Congressional Research Service
Informing the legislative debate since 1914

TESTIMONY

Statement of

Elizabeth Rybicki
Specialist on Congress and the Legislative Process

Before

Rules and Administration Committee
U.S. Senate

Hearing on

"Senate Procedures to Confirm Nominees"

July 30, 2024

Congressional Research Service
https://crsreports.congress.gov
TE10106

Chairwoman Klobuchar, Ranking Member Fischer, and members of the Committee, I am honored to have been invited to present testimony, on behalf of the Congressional Research Service, on Senate procedures for considering presidential nominations. As the Committee requested, I am going to begin with a brief explanation of current Senate procedures for confirming nominations. I will also provide some historical information on the Senate confirmation process, specifically, as requested, on the various efforts to change Senate procedures, as well as recent changes in practice.

Current Procedure and Practice

The Senate, in recent years, has received from the President between 800 and 1,200 civilian nominations each Congress; the number varies based on vacancies, which for many executive branch positions are higher at the start of a new presidential term.[1] If foreign service nominations and noncivilian military appointments and promotions are included in the total, approximately 45,000 nominations are received by the Senate each two-year Congress. Foreign service and military nominations are usually submitted as lists of names that are normally considered together by unanimous consent.[2]

To screen and process nominations, the Senate relies on its committee system. Most nominations are referred to committee according to the Senate's rules and precedents concerning committee jurisdiction. The committees are responsible for collecting information on the nominations, which includes not only reviewing some material collected by the executive branch, such as a financial disclosure report, but also conducting their own investigations. Most committees have their own forms and questionnaires, which can be tailored to the nomination, and committee members and staff sometimes meet with nominees. The committees, in this way, can assess possible conflicts of interest as well as the background of nominees; nominees to many positions are required by law to meet certain qualifications, such as a expertise in specified areas.[3] Committees can choose to hold public hearings on nominations, where Senators from all parties have an opportunity to ask questions of the nominee, express policy positions, and discuss relevant programs and other issues related to the committee's oversight role.[4] The nominee is often asked to commit, sometimes in response to an public question from the committee chair in a hearing, to being responsive to future committee requests, including to testify, if confirmed.[5]

Nominations referred to committee cannot be considered by the full Senate unless (1) a majority of the committee votes to report them or (2) the Senate discharges the committee from further consideration of the nomination, which, in practice, occurs only with the unanimous consent of the Senate.[6] Some

[1] Including foreign service nominations, which are typically submitted as lists of nominations that are considered together by unanimous consent, the Senate in recent Congress has received between approximately 4000 and 5000 civilian nominations each Congress. For the number of nominations received in the last two Congresses, see "Resume of Congressional Activity," Daily Digest, *Congressional Record*, daily edition, vol. 169 (Jan. 24, 2023), p. D55; "Interim Resume of Congressional Activity," Daily Digest, *Congressional Record*, daily edition, vol. 168 (Jan. 4, 2022), p. D11; "Interim Resume of Congressional Activity," Daily Digest, *Congressional Record*, daily edition, vol. 167 (Jan. 25, 2021), p. D59; "Interim Resume of Congressional Activity," Daily Digest, *Congressional Record*, daily edition, vol. 166 (Jan. 7, 2020), p. D17.

[2] Nominations that are submitted on lists such as these are normally assigned a single presidential nomination number even though the list contains multiple individual nominations. For example, PN842 in the 118th Congress included 391 named officers nominated for appointment to the rank of Major in the United States Air Force (https://www.congress.gov/nomination/118th-congress/842).

[3] For more information, see CRS Report RL33886, *Statutory Qualifications for Executive Branch Positions*, by Henry B. Hogue.

[4] See "The Confirmation Process" in CRS Report RL30240, *Congressional Oversight Manual*, coordinated by Ben Wilhelm, Todd Garvey, and Christopher M. Davis.

[5] Under a long-standing practice of the Senate, the Senate's *Executive Calendar* indicates, by asterisks next to the nomination, the "nominee's commitment to respond to requests to appear and testify before any duly constituted committee of the Senate."

[6] For more information, see CRS congressional distribution memorandum, "Discharging a Committee from Consideration of a Nomination: Current Procedure and Historical Practice" by Michael Greene and Elizabeth Rybicki, May 31, 2017, available from the authors to congressional requesters.

nominations, called "privileged" nominations, are not referred to committee (unless any single Senator requests referral). However, even privileged nominations are still screened by committee and are not eligible for floor consideration until 10 session days after the committee has indicated to the Executive Clerk that biographical and financial information on the nominee has been received.[7]

Unanimous Consent

Nominations supported by the committee of jurisdiction are most often taken up and approved by the full Senate without a roll call vote. This is true for both military and civilian nominations, although fewer civilian nominations are approved without a roll call vote in current practice than they were previously (See **Table 1**). Military and foreign service nominations are routinely taken up and confirmed on the Senate floor *en bloc* (as a group) by unanimous consent.[8]

Approving a nomination by unanimous consent requires that a Senator ask, during a session of the Senate, for that action to occur. Such requests are usually made by the majority leader (or his designee), and the presiding officer responds by inquiring if any Senator objects to the unanimous consent request. If no Senator objects, then the nomination or nominations are confirmed. In some cases, the unanimous consent request is to take up a nomination, or very often a group of nominations, and to vote on them; when there is no objection to the request, the Senate's practice is to immediately confirm them by voice vote.[9]

In practice, the majority leader does not usually ask unanimous consent to confirm nominations this way without first communicating with the minority leader and all other Senators to determine if any Senator would object. A *hold* on a nomination is a communication to the majority or minority leader that a Senator would object to taking up or approving the nomination by unanimous consent. If the majority leader learns any Senator would object, he usually does not ask unanimous consent on the floor and may try to address the concerns of the Senator.

[7] For more information, see section below, "'Privileged' Nominations (S.Res. 116, 112th Congress)" and CRS Report R46273, *Consideration of Privileged Nominations in the Senate*, by Michael Greene.

[8] For example, on May 23, 2024, the Senate took up and confirmed 1,940 Air Force nominations *en bloc* by unanimous consent *Congressional Record*, daily edition, vol. 170 (May 23, 2024), pp. S3879-80.

[9] The Congress.gov database does not appear to accurately distinguish between, on the one hand, approval by unanimous consent, and on the other, approval by voice vote after unanimous consent agreement is reached to hold the vote. Distinguishing between those technically confirmed by voice vote and those confirmed by unanimous consent would therefore require examination of the *Congressional Record* for each nomination. In both cases, party leaders have communicated with all Senators in advance to determine if there is an objection, and the length of time it requires to approve the nomination on the floor is the same in both cases.

