A Primer on Presidential Nominations
and the Senate Confirmation Process
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Congress Project Seminar on
The Senate Confirmation Process
Monday, March 16, 2009

President Barack Obama's admirable determination to hit the ground running by making early choices for key administration jobs slowed to a halting gait when four of his key nominees were forced to withdraw for personal reasons. It was reminiscent of President Bill Clinton's stumbles at the starting gate when his first two choices for attorney general had to withdraw over tax and the immigration problems. Such incidents, coupled with the time-consuming process of vetting and confirming presidential nominees, quadrennially focuses public and media attention on the nature of the process and whether there might be a better way of getting a government up and running in a timely fashion. The purpose of this essay is to provide a brief overview of the nomination-confirmation process, some historical context, and a discussion proposals for improving it.

The President's People

One of the most challenging and important responsibilities of a new president is to staff the top levels of government as quickly as possible with the most qualified and loyal people. Article II, section 2 of the Constitution provides that the President "shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States." The Constitution goes on to authorize Congress by law to vest in the president alone, or in the courts and heads of departments, the authority to appoint such inferior officers as it thinks proper.

Out of a total federal civilian workforce of 2.7 million employees,[1] 7,000 are non-competitive appointments. These include Senior Executive Service and Senior Foreign Service positions; Schedule C positions excepted from the competitive service by the President or director of the Office of Personnel Management due to the confidential or policy-determining nature of the duties; and other positions at the GS-14 level and above that excepted from the competitive service for the same reasons of confidentiality and policymaking responsibilities.[2]

In that latter category of non-competitive appointments, 1,141 positions are appointed by the president subject to confirmation by the Senate.[3] Most attention is focused on a president's picks to head-up the 15 cabinet departments and key independent agencies, the nominees for choice ambassadorial posts, openings on the Supreme Court and lower courts (including, at present, 17 court of appeals and 30 district court vacancies), and the possible replacement of most or all of the 93 U.S. attorneys (who serve for four year terms).

It is estimated that during each two-year term of a Congress approximately 4,000 civilian and 65,000 military nominations are submitted to the Senate.[4] While most nominations are routinely approved (sometimes involving hundreds of nominations being approved en bloc), there are still a few hundred nominations each year that are subject to Senate investigations and hearings. This paper will deal with the latter category--specifically the nominations submitted by the president--and how

they are handled.

Committee Consideration of Nominations

The president submits his nominations in writing to the Senate. The nominations are read on the floor and assigned a number by the executive clerk. Since 1868, Senate rules have provided for the referral of the nominations to the appropriate committees, "unless otherwise ordered." While the presiding officer formally makes the referral, administratively the referral is made by the executive clerks' office in accordance with Senate rules and precedents on jurisdiction. Senate Rule XXV defines the jurisdiction of committees according to issue areas, and these same jurisdictional guidelines apply to nominations as well as legislation. The Committee on Armed Services, for instance, handles military appointments and promotions; the Judiciary Committee handles the nominations of the attorney general, U.S. attorneys, U.S. marshals, and federal judges; and the Senate Foreign Relations Committee handles nominations for Secretary of State, U.S. ambassadors and other diplomatic appointments. Sometimes nominations are jointly (or sequentially) referred to more than one committee where there is shared jurisdiction over the subject matter of the nomination.[5]

A Congressional Research Service publication lists 16 Senate committees to which nominations are referred, along with a listing of the confirmable positions under each. The Committee on Agriculture, for instance, is responsible for the confirmation of 25 USDA officials. The Armed Services Committee, on the other hand, oversees the nominations of 70 full time officials–55 at the Department of Defense and (including the six-member Joint Chief of Staff), and 15 at the Department of Energy.[6]

Most Senate committees haves rule governing the confirmation process, including standards for information to be gathered from a nominee such as a biographical summary and a financial statement of assets and liabilities. Committee rules may also include timetables for various stages of the process with delays between various stages to enable members to digest the information collected. Of course, rules can also provide for waivers of these requirements by majority vote or by the chair and ranking member.[7]

As with a committee's legislative work, most of the preliminary information gathering is conducted by staff experts. Committees may rely in part on summaries of F.B.I. field investigations that were conducted prior to the president's decision to nominate someone. The sharing of such materials must be authorized by the president and is usually shown only to Senators, and not to staff. Likewise, the White House Counsel's office has collected an "Executive Personnel Financial Disclosure Report" which is certified by the relevant agency and Office of Government Ethics before the President decides on a nomination. These are also shared with the relevant committees and are made public. Committees may have their own financial disclosure forms for a nominee to complete, as well as questionnaires seeking personal background information.

Under the unwritten custom of "senatorial courtesy," the Senate generally defers to the wishes of the senator of the same political party as the president as to who should be appointed to a

federal position located in that state. Consequently, the president usually nominates the person recommended by that senator. By the same custom, the Senate generally refused to confirm a nominee objected to by a senator of the president's party from the state in which the position is located. Historically, a senator would typically invoke this rule of courtesy by announcing from the floor of the Senate that the nominee is "personally obnoxious" to him. This could either mean that the senator has personal or political differences with the nominee or that he has someone else in mind for the position.

