

CRS Report for Congress

Evolution of the Senate's Role in the Nomination and Confirmation Process: A Brief History

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Summary

Article II, Section 2 of the Constitution states that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Counsels, Judges of the Supreme Court, and all Other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law....”

Exactly what the phrase “advice and consent” means in terms of distribution of power between the legislative and executive branches has been disputed almost since the beginning of the Republic. While some drafters of the Constitution believed the Senate’s role would be minimal, others said the Senate would play a large role.

The role the Senate has played in the nomination process has depended, in part, upon the relationship between the President and the Senate. Nonetheless, while there have been many controversies over nominations, the vast majority of nominees eventually make it through the process and are confirmed.

Over time, the Senate has developed a series of procedures to deal with the concerns of its Members on nominations. First is the custom of senatorial courtesy, whereby Senators from the same party as the President might influence a nomination or kill it by objecting to it. This custom has not always been observed absolutely, but it has allowed Senators to play a fairly large role, particularly in the selection of nominees within a Senator’s home state, such as for district court judgeships.

For judicial nominations, the Judiciary Committee has developed a tradition of “blue slips,” a document used to get a home-state Senator’s opinion on a judicial nomination. The chair of the committee determines how much weight to give a home-state Senator’s objection to a judicial nominee.

Other procedures that Senators have used to express their position on a nomination include holds, an informal procedure that can allow a single Senator to block action on a nomination (or legislation), and filibusters, extended debate that can block an up-or-down vote on a nomination (or legislation). Both procedures have been used to delay or block action on nominations.

This report will be updated as events warrant.

Contents

Introduction	1
Development of Senate Procedures	3
Senatorial Courtesy	6
Blue Slips	9
“Holds”	10
Filibuster	11

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Introduction

Article II, Section 2 of the Constitution states that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Counsels, Judges of the Supreme Court, and all Other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law....”

The nomination clause was one of the last provisions agreed to by the Constitutional Convention, and the phrase setting up the process for the nomination and confirmation of federal officials, members of the Supreme Court, and others, clearly meant different things to different framers of the Constitution and those who have followed.

The participation of both the President and the Senate in the process was a compromise between two factions at the Convention who were concerned about the allocation of power. On the one side were men such as Elbridge Gerry of Massachusetts and Benjamin Franklin of Pennsylvania who worried most about vesting too much power in the hands of a single individual. Franklin said that he was concerned that “The Executive will always be increasing, here as elsewhere, til it end in Monarchy.”¹

Their counterparts, men like James Madison of Virginia, James Wilson of Pennsylvania, and Alexander Hamilton of New York, wanted a strong executive with ultimate responsibility for choosing members of his administration, and who would not be as indebted to factions as they believed Senators might. “Good laws are of no effect without a good Executive; and there can be no good Executive without a responsible appointment of officers to execute,” said Wilson during the convention debates. “Responsibility is in a manner destroyed by such an agency of the Senate.”²

During the course of the debate and the many drafts of the Constitution, the power to nominate flowed from the President to the Senate and back. The final

¹ James Madison, *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America* (Westport: Greenwood Press, 1920), p. 55.

² *Ibid.*, p. 528.

version of the phrase was defeated twice during the Convention before it was adopted on September 7, 1787.³

Hamilton believed that the clause gave the Senate a negative power, that of withholding its approval, which members would use only infrequently.

It will be the office of the President to *nominate*, and with the advice and consent of the Senate to *appoint*. There will, of course, be no exertion of choice on the part of the Senators. They may defeat one choice of the Executive and oblige him to make another; but they cannot themselves *choose* — they can only ratify or reject the choice of the President.⁴

John Adams, however, thought the Senate would play a far bigger role. In a letter to Thomas Jefferson in 1787, Adams wrote that:

You are apprehensive of monarchy, I of aristocracy. I would therefore, have given more power to the president, and less to the senate. The nomination and appointment to all offices I would have given to the President, assisted only by a privy council of his own creation; but not a vote or voice would I have given the Senate or any senator unless he were of the privy council. Faction and distraction are the sure and certain consequences of giving to a senate a vote on the distribution of offices.⁵

With such varied interpretations of the meaning of the phrase at its creation, it is no wonder that the proper role of the Senate in the nomination and confirmation process has been much disputed ever since. “While the Appointments Clause clearly vests in the president the power to identify individuals he wishes to place in confirmable offices,” wrote political scientist Michael J. Gerhardt, “the Senate’s official functions or duties in the appointments process are not so clear.”⁶

The Senate has played a large role in the process during some administrations and a lesser role in others, which has been largely a function of the President’s ability to translate his power into influence with Congress. Some Presidents, such as Thomas Jefferson, were able to both win confirmation of most of their nominees while largely retaining control over the choice of nominee. Others, such as President Abraham Lincoln, decided to share the power with the Senate, retaining sufficient influence over the positions to reap the rewards of patronage while giving the Senate enough authority to prevent many confirmation fights. Some Presidents, such as

³ Joseph P. Harris, *The Advice and Consent of the Senate* (Berkeley: University of California Press, 1953), p. 24.

