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Super-Majority Voting Requirement for Tax Increases: An Overview of Proposals for a Constitutional Amendment

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Summary

This report is an overview of proposed constitutional amendments (including H.J.Res. 50 and H.J.Res. 54, 108th Cong.) to require a super-majority vote for certain tax increases. Proponents of an extraordinary majority requirement argue that it would lead to greater public confidence in the predictability and stability of the tax system; opponents counter that such a requirement would disregard the constitutional principle of majority rule. There are now only a few constitutional provisions which expressly impose super-majority voting requirements.

This report will be updated as legislative action occurs. For additional information on this topic, see CRS Report 98-368, *A Tax Limitation Constitutional Amendment: Issues and Options Concerning a Super-Majority Requirement*.

Joint resolutions have been introduced in the House in the 108th Congress to amend the Constitution to require a super-majority vote to adopt certain tax increases.[1] H.J.Res. 50, introduced by Representative Sessions on April 10, 2003, and H.J.Res. 54, introduced

[1] A "simple majority" is a majority of legislators present and voting when a quorum is present (*i.e.*, one-half plus one of the Members voting). A "constitutional majority" is a majority of Members elected to a House and entitled to vote. An "extraordinary majority" (sometimes referred to as a "super-majority") requires some higher percentage of Members to pass a measure than either a simple or a constitutional majority. See *Dyer v. Blair*, 390 F. Supp. 1291, 1296 n.4, 1305 (N.D.Ill. 1975)(three-judge court).
Constitutional amendments have been proposed (see, *e.g.*, H.J.Res. 6, 108th Cong.) that would require that bills to increase revenue be approved by a constitutional majority of each House. Such proposed amendments are beyond the scope of this report. Also not included in the report are proposed amendments to require a rollcall vote on revenue increases, unless such measures also require a super-majority vote.

by Representative Ose on April 12, 2003, are identical measures[2] which provide that "any bill, resolution, or other legislative measure changing the internal revenue laws shall require for final adoption in each House the concurrence of two-thirds of the Members of the House voting and present, unless that bill, resolution, or other legislative measure is determined at the time of adoption, in a reasonable manner prescribed by law, not to increase the internal revenue by more than a de minimis amount." Certain requirements established by H.J.Res. 50 and H.J.Res. 54 could be waived by Congress when a declaration of war is in effect or when the United States is engaged in a military conflict which causes an imminent and serious threat to national security and which is declared by a joint resolution and enacted into law.

If any proposed constitutional amendment to require a super-majority vote for certain tax measures were to be approved by two-thirds of each House of Congress and ratified by three-fourths of the states, it would join a relative handful of existing constitutional provisions which expressly impose super-majority voting requirements for actions such as passing a bill over a presidential veto or approving a treaty. Although there is no constitutional provision requiring that the House and Senate act by majority vote[3] in instances not governed by one of the provisions mandating a super-majority, both bodies do, in most instances, operate by majority rule.[4]

In the last seven years, the House has considered constitutional amendments to require a two-thirds vote on certain tax legislation. In 1996, on tax day, the House considered, but did not approve, H.J.Res. 159, 104th Cong. In 1997, also on tax day, the House debated, but did not approve, a similar measure, H.J.Res. 62, 105th Cong. On April 22, 1998, the House considered, but failed to approve, another such measure, H.J.Res. 111, 105th Cong.[5] In 1999, on tax day, the House debated, but did not approve, H.J.Res. 37, 106th Cong.[6] On April 12, 2000, the House considered, but declined to approve, H.J.Res. 94, 106th Cong.[7] On April 25, 2001, the House debated, but did not approve,

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[2] The proposals introduced in the 108th Congress are identical to H.J.Res. 41,107th Cong., which was introduced by Representative Sessions on March 22, 2001. On April 4, 2001, the House Committee on the Judiciary considered H.J.Res. 41 and ordered it to be reported by a vote of 17-9. See H.Rept. 107-43, 107th Cong., 1st Sess. (2001).

