



Senate Consideration of Presidential Nominations: Committee and Floor Procedure

Elizabeth Rybicki

Specialist on Congress and the Legislative Process

November 25, 2013

Congressional Research Service

7-5700

www.crs.gov

RL31980

CRS Report for Congress

Prepared for Members and Committees of Congress

Summary

Article II, Section 2 of the Constitution provides that the President shall appoint officers of the United States “by and with the Advice and Consent of the Senate.” This report, which has been updated to reflect the changes resulting from Senate actions on November 21, 2013, 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.” Most nominations are referred, although a Senate standing order provides that some nominations to specified positions will not be referred unless requested by a Senator. The Senate Rule concerning committee jurisdictions (Rule XXV) broadly defines issue areas for committees, and the same jurisdictional statements generally apply to nominations as well as legislation. A committee often gathers information about a nominee either before or instead of a formal hearing.

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

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

The 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, in the past a higher level of support has been necessary. Cloture may be invoked to place limits on further consideration of a nomination. In November 2013, the Senate reinterpreted Rule XXII in order to allow a majority of Senators voting to invoke cloture on nominations other than to the Supreme Court. In the absence of unanimous consent, bringing a nomination to a vote could still require a multi-day cloture process, but with the exception of Supreme Court Justices it will no longer require the support of three-fifths of the Senate (typically 60 Senators).

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 desires Senate consideration, he must submit a new nomination to the Senate.

Contents

Introduction.....	1
Receipt and Referral	2
Committee Procedures.....	4
Written Rules.....	4
Investigations.....	4
Hearings.....	5
Reporting.....	6
Floor Procedures.....	7
Executive Calendar.....	7
Executive Session.....	8
Taking Up a Nomination	8
Consideration and Disposition.....	9
Cloture	9
Holds	11
Reduced Threshold for Invoking Cloture on Nominations: Possible Implications	12
Nominations Returned to the President	13
Recess Appointments.....	13

Tables

Table 1. Maximum Number of Hours of Post-Cloture Consideration of Nominations in the 113 th Congress.....	11
--	----

Contacts

Author Contact Information.....	14
---------------------------------	----

Introduction

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

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

Most 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 and Congress. Judicial nominations, particularly Supreme Court appointees, are generally subject to greater scrutiny than nominations to executive posts, partly because judges may serve for life.¹ Among the executive branch positions, nominees for policymaking positions are more likely to be examined closely, and are slightly less likely to be confirmed, than nominees for non-policy positions.²

There are several reasons that the Senate confirms a high percentage of nominations. Most nominations and promotions are not to policymaking positions and are of less interest to the Senate. In addition, some sentiment exists in the Senate that the selection of persons to fill executive branch positions is largely a presidential prerogative. Historically, the President has

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

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

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 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.

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

Receipt and Referral

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

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 (February 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.

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

⁷ CRS Report R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, by Maeve P. Carey; and CRS Report R42996, *Changes to Senate Procedures in the 113th Congress Affecting the Operation of Cloture (S.Res. 15 and S.Res. 16)*, by Elizabeth Rybicki.

Senate Rule XXXI provides that nominations shall be referred to appropriate committees “unless otherwise ordered.” A standing order of the Senate approved in the 112th Congress provides that, after August 28, 2011, some nominations to specified positions will not be referred unless a Senator requests referral.⁸ Instead of being immediately referred, the nominations will be listed in a special section of the *Executive Calendar*, a document distributed daily to congressional offices and available online.⁹ This section of the Calendar is titled “Privileged Nominations.” After the chair of the committee with jurisdiction over a nomination has notified the executive clerk that biographical and financial information on the nominee has been received, this is indicated in the Calendar. After 10 days, the nomination will be moved from the “Privileged Nominations” section of the Calendar and placed on the “Nominations” section with the same status as a nomination that had been reported by a committee. (See “Executive Calendar” below.) Importantly, at any time that the nomination is listed in the new section of the *Executive Calendar*, any Senator could request that a nomination be referred, and it would then be sent to the appropriate committee of jurisdiction.¹⁰

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

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

Occasionally, nominations are referred to more than one committee, either jointly or sequentially. A joint referral might occur when the jurisdictional claim of two committees is essentially equal. In such cases, both committees must report on the nomination before the whole Senate can act on it, unless the Senate discharges one or both committees. If two committees have unequal jurisdictional claims, then the nomination is more likely to be sequentially referred. In this case, the first committee must report the nomination before it is sequentially referred to the second

⁸ S.Res. 116, 112th Congress.

