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Cloture Attempts on Nominations

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Summary

Cloture is the only means by which the Senate can vote to limit debate on a matter, and thereby overcome a possible filibuster. It would be erroneous, however, to assume that cases in which cloture is sought are the same as those in which a filibuster occurs. Cloture may be sought when no filibuster is taking place, and filibusters may occur without cloture being sought.

Until 1949, cloture could not be invoked on nominations, and before 1980 this action was attempted only twice. From the 96th Congress (1979-1980) through the 102nd (1991-1992), cloture was never sought on more than three nominations in a single Congress, but since then this level has been exceeded three times.

From 1949 through 2004, cloture was sought on 49 nominations, and invoked on 21. Except in the 103rd Congress (1993-1994), most of the nominations involved have been judicial. Fourteen of the 49 nominees were not confirmed, all of whom were among the 18 on whom the Senate rejected cloture. Eleven of the 14 nominations not confirmed were considered during the 108th Congress (2003-2004).

Cloture has been sought on two nominations to the Supreme Court. In 1968, a cloture vote on the motion to proceed to consider the nomination of Abe Fortas to be Chief Justice failed. In 1971, when he was first appointed to the court, and again in 1986 when he was nominated to be Chief Justice, opponents of William H. Rehnquist mounted a filibuster. Though the cloture vote in 1971 was unsuccessful, Rehnquist was confirmed to the court; in 1986, the cloture vote was successful.

This report is to be updated after each Congress in which additional nominations are subjected to cloture attempts. Filibusters and cloture are discussed more generally in CRS Report RL30360, *Filibusters and Cloture in the Senate*. The process by which the Senate considers nominations is discussed more generally in CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, and CRS Report RL31948, *Evolution of the Senate's Role in the Nomination and Confirmation Process: A Brief History*.

Contents

| | |
|---|---|
| Cloture, Filibusters, and How They Differ | 1 |
| Frequency of Cloture Attempts on Nominations | 2 |
| Historical Development of Cloture Attempts on Nominations | 3 |
| Positions in Relation to Which Cloture Was Sought | 6 |

List of Tables

| | |
|---|---|
| Table 1. Cloture Attempts and Action on Nominations | 3 |
| Table 2. Frequency and Success of Cloture Attempts on Nominations, by Time Period, 1949-2004 | 4 |
| Table 3. Cloture Action on Judicial and Executive Nominations, by Time Period, 1967-2004 | 5 |
| Table 4. Nominations Subjected to Cloture Attempts, 1968-2004 | 7 |

Cloture Attempts on Nominations

Cloture, Filibusters, and How They Differ

Senate Rules place no general limits on how long consideration of a nomination (or most other matters) may last. Owing to this lack of general time limits, opponents of a nomination may be able to use extended debate or other delaying actions to prevent a final vote from occurring. Although a voting majority of Senators may be prepared to vote for a nominee, the nomination cannot be confirmed as long as other Senators, presumably a voting minority, are able to prevent the vote from occurring. The use of debate and procedural actions for the purpose of preventing or delaying a vote is a filibuster.

The motion for cloture is the only procedure by which the Senate can vote to place time limits on its consideration of a matter. It is, therefore, the Senate's most usual means of attempting to overcome a filibuster. When the Senate adopts a cloture motion on a matter, known as "invoking cloture," further consideration of the matter is limited to 30 hours.¹ By invoking cloture, the Senate may be able to ensure that a question will ultimately come to a vote, and can be decided by a voting majority.

The cloture rule permits Senators to move for cloture repeatedly, if necessary. The Senate, however, can impose the constraints of cloture only by a super-majority vote. For most matters, including nominations, three-fifths of the full Senate, or 60 votes, is required to invoke cloture. As a result, even if a majority of Senators support a nomination, opponents may still be able to prevent a vote on it by defeating any attempt to invoke cloture. Although the nomination itself can always be approved by a simple majority of Senators present and voting, the support of a super-majority may be required to limit consideration and enable the Senate to reach a vote.