Table 1. Number of Confirmed Civilian Nominations, With and Without Roll Call Vote

108th to 118th Congress (January 7, 2003-July 11, 2024)

Congress	Number of Nominations Confirmed	Number (%) of Confirmed Nominations Approved without a Roll Call Vote	Number (%) of Confirmed Nominations Approved with a Roll Call Vote[a]
108th (2003-2004)	713	631 (88%)	82 (12%)
109th (2005-2006)	740	692 (94%)	48 (6%)
110th (2007-2008)	**545**	**514 (94%)**	**31 (6%)**
111th (2009-2010)	920	855 (93%)	65 (7%)
112th (2011-2012)	573	488 (85%)	85 (15%)
113th (through Nov. 20, 2013)[b]	213	164 (77%)	49 (23%)
113th (Nov. 21, 2013-2014)[b]	398	244 (61%)	154 (39%)
114th (2015-2016)	**264**	**219 (83%)**	**45 (17%)**
115th (2017-2018)	715	529 (74%)	186 (26%)
116th (2019-2020)[c]	518	264 (51%)	254 (49%)
117th (2021-2022)	817	530 (65%)	287 (35%)
118th (2023-July 11, 2024)	302	123 (41%)	179 (59%)

Source: Congress.gov

Notes: Bolded entries indicate Congresses when the majority party in the Senate was a different party than the President. Excludes civilian nominations normally confirmed *en bloc* from lists submitted by the President, including nominations to the foreign service, the Public Health Service, and the civilian uniformed services of the National Oceanic and Atmospheric Administration. CRS determined nominations confirmed by searching "confirmed by yea-nay vote" or "confirmed by the Senate by Yea-Nay vote" for all confirmed civilian nominations.

a. In a few instances, the Senate invoked cloture by roll call vote and confirmed the nomination by voice vote. These cases are included in the totals of nominations approved with a roll call vote: 2 nominations each in the 109th, 111th, and 112th Congresses; 4 each in the 115th and 116th Congresses; and 15 in the 113th Congress, 14 of which occurred after Nov. 20, 2013.

b. On November 21, 2013, the Senate reversed a ruling of the presiding officer and, through the reversal, reinterpreted Senate Rule XXII to require only a majority to invoke cloture on presidential nominations (except those to the Supreme Court). Prior to November 21, 2013, a vote of three-fifths of the Senate (60 Senators if no more than one seat was vacant) was required to invoke cloture. In addition, a temporary standing order was in effect in the 113th Congress that reduced the time limit for consideration of most nominations after cloture was invoked.

c. During the 116th Congress, on April 3, 2019, the Senate reinterpreted Senate Rule XXII to reduce, from 30 hours to 2 hours, the maximum time allowed for consideration of most nominations after cloture is invoked.

Cloture

In the absence of unanimous consent, the Senate must consider each nomination separately. The question of confirmation is a debatable one in the Senate and may require a cloture process in order to end debate

and reach a vote. Under current Senate precedents, invoking cloture on a nomination requires majority support, and most nominations are subject to a maximum of two additional hours of post-cloture debate.[10]

Absent unanimous consent, the steps to confirm a nomination include:

- The Senate votes on a non-debatable motion to proceed to executive session to take up a nomination on the *Executive Calendar*.[11]
- The majority leader (or his designee) files cloture on the nomination.[12] The Senate must wait two session days before voting on cloture, absent unanimous consent to alter this "ripening period." The Senate can conduct other business during these two days, and usually does.
- Two days of session later, the Senate votes on cloture.[13] The rule requires that the vote to invoke cloture be a roll call vote. If a majority of Senators voting support cloture, then cloture is invoked, and further consideration of the nomination is limited.
- The Senate conducts post-cloture debate on the nomination. For all but the highest-ranking nominations, the maximum time for consideration of a nomination after cloture is invoked is two hours. Once cloture is invoked on a matter, the Senate can consider other business during the post-cloture period only by unanimous consent.
- After post-cloture debate time expires, or when no Senator seeks to discuss the nomination further, the Senate votes on the nomination.[14] Confirmation requires majority support.
- The motion to reconsider the confirmation vote is routinely, by unanimous consent, considered made and laid upon the table.[15] This final parliamentary step prevents the possibility of a re-vote on the nomination and immediately returns the approved nomination to the President.

Stacked Cloture Motions

Confirming a large number of nominations separately using the cloture process can take considerable floor time. To expedite the process somewhat, it is common for the majority leader to file cloture on several nominations, sequentially, on the same day (sometimes referred to as "stacking" cloture motions); the cloture motions then ripen simultaneously over the next two session days.

In order to stack cloture motions, the majority leader first makes a non-debatable motion to enter executive session to take up a specific nomination. The motion is routinely agreed to by voice vote, though any Senator could, with a sufficient second, secure a roll call vote. Next, the majority leader files

[10] The bullet point summary of cloture steps is adapted from CRS Insight IN12200, *Holds on Nominations*, by Elizabeth Rybicki and Michael Greene. For nominations subject to 30 hours of post-cloture debate, see **Table 4**.

[11] This motion is routinely approved immediately without a roll call vote—but with sufficient support, a Senator could secure a roll call vote on this question. The motion requires a majority vote to pass.

[12] In order to properly present a cloture motion on the Senate floor, Senate Rule XXII requires that it be signed by at least 16 Senators. Once the cloture motion is filed on the floor, it is read aloud in its entirety by the clerk. However, the Senate routinely waives the reading of the motion by unanimous consent.

[13] Prior to voting on the motion to invoke cloture, Senate Rule XXII requires the presiding officer to direct the clerk to call the roll in order to establish that a quorum is present. The Senate routinely waives this quorum call by unanimous consent, but any Senator could object and force this vote to occur.

[14] The vote is taken by voice, unless a Senator with sufficient support requests a roll call vote on the question of confirming the nomination. Securing a recorded vote requires the support of one-fifth of Senators present. When conducting business, the Senate assumes a quorum is present, which consists of a majority of at least 51 Senators. A minimum sufficient second for securing a recorded vote, therefore, requires 11 Senators (one-fifth of 51).