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

¹⁰ For more information on the new standing order and an analysis of its expected impact, see CRS Report R41872, *Presidential Appointments, the Senate’s Confirmation Process, and Changes Made in the 112th Congress*, by Maeve P. Carey.

¹¹ For a list of appointee positions requiring Senate confirmation and the committees to which they are referred as of November 15, 2012, see CRS Report RL30959, *Presidential Appointee Positions Requiring Senate Confirmation and Committees Handling Nominations*, by Christopher M. Davis and Jerry W. Mansfield.

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

committee. The second referral often is subject to a requirement that the committee report within a certain number of days. Typically, nominations are jointly or sequentially referred by unanimous consent. Sometimes the unanimous consent agreement applies to all future nominations to a position or category of positions.¹³

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 financial statement listing assets and liabilities. Some specify the terms under which financial statements will or will not be made public.

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

Investigations

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

Almost all nominees are also asked by the Office of the Counsel to the President to complete an "Executive Personnel Financial Disclosure Report, SF-278," which is reviewed and certified by the relevant agency as well as the Director of the Office of Government Ethics. The documents are then forwarded to the relevant committee, along with opinion letters from ethics officers in the relevant agency and the director of the Office of Government Ethics. In contrast to FBI

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

¹⁴ For more information on committee rules concerning nominations, see Table 3 in CRS Report R42361, *Senate Committee Rules in the 112th Congress: A Comparison of Key Provisions*, by Betsy Palmer.

reports, financial disclosure forms are made public. All committees review financial disclosure reports and some make them available in committee offices to Members, staff, and the public.

To varying degrees, committees also conduct their own information-gathering exercises. Some committees, after reviewing responses to their standard questionnaire, might ask a nominee to complete a second questionnaire. Committees frequently require that written responses to these questionnaires be submitted before a hearing is scheduled. The Committee on the Judiciary sends form letters, sometimes called “blue slips,” to Senators from a nominee’s home state to determine whether they support the nomination.¹⁵ The Committee on the Judiciary also has its own investigative staff. The Committee on Rules and Administration handles relatively few nominations and conducts its own investigations, sometimes with the assistance of the FBI or the Government Accountability Office (GAO).

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

Hearings

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

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

Committees sometimes send questions to nominees in advance of a hearing and ask for written responses. Nominees also might be asked to respond in writing to additional questions after a hearing. Especially for high-level positions, the nomination hearing may be only the first of many

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

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

times an individual will be asked to testify before a committee. Therefore, the committee often gains a commitment from the nominee to be cooperative with future oversight activities of the committee.¹⁷

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

Reporting

A committee considering a nomination has four options. It may report the nomination to the Senate favorably, unfavorably, or without recommendation, or it may choose to take no action at all. It is more common for a committee to take no action on a nomination than to report unfavorably. Particularly for policymaking positions, committees sometimes report a nomination favorably, subject to the commitment of the nominee to testify before a Senate committee. Sometimes, committees choose to report a nomination without recommendation. Even if a majority of Senators on a committee do not agree that a nomination should be reported favorably, a majority might agree to report a nomination without a recommendation in order to permit a vote by the whole Senate. 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 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.¹⁹

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

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

¹⁹ The reference in the rule to a "day" refers to a calendar day, not a legislative day. See Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, 101st Cong., 2nd sess., S.Doc. 101-28 (Washington: GPO, 1992) (Hereinafter *Riddick's Senate Procedure*), p. 943. A legislative day begins the first time the Senate meets (continued...)

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.²⁰ 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, 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 or resolution.²¹

Floor Procedures

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

Executive Calendar

After a committee reports a nomination or is discharged from considering it, the nomination is assigned a number by the executive clerk and placed on the *Executive Calendar*. Under a standing order of the Senate approved in the 112th Congress, certain nominations might also be placed in this status on the *Executive Calendar* after certain informational and time requirements are met.²² 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.