This custom of senatorial courtesy dates back to the presidency of George Washington when Georgia's two senators objected to the nomination of Benjamin Fishbourn to the post of naval officer of the port of Savannah, Georgia. The Senate honored their objections by rejecting the nomination. A nominee subsequently recommended by both senators was then easily confirmed. It was some years before the practice became firmly established. Since 1930 a senator has had to explain the reasons for opposition (and not simply raise the "personally obnoxious" objection).[8]

A variation on this custom is the "blue slip" process employed only by the Senate Judiciary Committee for nominations for federal district and appeals court judges and for U.S. attorney and U.S. marshal nominations. The practice dates back at least to 1917.[9] When such a nomination is made by the president, the chairman of the Judiciary Committee sends "blue slips" (form letters named for the color of paper they are printed on) to the senators from a nominee's home state. If either senator fails to return the slip to the chairman, the nomination is either automatically killed or extremely difficult to approve--depending on which blue slip policy a chairman is following at the time. There are, as it turns out, competing blue slip policies as is explained in the two instances cited below.

Senator Patrick Leahy (D-Vt.) in a Judiciary Committee hearing in October 2003, said, "The blue slip policy is the enforcement tool to ensure consultation by the Executive Branch with home-state senators about judicial appointments to their states." However, as Leahy went on to charge, during the 108th Congress (2003-2004), Chairman Sen. Orrin Hatch (R-Utah) "has changed his blue slip policy, so that even a negative blue slip from both home-state Senators is not sufficient to prevent action on a nominee." He went on to charge that in the past "the rule used to be that no judicial nominee would move out of this Committee if the Chair knew that the nomination was opposed by both home-state senators."[10]

Chairman Hatch explained current blue slip policy in June 2004, in another nomination involving two negative blue slips from home state senators. Since he became chairman in 1995, Hatch said, said, he had followed the same blue slip policy crafted by former chairmen Ted Kennedy (D-Mass.) and Joseph Biden (D-Del.) that "while negative blue slips are not dispositive...they are certainly a significant factor." Hatch went on to quote from a letter from Biden to President George H.W. Bush dated June 6, 1989, indicating that, "for many years under both Democratic and Republicans chairmanships, the return of a negative blue slip meant the nomination would not be considered. Biden went on, "that policy was modified under Senator Kennedy's chairmanship so that the return of a negative blue slip would not preclude consideration of the nomination. A hearing and vote would be held, although the return of a negative blue slip would be given substantial weight."

Hatch continued to quote from the Biden letter: "The return of a negative blue slip will be a significant factor to be weighed by the committee in its evaluation of the nominee unless the Administration has not consulted with both home state senators prior to submitting the nomination to the Senate." If such good faith consultation has not taken place, Biden concluded, "the Judiciary Committee will treat the return of a negative blue slip by a home state senator as dispositive and the nominee will not be considered."[11]

However, as Sen. Leahy noted in a April 2003 statement, when President Clinton was in office the face of the blue slip form carried the message:

> Please return this form as soon as possible to the nominations office. No further proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee's home state senators.

When President George W. Bush took office, the message was changed to read simply:

> Please complete the attached blue slip form and return it as soon as possible to the Committee office.

In the case of all significant nominations, once the preliminary forms are filed and staff investigative work completed, the chairman determines whether to move forward with a hearing on the nomination. The failure of a committee to consider and report a nomination to the Senate is tantamount to a Senate rejection of the nomination since there is no discharge process as there is for legislation not reported by a committee.

It wasn't until the mid-20th century, that committees began requiring nominees for major positions to appear in person before them.[12] Nevertheless, according to one estimate, about half of all civilian nominations are confirmed without a hearing. Much depends on the importance of the nomination and the committee's workload. The Senate Judiciary Committee, for instance, receives so many nominations that it usually does not hold hearings on nominations for U.S. attorneys, U.S. marshals, and members of part-time commissions. Committees receiving fewer nominations and having less of a workload, such as Agriculture and Energy and Natural Resources, typically hold hearings on most nominations.[13]

Hearings on important nominees, such as for cabinet secretaries or for the Supreme Court, can sometimes run for several days, beginning with the nominee's appearance (usually introduced by one or both home state senators), and then testimony from other interested parties both in support of and opposition to the nomination. Hearings are often used for more than "let's get acquainted purposes." Senators often use them to elicit or even influence policy views in a certain direction. The continued importance of the issue of torture surfaced in more than one of the confirmation hearings for President Obama's cabinet and intelligence nominees, even though the president had made clear by executive order on this first day in office that torture would not be permitted.

