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Constitutional Points of Order in the Senate

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Summary

In general, the Senate's presiding officer does not take the initiative in enforcing Senate rules and precedents. Instead, a Senator may raise a point of order if he or she believes the Senate is taking (or is about to take) an action that violates the rules. In most circumstances, the presiding officer rules on the point of order on advice of the Parliamentarian; that ruling is typically subject to an appeal on which the Senate votes (unless the appeal is tabled or withdrawn). Pursuant to Rule XX, however, in certain circumstances a point of order is not ruled on by the presiding officer but is instead submitted to the Senate for its decision. A point of order that a pending matter (a bill or amendment, for example) violates the U.S. Constitution presents one such circumstance. This report explains Senate rules, precedents, and practices in regard to these constitutional points of order, including an analysis of recent cases in which such a point of order has been raised, and will be updated as events warrant.

A Senator can raise a constitutional point of order against any pending matter unless a unanimous consent agreement prohibits points of order or provides for a vote on the pending matter without any intervening action. A unanimous consent agreement may also affect the time at which it is in order to raise a point of order. If a specific amount of debate has been agreed to for the pending matter, the point of order cannot be raised until the time has expired or been yielded back. While past practice has varied, the Senate's rules and precedents currently require a constitutional point of order to be submitted to the Senate for disposition, with a majority of those voting (a quorum being present) required to sustain the point of order. The point of order is debatable, though the time for debate may be subject to limitations under a unanimous consent agreement or under cloture, in some circumstances, pursuant to statutory provisions. The submitted point of order is, however, subject to a non-debatable motion to table.

This report identifies 17 constitutional points of order that have been raised and received a Senate vote since 1989. Eleven of these cases were disposed of negatively.

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Raising a Constitutional Point of Order

The process for raising a constitutional point of order against a pending² question does not differ from that for raising other points of order. A Senator seeking to raise a constitutional point of order would simply address the presiding officer at a time when no one else holds the floor. The Senator might say, “Mr. President, I rise to point of order” or simply “Point of order, Mr. President” and then proceed to state and explain the way in which the pending matter violates the Constitution.

Raising a constitutional point of order (or any point of order) confers no special recognition rights—unless a unanimous consent (UC) agreement has provided for it being raised, or considered as raised, at a certain time. No Senator can interrupt another Senator without his or her consent for the purposes of raising a point of order.³ In addition, a Senator loses the floor after he or she has raised the point of order, though the Senator could again seek recognition from the presiding officer once the point of order is submitted.

Effect of Unanimous Consent Agreements

A UC agreement may affect the availability of any point of order when the agreement includes language that prohibits all or certain points of order. In addition, if a UC agreement specifies that a vote on a matter would occur “at a time certain without any intervening action,” it would preclude a point of order being raised.⁴ Further, if a UC agreement limits the time for debate of a matter, then the point of order can be raised against it only after the debate time has been used or yielded back—except by unanimous consent. This is because if a matter has been guaranteed—by UC—a certain amount of debate or a vote at a time certain, then a new UC agreement is required to allow a point of order before that debate is complete, since the disposition of the point of order could have the effect of making the matter fall.

¹ For additional information on points of order in the Senate more generally, see CRS Report 98-306, *Points of Order, Rulings, and Appeals in the Senate*, by (name redacted) .

² Points of order may only be raised against a pending matter. Floyd M. Riddick and Alan S. Frumin, *Riddick’s Senate Procedure* (hereinafter, *Riddick’s*) 101st Cong., 2nd sess., S. Doc. 101-28 (Washington: GPO, 1992), p. 994.

³ *Ibid.*, pp. 990, 993-994. A Senator yielding to another Senator for this purpose would lose the floor.

⁴ *Ibid.*, p. 1358.

Disposition of a Constitutional Point of Order

Current and Historical Practice

Under current practice and precedents relating to Rule XX, a point of order that a pending matter is unconstitutional is submitted to the Senate for decision rather than ruled upon by the presiding officer.⁵ The logic behind the relevant precedents is that while the presiding officer has authority to interpret Senate rules, he or she does not have the authority to interpret the Constitution.