⁴ Benjamin Fletcher Wright, ed., *The Federalist* (Cambridge: The Belknap Press of Harvard University Press, 1966), p. 434.

⁵ Harris, *The Advice and Consent of the Senate*, p. 29.

⁶ Michael J. Gerhardt, *The Federal Appointments Process: A Constitutional and Historical Analysis* (Durham, NC: Duke University Press, 2000), p. 135.

John Tyler, spent most of their tenure losing battle after battle to the Senate over confirmations.⁷

While much attention is paid to those who did not win confirmation by the Senate, most nominees do make it through the process. “For many a presidential appointee, the Senate must loom like an institutional black hole — an abyss that engulfs even the most luminous nominee. That impression is, in fact, mistaken,” wrote congressional scholar Sarah A. Binder. “Most presidential nominees emerge from the Senate confirmation process and are eventually confirmed.”⁸

Traditionally, the Senate has exerted the most influence over the appointment of federal judges, members of the Supreme Court, and independent agencies. The Senate has usually given a President wider latitude in selecting members of his Cabinet. “Generally, the Senate defers far more to a president’s nominees to executive offices than to his nominees to judicial offices, particularly to the Supreme Court,” according to Gerhardt.⁹

Since 1789, of the 158 nominations to the Supreme Court, 114 were confirmed and served. Seven of the remaining 44 were confirmed but refused the position, one died before he could take office, and 36 nominations were not confirmed.¹⁰

During the same time period, the Senate failed to confirm 15 Cabinet nominees out of the hundreds who have been nominated, the last being the nomination of former Senator John G. Tower (R-TX) to be Secretary of Defense in 1989.¹¹

Development of Senate Procedures

Over time, the Senate has developed or adapted practices to deal with the confirmation process, none of which are explicitly contained in Senate rules but all of which have been adhered to and recognized by the chamber at one time or another. These traditions emanate from a desire on the part of Senators to be involved not only in passing judgment on nominations but also in the actual selection of the nominee in the first place, particularly for federal judges. While Hamilton and others did not foresee this as the way the Senate would operate, it nevertheless became the norm for the Senate.

In the course of time, the practice of consulting members of the Senate about appointments in their states was transformed into the custom of permitting them

⁷ Harris, *The Advice and Consent of the Senate*, pp. 46, 66, 71.

⁸ Sarah A. Binder, “The Senate as a Black Hole: Lessons Learned from the Judicial Appointment Experience,” *The Brookings Review*, vol. 19, spring 2001, p. 37.

⁹ Gerhardt, *The Federal Appointments Process*, p. 162.

¹⁰ CRS Report RL31171, *Supreme Court Nominations Not Confirmed, 1789-August 2006*, by Henry B. Hogue.

¹¹ CRS Report 89-460, *Cabinet and Other High-Level Nominations That Failed to Be Confirmed, 1789-1989* (no longer available; for more information, contact Betsy Palmer.)

to name the person to be appointed, with the President retaining only a veto over their recommendations.¹²

When a vacancy on the federal bench occurs, “the attorney general, usually through his deputies, undertakes a search for possible nominees. At this early stage, the senators of the president’s party are usually brought into the process.”¹³ Individual Senators exercised their role in this process in different ways.

They may have their own nominee or slate of nominees, or they may elect at this point to reserve judgement, preferring to react to the deputy attorney general’s nominees. In any case, their role is crucial, some say determinative. Through the custom of senatorial courtesy, the senators may exercise a virtual veto over the president’s choice. The extent and nature of this exercise of power varies considerably with the senator: some prefer wide consultation with state and local interests, giving those interests in effect the power of choice (in return, of course, for favors rendered); others jealously fight for this power to virtually dictate the choice of a particular nominee.¹⁴

Much of the process is informal and takes place behind closed doors, and not much has been written about it. From what has been written, it is clear that each state’s process differs, as does each President’s policy about consulting Senators. Some state delegations have agreements among office-holders about how the judicial selection process is to work. In others, there are commissions which are involved in the selection process, while in some states, there is no agreement at all.¹⁵

Since the first Congress, when Senators felt their desires were not being taken into account by the President, they developed institutional processes to make their displeasure known and protect what they saw as their role in the process. First, there developed the tradition of “senatorial courtesy,” by which Senators could block confirmation of the confirmation of individuals from their home states. Along the same lines is the “blue slip,” a tradition emanating from the Judiciary Committee, which can allow a home-state Senator to block a judicial nomination. Also, Senators have used the informal tradition of “holds” to prevent or delay the Senate from acting on a nomination. Senators also have used the tool of extended debate, known as a filibuster, to delay or prevent a nominee from being confirmed.

