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Super-Majority Votes in the Senate

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Updated April 12, 2010

Congressional Research Service

7-5700

www.crs.gov

98-779

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The Senate has long been known for its emphasis on minority rights, for it provides extensive procedural protections to individuals and minority coalitions. Yet most issues in the Senate are decided by a simple majority vote: one-half-plus-one of the Members voting, assuming the presence of a quorum. For instance, if all 100 Senators vote, the winning margin is at least 51—one more than half the membership of the Senate. Under Senate precedents, “[a] tie vote on a question defeats it.”

Some super-majority votes, however, are explicitly specified in the Constitution; implicitly, they also inhere in authority granted in Article I, Section 5, which says, “Each chamber may determine the Rules of Its Proceedings.” Under this affirmative constitutional power, the Senate has imposed on itself a number of additional super-majority (sometimes called “extraordinary majority”) requirements. Worth review, then, are the constitutional and Senate procedural-based exceptions to the general principle that Senators commonly decide issues by simple majority vote.

Constitutional Super-Majority Requirements

In the judgment of several of our Founding Fathers, among the infirmities of the Articles of Confederation was a super-majority requirement for deciding such questions as coining money, appropriating funds, and determining the size of the army and navy. As Alexander Hamilton declaimed in *Federalist* No. 22, “To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision), is, in its tendency, to subject the sense of the greater number to that of the lesser.” Overall, the Framers generally favored decision-making by simple majority vote. This view is buttressed by the grant of a vote to the Vice President (Article I, Section 3) in those cases where the Senators are “equally divided.”

On the other hand, the Framers also recognized the virtue of super-majority votes in certain circumstances. In *Federalist* No. 58, James Madison (like Hamilton a proponent of majority voting for most things) noted that super-majority votes could serve as a “shield to some particular interests, and another obstacle generally to hasty and partial measures.” Hamilton, too, in *Federalist* No. 73 highlighted the benefits of requiring an extraordinary majority of each chamber to overturn a president’s veto. “It establishes a salutary check upon the legislative body,” he said, “calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.”

The original Constitution requires a two-thirds vote of either the House, the Senate, or both in five situations. They include (1) overriding presidential vetoes, Article I, Section 7, clause 2; (2) removing Federal officers through impeachment proceedings with conviction by two-thirds vote of the Senate, Article I, Section 3, clause 6; (3) ratifying treaties by two-thirds vote of the Senate, Article II, Section 2, clause 2; (4) expelling members from the House or Senate, Article I, Section 5, clause 2; and (5) proposing constitutional amendments, Article V. In addition, the Fourteenth Amendment to the Constitution, ratified in 1868, disallowed anyone who engaged in “insurrection or rebellion” from holding any civil or military office unless each house removed this disability by a two-thirds vote. The 25th Amendment, ratified in 1967, addresses the issues of presidential succession and inability. In the case of an Acting President, the House and Senate, by a two-thirds vote of each chamber, may determine that “the President is unable to discharge the powers and duties of his office.”

Super-Majority Requirements Specified in Senate Rules and Precedents

The Senate has a number of rules or precedents that require either a two-thirds or a three-fifths vote. The super-majority requirements include the following.

Invoke Cloture

Under Senate Rule XXII, a three-fifths vote of all Senators (60 of 100) is required to invoke cloture (the closure of debate) on most questions. However, a two-thirds vote of the Senators present and voting is required to invoke cloture on measures or motions to amend Senate rules. Once cloture has been invoked, the 30 hours of debate available during post-cloture consideration may be extended by a three-fifths vote of all Senators duly chosen and sworn.

Suspend the Rules

Senate precedents stipulate a two-thirds vote of the Senators present, a quorum being present, is required to suspend the standing rules of the Senate.

Postpone Treaty Consideration Indefinitely

Senate Rule XXX states that a motion to postpone treaty consideration indefinitely “shall be decided by a vote of two-thirds.”

Make A Bill A Special Order

The Senate has an antiquated precedent (still listed in the modern compilation of precedents) which states that “a two-thirds vote is required to make a bill a special order.” On April 1, 1884, the chair noted that a Senator moved that further consideration of S. 1448 be postponed until a specific date and time, “and that it be made the special order for that time. The question is on agreeing to the motion ... , which requires a two-thirds vote.”