[15] Absent unanimous consent to table the motion to reconsider, a majority of the Senate could immediately vote to table the motion to reconsider if it were offered.

cloture on the nomination and then makes a non-debatable motion to return to legislative session (also routinely agreed to by voice vote). The majority leader can repeat these steps for any number of nominations. However, when deciding when and whether to stack cloture motions on multiple nominations, another consideration is the possible effect on other items of business on the Senate agenda. Once cloture has been filed on a matter, unanimous consent is required to withdraw the cloture motion. In addition, once cloture is invoked, during the post-cloture consideration time, unanimous consent is required to move on to any other Senate business.

Stacked cloture motions filed sequentially on multiple nominations ripen simultaneously. Two days of session later, each nomination must still be considered separately and in sequence; that is, first a vote to invoke cloture, then up to two hours of post-cloture debate, and, finally, a vote on confirmation for the nominee. The process is repeated for each stacked nomination. As a result of stacking cloture motions, the Senate is often able to confirm several nominations on the day that the cloture motions mature. This typically requires Senators come to the floor multiple times during the day to vote, since clustering the roll call votes requires unanimous consent.

The use of cloture to process nominations, which was uncommon 20 years ago, has now become routine. In the vast majority of cases where cloture is filed on nominations, there are two roll call votes cast in connection with them: one on the motion to invoke cloture and one to confirm the nomination. For the convenience of all Senators, the Senate usually enters into unanimous consent agreements that establish the times for the cloture and confirmation votes, but these unanimous consent agreements largely reflect what would occur under the procedures just described when cloture motions are stacked.

It is common, for example, for the majority leader to stack cloture motions on three nominations at a time, and for subsequent unanimous consent agreements to establish when the six roll call votes to process these three nominations will occur. Cloture motions are frequently stacked on three nominations at the end of one week that then ripen the following Tuesday. Unanimous consent agreements sometimes set the first cloture vote before the weekly caucus meetings, and set the first confirmation vote (followed immediately by the cloture vote on the second nomination) when the Senate returns to session after the meeting. To provide for predictability in the schedule, the time for the confirmation vote on the second nomination (followed immediately by the cloture vote on the third nomination) is also typically agreed to by unanimous consent, reflecting the terms of the rule that allow a maximum of two hours. Sometimes the unanimous consent agreements arrange for these votes to all occur on the same day—usually with two or three hours between cloture and confirmation votes—but it is just as likely that the six votes taken in relation to the stack of three nominations will occur over the course of two days of session.

Table 2 provides data on the number of roll call votes in relation to nominations and the number of days on which a roll call vote was cast in relation to nominations, for each Congress from the 108th Congress (2003-2004) to the 118th Congress through July 11, 2024. The number of days on which the Senate takes roll call votes in relation to nominations has increased, and it is not unusual for there to be multiple roll call votes on a single day.

Table 2. Roll Call Votes in Relation to Nominations

108th to 118th Congress (January 7, 2003-July 11, 2024)

Congress	Number of Roll Call Votes in Relation to Nominations (% of All Roll Call Votes)	Number of Days with Roll Call Votes in Relation to Nominations	Number of Nominations Subject to Cloture Votes	
			All	Judicial (%)
108th (2003-2004)	106 (16%)	73	11	10 (91%)
109th (2005-2006)	59 (9%)	46	11	6 (55%)
110th (2007-2008)	**37 (6%)**	**28**	**1**	**1 (100%)**
111th (2009-2010)	76 (11%)	59	12	2 (17%)
112th (2011-2012)	93 (19%)	79	10	6 (60%)
113th (through Nov. 20, 2013)[a]	67 (28%)	47	14[b]	1 (7%)
113th (Nov. 21, 2013-2014)[a]	299 (71%)	86	131	86 (66%)
114th (2015-2016)	**47 (9%)**	**45**	**2**	**0**
115th (2017-2018)	330 (55%)	181	127	48 (38%)
116th (2019-2020)[c]	515 (72%)	173	244	154 (63%)
117th (2021-2022)	559 (59%)	202	245	100 (41%)
118th (2023-July 11, 2024)	357 (63%)	146	173	102 (59%)

Sources: Senate roll call data available at https://www.senate.gov/legislative/common/generic/roll_call_lists.htm; Cloture vote data available at https://www.senate.gov/legislative/cloture/clotureCounts.htm; Archived CRS Report RL32878, *Cloture Attempts on Nominations: Data and Historical Development Through November 20, 2013*, by Richard S. Beth, Elizabeth Rybicki, and Michael Greene, updated Sept. 28, 2018; CRS congressional distribution memorandum, "Nominations with Cloture Motions, 113th (2013-2014); 114th (2015-2016); and 115th (2017-2018) Congresses," by Elizabeth Rybicki, Michael Greene, and Richard S. Beth, Jan. 15, 2019.

Notes: Bolded entries indicate Congresses when the majority party in the Senate was a different party than the President. Includes roll call votes with a PN in the "issue" field of the Senate data, such as votes on confirmation, votes on cloture on a nomination, votes to reconsider cloture votes, and votes to enter executive session to take up a nomination.

a. On November 21, 2013, the Senate reversed a ruling of the presiding officer, and, through the reversal, reinterpreted Senate Rule XXII to require only a majority to invoke cloture on presidential nominations (except those to the Supreme Court). Prior to November 21, 2013, a vote of three-fifths of the Senate (60 Senators if no more than one vacancy) was required to invoke cloture. In addition, in the 113th Congress, a temporary standing order was in effect that reduced the time limit for consideration of most nominations after cloture was invoked.

b. Does not include four failed cloture attempts on four nominations that occurred prior to November 21, 2013, because subsequent successful cloture votes were held on all four nominations after the reinterpretation of the rule and are included in the total in the next row.

c. On April 3, 2019, the Senate reinterpreted Senate Rule XXII to reduce, from 30 hours to 2 hours, the maximum time allowed for consideration of most nominations after cloture is invoked.

Nominations Returned to the President (Senate Rule XXXI, paragraph 6)

Paragraph 6 of Senate Rule XXXI requires that nominations that are not confirmed or rejected by the Senate be returned to the President at the end of a session, or when the Senate adjourns or recesses for more than 30 days. *Pro forma* sessions held during a recess of the Senate count as days of session. Holding *pro forma* sessions has become routine in recent years, and these sessions (effectively every third

day) prevent returns of nominations during longer state work periods.[16] Between the first and second sessions of a Congress, however, the Senate must waive the rule, or else nominations will be automatically returned at the end of the first session.[17] The President must submit a new nomination to the Senate to have the nominee considered in the second session, which could require a Senate committee to report the new nomination.