There are other tools that the Senate has used less frequently, such as changing the qualifications needed to do a job or doing away with a position entirely. Some scholars have suggested that Congress deliberately reduced the number of positions on the Supreme Court to prevent President Andrew Johnson from winning confirmation of his nomination of Henry Stanbery to be an associate justice. No

¹² Harris, *The Advice and Consent of the Senate*, p. 217.

¹³ CRS Report RL34405, *Role of Home State Senators in the Selection of Lower Federal Court Judges*, by Denis Steven Rutkus; Harry P. Stumpf, *American Judicial Politics* (Upper Saddle River, NJ: Prentice Hall, 1998), p. 171.

¹⁴ Stumpf, *American Judicial Politics*, pp. 171-172.

¹⁵ Alecia Marzullo, “The Process of Selecting a Judge,” *CQ Weekly*, vol. 59, April 28, 2001, p. 900.

mention was made of this purpose during the debate on the law which shrank the court to six members from eight, but the size of the court was increased back to eight within two months of a new President taking office.¹⁶

Finally, it is within the discretion of the chair of a committee whether to hold a hearing on a nomination. One of the key ways a nomination dies is with no public action. In 1997, President Clinton withdrew the nomination of former Massachusetts Governor William Weld to be ambassador to Mexico after Senator Jesse Helms (R-NC), chairman of the Senate Foreign Relations Committee, refused to hold a hearing on the nomination.¹⁷

The development of these practices is in keeping with what some Senators believe is the proper role of the Senate in the nomination and confirmation process. Then-Senate Majority Leader George Mitchell (D-ME) said in 1992:

The American Constitution does not assign different weights to the President's nominating power and the Senate's decision as to whether it shall 'advise and consent' to the confirmation of nominations. Instead, it establishes a process whereby the principal positions in our government can only be filled when the President and the Senate act jointly. Thus, from the time of our Founders, the Senate has been a vital partner in the process of evaluating candidates for service in high government positions.¹⁸

Senator Robert P. Griffin (R-MI) noted in 1968 that, early in its history, the Senate rejected President George Washington's nomination of John Rutledge to be Chief Justice of the Supreme Court. And, he continued:

That action in 1795 said to the President then in office and to future Presidents: 'Don't expect the Senate to be a rubberstamp. We have an independent coequal responsibility in the appointing process; and we intend to exercise that responsibility, as those who drafted the Constitution so clearly intended.'¹⁹

But Senate Majority Leader Mike Mansfield (D-MT), during the same 1968 debate, urged Senators to allow a vote on a Supreme Court nomination:

Clearly then, our responsibility is merely to evaluate the qualifications of the nominee and to record our pleasure or displeasure; to give our advice and consent or our advice and dissent.²⁰

¹⁶ CRS Report RL31171, *Supreme Court Nominations Not Confirmed, 1789-2004*.

¹⁷ Donna Cassata, "Weld Blows Bitter Kisses As Curtain Comes Down," *CQ Weekly*, vol. 55, September 20, 1997, p. 2240.

¹⁸ Sen. George Mitchell, "Visit to the Senate by Members of the British House of Commons," remarks in Senate, *Congressional Record*, vol. 138, February 4, 1992, p. 1346.

¹⁹ Sen. Robert Griffin, "Supreme Court of the United States," remarks in Senate, *Congressional Record*, vol. 114, October 1, 1968, p. 28929.

²⁰ Sen. Mike Mansfield, "Supreme Court of the United States," remarks in Senate, *Congressional Record*, vol. 114, October 1, 1968, p. 28931.

In characterizing Senate practice, political scientist Gerhardt noted, “The combination of the means available to individual senators to delay nominations, including but not limited to indefinite holds, filibusters, and special procedures ... provides individual senators with substantial means to impede a president’s nominating authority.”²¹

Senatorial Courtesy

Three months into the first Senate session, Senators rebuffed President George Washington on his nomination of Benjamin Fishbourn to be a naval officer of the Port of Savannah, Georgia. Senators had no objection to the individual Washington had selected; rather, they were responding to the two Senators from Georgia, who had wanted to give the job to someone else. After Fishbourn was rejected, Washington submitted the individual preferred by the Georgia Senators, who was promptly confirmed.²²

That was the first example of something that has come to be called “senatorial courtesy.” This unwritten tradition has meant that Senators from the home state of a nominee and also of the party of the President can block a nomination to a federal office within their state merely by objecting to it. Senators have also used the concept of “courtesy” to block a nominee of a President from another party, if the concerned Senator was in the majority in the chamber.²³ And, the objections of a Senator from the minority party have also stopped nominations on numerous occasions.²⁴

