

Senate Confirmation of Cabinet Appointments

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At the start of his presidency, George H. W. Bush nominated fellow Texan and former U.S. senator John Tower to be secretary of defense. There was little reason to expect the Senate would not confirm the appointment. Tower was a recognized expert on defense policy who for many years was a member of the Senate Armed Services Committee and had served as chief U.S. negotiator with the Soviet Union on nuclear arms reduction after retiring from the Senate. To the surprise of many, however, Tower's nomination was derailed when questions arose about his role as a consultant to defense contractors and allegations of alcohol abuse were made. After a six-week battle, the Senate voted 53-47 to reject Tower's nomination, the first nomination to the president's cabinet in 30 years to be rejected outright by the Senate.

The rejection of Tower's nomination was surprising because the Senate allows presidents great latitude in selecting top-level members of their administrations. As Joseph P. Harris (1953, 259) observed in his extensive study of presidential appointments, "It is recognized that unless [the president] is given a free hand in the choice of his Cabinet he cannot be held responsible for the administration of the executive branch." Senators of the president's party often portray the president's appointment of advisers not as a power of the office but as a privilege of the office. Senate Republican leader Robert Dole (R-KS) reflected this perspective during deliberations over Tower's nomination when he remarked, "This is [the president's] nominee. . . . He has a right to have [his] people in his Cabinet." (*CO Almanac 1989*, 407). Senators of the opposing political party do not accept presidential appointment power as a right but acknowledge the need for the president to receive advice from trusted confidants and that winning the election entitles the president to choose cabinet officers who share his policy views. In explaining his vote against the

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Tower nomination, Edward Kennedy (D-MA) commented, "[O]n almost all occasions, the Senate defers to the President, and his nominations are approved. But on rare occasions, such as the one before us, it is the Senate's duty to the Constitution and the country, so say no to the President and ask him to choose again." (U.S. Congress, Senate Committee on Armed Services, 1989)

Article II, section 2, of the U.S. Constitution invests in the president the power to "appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States." However, this power is not absolute, as the Constitution stipulates that the president makes these appointments "by and with the Advice and Consent of the Senate." While the Constitution has similar language concerning the shared power of appointing judges and executive officers, the appointment of executive officers has been much less controversial in recent years. Judges are effectively appointed for life and are independent of executive or legislative control; as a consequence, conflicts between the White House and opposition party senators over particular nominations have received substantial attention. This contrasts sharply with members of the president's cabinet, who are immediately answerable to the chief executive and who serve at the pleasure of the president. Thus, the Senate generally, but not always, defers to the president on executive appointments.

The term "**cabinet**" refers to the heads of the 15 principal departments of the United States executive branch. George Washington initiated the practice of having the department heads serve as a body of advisers, a practice that continued until the presidency of Franklin D. Roosevelt. Under Roosevelt, the **Executive Office of the President (EOP)** was created to provide a set of advisers at the immediate disposal of the president and whose responsibilities did not include managing departments charged with implementing policy decisions. The evolution of the EOP continued through administrations, reaching its current structure during the Nixon presidency. Today, most of the president's closest advisers are in the EOP, with particular cabinet officers providing input as appropriate; rarely does the cabinet counsel the president as a body. A number of positions within the EOP, for example, the director of the Office of Management and Budget, require Senate confirmation. Thus, this analysis includes both the 15 department heads who by statute have cabinet status and key positions within the EOP.

Patterns of Confirmation Decisions

At the simplest level, there are two possible outcomes when the president sends a nomination to the Senate: confirmation or rejection. However, the process is more complicated, as different levels of support of or opposition to a nomination provide different signals to the president even when the opposition is not substantial enough to prevent confirmation. It is therefore preferable to group nominations into three categories. The first includes nominations that are confirmed with no or only token opposition. In these instances, the nomination will be confirmed by a voice vote of the Senate or by a roll-call vote that has less than 10 percent of senators voting "no." In general, Senate deference to the president on cabinet-level positions results in the vast majority of cabinet-level nominations being confirmed with no or only token opposition. Between 1969 and 2008, 86 percent of nominations were confirmed without significant opposition. Recent examples include President George W. Bush's nomination of Henry Paulson to be secretary of the treasury, which was confirmed by voice vote, and nomination of Robert Gates to be secretary of defense, which was confirmed with only two dissenting votes. The few dissenting votes are cast for various reasons, but with full knowledge that the appointment will be confirmed.

