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Senate Consideration of Presidential Nominations: Committee and Floor Procedure

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Elizabeth Rybicki
Analyst in American National Government
Government and Finance Division

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Summary

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

The vast majority of presidential appointees are confirmed routinely by the Senate. A regularized process facilitates quick action on thousands of government positions. The process also allows for lengthy scrutiny of candidates when necessary. Each year, a few hundred nominees to high-level positions are subject to Senate investigations and public hearings.

Committees play the central role in the process through investigations and hearings. Senate Rule XXXI provides that nominations shall be referred to appropriate committees "unless otherwise ordered." The Senate rule concerning committee jurisdictions (Rule XXV) broadly defines issue areas for committees, and the same jurisdictional statements generally apply to nominations as well as legislation. A committee often gathers and reviews information about a nominee either before or instead of a formal hearing.

A committee considering a nomination has four options. It can report the nomination to the Senate favorably, unfavorably, or without recommendation, or it can choose to take no action at all. It is more common for a committee to fail to take action on a nomination than to reject a nominee outright.

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

The question before the Senate when a nomination is called up is "will the Senate advise and consent to this nomination?" Only a majority of Senators present and voting, a quorum being present, is required to approve a nomination. Because nominations are vulnerable to filibusters, however, stronger support may be necessary. Cloture may be invoked to bring debate on a nomination to a close.

Nominations that are pending when the Senate adjourns or recesses for more than 30 days are returned to the President unless the Senate, by unanimous consent, waives the rule requiring their return (Senate Rule XXXI, clause 6). If a nomination is returned, and the President still wants a nominee considered, he must submit a new nomination to the Senate.

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Introduction

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

Senate confirmation is required for several categories of government officials. Military appointments and promotions make up the majority of nominations, approximately 65,000 a Congress, and most are confirmed routinely. Each Congress also considers close to 4,000 civilian nominations, and, again, many of them, such as appointments to or promotions in the Foreign Service and the Public Health Service, are routine. Civilian nominations considered by the Senate also include federal judges and specified officers in executive departments, independent agencies, and regulatory boards and commissions. Some categories of civilian nominations are treated specifically and in greater depth in other Congressional Research Service (CRS) reports.[1]

Approximately 99% of presidential appointees are confirmed routinely by the Senate. With tens of thousands of nominations each Congress, the Senate cannot possibly consider them all in detail. A regularized process facilitates quick action on thousands of government positions. The Senate may approve *en bloc* hundreds of nominations at a time, especially military appointments and promotions.

Although most nominees are swiftly and routinely confirmed by the Senate, the process also allows for close scrutiny of candidates when necessary. Each year, a few hundred nominees to high-level positions are regularly subject to Senate investigations and public hearings. Most of these are routinely approved, while a small number of nominations are disputed and receive more attention from the media

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[1] A list of related CRS products is provided at the end of this report.

and Congress. Judicial nominations, particularly Supreme Court appointees, are generally subject to greater scrutiny than nominations to executive posts, partly because judges serve for life. Among the executive branch positions, nominees for policymaking positions are more likely to be examined closely, and are slightly less likely to be confirmed, than nominees for non-policy positions.[2]

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

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

Receipt and Referral

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

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

[3] Joseph P. Harris, *The Advice and Consent of the Senate* (New York: Greenwood Press Publishers, 1968), p. 2; Richard Allan Baker, "Legislative Power Over Appointments and Confirmations," in Joel Silbey, ed., *Encyclopedia of the American Legislative System* (New York: C. Scribner's Sons, 1994), vol. 3, p. 1616.

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

[5] For more on senatorial courtesy and its history, see CRS Report RL31948, *Evolution of the Senate's Role in the Nomination and Confirmation Process: A Brief History*, by Betsy Palmer.

nominations the day they are received, and most are referred immediately to committees.

Senate Rule XXXI provides that nominations shall be referred to appropriate committees "unless otherwise ordered." In a few instances, by unanimous consent, the Senate has confirmed nominations without referral to a committee, particularly when the nominee is a current or former Senator. Formally the presiding officer, but administratively the executive clerk's office, refers the nominations to committees according to the Senate's rules and precedents.