Waive the Congressional Budget Act of 1974

The 1974 Budget Act, as amended, contains provisions that operate as rules of the Senate. To set aside budget process procedures if a valid point of order is raised under the Budget Act, a three-fifths vote of all Senators may be necessary. Similarly, if a Budget Act provision establishes a three-fifths waiver requirement, then any appeal to overturn the chair’s ruling regarding that provision also requires a three-fifths vote of all Senators. See CRS Report 97-865, *Points of Order in the Congressional Budget Process*, by James V. Saturno.

Senate Rule XXVIII

The Honest Leadership and Open Government Act of 2007 (P.L. 110-81) amended Senate Rule XXVIII to modify restrictions in that rule regarding “out of scope” matter contained in conference reports. Specifically, the change prohibits conference reports from including provisions not contained in either the House or Senate version of the legislation. These so-called air-dropped provisions are subject to points of order—“Mr. President, I move to waive all applicable sections of Rule XXVIII”—which the Senate can set aside by vote of 60 Senators duly

sworn and chosen. A vote to waive means that the air-dropped matter remains in the conference report. If fewer than 60 Senators vote to waive, the presiding officer then rules on the point(s) of order. If the chair sustains the points of order, the offending material is removed from the conference report and the remaining matter is converted into an amendment for subsequent disposition by the Senate. Appeals of the chair's decisions require an affirmative three-fifths vote of the Senators duly chosen and sworn to sustain the rulings of the presiding officer. Worth a brief mention: under the old rule, a successful point of order would defeat the conference report; under the amended rule, the entire conference report is not put at risk of rejection if air-dropped provisions are stricken from the bicameral accord.

Senate Rule XLIV

The Honest Leadership and Open Government Act added a new Rule XLIV to the Senate's rulebook. One of its fundamental purposes is the public disclosure of "earmarks"—referred to as either congressionally directed spending provisions (discretionary or mandatory), limited tax benefits, and limited tariff benefits—contained in bills, joint resolutions, accompanying committee report language, or conference reports (and their accompanying joint explanatory statements). For example, in the case of a conference report and its joint explanatory statement, sponsors of earmarks must be identified through lists, charts, or other means and be available on a publicly accessible congressional website at least 48 hours before the conference report is voted upon. These requirements can be waived by an affirmative vote of three-fifths of the Senate or by joint agreement of the majority and minority leaders if there are disruptions in Internet services. Moreover, Senators may raise points of order against conference reports if they contain new (or "air-dropped") discretionary or mandatory spending earmarks not considered by either chamber. Like Rule XXVIII, points of order against air-dropped congressionally directed spending provisions in conference reports can be waived by a three-fifths vote of the Senate. To sustain appeals of the chair's rulings require an affirmative vote of three-fifths of the Senators duly chosen and sworn. For further discussion of the revisions to Senate Rules XXVIII and XLIV, see CRS Report RS22733, *Senate Rules Restricting the Content of Conference Reports*, by Elizabeth Rybicki.

Statutory Pay-As-You-Go Act of 2010

Title I of a law increasing the public debt limit is cited as the Statutory Pay-As-You-Go Act of 2010 (P.L. 111-139). The fundamental objectives of the PAYGO Act are to require budget neutrality on new revenue and direct (mandatory) spending legislation. For example, tax cuts or increases in entitlement spending must be *offset* by equivalent amounts through revenue increases or spending reductions in other mandatory (entitlement) programs. Two sections of the act authorize supermajority votes.

Section 4(g) provides that a provision in a measure can have an "emergency" designation, which sets aside the offset requirement of the PAYGO Act. If a successful point of order is made against the emergency designation, the provision "shall be stricken from the measure and may not be offered as an amendment from the floor." However, this section of the PAYGO Act may be waived or suspended by an affirmative vote of three-fifths of the Senators duly chosen and sworn. Appeals from the chair's rulings also require an identical affirmative vote to sustain decisions of the presiding officer.

Section 113 imposes limitations on changes to the Social Security Act. Under the PAYGO law, the Senate (and House) may not consider any bill or resolution, pursuant to any expedited procedure, that proposes changes to the Social Security Act based on the recommendations of any

commission, including the Task Force for Responsible Fiscal Action. Appeals of the chair's rulings also require an affirmative vote of three-fifths of the Senators duly sworn and chosen. (On February 18, 2010, President Obama issued an executive order creating an 18-member commission on fiscal responsibility and reform to recommend ways to improve the government's long-term debt and deficit outlook.)

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