[3] The Constitution does specify that "a majority of each [House] shall constitute a quorum to do business." Article I, § 5, cl. 1.

[4] *Jefferson's Manual of Parliamentary Practice*, § XLI, states: "The voice of the majority decides; for the *lex majoris partis* is the law of all councils, elections, etc., where not otherwise expressly provided...." The Supreme Court observed in *United States v. Ballin*, 144 U.S. 1, 6 (1892): "...[T]he general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations."

[5] See 144 *Cong. Rec.* H2133-64, H2170-71 (daily ed. Apr. 22, 1998).

[6] See 145 *Cong. Rec.* H2061-98 (daily ed. Apr. 15, 1999).

[7] See 146 *Cong. Rec*. H2128-47 (daily ed. Apr. 12, 2000).

H.J.Res. 41, 107th Cong.[8] And last year, on June 12, the House once again considered, but did not approve, such a measure, H.J.Res. 96, 107th Cong.[9]

Scheduling of the vote in the House on H.J.Res. 159 in the 104th Congress was the fulfillment of a promise made by the Republican leadership in January, 1995, when the House approved a balanced-budget constitutional amendment but rejected a version of that amendment, offered by Representative Barton, that would have required a three-fifths super-majority in both Houses to raise taxes. The three-fifths proviso was included in the Contract with America.

Although the House did not approve a constitutional amendment imposing a three-fifths requirement for tax increases, it did include in a package of House rules changes adopted on the first day of the 104th Congress a provision requiring that an income tax rate increase be approved by three-fifths of the Representatives voting.[10] H.J.Res. 50 and H.J.Res. 54, 108th Cong., would be more stringent than the present House rule in several respects. In contrast to the rule, the amendments: (a) would apply to both chambers, not just the House; (b) would impose a super-majority requirement of two-thirds, rather than three-fifths; (c) would be subject to waiver only on the grounds specified in the amendments; and (d) would apply to a broader range of measures.[11]

The National Commission on Economic Growth and Tax Reform, chaired by former Housing and Urban Development Secretary Jack Kemp, maintained that an extraordinary majority requirement would lead to greater public confidence in the predictability and stability of the tax system. Proponents of the two-thirds voting requirement argue that since it would make raising taxes more difficult, it would compel Congress to be "more fiscally responsible"[12] and to "focus on options other than raising taxes to manage the federal budget."[13] Proponents also argue that the two-thirds requirement would preclude

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[8] See 147 *Cong. Rec.* H1563-82 (daily ed. Apr. 25, 2001).

[9] See 148 *Cong. Rec.* H3472-87 (daily ed. June 12, 2002).

[10] The provision added the following new paragraph to House Rule XXI, cl. 5: "(c) No bill or joint resolution, amendment, or conference report carrying a Federal income tax rate increase shall be considered as passed or agreed to unless so determined by a vote of not less than three-fifths of the Members voting." (The rule was recodified in the 106th Congress as Rule XXI, cl. 5(b).) A lawsuit challenging the rule was dismissed for lack of standing. *Skaggs v. Carle*, 898 F. Supp. 1 (D.D.C. 1995), *aff'd*, 110 F.3d 831 (D.C. Cir. 1997). The suit was predicated on the premise that the rule was violative of the Constitution which, except in a few instances in which it specifically provides otherwise, seems to implicitly incorporate the parliamentary principle of majority rule. Of course, a constitutional amendment mandating a super-majority vote for tax increases would not be vulnerable to a comparable legal attack.

[11] Whereas the House rule applies only to a measure "carrying *a Federal income tax rate increase*" (emphasis added), H.J.Res. 50 and H.J.Res. 54 would apply to any measure "changing the internal revenue laws."

[12] 145 *Cong. Rec.* H2081 (daily ed. Apr. 15, 1999)(remarks of Rep. Bliley).