The Senate rule concerning committee jurisdictions (Rule XXV) broadly defines issue areas for committees, and the same jurisdictional statements generally apply to nominations as well as legislation.[6] An executive department nomination can be expected to be referred to the committee with jurisdiction over legislation concerning that department or to the committee that handled the legislation creating the position. In some instances, the committee of jurisdiction for a nomination has been set in statute.[7]

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

Occasionally, nominations are referred to more than one committee, either jointly or sequentially. A joint referral might occur when two committees each have a claim to a nomination. Both committees must report on the nomination before the whole Senate can act on it, unless the Senate discharges one or both committees. If two committees have unequal jurisdictional claims, then the nomination is more likely to be sequentially referred. In this case, the first committee must report the nomination before it is sequentially referred to the second committee. The second referral often is subject to a requirement that the committee report within a certain number of days. Typically, nominations are jointly or sequentially referred by unanimous consent. Sometimes the unanimous consent agreement applies to all future nominations to a position or category of positions.[8]

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[6] For a list of appointee positions requiring Senate confirmation and the committees to which they are referred as of Oct. 27, 2003, see CRS Report RL30959, *Presidential Appointee Positions Requiring Senate Confirmations and Committees Handling Nominations*, by Henry B. Hogue.

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

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

Committee Procedures

Written Rules

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

Committee rules also frequently contain timetables outlining the minimum layover required between committee actions. A common timing provision is a requirement that nominations be held for one or two weeks before the committee proceeds to a hearing or a vote, permitting Senators time to review a nomination before committee consideration. Other committee rules specifically mandate a delay between steps of the process, such as the receipt of pre-hearing information and the date of the hearing, or the distribution of hearing transcripts and the committee vote on the nomination. Some of the written rules also contain provisions for the rules to be waived by majority vote, by unanimous consent, or by the chair and the ranking minority member.[9]

Investigations

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

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

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[9] U.S. Congress, Senate Committee on Rules and Administration, *Authority and Rules of Senate Committees*, 108th Cong., 1st sess., S.Doc. 108-6 (Washington: GPO, 2003).

To varying degrees, committees also conduct their own information-gathering exercises. Most committees have their own financial disclosure and personal background forms that a nominee must complete. Some committees, after reviewing responses to their standard questionnaire, might ask a nominee to complete a second questionnaire. Committees frequently require that written responses to these questionnaires be submitted before a hearing is scheduled. The Committee on the Judiciary sends form letters, sometimes called "blue slips," to Senators from a nominee's home state to determine whether they support the nomination. The Committee on the Judiciary also has its own investigative staff. The Committee on Rules and Administration handles relatively few nominations and conducts its own investigations, sometimes with the assistance of the FBI or the Government Accountability Office (GAO; formerly named General Accounting Office).

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

Hearings

Approximately half of all civilian appointees are confirmed without a hearing.[10] All committees that receive nominations do hold hearings on some nominations, and the likelihood of hearings varies with the importance of the position and the workload of the committee. The Committee on the Judiciary, for example, which receives a large number of nominations, does not usually hold hearings for U.S. attorneys, U.S. marshals, or members of part-time commissions. The Committee on Agriculture, Nutrition, and Forestry and the Committee on Energy and Natural Resources, on the other hand, typically hold hearings on most nominations that are referred to them. Committees often combine related nominations into a single hearing.

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

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[10] The estimate excludes military appointees as well as civilian appointees usually submitted on lists to the Senate. Civilian nominations usually submitted on lists include appointments to, and promotions in, the Coast Guard, Foreign Service, National Oceanic and Atmospheric Administration, and Public Health Service.

Committees sometimes send questions to nominees in advance of a hearing and ask for written responses. Nominees also might be asked to respond in writing to additional questions after a hearing. Especially for high-level positions, the nomination hearing may be only the first of many times an individual will be asked to testify before a committee. Therefore, the committee often gains a commitment from the nominee to be cooperative in future oversight activities of the committee.[11]

Hearings, under Senate Rule XXVI, are open to the public unless closed by majority vote for one of the reasons specified in the rule. Witness testimony is sometimes made available online through the website of the relevant committee and also through several commercial services, including Congressional Quarterly and Lexis-Nexis. Most committees print the hearings, although no rule requires it. The number of Senators necessary to constitute a quorum for the purpose of taking testimony varies from committee to committee, but it is usually smaller than a majority of the membership.[12]