The second category includes nominations confirmed but with significant opposition, here defined as more than 10 percent of senators opposing the appointment. Eleven percent of nominations fit this category. In these instances, senators use the confirmation process to express discontent with the nominee or with the president's policies. The most recent example was President Bush's nomination of Michael Mukasey to be attorney general. Senate Democrats challenged Mukasey to state clearly his views on the legality of the interrogation techniques that some consider torture and domestic surveillance techniques the president claimed were necessary to combat terrorism. There was little hope of defeating the nomination, but the opposing senators hoped to influence Mukasey's policy decisions or implementation of programs by voicing their opposition.

The third category includes nominations that are rejected by the Senate. While Tower's nomination to be defense secretary was the only one rejected by a vote of the Senate since 1969, other nominations were withdrawn in the face of opposition by senators (Table 1). Some of these nominations might have been confirmed if the president had chosen to press the issue, but either the president decided not to expend political capital on a contentious confirmation battle or the nominee decided

the personal cost of the ordeal was too great. Whether the nomination fails because of a negative vote in the Senate or a forced withdrawal does not matter; either way, the opponents have succeeded in preventing an unacceptable nominee from gaining office. In all, 3 percent of cabinet-level nominations have failed either by rejection or withdrawal.

TABLE 1
FAILED NOMINATIONS TO CABINET-LEVEL POSITIONS, 1969–2008

	Year	President	Nominee	Department	Outcome
Cabinet Departments	1989	G. H. W. Bush	John Tower	Defense	Rejected
	1993	Clinton	Zoe Baird	Justice	Withdrawn
	1997	Clinton	Hershel Gober	Veterans Affairs	Withdrawn
	2001	G. W. Bush	Linda Chavez	Labor	Withdrawn
Executive Office of the President	2004	G. W. Bush	Bernard Kerik	Homeland Security	Withdrawn
	1977	Carter	Ted Sorenson	CIA	Withdrawn
	1987	Reagan	Robert Gates	CIA	Withdrawn
	1995	Clinton	Anthony Lake	CIA	Withdrawn
	2005	G. W. Bush	John Bolton	UN Ambassador	Withdrawn

There have been few differences across administrations in the rate of opposition to appointments. However, there are differences in the level of opposition by office (Table 2). Nominations to particular offices, by the nature of the policies for which they are responsible, generate greater opposition in the Senate. Not a single nominee to 6 of the 22 offices included here faced significant opposition between 1969 and 2008. On the other hand, a majority of the nominations generating significant opposition were to three positions: attorney general, director of central intelligence, and secretary of the interior.

The Department of Justice is a particular lightning rod when it comes to confirmation politics, with half of nominations for attorney general encountering opposition. Although only one nominee (Zoe Baird, during the Clinton administration) failed to eventually gain the office, several others, including George W. Bush's three nominations for attorney general, have met resistance in the Senate. The next greatest level of opposition has been in the intelligence field. Forty-four percent of all nominations in this area encountered significant opposition, with three nominations being withdrawn due to Senate opposition. Almost as high a proportion (42 percent) of nominations to head the Department of the Interior were challenged in the Senate.

