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Supreme Court Nominations: Senate Floor Procedure and Practice, 1789-2011

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Summary

From 1789 through 2009, the President submitted to the Senate 160 nominations for positions on the Supreme Court. Of these nominations, 148 received action on the floor of the Senate, and 124 were confirmed. On August 5, 2010, the Senate confirmed the nomination of Solicitor General Elana Kagan to be an Associate Justice of the Supreme Court, making her the 124th Justice on the Court.

The forms of proceeding by which the Senate considered the 148 nominees to reach the floor break down relatively naturally into five patterns over time. First, from 1789 through about 1834, the Senate considered the nominations on the floor on the day after they were received from the President. The second period (1835-1867) was distinguished by the beginning of referral of nominations to the Committee on the Judiciary. The third period (1868-1921) was marked by rule changes that brought about more formalization of the process. During the fourth period (1922-1967), the Senate began using the Calendar Call to manage the consideration of Supreme Court nominations, and the final time period, 1968 to the present, is marked by routine roll call votes on confirmation and the use of unanimous consent agreements to structure debate.

Of the 124 votes by which the Senate confirmed nominees, 73 took place by voice vote and 51 by roll call, but on only 26 of the roll calls did 10 or more Senators vote against. Of the 36 nominations not confirmed, the Senate rejected 11 outright, and 12 others never received floor consideration (some, apparently because of opposition; others were withdrawn). The remaining 13 nominations reached the floor but never received a final vote, usually because some procedural action terminated consideration before a vote could occur (and the President later withdrew some of these). Including those that received incomplete consideration, were rejected, or drew more than 10 negative votes, just 50 of the 160 total nominations experienced opposition that might be called "significant."

Of the 148 nominations that reached the floor, 100 received one day of consideration, while 26 received more than two days, including four on which floor action took seven days or more. Of these 148 nominations, optional procedural actions that indicate the presence of an attempt to delay or block a confirmation vote occurred on 58, of which 26 involved procedural roll calls. Among a wide variety of procedural actions used, the more common ones have included motions to postpone, recommit, and table; motions to proceed to consider or other complications in calling up; live quorum calls, and unanimous consent agreements.

Neither extended consideration, the presence of extra procedural actions, nor the appearance of "significant" opposition affords definitive evidence, by itself, that proceedings were contentious. For example, some nominations considered for one day still faced procedural roll calls, some considered for three days or more faced no optional procedures, and some opposed by more than 10 Senators were still considered only briefly and without optional procedures. Of the 148 nominations to reach the floor, however, 76 were confirmed in a single day of action with neither optional procedural actions nor more than scattered opposition.

This report will be updated to reflect action on additional nominations to the Court.

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Introduction

The nomination of a Justice to the Supreme Court of the United States is one of the rare moments when all three branches of the federal government come together: the executive branch nominates, and the legislative branch considers the nomination, deciding whether the nominee will become a member of the high court. Presidents and Senators have said that, short of declaring war, deciding who should be on the Supreme Court is the most important decision they will make while in office.

The Constitution, in Article II, Section 2, divides the responsibility for selecting and confirming members of the Supreme Court between the President and the Senate. It says that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for...."

The Senate has traditionally deferred to the President on nominations to the Cabinet, but they have shown less deference to a President's choice for the Supreme Court.[1] Of the 160 nominations Presidents made to the Supreme Court since 1789, 36 were not confirmed. Of the hundreds of Cabinet officials nominated over the same time period, just 15 failed of confirmation.[2]

Some nominations to the Supreme Court have won confirmation with little debate and no procedural complications, while others have been debated extensively, with significant resort to parliamentary procedures during consideration. It appears that the Senate has never felt strictly bound by past practice in considering these nominations, but that it has used procedures and forms of consideration that the body has at the time deemed appropriate to each individual case. Nothing in Senate rules, procedures, or practice requires that the Senate proceed to a final vote on a nomination, for example, although in most instances it has done so. Of the 160 nominations for the Supreme Court, 12 never reached the floor and 13 others never received a final vote, although they were debated on the floor. The remaining 11 nominations that failed of confirmation reached a final vote, but were rejected by the Senate.

This report examines the ways in which the Senate has handled the 160 Supreme Court nominations the President has sent to the Senate. As the purpose of this report is to examine the forms taken by Senate proceedings on these 160 nominations, it treats each nomination as a separate case.[3] It is not couched in terms of the smaller number of different individuals nominated or the ultimate outcome the confirmation process may have had for each individual.[4]

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[1] Michael J. Gerhardt, *The Federal Appointment Process: A Constitutional and Historical Analysis* (Durham, NC: Duke University Press, 2000), p. 162; out-of-print CRS Report 89-253, *Cabinet and Other High Level Nominations that Failed to be Confirmed, 1789-1989*, by Rogelio Garcia. For more information, Members of Congress and their staff should contact Betsy Palmer.

[2] CRS Report RL31171, *Supreme Court Nominations Not Confirmed, 1789-August 2010*, by Henry B. Hogue; out-of-print CRS Report 89-253, *Cabinet and Other High Level Nominations that Failed to be Confirmed, 1789-1989*.

[3] A list of all 160 nominations appears as **Table A-1** in the **Appendix** to this report, giving for each the full name, year, disposition, and information on the form of consideration. Discussion in the text identifies nominations by surname and year, facilitating reference to fuller information in the **Appendix**. In cases in which an individual was nominated twice in the same year, the suffixes "-1" and "-2" are used after the date to distinguish the first from the second nomination.

[4] The 160 nominations involved only 141 different individuals, because on 11 occasions, a President resubmitted the name of an individual previously nominated but not confirmed, and on another eight occasions, a President nominated either a sitting or a former Justice to be Chief Justice. Of the 141 individuals nominated, the Senate confirmed 118, leaving 23 on whom the Senate never took favorable action. Of the 118 confirmed, five never served because they

Supreme Court confirmation debates, of course, do not occur in a vacuum. They are a product of the President making the choice, the state of the Senate at the time, the nominee and his or her views, and the prevailing mood of the country. These elements, while critical to understanding specific cases, are not considered in this report; discussions of them can be found in other reports on the Supreme Court.[5] This report focuses on the kinds of actions the Senate has taken during consideration of Supreme Court nominees, how they have changed over time, and how they have affected the process of confirmation.

The emphasis of this report is on the 148 nominations on which some form of formal proceedings took place on the Senate floor, not on the ways in which the nominations might have been handled in committee or other pre-floor stages.[6] The information presented was drawn from a comprehensive search of the *Executive Journals* of the Senate, which are its official record of procedural actions taken in relation to executive business (i.e., nominations and treaties, which are the forms of business submitted to the Senate by the President). For recent Congresses for which the *Journal* was not yet available, information was taken from the *Congressional Record* and the Nominations data base of the congressional Legislative Information System.

The following discussion first sketches the changing patterns of consideration that have been normal in successive historical periods since 1789, noting their relation to changes in the procedural rules and practice of the Senate. For each period, it not only describes normal and exceptional practice, but also provides examples of proceedings that were either typical or notable. The report then successively addresses three key characteristics of floor action on these nominations: the dispositions the Senate made of them, the length of floor consideration, and the kinds of procedural action taken during consideration.

Historical Trends in Floor Consideration

Although the Constitution mandates a role for the Senate in the consideration of nominees to the Supreme Court, it does not include any specific method for doing so. The process by which the Senate has considered these nominations has typically included several stages, from receipt and committee referral through committee consideration and reporting, to scheduling for floor action, followed by floor debate and a final vote. Within this broad outline, the Senate has answered the basic question—what should the procedure be for consideration of nominations?—in different ways at different times.

A review of all Supreme Court nominations since 1789 yields two general conclusions about the procedures used. First, the Senate has not felt bound to consider each nomination in exactly the same way that the others before it were considered. Although some Supreme Court nominations, for example, never reached the Senate floor (and hence, did not receive a vote), the Senate spent numerous days debating other nominations. Neither of those practices has been routine, but their use shows how the Senate has reserved to itself the right to take the course of action that it believes best suits consideration of a particular nomination. This stance becomes even more

declined the office, and one died before assuming it, so that 112 people (all but four of them men) have served as Justices of the Supreme Court. See CRS Report RL33225, *Supreme Court Nominations, 1789 - 2010: Actions by the Senate, the Judiciary Committee, and the President*, by Denis Steven Rutkus and Maureen Bearden.

[5] See CRS Report RL31989, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate*, by Denis Steven Rutkus, and CRS Report RL32821, *The Chief Justice of the United States: Responsibilities of the Office and Process for Appointment*, by Denis Steven Rutkus and Lorraine H. Tong.

[6] **Table A-2** in the **Appendix**, however, provides some general information on committee consideration of Supreme Court nominees.

evident when the Senate considers a well-known person for a Supreme Court seat. The Senate received, debated and confirmed the nomination of former President William Howard Taft to be Chief Justice on the same day, for example.

Second, although the form of confirmation proceedings has varied, the Senate's process has tended to become longer and more formal over time. Although members of the first Supreme Court were confirmed just two days after their nominations were received, the norm in modern times has tended toward weeks, if not months, between the receipt of the nomination and disposition by the Senate.[7] Early in the Senate's history, it was not typical for Supreme Court nominations to be referred to committee at all; by modern times, it was the norm for the Senate Committee on the Judiciary to spend significant time reviewing nominees.

A study of the 160 nominations sent to the Senate finds that the Senate's floor consideration of Supreme Court nominations breaks down relatively naturally into five patterns over time.

Beginning Patterns, 1789-1834

In the earliest years, the Senate normally considered a Supreme Court nomination, as a matter of course, on the second day after it had been received from the President. There was no routine referral to committee, although at least one nominee, Alexander Wolcott, was referred to a select committee in 1811 (his nomination was defeated). From the beginning, the Senate has considered nominations in executive session, that portion of the Senate's business that was established to consider business that comes directly from the President. At this time, executive session also meant that the doors were closed, only Senators and select staff were permitted to be in the chamber, and the proceedings were to remain secret.[8]

The first set of Senate rules, developed and adopted in 1789, did not include any specific provisions for handling nominations. In 1806, the Senate adopted a general revision of its rules, which included a new provision on nominations. This rule required that "when nominations shall be made in writing by the President of the United States to the Senate, a future day shall be assigned, unless the Senate unanimously direct otherwise, for taking them into consideration."[9] Despite adoption of this rule, however, there is no indication that the Senate either fixed a date for consideration of nominations when they were received, or that the Senate waived this rule.

The *Executive Journal* records no motion to consider these early nominations, instead stating simply that "the Senate proceeded to consider" the message from the President. The message from the President became the de facto method of organizing the nominations, apparently representing a precursor of the Calendar Call the Senate was to employ later. Of the 31 Supreme Court nominations sent to the Senate during this period, all 28 confirmations occurred by voice vote; the two rejections were by roll call (one nomination was considered by the Senate but left unfinished).

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[7] CRS Report RL33118, *Speed of Presidential and Senate Actions on Supreme Court Nominations, 1900-2010*, by R. Sam Garrett and Denis Steven Rutkus.

[8] The Senate decided to open its deliberations to the public on treaties and nominations in 1929. See section below, "The Calendar Call Becomes Formalized, 1922-1967."

[9] U.S. Congress, Senate, *History of the Committee on Rules and Administration*, Senate Doc. 96-27, 96th Cong., 1st sess., prepared by Floyd M. Riddick, Parliamentarian Emeritus, with the assistance of Louise M. McPherson (Washington: GPO, 1980), p. 10. The Senate has adopted general revisions of its rules just seven times since 1789, and this book sets forth each of these revisions. The Senate routinely makes changes to its rules in a piecemeal fashion, and sometimes the general revisions include changes that had actually been made earlier in time. To date, however, this book is the best source for changes in Senate rules over time.

Also, the normal period of floor consideration during this period was one day for each nomination. Five nominations were considered for more than one day: the three nominations not confirmed, Wolcott, John Rutledge (1795), and John J. Crittenden (1828); and two others, those of Alfred Moore (1799) and Robert Trimble (1826).

This pattern of consideration is shown in the confirmation of the very first Supreme Court, in the following case study.

The Original Court, 1789

The Court's first six members, a Chief Justice and five Associate Justices, were nominated by President George Washington on September 24, 1789. The nominations were not referred to committee. These men were personally known to many, if not all, members of the Senate, and there was no extensive investigation into their background. On September 26, the Senate proceeded to consider each of the six men, and in each case, "on the question to advise and consent thereto, it passed in the affirmative."[10] There is no indication of lengthy debate; all six nominations were confirmed on the same day, in the same way. John Jay was confirmed as Chief Justice, and John Rutledge, of South Carolina; James Wilson, of Pennsylvania; William Cushing, of Massachusetts; Robert H. Harrison, of Maryland; and John Blair, of Virginia, were confirmed as Associate Justices.

Although the vast majority of nominations during this time were handled in the same way as the above, there were instances of extraordinary procedure, particularly when the nomination appeared to be controversial, as shown in the following case study.