(...continued)

after an adjournment and ends when the Senate adjourns again. A legislative day is not necessarily a calendar day because the Senate does not always adjourn each calendar day.

²⁰ *Riddick’s Senate Procedure*, 944.

²¹ For example, in 2003, then-Majority Leader Bill Frist submitted four resolutions to discharge the Judiciary Committee from further consideration of four U.S. Circuit Judge nominations. In each case, a Senator objected to immediate consideration of the resolution, and all four resolutions were placed on the Executive Calendar. No further action was taken the resolutions to discharge. See “Resolutions Placed on the Executive Calendar,” *Congressional Record*, vol. 149 (July 7, 2003), pp. 16949-16950.

²² S.Res. 116, 112th Congress. See discussion above under “Receipt and Referral,” and CRS Report R41872, *Presidential Appointments, the Senate’s Confirmation Process, and Changes Made in the 112th Congress*, by Maeve P. Carey.

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 executive calendars under the Senate tab of the website of the Legislative Information System of the U.S. Congress at <http://www.congress.gov/>.²³

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

The majority leader, by custom, makes most motions and requests that determine when or whether a nomination will be called up for consideration. For example, the majority leader may move or ask unanimous consent to “immediately proceed to executive session to consider the following nomination on the Executive Calendar....” By precedent, the motion to go into executive session to take up a specified nomination is not debatable.²⁴ The nomination itself, however, is debatable.

It is not in order for a Senator to move to consider a nomination that is not on the Calendar, and, except by unanimous consent, a nomination on the Calendar cannot be taken up until it has been on the Calendar at least one day (Rule XXXI, clause 1). A day for this purpose is a calendar day. In other words, a nomination reported and placed on the Calendar on a Monday can be considered on Tuesday, even if it is the same legislative day.²⁵

²³ See also CRS Report 98-438, *The Senate’s Executive Calendar*, coordinated by Elizabeth Rybicki.

²⁴ *Riddick’s Senate Procedure*, p. 941.

²⁵ The reference in Senate Rule XXXI, clause 1 to a “day” refers to a calendar day, not a legislative day. See *Riddick’s Senate Procedure*, p. 943. See footnote 19 for a definition of a legislative day.

If the Senate simply resolved into executive session, the business immediately pending would be the first item on the *Executive Calendar*. A motion to proceed to another matter on the Calendar would be debatable and subject to a filibuster. For this reason, the Senate does not typically begin consideration of executive business this way.

Consideration and Disposition

The question before the Senate when a nomination is taken up is “will the Senate advise and consent to this nomination?” The Senate can approve or reject a nomination.²⁶ A majority of Senators present and voting, a quorum being present, is required to approve a nomination.

According to Senate Rule XXXI, any Senator who voted with the majority on the nomination has the option of moving to reconsider a vote on the day of the vote or the next two days the Senate meets in executive session. Only one motion to reconsider is in order on each nomination, and often the motion to reconsider is laid upon the table, by unanimous consent, shortly after the vote on the nomination. This action prevents any subsequent attempt to reconsider.²⁷ 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.

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

Cloture

Senate Rule XXII provides a means to bring debate on a nomination to a close, if necessary.²⁸ Under the terms of Rule XXII, at least 16 Senators sign a cloture motion to end debate on a pending nomination. The motion proposed is “to bring to a close the debate upon [the pending nomination].” A Senator can interrupt a Senator who is speaking to present a cloture motion. Cloture may be moved only on a question that is pending before the Senate; therefore, absent

²⁶ In addition to approving and rejecting a nomination, the Senate has the option of sending a nomination back to a committee for further consideration. Although infrequently used, the motion to recommit is available and may allow a panel to reconsider its recommendation when information concerning a nominee comes to light after the committee has reported to the full Senate.

²⁷ Senate Rule XXXI requires that the Secretary of the Senate wait until the time for moving to reconsider has expired before sending notice to the President; in practice, however, notice is usually sent immediately, permitted by unanimous consent. If notice has already been sent to the President, a motion to reconsider is accompanied by a request to the President to return the nomination. If the President does not comply with the request, the Senate cannot reconsider the nomination (*Riddick’s Senate Procedure*, p. 948).