TABLE 2
LEVEL OF OPPOSITION BY OFFICE

Department or Position	No or Token Opposition	Confirmed with Significant Opposition	Rejected or Withdrawn
State	91%	9%	0%
Treasury	100%	0%	0%
Defense	93%	0%	7%
Justice	50%	44%	6%
Interior	58%	42%	0%
Agriculture	92%	8%	0%
Commerce	93%	7%	0%
Labor	70%	20%	6%
Health and Human Services*	92%	8%	0%
Housing and Urban Development	100%	0%	0%
Transportation	100%	0%	0%
Energy	100%	0%	0%
Education*	100%	0%	0%
Veterans Affairs	86%	0%	14%
Homeland Security	67%	0%	33%
CIA / National Intelligence	56%	25%	19%
UN Ambassador	89%	6%	6%
US Trade Representative	92%	8%	0%
Office of Management and Budget	93%	7%	0%
Council of Economic Advisors	94%	8%	0%
Environmental Protection Agency	100%	0%	0%
National Drug Control Policy	80%	20%	0%
Totals	86%	11%	3%

*These two departments were divided from the old Department of Health, Education, and Welfare; HEW appointments are included with the HHS Department.

Why do nominations to these offices generate greater opposition than nominations to other offices? The answer lies, at least in part, in the responsibilities of these agencies. Historically, the intelligence gathering and covert operations of the CIA and questions of proper law enforcement, including enforcement of civil rights laws, were at the center of conflicts between the White House and Senate over these positions. During the presidency of George W. Bush, both the CIA and Justice Department have been involved in controversial detentions and interrogations of prisoners captured in Afghanistan and Iraq. Unwilling to let pass an opportunity to challenge the administration, senators disagreeing with the president—whether the president was Jimmy Carter or George W. Bush—have made confirmation deliberation extensions of broader debates over policies and programs. Conflicts over nominations for secretary

of the interior are part of the ongoing struggle between conservationists wanting to preserve federal lands in their present conditions and resource developers wishing to tap the highly restricted mineral and forest resources on federal lands. All challenges to secretaries-designate of the interior involved conservationists claiming the nominee was biased toward development and insensitive to environmental concerns. Other departments have seen fewer challenges to nominations, as they are not consistently at the heart of policy debates or do not have rival constituencies within their areas of responsibilities.

Reasons for opposing nominations

In *Federalist 76* (Rossiter 1999, 457), Alexander Hamilton explained that the president was expected to have wide latitude in selecting executive officials and that the Senate's confirmation would be refused only when there are "special and strong reasons for the refusal." The rarity of a failed nomination indicates that senators have mostly embraced Hamilton's view. However, because neither the text of the Constitution nor any of the framers who wrote about its provisions provided a clear indication of what "special and strong reasons" might warrant the rejection of a presidential nomination, each senator is free to define the "special and strong reasons" that will lead him or her to oppose the president. The reasons most often given by senators for opposing a cabinet nomination fall into four broad categories: illegal or unethical behavior, conflicts of interest, qualifications for the office, and public policy. The frequency of objections being raised on each basis varies widely, as does the impact of each on confirmation votes in the Senate.

Illegal or Unethical Behavior

In his study of presidential nomination politics, G. Calvin Mackenzie (1981, 97) observed: "The most elementary of the purposes for which the confirmation process is used is that of examining and passing judgment on the character and competence of the President's nominees." Most basic to a nominee's character is whether he or she has violated the law or engaged in unethical behavior. As seen in Table 3, such allegations appeared in 27 percent of contentious nomination deliberations and were the primary reasons for opposing the nomination in 24 percent of the cases. These allegations can be especially damaging to a nomination being considered by the Senate. Senators of the political party other than the president's are significantly more likely to vote against a nomination when allegations of wrongdoing are raised. Interestingly, senators of the president's party are more likely to vote for the

nomination when such allegations are made; apparently, there is a closing of ranks within the president's party in these circumstances (King and Riddlesperger 2006).

