreement, most nominations can now receive a vote two hours after a vote to invoke cloture. The two hours is not formally divided between the parties pursuant to the rule (or pursuant to the reinterpretation of the rule), but it might be divided, by unanimous consent, between the Majority and Minority Leader. Even without an explicit unanimous consent agreement, the Majority and Minority Leaders are recognized before any other Senators. In addition, a Senator can speak for a maximum of one hour post-cloture. As a result, the Majority Leader could claim the first hour, and the Minority Leader the second, or vice versa. (Of course, Senators could speak on a nomination at times other than after cloture has been invoked, even when the nomination is not formally pending before the Senate.[37])

It is also possible that the recent reinterpretation of the rule will affect how often the Senate relies on the cloture process to approve nominations. After the first reinterpretation of the cloture rule in 2013, the number of nominations subjected to cloture motions increased significantly in both of the Congresses when the Senate was controlled by the same party as the President (113th [2013-2014] and 115th [2017-2018] Congresses).[38]

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[36] This was a different parliamentary situation than when the Senate reinterpreted the rule to lower the threshold necessary to invoke cloture. In those cases, the appeal could not be made after cloture was invoked, since it was necessary to reinterpret the rule prior to the cloture vote in order to establish the lower threshold. In those cases, the Majority Leader made the appeal in between two questions that were not debatable. *Riddick's Senate Procedure* states that "appeals arising in connection with a non-debatable motion" are not debatable (p. 726). The particular parliamentary actions of November 21, 2013, were unique in that it was the first time an appeal was made after a motion to reconsider a cloture vote was agreed to, but before the cloture vote. The same procedural steps were followed on April 6, 2017, in relation to the vote necessary to invoke cloture on Supreme Court nominations.

[37] Generally, debate on the Senate floor is not required to be germane before cloture has been invoked on a matter. In addition, the Senate often arranges periods of time for Senators to speak on topics of their choice. For information on when debate is required to be germane, see CRS Report R45134, *Germaneness of Debate in the Senate: The Pastore Rule*, by Christopher M. Davis and Michael Greene.

[38] CRS Report RL32878, *Cloture Attempts on Nominations: Data and Historical Development Through November 20,*

Nominations Returned to the President

Nominations that are not confirmed or rejected are returned to the President at the end of a session or when the Senate adjourns or recesses for more than 30 days (Senate Rule XXXI, paragraph 6). If the President still wants a nominee considered, he must submit a new nomination to the Senate. The Senate can, however, waive this rule by unanimous consent, and it often does to allow nominations to remain "in status quo" between the first and second sessions of a Congress or during a long recess. The majority leader or his designee also may exempt specific nominees by name from the unanimous consent agreement, allowing them to be returned during the recess or adjournment.

Recess Appointments

The Constitution, in Article II, Section 2, grants the President the authority to fill temporarily vacancies that "may happen during the Recess of the Senate." These appointments do not require the advice and consent of the Senate; the appointees temporarily fill the vacancies without Senate confirmation. In most cases, recess appointees have also been nominated to the positions to which they were appointed. Furthermore, when a recess appointment is made of an individual previously nominated to the position, the President usually submits a new nomination to the Senate in order to comply with a provision of law affecting the pay of recess appointees (5 U.S.C. 5503(a)). Recess appointments have sometimes been controversial and have occasionally led to inter-branch conflict.[39]

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2013, by Richard S. Beth, Elizabeth Rybicki, and Michael Greene; CRS congressional distribution memorandum, "Nominations with Cloture Motions, 113th, 114th, and 115th Congresses," by Elizabeth Rybicki, Michael Greene, and Richard S. Beth (retired) (available to congressional clients on request from the authors).

[39] For more information on recess appointments, see CRS Report RS21412, *Temporarily Filling Presidentially Appointed, Senate-Confirmed Positions*, by Henry B. Hogue; CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue; CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu; CRS Report RL33310, *Recess Appointments Made by President George W. Bush*, by Henry B. Hogue and Maureen O. Bearden; and CRS Report R42329, *Recess Appointments Made by President Barack Obama*, by Henry B. Hogue.

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