Though an unwritten tradition, senatorial courtesy has been honored, to some degree or another, by most Presidents. “Every president since Madison has paid at least lip service to senatorial courtesy,” wrote Gerhardt. “Much more often than not, presidents have paid dearly for ignoring or failing to give adequate respect to senatorial courtesy.”²⁵

The strength of the tradition comes from the idea that courtesy means one Senator will honor the objections of another to a nomination in the first Senator’s home state:

‘The courtesy of the Senate’ soon became a cherished usage. In its general application this fair phrase has come to signify deference, not to the President nor the public interest, but to the wishes of one’s colleagues — a courtesy of the

²¹ Gerhardt, *The Federal Appointments Process*, p. 143.

²² George H. Haynes, *Senate of the United States, Its History and Precedent* (Boston: Houghton Mifflin Co., 1938), p. 737.

²³ “Senatorial courtesy” is also used in another way, to explain the deference Members of the Senate usually show when a Senator is nominated by a President for an executive or judicial branch office. Typically, these kinds of nominations have been readily confirmed.

²⁴ Harris, *The Advice and Consent of the Senate*, p. 224.

²⁵ Gerhardt, *The Federal Appointments Process*, p. 145.

Senate, for the Senate and by the Senate. In general practice this understanding or gentleman's agreement has seemed to reduce to this: Nominations from a given state are not to be confirmed unless they have received the approval of the Senators of the President's party from that state, other Senators following their lead in the attitude they take toward such nominations.²⁶

Senators can invoke senatorial courtesy at any point in the process, such as a hearing or on the floor of the Senate. Historically, a Senator has stood on the floor of the chamber and said that the nomination was "personally obnoxious" to him. Frequently, that pronouncement was sufficient to kill the nomination. President Franklin Delano Roosevelt nominated Floyd H. Roberts to be a district judge in Virginia in 1939. He did so even though the state's two Senators opposed the nomination. During Judiciary Committee debate on the nomination, Senator Harry F. Byrd (D-VA) said:

It is my sincere and honest conviction that this nomination was made for the purpose of being personally offensive to the Virginia Senators, and it is personally offensive to the Virginia Senators, and is personally obnoxious to me, as well as to my colleague.²⁷

The nomination was rejected on the Senate floor by a vote of 9-72.²⁸

There has been disagreement within the Senate about whether or not a Senator needs to state the grounds for an objection. During a 1934 debate on the nomination of Daniel D. Moore to be collector of internal revenue in Louisiana, Senator Huey Long said: "I first state to the Senate that this nomination is offensive to me personally." Long continued:

I have never held the duty to be imposed upon any Member of the Senate to justify his reasons for stating that a nomination was personally obnoxious to him. I have held, as has been the majority of thought in this body, that no Member of the Senate was called upon to justify his statement that a nominee was personally objectionable to him, but that when a state sent its ambassadors to the Senate, under the great doctrine of states' rights which my part of the country has held and upheld from the time the memory of man runneth not to the contrary; no Senator would have to present anything except his own objection, and his own proposal that a nomination should not be confirmed by the Senate.²⁹

Nevertheless, Long went on to state his reasons in opposition to Moore. Though the Senate initially confirmed Moore, Senators then reconsidered the vote and

²⁶ Haynes, *Senate of the United States, Its History and Precedent*, p. 740.

²⁷ Sen. Alexander Wiley, "Memo on Senatorial Courtesy," *Congressional Record*, vol. 93, part 7, July 1, 1947, p. 7989.

²⁸ *Ibid.*, p. 7989.

²⁹ *Ibid.*, p. 7987.

ordered the nomination recommitted. Subsequently, the committee reported the nomination again, but Moore was never confirmed.³⁰

The tradition of senatorial courtesy has not, however, been absolute. In 1938, Senator Rush D. Holt of West Virginia objected to the nomination of F. Roy Yoke to be a collector of internal revenue in West Virginia. The Senate confirmed him over Holt's objections.³¹

Still, the courtesy tradition became so ingrained with judicial nominations to district courts that Senator Griffin wrote about the practice in 1969: "It is a fact, though sometimes deplored by political scientists, that judges of the lower federal courts are actually 'nominated' by Senators while the President exercises nothing more than a veto authority."³²

In 2003, Senator Orrin Hatch noted that the custom of senatorial courtesy continues to be followed. Senator Hatch, who was chairman of the Senate Judiciary Committee during the last six years of the presidency of Bill Clinton, was explaining what had happened to judges nominated by Clinton who were not confirmed. "Seventeen of those lacked home state support, which often resulted from the White House's failure to consult with home state senators," Hatch said. "There was no way to confirm those nominations without completely ignoring the senatorial courtesy we afford to home state Senators in the nominations process."³³

The objections Hatch referred to were made before the nomination ever made it to the floor for a vote — Senators no longer stand on the floor and declare candidates to be "personally obnoxious."