TABLE 3
REASONS FOR OPPOSING CABINET-LEVEL NOMINATIONS, 1969–2008

Reason	Reason Primary	Given Reason
Illegal or unethical behavior	27%	24%
Conflict of interest	22%	8%
Unqualified	16%	11%
Public policy differences	70%	57%
Number of cases	37	37

Occasionally, allegations of inappropriate behavior involve possible felonies. Reagan's nomination of Raymond Donovan to be secretary of labor was delayed while the Senate investigated allegations of connections between Donovan's construction company and organized crime and allegations of union corruption. Donovan was confirmed over substantial opposition but later faced criminal indictment and was forced to resign. Several possible cabinet officers had their nominations derailed during the Clinton and George W. Bush administrations for possible violations of immigration laws. The first was Z e Baird, nominated by Clinton to be attorney general. An accomplished corporate lawyer, Baird had employed illegal immigrants as domestic servants and failed to pay Social Security taxes on their wages. The legal breach was discovered and efforts to correct the situation were initiated prior to Baird's nomination. However, this did not stop opponents from questioning her credentials to be the nation's chief legal officer. Baird withdrew from consideration when it appeared the Senate might reject her nomination. Similar allegations led Bush to withdraw his nominations of Linda Chavez to be secretary of labor and Bernard Kerik to be secretary of homeland security. Most novel, of course, were the allegations of alcohol abuse that helped derail Tower's nomination to be secretary of defense.

Conflicts of Interest

Another character-related reason for opposing a nomination is conflict of interest. The most basic form of conflict of interest is financial gain. Does the nominee stand to benefit financially from decisions made in office? There often is concern when a cabinet nominee has extensive stock holdings in companies with contracts issued or administered by his or her department, as government contracts improve a company's profitability, which in turn increases the value of company stock. These concerns are usually soothed by having the nominee divest him- or herself of stock in certain

companies or place assets in blind trusts. For example, President John Kennedy nominated Robert McNamara, president of Ford Motor Company, to be secretary of defense. Because Ford had substantial contracts with the Department of Defense, McNamara sold his interest in the company before assuming office. Practices such as these for handling personal assets have resulted in financial conflicts of interest rarely being a concern in confirmation debates.

More troubling are what Mackenzie (1981, 103–105) calls "predispositional conflicts of interest." Predispositional conflicts of interest occur when a nominee has close ties to the industry or constituency overseen by the department and therefore might be predisposed to supporting a particular policy perspective because of that former affiliation. There are policy implications to these challenges, but the focus is not on explicit policy positions expressed by the nominee or policies of the administration. Instead, the focus is on potential biases held by the nominee. The essence of predispositional conflicts of interest was reflected by Senator Hubert Humphrey, who once told a cabinet nominee, "You can put all [your investments] in escrow, but I don't think you can put your philosophy in escrow" (quoted in Mackenzie 1981, 104). The nomination of John Tower to be secretary of defense failed, in part, because of predispositional conflicts of interest. Although recognized as an expert on defense policy, Tower had been a consultant to defense industries after leaving the Senate and many senators were concerned that his decisions as secretary of defense would be heavily influenced by connections with defense industries. Allegations of predispositional conflicts of interest are made in 22 percent of contentious nominations but are the primary reason in only 8 percent of the cases.

Qualifications

Most nominees have the training or experience to be considered specialists in the policies of their departments. It is common, in fact, for cabinet officers to have served previously in the executive branch of the national government or even the department they now lead (King and Riddlesperger 1984; Riddlesperger and King 1986). However, on rare occasions, a nominee's qualifications for a cabinet post will be questioned by senators. For example, President Reagan nominated William Clark, a close adviser to Reagan since his days as governor of California and a foreign policy adviser to the president at the start of his administration, to be secretary of the interior after James Watt, plagued by controversy, resigned. While the nomination was confirmed, several senators questioned Clark's qualifications to be interior secretary, noting that he had no expertise or background in natural resource policy.