While the Senate, in its earliest history, similarly disposed of constitutional points of order through a vote of the body, there were some intervening periods during which practice varied.⁶ For an approximately 40-year period in the late 19th and early 20th centuries, these points of order were not submitted for disposition, but instead the proceedings resembled the current practice in the House of Representatives, under which Members are expected to implicitly express their opinion on the constitutionality of a measure by their vote for or against the measure itself.⁷ However, the Senate has generally followed its current practice of submitting constitutional points of order since establishing a relevant precedent in 1924.⁸ Sustaining the submitted point of order requires an affirmative vote of a majority of Senators voting, assuming a quorum is present.

A point of order submitted to the Senate for decision is debatable⁹ except when the Senate is operating under cloture.¹⁰ Under most circumstances, accordingly, a cloture process could theoretically be used to end extended debate and force a vote on the point of order.¹¹ Under some circumstances, statutory provisions may limit debate on points of order; these debate limits would apply equally to a submitted constitutional point of order.¹²

⁵ *Ibid.*, pp. 52-54, 685, 987.

⁶ I am indebted to my CRS colleagues Richard Beth and (name redacted) for research and insight they provided on historical practices prior to the 100th Congress.

⁷ Asher C. Hinds, *Hinds' Precedent of the House of Representatives of the United States*, vol. II, Sections. 1255, 1318-1320 (Washington: GPO, 1907); Clarence Cannon, *Cannon's Precedents of the House of Representatives of the United States*, vol. VIII, Section 3427 (Washington: GPO, 1935).

⁸ In *Riddick's* discussion of the constitutionality of amendments, the June 16, 1924, case is the oldest cited precedent providing for submission to the Senate of a constitutional point of order. While this was not the first case of the Senate voting on a constitutional point of order, it appears to be the guiding precedent most frequently cited in subsequent years for disposition of a constitutional point of order. One apparent exception to the application of the precedent in subsequent years occurred on August 27, 1940, when a Senator made a point of order that it “is a constitutional matter for the Senate to have a quorum present.... I make a constitutional point of order.” *Congressional Record*, vol. 86, p. 11036. In this circumstance, the chair did not submit the question to the Senate, and the Senate—via voice vote—upheld the ruling of the presiding officer on appeal. The basis on which the point of order was made—and the possible perception of its dilatory intent—may have led the Senate to consider this a case to which the precedent did not apply.

⁹ The fact that submitted points of order are typically subject to extended debate in the Senate is central to recent discussions about potential changes in Senate rules and practices. For more information, see CRS Report R42929, *Procedures for Considering Changes in Senate Rules*, by (name redacted).

¹⁰ *Riddick's*, pp. 53, 686, 766, 987, 989. Once cloture is invoked on a question, Rule XXII prohibits debate on points of order, as well as on appeals of the chair in circumstances on which the chair has ruled.

¹¹ The cloture process provided by Rule XXII involves the filing of a cloture petition, a layover of two days of Senate session, and then a vote that requires the support of three-fifths of the Senate to invoke cloture. If cloture is invoked, the point of order would be subject to a maximum of 30 additional hours of Senate consideration.

¹² For example, pursuant to Section 305(c)(2) of the Congressional Budget Act, points of order on a budget resolution or a reconciliation measure are subject to one hour of debate. A constitutional point of order raised in the Senate on August 6, 1993 (against the conference report on a reconciliation measure), provides an example of the application of this statutory debate limit to a point of order.

Availability of the Motion to Table

While a submitted point of order is generally subject to extended debate, it is also subject to a non-debatable motion to table.¹³ The tabling motion could be made at any time after the point of order has been raised unless the Senate had agreed by UC to provide a specific amount of time for debate on the point of order, in which case the tabling motion could not be made until the time has expired or been yielded back. Agreeing to a tabling motion requires a majority of those voting (assuming a quorum is present). If the motion is agreed to, it adversely and permanently disposes of the point of order. Thus, if a Senator makes a motion to table the point of order, a majority of Senators could dispose of the point of order by agreeing to the motion to table. This disposition would have the effect of determining the constitutional point of order not to be well taken.

