

CRS Report for Congress

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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. Until 1949, cloture could not be invoked on nominations, and before 1980 this action was attempted only twice. From 1949 through 2002, cloture was sought on 35 nominations, and invoked on 21. Only three of the 35 nominees were not confirmed; all three were among those on whom the Senate rejected cloture. Except in the 103rd Congress (1993-1994), most of the nominations involved have been judicial. The 103rd and 107th Congress are the only ones in which cloture was sought on more than three nominations.

This report is to be updated at the end of 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*.

Relation Between Cloture Attempts and Filibusters

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 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 dilatory actions for such a purpose 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. 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.

It would be incorrect to assume that situations in which cloture is sought correspond completely with those in which filibusters occur. Even if opponents attempt to block a nomination through delaying tactics, supporters may decide not to move for cloture. This situation is perhaps uncommon today, but does seem to have occurred in relation to nominations. Conversely, supporters of a nomination may move for cloture, in order to speed action, even when opponents may not consider themselves to be conducting a filibuster against it, or when they may have only threatened, but not actually conducted, a filibuster.

Since filibusters may be conducted through a variety of tactics, there are no specific actions that definitively indicate the occurrence of a filibuster, much less of a mere threat to filibuster. To this extent, the presence of cloture attempts may at least be a readily available means for attempting to identify some cases in which filibusters may have occurred.

Nominations on Which Cloture was Sought

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.² From 1949 through 2002 (81st-107th Congresses), cloture was sought on 35 nominations.³ **Table 3** identifies the 35 nominations, the number of cloture motions filed on each, the outcome of the cloture attempt, and the disposition of each nomination. Many of these nominations have been to clearly secondary or subordinate positions; only three have been to the Supreme Court, and one to the President's Cabinet.

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. 106-1, 106th Cong., 1st sess., prepared by Lory Breneman under the direction of Tamara S. Somerville, Staff Director (Washington: GPO, 2000), 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.

² 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)*, committee print 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.

³ For these purposes five State Department nominations considered concurrently are counted as one, and the nomination of one individual to two positions is counted as one.

Table 1. Cloture Attempts and Action on Nominations

Cloture Action	Action on Nomination	
	Confirmed	Not confirmed
Invoked	21	0
No vote	7	0
Rejected	4	3

Source: Table 3.

As shown by the summary in **Table 1**, the Senate invoked cloture on 21 of these 35 nominations. On another seven, cloture motions were offered, but never came to a vote. On the remaining seven, the Senate voted only against imposing cloture.

All 21 nominations on which cloture was invoked were confirmed. Of the 14 nominations on which cloture was sought but not invoked, 11 were confirmed. Only three of the 35 nominees ultimately failed of confirmation, and on all three of these the Senate had rejected cloture. These were:

- ! Justice Abe Fortas to be Chief Justice in 1968,
- ! Sam Brown to be Ambassador in 1994, and
- ! Dr. Henry Foster to be Surgeon General in 1995.

Historical Development of Cloture Attempts on Nominations

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

Cloture was sought on no other nomination until 1980. In the meantime, in 1975, the majority required for 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).⁴ The 1980 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 in this case and the nomination was confirmed.

⁴ Committee on Rules and Administration, *Senate Cloture Rule*, pp. 30-32, 53-54, 119-121.

Cloture has never been sought on more than three nominations in the same Congress, except for 12 in the 103rd (1993-1994) and five in the 107th (2001-2002). Each of these Congresses was the first of a new presidency, so that the number of nominations to be considered was presumably especially large. The 103rd Congress was also the only one between 1981 and 2000 in which the presidency, Senate, and House were all controlled by the same political party. In that Congress, cloture was invoked on but four of the 12 nominations where attempted, a much lower proportion than for other Congresses.

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 judicial positions. 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. **Table 2** summarizes the outcomes of cloture action on executive and judicial nominations before, in, and after the 103rd Congress.

Table 2. Cloture Action on Judicial and Executive Nominations by Time Period

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
TOTAL	11	6	10	8

Source: Table 3.

a. On one nomination in each of these groups, cloture was ultimately rejected and the nominee was not confirmed. All other nominees were confirmed.

Table 3. Nominations Subjected to Cloture Attempts, 1968-2002(Executive branch nominations in roman; Judicial nominations in *italic*)

Congress and Year	Nominee	Position	Cloture Motions Filed	Outcome of Cloture Attempt	Disposition of Nomination
<i>90th, 1968</i>	<i>Abe Fortas</i>	<i>Chief Justice</i>	<i>1</i>	<i>rejected</i>	<i>withdrawn</i>
<i>92nd, 1971</i>	<i>William H. Rehnquist</i>	<i>Associate Justice</i>	<i>2</i>	<i>rejected</i>	<i>confirmed</i>
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
<i>96th, 1980</i>	<i>Stephen G. Breyer</i>	<i>Circuit Judge</i>	<i>2</i>	<i>invoked</i>	<i>confirmed</i>
<i>98th, 1984</i>	<i>J. Harvie Wilkinson</i>	<i>Circuit Judge</i>	<i>2</i>	<i>invoked</i>	<i>confirmed</i>
<i>99th, 1986</i>	<i>Sidney A. Fitzwater</i>	<i>District Judge</i>	<i>1</i>	<i>invoked</i>	<i>confirmed</i>
<i>99th, 1986</i>	<i>Daniel A. Manion</i>	<i>Circuit Judge</i>	<i>1</i>	<i>withdrawn</i>	<i>confirmed</i>
<i>99th, 1986</i>	<i>William H. Rehnquist</i>	<i>Chief Justice</i>	<i>1</i>	<i>invoked</i>	<i>confirmed</i>
100 th , 1987	Melissa Wells	Ambassador	1	invoked	confirmed
100 th , 1987	C. William Verity	Secretary of Commerce	1	invoked	confirmed
<i>102nd, 1992</i>	<i>Edward Earl Carnes, Jr.</i>	<i>Circuit Judge</i>	<i>1</i>	<i>invoked</i>	<i>confirmed</i>
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
<i>103rd, 1994</i>	<i>Rosemary Barkett</i>	<i>Circuit Judge</i>	<i>1</i>	<i>withdrawn</i>	<i>confirmed</i>
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
<i>103rd, 1994</i>	<i>H. Lee Sarokin</i>	<i>Circuit Judge</i>	<i>1</i>	<i>invoked</i>	<i>confirmed</i>

Congress and Year	Nominee	Position	Cloture Motions Filed	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 Theodore 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>

Sources: Compilations by CRS and by the 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:

- 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.
- Cloture motion became moot and received no action.
- Tigert was nominated simultaneously for these two positions, and cloture action took place on each nomination in turn; the table counts these events as one case.
- Senate unanimously consented to treat the cloture motion as having no effect.