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Return of Nominations to the President Under Senate Rule XXXI

Nominations that have been neither confirmed nor rejected by the Senate at the time the Senate adjourns sine die or for a period of more than 30 days are returned to the President pursuant to Senate Rule XXXI, clause 6. *Pro forma* sessions held during a recess of the Senate count as days in session and can prevent what would otherwise be a greater than 30-day recess that would trigger the return of nominations under the rule. The use of *pro forma* sessions in modern Senate practice means that the need to suspend Rule XXXI usually only occurs at the end of the 1st session of a Congress.

The Senate routinely holds over at least some nominations between sessions of Congress or recesses lasting more than 30 days. Nominations can be held over if the Senate agrees, by unanimous consent, to suspend the rule. Unanimous consent agreements to waive the rule might be applied to some or all nominations pending before the Senate and its committees. Nominations chosen to be held over are typically negotiated by party and committee leaders, though individual Senators have leverage in negotiations as any objection to a unanimous consent request would kill it. Nominations for which the rule has been suspended remain in status quo, meaning they continue to be pending on the *Executive Calendar* instead of being returned to the President as required under Senate rules. The Senate returns all nominations at the end of a Congress.

If a nomination is returned to the President, it is no longer eligible for consideration by the Senate. The President may submit a new nomination, either for the previously returned nominee or for a new candidate. This new nomination is referred to its committee of jurisdiction, which must report out or be discharged before the Senate can vote on confirmation (even if the nominee had previously been considered and reported by the committee under a prior nomination). Committees have broad latitude in determining what they will require from a resubmitted nominee, whether that means updating paperwork and questionnaires provided to the committee and/or having a nominee participate in a confirmation hearing where the nominee would face questions from committee members.

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Introduction

Under the Constitution, the President has the power to appoint individuals to certain positions “by and with the Advice and Consent of the Senate.”¹ Hundreds of nominations are submitted by the President and considered by the Senate each Congress.² The lifecycle of a nomination concludes when the Senate votes to confirm or reject a nominee, when it is withdrawn by the President, or when it is returned to the President by the Senate. This report discusses the return of nominations as provided for under Senate Rule XXXI. It describes requirements under the rule, explains how the Senate routinely waives the rule, and addresses questions on related topics.

Rule XXXI, Paragraph 6

Rule XXXI, paragraph 6, limits the period of time that the Senate can consider nominations submitted to the chamber by the President. The rule does so in two ways: first, by limiting action on a nomination to the session during which it was submitted; and second, by directing the Secretary of the Senate to return nominations “not finally acted upon” to the President when the Senate adjourns or recesses for more than 30 days.

Senate Rule XXXI, Paragraph 6

Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.

Unlike a number of Senate rules which require proactive enforcement, nominations that have been neither confirmed nor rejected are automatically returned under Rule XXXI when the Senate has adjourned *sine die* at the end of a session or has recessed for a period of more than 30 days.³ In other words, the Senate must take action to prevent the return of nominations to the President under the rule. Nominations returned in this way are permanently disposed of and no longer pending before the Senate. Further consideration can only occur if and when the President submits a new nomination to the Senate. However, in modern practice, this rule is frequently waived for at least some nominations. By waiving the rule, nominations that would have otherwise been returned to the President remain before the Senate and can be considered into the next session.

¹ Article II, Section 2.

² For more reading on the confirmation process in the Senate, see CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki.

³ Each two-year Congress is comprised of two regular annual sessions, which convene on January 3 of each year as required by the Constitution and, in modern practice, are usually not adjourned *sine die* until the very end of the year (or just at the start of the new one). See CRS Report R42977, *Sessions, Adjournments, and Recesses of Congress*, by Richard S. Beth and Valerie Heitshusen for further discussion of these concepts.

Waiving the Rule

As already discussed, if the Senate takes no action prior to adjourning *sine die* or recessing for more than 30 days, nominations for which no final action has been taken will be returned to the President. To prevent this, the Senate frequently reaches unanimous consent to waive Rule XXXI, paragraph 6 before the start of a recess longer than 30 days or to allow nominations to carry over from the first to the second session.⁴ According to Senate precedents, the rule can only be waived by unanimous consent.⁵ At the end of a Congress, the Senate returns all nominations to the President.

A unanimous consent request to hold over nominations is usually propounded by the majority or minority leaders or their designees, depending on the party of the President, though any Senator may do so.⁶ These requests contain language asking that certain or all pending nominations be kept in status quo, notwithstanding the rule.⁷ In determining which nominations should be held over or returned, the party leaders typically consult each other and also ask committee leaders for their input. Because the objection of any Senator can defeat a unanimous consent request, individual Senators also have leverage to negotiate whether certain nominees will be held over or not.