Committees often submit questions to nominees in advance of their hearing both to better prepare them for the session but also to ensure that written answers are available even if the question cannot be posed orally at the hearing. Moreover, written questions can alert the nominee as to the issues of most importance to committee members and sometimes even hint at the policy preferences of senators. Sen. Hillary Rodham Clinton, for instance, brought answers to 29 questions she had received in advance of her confirmation hearing for secretary of state. While her 16-page prepared statement was published on the Foreign Relations Committee's website, her written responses to the questions submitted to her in advance were not.

Once the hearing stage is completed, and after at least a day's hiatus, the committee is faced with four options: it may report the nomination to the Senate favorably; it may report the nomination unfavorably; it may report the nomination without recommendation; or, it may take no action at all (which is tantamount to rejecting the nomination unless the committee supports bringing the nomination directly to the floor by a discharge motion). Nominations that are reported usually are not accompanied by a form committee report. They are presented to the executive clerk who then places the nomination in the Congressional Record, assigns the nomination a number, and places it on the Executive Calendar.

Floor Consideration of Nominations

Business on the Executive Calendar, which includes nominations and treaties, is considered in executive session (as opposed to legislative session). Since 1929, executive sessions have been public unless the Senate orders otherwise. Executive sessions are conducted after the Senate has completed its legislative business of the day, and are convened either by motion or by unanimous consent. The motion is not subject to debate, can be offered at any time, and is not subject to being tabled. Once in Executive Session, the Senate proceeds to the nomination at the top of the Executive Calendar. Any motion to proceed to another nomination on the Calendar would be subject to debate and a filibuster. This is easily circumvented by offering a general motion to go into executive session and announcing separately which calendar number(s) will be considered. That does not prevent a filibuster on the nomination itself once debate is underway, and the usual 60 votes is required to invoke cloture and bring debate to an end.

Another device that is used by opponents of nominations (just as it is on legislation), is the anonymous "hold." Under this procedure a senator communicates privately to the party leader that he (or she) is placing a hold on a particular nomination, that is, a request to prevent or delay consideration of the bill or nomination. Sometimes holds are used to leverage consideration of an unrelated matter and may have nothing to do with opposition to the bill or nomination being held back. Holds are technically requests to be notified before the matter is brought up. They are an indication that the senator making the request would object to any unanimous consent request to consider the matter if not consulted in any negotiations on how and when the matter should be considered.

Once all holds are collected on a particular bill or nomination, they are conveyed to the majority leader and negotiations proceed to take care of all the concerns raised. They usually

produce a unanimous consent agreement that delineates the time for debate and, in the case of legislation, what amendments may be offered. Holds are effective devices because they are considered a matter of senatorial deference, but also because they are an early warning signal of a possible filibuster threat if the matter is brought up. Holds can effectively kill a nomination if placed late in a session.

Once a nomination is brought up in Executive Session, the question before the body is, "Will the Senate advise and consent to this nomination?" Debate is usually opened by a statement from the chairman of the committee reporting the nomination. Following all debate, which has no limits unless set by unanimous consent or imposed by invoking cloture, the Senate has the options of approving, disapproving or recommitting the nomination to committee. Recommital, while seldom used on nominations, can have the advantage of examining matters that came to light after the committee originally reported the nomination. The recommit motions are debatable and thus subject to filibuster. After the Senate takes final action on a nomination the secretary of the Senate attests to a resolution of confirmation (or disapproval) which is transmitted to the White House. Nominations that are rejected or not confirmed are returned to the President at the end of the session. There is nothing to prevent the president from resubmitting the same person for the same position at the next session of the Congress.[14]

The Historical Record

Of all the tens of thousands of nominations submitted to the Senate over the last 220 years, the overwhelming majority have been approved by unanimous consent. This is because most are military commissions or promotions. But even most of the major presidential civilian nominations to high-level cabinet or independent agency positions or to the federal courts have been easily confirmed as well. This is partially out of deference to presidents' right to choose their own people to head-up important administration policy making jobs. Of the over three million nominations received by the Senate in the 39 Congresses between 1929 and 2009, 99.8 percent were confirmed (see Appendix A.).

Looking at nominations for justices to the Supreme Court and as cabinet secretaries since the beginning of the Republic, only 12 Supreme Court nominees and 12 cabinet nominations have been rejected by the Senate, although another 23 Supreme Court nominees and 11 cabinet nominations were withdrawn (not counting the three Obama cabinet nominees).[15] Presidents Grover Cleveland and Richard Nixon are tied for the most Supreme Court nominees rejected by the Senate–two each, while President John Tyler holds the undisputed record for the most nominees for cabinet secretaries rejected–four–one of whom was rejected three times (see Appendices B and C).