While cloture affords the Senate a means of overcoming a filibuster, it is erroneous to assume that cases in which cloture is sought are always the same as those in which a filibuster occurs. Cloture may be sought when no filibuster is taking place, and filibusters may occur without cloture being sought. The reason is that cloture is sought by supporters of a matter; while filibusters are conducted by its opponents. Leaders of the majority party, or other supporters, may move for cloture even when opponents do not assert that they are attempting a filibuster, or when no

¹ Senate Rule XXII, paragraph 2. U.S. Senate, Committee on Rules and Administration, *Senate Manual, Containing the Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the United States Senate*, S.Doc. 107-1, 107th Cong., 1st sess., prepared by Andrea LaRue under the direction of Kennie Gill, Staff Director (Washington: GPO, 2002), sec. 22.2. During the 30 hours, no single Senator, other than the party floor leaders and the managers of the debate, may occupy more than one hour in debate.

extended debate or delaying actions have actually occurred. They may do so in response to a threat or perceived threat of a filibuster, or simply in an effort to speed action.

It is also possible for opponents of a matter to engage in a filibuster without supporters deciding to move for cloture. Supporters may refrain either because they think they lack the votes to obtain cloture, because they believe they can overcome any delaying actions and reach a vote without cloture, or because they hope to resolve the matter in dispute by some negotiated accommodation. This situation may be less common today, but does seem to have occurred in relation to nominations in earlier times.

If cloture is not an automatic indicator of a filibuster, neither is any other specific procedural action. A filibuster is a matter of intent; any course of action by opponents of a matter may be a filibuster if it is undertaken with the purpose of blocking or delaying a vote. Yet any of the procedural actions that might be used to delay or block a vote might also be used for other purposes. As a result, filibusters cannot simply be identified by explicit or uniform criteria, and there is no commonly accepted set of criteria for doing so. Instead, determining whether a filibuster is occurring in any specific case typically requires a degree of subjective judgment.

For these reasons, it would be a misuse of the following data, identifying nominations on which cloture was sought, to treat them as identifying nominations subjected to filibuster. It would equally be a misinterpretation to assume that all nominations on which cloture was not sought were not filibustered (especially for periods before cloture could be moved on nominations, as described in the next section). This report provides data only on nominations on which cloture motions were offered. It is not to be taken as providing systematic data on nominations that were or were not filibustered. It would not be feasible to develop a list of measures filibustered unless a commonly accepted single standard for identifying what constitutes filibustering could first be established.² At most, the data presented here may be regarded as identifying some potentially likely cases in which a filibuster (by some appropriate definition) may have occurred.

Frequency of Cloture Attempts on Nominations

The Senate first adopted a cloture rule in 1917. Until 1949, cloture could be moved only on legislative measures, and nominations could not be subjected to cloture attempts.³ From 1949 through 2004 (81st-108th Congresses), cloture was

² These questions of method are discussed in more detail in Richard S. Beth, "What We Don't Know About Filibusters," paper presented at the annual meeting of the Western Political Science Association, Portland, Ore., March 1995 (available from the author).

³ U.S. Congress, Senate, Committee on Rules and Administration, *Senate Cloture Rule: Limitation of Debate in the Congress of the United States and Legislative History of Paragraph 2 of Rule XXII of the Standing Rules of the United States Senate (Cloture Rule)*, S.Print 99-95, prepared by the Congressional Research Service, Library of Congress, 99th Cong., 1st sess. (Washington: GPO, 1985), pp. 17, 21, 38-39, 105-112.

sought on 49 nominations.⁴ **Table 4**, following the text, identifies the 49 nominations, the number of separate cloture motions filed on each, the ultimate outcome of the cloture attempt in each case, and the disposition of each nomination. As shown by the summary in **Table 1**, the Senate invoked cloture on 21 of these 49 nominations. On another 10 nominations, cloture motions were offered, but never came to a vote. On the remaining 18 nominations, the Senate voted against imposing cloture.