The role of courtesy has strengthened the hand of individual Senators in the process, according to Gerhardt. "There is a rich history of individual senators who have been successful, either by manipulating Senate rules or by building coalitions, at thwarting or delaying nominations in situations in which the nominating president failed to consult with them before making nominations (or failed to accept their recommendations) for offices in the senators' field of interest or home states."³⁴

³⁰ Ibid., p. 7987.

³¹ Haynes, *Senate of the United States, Its History and Precedent*, p. 742.

³² Sen. Robert P. Griffin, in the April 1969 issue of *Prospectus, A Journal of Law Reform*, University of Michigan Law School as cited in the *Congressional Record*, vol. 115, part 9, May 14, 1969, p. 12608.

³³ Sen. Orrin Hatch, "Estrada Nomination," *Congressional Record*, daily edition, vol. 149, March 3, 2003, p. S3001.

³⁴ Gerhardt, *The Federal Appointments Process*, p. 151.

Blue Slips

One way in which senatorial courtesy has manifested itself is something called the “blue slip.”³⁵ This is a device used by the Senate Judiciary Committee to communicate with the home-state Senators about a nomination to the U.S. courts of appeal or district courts, or to be a U.S. marshal or U.S. attorney. When a nominee is referred to the committee, the committee sends a letter (typically on light blue paper) asking the two home-state Senators to take a position on the nomination. The Senators check off the appropriate box on the sheet — either approve or disapprove — and return the paper to the Judiciary Committee.

The blue slip process is used only by the Senate Judiciary Committee — no other Senate committee uses it for other kinds of nominations. The practice of using blue slips dates back to at least 1917.³⁶

It is a matter of some debate how important blue slips are in the confirmation process. The blue slip practice is not a formal part of the Judiciary Committee’s rules, and the determination of just how much weight to give to a Senator’s opposition to a nomination is left largely up to the chair of the committee. Among other issues, the chair will decide whether to honor the objections, voiced through blue-slips, from all home-state senators or just those who belong to the same party as the president.³⁷

When James O. Eastland (D-MS) chaired the Judiciary Committee from 1956 to 1978, his policy stated that if he did not get back two blue slips endorsing the nominee, the nomination would not move further in the process. Other chairs have said they would give blue slips strong consideration, but that a negative blue slip or one not returned by a Senator would not necessarily kill a nomination.³⁸ Some Senators have declined to return a completed blue slip to the committee in an effort to delay action on the nomination.

Some analysts have said that the blue slip process developed because the Senate needed to create a process by which Members could register their disapproval if a President did not involve them enough in the “advice phase” of a nomination. “The

³⁵ In the House, the concept of “blue-slipping” refers to the act of returning to the Senate a measure that the House believes has violated a clause of the Constitution requiring that all revenue raising measures originate in the House. For more information, see CRS Report RS21236, *Blue Slipping: The Origination Clause in the House of Representatives*, by James V. Saturno.

³⁶ National Archives and Records Administration, Record Group 46, Records of the U.S. Senate, 65th Cong., Records of Executive Proceedings, Nomination Files, Judiciary Committee, Robert P. Stewart, Blue Slip (1917). For additional information on the history of the blue slip, see CRS Report RL32013, *The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*.

³⁷ Binder, “The Senate as a Black Hole,” pp. 37-40.

³⁸ Brannon P. Denning, “The Judicial Confirmation Process and the BLUE SLIP,” *Judicature*, March-April 2002, p. 220.

blue slip process is the sanction that a president faces for violating the norm of senatorial courtesy in the judicial appointment process,” wrote political scientist Brannon P. Denning³⁹

Senator Paul Laxalt (R-NV) in 1979, defended the blue-slip system in the Senate during a hearing on the process for confirming federal judges.

One means of effective scrutiny of a candidate is to seek the opinion of the U.S. Senators of his respective State. For this reason, I presume the committee will honor the blue-slip system that has worked so well in the past. This is not only a matter of senatorial courtesy but has on many occasions provided insight on a nominee not otherwise presented.⁴⁰

Much also has been written that is critical of the blue-slip system. George Washington University law professor Jonathan Turley described the system this way:

Blue-slipping is a little known process by which senators can block federal judge nominees from their state. This means that judges who may rule in your case often are selected to meet senatorial, not professional, demands. By simply not returning blue slips sent by the Senate Judiciary Committee, a senator can block a nominee for the most nefarious or arbitrary reasons, including a personal grudge, a bargaining tool with the White House or failure of the nominee to be sufficiently fawning in the senator’s presence.⁴¹

“Holds”

A hold is a device by which Senators can block or delay action on a treaty, nomination or legislation, merely by telling their party leader that they want to delay floor action on the matter in question. Whether to grant that request is a decision of the leaders.