It is perhaps fitting that the Father of our country and first president, George Washington, would be the first to experience the Senate's power to advise and dissent from nominations, first in the case of Benjamin Fishbourn for naval officer at Savanna (mentioned earlier in this paper), and then for a nominee to the Supreme Court. Washington still holds the record, for obvious reasons, for the most nominations to the Supreme Court during his eight years as president. He made 13 selections for ten vacancies on the six-member court. One associate justice declined to serve after confirmation in 1789; another nominee, John Rutledge, who had received a recess appointment to

the bench in August 1795, was rejected by the Senate, 10 to 14, when it reconvened in December (he had made some disparaging remarks about the Jay Treaty in the interim which the administration and Senate had supported); and a third nominee, an associate justice, turned down an appointment as chief justice in 1796.[16]

For those who think the confirmation process has become politicized only in the last four decades or so, take another look at history (it didn't begin with Nixon). The ink had barely dried on the Constitution when political parties began to emerge and with them differences over who should be appointed to run the government. Washington made it clear that he wanted to fill the top jobs with people who were loyal to him, but those below would be appointed on the basis of merit. Nevertheless, many of these subordinate appointments took on a heavy partisan caste.

While Washington's successor, John Adams, vowed to avoid Washington's mistakes, he met heavy resistance from Washington appointees who refused to resign and make way for his own choices, as well as from the Senate which insisted on playing a more active role beyond just eliminating unfit nominees. Consequently, Adams paid more deference to senators (and House Members) regarding appointments within their states.

While the official record indicates that President Andrew Jackson was the first president to have a cabinet nominee rejected (Roger Taney as secretary of the Treasury in 1834), James Madison probably should hold that distinction. In 1815 Madison nominated Henry Dearborn to be Secretary of War. Dearborn had held that post during the Jefferson administration, but had come under criticism for a poor military record during the War of 1812. When Madison realized that Dearborn was likely to be rejected by the Senate, he moved to withdraw the nomination the day after it had been submitted. He was too late, though–the Senate had already voted against the nomination. However, when the Senate learned of Madison's effort to rescind the nomination, it erased its vote from its journal. (Earlier in his term, Madison had suffered the defeat of a Supreme Court nominee.)[17]

Andrew Jackson presidency was probably the most tumultuous when it came to nominations. His first set of appointments, made while Congress was in recess, was a "batch of [newspaper] editors" who had supported him during the 1828 election campaign. When Congress returned, Jackson's foes responded with a "massacre of the editors," defeating ten of the nominees. Likewise in 1834, the Senate retaliated for Jackson's attack on the Second Bank of the United States by defeating four of the bank's government directors, and did the same by an even wider margin when he re-nominated them.[18]

President Lincoln's successor, Andrew Johnson, had the opposite problem, and that was trying to remove officials he had inherited and didn't want. During Lincoln's administration, Congress had passed and the president had signed a law that stipulated the comptroller of the Treasury could only be removed by permission of the Senate. Other statutes applied the same rule to consular clerks and military officers. When Congress criticized Johnson's policies, he reacted by firing officials who had been recommended by his opponents in Congress. Congress reacted by enacting the Tenure of Office Act which prohibited the president from removing any civil officers who had been confirmed by the Senate unless Senate approval of any proposed removal was

obtained. The law was primarily designed to insulate Secretary of War Edwin Stanton from removal. But five months later, while the Senate was in recess, Johnson suspended Stanton and pointed Ulysses S. Grant in his place. That prompted both houses to pass resolutions charging Johnson with violating the Tenure of Office Act. Although Grant relinquished his office to Stanton, the House proceeded to pass articles of impeachment, and Johnson survived conviction and removal in the Senate by just one vote.[19]

The post-civil war period also witnessed the greatest turbulence over Supreme Court nominations. President Andrew Johnson's attempt to nominate Henry Stanbery to the Court (as well as the next two vacancies) was blocked when Congress enacted a law in 1866 reducing the size of the Court from 10 to 6 justices. In 1869, President Ulysses Grant's nomination of Attorney General Ebenezer Hoar to the Court was rejected by the Senate due to his earlier criticism of the poor quality of judicial nominees it had forced on the president. Grant's next two nominees to the Court were forced to withdraw under critical fire.

During his eight years as president, Grant lost nine of 58 contested executive and judicial nominations on Senate votes. His successor, Rutherford B. Hayes, had a much worse track record on nominations, losing 51 of 92 contested nominations in the Senate. Hayes's successor, James Garfield, became even more embroiled with the Senate when he attacked "senatorial courtesy" over appointments to federal posts in New York. Garfield said the issue was whether the president was to be the mere registering clerk for the Senate or chief executive of the country. When Garfield refused to withdraw the nomination of a customs collector who did not have the support of the state's two senators, they both resigned in protest. Garfield's nominee was subsequently confirmed and neither senator succeeded in their reelection bids. As one account summed-up, "the concept of 'senatorial courtesy,' carried to its extreme, suffered a severe blow." (Ironically, Garfield's assassination by a disgruntled job seeker led to enactment of the Civil Service Act of 1883–a law that removed many lower level federal positions from patronage control.)[20]

The twentieth century brought a shift in the balance of power between the president and Congress, with the chief executive taking on greater powers. With this shift, and the fact of unified party government for most of the first half of the century, there were fewer contested nominations in the Senate. During the first nine decades of the century only three cabinet and five Supreme Court nominees were rejected by the Senate–five of the eight rejections occurring during divided party government.[21]