Table 1. Cloture Attempts and Action on Nominations

| Final Cloture Action | Action on Nomination | | Total |
|----------------------|----------------------|---------------|-------|
| | Confirmed | Not confirmed | |
| Invoked | 21 | 0 | 21 |
| No vote | 10 | 0 | 10 |
| Rejected | 4 | 14 | 18 |
| Total | 35 | 14 | 49 |

Source: Table 3.

Of the 49 nominations on which cloture was sought, 35 ultimately won confirmation. Of those 35 nominations, the Senate invoked cloture on 21, the Senate did not vote on the cloture petitions in 10 cases, and in four cases the nominations were confirmed despite the Senate rejecting cloture on the nomination. In 14 cases, 11 of them from the 108th Congress (2003-2004), the Senate refused to invoke cloture and the nominations were unsuccessful. In earlier Congresses, only three of the 35 nominations on which cloture was sought were ultimately rejected. These were

- Justice Abe Fortas to be Chief Justice of the United States in 1968;
- Sam Brown to be Ambassador during his tenure as Head of Delegation to the Conference on Security and Cooperation in Europe (CSCE) in 1994; and
- Dr. Henry Foster to be Surgeon General of the United States in 1995.

Historical Development of Cloture Attempts on Nominations

Even after Senate rules began to permit cloture on nominations in 1949, cloture was sought on none until 1968, when a motion to proceed to consider the nomination of Supreme Court Associate Justice Abe Fortas to be Chief Justice was debated at length. After the Senate rejected cloture on the motion to proceed, 45-43, President

⁴ For these purposes, five State Department nominations considered concurrently are counted as one, and the simultaneous nomination of a single individual to two positions is counted as one.

Lyndon B. Johnson withdrew the nomination at Fortas' request. In 1969 and 1970, the nominations of Clement F. Haynsworth and G. Harrold Carswell to the Supreme Court were defeated after lengthy debate, but no cloture motion was filed on either. When the Senate considered the nomination to the Supreme Court of William H. Rehnquist late in the 1971 session, however, cloture was quickly sought. Though the Senate did not invoke cloture (52-42), the nomination was subsequently confirmed.

In 1975, the majority required for invoking cloture on most matters, including nominations, was changed from two-thirds of Senators present and voting to three-fifths of the full membership of the Senate (normally 60).⁵ This change in the rules generally meant that the threshold for invoking cloture was lowered; if all 100 Senators participated in the vote, the previous rule required the votes of 67 to invoke cloture, the new rule required 60 votes, regardless of how many Senators participated.

Cloture was sought on no other nomination until 1980. That occurrence was the first in which cloture was sought on a nomination to an executive branch position, that of William G. Lubbers to be General Counsel of the National Labor Relations Board. Cloture was invoked, and the nomination was confirmed.

Table 2. Frequency and Success of Cloture Attempts on Nominations, by Time Period, 1949-2004

| Congresses and (years) | Nominations on which cloture was: | | | |
|--|-----------------------------------|----------------------|---------|------------------|
| | Moved | | Invoked | |
| | Number | Average per Congress | Number | Percent of moved |
| 81 st -89 th (1949-1966) | 0 | 0 | 0 | — |
| 90 th -102 nd (1967-1992) | 12 | 0.9 | 9 | 75% |
| 103 rd -108 th (1993-2004) | 37 | 6.2 | 12 | 32% |

As **Table 2** illustrates, the frequency with which cloture has been sought on nominations has increased in recent years (a development that reflects the trend in the overall frequency of cloture motions). Before the 103rd Congress, cloture was sought on as many as three nominations only in the 96th Congress (1979-1980) and the 99th Congress (1985-1986). Since then, however, this level has been exceeded three times. Cloture was sought on 12 nominations in the 103rd Congress (1993-1994), five in the 107th (2001-2002), and 14 in the 108th (2003-2004). These three Congresses were also the only ones since 1981 in which the presidency, Senate, and House were all controlled by the same political party.⁶ In addition, the 103rd and

⁵ Committee on Rules and Administration, *Senate Cloture Rule*, pp. 30-32, 53-54, 119-121.

⁶ The Republican Party lost control of the Senate during the 1st session of the 107th Congress.