Effect of Unanimous Consent Agreements

A unanimous consent agreement may affect the debatability of a submitted point of order. For example, if a UC agreement sets a time certain for a vote on the matter on which a point of order is contemplated, then a submitted point of order raised against that matter would be subject to debate only until that time expires. Other language in a UC agreement (e.g., that establishes a specific amount of debate time on a pending amendment and provides for another action immediately upon the disposition of that amendment) may also preclude extended debate on a constitutional point of order raised against that amendment.¹⁴

Recent Instances of Constitutional Points of Order in the Senate

Constitutional points of order are not common, relative to many other points of order that are more routinely made (e.g., that an amendment violates the Congressional Budget Act or that an amendment to an appropriations bill constitutes legislation). **Table 1** presents data on constitutional points of order in the Senate made since 1989 (the start of the 101st Congress) on which the Senate voted, as identified in the *Legislative Information System* (LIS) and the *Daily Digest*. (An examination of references to constitutional points of order in the full text of the *Congressional Record* for the Congresses in question did not produce any additional examples.) The table does not include any constitutional points of order that were raised but then withdrawn before a Senate vote or those that may have been rendered moot because the underlying matter was withdrawn or otherwise negatively disposed of.

¹³ *Riddick's*, pp. 989, 992.

¹⁴ For more information on precedents providing that debate is restricted on subsidiary motions or amendments when the Senate has agreed to a debate limitation on the underlying matter, see *Riddick's*, pp. 726, 1328, and 1342-1343.

Table I. Constitutional Points of Order on Which the Senate Voted101st Congress to April 20, 2017 (115th Congress)

Congress	Date	Matter on Which Point of Order Raised	Disposition of Point of Order	Vote	Basis on Which Point of Order Raised
113	12/13/14	Division L of the House amendment to the Senate amendment to H.R. 83	Not well taken	22-74	multiple sections of Articles I and II (in relation to powers of Congress and the President) ^a
111	12/23/09	Amdt. 2786 to H.R. 3590	Not well taken	39-60	10 th Amendment (reserved powers)
111	12/22/09 ^b	Amdt. 2786 to H.R. 3590	Not well taken	39-60	Art. I, Section 8; 5 th Amendment (powers of Congress; takings)
111	7/6/09	Amdt. 1365 to H.R. 2918	Not well taken	23-70 ^c	Art. I, Section 8; 10 th Amendment (powers of Congress; reserved powers)
111	2/25/09	S. 160	Not well taken	36-62	Art. I, Section 2 (basis for congressional representation)
107	6/29/01	Motion to commit S. 1052 with instructions	Sustained	57-41	Art I, Section 7, clause 1 (Origination Clause)
107	6/21/01	Amdt. 807 to S. 1052	Sustained	52-45	Art. I, Section 7, clause 1 (Origination Clause)
106	6/8/00	Amdt. 3214 to Amdt. 3210 to S. 2549	Not well taken	42-57	Art. I, Section 7, clause 1 (Origination Clause)
106	2/24/99	Amdt. 29 to S. 4	Sustained	80-20	Art. I, Section 7, clause 1 (Origination Clause)
105	9/18/97	Amdt. 1224 to H.R. 2107	Sustained	59-39	Art I, Section 7, clause 1 (Origination Clause)
103	8/6/93	Conference Report on H.R. 2264	Not well taken	44-56	5 th Amendment (Due Process)
103	6/17/93	"S. 3, as amended" ^d	Not well taken	39-59	1 st Amendment (freedom of speech)
102	4/10/92	Amdt. 1784 to S.Con.Res. 106	Not well taken	45-45	"proposes to impinge upon the rights of citizens to travel freely from State to State" ^e
102	10/29/91	Amdt. 1287 to Amdt. 1274 to S. 1745	Not well taken	22-76	"proposes an unconstitutional intrusion into the affairs of the executive and legislative branches" ^f
102	9/24/91	Amdt. 1187 to S. 1722	Sustained (after motion to table failed, 39-60)	voice vote	Art I, Section 7, clause 1 (Origination Clause)
101	6/26/90	Amdt. 2066 to S.J.Res. 332	Sustained	51-48	1 st Amendment (freedom of speech)
101	7/13/89	Amdt. 255 to S. 358	Tabled	56-43	Art. I, Section 2 (basis for Congressional representation)