Woodrow Wilson on Appointments

It is fitting and proper for a seminar at the Woodrow Wilson Center to end this historical review of the nomination-confirmation process with a few words on Wilson's attitudes toward the process, both as a scholar and then as our twenty-eighth president. In his 1891 book, *The State and Federal Governments of the United States*, Wilson takes a dim view of the practice of "senatorial courtesy" surrounding the appointment of federal officials located in the states of senators:

The unfortunate, the demoralizing influences which have been allowed to determine

> executive appointments since President Jackson's time have affected appointments made subject to the Senate's confirmation hardly less than those made without its cooperation: senatorial scrutiny has not proved effectual for security the proper constitution of the public service. Indeed, the "courtesy of the Senate"–the so-called courtesy by which senators allowed appointments in the several states to be relegated by the preferences of the senators of the predominant party from the state concerned–at one time promised to add to the improper motives of the Executive the equally improper motives of the Senate.[22]

In *Constitutional Government*, a compilation of a series of lectures delivered at Columbia University in 1907, Wilson observed that, "The mere task for making appointments to office, which the Constitution imposes upon the President, has come near to breaking some of our Presidents down, because it is a never-ending task in a civil service not yet put upon a professional footing, confused with short terms of office, always forming and dissolving."[23]

At another point, Wilson contrasts presidents with political bosses who operate in secret, pulling strings behind the scenes: "But the President's appointments are public, and he alone by constitutional assignment, is responsible for them....Responsible appointments are always better than irresponsible. Responsible appointments are appointments made under scrutiny; irresponsible appointments are those made by private persons in private."[24]

As president, Wilson sought men who he thought would implement his political ideology. One of his most daring picks was three-time Democratic presidential nominee William Jennings Bryan as his secretary of state. Bryan would later resign on June 9, 1915, over Wilson's less than neutral tilt toward Britain during World War I. The other bold move was Wilson's nomination to the Supreme Court in late January 1916, of his friend and informal economic adviser, Louis Brandeis, the progressive "people's lawyer" from Boston. Wilson sent the nomination to the Senate without first consulting Brandeis's two home state senators, conservative Massachusetts Republicans Henry Cabot Lodge and John W. Weeks.

As Wilson biographer Arthur Link described it, "It was nothing less than an act of defiance, not merely of conservative senators, but, more importantly, of all the powers of organized wealth in the country." One Washington correspondent noted that, "If Mr. Wilson has a sense of humor left, it must be working overtime today. When Brandeis's nomination came in yesterday, the Senate simply gasped....There wasn't any more excitement at the Capitol when Congress passed the Spanish War Resolution."[25]

Link writes that, Boston politicians, conservatives, defenders of the status quo, and men who liked to think of themselves as devotees of constitutional government were stunned and furious....Former President Taft almost went into trauma when he heard the news." Taft commented in a letter to a friend it was "one of the deepest wounds I have had as an American and a lover of the Constitution and a believer in progressive conservatism." Taft went on to characterize Brandeis in the harshest of terms: "He is a muckraker, an emotionalist for his own purposes, a socialist, prompted by jealousy, a hypocrite, a man who has certain high ideals in his imagination but who is utterly unscrupulous in method in reaching them, a man of infinite cunning... of great tenacity of

purpose, and, in my judgment, of much power for evil."[26]

Progressives, on the other hand, were overjoyed with the nomination and rallied to support Wilson and Brandeis which all fit perfectly into Wilson's reelection year plans to move to the left and bring the progressive movement into the Democratic tent. The Senate Judiciary Committee held hearings from early February into mid-March, hearing from Brandeis's friends and foes alike. This was all before the practice began in the 1920s of calling the nominee before the committee of jurisdiction. Nor did Wilson play an active role early in the nomination campaign. He confined himself to writing a letter to Senator Robert L. Owen (D-Okla.) saying, "I believe the nomination was the wisest that could possibly have been made, and I feel that few things have arisen more important to the country or to the party than the matter of his confirmation."[27]

When some Wilson loyalists began to worry that the president didn't really care, that the nomination might lose, and that it would have disastrous consequences for Wilson in the November election, Wilson finally became engaged behind the scenes, talking privately to several senators. Wilson drafted a strongly supportive letter to Senator Charles A. Culberson, chairman of the Judiciary Committee, outlining his reasons for nominating Brandeis and refuting some of the wild charges that had been made against Brandeis during the course of the nomination hearings. The letter concluded: "This friend of justice and of men will ornament the high court of which we are all so justly proud. I am glad to have had the opportunity to pay him this tribute of admiration and of confidence; and I beg that your committee will accept this nomination as coming from me, quick with a sense of public obligation and responsibility."[28]

Wilson and his aides continued to work on wavering senators behind the scenes. Finally, the Judiciary Committee voted to favorably report the nomination May 24, 1916, by a 10 to 8 vote. On June 1, the full Senate approved the nomination in executive session, without debate, by a vote of 47 to 22. Wilson wrote soon after, "I am indeed relieved and delighted at the confirmation of Brandeis. I never signed any commission with such satisfaction as I signed this."[29]

Can the Process Be Improved?