The Senate usually reaches unanimous consent agreements to allow some nominations to remain "in status quo" between the first and second sessions of a Congress. The Senate sometimes exempts specific nominees from such unanimous consent agreements, allowing them to be returned during the recess or adjournment. According to a Congressional Research Service report, "In recent years, while unanimous consent continues 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."[18]

Recent Efforts to Change Senate Procedures for Considering Nominations

In the past 20 years, there has been Senate interest in the process for confirming nominations, resulting in several efforts, some successful, to change Senate procedures. Below, as you requested, CRS has summarized several of these attempts, beginning with a resolution reported by the Committee on Rules and Administration in the 108th Congress (2003-2004) affecting the cloture threshold for nominations, and ending with a resolution reported this year that would have allowed cloture to be filed on multiple military nominations, *en bloc*.[19]

Proposal to Reduce the Number of Votes to Invoke Cloture on Successive Cloture Motions on the Same Nomination (S.Res. 138, 108th Congress)

On June 26, 2003, the Committee on Rules and Administration reported S. Res. 138, a resolution to amend the cloture rule (Rule XXI, paragraph 2) relating to the consideration of nominations requiring the advice and consent of the Senate.[20] The resolution proposed that after a failed cloture vote on a nomination (in which less than three-fifths of Senators duly chosen and sworn had voted to end debate), additional cloture motions on the same nomination could be made, but the threshold necessary to invoke cloture pursuant to each subsequent motion would drop by three votes until the threshold reached a level

[16] For more information, see CRS Report R42977, *Sessions, Adjournments, and Recesses of Congress*, by Valerie Heitshusen.

[17] Unanimous consent may be necessary to waive the rule. See Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, 101st Cong., 2nd sess., S.Doc. 101-28 (Washington: GPO, 1992), p. 946. For more information, see CRS Report R46664, *Return of Nominations to the President Under Senate Rule XXXI*, by Michael Greene, page 2, footnote 5.

[18] CRS Report R46664, *Return of Nominations to the President Under Senate Rule XXXI*, by Michael Greene.

[19] Although beyond the scope of this testimony, during this period the Senate has also considered possible changes to the practice of placing "holds" on both legislation and nominations. The Senate Rules and Administration Committee held hearings on the topic, and in 2011 the Senate agreed to S.Res. 28, "a resolution to establish as a standing order of the Senate that a Senator publicly disclose a notice of intent to objecting to any measure or matter." For more information, see archived CRS Report RL31685, *Proposals to Reform 'Holds' in the Senate*, by Walter J. Oleszek.

[20] According to press coverage, the resolution was reported by voice vote with only majority party members of the committee present. See David Miller, "Senate Rules and Administration Committee Markup: Panel OKs Measure that Would Change Rules for Approving Judicial Nominees," *CQ Committee Coverage*, June 24, 2003.

equal to or less than a majority of the full Senate. This final cloture motion would then be agreed to only if a simple majority of Senators duly chosen and sworn agreed.

For example, under this proposal, if there was not more than one vacancy in the Senate, the threshold would have started at 60 votes required, but votes on subsequent cloture motions (on the same question) would have dropped to 57, then 54, then 51. The proposal prohibited the filing of a subsequent cloture motion until the Senate had disposed of the previous one, and it retained the timing process under the cloture rule at the time—that is, the two-day waiting period and a maximum of 30 hours of post-cloture consideration. In previous Congresses, similar resolutions ratcheting down the number needed to invoke cloture had been introduced, though those proposals applied to all questions, not just nominations.[21]

The majority leader submitted the resolution, cosponsored by the Chair of the Rules and Administration Committee, after repeated failed cloture votes on two judicial nominations.[22] The Rules and Administration Committee held a hearing in early June on the proposal, and the chair argued that, historically, cloture had not been filed often on nominations, and that the practice of a minority of Senators preventing judicial nominations from reaching a vote was unconstitutional.[23] Senators and Senate observers were discussing what was referred to, at the time, as the "constitutional option," or sometimes the "nuclear option," which was an unspecified plan to change Senate procedures with only simple majority support, presumably by taking unusual actions to overcome the supermajority support necessary under established procedures.[24] In a related Senate Judiciary Committee hearing held in May, Senators opposed to changing procedures to allow a nomination to move forward with simple majority support argued nominations had been delayed or not confirmed many times in Senate history, including under the previous administration when their party controlled the White House and the other party controlled the Senate. They pointed to the number of judicial nominations that had been confirmed during that Congress, and argued the Senate was an important check on the nature of the nominees selected by the President.[25]

The full Senate never attempted formal action on S.Res. 138 in the 108th Congress (2003-2004), but the measure was discussed on the Senate floor by several Senators, on November 12-14, 2003, when the Senate organized a multi-day debate on the process for considering judicial nominations.[26] In the following Congress, the majority and minority leaders reportedly were discussing possible changes to the rules, including a proposal by the majority leader that would have guaranteed a vote on a nomination after

[21] In 1995, Senator Harkin, on behalf of himself and Senators Lieberman, Pell, and Robb, offered an amendment proposing a similar process that would have applied to all matters; the amendment was tabled, 76-19 ("Amending Paragraph 2 of Rule XXV," *Congressional Record*, daily edition, vol. 141 (January 4, 1995), p. S30 and (January 5, 1995), p. S438). See also S.Res. 85, 108th Congress, to amend paragraph 2 of rule XXII of the Standing Rules of the Senate, submitted by Senator Miller on March 13, 2003. For more information on "ratchet" proposals, on which this summary is based, see CRS congressional distribution memorandum, "Proposals to Change Senate Rules Submitted January 3, 2013," by Valerie Heitshusen and Elizabeth Rybicki, Jan. 18, 2013, pp. 7-11, available upon request from the author.

[22] In the 108th Congress, there were 7 cloture votes on the nomination of Miguel A. Estrada to be a Circuit Judge and four on the nomination of Priscilla Richman Owen to be a Circuit Judge.

[23] Statement of Senator Trent Lott, "Judicial Confirmation Process," *CQ Committee Testimony*, June 5, 2003. Full hearing transcript not available.

[24] See, for example, John Cornyn. "Our Broken Judicial Confirmation Process and the Need for Filibuster Reform." *Harvard Journal of Law and Public Policy*, vol. 27, fall 2003, pp. 181-230; Robert C. Byrd. "In Defense of Senate Tradition." *Congressional Record*, daily edition, vol. 151, March 20, 2005, pp. S3100-S3103; Martin B. Gold and Dimple Gupta. "The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster." Harvard Journal of Law and Public Policy, vol. 28, fall 2004, pp. 205-272.