John Crittenden, 1828

On December 17, 1828, President John Quincy Adams nominated John Crittenden, a Kentucky lawyer, to be an Associate Justice of the Supreme Court, to replace Justice Robert Trimble, who had died. The nomination took place after Adams' successor, Andrew Jackson, had been elected in November. Opposition to Crittenden by supporters of Jackson prevented the Senate from confirming him.[11]

Crittenden's supporters did not give in without a fight, and the Senate debated the nomination for nine days. In an unusual proceeding, rather than consider the nomination itself, the Senate debated a resolution, offered by opponents of the nomination. It read:

> Resolved, That it is not expedient to act upon the nomination of John I. Crittenden, as a Justice of the Supreme Court of the United States, until the Senate shall have acted finally on the report of the Judiciary Committee, relative to the amendment of the Judicial System of the United States.[12]

One purpose of the above report was to address the question of whether to change the size of the Supreme Court, which might have had the effect of abolishing the seat to which Adams had nominated Crittenden. Supporters of the nomination offered a lengthy amendment to the resolution, which, in essence, said that it was the duty of the President to fill vacant slots no

[10] *Journal of the Executive Proceedings of the Senate*, September 26, 1789, p. 29, available at http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(ej00135)), accessed on May 12, 2010. (Hereafter cited as *Senate Executive Journal*).

[11] J. Myron Jacobstein and Roy M. Mersky, *The Rejected: Sketches of the 26 Men Nominated for the Supreme Court but Not Confirmed by the Senate* (Milpitas, CA: Toucan Valley Publications, 1993), pp. 19-23.

[12] *Senate Executive Journal*, January 26, 1829, p. 626.

matter at what point in a Presidency they occurred. An amendment to this amendment was then offered, declaring:

> That the duty of the Senate to confirm or reject the nominations of the President, is as imperative as his duty to nominate; that such has heretofore been the settled practice of the government; and that it is not now expedient or proper to alter it.[13]

The Senate rejected this amendment to the amendment by voice vote, voted 17-24 to reject the original amendment, and then voted 23-17 on February 12, 1829, to adopt the original resolution declaring it "not expedient" to act on the Crittenden nomination. By this action, the early Senate declined to endorse the principle that proper practice required it to consider and proceed to a final vote on every nomination.

Committee Referral, 1835-1867

A new pattern of bringing up and considering Supreme Court nomination emerged in 1835, when the Senate began to refer nominations routinely to the Senate Committee on the Judiciary, which had been created, as a part of the Senate's first standing committee system, in 1816. Once the committee reported a nomination to the Senate, the chamber tended to act upon it immediately. In most cases, the nomination was reported and then confirmed, almost as one action. As with the previous practice, most of these confirmations were accomplished by voice vote. The Senate followed this form of proceeding through 1867.

In some cases, a Senator, apparently opposed to a particular nomination, would move to table the nomination immediately after it was reported from committee. The effect of a motion to table, however, was not the same as it is in current Senate parliamentary practice, where the motion, if successful, has the same effect as rejection. At this point in the development of the Senate, it appears that the motion to table had an effect more like a motion to postpone, and was used as a way to avoid taking action on the nomination on that day. When the Senate considered the nomination of Roger B. Taney to be Chief Justice in 1835, for example, the nomination was immediately tabled after the committee reported it. Later, however, the Senate voted 25-19 to proceed to consider the nomination, and he was confirmed.

Robert C. Grier, 1846

The nomination of Robert C. Grier shows the typical features of this time period.

President Polk nominated Grier on August 3, 1846, to replace Henry Baldwin, who had died. Grier had served as president judge of the District of Allegheny Court in Pennsylvania. The nomination was referred to the Judiciary Committee, which reported it out the next day. The Senate considered the nomination immediately after it was reported and confirmed Grier by voice vote.[14]

Tyler Presidency, 1844-1845

The major departure from the normal pattern of consideration for Supreme Court nominations during this time period took place during the presidency of John Tyler. He had been elected Vice President on the Whig ticket with William Henry Harrison in 1840. Harrison died 31 days after taking the oath of office, and Tyler became President. His relations with the Whig party were

[13] Ibid, p. 638.

[14] David G. Savage, ed., *Guide to the U.S. Supreme Court*, 4th ed. (Washington: CQ Press, 2004), pp. 945-946.

strained, and after he vetoed a banking bill, Tyler's entire Cabinet but for one resigned, and Tyler was later expelled from the Whig party. Not surprisingly, Tyler had difficulties winning confirmation of his Supreme Court nominations from a Whig-dominated Senate.[15]

Tyler tried nine times to win Senate confirmation of a Supreme Court nomination, but he was successful only once, with the nomination of Samuel Nelson in 1845. Tyler nominated four other men over the course of more than a year to fill vacancies on the Court. He sent the name of Edward King to the Senate twice, that of John C. Spencer twice, and that of Reuben H. Walworth three times. The Senate responded with disdain. Four times the Senate voted to table Tyler nominations (and took no further action on them); one, the 1844 nomination of Spencer, the Senate rejected outright by a vote of 21-26.

The standoff between the President and the Senate took on such intensity that in one day, June 17, 1844, Tyler changed his mind about whom to nominate twice. At the time, the Senate had tabled the nomination of Walworth to be an Associate Justice. According to the Senate *Executive Journal*, Tyler sent the following message to the Senate:

> I have learned that the Senate has laid on the table the nomination, heretofore made, of Reuben H. Walworth, to be associate justice of the Supreme Court, in place of Smith Thompson, deceased. I am informed that a large amount of business has accumulated in the second district, and that the immediate appointment of a judge for that circuit is essential to the administration of justice. Under those circumstances, I feel it is my duty to withdraw the name of Mr. Walworth, whose appointment the Senate by their action seems not now prepared to confirm, in the hopes that another name might be more acceptable. The circumstances under which the Senate heretofore declined to advise and consent to the nomination of John C. Spencer have so far changed as to justify me in my again submitting his name to their consideration. I, therefore, nominate John C. Spencer, of New York, to be appointed as an associate justice of the Supreme Court, in the place of Smith Thompson, deceased.[16]
>
> JOHN TYLER

Tyler then sent several other appointment messages to the Senate, which were read. The Senate confirmed several of the other appointments. The journal then records a dispute over whether the Senate should receive a further message from the President, as the time previously set to end the Congress had arrived. Senators agreed to hear the message, which read "I withdraw the nomination of John C. Spencer to be associate justice of the Supreme Court of the United States, and I renominate Reuben H. Walworth to be associate justice of the Supreme Court of the United States."

A motion was made to consider Walworth, but objection was heard, and the Senate then adjourned sine die.[17]

George E. Badger, 1853

Another signal that confirmation ceased to be virtually automatic for Supreme Court nominations, was the case of George E. Badger, a sitting Senator.

On January 10, 1853, President Millard Fillmore nominated George E. Badger to be an Associate Justice, to replace Justice John McKinley, who had died. Although Fillmore, a Whig, was a "lame

[15] Jacobstein and Mersky, *The Rejected*, pp. 33-41.

[16] *Senate Executive Journal*, June 17, 1844, p. 353.

[17] Ibid, p. 354.

duck" President following the fall election of Democrat Franklin Pierce, he nevertheless desired to place a nominee on the Supreme Court. Badger, an incumbent Senator from North Carolina and who served as Secretary of the Navy under Presidents Harrison and Tyler, would seem to have been a good choice, because "It was thought that the Senate would exercise Senatorial courtesy and not reject a fellow a Senator," according to historians.[18]

The Senate, however, was controlled by Democrats, by a margin of 38 Democrats to 22 Whigs and 2 Free Soilers. The Senate debated the Badger nomination for portions of four days. The Senate postponed consideration several times, and in the course of one day's debate on the nomination, it voted 26-25 to adjourn. Finally, on February 11, the Senate agreed by a vote of 26-25 to postpone consideration of the nomination until March 4, the date when the term of the Congress would expire and the new President would take office.

Increased Formalization, 1868-1922

In 1868, the Senate adopted another general revision of its rules. It contained a lengthier and far more specific method for dealing with nominations.

> When nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered by the Senate, be referred to appropriate committees; and the final question on every nomination shall be "Will the Senate advise and consent to this nomination?" which question shall not be put on the same day on which the nomination is received nor on the day on which it may be reported by committee, unless by unanimous consent of the Senate. Nominations neither approved nor rejected by the Senate during the session at which they are made shall not be acted upon at any succeeding session without being again made by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of such adjournment or recess shall be returned to the President and shall not be afterwards acted upon, unless again submitted to the Senate by the President; and all motions pending to reconsider a vote upon a nomination shall fall on such adjournment or recess; and the Secretary of the Senate shall thereupon make out and furnish to the heads of departments and other officers the list of nominations rejected or not confirmed, as required by law.[19]

This rule codified what had since 1835 become the practice of the Senate, at least in regard to Supreme Court nominations, to refer the nomination to committee. It also called for a layover of at least one day from the time a committee reported on a nomination to Senate action on that nomination, unless the Senate decided by unanimous consent to do otherwise.

Despite the rule, however, the Senate did tend to decide otherwise. Of the 41 nominations in this period, nearly half, 18, were considered by the Senate by unanimous consent on the same day they were reported out of committee. Nine other nominations were considered within two days of the committee's report. The remaining 10 nominations which saw floor action came up on the floor more than two days after the committee reported, sometimes significantly more than two days later. In the case of Melville W. Fuller to be Chief Justice (1888), for example, the Senate took up the nomination 17 days after the committee reported it.

In a change from past practice, the Senate Committee on the Judiciary began issuing reports that characterized the committee's support for the nomination: the committee would usually report favorably, but sometimes adversely. Prior to 1869, the committee had simply reported the nomination, without such characterizations.

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[18] Jacobstein and Mersky, *The Rejected*, pp. 53-59.

[19] Riddick, *History of the Committee on Rules and Administration*, p. 26.

Roll call votes on the confirmation of the pending nomination became more common during this period, occurring on 16 of the 41 nominations. The Senate rejected three nominations decided by roll call votes and confirmed the 13 others.

William B. Woods, 1880

The nomination of William B. Woods illustrates the key patterns of consideration at this time.

When Associate Justice William Strong resigned, President Rutherford B. Hayes looked for a southerner to replace him. Woods was born and educated in the North, and had been a leader in the Ohio legislature and subsequently a Union general. After the war, however, he had settled in Alabama, and had become a circuit court judge on the Fifth Circuit. Hayes nominated Woods on December 15, 1880. The nomination was referred to the Judiciary Committee, which reported it favorably on December 20. The next day the Senate considered the nomination and, by a vote of 39-8, confirmed it.[20]

Ebenezer Rockwood Hoar, 1869

Debates on Supreme Court nominations during these years still took place behind closed doors, and Senators were supposed to maintain the secrecy of these proceedings. The nomination of Ebenezer Rockwood Hoar is one of the few instances in which some information is available about what went on during the Senate debate.

Hoar, who was serving as Attorney General, was nominated for the Supreme Court by President Grant in 1869. Republicans then controlled the Senate by a large margin, 62-12, and it was thought, at first, that Hoar would have no trouble winning confirmation. But, as it turned out, Hoar had badly alienated the Senate as Attorney General during implementation of the law which authorized new circuit court judges throughtout the country in early 1869. The law created a series of new federal judgeships, and Hoar was responsible for choosing names to recommend to the President for filling these positions. Hoar undertook the job without consulting Senators on those positions. According to Hoar's biography, "Nearly every Senator had a candidate of his own for the Circuit Court, but in almost every instance the President took the Attorney General's advice." The same biography also notes that "Unhappily, the judge's manner in discharging his duty was not engaging. He had the plain speech and trying sincerity of latitude 42 degrees N., in an extreme degree, and it proved hard to bear at Washington."[21]

The Senate received Hoar's nomination on December 15, 1869. It was referred to the Judiciary Committee, and on December 22 the committee reported it out with an adverse recommendation. The Senate began debate on the nomination on the same day it was reported. A motion was offered to adjourn, which failed by a vote of 23-31, as was a motion to table the nomination, which also failed 24-30. But supporters of the nomination evidently saw the writing on the wall and eventually agreed later that same day, by voice vote, to table the nomination, which, at that time, still meant only to delay its further consideration, and not necessarily to kill it.

In a letter to Hoar, Massachusetts Senator Henry Wilson said it had been a difficult fight. "I write simply to say that your friends for more than four hours battled for you, that all was said and done that could be. When it was clearly seen that a majority had determined on a vote of rejection, we struggled for more than two hours against coming to a vote, before we secured an adjournment. Never have I seen such action in the Senate." Another letter, from J.D. Cox, a former House

[20] Savage, *Guide to the U.S. Supreme Court*, pp. 958-959.

[21] Moorfield Storey and Edward W. Emerson, *Ebenezer Rockwood Hoar: A Memoir* (Boston: Houghton Mifflin Company, 1911), p. 182.

Member who was then Secretary of the Interior, said he had met with several senators about the nomination fight. He said of those opposed to Hoar: "They were determined to be content with nothing but a prompt rejection, and did not even consent to a motion to table the business, after four hours exciting struggle, until [Alexander G.] Cattell [a Senator from New Jersey] told them he would make dilatory motions all night before he would permit such an outrage. The result was the tabling of the question, with (as the opposition claim) an understanding that it shall not be again taken up."[22]

The Senate reconvened in 1870 and, on February 3, rejected Hoar's nomination by a vote of 24-33.