Reporting

A committee considering a nomination has four options. It may report the nomination to the Senate favorably, unfavorably, or without recommendation, or it may choose to take no action at all. It is more common for a committee to fail to take action on a nomination than to report unfavorably. Committees occasionally report a nomination favorably, subject to the commitment of the nominee to testify before a Senate committee. Sometimes, committees choose to report a nomination without recommendation. Even if a majority of Senators on a committee do not agree that a nomination should be reported favorably, a majority might agree to report a nomination without a recommendation in order to permit a vote by the whole Senate. It is rare for the full Senate to consider a nomination if a committee chooses not to report it and the committee is not discharged by unanimous consent. The practice of discharging a committee of the consideration of a nomination is discussed below.

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

Most of the time, committees do not formally present reports on nominations on the floor of the Senate. Instead, a Senator, typically the committee chair, informs

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[11] Roger H. Davidson and Walter J. Oleszek, *Congress and Its Members*, 7th ed. (Washington: CQ Press, 2000), p. 314.

[12] For more details concerning hearings, see CRS Report 98-337, *Senate Committee Hearings: Scheduling and Notification*, by Thomas P. Carr, and CRS Report 98-392, *Senate Committee Hearings: Witness Testimony*, by Thomas P. Carr.

the legislative clerk stationed at the desk of the committee's decision. The executive clerk then arranges for the nomination to be printed in the *Congressional Record* and placed on the Executive Calendar. If a report were presented on the floor, it would have to be done in executive session. Executive session and the Executive Calendar will be discussed in the next section. According to Senate Rule XXXI, the Senate cannot vote on a nomination the same day it is reported except by unanimous consent.[13]

Although very few nominations proceed without the support of a committee, chamber rules make it possible for the full Senate to consider a nomination a committee does not report. Technically, Senate Rule XVII permits any Senator to submit a motion or resolution that a committee be discharged from the consideration of a subject referred to it. A motion to discharge a committee from the consideration of a nomination is, like all business concerning nominations, in order only in executive session.[14] If there is an objection to the motion to discharge, it must lie over until the next executive session on another day. It is fairly common for committees to be discharged from noncontroversial nominations by unanimous consent, often with the support of the committee, as a means of simplifying the process. It is far less common for Senators to attempt to discharge a committee from a nomination by motion.[15]

Floor Procedures

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

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

[14] Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, 101st Cong., 2nd sess., S. Doc. 101-28 (Washington: GPO, 1992), p. 944.

[15] The most recent example of an attempt appears to be the resolution to discharge the Judiciary Committee from further consideration of the 1989 nomination of William Lucas to be assistant attorney general. The resolution was ordered to lie over one day and then placed on the Executive Calendar. No further action was taken on the resolution. See "Senate Executive Resolution 166 — To Discharge the Lucas Nomination,"*Congressional Record*, vol. 135 (Aug. 3, 1989), p. 18435.

Executive Calendar

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

The Executive Calendar is distributed to Senate personal offices and committee offices when there is business on it. It is also available to congressional personnel online by following the link to legislative and executive calendars on the website of the Legislative Information System of the U.S. Congress [http://www.congress.gov/].

Executive Session

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

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

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

Taking Up A Nomination

If the Senate simply resolves into executive session, the business immediately pending is the first item on the Executive Calendar. A motion to proceed to another matter on the calendar would be debatable and subject to a filibuster.

In practice, the Senate expedites the process by specifying the business to be considered as part of the motion or unanimous consent request to go into executive session. The majority leader, by custom, effectively determines when or whether a nomination will be called up for consideration. For example, the majority leader may move or ask unanimous consent to "immediately proceed to executive session to consider the following nomination on the executive calendar...." By precedent, the motion to go into executive session to take up a specified nomination is not debatable.[16] The nomination itself, however, is debatable.