As the above historical overview indicates, the nomination-confirmation process has been fraught with controversy and politics since the beginning of the Republic. No one disagrees that the president is entitled to pick his own people to run the administration. At the same time, the Senate's advice and consent role is intended as more than just a rubber stamp for the president's nomination papers. As one account of the process concludes, "Contrary to recurring claims that a nominee's philosophy or ideology traditionally have not been legitimate soures of Senate attention, senators have routinely considered these matters, even if they veiled their concerns in more acceptable objections over the nominee's ability and character."[30]

However, another close observer of the process, Stephen Hess of Brookings, notes that the challenges to the nominations by President George W. Bush of John Ashcroft as attorney general and Gale Norton as Interior Secretary "on the basis of their policy beliefs rather than personal behavior is a relatively new phenomenon, going back no further perhaps than Richard Nixon's

appointment of interior secretary Walter Hickel, a business-oriented governor of Alaska who was accused of being insensitive to conservation." Hess says the rule of thumb in earlier times that presidents were entitled to their choices, with minimum ethical standards, since the appointees only served at the pleasure of the President and were not passed on to the next president. But, "those were the good old days," laments Hess.[31]

Hess says there will always be a couple of top nominees in every administration who are forced to withdraw or risk rejection by the Senate, and that the Senate always tends to focus most of its fire power on one nominee. "Perhaps you should designate one of your appointees to be the sacrificial lambs that the other can survive unscathed," Hess jokingly suggests. Most nomination problems can be traced to "inadequate vetting."

Prolonged confirmation battles have a tendency to slow down the whole process for clearing other nominees waiting in line. The Senate has a limited number of members, committees, and staff, and the workload can seem overwhelming at the beginning of a new administration when there has been a change in party control of the White House.

At least Supreme Court vacancies do not usually occur at the beginning of a new administration. But as recent judicial confirmation battles have revealed, nominations to the Supreme Court have taken on much greater public, media, and Senate time and attention than have nominations to the lower courts and executive branch. This is in part due to the divided nature of the Court in contemporary times, the vast array of controversial issues tackled by the Court, and the fact that justices have lifetime tenure. This makes the stakes extremely high for all manner of interest groups potentially affected Court decisions that could go either way depending on who fills the next vacancies.

While most recommendations for change over recent years have emphasized the need for a transition team, separate from a presidential candidates campaign team, start to work early in putting together lists of the most qualified party loyalists for top administration positions, and this is the model that is being followed in recent times, it is no cure-all, as the most recent nomination stumbles amply attest. In summary, there is no magic bullet to make this clash of very human institutions work perfectly. The best laid plans of mice and men are still bound to go awry from time to time, and that is no more evident than in the transparent democracy we pride ourselves on.

APPENDIX A. Senate Action on Nominations, 1929-2008

Congress	Received	Confirmed	Withdrawn	Rejected	Unconfirmed
71st (1929-1931)	17,509	16,905	68	5	530
72nd (1931-1933)	12,716	10,909	19	1	1,787
73rd (1933-1935)	9,094	9,027	17	3	47
74th (1935-1937)	22,487	22,286	51	15	135
75th (1937-1939)	15,330	15,193	20	27	90
76th (1939-1941)	29,072	28,939	16	21	96
77th (1941-1943)	24,344	24,137	33	5	169
78th (1943-1945)	21,775	21,371	31	6	367
79th (1945-1947)	37,022	36,550	17	3	452
80th (1947-1949)	66,641	54,796	153	0	11,692
81st (1949-1951)	87,266	86,562	45	6	653
82nd (1951-1953)	46,920	46,504	45	2	369
83rd (1953-1955)	69,458	68,563	43	0	852
84th (1955-1957)	84,173	82,694	38	3	1,438
85th (1957-1959)	104,193	103,311	54	0	828
86th (1959-1961)	91,476	89,900	30	1	1,545
87th (1961-1963)	102,849	100,741	1,279	0	829
88th (1963-1965)	122,190	120,201	36	0	953
89th (1966-1967)	123,019	120,865	173	0	1,981
90th (1967-1969)	120,231	118,231	34	0	1,966
91st (1969-1971)	134,464	131,254	15	0	178
92nd (1971-1973)	117,053	114,909	11	0	2,133
93rd (1973-1975)	134,384	131,254	15	0	3,115
94th (1975-1977)	135,302	131,378	21	0	3,903
95th (1977-1979)	137,509	124,730	66	0	12,713
96th (1979-1981)	156,141	154,665	18	0	1,458
97th (1981-1983)	186,264	184,856	55	0	1,353
98th (1983-1985)	97,893	97,262	4	0	627
99th (1985-1987)	99,614	95,811	16	0	3,787
100th (1987-1989)	94,687	88,721	23	1	5,942
101st (1989-1991)	96,130	88,078	48	1	8,003
102nd (1991-1993)	76,628	75,802	24	0	802
103rd (1993-1995)	79,956	76,122	1,080	0	2,754
104th (1995-1997)	82,214	73,711	22	0	8,481
105th (1997-1999)	46,290	45,878	402	0	372
106th (1999-2001)	45,802	44,980	25	0	797
107th (2001-2003)	49,615	45,878	40	0	812
108th (2003-2005)	52,420	48,627	39	0	4,177
109th (2005-2007)	55,841	53,820	38	0	1,983
110th (2007-2009)	45,237	44,677	74	0	486