The Calendar Call Becomes Formalized, 1922-1967

Beginning in 1922, the Senate began to call up Supreme Court nominations under a system known as the Call of the Calendar or a Calendar Call. Under this procedure, the Senate would consider the nominations that had been reported by committee and placed on the *Executive Calendar* in the order in which they appeared on that calendar. Under this system, there was no need to make a motion or ask unanimous consent to take up a Supreme Court nomination. The Senate would instead begin with the first available nomination and work its way through the calendar until reaching the Supreme Court nomination. If a nomination was experiencing difficulty, the Senate could pass it over when it was reached on the Calendar Call. It would come up again the next time the Senate took up the Calendar. Particularly in cases for which there was no controversy, on the other hand, the Senate could call up a nomination out of order by unanimous consent. These practices appear to represent a formalization of the process used from 1868 to 1922.

Twenty of the 30 Supreme Court nominations during this time period came up when their place on the Calendar had been reached. Several others were considered out of order by unanimous consent, including Edward T. Sanford in 1923 and Byron White and Arthur J. Goldberg in 1962.

Another major development, as well, took place early in this period: debate on nominations became public. After years of debating the issue, in 1929 the Senate decided to conduct its executive business in open session. Although the doors had been closed and debate on nominations was supposed to remain secret, increasingly in the preceding years details of the sessions would leak out to the press. In addition, the rule of secrecy had been set aside several times, so that certain debates, such as that on Louis D. Brandeis to be an Associate Justice in 1916, could be opened to the public.

The immediate trigger for the rules change was the disclosure, by the United Press, of the roll call vote on the nomination of Roy O. West to be Secretary of the Interior. Soon after, UP also published the vote on the nomination of former Senator Irvine Lenroot to be a judge of the Customs Court of Appeals. The Senate Rules Committee began an investigation into who leaked the Lenroot vote, and, for a variety of reasons, it was forced to hold this inquiry in open session. The reporter, Paul Mallon, refused to disclose who his source had been, and the committee came to no conclusion on the matter. The Senate then considered a rules change that would have allowed a majority to vote to open any executive session. An alternative was proposed to make all debates open unless a majority voted to close them. The Senate approved this amendment, 69-5.[23]

[22] Ibid., pp.189-190, 191.

[23] Joseph P. Harris, *The Advice and Consent of the Senate* (New York: Greenwood Press, 1968), pp. 249-255.

John J. Parker, 1930

The case of Judge Parker shows one of the first nominations to be debated in open session.

John J. Parker, an appeals court judge in North Carolina, was nominated by President Hoover to be an Associate Justice of the Supreme Court on March 21, 1930, to replace Edward T. Sanford, who had died. At the time, Republicans also controlled the Senate, by a sizeable margin of 56 seats to 39 seats for the Democrats, with one Farmer-Labor member. Opposition to the nomination soon surfaced, with special attention paid to two issues: a ruling Parker had made as a member of the Fourth Circuit on "yellow dog" labor contracts and a remark on race issues he had made during a 1920 campaign for Governor of North Carolina. "Yellow dog" contracts were ones under which employers required their prospective employees to sign an agreement promising that they would not join a labor union, a position opposed by many in the Republican Senate majority. Parker's court opinion upheld the use of such contracts. The opposition also focused on Parker's remark, in the course of his 1920 gubenatorial campaign, that the African American man did not want to participate in politics and that "the Republican party of North Carolina does not desire him to do so." This remark motivated the National Association for the Advancement of Colored People to oppose his nomination.[24]

The nomination had been referred to the Judiciary Committee. As the committee was debating it, Parker announced he would be willing to come before the panel and discuss the issues of controversy. The Judiciary Committee rejected his offer by a vote of 10-4, then voted to report his nomination with an unfavorable recommendation by a vote of 10-6, with both votes taking place on April 21.

The Senate considered the nomination on the floor for large portions of eight days that were marked by repeated calls for a live quorum. Such repeated calls can be indications of contention on the floor. A reading of the debate and a review of the news stories, however, seems to indicate that this did not seem to be the case here. Several times one of the floor leaders, who supported Parker's nomination, asked for the quorum call, sometimes to make announcements and sometimes, it appears, to bring Senators to the floor to listen to the debate. Twice opponents of the nomination made the quorum call request, but both times it appears that the Presiding Officer was preparing to put the question of the nomination (and thus force the Senate to vote) and the quorum call forestalled that move.

Opponents of the nomination did object to a unanimous consent request that debate on the nomination not start until the senior Senator from North Carolina was able to return to Washington. The nomination also was briefly interrupted by a motion from a Senator that allegations made by another Senator—that judgeships were being offered as rewards for those who would vote for Parker—be investigated before the chamber voted on the nomination. That motion was later withdrawn. Finally, the Senate set the time for the vote on Parker by unanimous consent.

News reports say the galleries were packed with people like Alice Longworth, daughter of Theodore Roosevelt and wife of the House Speaker; Frank Morrison, a labor leader; and Representative Oscar S. De Priest, then the only African American in the Congress, who attended the debates and watched from the back of the chamber. When the final vote came on May 7, other Members of the House "drifted into the Senate chamber and lined its walls three deep. The

[24] Jacobstein and Mersky, *The Rejected,* pp. 111-122; Richard L. Watson Jr., "The Defeat of Judge Parker: A Study in Pressure Groups and Politics," *Mississippi Valley Historical Review*, vol. 50, Sept., 1963.

utmost silence prevailed as the Senators answered their names."[25] The vote was 39-41 against Parker's confirmation.

William O. Douglas, 1939

The nomination of William O. Douglas also shows how the Calendar Call operated when there was controversy.

President Roosevelt nominated Douglas to be an Associate Justice on March 20, 1939, to replace retiring Justice Louis D. Brandeis. Douglas was the head of the Securities and Exchange Commission, and he seemed well-known to the Senate. The Senate Committee on the Judiciary referred the nomination to a subcommittee, which held a hearing at which no one testified. The subcommittee unanimously reported the nomination to the full committee, which then unanimously reported the nomination favorably to the full Senate on March 27. A news report stated that Douglas attended the full committee's meeting so that he could "meet the members."[26]

Between the committee session and floor debate, however, opposition developed. Senator Lynn Frazier of North Dakota argued Douglas had an improper relationship with the leaders of the New York Stock Exchange. The nomination was passed over twice on the Call of the Calendar, in order to facilitate fuller debate. In particular, the first time the nomination was passed over it was because Senator Frazier could not be in the chamber, and he wanted the Senate to wait until he was able to be a part of the debate. Three live quorum calls were taken during consideration of the nomination. The first of these was demanded at the start of the debate, and the second during the middle of Senator Frazier's speech. The third live quorum call was demanded just prior to the final speech of the debate, made by Senator Maloney in favor of the nomination. The vote to confirm Douglas was 62-4, with 30 Senators not voting.[27]

Unanimous Consent Agreements, 1968 to present

In the modern era, Senate practices of floor consideration generally have come to be dominated by the use of unanimous consent agreements, under which Senators agree to limit their rights to debate and to take procedural actions. The pervasiveness of these agreements has extended to the consideration of Supreme Court nominations. From about 1968 to the present, unanimous consent agreements have been reached that typically provide for when the Senate will take up nominations, limit and structure the debate, and, in many instances, provide for a final confirmation vote.

These agreements allow the Senate leadership to move to consider each nomination at a time, and in a way, they desire, instead of waiting until the nomination is reached on the Calendar. In fact, majority leaders began to ask unanimous consent to go into executive session to consider a specific Supreme Court nomination. This proceeding had been used as early as 1959 for the consideration of the nomination of Potter Stewart, and it was the method used, for example, when Majority Leader Mike Mansfield called up Harry A. Blackmun for Senate floor consideration in

[25] "Nominee's Career Assailed, Californian Terms Him 'A Perennial Candidate' in Last Day's Debate," *New York Times*, May 8, 1930, p. 1.

[26] "Senators Approve the Nomination of William O. Douglas," *New York Times*, Mar. 25, 1939, p. 3; Associated Press, "Committee Approval Is Given to Douglas for Supreme Court," *Chicago Daily Tribune*, March 28, 1939, p. 3.

[27] "Associate Justice of the Supreme Court of the United States," remarks in Senate, *Congressional Record*, vol. 84, April 3 and 4, 1939, pp. 3705-3713, 3773-3788. For more on Frazier's concerns, see "Frazier Attacks Choice of Douglas," *New York Times*, April 4, 1939, p. 15.

1970. Under a later precedent of the Senate, a motion to go into executive session to consider a specific nomination is not debatable, though the nomination itself is.[28]

Another change also took place roughly around the same time. The Senate routinely began to decide the question of confirmation by roll call votes. Since 1967, indeed, the Senate has evidently come to consider it appropriate always to take roll call votes on Supreme Court nominations. In addition, nominations during this period have typically received longer floor consideration than in any previous period.

A further characteristic of the modern era is the use of the cloture motion. The Senate cloture rule, which permits a super-majority to limit the time for consideration of a matter by a roll call vote, did not exist until 1917, and it could not be applied to nominations until 1949. Since then, supporters have attempted to use the motion to impose limits on the consideration of only four Supreme Court nominations. The first attempt was on the motion to proceed to the 1968 nomination of Abe Fortas, already a member of the Court, to be Chief Justice. Cloture failed, as did the 1971 cloture attempt on the nomination of William H. Rehnquist to be an Associate Justice (though Rehquist was confirmed, while Fortas was not). The Senate did invoke cloture on the consideration of the 1986 elevation of Rehnquist to the position of Chief Justice and the 2005 nomination of Samuel Alito to be an Associate Justice.

William H. Rehnquist, 1971

The 1971 nomination of William H. Rehnquist illustrates the use of cloture on a Supreme Court nomination.

President Nixon named Rehnquist to be an Associate Justice of the Supreme Court on October 26, 1971, to replace retiring Justice John Marshall Harlan. Rehnquist had been Assistant Attorney General for two years and was well known on Capitol Hill, but opponents contended that he had shown insufficient commitment to civil rights and civil liberties.[29]

The Judiciary Committee held five days of hearings on the Rehnquist nomination, and opponents delayed the committee vote on recommending the nomination to the full Senate for a week. The committee voted 12-4 to report the nomination favorably. The nomination was debated on the Senate floor for five days. A motion to invoke cloture, and limit debate on the nomination, failed on the fifth day by a vote of 52-42 (at that time, a vote of two-thirds of Senators present and voting was required to succeed, which would have been the votes of 63 Senators in this case). A motion that consideration of the nomination be postponed until mid-January was defeated by a vote of 22-70. Only then did the Senate agree, by unanimous consent, to take a vote on the nomination at 5:00 p.m. that day. Rehnquist was confirmed by a vote of 68-26. (Subsequently, in 1986, he was confirmed as Chief Justice of the United States by a Senate vote of 65-33, after proceedings in which cloture was invoked.)[30]

John G. Roberts, 2005

The case of John Roberts, 2005, shows how unanimous consent agreements are used in current practice.

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[28] Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure*, 101st Cong., 2nd sess., S. Doc. 101-28 (Washington: GPO, 1992), p. 941.

[29] Glen Elasser, "Rehnquist Assailed as Segregationist," *Chicago Tribune*, November 10, 1971, p. 5; Spencer Rich, "Rehnquist Civil Liberties Stance Eyed," *Washington Post*, October 26, 1971, p. A1.

[30] "Court Nominees: Powell and Rehnquist Confirmed," *Congressional Quarterly Almanac* (Washington: Congressional Quarterly Press, 1971), pp. 851-859.

President George W. Bush originally nominated Roberts for an Associate Justice position on the Supreme Court, to replace Sandra Day O'Connor, who had announced her retirement. Following the death of Chief Justice William H. Rehnquist, however, Bush withdrew that initial nomination and instead nominated Roberts to be Chief Justice (the Senate had referred the initial nomination to the Judiciary Committee, but the committee had not acted on it).

The Committee on the Judiciary considered President Bush's nomination of Roberts to be Chief Justice for five days. The full Senate also debated the nomination for five days. Three separate unanimous consent agreements set the time for debate each day and, in some cases, specifically divided the time between specific Senators. Roberts was confirmed by a vote of 78-22, with no procedural actions other than the unanimous consent agreements that structured the time for consideration of the nomination.

Characteristics of Floor Action

Senate floor proceedings on Supreme Court nominations might be distinguished in terms of a wide variety of different characteristics. The present study focuses chiefly on three that are readily identifiable and often referred to

- the kind of vote (or other action) by which the Senate disposed of the nominations;
- the amount of time the Senate spent considering them on the floor; and
- the forms of procedural action that occurred during their consideration.