107th Congresses were each the first of a new presidency, so that the number of nominations to be considered was presumably especially large.

Table 2 also indicates that, as the frequency of cloture attempts on nominations has increased, the frequency of their success has tended to decrease. This relationship appears to suggest that cloture is now being sought more often in cases when it is unlikely to be invoked. This shift was evident especially in the 103rd Congress, when cloture was successfully invoked on only four of the 12 nominations where attempted, and in the 108th Congress, when it was invoked on none of the 14 nominations on which it was attempted. In other Congresses, the proportion of cloture attempts that succeeded has generally been much higher.

In the 108th Congress (2003-2004), the pattern of Senate action on nominations on which cloture was sought displayed several distinctive features. First, the maximum number of cloture motions offered on each nomination was higher than ever before. In earlier Congresses, as many as three cloture motions had been offered on a single nomination only on three occasions (two in 1980 and one in 1994). In the 108th Congress, by contrast, one nomination was subjected to seven cloture motions and another to four. Second, when the Senate sought cloture on a nomination but was unable to confirm it, the Senate in the 108th Congress retained the nomination on its calendar until final adjournment. In earlier Congresses, nominations that were not confirmed after cloture attempts were typically either withdrawn or returned to the President. Both these shifts may represent indications of an increased intensity with which supporters of these nominations were attempting to secure Senate votes on them.

Table 3. Cloture Action on Judicial and Executive Nominations, by Time Period, 1967-2004

| Congress and (years) | Judicial | | Executive | |
|--|--------------------|------------------------|--------------------|------------------------|
| | Cloture Invoked | Cloture Not Invoked | Cloture Invoked | Cloture Not Invoked |
| 90 th -102 nd (1967-1992) | 5 | 3 ^a | 4 | 0 |
| 103 rd (1993-1994) | 1 | 1 | 3 | 7 ^a |
| 104 th -107 th (1995-2002) | 5 | 2 | 3 | 1 ^a |
| 108 th (2003-2004) | 0 | 12 ^b | 0 | 2 ^a |
| Total | 11 | 18 | 10 | 10 |

Source: Table 4.

Notes:

- a. On one nomination in each of these groups, cloture was ultimately rejected and the nominee was not confirmed.
- b. On 10 nominations in this group, cloture was ultimately rejected and the nominee was not confirmed.

Positions in Relation to Which Cloture Was Sought

Most of the nominations on which cloture has been attempted have been to clearly secondary or subordinate positions. Only three have been to the Supreme Court, and two to offices at the level of the President's Cabinet. In general, most nominations on which cloture has been sought have been to positions on the federal bench. This circumstance perhaps reflects the Senate's traditional inclination to permit the President generally wide latitude in selecting officials to serve under him in executive branch positions. Only in the 103rd Congress was cloture sought chiefly on nominations to positions in the executive branch.

Of the 12 nominations on which cloture action occurred during the 103rd Congress, 10 were for executive branch positions. Except in that Congress, most nominations on which cloture has been sought have been to the federal courts. **Table 3** summarizes the outcomes of cloture action on executive and judicial nominations, broken down into four periods that display distinctive patterns.