Source: Congressional Research Services analysis of the Legislative Information System (LIS) and *Congressional Record*.

Notes: The table does not include any constitutional points of order that may have been raised but were not disposed of through a vote of the Senate (e.g., were withdrawn or rendered moot when the underlying question was withdrawn).

- a. The constitutional grounds for the point of order were stated as violation of “the separation of powers embodied in the vesting clauses of article I, section I, and article II, section I; the enumerated powers of Congress, stated in article I, section 8; and the requirement that the President take care that the laws be faithfully executed as stated in article II, section 3.” See *Congressional Record*, December 13, 2014, daily edition, p. S6813, which also includes discussion of the presidential actions cited in the rationale behind the point of order.
- b. The point of order was raised on December 22, 2009, but pursuant to the provisions of a unanimous consent agreement, disposition occurred on the following day (December 23, 2009).
- c. The official Senate vote tally for July 6, 2009, was actually recorded as 70-23, because the presiding officer put the question as whether or not “to allow the amendment” rather than as a vote on the point of order itself.
- d. The *Congressional Record* indicates that the point of order was raised on “S.3, as amended” by the substitute amendment, Amdt. 366. However, the Senate had not yet agreed to Amdt. 366 at the time the point of order was submitted. Both Amdt. 366 and S. 3 were pending, however, so either was subject to a point of order at the time.
- e. The Senator making the point of order did not identify the specific constitutional provision the amendment might violate but instead used the language quoted in the table to explain the alleged violation. *Congressional Record*, April 10, 1992, daily edition, p. S5475.
- f. The Senator making the point of order did not identify the specific constitutional provision the amendment might violate but instead used the language quoted in the table to explain the alleged violation. *Congressional Record*, October 29, 1991, daily edition, p. S15390.

Of the cases identified, more than half (11 of 17) were disposed of negatively, either through a direct vote on the point of order or via a successful motion to table; the remaining six points of order were sustained. Five of the six sustained points of order were in relation to an alleged violation of the Origination Clause (Article 1, Section 7, clause 1, which provides that only the House may originate revenue measures).¹⁵ Of the 11 points of order that were not well taken, 10 were raised in relation to other constitutional provisions.

The table makes clear that constitutional points of order raised in the 106th and 107th Congresses were raised exclusively on the grounds that the pending matter would violate the Origination Clause. In the most recent Congresses (111th and 113th) in which constitutional points of order were raised, however, they were raised only in relation to other provisions of the Constitution. This dominance of points of order on the grounds of other (non-Origination Clause) constitutional provisions is also evident in the Congresses spanning the 1990s. This recent ebb and flow in the constitutional grounds on which such points of order are raised is similar to the historical variation that characterizes previous periods. While the Origination Clause was the primary constitutional provision invoked prior to the 1960s, other constitutional provisions were referenced with almost equal frequency in the subsequent decades. For example, from the 1960s to 1980s, points of order were raised on constitutional grounds such as the ability of the Senate to make its own rules, the process for proposing constitutional amendments, representation and apportionment issues, the line item veto, and the Equal Protection Clause. As noted in the table above, the two most recent decades included points of order raised in relation to the First Amendment, the Due Process Clause, questions of congressional apportionment and representation, and the powers afforded to Congress (and reserved to the states), among others.

¹⁵ For more information on the Origination Clause and its enforcement, see CRS Report RL31399, *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement*, by (name redacted) .

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