Each of these represents a salient element of the procedural context in which a nomination is considered. Together, they may afford an indication of the amount of controversy, contention, or opposition that surrounds a nomination. For example, if the Senate approves a nomination by a voice vote after a single day of consideration, during which no procedural actions occur, one might reasonably conclude that it involved little opposition or controversy. As the following discussion indicates, however, none of these three characteristics, in itself, can simply be equated with the level of controversy.

Forms of Disposition

Varieties of Disposition

An obvious initial distinction among the 160 nominations concerns the ways the Senate disposed of them. In the broadest terms, the Senate confirmed 124 and failed to confirm the remaining 36. This breakdown, however, conflates the 11 nominations that the Senate affirmatively rejected with the 25 on which no final vote occurred. Further, the 25 without a final vote include 12 that never received floor consideration at all and 13 that were called up, but on which the Senate never finished action. The meaning and implications of each form of disposition may differ.

Nominations Confirmed

The 124 nominations confirmed make up 92% of the 135 on which the Senate reached a final vote. Well over half the 124 confirmations (73, or 59% of the 124 confirmed) took place by voice vote,[31] and the remaining 51 (41% of confirmations) by roll call. In earlier periods of American

[31] For this purpose, confirmation by unanimous consent is included with voice votes. At least 10 nominations have been confirmed by unanimous consent, especially between 1923 and 1945.

history, both voice and roll call votes occurred, but, as noted in the preceding section, in recent decades roll calls have become universal. The closest vote by which a nomination was confirmed was that of Matthews (1881-2), by 24-23; other close votes to confirm include those for Thomas (1991), by 52-48; Lamar (1888), by 32-28; and Clifford (1857), by 26-23.

Nominations Rejected

The 11 Supreme Court nominations the Senate has rejected make up the remaining 8% of those on which the Senate reached a final vote. All 11 of these rejections occurred on roll calls; the Senate has never rejected a nominee by voice vote. As with confirmations, these 11 rejections occurred at points scattered throughout American history. The earliest was Rutledge for Chief Justice in 1795; the most recent, the nomination of Robert Bork in 1987 to be an Associate Justice. Bork's was also the nomination rejected by the widest margin (42-58); the closest was that of Parker (1930), who was rejected by 39-41. The median margin of defeat, however, has been nine votes. Only in one instance (Spencer, 1844-2) has a President resubmitted a nomination the Senate had previously rejected, and then, not surprisingly, without success.

Table 1. Supreme Court Nominations That Received No Vote on Confirmation

Last Procedural Floor Action	Nomination	With-drawn?[a]	Later Action on Individual		Total
			Renom-inated?[a]	Con-firmed?[b]	
No Floor Action					12
None	Harriet Miers, 2005	yes			
	John Roberts, 2005	yes	yes	yes	
	Homer Thornberry, 1968	yes			
	John M. Harlan, 1954		yes	yes	
	Pierce Butler, 1922-1		yes	yes	
	William Hornblower, 1893-1		yes	rejected	
	Stanley Matthews, 1881-1		yes	yes	
	Caleb Cushing, 1874	yes			
	Henry Stanbery, 1866				
	William Micou, 1853				
	John C. Spencer, 1844-2	yes			
	William Paterson, 1793-1	yes	yes	yes	
Floor Action Without Vote on Confirmation					13
Tabled	Edward A. Bradford, 1852				
	Edward King, 1845	yes			
	Reuben H. Walworth, 1845	yes			
	Reuben H. Walworth, 1844-1	yes	yes	no	
	Edward King, 1844		yes	no	
Postponed[c]	George E. Badger, 1853				
	Roger B. Taney, 1835-1		yes	yes	
	John J. Crittenden, 1828				
Motion to consider defeated	Jeremiah S. Black, 1861				
Motion to consider met objection	Reuben H. Walworth, 1844-2		yes	no	
Cloture failed on motion to consider	Abe Fortas, 1968	yes			
Recommitted	George H. Williams, 1874	yes			
No procedures	John M. Read, 1845[d]				
Totals		11	10	6	25

Source: *Senate Executive Journal*. For 21st century nominations, congressional Legislative Information System (LIS) and *Congressional Record*.

a. Blanks indicate that the action in question did not occur. For details on the reasons for withdrawal, see accompanying text.

b. "No" indicates that no final vote occurred on the subsequent nomination. Blanks appear when there was no subsequent nomination.

c. For details on the means by which these postponements occurred, see section on "Procedural Complexity."

d. Nomination was taken up near the end of the session, and the Senate adjourned *sine die* before completing consideration.

Nominations Without Final Vote

The Senate conducted no final vote on 25 nominations. **Table 1** lists these 25 nominations and notes some pertinent contextual features of each. They make up 16% of the total number of high court nominations submitted, an indication of the extent to which the Senate has not always considered itself obligated to proceed to a final up-or-down vote on every Supreme Court nomination presented to it.

These 25 nominations fall into two groups discussed separately in the following two subsections: (1) 13 on which the Senate initiated floor action, but never completed it; and (2) 12 that never reached the floor at all. For purposes of this report, all formal proceedings in the full Senate in relation to a nomination, once it was available for floor consideration, were counted as floor action. For example, a nomination was treated as receiving floor action even if the Senate never actually proceeded to its consideration, but did decline to grant unanimous consent to do so.[32] Overall, by this standard, the Senate has taken some floor action on nearly 93% of all nominations submitted, and proceeded to a final vote on 84%.

No Floor Action

The 12 occasions on which the Senate has failed to bring a nomination to the floor have also been scattered throughout history. The circumstances of their occurrence have varied, as well. Five of the 12 were submitted quite late in a session, so that the Senate may simply have lacked time to act. Six others were withdrawn before floor consideration could commence, including instances from Paterson in 1793 (first nomination) to Miers in 2005. The last of the 12 (Stanbery, 1866) became moot because Congress reduced the size of the Court, thereby abolishing the vacancy.

This distribution of conditions for the lack of floor action suggests that the Senate has exhibited little tendency to leave Supreme Court nominations without a final vote simply out of reluctance to act, or to use inaction as an indirect means of denying confirmation. Four of the five nominations late in a session, and two of the six withdrawn, were later resubmitted (usually at the following session), and the Senate proceeded to a final vote on each of the resubmitted nominations. The other four withdrawn nominations were never resubmitted. Overall, therefore, only two of these 12 nominations continued to be available to the Senate and yet never received floor action. These included one of the late-session nominations and the one that became moot.

These observations show that the simple absence of floor consideration cannot be taken to imply that the Senate found the nomination less than acceptable. Of the five nominations in this group that were later resubmitted, the Senate confirmed four, rejecting only one. In addition, at least some of the withdrawals evidently occurred for reasons unrelated to Senate sentiment about the nomination. Paterson (1793-1), for example, who was among those later resubmitted and confirmed, was initially withdrawn only because he was constitutionally ineligible to sit on the Court at that point, as he had previously been elected to a Senate term that had not yet expired, and during which the salary of the Justices had been increased.[33] The nomination of Roberts

[32] The use of this inclusive criterion of floor action accounts for certain small differences between the figures presented here and in CRS Report RL31171, *Supreme Court Nominations Not Confirmed, 1789-August 2010*, by Henry B. Hogue.

[33] Article 1, section 6, clause 2 prohibits Members from holding an office if they voted to increase the salary of that office. It states, "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

(2005-1) was withdrawn because the President decided to nominate him instead for the post of Chief Justice, which became available subsequent to his original submission of the Roberts' nomination.[34]

Among nominations not resubmitted, Thornberry's (1968) was withdrawn simply because the vacancy he was to fill was eliminated by the failure of a concurrent nomination of a sitting Justice to be Chief Justice. The late nomination of Micou (1853) presents a more ambiguous case, but the immediate reason it was not resubmitted was that the lame duck President who originally submitted it had left office.

On other nominations in this group, circumstances suggest that the Senate's inaction did reflect the presence of opposition. Most clearly, the congressional action to abolish Stanbery's vacancy (1866) appears to reveal emphatic objection to his nomination.[35] Also, after Hornblower's initial nomination received no action late in a session (1893-1), the Senate rejected his renomination outright (1893-2). In the case of Spencer, as discussed earlier, the Senate had already rejected the nomination once before President Tyler later resubmitted and withdrew it on the same day (1844).[36] There also appears reason to conclude that the withdrawals of both Cushing (1874) and Miers (2005) represent responses to expressed opposition.[37]

Floor Action Without Final Vote

The 13 nominations that received floor action, but no final vote, reflect a different distribution of circumstances. Consideration of one of the 13 (Read, 1845) appears simply to have begun too late in a session to be completed, but the Senate appears to have laid aside each of the other 12 as a consequence of unfavorable action on some procedural motion. The specific actions taken in these cases, noted in **Table 1** and described in more detail in the section on "Procedural Complexity," were seldom ones that conclusively precluded further consideration. Instead, the Senate seems simply to have taken these actions as demonstrating a lack of sufficient support for confirmation. The President, correspondingly, subsequently withdrew six of these nominations.

The frequency of these proceedings may indicate the extent to which the Senate, in the presence of opposition to a Supreme Court nomination, has been willing to give it consideration and yet decline to proceed to an "up-or-down" vote. In recent times, the Senate has not often resorted to this form of proceeding. Nine of the 13 instances occurred in the decade from 1844 to 1853, and only two took place after the Civil War. The earliest instance occurred in 1828, when the Senate set aside the Crittenden nomination until after a reorganization of the Judiciary (by which point the nominating President would have left office).[38] The most recent case was the Fortas nomination for Chief Justice, which President Johnson withdrew in 1968 after supporters mustered only 45 votes for cloture on the motion to proceed to consider the nomination.[39]

[34] Jacobstein and Mersky, *The Rejected*, p. 59.

[35] Ibid., pp. 70-72. In the following session, nevertheless, Stanbery was nominated and confirmed as Attorney General.

[36] Ibid., pp. 37-38.

[37] Ibid, pp. 87-93; Robin Toner, David D. Kirkpatrick and Anne E. Kornblut, "Steady Erosion in Support Undercut Nomination," *New York Times*, October 28, 2005, p. 16.

[38] Jacobstein and Mersky, *The Rejected*, pp. 21-23.

[39] Under the rule then in effect, two-thirds of Senators present and voting were needed to invoke cloture. On the vote in question, the required number would have been 59.

Dispositions and the Extent of Opposition

The left-hand group of columns in **Table 2** summarizes the preceding discussion of how the Senate has disposed of Supreme Court nominations, showing that the Senate has confirmed more than three-quarters of all nominations submitted to it, and more than nine of every ten on which it voted. Indeed, as the middle group of columns shows, the Senate has confirmed almost half of all Supreme Court nominations ever submitted to it without even requiring a roll call vote. Roll calls, on the other hand, have by no means been uncommon, occurring on four of every nine final votes, including every one since 1967.

Neither the type nor the outcome of a vote, in itself, can be taken as affording a clear indication of the extent of the opposition a nomination may have generated. In particular, although a voice vote may reasonably be viewed as *failing* to indicate the *presence* of opposition, it could be rash to presume that it *demonstrates* an *absence* of opposition.[40] Conversely, although a roll call vote may reflect the presence of extensive opposition, it may also occur when no such level of opposition is present. In the years since 1968, for example, eight of the 19 roll calls have registered fewer than four "no" votes. More broadly, as **Table 2** shows, half of all roll call votes on Supreme Court nominations throughout history have involved fewer than 10 votes in opposition.

Taking the appearance of at least 10 "nay" votes as a rough threshold for the presence of significant opposition permits a more meaningful judgment of the significance of these data on the disposition of nominations.[41] By this standard, 26 of the 51 roll calls by which nominations were confirmed revealed "significant" opposition. Combining these 26 nominations with the 11 that were rejected, it may be said that just 37 of the Senate's 135 votes on confirmation indicated the presence of "significant" opposition.

By incorporating nominations that received no final vote into this approach, a unified account may be given of what different outcomes on these nominations mean. The earlier discussion of nominations that received floor action but no final vote suggested that this outcome typically reflected the presence of opposition. The discussion of nominations that received no floor action, on the other hand, concluded that this outcome has come about, on different occasions, both when significant opposition was present and not. Accordingly, this disposition cannot, in itself, be taken as an indicator of either circumstance.

[40] A salient example is provided by the confirmation of Goldberg in 1962, when one Senator explicitly asked to be recorded in opposition even though the Senate was acting by voice vote.

[41] In early days, when the Senate was much smaller, fewer than 10 negative votes might still have represented a significant level of opposition. In practice, however, the rough standard proposed may reasonably be applied to all periods, because until 1870, all nominations opposed by fewer than 14 Senators were opposed by fewer than five.

Table 2. Dispositions of Supreme Court Nominations, Types of Vote, and Extent of Opposition Indicated

Form of Disposition	Outcome			Type of Vote			Extent of Opposition Indicated by Form of Disposition (see text)		
	Confirmed	Rejected	No Final Action	Voice[a]	Roll Call	None	Scattered or None	"Significant"	Indeterminate
Confirmed, voice vote[a]	73			73			73		
Confirmed, roll call vote, fewer than 10 opposed	25				25		25		
Confirmed, roll call vote, 10 or more opposed	26				26			26	
Rejected (all by roll call vote)		11			11			11	
Floor action without final vote			13			13		13	
No floor action			12			12			12
Total	**124**	**11**	**25**	**73**	**62**	**25**	**98**	**50**	**12**
Percent of 160 total nominations	*78*	*7*	*16*	*46*	*39*	*16*	*61*	*31*	*8*
Percent of 135 nominations reaching a vote	*92*	*8*		*54*	*46*				
Percent of 148 nominations receiving floor action							*66*	*34*	

Source: *Senate Executive Journal*; **Table A-1**.

a. Includes unanimous consent.