Sources: 71st to 80th Congresses: Floyd M. Ridddick, *The United States Congress: Organizations and Procedures*; for the 81st to 110th Congresses: "Resume of Congressional Activity," *Congressional Record*. (As reprinted in "The Senate Confirmation Process," *Guide to Congress* (Washington: The CQ Press, 2008, Sixth Edition, Volume 1), Table 7-3.

Notes: The "Rejected" category includes only those nominations rejected outright by a Senate vote. Most of the nominations that fail to win confirmation are unfavorably reported from committee and never brought to a floor vote. In some cases the Senate votes to recommit a nomination to committee which effectively kills it. Nominations which are not confirmed or rejected must be returned to the President in the session they are made, or if the Senate adjourns or

recesses for more than 30 days (Senate Rule XXI).

APPENDIX B. Supreme Court Nominations Not Confirmed by the Senate

Nominee	President	Date of Nomination	Senate Action	Date of Senate Action
William Paterson[1]	Washington	Feb. 27, 1793	Withdrawn	
John Rutledge	Washington	Dec. 10, 1795	Rejected (10-14)	Dec. 15, 1795
Alexander Wolcott	Madison	Feb. 4, 1811	Rejected (9-24)	Feb. 13, 1811
John Crittenden	John Quincy Adams	Dec. 17, 1828	Postponed	Feb. 12, 1829
Roger Brook Taney	Jackson	Jan. 15, 1835	Postponed (24-21)	March 3, 1835
John C. Spencer	Tyler	Jan. 9, 1844	Rejected (21-26)	Jan. 31, 1844
Reuben Walworth	Tyler	March 13, 1844	Withdrawn	
Edward King	Tyler	June 5, 1844	Postponed (29-18)	June 15, 1844
John Spencer	Tyler	June 17, 1844	Withdrawn	
Reuben Walworth	Tyler	June 17, 1844	Not acted upon	
Edward King	Tyler	Dec. 4, 1844	Withdrawn	
Reuben Walworth	Tyler	Dec. 4, 1844	Withdrawn	
John Reed	Tyler	Feb. 7, 1845	Not acted upon	
George Woodward	Polk	Dec. 23, 1845	Rejected (20-29)	Jan. 26, 1846
Edward Bradford	Fillmore	Aug. 16, 1852	Not acted upon	
George Badger	Fillmore	Jan. 3, 1853	Withdrawn	
William Micou	Fillmore	Feb. 14, 1853	Not acted upon	
Jeremiah Black	Buchanan	Feb, 5, 1861	Rejected (25-26)	Feb. 21, 1861
Henry Standbery	Andrew Johnson	April 16, 1866	Not acted upon	
Ebenezer Hoar	Grant	Dec. 14, 1869	Rejected (24-33)	Feb. 3, 1870
George Williams	Grant	Dec. 1, 1873	Withdrawn	
Caleb Cushing	Grant	Jan. 9, 1874	Withdrawn	
Stanley Matthews	Hayes	Jan. 26, 1881	Not acted upon	
Wm. Hornblower	Cleveland	Sept. 19, 1893	Not acted upon	
Wm. Hornblower	Cleveland	Dec. 5, 1893	Rejected (24-30)	Jan. 15, 1894
Wheeler Peckham	Cleveland	Jan. 22, 1894	Rejected (32-41)	Feb. 16, 1894
John Parker	Hoover	March 21, 1930	Rejected (39-41)	May 7, 1930
John Harlan II	Eisenhower	Nov. 9, 1954	Not acted upon	
Abe Fortas	Lyndon Johnson	June 26, 1968	Withdrawn	
Homer Thornberry	Lyndon Johnson	June 26, 1968	Not acted upon	
Clement Haynsworth, Jr.	Nixon	Aug. 21, 1969	Rejected (45-55)	Nov. 21, 1969
G. Harold Carswell	Nixon	Jan. 19, 1970	Rejected (45-51)	April 8, 1970
Robert Bork	Reagan	July 1, 1987	Rejected (42-58)	Oct. 23, 1987
Harriet Miers	George W. Bush	Oct. 7, 2005	Withdrawn	
John G. Roberts, Jr.[2]	George W. Bush	July 29, 2005	Withdrawn	

[1] Later nominated and confirmed.