²⁸ Although Senate rules have permitted cloture to be moved on nominations since 1949, cloture was not sought on a judicial nomination until 1968 or on an executive branch nomination until 1980. For data on the nominations subjected to cloture attempts through 2010, see CRS Report RL32878, *Cloture Attempts on Nominations: Data and Historical Development*, by Richard S. Beth.

unanimous consent, the Senate must be in executive session and considering the nomination when the motion is filed. After the clerk reads the motion, the Senate returns to the business it was considering before the presentation of the motion.

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

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

Under a recent decision of the Senate, cloture can be invoked in the Senate on most nominations by a majority of Senators voting, a quorum being present.²⁹ On a nomination to the Supreme Court, it takes three-fifths of the Senate, or 60 Senators if there is no more than one vacancy, to invoke cloture.

Once cloture is invoked, under Rule XXII there can be a maximum of 30 hours of post-cloture consideration, including debate and time consumed by quorum calls, parliamentary inquiries, and all other proceedings.³⁰ In January of 2013, the Senate approved a temporary standing order (Section 2 of S.Res. 15) that reduces post-cloture consideration time for many nominations. In the 113th Congress, pursuant to this standing order, the maximum number of hours of post-cloture consideration for most nominations is reduced to eight hours; for U.S. district court judges it is reduced to two hours. The standing order excludes some high-level executive and judicial nominations. These nominations continue to be subject to the 30-hour limit on post-cloture consideration under Rule XXII. More specifically, in the 113th Congress, post-cloture consideration of nominations will be limited in the manner presented in **Table 1**.

²⁹ *Congressional Record*, daily edition, vol. 159 (November 21, 2013), pp. S8417-S8418. These proceedings are discussed more fully below in the section, “Reduced Threshold for Invoking Cloture on Nominations: Some Possible Implications.”

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

Table I. Maximum Number of Hours of Post-Cloture Consideration of Nominations in the 113th Congress

Pursuant to S.Res. 15 and Senate Rule XXII

Nomination	Maximum Consideration
U.S. district courts	2 hours
Courts with fixed terms, such as the court of claims, the tax court, and presumably the territorial courts	8 hours
All executive branch positions except 21 high level positions	8 hours
21 high level executive branch positions, including the head of each executive department ^a	30 hours
The Supreme Court, the U.S. Circuit Courts of Appeals, and the U.S. Court of International Trade	30 hours

Source: S.Res. 15, Section 2.

Notes:

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

Hold

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

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

The new Senate precedent reducing the threshold necessary to invoke cloture on most nominations could affect the practice of holds. In some sense, holds are connected to the Senate traditions of mutual deference, since they may have originated as requests for more time to examine a pending nomination or bill. The effectiveness of a hold, however, ultimately has been grounded in the power of the Senator placing the hold to filibuster the nomination and the difficulty of invoking cloture. Invoking cloture is now easier because the support of fewer

³¹ The standing order can be found in S.Res. 28 of the 112th Congress. For more information concerning holds, see CRS Report RL34255, *Senate Policy on “Holds”: Action in the 110th Congress*, by Walter J. Oleszek. For more information concerning the history, types, and potency of holds, see CRS Report RL31685, *Proposals to Reform “Holds” in the Senate*, by Walter J. Oleszek.

Senators is necessary, although the waiting periods and floor time required for a cloture process were not altered by the reinterpretation of the rule.

Reduced Threshold for Invoking Cloture on Nominations: Possible Implications

On November 21, 2013, the Senate reinterpreted Rule XXII to allow a majority of Senators voting to invoke cloture on nominations other than to the Supreme Court. The Senate did this by reversing a ruling by the presiding officer on a vote of 52-48.³²

It is uncommon for the Senate to reverse a decision by the presiding officer.³³ Any Senator can attempt to reverse a ruling by making an appeal, and most appeals are decided by majority vote.³⁴ In most circumstances, however, appeals are debatable, and therefore supermajority support (through a cloture process) is typically necessary to reach a vote to reverse a decision of the presiding officer. In the November 21 proceedings, it was accepted that the appeal raised in the existing parliamentary circumstance was not debatable.³⁵ Therefore, when the majority leader challenged the ruling of the presiding officer, the question on whether the ruling should stand as the judgment of the Senate was put to a vote without an opportunity for extended debate. The Senate voted that the ruling should not stand, and thereby upheld instead the position of the majority leader.³⁶

The impact of the decision on the nominations process is difficult to assess at this time, but it is likely to be significant on the small proportion of nominations that are disputed and receive more attention from Senators and the media, and it has the potential to affect proceedings on other nominations as well.