The results of these considerations are summarized in the right-hand columns of **Table 2**. The 13 nominations on which floor action failed to result in a final vote are counted as cases of "significant" opposition, but the 12 that never reached the floor are treated as permitting no definite conclusion about opposition. This classification yields a total of 50 nominations with dispositions that imply "significant" opposition.[42] From this perspective, accordingly, it can be held that just about two-thirds of the 148 Supreme Court nominations reaching the Senate floor have met no more than scattered opposition.

Length of Floor Action

Days of Floor Action

Another salient characteristic in terms of which Supreme Court nominations vary is the length of consideration they receive on the floor. As with forms of disposition, of course, length of consideration can be established only for those nominations on which consideration occurs. Accordingly, the data discussed in this section again reflect only the 148 nominations that reached the floor.

The length of consideration of Supreme Court nominations is identified in **Table 3** in terms of the number of calendar days on which Senate floor action took place on the nomination.[43] In general, each day (post-committee if reffered) was counted on which any formal procedural action in relation to a nomination occurred, even if the nomination itself was not formally under consideration on that day. For example, a day was counted on which a motion to proceed to consider a nomination was offered or debated, even if the motion was defeated, or was not adopted until the following day. Otherwise, for example, all Senate floor action on the Fortas nomination for Chief Justice (1968), which occurred in its entirety pending a motion to proceed to consider the nomination, would not be counted. Similarly, in relation to the 1828 Crittenden nomination, days on which the Senate debated the resolution to postpone action are counted as days of floor action on the nomination. On the other hand, days were not counted on which Senators made individual speeches in relation to a nomination, but the Senate did not formally have it under consideration on the floor, as happened extensively, for example, on the Rehnquist nomination for Associate Justice (1971).

Table 3. Length of Floor Action on Supreme Court Nominations

Days	Number of Nominations	Nominations	Disposition (if not confirmed)	For Chief Justice?
1	100	[individuals not listed]		
2	21	[individuals not listed]		
3	12	[individuals not listed]		

[42] Alternatively, the 12 nominations without floor action might be incorporated into the classification on the basis of the individual circumstances identified in their earlier discussion. The observations offered there suggest that five of the 12 might be taken as representing responses to opposition. The addition of these five would result in counting 55 nominations with "significant" opposition out of a total of 160, or 34%, a result but slightly different from that displayed for only those nominations that reached the floor.

[43] A more detailed measure, such as the number of hours consumed, would have been impracticable to compile, especially for the years before 1929, when the Senate typically did all executive business in closed session. Number of days, however, could be readily and definitively ascertained from the *Executive Journal*.

Days	Number of Nominations	Nominations	Disposition (if not confirmed)	For Chief Justice?
4	5	John G. Roberts, 2005		
		Charles Evans Hughes, 1930		yes
		Harlan F. Stone, 1925		yes
		Joseph P. Bradley, 1870		
		Alexander Wolcott, 1811	rejected	
5	4	Samuel A. Alito, 2005		
		Clarence Thomas, 1991		
		William H. Rehnquist, 1986		yes
		William H. Rehnquist, 1971		
6	2	Abe Fortas, 1968	unfinished	yes
		George E. Badger, 1853	unfinished	
7	1	Clement Haynsworth Jr., 1970	rejected	
8	1	John J. Parker, 1930	rejected	
9	1	John J. Crittenden, 1828	unfinished	
10-13	0			
14	1	G. Harrold Carswell, 1970	rejected	
Total	148			

Source: *Senate Executive Journal*; **Table A-1**.

The data presented, accordingly, are more precisely described as presenting the length of "floor action" than of formal "consideration" or of "debate." In compiling these data, however, a few actions were treated as exceptions to the standard just identified. Especially during the first half of the 19th century, for example, the Senate commonly referred newly received nominations to committee through action taken on the floor. In more recent times, the Senate has sometimes reached a unanimous consent agreement setting terms for consideration of a nomination in advance of any actual consideration. When either such action was the only one taken in relation to a nomination on a given day, the day was not counted as a day of consideration. A contrary practice would tend to overstate the length of consideration of these nominations relative to others to which the Senate actually devoted similar time, but on which similar actions occurred not on a preceding day, but on the same day as other steps.

Extended Consideration and Opposition

Table 3 shows that, historically, the Senate has found a single day sufficient for floor action on more than two-thirds of all the nominations submitted (although this form of action has ceased to be the norm in the years since 1967). For nominations receiving longer consideration, numbers decline quickly as length of consideration rises, so that 10% of those reaching the floor remained there for more than three days.

The more extended consideration given to this relative handful of nominations may rest on a variety of causes. Assessment of their nature is likely to begin from the well understood circumstance that opponents of a matter in the Senate may engage in extended debate as a means of delaying or blocking final action.[44] Accordingly, it might be natural to take the length of floor action as an indicator of the intensity of opposition to a nomination, and specifically of the

[44] These possibilities are discussed in more detail in CRS Report RL30360, *Filibusters and Cloture in the Senate*, by Richard S. Beth, Valerie Heitshusen, and Betsy Palmer.

determination with which opponents attempted to delay its confirmation. Such a supposition might be supported by the observation that none of the six nominations receiving more than five days' consideration was confirmed.

Other considerations, however, also may be pertinent. It may be significant, for example, that four of the 15 nominations considered for more than three days were for Chief Justice; it may plausibly be supposed that the Senate has generally tended to find these nominations as necessitating more sustained consideration. More broadly, the Senate may well have been likely to devote more time to nominations that were considered particularly important, for example, to the balance or future course of the Court.

In addition, the data in **Table 3** also suggest a trend toward longer consideration in more recent times. Although extended consideration was not unheard of even in very early years (e.g., Wolcott, 1811, and Crittenden, 1828), seven of the 10 nominations receiving more than four days' consideration occurred in 1968 or later, beginning with the Fortas nomination for Chief Justice. This trend may be associated either with generally observable developments in the way the Senate handles its business or with increases in controversy specifically over nominations to the Court.

These considerations suggest that the occurrence of extended consideration on Supreme Court nominations cannot, in itself, be taken as a definitive indicator of strong opposition. Not only may extended consideration occur for other reasons, but it is also not necessarily the case that even determined opponents have always expressed their position by attempting to protract proceedings. On the other hand, lengthy consideration may reasonably be viewed as a sign of the *possibility* that opposition may have been present. Correspondingly, although the completion of consideration on a single day cannot be taken to demonstrate an absence of opposition, it may appropriately be viewed, more cautiously, as *failing* to afford evidence that significant opposition *was* present.

Procedural Complexity

Optional Procedural Actions

Senate floor proceedings on Supreme Court nominations, like those on other matters, are distinguishable not only in terms of the means of disposition and the length of time consumed, but also by the procedural actions that may occur in the course of consideration. As with these other characteristics of floor action, procedural actions can be identified only for the 148 nominations that reached the floor. **Table 4** lists various forms of procedural action that have occurred in the course of Senate floor consideration on these nominations and how often each has appeared. It shows that no single procedure was used on more than about one in seven of the Supreme Court nominations reaching the floor, but also that a half-dozen different procedures were used at least half that often. No single procedure either stands out as especially characteristic of proceedings on these nominations or clearly identifies any distinctive subgroup among them.

Instead, floor proceedings on Supreme Court nominations are more readily categorized, in this respect, simply in terms of whether or not any procedural actions at all occurred beyond those required in the course of consideration itself. Throughout history, floor action on Supreme Court nominations has most often remained procedurally simple in this sense. Proceedings on 78 of the 148 nominations were procedurally simple in the sense of involving no optional procedural actions. The remaining 70 nominations (47% of the total) may be identified, in this minimal sense, as "procedurally complex."

Procedurally complex nominations might be further distinguished in several ways, such as by the number of procedural actions that occurred in the course of floor action or the extent to which procedural actions were applied to other procedural actions (e.g., a motion to table a motion to postpone). A more readily applicable criterion for this purpose, however, is whether any of the procedural actions taken resulted in a roll call vote. Again as **Table 4** shows, procedural roll calls occurred on 26 of the 70 nominations on which any optional procedures were used (18% of the total 148 nominations on which floor action occurred). This further distinction affords a rough indicator of the intensity with which procedural action was pursued.

For some kinds of optional procedure used in relation to Supreme Court nominations, the principal effect would have been to expedite rather than delay consideration. These included chiefly (1) actions, taken either by motion or unanimous consent, to proceed to consider a nomination on the same day reported; and (2) consent agreements assuring a final vote (either by limiting debate or setting a time certain) that were reached before consideration began or on its first day. In order to examine the potential use of optional procedures as means of pursuing opposition to Supreme Court nominations, it is appropriate to exclude these forms of action from consideration. The second column of **Table 4** presents a count of optional procedures that could potentially have been used for purposes of delay or opposition.

Using this criterion, 90 of the total 148 nominations reaching the floor (61%) may be said to have been subject to no optional procedures that could have had the effect of delaying or terminating consideration. This percentage is comparable to the 62% of nominations reaching the floor that faced no significant opposition and the 68% that received action on only a single day. As with those other characteristics of consideration, it would not be appropriate to take the absence of procedural complexity as demonstrating the absence of opposition. It could reasonably be said, nevertheless, that when nominations involve no procedural complexity, no positive inference may be drawn from the procedural features of consideration that opposition or contention was present. Conversely, the occurrence of procedural complexity, or even of procedural roll calls, cannot be regarded as sufficient in itself to *demonstrate* the presence of opposition or contention, but may reasonably be taken as cause to think that such opposition *may* have been present.

The occurrence of optional procedural actions is also related to the occasions, previously detailed in **Table 1**, on which nominations reached the floor but failed to reach a final vote on confirmation. In 12 of the 13 cases of incomplete consideration listed in **Table 1**, some optional procedural action was the last one that occurred, and had the effect of terminating consideration. In order to indicate some potential effects of optional procedural actions, the last column of **Table 4** reproduces this information in summary form.

Table 4. Procedural Actions Occurring During Floor Action on Supreme Court Nominations

Procedural Action	Number of Nominations on Which the Procedural Action—			
	Occurred	Potentially Involved Delay	Received a Roll Call Vote	Had Effect of Terminating Consideration
Motion to postpone	19	19	8	3
Motion to recommit (or commit)	14	14	8	1
Intervention in calling up	23[a]	13[b]	n.a.[c]	n.a.[c]
Motion to proceed to consider	13[d]	13[d]	3	2

Procedural Action	Number of Nominations on Which the Procedural Action—			
	Occurred	Potentially Involved Delay	Received a Roll Call Vote	Had Effect of Terminating Consideration
Motion to lay on the table	13	13	4	5
Live quorum call	11	11	n.a.[c]	n.a.[c]
Motion to adjourn or recess	7[e]	7	6	0
Consent agreement for final vote	19[f]	7[g]	n.a.[c]	n.a.[c]
Motion for cloture	4	4	4	1
Motion to reconsider	3	3	1	0
Total number of nominations	**70**[h]	**59**[h]	**26**[h]	**12**

Source: *Senate Executive Journal*. For 21st century nominations, congressional Legislative Information System (LIS) and *Congressional Record*.

a. Includes only the following: (1) objections to a request, made either by motion or by unanimous consent, to proceed to consider a nomination on the same day reported; (2) passing a nomination over on calendar call; and (3) unanimous consent arrangements (including those made by special order) providing for consideration at a future time.

b. Includes only the following: (1) objections to a request, made either by motion to unanimous consent, to proceed to consider a nomination on the same day reported; (2) passing a nomination over on calendar call; and (3) unanimous consent arrangements *before 1967* (including those made by special order) providing for consideration at a future time.

c. Not applicable (see accompanying text).

d. Includes special orders for consideration that were established by vote; excludes motions that could have been defeated by objection, which are included under (a)(1) and (b)(1) as "Interventions in calling up."

e. Includes only those motions to adjourn or recess that were offered in executive session, and so could have delayed or protracted consideration more than would normally have occurred.

f. Includes only consent agreements that assured the occurrence of a final vote, either by limiting total debate time, setting a time certain for a final vote, or otherwise.

g. Includes only consent agreements that assured the occurrence of a final vote and were not reached until after the first day of consideration.

h. For the first three data columns, the total displayed is less than the sum of the cell entries, because some nominations involved more than one procedural action.