[2] Later nominated for chief justice and confirmed

Sources: Senate Historian's Office (and as reprinted in "The Senate Confirmation Process," *Guide to Congress* (Washington: The CQ Press, 2008, Sixth Edition, Volume 1), Table 7-1.

APPENDIX C. Senate Rejections of Cabinet Nominations

Nominee	Position	President	Date	Vote
Roger Taney	Sec. of Treasury	Andrew Jackson	June 23, 1834	18-28
Caleb Cushing	Sec. of Treasury	John Tyler	March 3, 1843	19-27
Caleb Cushing	Sec. of Treasury	Tyler	March 3, 1843	10-27
Caleb Cushing	Sec. of Treasury	Tyler	March 3, 1843	2-29
David Henshaw	Sec. of Navy	Tyler	Jan. 15, 1844	Not recorded
James Porter	Sec. of War	Tyler	Jan. 30, 1844	3-38
James Green	Sec. of Treasury	Tyler	June 15, 1844	Not recorded
Henry Stanbery	Attorney General	Andrew Johnson	June 2, 1868	11-29
Charles Warren	Attorney General	Calvin Coolidge	March 10, 1925	39-41
Charles Warren	Attorney General	Coolidge	March 16, 1825	39-46
Lewis Strauss	Sec. of Commerce	Eisenhower	June 19, 1959	46-49
John Tower	Sec. of Defense	George H.W. Bush	March 9, 1989	47-53

Sources: "The Senate Confirmation Process," *Guide to Congress* (Washington: The CQ Press, 2008, Sixth Edition, Volume 1), Table 7.2, "Senate Rejections of Cabinet Nominations," 341, adapted from George H. Haynes, *The Senate of the United States: Its History and Practice* (Boston: Houghton Mifflin, 1938) and *Congressional Quarterly Almanac* for various years.

Endnotes

1. U.S. Congress, "Characteristics and Pay of Federal Civilian Employees," The Congressional Budget Office (March 2007), Table A-1, "Total Number of Federal Civilian Employees, Selected Years, 1990 to 2005," 22.

2. U.S. Congress, 110th Congress, 2d Session, "United States Government Policy and Supporting Positions" (a.k.a. the "Plum Book"), Committee on Homeland Security and Governmental Affairs, United States Senate (S. Prt. 110-36), November 12, 2008, Appendix No. 1, "Summary of Positions Subject to Noncompetitive Appointment," 197.

3. Ibid.

4. U.S. Congress, Elizabeth Rybicki, "Senate Consideration of Presidential Nominations: Committee and Floor Procedure," CRS Report for Congress (RL 31980), July 1, 2003, 1.

5. Ibid, 3.

6. U.S. Congress, Henry B. Hogue, "Presidential Appointee Positions Requiring Senate Confirmation and Committees Handling Nominations, CRS Report for Congress (RL30959), October 27, 2002, 1-8.

7. Rybicki, CRS-4.

8. "Confirmation of Nominations," *Guide to Congress* (Washington: Congressional Quarterly, Inc., 1976), 178.

9. U.S. Congress, Betsy Palmer, "Evolution of the Senate's Role in the Nomination and Confirmation Process: A Brief History," CRS Report for Congress (RL31948), July 2, 2008, CRS-9.

10. U.S. Congress, Statement of Senator Patrick Leahy, Hearing Before the Senate Judiciary Committee on the Nomination of Claude Allen, October 28, 2003, accessed at: <http://leahy.senate.gov/press/200210/102803b.html> on Feb. 9, 2009.

11. U.S. Congress, Statement of Sen. Orrin Hatch, United States Senate Committee on the Judiciary, Judicial Nominations, June 16, 2004, accessed at: <http://judiciary.senate.gov/print_member_statement.cfm?id=122@wit_id=51> on 6/30/06.

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13. Rybicki, CRS-5.

14. Ibid, CRS-7-12.

15. "Nominations," U.S. Senate Historian's Office," op. cit., 12-15.

16. Ibid, 3.

17. Ibid, 5.

18. Ibid.

19. Ibid, 6.

20. Ibid, 7.

21. Ibid, 12-15.

22. Woodrow Wilson, *The State and Federal Governments of the United States* (Boston: D.C. Heath and Company, Publishers, 1891), 116.

23. Woodrow Wilson, *Constitutional Government* (New Brunswick, N.J.: Transaction Press, 2002; originally published by Columbia University Press, 1908), 79.

24. Ibid, 215-16.

25. Arthur Link, *Wilson: Confusions and Crises, 1915-1916* (Princeton: Princeton University Press, 1964), 323-25.

26. Ibid, 325.

27. Ibid, 357.

28. Ibid, 360.

29. Ibid, 361.

30. "Nominations," U.S. Senate Historian's Office, 11.

31. Stephen Hess, "What Now? Confirmation Battles," Workbook for the President-Elect: Week 7, The Brooking Institution, Dec. 19, 2008, accessed at: <http://www.brookings.edu/articles/2008/1219_transition_conrfirmation_hess.aspx?p=1> on Feb. 13, 2009.