[25] U.S. Congress, Senate Judiciary Committee, *Judicial Nominations, Filibusters, and the Constitution: When a Majority Is Denied Its Right to Consent*, 108th Cong., 1st sess., May 6, 2003, 108-227 (Washington: GPO, 2003).

[26] *Congressional Record*, daily edition, vol. 149, November 12, 2003, pp. S14529; S14580; S14663-S14665; S14765-S14767; See also Keith Perine and Mary Clare Jalonic, "Senate's Marathon Debate Ends with More Judges Blocked," *CQ Today Online News*, November 14, 2003.

100 hours of debate.[27] In May of 2005, reportedly after leadership talks had ceased, the majority leader filed cloture on a judicial nomination that had been subject to multiple failed cloture motions for several years. The expectation was that a simple majority would use novel procedures (a "constitutional" or "nuclear option") to lower the cloture threshold. However, a group of Senators, seven from each party, entered into an agreement that prevented the reinterpretation of the rule and moved several judicial nominations forward.[28]

"Privileged Nominations" (S.Res. 116, 112th Congress)

On May 12, 2011, the Senate Rules and Administration Committee reported S.Res. 116, a resolution to create a new process to allow some nominations to specified positions to bypass formal committee consideration (unless formal consideration was requested by any Senator). The resolution emerged from bipartisan negotiations, including the Chairs and Ranking Members of the Rules and Administration Committee and the Homeland Security and Governmental Affairs Committee, that also resulted in the introduction and eventual enactment of S. 679 (P.L. 112-116), a law that eliminated the requirement for advice and consent of the Senate for 163 positions.[29] The nominations included in S.Res.116, as reported, were largely to part-time positions to boards and commissions.

The full Senate considered the resolution on June 29, 2011, pursuant to a unanimous consent agreement that allowed only relevant amendments. One amendment, sponsored by the Chair and Ranking Member of the Rules and Administration Committee, was agreed to by unanimous consent. The amendment added 39 positions to the resolution, including full-time chief financial officers and certain assistant secretaries, that had previously been included in the bill eliminating the advice and consent requirement. The amendment also added a requirement that any committee report accompanying a bill or joint resolution, "contain an evaluation and justification made by such committee for the establishment in the measure being reported of any new position appointed by the President within an existing or new Federal entity." The Senate agreed to the resolution by a vote of 89-8 on June 29, 2011.[30]

The resolution, as approved by the Senate, provided that 272 nominations to specified positions in executive branch agencies, independent agencies, and oversight boards and advisory councils would not be referred to committee unless a Senator requested referral.[31] Instead of being immediately referred, these nominations are instead listed in a special section of the *Executive Calendar*, a document distributed daily to congressional offices and available online. 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 of Senate session, the nomination is 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. Importantly, at any time that the nomination is listed

[27] Statement issued by the Office of the Majority Leader, published in "Viewpoint," *Roll Call*, May 17, 2005, p. 4.

[28] For a description of the agreement, see "Judicial Filibusters," *Congressional Record*, daily edition, vol. 151 (May 25, 2003), pp. S5859-S5860. For more information, see archived CRS Report RS22208, *The "Memorandum of Understanding:" A Senate Compromise on Judicial Filibusters*, by Walter J. Oleszek, July 26, 2005.

[29] The law also eliminated the advice and consent requirement for approximately 2,855 positions from the Public Health Service and National Oceanic and Atmospheric Administration officer corps, which typically were submitted on long lists considered by the Senate *en bloc* by unanimous consent. For more information, see CRS Report R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, by Maeve P. Carey.

[30] For more information, see CRS Report R46273, *Consideration of Privileged Nominations in the Senate*, by Michael Greene.

[31] The Senate created a new 13-member Board of Directors for the National Association of Registered Agents and Brokers in the Terrorism Risk Insurance Program Reauthorization Act of 2015 (P.L. 114-1), members of which are considered privileged nominations under the terms of the law.

in the "Privileged Nominations" section of the *Executive Calendar*, any Senator can request that a nomination be referred, and it is then sent to the appropriate committee of jurisdiction.

Senators who supported the resolution argued that it would make for easier confirmation for specified nominations. The Chair of the Rules Committee stated that it was his presumption that once privileged nominations had reached the regular section of the *Executive Calendar,* "these noncontroversial positions would be passed by unanimous consent."[32] A cosponsor of the resolution stated, the day it was submitted, that the resolution "retains the authority of the Senate over these positions, but streamlines the process, lessening the burden on the Senate for routine, non-controversial nominations and providing for a faster road to confirmation as well."[33] Although committees are still responsible for gathering information on the nominee, including financial and biographical information, the work and time necessary to prepare for a public business meeting is saved. In addition, Senators do not have to meet formally, with a majority of the committee physically present, to vote to move the nomination forward, a responsibility that can be challenging given the multiple demands for Senators' time.[34] If any Senator wishes the nomination to go through the regular process, that Senator can request referral, and committees have sometimes chosen to hold hearings on privileged nominations.

According to a previous study conducted by the Congressional Research Service, since the privileged nominations process went into effect during the 112th Congress, on June 29, 2011, the Senate has considered 634 privileged nominations, and 58 (9.1%) have been referred at the request of a Senator.[35]

Temporary Standing Order: Reduced Post-Cloture Consideration for Nominations (Section 2 of S.Res. 15, 113th Congress)

On January 24, 2013, the Senate approved a resolution, S.Res. 15, affecting the process for considering nominations. The resolution established a temporary Senate standing order that was in effect only in the 113th Congress (2013-2014). At the time the standing order was approved, a vote of three-fifths of the Senate was required to invoke cloture on a nomination, and a successful cloture vote would limit further consideration of the nomination to a maximum of 30 hours. The standing order reduced the 30-hour period to 8 hours for most nominations, and to 2 hours for U.S. district court nominations. The specific nominations affected and excluded by the standing order are listed in **Table 3**. In addition, while the hours for post-cloture consideration under Rule XXII are not equally divided, under the standing order they were divided "in the usual form."[36]

The resolution was taken up the same day it was submitted and considered pursuant to a unanimous consent agreement requiring 60 votes for adoption. The Senate agreed to S.Res. 15 by a roll call vote of 78-16.[37]

---

[32] Sen. Chuck Schumer, remarks in Senate, *Congressional Record*, daily edition, vol. 157 (June 29, 2011), p. S4203.

[33] Sen. Susan Collins, remarks in Senate, *Congressional Record*, daily edition, vol. 157 (March 30, 2011), p. S1990.