A peculiar qualification-related objection raised occasionally is whether the nominee, if confirmed, will be sufficiently independent of the president. Senatorial deference to the president is justified, at least in part, on the idea that allowing the president to choose cabinet officers is necessary to hold the president accountable for executive decisions. However, controversies of the manner in which policies are implemented, most notably by the Department of Justice and Central Intelligence Agency, have resulted in some senators expressing concern that a cabinet officer will obey commands from the White House rather than stand up for other principles. George W. Bush's nomination of Porter Goss to be director of central intelligence illustrates this. Some Senate Democrats were concerned that pressure from the White House had led the CIA to provide biased intelligence information concerning Iraq's weapons of mass destruction program; these senators wanted assurances that the new director of central intelligence would provide Congress with unbiased reports.

Regardless of the qualification in question, challenges to a nominee's qualifications are rarely sufficient to defeat a nomination. Cabinet nominees are highly intelligent men and women who have been very successful in their careers in the public and private sectors. A substantial majority of senators will defer to the president and vote to confirm when qualifications are the only grounds for challenging a nomination.

Public Policy

The principal change in confirmation politics over the past half century is that disagreements over public policy now dominate debates over contested cabinet-level nominations. "Senators vote against nominees, and nominations fail," G. Calvin Mackenzie (2001, 27–28) noted, "because the appointments process has become a policy battleground." This is substantially different from the middle of the twentieth century, when Harris (1953, 263–264) observed: "Senators who have opposed Cabinet nominations have usually conceded . . . that nominees should not be rejected merely because they hold views that are not agreeable to a majority of the Senate." Over the past three decades, disagreements over public policy have moved to the forefront of most contentious confirmation debates. Public policy concerns were expressed by senators in 70 percent of nominations encountering significant opposition and were the primary reason expressed in 57 percent of cases.

Differences over public policy can focus on the positions advocated by the nominee or the president. Examples of both have been seen in George W. Bush's nominations for attorney general. At the start of his administration, Bush named

former Senator John Ashcroft to head the Department of Justice. Former senators were once considered shoo-ins for confirmation, but no longer. Ashcroft found his positions on affirmative action and abortion challenged by his Democratic former colleagues and endured a bruising confirmation battle that ended in a 58-42 vote in his favor. Ashcroft left the administration following Bush's reelection and was replaced by White House counsel Alberto Gonzales, whose nomination was also challenged, but for very different reasons. The wars in Afghanistan and Iraq that followed the September 11, 2001, terrorist attacks resulted in many legal questions about the detention of prisoners captured in these wars and the interrogation of detainees. Gonzales was questioned about the administration's policies on interrogation techniques, including whether torture was permitted, and his role in formulating those policies as White House counsel. The 36 votes cast against his confirmation reflected concerns over both the administration's and Gonzales's perspectives on detention and interrogation. Many of these issues were revisited in 2007 when Michael Mukasey was nominated to succeed Gonzales as attorney general.

Is the "Advice and Consent" Power Effective?

The deference to the president shown by the Senate in senior-level executive appointments has caused some observers to question whether the spirit of shared powers reflected in the Constitution's "advice and consent" clause is being satisfied. Richard Fenno characterized the confirmation process as "hardly a limitation at all upon the ultimacy of the presidential decision" (1966, 54). Constitutional scholar James Sundquist concluded that this power "can never be more than a weak instrument for controlling the executive branch" (1989, 319). Others view the rarity of rejections of presidential nominees to executive positions as evidence that the oversight function is succeeding. "Conflict avoidance in the selection process and conflict resolution in the confirmation process combine to make rejection a rarity," Mackenzie argued (1981, 175). "Those individuals likely to be unacceptable to the Senate are usually weeded out before a formal nomination is made." There is no better example of this effect on the president's choice of cabinet officer than George W. Bush's selection in 2006 of Robert Gates to replace Donald Rumsfeld as secretary of defense. Growing public discontent with the war in Iraq and congressional discontent with Rumsfeld meant that Bush had to choose a new secretary from outside his administration, rather than promoting someone from within as is usually done at this stage of a presidency. A nominee respected on Capitol Hill and who had expressed reservations about some aspects of Bush's foreign policy was needed to avoid a wholesale examination of the