Nowhere in the written Senate rules is the tradition of “holds” to be found, and it is not clear when the practice began. The very nature of the holds process gives the majority and minority leaders a great deal of discretion in deciding whether to honor a request for a hold and, if so, for how long. However, implicit in a request for a hold is the ability of a Senator to use parliamentary tools to filibuster or to delay consideration of the nomination or legislation at issue. Also implicit in a request for a hold is the desire of the Senator to be consulted by party leadership on the matter subject to the hold. Holds can sometimes kill a nomination, but more frequently they delay action.⁴²

³⁹ Ibid., p. 223.

⁴⁰ U.S. Congress, Senate Committee on the Judiciary, *The Selection and Confirmation of Federal Judges*, hearings, part 1, 96th Cong., 1st sess., January 25, 1979 (Washington: GPO, 1979), p. 5.

⁴¹ Jonathan Turley, “Seeing Red on Blue Slips,” *Los Angeles Times*, May 16, 2001, p. B-13.

⁴² CRS Report 98-712, “Holds” in the Senate, by Walter J. Oleszek.

In general, whether a Senator has placed a hold on a nomination or legislation is not publicly available information, and the information is closely held by the two party leaders.⁴³ Only when a Senator announces that he or she has placed a hold on a measure or a matter does the information become public. On September 14, 2007, the President signed S. 1, the Honest Leadership and Open Government Act of 2007 (P.L. 110-81). A provision in that law, supporters say, is designed to make it more difficult for a Senator placing a hold on a measure or a matter to keep their identity secret.⁴⁴

Because every Senator can attempt to place a hold at any time for any reason, situations can get complicated with “multiple holds” and “counter holds.” Consider the following situation:

[I]n 1997, then-Senator Carol Moseley-Braun, a Democrat, put a hold on President Clinton’s nomination of Joe Dial for another term on the Commodity Futures Trading Commission (CFTC), precluding the nomination from being voted on before the end of the congressional session and thereby killing the nomination for good. In retaliation, Republican Senator Phil Gramm, a friend of Dial’s, maintained as of the spring of 1998 a hold on two judicial nominees for the state of Illinois. In retaliation against Gramm’s hold, Illinois’s other Democratic Senator, Richard Durbin, blocked the Senate’s consideration of a Republican education bill, pending final Senate action on the two judicial nominees from Illinois. The logjam ended, however, at the end of March 1998, when President Clinton agreed to nominate a Republican to the CFTC seat to which Dial had not been appointed. Almost immediately thereafter, Senator Gramm released his hold on the two Illinois judicial nominees, who were easily confirmed in early April 1998.⁴⁵

Filibuster

The Senate in most instances allows its Members to debate an issue for as long as they want. When opponents of a measure or nomination use this ability to try to prevent final action on the matter at hand, it is generally called a filibuster. It is a tactic that also can be used when the Senate is considering legislation.

It is difficult to know exactly when Members of the Senate began to use the tactic of the filibuster on nominations. Prior to 1929, action on confirmation of nominations by the full Senate was done in executive (closed) session, open only occasionally when the Senate voted to do so. Also clouding the issue is the question of what kinds of actions Senators must take to be considered to be filibustering. Is

⁴³ Ibid.

⁴⁴ The provision would require that, if unanimous consent to a motion to proceed to consider or pass a measure is objected to on behalf of a Senator, then that Senator must file a written notice of intent to object to that request to their party’s leader. Six session days later that information would be printed in the *Congressional Record*. It is not clear what would happen if a Senator merely made clear to the party leader his or her intent to object should a unanimous consent request be sought on the motion to proceed.

⁴⁵ Gerhardt, *The Federal Appointments Process*, pp. 140-141.

it merely lengthy debate or must there be an attempt to use dilatory tactics to slow or stop consideration of the matter at hand?

One indication of a filibuster is the taking of one or more cloture votes to bring debate on an issue to an end. (There have also been filibusters where there was no cloture vote; so, looking at cloture votes provides only a partial picture.)

The Senate adopted the cloture rule in 1917, which then for the first time provided Members with a way of ending debate. After a lengthy debate in 1949, the Senate adopted a change to its rules that, in addition to many other things, allowed the Senate to vote cloture on items of executive business, such as treaties and nominations. While proponents of the 1949 cloture change talked about the need to get to a final vote on treaties, they did not mention nominations or any situations they might have had in mind concerning filibusters of nominations.⁴⁶ Also, the two most comprehensive historical analyses of the Senate's role in advice and consent, one published in 1938 and the other in 1953, do not mention the word "filibuster" in conjunction with nominations.⁴⁷

One reason could be that the other devices in place — the blue slip and senatorial courtesy — allowed Senators to prevent confirmation by the full Senate when they were concerned about a particular nomination. Another interpretation is that Senators did not previously use filibusters against nominations or, when they did, the Senate used other methods other than cloture to try to bring the debate to a close, such as enforcing the Senate rule which prohibits Members from making more than two speeches on the same subject on any day.