[34] Summary based on longer discussion in CRS Report R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, by Maeve P. Carey, pp. 13-15.

[35] CRS Report R46273, *Consideration of Privileged Nominations in the Senate*, by Michael Greene.

[36] When time is divided in the usual form, a manager from each side controls half the time, and yields portions of time to members on his or her side. It is possible for a manager to yield back time when it is controlled, which could further reduce the maximum time for post-cloture consideration. Under Rule XXII, the cloture rule, time cannot be yielded back. For information on "the usual form," see Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure*, 101st Cong., 2nd sess., S. Doc. 101-28 (Washington: GPO, 1992), pp. 1367-1368.

[37] *Congressional Record*, daily edition, vol. 159 (January 24, 2013), p. S272.

Table 3. Maximum Number of Hours of Post-Cloture Consideration of Nominations Under Temporary Standing Order of 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 Court 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.

The standing order responded to concerns related to the process of approving nominations. Although many factors were understood to contribute to the length of time required for processing nominations,[38] one concern was the possibility that one Senator could delay approval of a nomination that, if brought to a vote, would be approved by a large margin.[39] The leverage individual Senators have in the nominations process derives in part from the time that could be required for a cloture process on each of the hundreds of nominations the Senate receives from the President. One expectation was that altering the timing of the cloture process would reduce this leverage, and perhaps facilitate reaching unanimous consent agreements for the disposition of the nominations.[40]

Reduced Threshold for Invoking Cloture on Nominations Other Than to the Supreme Court: Reinterpretation of the Rule

On November 21, 2013, the Senate reinterpreted Senate Rule XXII to allow a majority of Senators voting to invoke cloture on all 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.[41]

[38] For more information, see archived CRS Report R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, by Maeve P. Carey; archived CRS Report R42732, *Length of Time from Nomination to Confirmation for "Uncontroversial" U.S. Circuit and District Court Nominees: Detailed Analysis*, by Barry J. McMillion; archived CRS Report RL33118, *Speed of Presidential and Senate Actions on Supreme Court Nominations, 1900-2010*, by R. Sam Garrett and Denis Steven Rutkus; and archived CRS Report R40119, *Filling Advice and Consent Positions at the Outset of a New Administration*, by Henry B. Hogue and Maureen Bearden.

[39] See, for example, *Congressional Record*, daily edition, vol. 158 (July 30, 2012), p. S5654, and (December 13, 2012), pp. S3011-S3013.

[40] The majority leader stated that "it is our expectation that this new process for considering nominations as set out in this order will not be the norm, but that the two leaders will continue to work together to schedule votes on nominees in a timely manner by unanimous consent, except in extraordinary circumstances." (*Congressional Record*, daily edition, vol. 159 (January 24, 2013), p. S272.)

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

It is uncommon for the Senate to reverse a decision by the presiding officer.[42] Any Senator can attempt to reverse a ruling by making an appeal, and most appeals are decided by majority vote.[43] 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, the appeal raised in those parliamentary circumstances was apparently determined to not be debatable.[44] 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 immediately to a vote. The Senate voted that the ruling should not stand, and thereby supported instead the position of the majority leader.[45]

The majority leader had announced his intention to attempt to reinterpret the rule after a failed cloture vote on a D.C. Circuit nomination; two other nominations to fill the other two vacancies on that Court had failed earlier in the Congress.[46] Senators who supported the reinterpretation of the rule argued it was a necessary response to Senators opposing cloture and also blocking consideration of nominations by unanimous consent. Those opposed to the reinterpretation argued that the requirement for supermajority support was consistent with the advice and consent role of the Senate, since it encouraged communication and cooperation between the branches regardless of party control of the Senate and the Presidency. Furthermore, the method of changing the procedures was controversial, as some argued it could have unexpected and potentially far-reaching consequences on Senate proceedings.[47]

This reinterpretation of the rule as it applied to the nominations process impacted the small proportion of nominations that had long been subject to close scrutiny by the full Senate each Congress, and it affected proceedings on other nominations as well. In the past, some nominations with demonstrated majority support were not confirmed by the Senate because cloture could not be invoked; other nominations might not have received any floor consideration because it was anticipated that supermajority support could not be obtained for approval. Under the 2013 reinterpretation of Senate Rules, such nominations can be 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 effectively be necessary. Under the new procedures, this practice could have changed, although it is not possible to identify and measure such a change.

Most nominations, both before and after the reinterpretation of the rule, are never subjected to a cloture process. They are approved swiftly on the floor by unanimous consent, reflecting practices of consultation both prior to presidential selection of nominees and Senate discussions prior to floor consideration. The

---

[42] Since 1965, the Senate has reversed a decision of the presiding officer 36 times. CRS identified reversals through a search of roll call votes, and it is possible (although unlikely) that other reversals occurred without a roll call vote on any associated question. For more information, see CRS congressional distribution memorandum, "Senate Decisions Reversing a Ruling of the Presiding Officer, 1965-March 31, 2017" (available to congressional clients on request from the author of this testimony).

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

[44] 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 parliamentary inquiry or a point of order regarding whether the appeal was debatable, and no debate was attempted.

[45] The procedures used to reinterpret the cloture rule were referred to as "the nuclear option." For more information, see CRS Report R43331, *Majority Cloture for Nominations: Implications and the "Nuclear" Proceedings*, by Valerie Heitshusen; 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.

[46] Burgess Everett, "Reid Weighing Nuclear Option," *Politico*, Nov. 19, 2013.

[47] See, for example, remarks of the majority leader and the minority leader, *Congressional Record*, daily edition, vol. 159 (November 21, 2013), pp. S8414-S8416.

practices for considering such nominees pursuant to negotiated unanimous consent agreements, however, appear to have been impacted by the 2013 decision of the Senate.[48] Unanimous consent is still required to process nominations expeditiously, and the number of nominations subject to a cloture motion has increased since the reinterpretation of the rule in 2013 (**Table 2**).