It is not in order for a Senator to move to consider a nomination that is not on the calendar, and, except by unanimous consent, a nomination on the calendar cannot be taken up until it has been on the calendar at least one day (Rule XXXI, clause 1). In other words, a nomination reported and placed on the calendar on a Monday can be considered on Tuesday, even if it is the same legislative day.[17]

Holds

A hold is a request by a Senator to his or her party leader to prevent or delay action on a nomination or a bill. Holds are not mentioned in the rules or precedents of the Senate, and they are enforced only through the agenda decisions of party leaders.[18] Some analysts and congressional observers claim the use of holds has increased in recent decades.[19]

The effectiveness of a hold ultimately is grounded in the power of the Senator placing the hold to filibuster the nomination and the difficulty of invoking cloture. The rules governing cloture in relation to nominations are discussed in a later section of this report. In another sense, however, holds are connected to the Senate traditions of mutual deference, since they may have originated as requests for more time to examine a pending nomination or bill.

Senators place holds on nominations for a number of reasons. One common purpose is to give a Senator more time to review a nomination or to consult with the nominee. Senators may also place holds because they disagree with the policy positions of the nominee. Senators have also admitted to using holds in order to gain

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

[17] The reference in Senate Rule XXXI, clause 1 to a "day" refers to a calendar day, not a legislative day. See Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, 101st Cong., 2nd sess., S.Doc. 101-28 (Washington: GPO, 1992), p. 943. A legislative day begins the first time the Senate meets after an adjournment and ends with the Senate adjourns again. A legislative day is not necessarily a calendar day because the Senate does not always adjourn prior to the end of a calendar day.

[18] For more information concerning the history, types, and potency of holds, see CRS Report RL31685, *Proposals to Reform "Holds" in the Senate*, by Walter J. Oleszek, and CRS Report 98-712, *"Holds" in the Senate*, by Walter J. Oleszek.

[19] Toby J. McIntosh, "Senate 'Holds' System Developing as Sophisticated Tactic for Leverage, Delay," *Daily Report for Executives* (Bureau of National Affairs), no. 165 (Aug. 26, 1991), p. C-1.

concessions from the executive branch on matters not directly related to the nomination. Depending on the timing of the hold and the support for the nomination, a hold can kill a nomination by preventing it from ever coming to the Senate floor.

Consideration and Disposition

The question before the Senate when a nomination is taken up is "will the Senate advise and consent to this nomination?" The Senate can approve, reject, or recommit a nomination.

Most nominations are brought up by unanimous consent and approved without objection; routine nominations often are called up and approved all together, or *en bloc*. A small proportion of nominations, generally to higher-level positions, can be controversial. When there is debate on a nomination, the chair of the committee usually makes an opening speech. For positions within a state, Senators from the state may wish to speak on the nominee, particularly if they were involved in the selection process. While floor debate is rarely lengthy, there are no time limits except when conducted under cloture or a unanimous consent agreement.[20]

A majority of Senators present and voting, a quorum being present, is required to approve a nomination. Because nominations are vulnerable to filibusters, however, stronger support may be necessary in order to invoke cloture, as discussed further below. The majority leader is unlikely to bring a nomination to the floor unless it is expected to be approved.

After the Senate acts on a nomination, the secretary of the Senate attests to a resolution of confirmation or disapproval and transmits it to the White House.

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

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[20] On May 23, 2005, a bipartisan group of Senators entered into a "Memorandum of Understanding on Judicial Nominations." The memorandum does not change the procedures of the Senate described in this report; it is a "commitment" that "nominees should only be filibustered under extraordinary circumstances" and an agreement "to oppose ... any amendment to or interpretation of the Rules of the Senate that would force a vote on a judicial nomination by means other than unanimous consent or Rule XXII" [the cloture rule]. For the text of the memorandum, see [http://www.cq.com/news.do], last visited on May 24, 2005, or contact the author of this report. The memorandum is a response to a proposal to change Senate procedures for limiting debate on judicial nominations. For more information on the proposed procedural change, see CRS Report RL32843, *'Entrenchment' of Senate Procedure and the 'Nuclear Option' for Change: Possible Proceedings and Their Implications,* by Richard S. Beth; CRS Report RL32684, *Changing Senate Rules: The "Constitutional" or "Nuclear" Option,* by Betsy Palmer; CRS Report RL32149, *Proposals to Amend the Senate Cloture Rule,* by Christopher M. Davis and Betsy Palmer; and CRS Report RL32874, *Standing Order and Rulemaking Statute: Possible Alternatives to the 'Nuclear Option'?,* by Christopher M. Davis.

comes to light after the committee has reported to the full Senate. The motion to recommit is debatable, and so may be subjected to a filibuster.