Table 4. Nominations Subjected to Cloture Attempts, 1968-2004

| Congress and Year | Nominee | Position | Cloture Motions Filed | Final Outcome of Cloture Attempt | Disposition of Nomination |
|--------------------------|--------------------------------|--|------------------------------|---|----------------------------------|
| 90 th , 1968 | <i>Abe Fortas</i> | <i>Chief Justice</i> | 1 | rejected | withdrawn |
| 92 nd , 1971 | <i>William H. Rehnquist</i> | <i>Associate Justice</i> | 2 | rejected | confirmed |
| 96 th , 1980 | William A. Lubbers | General Counsel, National Labor Relations Board | 3 | invoked | confirmed |
| 96 th , 1980 | Don Zimmerman | Member, National Labor Relations Board | 3 | invoked | confirmed |
| 96 th , 1980 | <i>Stephen G. Breyer</i> | <i>Circuit Judge</i> | 2 | invoked | confirmed |
| 98 th , 1984 | <i>J. Harvie Wilkinson</i> | <i>Circuit Judge</i> | 2 | invoked | confirmed |
| 99 th , 1986 | <i>Sidney A. Fitzwater</i> | <i>District Judge</i> | 1 | invoked | confirmed |
| 99 th , 1986 | <i>Daniel A. Manion</i> | <i>Circuit Judge</i> | 1 | withdrawn | confirmed |
| 99 th , 1986 | <i>William H. Rehnquist</i> | <i>Chief Justice</i> | 1 | invoked | confirmed |
| 100 th , 1987 | Melissa Wells | Ambassador | 1 | invoked | confirmed |
| 100 th , 1987 | C. William Verity | Secretary of Commerce | 1 | invoked | confirmed |
| 102 nd , 1992 | <i>Edward Earl Carnes, Jr.</i> | <i>Circuit Judge</i> | 1 | invoked | confirmed |
| 103 rd , 1993 | Walter Dellinger | Assistant Attorney General | 2 | rejected | confirmed |
| 103 rd , 1993 | five nominations ^a | State Department | 2 | rejected | confirmed |
| 103 rd , 1993 | Janet Napolitano | U.S. Attorney | 1 | invoked | confirmed |
| 103 rd , 1994 | M. Larry Lawrence | Ambassador | 1 | fell ^b | confirmed |
| 103 rd , 1994 | <i>Rosemary Barkett</i> | <i>Circuit Judge</i> | 1 | withdrawn | confirmed |
| 103 rd , 1994 | Sam Brown | Ambassador | 3 | rejected | returned to president |
| 103 rd , 1994 | Derek Shearer | Ambassador | 2 | invoked | confirmed |
| 103 rd , 1994 | Ricki Tigert | Board Member and Chair, Federal Deposit Insurance Corporation ^c | 2 | invoked | confirmed |
| 103 rd , 1994 | <i>H. Lee Sarokin</i> | <i>Circuit Judge</i> | 1 | invoked | confirmed |

| Congress and Year | Nominee | Position | Cloture Motions Filed | Final Outcome of Cloture Attempt | Disposition of Nomination |
|--------------------------|----------------------------------|---|------------------------------|---|----------------------------------|
| 103 rd , 1994 | Buster Glosson | Air Force Lieutenant General (retired) | 1 | withdrawn | confirmed |
| 103 rd , 1994 | Claude Bolton, Jr. | Air Force Brigadier General | 1 | vitiated ^d | confirmed |
| 103 rd , 1994 | Edward P. Barry, Jr. | Air Force Lieutenant General (retired) | 1 | vitiated ^d | confirmed |
| 104 th , 1995 | Henry Foster | Surgeon General | 2 | rejected | no final vote |
| 105 th , 1997 | Joel I. Klein | Assistant Attorney General | 1 | invoked | confirmed |
| 105 th , 1998 | David Satcher | Surgeon General | 1 | invoked | confirmed |
| 106 th , 1999 | <i>Brian Theadore Stewart</i> | <i>District Judge</i> | <i>1</i> | <i>rejected</i> | <i>confirmed</i> |
| 106 th , 2000 | <i>Marsha L. Berzon</i> | <i>Circuit Judge</i> | <i>1</i> | <i>invoked</i> | <i>confirmed</i> |
| 106 th , 2000 | <i>Richard A. Paez</i> | <i>Circuit Judge</i> | <i>1</i> | <i>invoked</i> | <i>confirmed</i> |
| 107 th , 2002 | <i>Lavenski R. Smith</i> | <i>Circuit Judge</i> | <i>1</i> | <i>invoked</i> | <i>confirmed</i> |
| 107 th , 2002 | <i>Richard R. Clifton</i> | <i>Circuit Judge</i> | <i>1</i> | <i>invoked</i> | <i>confirmed</i> |
| 107 th , 2002 | Richard H. Carmona | Surgeon General | 1 | invoked | confirmed |
| 107 th , 2002 | <i>Julia Smith Gibbons</i> | <i>Circuit Judge</i> | <i>1</i> | <i>invoked</i> | <i>confirmed</i> |
| 107 th , 2002 | <i>Dennis W. Shedd</i> | <i>Circuit Judge</i> | <i>1</i> | <i>vitiated^d</i> | <i>confirmed</i> |
| 108 th , 2003 | <i>Victor J. Wolski</i> | <i>Judge, Court of Claims</i> | <i>1</i> | <i>vitiated^d</i> | <i>confirmed</i> |
| 108 th , 2003 | <i>Miguel A. Estrada</i> | <i>Circuit Judge</i> | <i>7</i> | <i>rejected</i> | <i>withdrawn</i> |
| 108 th , 2003 | Michael O. Leavitt | Administrator, Environmental Protection Agency ^c | 1 | withdrawn | confirmed |
| 108 th , 2003 | <i>Charles W. Pickering, Sr.</i> | <i>Circuit Judge</i> | <i>1</i> | <i>rejected</i> | <i>no final vote</i> |
| 108 th , 2003 | <i>William H. Pryor, Jr.</i> | <i>Circuit Judge</i> | <i>2</i> | <i>rejected</i> | <i>no final vote</i> |
| 108 th , 2003 | <i>Priscilla Richman Owen</i> | <i>Circuit Judge</i> | <i>4</i> | <i>rejected</i> | <i>no final vote</i> |
| 108 th , 2003 | <i>Carolyn B. Kuhl</i> | <i>Circuit Judge</i> | <i>2</i> | <i>rejected</i> | <i>no final vote</i> |
| 108 th , 2003 | <i>Janice R. Brown</i> | <i>Circuit Judge</i> | <i>1</i> | <i>rejected</i> | <i>no final vote</i> |