These 12 instances show that the effect of a procedural action in any individual case depends only in part on the prescribed effect of the action. It is also affected, in some cases, by the procedural context in which the action is undertaken, and in particular on whether it is integral to or divergent from the routine practice of the time. Procedural context changes from case to case, normal practice also has changed over the course of Senate history, and in some cases, the prescribed effect of procedural actions has changed as well. Accordingly, the potential significance of optional procedural actions may be clarified by reference to some of the points initially developed in the section on "Historical Trends in Floor Consideration." For this purpose, it is useful to look separately at actions that affect how the Senate has taken up nominations and those that can occur in the course of consideration. In both cases, however, the periods during which distinctive patterns of optional procedural action characteristically appear differ from those discussed in earlier sections, which were defined by changes in the normal terms of consideration. Each of the following sections, accordingly, is couched in terms of its own appropriate periodization.

Calling Up Nominations

The Senate has always taken up nominations under procedures that govern action in executive session, which are in some respects separate from those regulating legislative action. It has usually done so by going into executive session to consider the nomination, but occasionally by granting unanimous consent to consider the nomination "as in" executive session, without actually leaving legislative session for the purpose. As described earlier, in the section on "Historical Trends in Floor Consideration," it appears that the normal practice of the Senate for most of its history (from 1789 until roughly 1967) was to take up each nomination automatically when it was reached in the course of considering executive business. In order to be eligible for consideration under this procedure, a nomination apparently had to have become available for floor action at least one day previously. Initially, nominations became available when received from the President; after 1835, when nominations to the Supreme Court began routinely to be referred to committee, they normally became available for consideration when reported. After about 1922, it appears, this proceeding was formalized as a Call of the Calendar of nominations.

Sometimes, however, by unanimous consent, the Senate has taken up a nomination on the same day reported or submitted. As previously noted, in fact, this proceeding was used for nearly half of all nominations reaching the floor (18 of 41) from 1868 to 1922.

No departure from these routine forms of proceeding occurred before 1835, when the nominations of Taney and Barbour, though eligible for the normal procedures, were called up instead by a roll call vote on a motion to proceed to consider. Complications of a similar kind were faced by Badger in 1853, when the Senate was unable to reach a vote on a motion to proceed, and by Black in 1861, when the Senate defeated a motion to proceed on a roll call vote. During roughly this same period, however (1844-1874), motions to proceed to consider were also offered on seven other nominations that were eligible for normal consideration, but the Senate adopted these motions in short order and by voice vote.

In the cases of both Badger and Black, the Senate also attempted to bring the nomination to the floor through a special order providing that it proceed to consideration on a specified later day. The Senate ultimately adopted a special order of this kind for Badger by voice vote, but never accepted one for Black. On five Supreme Court nominations thereafter, through 1930, the Senate used unanimous consent to establish special orders of this kind. These special orders represent forerunners of the contemporary practice of reaching agreements in advance, by unanimous consent, to take a matter up. In these earlier times, however, special orders seem to have been used for these nominations only in unusual circumstances, to overcome difficulties in bringing a matter to the floor, and their effect was to put off its consideration until after the point at which it would normally have come up.

Another form of action that indicated an attempt to delay consideration appeared on four scattered occasions before 1967 when an attempt to call a nomination up on the same day it was reported or submitted was prevented by objection. A more definite, though still only temporary, form of delay was imposed on five nominations during this period (all after 1880), each of which was passed over for consideration at least once, upon demand of a Senator, when reached in its normal order.

From 1968 on, the Call of the Calendar of nominations fell into disuse for the consideration of Supreme Court nominations, and a different set of practices for initiating floor action on these nominations has become standard. All but one of the 21 nominations that have reached the floor since that time did so pursuant to a request for unanimous consent that the Senate proceed to consider it. For eleven nominations, this consent agreement provided for immediate consideration; for the remaining nine, it provided, like the earlier special orders, for consideration to begin at some future date. In addition, some of these consent agreements provided for the

Senate not only to take up the nomination, but to go into executive session for the purpose, and some also limited debate or set a time certain for a final vote. Whether or not they included these additional provisions, however, these agreements represent a routine proceeding for taking up the nomination and fail to suggest any potential difficulties in bringing it to the floor. The only nomination in this recent period to experience difficulty at the point of calling up has been that of Fortas in 1968, on which a motion to proceed to consider was found necessary and could not be brought to a vote.

Proceedings in the Course of Floor Action

Senate rules do not establish separate procedures for the consideration of nominations and of legislation to the same extent that they do for calling up business of the two kinds. The most evident differences in forms of proceeding between the two kinds of matter may be that nominations, of course, cannot be amended. Otherwise, most of the same procedural mechanisms used for legislative business are also available on nominations.

1789-1835

The only optional procedures used during consideration of Supreme Court nominations in these years were motions to postpone temporarily, to commit with instructions, and to lay on the table. The use of any of these motions was uncommon, occurring on only five of the 31 nominations reaching the floor before 1835. Motions to postpone temporarily, however, were used as early as 1795, motions to commit with instructions by 1811, and motions to table by 1826.

During this period, a motion to postpone or table was sometimes offered at the point when the Senate was just proceeding to consider a nomination, so that the motions might in these instances have been treated as part of the proceedings for calling up nominations. In order to present a consolidated view of the use of each motion, however, the present discussion views all of them as having been offered in the course of consideration.

Occasionally, as well, action with effect similar to one of these motions also was proposed by resolution. For example, the Senate several times entertained a resolution that it postpone or table a nomination until enactment of legislation reorganizing the circuit courts (which could have the effect of eliminating the nominee's vacancy), or one that directed a committee to investigate a nominee further, but did not formally recommit the nomination. **Table 4** includes these proceedings in the count of corresponding motions.

In most instances during this period, when motions to postpone, commit, or table were offered, the Senate adopted them by voice vote. At that time, adoption of a motion to table evidently did not have the effect of a final negative disposition, as it does today, but only of putting off action for the time being. The normal effect of adopting any of these motions, accordingly, was only to delay further action by taking the nomination off the floor temporarily. The only exception to this pattern occurred in 1828, when adoption (by roll call) of the resolution postponing the Crittenden nomination until after a circuit court reorganization effectively terminated consideration of the nomination.

1835-1845

During the decade between 1835 and 1845, by contrast with earlier years, only five of the 16 Supreme Court nominations that reached the floor were considered without the intervention of optional procedures. The procedures used continued to include only motions to postpone, commit, and table, but the consequences of their use became more varied. Some of these motions

continued to be adopted by voice vote, but others were either adopted or rejected on roll call votes. Adoption by voice vote may most likely suggest that supporters of the nomination may have been using the motion either to gain time or for routine purposes of agenda management; rejection by roll call suggests that the motions may have been offered by opponents seeking to bring about delays in consideration. Either of these results, however, normally permitted consideration to continue.

Especially when one of these motions was adopted by roll call, on the other hand, it often had the effect of terminating consideration before an up-or-down vote could occur. In 1835, the Senate tabled a resolution to postpone the Taney nomination until a circuit court reorganization, then adopted a motion to postpone it indefinitely. In 1844, the Senate, by roll call votes, tabled President Tyler's nominations of Walworth and King, and in the following year it did the same to their renominations, but by voice vote. The motion for indefinite postponement has the explicit purpose of terminating consideration, but, under the practice of the time, a similar consequence followed from adopting the motions to table only because the Senate never subsequently chose to resume consideration of the nomination. It appears highly likely that in taking these actions, the Senate understood that leaving consideration unfinished was their proponents' intent and would be the practical effect.

1845-1890

In the decades after 1845, political circumstances varied widely, but the overall incidence of procedural complexity on Supreme Court nominations declined, although not to early levels. A solid majority of the nominations reaching the floor between 1845 and 1890 (20 of 31) experienced no optional procedural action at all after being called up. (This figure, however, includes the five nominations confirmed during the Civil War, when any substantial opposition to the administration was absent from the Senate.)

During this period, the motions to postpone, to commit, and to table continued to be used on Supreme Court nominations, except that, because initial committee referral had become routine, the motion to recommit largely replaced the motion to commit. These three motions continued to be used in ways similar to the previous period, and continued to have a similar range of consequences. In 1870, however, a resolution was offered to lay two Supreme Court nominations on the table until Congress completed a circuit court reorganization, and this proved to be the last occasion on which an attempt was made in the Senate to table such a nomination. The Senate, accordingly, has never attempted to use this motion on Supreme Court nominations during the era when it would have the effect of a final negative disposition.

Beginning in 1853, however, the Senate also started to use motions to adjourn with the effect or apparent intent of putting off consideration of a Supreme Court nomination.[45] On the Badger nomination in 1853, such a motion was adopted by a roll call vote. Thereafter, the motion to adjourn was offered on six other nominations through 1889. On one occasion it was adopted by voice vote, but otherwise a roll call always rejected it.

For a brief period beginning in 1870, motions to reconsider a vote to confirm also appeared. The first such motion (on Strong in 1870) was withdrawn after three days' debate and the failure of a motion to postpone it. The second (on Harlan in 1877) never reached a vote. The last (on Woods in 1880) was tabled by roll call after a quorum failed on an initial roll call on the motion itself.

[45] Routine adjournments and recesses by voice vote or unanimous consent, most of which occurred outside executive session in any case, were not taken into account for this purpose.

After this third unsuccessful attempt, the Senate abandoned use of this motion in this context as well.

Neither the motion to adjourn nor the motion to reconsider was ever used with the effect of terminating consideration. The motions to postpone, to recommit, and to table, on the other hand, which had continued to appear since earlier times, were still occasionally used with this effect. The Bradford nomination was tabled in 1852 and received no further action, and the Badger nomination in the following year was postponed until a date after Congress was to adjourn. In 1873, the Williams nomination became the only one on which a recommittal ever terminated consideration.

On only one subsequent occasion (Fortas, 1968; see below) has the Senate ever again resorted to optional procedural actions to terminate action on a Supreme Court nomination short of an up-or-down vote. With this one exception, accordingly, such terminations came about only in the half century from 1828 through 1873. This period included not only the nine nominations on which floor action was terminated before a vote through optional procedures during consideration, but also the two on which this effect followed from Senate action on a motion to proceed to consider.[46] As already suggested in the case of the tabled Tyler nominations, it appears likely that in these instances, even when the procedures used did not, in themselves, definitively terminate consideration, the Senate understood in using them that this would be their practical effect.

1890-1967

After 1890, the frequency of optional procedural action during consideration declined further; from then through 1967, such action appeared on just 14 of the 50 nominations that reached the floor. Additional shifts also occurred in the forms of procedural action used. These shifts amounted principally to a substantial decline in the use of motions that required a vote of the Senate, and an increasing resort instead to live quorum calls, which can be demanded by a single Senator, and unanimous consent agreements, which can be blocked by the objection of any single Senator. Although the votable motions could potentially be used in ways that would have the effect of terminating consideration, such a result was not likely from either of these procedures that newly came into use on Supreme Court nominations during this period.

Early in this period, the Senate continued to adopt motions to recommit and to postpone by voice vote, and to reject them by roll call. After 1930, however, these motions became more unusual, and the motion to adjourn ceased to be used at all in this context. A motion to recommit or postpone has been offered on just four nominations since 1930, most recently in 1971 (on Rehnquist for Associate Justice), and all have been rejected on roll calls. Only routine motions to adjourn or recess have been offered during consideration of any Supreme Court nomination since 1890, except for one occasion (on the nomination of Hughes for Chief Justice in 1930) on which a roll call rejected a motion to recess. As noted earlier, the motion to reconsider had already become disused in this context, perhaps because the Senate had already begun to adopt its current practice of tabling this motion immediately after every successful action.

Beginning with the Stone nomination for Associate Justice in 1925, live quorum calls came to be used with some regularity during consideration (although a single such call had already occurred once previously, on the Woods nomination of 1880). At least 10 such calls each were demanded on the Hughes and Parker nominations in 1930. This procedure can be used to bring about a certain amount of delay even if it succeeds in producing a quorum, although only once (in the

[46] It also included the single case in which consideration lapsed without a vote in the absence of any procedural action (Read, 1845; see **Table 1**).

consideration of Parker) did such a call ever result in the actual failure of a quorum. After 1930, live quorum calls occurred on seven more nominations, most recently in 1971, but no more than three times on any single nomination.

The unanimous consent agreements that are to be taken into account in this connection include only those that assured the ability of the Senate to reach a final vote on a nomination, usually by setting either a time certain for the vote or an overall limit on the time for debate.[47] Such an agreement was first reached for Brewer (1889), but appeared on just three other nominations between then and 1967. Three of these four agreements were reached either in advance of consideration or on its first day, and accordingly appear likely to represent consensual arrangements to facilitate consideration. The fourth agreement, by contrast (on Parker in 1930), was not reached until the seventh day of consideration, and so appears more likely to represent a response to attempts to delay or extend consideration.

1968-Present

From 1968 onward, however, consent agreements became the standard means of regulating consideration of Supreme Court nominations, as they increasingly did for other major matters. Such agreements appeared on 17 of the 21 nominations that have reached the floor during this period, and six of the 17 were established only after the first day of consideration. Many of these agreements, on the other hand, may have represented collegial arrangements rather than attempts to overcome any difficulties in consideration, especially inasmuch as, on 12 of the 17 nominations in question, the consent agreement was the only optional procedural action taken. Overall, indeed, consideration of 16 of the 21 nominations reaching the floor since 1968 involved no optional procedural actions other than the consent agreement.