Once the request is offered on the floor and assuming no Senator objects, any nominations designated as being held in status quo would continue on in their respective places, either pending before committees or on the Senate's *Executive Calendar*. On occasion, the Senate has failed to reach unanimous consent to waive this rule, resulting in the return of hundreds of nominations to the President.⁸ In recent years, while unanimous consent continues routinely to be reached to hold over some nominations, larger numbers of nominations have been returned to the President during adjournments between sessions of the Senate.⁹

⁴ See Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, 101st Cong., 1st sess., S.Doc. 101-28 (Washington: GPO, 1992), p. 947.

⁵ Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, 101st Cong., 2nd sess., S.Doc. 101-28 (Washington: GPO, 1992), p. 946. It appears that a motion to suspend the rule—requiring notice of one day and a two-thirds vote—would not be allowed. The only citation provided by *Riddick's*, regarding the ineligibility of a motion to waive the rule, cites to an instance from 1974 where Senator Hugh Scott made a motion to waive the rule (at the time designated under Rule XXXVIII) “as to routine nominations at the desk” in order to prevent their return to the President. The presiding officer then advises that “a unanimous consent request is necessary” and the rule is then waived by unanimous consent (*Congressional Record*, vol. 120 (October 9, 1974), p. 34658). Notably, an examination of the *Congressional Record* shows that Senator Scott did not give one day's notice in writing of his intent to offer this motion, which would be required under Paragraph 1 of Senate Rule V if he intended to move to suspend the rule.

⁶ In cases of divided government, with the President of a different party than the majority in the Senate, the minority party usually propounds the request to hold over nominations.

⁷ Recent examples of unanimous consent requests can be found at *Congressional Record*, daily edition, vol. 165 (December 19, 2019), p. S7238; *Congressional Record*, daily edition, vol. 163 (January 2, 2018), p. S8289; and, *Congressional Record*, daily edition, vol. 163 (December 21, 2017), p. S8241.

⁸ This most recently occurred on December 30, 2013, when an objection was made to a unanimous consent request to hold over all nominations received in the Senate during the first session of the 113th Congress (2013-2014) into the second session. (*Congressional Record*, daily edition, vol. 159 (December 20, 2013), p. S9089). As a result, 281 nominations were returned to the President at the end of the first session of the 113th Congress. It appears the objection to holding over these nominations was in reaction to the majority party's reinterpretation of Senate Rule XXII one month prior, on November 21, 2013. The rule was reinterpreted to mean that cloture on all nominations, except those made to the Supreme Court, only required a simple majority as opposed to a three-fifths supermajority. For further reading, see CRS Report R43331, *Majority Cloture for Nominations: Implications and the “Nuclear” Proceedings of November 21, 2013*, by Valerie Heitsch.

⁹ For example, at the end of the 1st session of the 114th Congress (2015-2016), the Senate reached unanimous consent to (continued...)

Examples of Status Quo Consent Agreements

The structure of a unanimous consent agreement to hold over nominations in status quo can vary. The Senate may choose to hold over all nominations, only specific individuals, or none at all (in which case no action would need to be taken). The following examples illustrate how unanimous consent requests can vary to effect what nominations are or are not held over.

In certain circumstances, the Senate might choose to hold over all nominations it has not yet acted on. A recess of more than 30 days that would trigger the return of nominations might not be optimal for the Senate when it would otherwise still have several months of the session to consider pending nominees. In the example below, the Senate reached consent to hold over all pending nominations prior to a 32-day recess from August 7, 2015, to September 8, 2015.

I ask unanimous consent that all the nominations received by the Senate during the 114th Congress, first session, remain in status quo, notwithstanding the provisions of rule XXXI, paragraph 6, of the Standing Rules of the Senate.¹⁰

In some cases, dozens or possibly hundreds of specific nominations are requested to be held over. The request below references a list of names sent to the desk which was then reprinted in the *Congressional Record* and organized by committee of jurisdiction.

Mr. President, I send a list of nominations to the desk and ask that they be kept in status quo despite the sine die adjournment of the 1st session of the 116th Congress.

The PRESIDING OFFICER. Without objection, it is so ordered. The nominations in status quo are as follows...¹¹

In this final example, the Senate consented to hold over all nominations except for two specific nominees as identified directly in the request by their PN or Presidential Nomination numbers.¹² An inverse of the previous example, it lists those nominations that are not to be held over.