Reduced Threshold for Invoking Cloture on All Nominations: Reinterpretation of the Rule

In April of 2017, the Senate reinterpreted Rule XXII in order to allow cloture to be invoked on all nominations by a majority of Senators voting (a quorum being present), including nominations to the U.S. Supreme Court.[49] This expanded the effect of similar actions taken by the Senate in November 2013, which changed the cloture vote requirement to a majority for nominations *except* to the Supreme Court.[50] The first Supreme Court nomination submitted to the Senate after the 2013 reinterpretation of the cloture rule was that of Merrick B. Garland in 2016; the Judiciary Committee did not report the nomination and it was never considered on the Senate floor.[51] The reinterpretation therefore occurred on the first Supreme Court nomination taken up on the floor by the Senate since the reinterpretation. Senators in favor of the reinterpretation argued that it was a necessary response to actions that had been taken by the other party for decades to prevent confirmation of judicial nominations. They argued that members of the minority party had voted for cloture on Supreme Court nominations in the past, even if they opposed the nominations, and that the change was necessary if this norm was not going to be followed. Those opposed to the reinterpretation argued that it was the other side that had been blocking or preventing judicial nominations, including the prior nominee to the vacancy on the Supreme Court, and that the supermajority threshold should remain to permit more Senators to influence the selection of nominations.[52]

Proposal for Reduced Post-Cloture Time on Nominations (S.Res. 355, 115th Congress; S.Res. 50, 116th Congress)

In both the 115th Congress (2017-2018) and the 116th Congress (2019-2020), the Committee on Rules and Administration reported out resolutions proposing to reduce the maximum time allowed for consideration of nominations after cloture was invoked.

In the 115th Congress, the committee reported, 10-9, S.Res. 355, which had the same terms as those agreed to temporarily in the 113th Congress (S.Res. 15). S.Res. 355 would have reduced the maximum time allowed for consideration of a nomination after cloture was invoked to eight hours, excluding the highest-level executive and judicial positions, which would have remained at 30 hours. The resolution also proposed that post-cloture time for district court nominations be reduced to two hours. It further

[48] For a discussion of the effect shortly after the decision on consideration of district court nominations, see CRS Report R43762, *The Appointment Process for U.S. Circuit and District Court Nominations: An Overview*, by Barry J. McMillion, pp. 36-38.

[49] *Congressional Record*, daily edition, vol. 163 (April 6, 2017), pp. S2388-S2390.

[50] For more information, see CRS Report R44819, *Senate Proceedings Establishing Majority Cloture for Supreme Court Nominations: In Brief*, by Valerie Heitshusen.

[51] On March 16, 2016, President Obama had nominated Merrick B. Garland to the Supreme Court, but the Senate Judiciary Committee did not hold a hearing on or report the nomination. CRS Report RL33225, *Supreme Court Nominations, 1789 to 2020: Actions by the Senate, the Judiciary Committee, and the President*, by Barry J. McMillion.

[52] See, for example, remarks by the majority leader and minority leader, *Congressional Record*, vol. 163 (April 6, 2017), pp. S2383-S2385.

provided that the time be divided, "in the usual form," meaning a manager on each side would control half the time and yield portions to those who wished to speak.[53]

Proponents of the resolution argued that waiting for post-cloture time to expire, when the outcome was certain, was not constructive. Opponents argued the change would result in a further erosion of minority rights.[54] Supporters of the change further argued that the pace of Senate confirmation of the new President's nominees was problematic, while those opposed disagreed, pointing toward the nominations that had been confirmed, and, further, arguing that the nominations were requiring increased scrutiny in response to the White House vetting process.[55] The full Senate did not take any action on S.Res. 355 in the 115th Congress.

The following Congress, the Rules and Administration Committee reported, 9-3, S.Res. 50, which also proposed to reduce post-cloture consideration time, but in a different way. This second resolution would have reduced post-cloture time to two hours, equally divided in the usual form, for all district court nominations and some executive branch nominations. The executive branch nominations that would have remained at 30 hours included not just the same 21 high-level nominations left at 30 hours by the standing order in the 113th Congress, but also members of several Commissions.[56] All judicial nominations except district court nominations would have remained subject to 30 hours of post-cloture consideration.

During the committee markup, proponents cited the number of lower-level executive branch nominees that had not been confirmed, despite having been supported by members from both parties in committee. Some also argued that vacancies in the executive branch would erode the advice and consent role of the Senate, as executive branch agencies had to rely on acting officials to perform leadership roles. Senators on the committee also argued that the use of cloture on nominations had increased, and that the nominations, when they reached a vote, often received bipartisan support. Senators opposed argued that the current process helped to ensure nominees had the proper qualifications, and they also proposed that any rules change proposal take effect in a future Congress (when it would not be known which party would be in the White House or the majority). The current procedure, it was argued, encouraged bipartisanship; shortening the post-cloture time would allow majority party Senators to push nominations through more easily.[57]

---

[53] As mentioned above, it is possible for a manager to yield back time when it is controlled, which could further reduce the maximum time for post-cloture consideration. For information on the "usual form," see Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure*, 101st Cong., 2nd sess., S. Doc. 101-28 (Washington: GPO, 1992), pp. 1367-1368.

[54] In addition to the reduced threshold for cloture, opponents pointed to a recent change in practice regarding the "blue slip" policy of the Judiciary Committee. For more information, see CRS Report R44975, *The Blue Slip Process for U.S. Circuit and District Court Nominations (1917-Present)*, by Barry J. McMillion.

[55] *Congressional Record*, daily edition, vol. 164 (April 24, 2018), pp. S2361-S2364; *Congressional Record*, daily edition, vol. 164 (April 25, 2018), pp. S2407-S2408; See also Jacob Holzman, "Senate Rules and Administration Committee Markup: Panel Moves Resolution to Change Senate Debate," *CQ Markup and Vote Coverage*, April 25, 2018; Ed Pesce, "Boiling Mad About Nominations," *CQ Senate*, April 25, 2018.

[56] Nominations to be a member of the following commissions and boards would have remained subject to a maximum of 30 hours of post-cloture consideration: the Equal Employment Opportunity Commission; Securities and Exchange Commission; Federal Election Commission; Federal Energy Regulatory Commission; Federal Trade Commission; National Labor Relations Board; Commodity Futures Trading Commission; Consumer Product Safety Commission; Federal Communications Commission; Surface Transportation Board; Nuclear Regulatory Commission; Federal Deposit Insurance Corporation; and Board of Governors of the Federal Reserve System.

[57] "Full Committee Business Meeting," February 13, 2019, video, available at https://www.rules.senate.gov/hearings/full-committee-business-meeting, visited July 20, 2024. See also Niels Lesniewski, "Senate Rules and Administration Committee: Panel Spars Over Judges, Advances GOP Effort to Cut Nomination Debate Time." *CQ Committee Coverage*, February 13, 2019.

The Senate majority leader moved to proceed to consider S.Res. 50 on March 28, 2019, and filed cloture on the motion.[58] The cloture vote on the motion to proceed, which would have required the support of three-fifths of the Senate, failed, 51-48, on April 2, 2019.