On the remaining five of these 21 recent nominations, the only optional procedures used were to postpone (once), to recommit (once), and for cloture. The motion for cloture, which allows a super-majority to limit the time for consideration of a matter, started to be used on Supreme Court nominations at about the same time as consent agreements became routine. As noted in the section on "Historical Trends in Floor Consideration," this motion did not become available for use on nominations until 1949. It was not used on any nomination, however, until 1968, when the Senate rejected cloture on a motion to proceed to consider the Fortas nomination for Chief Justice (and thereafter abandoned action on the nomination). This action represents the only time since 1873 when the Senate has terminated floor action on a Supreme Court nomination short of an up-or-down vote. Subsequently, cloture was moved also on the two Rehnquist nominations, as noted in the case study presented earlier. On a 1971 nomination for Associate Justice the motion failed, but a consent agreement was subsequently reached that permitted the Senate to reach a vote on confirmation. On a 1986 nomination for Chief Justice, the Senate invoked cloture, the first time it had done so on a Supreme Court nomination. Cloture was invoked also on the fourth Supreme Court nomination on which it was moved, that of Alito in 2006.

Procedural Complexity and Opposition

As was the case for forms of disposition and length of consideration, the significance of procedural complexity is more difficult to ascertain than is its occurrence. The preceding discussion shows that, on some occasions, optional procedures may have been used routinely, with the apparent purpose of managing the flow of business, and with a potential effect only of

[47] Consent agreements providing that the Senate proceed to consider a nomination at a subsequent point were addressed in the previous section, on "Calling Up Nominations." Agreements that involved both features are counted in both groups and considered separately under each head.

expediting action. On other occasions, optional procedures may have been used as means of delaying consideration or even placing obstacles in the way of a final disposition. In cases when the occurrence of optional procedural action resulted in consideration being terminated before a final vote, for example, it might reasonably be conjectured that the procedural action in question could have been undertaken with the intent of bringing about this result. It is equally reasonable to suppose that similar actions, undertaken on other nominations, may at least sometimes have reflected similar intentions, even if the results did not successfully fulfill those intentions.

No definitive conclusions, of course, might be drawn about the purpose of optional procedural actions in any specific case in the absence of information about the intentions of Senators undertaking them. Even to offer inferences about specific occasions on which such intentions were present would require examination of the political and historical circumstances surrounding each nomination, a task beyond both the scope and the purpose of this report. The preceding discussion, nevertheless, permits some assessment about which optional procedures may have afforded the possibility of delaying consideration or forestalling a final vote, and, accordingly, which of them might, in principle, have been used in some instances for such a purpose.

As with the level of opposition manifested in the final vote and in the length of floor action, it is plausible to consider the occurrence of procedural actions, or procedural roll calls, as an indication that contention or controversy *may* have been present, but it is insufficient to demonstrate that substantial contentiousness actually *was* present. At most, it may be appropriate to consider that the *absence* of optional procedural actions that could have been used for delay presents an *absence* of indication of controversy.

Relation Among Characteristics of Proceedings

That none of the three indicators examined in this part of the report may be taken as a definitive demonstration of the presence or absence of controversy is substantiated by the observation that these three criteria do not always identify the same nominations as possibly controversial. On the other hand, substantial overlap does exist among the nominations picked out by each indicator. This circumstance suggests that a more reliable and comprehensive measure of the level of controversy on each nomination might be derived from a simultaneous consideration of all three indicators together. Such an analysis, however, is beyond the scope of this report.

Appendix. Selected Characteristics of Senate Action on Supreme Court Nominations

Selected Characteristics of Floor Proceedings

Table A-1 provides information on the extent of opposition to, length of consideration of, and procedural actions taken on, each Supreme Court nomination submitted by the President from 1789 through 2005. This table identifies each nomination by the name of the nominee, and nominations for Chief Justice are distinguished by *italics*. Each nomination is also identified by the year in which it was submitted (action on some nominations extended into the following year).

Nominations that received no floor consideration, or that were withdrawn by the President, are identified in the "Notes" column, and for those that received no floor consideration, the columns for characteristics of floor proceedings are blank.

The column on "final vote" gives the tally of each roll call vote on confirmation. Nominations confirmed by a voice vote are identified by the entry of "voice" in this column. If no vote on confirmation occurred, the column is left blank.

For nominations confirmed by voice vote, by unanimous consent, or with fewer than 10 "nay" votes, the "Extent of Opposition" column is left blank. Other entries in this column identify those nominations that

- received no final vote, by an entry of "unfinished;"
- were rejected, by an entry of "rejected;" and
- were confirmed with more than more than 10 "nay" votes, by an entry of "opposition."

The column on "Optional Procedural Actions" is blank only for those nominations on which no floor action occurred. For nominations on which floor action occurred, the extent of optional procedural actions is identified by entries of

- "n" if no such actions occurred;
- "op" if such actions occurred, but with no procedural roll calls; and
- "opr" if procedural actions with roll calls occurred.

Table A-1. Selected Characteristics of Floor Proceedings on Supreme Court Nominations

Year	Nominee	Final Vote	Extent of Opposition	Floor Days	Optional Procedural Action[a]	Notes
1789	*John Jay*	Voice		1	n	
1789	John Rutledge	Voice		1	n	
1789	William Cushing	Voice		1	n	
1789	Robert H. Harrison	Voice		1	n	Declined to serve
1789	James Wilson	Voice		1	n	

Year	Nominee	Final Vote	Extent of Opposition	Floor Days	Optional Procedural Action[a]	Notes
1789	John Blair	Voice		1	n	
1790	James Iredell	Voice		1	n	
1791	Thomas Johnson	Voice		1	n	
1793-1	William Paterson					No floor action; withdrawn
1793-2	William Paterson	Voice		1	n	
1795	*John Rutledge*	10-14	Rejected	2	op	
1796	*William Cushing*	Voice		1	n	Declined to serve
1796	Samuel Chase	Voice		1	n	
1796	*Oliver Ellsworth*	21-1		1	n	
1798	Bushrod Washington	Voice		1	n	
1799	Alfred Moore	Voice		3	op	
1800	*John Jay*	Voice		1	n	Declined to serve
1801	*John Marshall*	Voice		1	n	
1804	William Johnson	Voice		1	n	
1806	H. Brockholst Livingston	Voice		1	n	
1807	Thomas Todd	Voice		1	n	
1811	Levi Lincoln	Voice		1	n	Declined to serve
1811	Alexander Wolcott	9-24	Rejected	4	op	
1811	John Quincy Adams	Voice		1	n	Declined to serve
1811	Joseph Story	Voice		1	n	
1811	Gabriel Duvall	Voice		1	n	
1823	Smith Thompson	Voice		1	n	
1826	Robert Trimble	27-5		2	opr	
1828	John J. Crittenden		Unfinished	9	opr	
1829	John McLean	Voice		1	n	
1830	Henry Baldwin	41-2		1	n	
1835	James M. Wayne	Voice		1	n	
1835-1	Roger B. Taney		Unfinished	3	opr	
1835-2	*Roger B. Taney*	29-15	Significant	3	opr	
1835	Philip P. Barbour	30-11	Significant	1	opr	
1837	William Smith	23-18	Significant	2	op	Declined to serve
1837	John Catron	28-15	Significant	2	op	

Year	Nominee	Final Vote	Extent of Opposition	Floor Days	Optional Procedural Action[a]	Notes
1837	John McKinley	Voice		1	n	
1841	Peter V. Daniel	22-5		1	opr	
1844-1	John C. Spencer	21-26	Rejected	1	n	
1844-1	Reuben H. Walworth		Unfinished	1	opr	Withdrawn
1844	Edward King		Unfinished	1	opr	
1844-2	John C. Spencer					No floor action; withdrawn
1844-2	Reuben H. Walworth		Unfinished	1	op	
1845	Reuben H. Walworth		Unfinished	1	op	Withdrawn
1845	Edward King		Unfinished	1	op	Withdrawn
1845	Samuel Nelson	Voice		1	op	
1845	John M. Read		Unfinished	1	op	
1845	George W. Woodward	20-29	Rejected	2	opr	
1845	Levi Woodbury	Voice		1	n	
1846	Robert C. Grier	Voice		1	n	
1851	Benjamin R. Curtis	Voice		1	n	
1852	Edward A. Bradford		Unfinished	1	op	
1853	George E. Badger		Unfinished	6	opr	
1853	William C. Micou					No floor action
1853	John A. Campbell	Voice		1	n	
1857	Nathan Clifford	26-23	Significant	2	op	
1861	Jeremiah S. Black		Unfinished	3	opr	
1862	Noah H. Swayne	38-1		1	n	
1862	Samuel F. Miller	Voice		1	n	
1862	David Davis	Voice		1	n	
1863	Stephen J. Field	Voice		1	n	
1864	*Salmon P. Chase*	Voice		1	n	
1866	Henry Stanbery					No floor action
1869	Ebenezer R. Hoar	24-33	Rejected	2	opr	
1869	Edwin M. Stanton	46-11	Significant	1	n	Did not serve
1870	William Strong	Voice		3	opr	
1870	Joseph P. Bradley	46-9		4	opr	
1872	Ward Hunt	Voice		1	n	
1874	*George H. Williams*		Unfinished	2	op	Withdrawn
1874	*Caleb Cushing*					No floor action; withdrawn
1874	*Morrison R. Waite*	63-0		1	op	

Year	Nominee	Final Vote	Extent of Opposition	Floor Days	Optional Procedural Action[a]	Notes
1877	John M. Harlan	Voice		1	op	
1880	William B. Woods	39-8		2	opr	
1881-1	Stanley Matthews					No floor action
1881-2	Stanley Matthews	24-23	Significant	3	op	
1881	Horace Gray	51-5		1	n	
1882	Roscoe Conkling	39-12	Significant	1	n	Declined to serve
1882	Samuel Blatchford	Voice		1	n	
1888	Lucius Q.C. Lamar	32-28	Significant	1	n	
1888	*Melville W. Fuller*	41-20	Significant	1	n	
1889	David J. Brewer	53-11	Significant	2	opr	
1890	Henry B. Brown	Voice		1	n	
1892	George Shiras, Jr.	Voice		1	n	
1893	Howell E. Jackson	Voice		2	op	
1893-1	William B. Hornblower					No floor action
1893-2	William B. Hornblower	24-30	Rejected	2	op	
1894	Wheller H. Peckham	32-41	Rejected	3	op	
1894	Edward D. White	Voice		1	n	
1895	Rufus W. Peckham	Voice		1	n	
1898	Joseph McKenna	Voice		2	op	
1902	Oliver W. Holmes	Voice		1	n	
1903	William R. Day	Voice		1	n	
1906	William H. Moody	Voice		1	n	
1909	Horace Lurton	Voice		1	n	
1910	Charles E. Hughes	Voice		1	n	
1910	*Edward D. White*	UC		1	n	
1910	Willis Van Devanter	Voice		1	n	
1910	Joseph R. Lamar	Voice		1	n	
1912	Mahlon Pitney	50-26	Significant	3	n	
1914	James C. McReynolds	44-6		2	n	
1916	Louis D. Brandeis	47-22	Significant	1	op	
1916	John H. Clarke	UC		1	n	
1921	*William H. Taft*	60-4		1	n	
1922	George Sutherland	Voice		1	n	
1922-1	Pierce Butler					No floor action
1922-2	Pierce Butler	61-8		1	opr	

Year	Nominee	Final Vote	Extent of Opposition	Floor Days	Optional Procedural Action[a]	Notes
1923	Edward T. Sanford	UC		1	n	
1925	Harlan F. Stone	71-6		4	op	
1930	*Charles E. Hughes*	52-26	Significant	4	opr	
1930	John J. Parker	39-41	Rejected	8	op	
1930	Owen J. Roberts	UC		1	n	
1932	Benjamin N. Cardozo	UC		1	n	
1937	Hugo L. Black	63-16	Significant	1	opr	
1938	Stanley F. Reed	UC		1	n	
1939	Felix Frankfurter	Voice		1	n	
1939	William O. Douglas	62-4		2	op	
1940	Frank Murphy	UC		1	n	
1941	*Harlan F. Stone*	UC		1	n	
1941	James F. Byrnes	UC		1	n	
1941	Robert H. Jackson	Voice		1	op	
1943	Wiley B. Rutledge	Voice		1	n	
1945	Harold H. Burton	UC		1	n	
1946	*Fred M. Vinson*	Voice		1	n	
1949	Tom C. Clark	73-8		2	n	
1949	Sherman Minton	48-16	Significant	1	opr	
1954	*Earl Warren*	Voice		1	n	see note[b]
1954	John M. Harlan					No floor action
1955	John M. Harlan	71-11	Significant	2	op	
1957	William J. Brennan, Jr.	Voice		2	op	
1957	Charles E. Whittaker	Voice		1	n	
1959	Potter Stewart	70-17	Significant	1	op	
1962	Byron R. White	Voice		1	n	
1962	Arthur J. Goldberg	Voice		1	n	see note[c]
1965	Abe Fortas	Voice		1	n	
1967	Thurgood Marshall	69-11	Significant	2	n	
1968	*Abe Fortas*		Unfinished	6	opr	Withdrawn
1968	Homer Thornberry					No floor action; withdrawn
1969	*Warren E. Burger*	74-3		1	n	
1970	Clement Haynsworth, Jr.	45-55	Rejected	6	op	
1970	G. Harrold Carswell	45-51	Rejected	14	opr	
1970	Harry A. Blackmun	94-0		2	n	