administration's Iraq policy. Gates, who had previously served respectably as director of central intelligence and on the Iraq Study Group, which issued a report critical of the administration shortly after the change at the Pentagon was announced, met these criteria. Of course, Gates's case is an interesting one—he had withdrawn his original nomination as CIA director during the Reagan years because of concern about his role in the Iran-Contra Crisis. With a bit of perspective over time, Gates was seen as a perfect replacement for the unpopular Rumsfeld. The confirmation process is also used by senators to extract pledges of support for specific policies or commitments to implement policies in a particular way. Mukasey's nomination to be attorney general is the most recent of many possible examples of this dynamic.

Oddly, for all the criticism directed toward the Senate's consideration of cabinet nominations, the contemporary process might be closer to what the framers of the Constitution intended than at any other time in American history. During the middle part of the nineteenth century, the process was turned on its head, with the Senate effectively dictating to the president the membership of his cabinet. The pendulum of control over appointments shifted toward the president, culminating with almost total presidential control by the mid-twentieth century (Binkley 1947, 152–167; Harris 1953, 65–98; Mackenzie 1981, 11–78). Almost immediate confirmation, with at best perfunctory scrutiny and deliberation by the Senate, became the norm. Today, appointments to the Department of the Interior and the Department of Justice are reviewed carefully, but the nominations of Frederick Seaton and Nicholas Katzenbach, for secretary of the interior in the Eisenhower administration and attorney general in the Lyndon Johnson administration, respectively, were confirmed just days after being announced. Such an approach hardly seems in line with the sharing of powers by the president and Congress that the Constitution's authors envisioned.

Beginning with Richard Nixon, each president has faced a Senate prepared to scrutinize cabinet appointments but not prepared to reject nominations irresponsibly. Alexander Hamilton predicted “it is unlikely that [senators'] sanction would often be refused, where there were not special and strong reasons for the refusal” (Rossiter 1999, 457). While presidents and the senators of their party often bemoan the loss of executive prerogative during contentious confirmation debates, time has borne out Hamilton's prophecy. Even a president encountering an obstructionist Congress can expect four out of five nominations to be confirmed with little or no opposition. The president has retained responsibility for senior-level positions while the Senate performs its watchdog role, raising objections when those “special and strong reasons” arise.

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Study Information

Key terms:

1. **Cabinet:** The group of administrative officials overseeing the major administrative departments of the national government. Because of the importance of their positions, they often stand in the crossfire in the struggle between Congress and the president.
2. **Executive Office of the President:** A group of offices, originally created in the 1930s, whose members serve as some of the president's closest advisers.
3. **Reasons of opposition to executive appointments:**
 - a. *Conflict of interest:* A charge that might arise if a nominee stands to benefit financially from decisions made in office. For example, there often is concern when a cabinet nominee has extensive stock holdings in companies with contracts issued or administered by his or her department.
 - b. *Illegal or unethical behavior:* The confirmation process is ultimately about a nominee's character. Most basic to a nominee's character is whether he or she has violated the law or engaged in unethical behavior.
 - c. *Qualifications:* Though one might expect all candidates to have extensive backgrounds in the areas to which they are appointed, on rare occasions, a nominee's qualifications for a cabinet post will be questioned by senators.
 - d. *Public policy:* The appointments process has become a policy battleground in recent times. Senators may oppose a candidate because they disagree with the policy preferences of the candidate.

Sample free-response question:

One of the ways in which the Senate can exercise a check against presidential power is through the confirmation process of major executive branch officials. In this essay, answer the following:

- (a) Discuss how two of the following might affect the success of a nominee for a cabinet or Executive Office of the President position:
 - (1) Conflict of interest
 - (2) Illegal or unethical behavior
 - (3) Qualifications
 - (4) Public policy
- (b) Using Table 3, identify which of the four issues addressed in (a) above is most likely to be cited as the primary reason for opposing an executive department nominee.
- (c) Using Table 2, identify one important difference between the opposition rates of appointees to major offices.