Reduced Post-Cloture Time on Nominations: Reinterpretation of the Rule

On April 3, 2019, the Senate reinterpreted Senate Rule XXII to reduce, from 30 hours to 2 hours, the maximum time allowed for consideration of most nominations after cloture is invoked. The Senate took this step by reversing two rulings by the presiding officer. The first vote established that "postcloture time under rule XXII for all executive branch nominations other than a position at level I of the Executive Schedule under section 5312 of title 5 of the United States Code is 2 hours."[59] On the second vote, the Senate established that "postcloture time under rule XXII for all judicial nominations, other than circuit courts or Supreme Court of the United States, is 2 hours"[60] (see **Table 4**).

Table 4. Maximum Number of Hours of Post-Cloture Consideration of Nominations

Pursuant to a Reinterpretation of Senate Rules on April 3, 2019

Nomination	Maximum Consideration
U.S. district courts and all other judicial positions except the U.S. Supreme Court and the U.S. Circuit Court of Appeals	2 hours
All executive branch positions except 21 high-level positions	2 hours
21 high-level executive branch positions, including the head of each executive department[a]	30 hours
U.S. Supreme Court Justices and the U.S. Circuit Court of Appeals judges	30 hours

Source: *Congressional Record*, daily edition, vol. 165 (April 3, 2019), pp. S2220 and S2225.

a. The decision excluded 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, 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.

In most circumstances appeals of the chair's ruling 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 April 3 proceedings, however, the appeal was raised after cloture had been invoked on a nomination. Senate Rule XXII states that after a successful cloture vote, "appeals from the decision of the presiding officer, shall be decided without debate."[61] Therefore, when the majority leader appealed the

[58] For the majority leader's statement regarding the resolution, see *Congressional Record*, daily edition, vol. 165 (March 28, 2019), pp. S2081-S2082.

[59] The majority leader made a point of order that such executive branch nominations were subject to two hours of post-cloture consideration. The presiding officer did not sustain the point of order. The majority leader appealed the ruling of the chair, and the Senate voted 51-48 to reverse the ruling. *Congressional Record*, daily edition, vol. 165 (April 3, 2019), p. S2220.

[60] The majority leader made a point of order that such judicial branch nominations were subject to two hours of post-cloture consideration. The presiding officer did not sustain the point of order. The majority leader appealed the ruling of the chair, and the Senate voted 51-48 to reverse the ruling. *Congressional Record*, daily edition, vol. 165 (April 3, 2019), p. S2225.

[61] This was a different parliamentary situation than the two occasions on which the Senate reinterpreted the rule to lower the threshold necessary to invoke cloture. In those cases, the appeal could not be made after cloture was invoked, since it was necessary to reinterpret the rule prior to the cloture vote in order to establish the lower threshold. In both of those cases, the majority leader a the time made the appeal in between two questions that were not debatable. *Riddick's Senate Procedure* states (continued...)

rulings of the presiding officer, the questions on whether the ruling should stand as the judgment of the Senate received a vote without an opportunity for extended debate. In each case, the Senate voted that the ruling should not stand, and thereby supported instead the position of the majority leader.

Providing for *En Bloc* Consideration of Military Nominations (S.Res. 444, 118th Congress)

On November 14, 2023, the Rules and Administration Committee voted to report, 9-7, S.Res. 444, a resolution proposing a temporary process that would allow the Senate to consider more than one military nomination at a time (referred to as *en bloc* consideration).[62]

The procedures proposed in S.Res. 444 would apply to military promotions and appointments reported favorably by the Armed Services Committee, excluding nominations to the eight positions that make up the Joint Chiefs of Staff (defined by law) and excluding nominations to be a commander of the 11 combatant commands (also defined by law, including separate provisions of law concerning the combatant command for special operations forces and for cyber operations).

S.Res. 444 would allow a group of military nominations to be considered under the same cloture process that can currently be used for a single nomination. Specifically, under S.Res. 444, the steps to confirm a group of military nominations in the absence of unanimous consent would include the following:

- The majority leader (or his designee) makes a motion to proceed to consider a group of military nominations. Qualifying military nominations can only be included in the motion if they were reported favorably by the Armed Services Committee on or before the previous calendar day.
- The Senate votes on the motion to proceed; this motion is not debatable and requires majority support for approval.
- If the Senate agrees to take up the group of nominations, a single cloture motion can be filed on that group of nominations.
- Two days of session later, the Senate votes on cloture. If a majority of Senators voting support cloture, then cloture is invoked, and further consideration of the nomination is limited.
- The Senate conducts post-cloture consideration on the nominations for a maximum of two hours.

that "appeals arising in connection with a non-debatable motion" are not debatable (p. 726). The particular parliamentary actions of November 21, 2013, 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. The same procedural steps were followed on April 6, 2017, in relation to the vote necessary to invoke cloture on Supreme Court nominations.

[62] Senator Jack Reed, chair of the Senate Armed Services Committee, submitted S.Res. 444 on October 31, 2023. Earlier in the Congress, on May 18, 2023, the chair of the Committee on Rules and Administration submitted S.Res. 219, which also concerned the *en bloc* consideration of nominations.

- After the two hours of post-cloture consideration expires, or when no Senator seeks recognition to continue consideration of the nominations, the Senate takes a single vote to confirm the group of nominations, which requires majority support.
- The motion to reconsider the confirmation vote is considered made and tabled (i.e., adversely disposed of). This action makes the confirmation vote on the group of nominations final and immediately triggers notification to the President of Senate approval of the nominations.

Under the terms of S.Res. 444, at no time during this process could a Senator force consideration of each nomination separately by demanding a division of the question. Although infrequent, under regular Senate procedures, a single Senator can cause some questions that consist of multiple parts, such as an amendment inserting several sections into a bill, to be divided for a separate debate and vote on each component part. S.Res. 444 explicitly states that this parliamentary action would not be permitted.

S.Res. 444, if agreed to, would be in effect only during the 118th Congress. There is no limit on the number of times this motion to consider military nominations *en bloc* could be used during the Congress.

S.Res. 444 was introduced in response to a Senator having announced a blanket hold on military nominations.[63] The Senator lifted the hold December 5, 2023[64], and the full Senate has not taken any action on S.Res. 444.

Disclaimer

[63] Caroline Coudriet, "Democrats Prepare Resolution to Bypass Tuberville Blockade," *CQ News*, November 1, 2023.

[64] Liz Goodwin and Dan Lamothe, "Tommy Tuberville Announces End to Blanket Military Holds," *Washington Post*, December 5, 2023.