Year	Nominee	Final Vote	Extent of Opposition	Floor Days	Optional Procedural Action[a]	Notes
1971	Lewis F. Powell, Jr.	89-1		3	n	
1971	William H. Rehnquist	68-26	Significant	5	opr	
1975	John Paul Stevens	98-0		1	n	
1981	Sandra Day O'Connor	99-0		1	n	
1986	*William H. Rehnquist*	65-33	Significant	5	opr	
1986	Antonin Scalia	98-0		1	n	
1987	Robert H. Bork	42-58	Rejected	3	op	
1988	Anthony M. Kennedy	97-0		1	n	
1990	David H. Souter	90-9		2	n	
1991	Clarence Thomas	52-48	Significant	6	op	
1993	Ruth Bader Ginsburg	96-3		3	n	
1994	Stephen G. Breyer	87-9		1	n	
2005-1	John G. Roberts					No floor action; withdrawn
2005-2	*John G. Roberts*	78-22	Significant	4	n	
2005	Harriet Miers					No floor action; withdrawn
2005	Samuel A. Alito	58-42	Significant	5	opr	
2009	Sonia Sotomayor	68-31	Significant	3	n	
2010	Elena Kagan	63-37	Significant	3	n	

Source: *Senate Executive Journal.* For 21st century nominations, Legislative Information System (LIS) and *Congressional Record*.

a. Includes only procedural actions having the potential for delaying consideration. For details, see **Table 4** and accompanying text.

b. Recorded as unanimous.

c. One Senator asked to be recorded in opposition.

Selected Characteristics of Committee Action

Table A-2 provides information about the course of committee action on Supreme Court nominations which, like that in **Table A-1**, may shed light on the extent and intensity of opposition thereto. Also like **Table A-1**, this table identifies nominees by name and by year of submission (which in some cases is not the year in which action was concluded), distinguishing nominations for Chief Justice by *italics*.

Table A-2 addresses only committee action that occurred before initial floor consideration. If a nomination was not referred to committee before initial floor consideration, the columns on "Days from receipt to committee report (or other final action)," and on ""Form of reporting (or other final committee action)" are left blank. Similarly, the column on "Days of open committee hearings" is left blank for cases in which no open committee hearings are known to have been held.

Finally, the column on "floor disposition" is left blank for nominations that were confirmed. For nominations not confirmed, a summary indication of floor disposition appears in this column, but greater detail appears in **Table A-1**, above.

The table provides the "Form of reporting (or other final committee action)" for each nomination that was referred to committee. In cases in which the committee action took any form other than the normal form of favorable action, the entry in this column is given in **bold face**. "Reported" was the normal form of favorable committee action from 1835 to 1865; "reported favorably" thereafter.

Table A-2. Selected Characteristics of Committee Action on Supreme Court Nominations

Year	Nominee	Days from receipt to committee report (or other final action)	Days of open committee hearings	Form of reporting (or other final committee action)	Floor Disposition (Blank if confirmed)
1789	*John Jay*				
1789	John Rutledge				
1789	William Cushing				
1789	Robert H. Harrison				
1789	James Wilson				
1789	John Blair				
1790	James Iredell				
1791	Thomas Johnson				
1793-1	William Paterson				no floor action; withdrawn
1793-2	William Paterson				
1795	*John Rutledge*				rejected
1796	*William Cushing*				
1796	Samuel Chase				
1796	*Oliver Ellsworth*				
1798	Bushrod Washington				
1799	Alfred Moore				
1800	*John Jay*				
1801	*John Marshall*				
1804	William Johnson				
1806	H. Brockholst Livingston				
1807	Thomas Todd				
1811	Levi Lincoln				
1811	Alexander Wolcott	see note[a]			rejected
1811	John Quincy Adams				
1811	Joseph Story				

Year	Nominee	Days from receipt to committee report (or other final action)	Days of open committee hearings	Form of reporting (or other final committee action)	Floor Disposition (Blank if confirmed)
1811	Gabriel Duvall				
1823	Smith Thompson				
1826	Robert Trimble				
1828	John J. Crittenden	39		**recommended not to act**	unfinished
1829	John McLean				
1830	Henry Baldwin				
1835	James M. Wayne	2		reported	
1835-1	Roger B. Taney				unfinished
1835-2	*Roger B. Taney*	8		reported	
1835	Philip P. Barbour	8		reported	
1837	William Smith	5		reported	
1837	John Catron	5		reported	
1837	John McKinley	6		reported	
1841	Peter V. Daniel				
1844-1	John C. Spencer	21		reported	rejected
1844-1	Reuben H. Walworth	93		reported	unfinished; withdrawn
1844	Edward King	9		reported	unfinished
1844-2	John C. Spencer				no floor action; withdrawn
1844-2	Reuben H. Walworth				unfinished
1845	Reuben H. Walworth	42		reported	unfinished; withdrawn
1845	Edward King	42		reported	unfinished; withdrawn
1845	Samuel Nelson	2		reported	
1845	John M. Read	6		reported	unfinished
1845	George W. Woodward	28		reported	rejected
1845	Levi Woodbury	11		reported	
1846	Robert C. Grier	1		reported	
1851	Benjamin R. Curtis	11		reported	
1852	Edward A. Bradford	9		reported	unfinished
1853	George E. Badger				unfinished
1853	William C. Micou	1		**discharged**	no floor action
1853	John A. Campbell	1		reported	

Year	Nominee	Days from receipt to committee report (or other final action)	Days of open committee hearings	Form of reporting (or other final committee action)	Floor Disposition (Blank if confirmed)
1857	Nathan Clifford	28		reported	
1861	Jeremiah S. Black				unfinished
1862	Noah H. Swayne	2		reported	
1862	Samuel F. Miller				
1862	David Davis	2		reported	
1863	Stephen J. Field	2		reported	
1864	*Salmon P. Chase*				
1866	Henry Stanbery	see note[b]		**no action**	no floor action
1869	Ebenezer R. Hoar	7		**adversely**	
1869	Edwin M. Stanton				
1870	William Strong	6		favorably	
1870	Joseph P. Bradley	6		favorably	
1872	Ward Hunt	5		favorably	
1874	*George H. Williams*	9	see note[c]	favorably	unfinished; withdrawn
1874	*Caleb Cushing*	0		favorably	no floor action; withdrawn
1874	*Morrison R. Waite*	1		favorably	
1877	John M. Harlan	40		favorably	
1880	William B. Woods	5		favorably	
1881-1	Stanley Matthews	19[d]		**no action**	no floor action
1881-2	Stanley Matthews	53		**adversely**	
1881	Horace Gray	1		favorably	
1882	Roscoe Conkling	6		favorably	
1882	Samuel Blatchford	9		favorably	
1888	Lucius Q.C. Lamar	29		**adversely**	
1888	*Melville W. Fuller*	61		**without recommendation**	
1889	David J. Brewer	12		favorably	
1890	Henry B. Brown	6		favorably	
1892	George Shiras, Jr.	6		**without recommendation**	
1893	Howell E. Jackson	11		favorably	
1893-1	William B. Hornblower	see note[b]		**no action**	no floor action
1893-2	William B. Hornblower	33		**adversely**	rejected

Year	Nominee	Days from receipt to committee report (or other final action)	Days of open committee hearings	Form of reporting (or other final committee action)	Floor Disposition (Blank if confirmed)
1894	Wheller H. Peckham	21		**without recommendation**	rejected
1894	Edward D. White				
1895	Rufus W. Peckham	6		favorably	
1898	Joseph McKenna	28		favorably	
1902	Oliver W. Holmes	2		favorably	
1903	William R. Day	4		favorably	
1906	William H. Moody	7		favorably	
1909	Horace Lurton	3		favorably	
1910	Charles E. Hughes	7		favorably	
1910	*Edward D. White*				
1910	Willis Van Devanter	3		favorably	
1910	Joseph R. Lamar	3		favorably	
1912	Mahlon Pitney	14		favorably	
1914	James C. McReynolds	5		favorably	
1916	Louis D. Brandeis	117	19	favorably	
1916	John H. Clarke	10		favorably	
1921	*William H. Taft*				
1922	George Sutherland				
1922-1	Pierce Butler	5		favorably	no floor action
1922-2	Pierce Butler	13		favorably	
1923	Edward T. Sanford	5		favorably	
1925	Harlan F. Stone	28	see note[e]	favorably	
1930	*Charles E. Hughes*	7		favorably	
1930	John J. Parker	27	1	**adversely**	rejected
1930	Owen J. Roberts	10		favorably	
1932	Benjamin N. Cardozo	8		favorably	
1937	Hugo L. Black	4		favorably	
1938	Stanley F. Reed	9	1	favorably	
1939	Felix Frankfurter	11	4	favorably	
1939	William O. Douglas	7	1	favorably	
1940	Frank Murphy	11		favorably	
1941	*Harlan F. Stone*	11	1	favorably	
1941	James F. Byrnes				
1941	Robert H. Jackson	18	1	favorably	

Year	Nominee	Days from receipt to committee report (or other final action)	Days of open committee hearings	Form of reporting (or other final committee action)	Floor Disposition (Blank if confirmed)
1943	Wiley B. Rutledge	21	1	favorably	
1945	Harold H. Burton	1		favorably	
1946	*Fred M. Vinson*	13	1	favorably	
1949	Tom C. Clark	10	3	favorably	
1949	Sherman Minton	18	1	favorably	
1954	*Earl Warren*	44	2	favorably	
1954	John M. Harlan	see note[b]		**no action**	no floor action
1955	John M. Harlan	59	2	favorably	
1957	William J. Brennan, Jr.	49	2	favorably	
1957	Charles E. Whittaker	16	1	favorably	
1959	Potter Stewart	93	2	favorably	
1962	Byron R. White	8	1	favorably	
1962	Arthur J. Goldberg	25	2	favorably	
1965	Abe Fortas	13	1	favorably	
1967	Thurgood Marshall	51	5	favorably	
1968	*Abe Fortas*	83	11	favorably	unfinished; withdrawn
1968	Homer Thornberry	see note[b]	11	**no action**	no floor action; withdrawn
1969	*Warren E. Burger*	11	1	favorably	
1970	Clement Haynsworth, Jr.	36	8	favorably	rejected
1970	G. Harrold Carswell	28	5	favorably	rejected
1970	Harry A. Blackmun	21	1	favorably	
1971	Lewis F. Powell, Jr.	32	5	favorably	
1971	William H. Rehnquist	32	5	favorably	
1975	John Paul Stevens	10	3	favorably	
1981	Sandra Day O'Connor	27	3	favorably	
1986	*William H. Rehnquist*	55	4	favorably	
1986	Antonin Scalia	51	2	favorably	
1987	Robert H. Bork	91	12	**unfavorably**	rejected
1988	Anthony M. Kennedy	58	3	favorably	
1990	David H. Souter	64	5	favorably	
1991	Clarence Thomas	81	8[f]	**without recommendation**	
1993	Ruth Bader Ginsburg	37	4	favorably	
1994	Stephen G. Breyer	63	4		

Year	Nominee	Days from receipt to committee report (or other final action)	Days of open committee hearings	Form of reporting (or other final committee action)	Floor Disposition (Blank if confirmed)
2005-1	John G. Roberts	see note[b]		**no action**	no floor action; withdrawn
2005-2	*John G. Roberts*	16	4	favorably	
2005	Harriet Miers	see note[b]		**no action**	no floor action; withdrawn
2005	Samuel A. Alito	75	5	favorably	
2009	Sonia Sotomayor	57	4	favorably	
2010	Elena Kagen	71	5	favorably	

Source: CRS Report RL33225, *Supreme Court Nominations, 1789 - 2010: Actions by the Senate, the Judiciary Committee, and the President*, by Denis Steven Rutkus and Maureen Bearden. Also, for 21st century nominations, Legislative Information System (LIS) and *Congressional Record*.

a. The Senate referred the Wolcott nomination to a special committee only subsequent to the start of floor consideration.

b. The nomination was referred, but the committee took no final action.

c. The committee held two days of closed hearings on the Williams nomination after it was recommitted subsequent to the start of floor consideration.

d. The committee took no action to report the first Matthews nomination, but at the end of the period stated voted to postpone it.

e. The committee held one day of hearings on the Stone nomination after it was recommitted subsequent to the start of floor consideration.

f. The committee held three additional days of hearings on the Thomas nomination subsequent to the start of floor consideration, although the nomination was not formally recommitted.

Author Information

Richard S. Beth
Specialist on Congress and the Legislative Process

Betsy Palmer
Analyst on Congress and the Legislative Process

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