I ask unanimous consent that all the nominations received by the Senate during the 114th Congress, first session, remain in status quo, notwithstanding the provisions of rule XXXI, paragraph 6, of the Standing Rules of the Senate, with the exception of PN128 and PN214.¹³

hold over all but two nominations into the 2nd session (*Congressional Record*, daily edition, vol. 161 (December 18, 2015), p. S8913). The following two Congresses saw more nominations returned than held over between each session. At the end of the first session of the 115th Congress (2017-2018), the Senate reached unanimous consent to hold over 97 nominations while 98 other nominations were returned to the President (*Congressional Record*, daily edition, vol. 163 (December 21, 2017), p. S8241). Between the first and second sessions of the 116th Congress (2019-2020), the Senate agreed to hold over 95 nominations, while 113 other nominations were returned (*Congressional Record*, daily edition, vol. 165 (December 19, 2019), pp. S7238-S7239).

¹⁰ *Congressional Record*, daily edition, vol. 161 (August 5, 2015), p. S6356.

¹¹ *Congressional Record*, daily edition, vol. 165 (December 19, 2019), p. S7238.

¹² PNs are assigned to nominations by the Senate Executive Clerk upon receipt in the chamber. The number represents the sequential order in which it was received in the Senate from the President.

¹³ *Congressional Record*, daily edition, vol. 161 (December 18, 2015), p. S8913.

Effect of *Pro Forma* Sessions on Return of Nominations

Under the Constitution, neither the House of Representatives nor the Senate may adjourn for more than three days without the consent of the other.¹⁴ To comply with this constitutional requirement during extended adjournments, the Senate will sometimes reach unanimous consent to briefly convene every three days for short sessions where little or no business is conducted.¹⁵ These meeting days, commonly referred to as *pro forma* sessions, are considered as a regular session day of the Senate when determining the duration of a recess under Rule XXXI, paragraph 6.¹⁶ As a result, *pro forma* sessions held during what would otherwise be an adjournment of 30 or more days can otherwise prevent the return of nominations under the rule.¹⁷

Consideration of Resubmitted Nominations

For a returned nominee to be eligible for further consideration, the President must submit a new nomination to the Senate.¹⁸ Even if the nomination is for the same person to the same position that was considered in the prior session, it is new—from a procedural standpoint—in the Senate, and is referred to the appropriate committee(s) of jurisdiction. Committees may require updated paperwork from nominees, including financial and ethical disclosures, answers to questionnaires, and other documents otherwise required under a committee’s rules. Hearings can be held on resubmitted nominees, although committees frequently opt not to do so when a hearing was held on the preliminary nomination. As with any referral, a committee must report the nomination to the Senate or be discharged from considering the nomination before the full Senate can hold a vote on confirmation. In lieu of holding a business meeting to report out a nomination, some committees may informally poll their members to see if there is any objection to a consent request to be discharged by the Senate.

The Senate may determine it is advantageous to prevent certain nominations from being returned to the President. By keeping nominations in status quo between sessions, committees would not have to consider potentially hundreds of nominees that they had already taken time to report to the Senate. Alternatively, allowing nominations to be returned to the President can be a useful signal to the Administration that a nominee does not have sufficient support to get confirmed in the Senate and that another candidate should be nominated instead.

¹⁴ Article 1, Section 5.

¹⁵ See, *Congressional Record*, daily edition, vol. 166 (August 13, 2020), p. S5413, for an example of a unanimous consent request that the Senate “adjourn to then convene for *pro forma* sessions only, with no business being conducted” on specific dates.

¹⁶ For further reading on *pro forma* sessions, see CRS Report R42977, *Sessions, Adjournments, and Recesses of Congress*, by Richard S. Beth and Valerie Heitshusen.

¹⁷ For example, from August 2, 2019, to September 9, 2019, the Senate only convened for 11 *pro forma* sessions but was otherwise adjourned. These *pro forma* sessions disrupted what would have otherwise been a greater than 30-day adjournment of the Senate to which Rule XXXI, paragraph 6 would have applied. See *Congressional Record*, daily edition, vol. 165 (August 1, 2019), p. S5321.

¹⁸ This resubmission process by the Senate can and has occurred as late as the final weeks of a presidential term prior to the inauguration of a new President on January 20th. For more information, see CRS distribution memo “Senate consideration of nominations made during the final month of a presidential administration,” by Michael Greene. Copies are available from the author upon congressional request.

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