| Congress and Year | Nominee | Position | Cloture Motions Filed | Final Outcome of Cloture Attempt | Disposition of Nomination |
|--------------------------|--------------------------------|---|------------------------------|---|----------------------------------|
| 108 th , 2003 | Thomas C. Dorr | Undersecretary of Agriculture for Rural Development and Board Member, Commodity Credit Corporation ^c | 2 | rejected | no final vote |
| 108 th , 2004 | <i>Marcia G. Cooke</i> | <i>District Judge</i> | 1 | <i>withdrawn</i> | <i>confirmed</i> |
| 108 th , 2004 | <i>William Gerry Myers III</i> | <i>Circuit Judge</i> | 1 | <i>rejected</i> | <i>no final vote</i> |
| 108 th , 2004 | <i>David W. McKeague</i> | <i>Circuit Judge</i> | 1 | <i>rejected</i> | <i>no final vote</i> |
| 108 th , 2004 | <i>Henry W. Saad</i> | <i>Circuit Judge</i> | 1 | <i>rejected</i> | <i>no final vote</i> |
| 108 th , 2004 | <i>Richard A. Griffin</i> | <i>Circuit Judge</i> | 1 | <i>rejected</i> | <i>no final vote</i> |

Sources: Compilations by CRS and Senate Library; Legislative Information System of the U.S. Congress; U.S. Congress, Senate, Committee on Rules and Administration, *Senate Cloture Rule*, committee print 99-95, 99th Cong., 1st sess. (Washington: GPO, 1985), pp. 44-70, 78-85; *Congressional Record* (Daily Digest); and *Congressional Quarterly Almanac* for 1986, 1987, 1992, 1995, 1999.

Notes: Executive branch nominations in roman; *Judicial nominations in italic*. Final outcome of cloture attempt is shaded when cloture was not invoked. Disposition of nomination is shaded when the nominee was not confirmed.

- a. These five nominations to various positions in the State Department received consideration and cloture action concurrently, and are counted as one case in the table.
- b. Cloture motion became moot and received no action.
- c. The individual was nominated simultaneously for the two positions specified, and cloture action took place on each nomination in turn. The table counts all actions on one nominee as one case.
- d. Senate unanimously consented to treat the cloture motion as having no effect.