Nominations recommitted may be re-reported and have the same status as when originally reported. If not re-reported, however, the Senate will be unable to vote on recommitted nominations, unless the committee is discharged. The Senate may vote to recommit a nomination with instructions to re-report, perhaps by a set date or after gathering more information on the nomination.

A motion to recommit a nomination is not in order if a unanimous consent agreement to vote on the confirmation at a specified hour is in effect. Furthermore, groups of nominations cannot be recommitted without unanimous consent.

Reconsideration. According to Senate Rule XXXI, any Senator who voted with the majority has the option of moving to reconsider a vote on the nomination. The motion to reconsider is in order on the day of the vote or the next two days the Senate meets in executive session. The motion is made in executive session or, by unanimous consent, "as in executive session." Only one motion to reconsider is in order on each nomination. Often, the motion to reconsider is laid upon the table, by unanimous consent, shortly after the vote on the nomination. This action prevents any subsequent attempt to reconsider.

Senate Rule XXXI requires that the secretary of the Senate wait until the time for moving to reconsider has expired before sending notice to the President; in practice, however, notice is usually sent immediately, permitted by unanimous consent. If a nomination has already been sent to the President, a motion to reconsider is accompanied by a request to the President to return the nomination. If the President does not comply with the request, the Senate cannot reconsider the nomination.[21]

Cloture

In most instances, the Senate imposes no limitation on floor debate on a nomination. As many Senators who are interested can speak on a nomination for as long as they want. If necessary, however, Senate Rule XXII provides a means to bring debate on a nomination to a close.

Rule XXII, known as the cloture rule, applies to any debatable question including bills, resolutions, amendments, conference reports, nominations, and various debatable motions. The rule operates the same way on nominations as it does on legislation and other debatable questions. Because the motion to go into executive session and take up a specific nomination is not debatable, however, it is not necessary, as it may be in the case of legislation, to file cloture both on a motion to take up a matter and on the matter itself.

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[21] Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure*, 101st Cong., 2nd sess., S. Doc. 101-28 (Washington: GPO, 1992), p. 948.

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

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

According to Rule XXII, the presiding officer first directs the clerk to call the roll to ascertain that a quorum is present, although this requirement is often waived by unanimous consent. Senators then vote either yea or nay on the question: "Is it the sense of the Senate that the debate shall be brought to a close?" It takes three-fifths of the Senate, or 60 Senators if there are no vacancies, to invoke cloture on a nomination. Once cloture is invoked, there can be a maximum of 30 hours of consideration, including debate and time consumed by quorum calls, parliamentary inquiries, and all other proceedings.[22]

Although Senate rules have permitted cloture to be moved on nominations since 1949, cloture was not sought on a judicial nomination until 1968 or on an executive branch nomination until 1980.[23]

Nominations Returned to the President

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

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

[23] For data on the nominations subjected to cloture attempts, see CRS Report RL32878, *Cloture Attempts on Nominations*, by Richard S. Beth and Betsy Palmer.

Recess Appointments

Recess appointments are those that are made when the Senate is not in session. The Constitution, in Article II, Section 2 grants the President the authority to fill vacancies that "may happen during the Recess of the Senate," and this language has been interpreted to allow the President to make appointments during an intrasession recess or between sessions, no matter when the position was vacated. The Senate does not act on recess appointments; the appointees temporarily fill the vacancies without Senate confirmation. Someone appointed during a recess can hold the position until the end of the next Senate session. If the appointment is made when the Senate is adjourned between sessions, then the appointment expires at the end of the upcoming session. Depending on the timing, a recess appointee may hold a position for nearly two years. When a recess appointment is made, however, the President usually submits a new nomination to the Senate in order to comply with a provision of law affecting the pay of recess appointees (5 U.S.C. 5503(a)).[24]

Related CRS Reports

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[24] For more information on recess appointments, see CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue.

CRS Report RL30959, *Presidential Appointee Positions Requiring Senate Confirmations and Committees Handling Nominations*, by Henry B. Hogue.

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