One historian found that President Woodrow Wilson's nominee to be director of the census was blocked several times in executive (closed) sessions in 1913. Once it became clear that a full filibuster of the nomination was a possibility, supporters of the nomination agreed to postpone consideration of the nomination until the end of the fiscal year.⁴⁸

There are also several examples of parties in the Senate blocking action on a group of nominations toward the end of a President's term, particularly when a new administration from a different party was poised to take power. At the end of the administration of President Taft, for example, Progressives and Democrats in the Senate prevented that chamber from going into executive session until Congress ended, thus killing some 1,300 nominations submitted by President Taft.⁴⁹

⁴⁶ "Cloture Rule Debate," *Congressional Record*, vol. 95, parts 1-3 (between January 10, 1949 through March 15, 1949), pp. 73-2510.

⁴⁷ Haynes, *Senate of the United States, Its History and Precedent*, and Harris, *The Advice and Consent of the Senate*.

⁴⁸ Franklin L. Burdette, *Filibustering in the Senate* (Princeton: Princeton University Press, 1940), p. 95.

⁴⁹ Harris, *The Advice and Consent of the Senate*, p. 94. A similar situation occurred in 1881 with the outgoing administration of President Rutherford B. Hayes and the incoming (continued...)

The first clear-cut example of a successful use of a filibuster against a nomination, including taking a cloture vote, occurred in 1968 over President Lyndon B. Johnson's decision to elevate Associate Supreme Court Justice Abe Fortas to be Chief Justice.⁵⁰ Senators spoke for several days on the motion to proceed to the nomination. The vote to invoke cloture on the motion to proceed failed, 45-43, on October 1, and, at Fortas's request, President Johnson withdrew the nomination on October 4, roughly one month before the presidential election.

There was considerable concern among Senators about whether what they were doing was establishing a precedent of using a filibuster against a nominee, particularly one to the Supreme Court. New York Republican Jacob K. Javits said:

It seems to me that the use of the filibuster, which is signaled by the extended debate now indicated on the motion to take up the nomination, is a matter of utmost concern to me and to the Nation. I condemn this step unreservedly; the filibuster has never been used for this purpose, and it is shameful that it may be so used now. There is ample opportunity afforded in this matter to debate, and an effort to suffocate the nomination through the filibuster is unwarranted and destructive, in my judgement, of the national interest and the prestige and character of the Senate. Those who charged that the President should not have acted with respect to the appointment at all, notwithstanding his constitutional duties as President, have a perfect opportunity to test out their case after debating it by a motion to table the nomination, or by voting against the motion to take it up. But the Senate has the right to vote on the nomination on the merits after reasonable debate.⁵¹

Michigan Democrat Philip A. Hart also spoke in opposition to the filibuster:

To reject the nomination, with all of its implications for the future of the Supreme Court, is so serious that the matter should be proceeded with on its merits. If we, for the first time in our history, permit a Supreme Court nomination to be lost in a fog of a filibuster I think we would be setting a precedent which would come back to haunt our successors. We tend to overstate the importance of anything in which we are involved here. I have a lingering suspicion that history will record this to have been one of the most significant actions — and I hope it will be action — that the Senate will be confronted with in the period that many of us have been permitted to sit here. I do hope we will

⁴⁹ (...continued)

administration of James A. Garfield.

⁵⁰ Recently, some have questioned whether the Fortas situation was a filibuster. While there is no generally accepted definition of what constitutes a filibuster, typically filibusters are characterized by lengthy debate and the use of parliamentary tactics to prevent a final vote on a measure or a matter. The debate on the motion to proceed to the Fortas nomination consumed more than 25 hours over five days. News stories at the time of the debate called the floor action against Fortas a filibuster, and the leader of the fight against Fortas, Senator Robert P. Griffin, said his group was prepared to “keep the debate going indefinitely.” See Robert C. Albright, “GOP to Lead a Filibuster Against Fortas,” *Washington Post*, September 20, 1968, p. A7.

