

What a Confirmation Hearing Might Reveal

By: Heidi King | September 28, 2022

In brief...

Senate confirmation hearings represent one of the most important checks on the power of the presidency. Knowing what to look for is key to understanding the implications of the hearing for future regulations.

Confirmation Hearings for Regulatory Officials Can Influence Regulation

The U.S. Constitution provides the Senate with the responsibility to provide the president “[advice and consent](#)” regarding his nominees prior to their appointment to serve in powerful roles throughout the executive branch, including the Administrator of the Office of Information and Regulatory Affairs.¹ The process by which the Senate scrutinizes the president’s nominees prior to offering advice and consent – in the form of a vote – includes a public hearing where nominees respond to senators’ questions.

Confirmation hearings for regulatory officials represent a powerful venue for Senate influence over future regulatory actions because they provide an opportunity for senators to seek commitments from a nominee regarding their future decisions and actions. Any commitments senators extract during the hearing process are likely to become the subject of future congressional oversight. Because such commitments might constrain or limit his or her future decisions, the nominee will seek to avoid making commitments while also seeking to build a positive impression that will result in a positive Senate vote. The tension between the congressional goal of regulatory commitments and the nominee’s goal of achieving a positive vote while also preserving options will often provide helpful insights and indications of future regulatory priorities and pathways.

A Unique Opportunity for Senators to Influence Regulations

Though many recent vote outcomes fall along party lines, the hearing process remains a powerful tool for the Senate to influence the president and his executive branch regulators. The power of the vote in a confirmation process is distinct from the legislative process because it is held by individual senators, while legislative powers are diffused through the negotiated, compromised language of the legislative drafting process. A confirmation hearing offers individual senators an opportunity to negotiate – subtly, or sometimes not so subtly – a particular commitment from a nominee. Individual senators will not only seek

¹ The U.S. Senate describes the process at <https://www.senate.gov/about/powers-procedures/nominations.htm>.

to gain specific commitments from a nominee but will plan to monitor adherence to those commitments through future oversight, including hearings, requests for information, and letters. In this way, individual senators find in the confirmation hearing a venue for exerting influence on future executive branch regulations.

The nominee in turn will seek to avoid being drawn into commitments that reduce future decision-making authority or alternatives, while at the same time appearing responsive enough to secure the questioner's vote. The nominee will seek to preserve both individual decision-making authority until becoming informed about specific matters that will be under consideration, but also to maintain a broad set of alternatives for the president and to avoid binding the future decision-making options for other executive branch officers.

The tension between senators seeking commitments and a nominee seeking votes provides entertaining political theater but also information regarding how strongly a senator chooses to represent a policy position – either on behalf of constituents or a political caucus. Strong policy differences will, not surprisingly, yield more contentious exchanges.

Long-time observers of regulatory nomination hearings recognize certain behaviors as less informative, although to the unpracticed eye they appear to signal either passion or indifference.

Occasionally, a senator might choose to speak at length, even appearing to grandstand or rail at the nominee despite the fact that the nominee had not yet been appointed to the role. Such displays can appear to represent a strongly held policy position but are instead a performance for the purpose of capturing a video clip that will be posted on the member's website or attracting media attention to demonstrate to constituents at home that the senator is working vigorously to represent them. These displays are understood as such by seasoned observers.

To the casual observer, a senator may seem indifferent to the proceedings – arriving late and leaving the dais during discussion. Interrupted attendance is common and should not be interpreted as disinterest. A senator might be committed to appear at other concurrent hearings, attend meetings, or perform senate floor activities during the duration of the nomination hearing. Attendance is likely to be determined by the relative importance of their other obligations and does not indicate inattention to the nomination.

[Reading the Room Offers Additional Insights](#)

The great majority of the work to prepare for a confirmation hearing is performed by the Senate staff who advise both committee leadership and individual senators, and the outcome of the nomination hearing is reliant upon their efforts and skill. The work of individual staffers to understand the background of a nominee, including their prior policy positions, as well as knowledge of broad Senate priorities and the interests of each member's constituents, combine to imbue in Senate staff an importance to the hearing's outcome that is easy to underestimate. In addition to advising and supporting senators in attendance, staff will sit behind their members wearing an inscrutable expression, except perhaps to look up from a smartphone to observe a specific exchange. The staff will also execute much of the work of recording, retaining, and managing oversight of any commitments earned during the proceedings. Despite their

understated demeanor and low-profile position sitting quietly behind the dais, they are among the most important attendees in the room.

Departures from party-line vote or policy position may be revealed on either side of the aisle. Specific exchanges may signal departure from party-line vote or oversight, in particular where a vigorous or even contentious exchange emerges among a senator and nominee who share the same party identity. A cordial exchange between a senator and nominee of different parties on issues where party views diverge may also signal that the senator is likely to depart from party-line vote. Such dynamics help to predict whether there are uniform expectations regarding future regulatory decisions and actions, as well as the vigor and effectiveness of future congressional oversight.

Additional insights might be gleaned by noting greetings before and after the hearing proceedings, around the dais and in the hearing room. Whether greetings are friendly or formal, and whether greetings are extended to members of the nominee's family are sometimes indications of an alignment on key policy issues or regulatory approaches. A nominee's family members are typically seated behind the witness table as a visible reminder to the senators of the standing and humanity of the nominee; nominees will almost always introduce family in the early part of their testimony as if to soften the vigorous questioning of the senators.

In-person attendees at a nomination hearing may indicate the nature and scope of interests likely to be affected by any commitments sought during the hearing. Members of policy advocacy groups, private industries, and law firms may attend in person, along with others who will benefit from knowledge of the sometimes-subtle policy indications revealed during the course of the hearing. In many cases, these interested parties have suggested some of the questions senators pose.

At the close of the hearing, which can be grueling, it is worth noting how the nominee's advisors manage potential interactions with representatives of the press. If the hearing went well from the administration's perspective, the nominee might be allowed to talk with the press. Senators, too, may take an opportunity to express their views on the nominee's qualifications and performance.

A nomination hearing for an individual chosen by the president to serve as a regulatory official offers the Senate an opportunity to exert influence on future regulatory decisions and approaches, and also foreshadows the nature of the working relationship between the executive and legislative branches on regulatory matters. The power of the confirmation vote wielded skillfully in a nomination hearing also provides a rare opportunity for individual senators to seek to exert their policy preferences in federal regulation. Even if a party-line vote is expected, the hearing process remains an important congressional check on executive authority.

For further reading, consider the Senate's brief history on the [history of the nomination of executive branch officials](#) or a [detailed guide to nomination process and procedures](#) by the Congressional Research Service.