Although nominations have always only needed majority support for approval, the possibility of a filibuster has meant that supermajority support was sometimes necessary when cloture was required to reach a vote. In the past, some nominations with demonstrated majority support were not confirmed by the Senate because cloture could not be invoked; other nominations may have

³² *Congressional Record*, daily edition, vol. 159 (November 21, 2013), pp. S8417-S8418.

³³ In the past 30 years, the Senate has reversed a decision of the presiding officer 17 times, and, in the last 10 years, only three times (including the November 2013 instance). CRS identified reversals through a search of roll call votes, and it is possible (although unlikely) that that other reversals occurred without a roll call vote on any associated question.

³⁴ For more information, see CRS Report 98-306, *Points of Order, Rulings, and Appeals in the Senate*, by Valerie Heitshusen.

³⁵ The majority leader made the appeal in between two questions that were not debatable. *Riddick's Senate Procedure* states that "appeals arising in connection with a non-debatable motion" are not debatable (p. 726). The particular parliamentary actions of November 21 were unique in that it was the first time an appeal was made after a motion to reconsider a cloture vote was agreed to, but before the cloture vote. No Senator made a point of order or a parliamentary inquiry regarding whether the appeal was debatable, and no debate was attempted. The minority leader did, however, propound a parliamentary inquiry regarding the number of votes required "to appeal the ruling of the Chair in this instance," which might have been referring to the appeal not being subject to debate and thus not needing supermajority support to receive a vote.

³⁶ The procedures used to reinterpret the cloture rule were referred to as "the nuclear option." For more information, see CRS Report R42929, *Procedures for Considering Changes in Senate Rules*, by Richard S. Beth, and CRS Report RL32843, "Entrenchment" of Senate Procedure and the "Nuclear Option" for Change: Possible Proceedings and Their Implications, by Richard S. Beth.

received no floor consideration because it was anticipated that supermajority support could not be obtained for their approval. Under the new interpretation of the Rules, such nominations could be considered and confirmed. In addition, under the previous interpretation of Senate Rule XXII, the President might have selected nominees with the understanding that the support of more than a majority might be necessary. Under the new procedures, this practice could change.

Disputed nominations will likely continue to be debated on the floor, as unanimous consent is still required to limit debate time through any means other than cloture (and cloture guarantees a limited time for floor consideration). In addition, it is possible that such nominations might receive greater scrutiny at the committee stage. As explained above, to be taken up by the full Senate, and therefore made eligible for a cloture process, a nomination effectively requires the support of the committee.

Most nominations, of course, are never subjected to a cloture process. They are approved swiftly on the floor by unanimous consent, reflecting practices of consultation prior to selection of nominees and discussions among Senators prior to floor consideration. The practices for considering such nominees pursuant to negotiated unanimous consent agreements might be unchanged by the recent decision of the Senate. The President submits thousands of nominations to the Senate each Congress, and unanimous consent will continue to be required to process them expeditiously. It is also possible, however, due to the nature of the proceedings used to reinterpret Senate Rule XXII, that unanimous consent negotiations to approve nominations with little floor time will be affected.

Nominations Returned to the President

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

Recess Appointments

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

5503(a)). Recess appointments have sometimes been controversial and have occasionally led to inter-branch conflict.³⁷

Author Contact Information

Elizabeth Rybicki
Specialist on Congress and the Legislative Process
erybicki@crs.loc.gov, 7-0644

³⁷ For more information on recess appointments, see CRS Report RS21412, *Temporarily Filling Presidentially Appointed, Senate-Confirmed Positions*, by Henry B. Hogue; CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue; CRS Report RL33009, *Recess Appointments: A Legal Overview*, by Vivian S. Chu; CRS Report RL33310, *Recess Appointments Made by President George W. Bush*, by Henry B. Hogue and Maureen O. Bearden; and CRS Report R42329, *Recess Appointments Made by President Barack Obama*, by Henry B. Hogue and Maureen O. Bearden.