⁵¹ Sen. Jacob Javits, “Supreme Court of the United States,” *Congressional Record*, vol. 114, September 26, 1968, p. 28268.

be permitted to discharge our constitutional responsibility to advise and consent or not consent.⁵²

Opponents of the Fortas nomination said they believed it was their constitutional duty to advise and consent, which gave them the right to talk about the nomination as long as they felt necessary under Rule XXII of the Senate Rules, which sets out the process for cloture. Tennessee Republican Howard Baker said:

And, so, Mr. President, I am also not overly taken with charges which are made from time to time in the press and elsewhere, and from time to time on the floor of this body, that dilatory tactics, sometimes characterized as filibusters, otherwise extended debate, frequently as obstructionism, but which are clearly within the framework and scope of the rules of procedure in the Senate, and particularly rule XXII, are permitting a wilful minority, as one distinguished daily newspaper characterized it, to obstruct the will of the majority.... It occurs to me further that it is basic and fundamental to the governing process in a democracy and consonant with the traditions of this Nation, that at any given moment the majority is not always right all of the time. And it is clear and predictable that the people of America, in their compassionate wisdom, require the protection of the rights of the minority as well as the implementation of the will of the majority.⁵³

North Carolina Democrat Sam Ervin, who opposed the Fortas nomination and voted not to end debate on the motion to proceed, defended the use of the filibuster and cloture procedure:

Mr. President, I think that rule XXII is perfectly constitutional. The Constitution provides that each House may determine the rules of its proceedings. The Senate adopted rule XXII in pursuance of that constitutional authority. I think rule XXII is very wise. It protects a minority which thinks it is right against the tyranny of the majority. That is very desirable. Majorities need no protection. It is only minorities which need protection.... Rule XXII is needed. It tends to expand the ability of the minority to convert an erroneous majority to its views. It is a wise and enlightened process and should be treated with great veneration by all men.⁵⁴

Including the Fortas nomination, cloture has been sought on 35 judicial nominations and 36 executive branch nominations between 1968 and 2006.⁵⁵ For 17 of those 71 nominations, the nomination ultimately failed of confirmation: the nomination of John R. Bolton to be Representative of the United States of America in the United Nations in the 109th Congress; the nomination of Peter Cyril Wyche

⁵² Sen. Phillip A. Hart, "Supreme Court of the United States," *Congressional Record*, vol. 114, September 26, 1968, p. 28252.

⁵³ Sen. Howard Baker, "Supreme Court of the United States," *Congressional Record*, vol. 114, September 26, 1968, p. 28253.

⁵⁴ Sen. Sam Ervin, "Supreme Court of the United States," *Congressional Record*, vol. 114, part 22, September 27, 1968, p. 28585.

⁵⁵ This figure includes five executive branch nominations that received consideration and cloture action concurrently as a single case. See CRS Report RL32878, *Cloture Attempts on Nominations*, by Richard S. Beth and Betsy Palmer.

Flory to be assistant secretary of Defense for International Security Policy in the 109th Congress; the nomination of Richard Stickler to be assistant secretary of Labor for Mine Safety and Health in the 109th Congress; 10 judicial nominations in the 108th Congress, the nomination of Thomas C. Dorr, to be under secretary of Agriculture for Rural Development in the 108th Congress; Fortas; the 1994 nomination of Sam Brown to be ambassador to the Conference on Cooperation and Security in Europe; and the 1995 nomination of Dr. Henry Foster to be Surgeon General.

There has been significant debate about whether filibustering nominations is a violation of the Constitution's requirement that the Senate advise and consent to a nomination.⁵⁶ Opponents of using filibusters against nominations say that the Constitution requires the full Senate to act on nominations sent to it by the President and that the need to win 60 votes to invoke cloture is an unconstitutional super-majority.⁵⁷

Those who defend the use of filibusters against nominations note that one of the dominant themes during debates on the Constitution was how to protect the rights of the minority, something extended debate has the effect of doing. And they note that the Senate is empowered by the Constitution to set its own rules of procedures.⁵⁸

In the 108th Congress, a resolution to amend Senate rules on cloture was reported by the Senate Rules and Administration Committee. Senate Majority Leader Bill Frist proposed to change the Senate's rules regarding debate on presidential nominations. His resolution (S.Res. 138) would have changed Rule XXII by imposing on succeeding cloture votes an ever-decreasing threshold for invoking cloture on a nomination, until it could be achieved by a majority vote. The Senate Rules and Administration Committee reported the resolution to the full Senate on June 26, 2003.⁵⁹

In the 109th Congress, there was significant debate about whether Senate rules on cloture for nominations should be changed, and, if so, how they could be changed. Majority Leader Frist said he might consider using a complicated set of parliamentary steps to allow a majority of Senators to change Senate rules over the objections of the minority, an option called the "nuclear option," by opponents and the "constitutional option," by its supporters.

⁵⁶ CRS General Distribution Memorandum, *Constitutionality of the Senate Filibuster*, by Jay R. Shampansky.

⁵⁷ *Ibid.*, p. 8.

⁵⁸ *Ibid.*

⁵⁹ See CRS Report RL32149, *Proposals to Amend the Senate Cloture Rule*, by Christopher M. Davis and Betsy Palmer.