[13] H.Rept. 105-50, 105th Cong., 1st Sess. 2 (1997)(report on H.J.Res. 62, 105th Cong.).

tax increases without a "national consensus of a super-majority"[14] and would make it clear that legislation raising taxes is a matter of special importance.[15]

Opponents of an extraordinary majority requirement argue that the proposed amendment "disregards [the] constitutional principle of majority rule,"[16] and would thus shift control of tax legislation to a minority of Members in each House,[17] producing "tyranny" by a minority of one-third.[18] Opponents also contend that an extraordinary majority requirement is impractical, as demonstrated by several instances in which the House has waived its rule mandating a three-fifths vote for tax increases,[19] and would lead to considerable litigation.[20]

Proponents of the two-thirds voting requirement also have differed with opponents as to the scope of tax legislation that would be encompassed by a constitutional amendment that imposes a super-majority voting requirement,[21] as to the application of such an amendment to legislation to close "loopholes" that may benefit certain taxpayers,[22] and as to whether a citizen would have standing to seek a judicial ruling concerning congressional compliance with the two-thirds rule.[23] Finally, advocates of a two-thirds majority requirement have argued that the Constitution presently requires such

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[14] 146 *Cong. Rec*. H2144 (daily ed. Apr. 12, 2000)(remarks of Rep. Barton, of Texas). See also 147 *Cong. Rec*. H1580 (daily ed. Apr. 25, 2001)(remarks of Rep. Sensenbrenner).

[15] 142 *Cong. Rec.* 2879 (1996)(remarks of Senator Kyl).

[16] H.Rept. 105-50, *supra* note 13, at p. 14 (dissenting views). See also 148 *Cong. Rec*. H3481, H3484 (daily ed. June 12, 2002)(remarks of Rep. Nadler).

[17] 148 *Cong. Rec.* H3473 (daily ed. June 12, 2002)(remarks of Rep. Frost).

[18] 146 *Cong. Rec.* H2143 (daily ed. Apr. 12, 2000)(remarks of Rep. Neal, of Massachusetts). It has also been argued that the proposed amendment "dilutes the vote of Members ...." 147 *Cong. Rec*. H1576 (daily ed. Apr. 25, 2001)(remarks of Rep. Jackson-Lee).

[19] H.Rept. 107-43, *supra* note 2, at p. 57.

[20] 145 *Cong. Rec.* H2073 (daily ed. Apr. 15, 1999)(remarks of Rep. Conyers); *id.* at H2093 (remarks of Rep. Watt, of North Carolina). Critics claim that the use of "vague" terms (such as "de minimis" in H.J.Res. 96, 107th Cong.) would give rise to litigation.

[21] Proponents have differed with opponents in regard to the meaning of the exception from the two-thirds requirement for tax legislation that increases the internal revenue by only a de minimis amount. *Compare, e.g.,* letter of Apr. 7, 1997, from House Ways and Means Committee Chairman Bill Archer to House Judiciary Committee Chairman Henry Hyde (*reprinted* at 144 *Cong. Rec.* H2137-38 (daily ed. Apr. 22, 1998)) *with* remarks of Representative Scott (*id*. at H2137). Proponents have also differed with opponents in regard to the meaning of the "internal revenue laws" covered by the two-thirds requirement (*compare* H.Rept. 107-43, *supra* note 2, at p. 3 *with id*. at pp. 49, 56 (dissenting views)) and in regard to the question of whether the two-thirds requirement would apply only to bills increasing the internal revenue by more than a de minimis amount or also to bills that decrease revenue or that are revenue neutral. *Compare* H.Rept. 107-43, *supra*, at pp. 3, 8 *with id* at p. 53 (dissenting views).

[22] *Compare, e.g.*, 148 *Cong. Rec.* H3474 (daily ed. June 12, 2002)(remarks of Rep. Doggett) *with id.* at H3476 (remarks of Rep. Barton, of Texas).

[23] *Compare* H.Rept. 107-43, *supra* note 2, at p. 7 *with id*. at p. 57 (dissenting views) and *with* 147 *Cong. Rec*. H1577 (daily ed. Apr. 25, 2001)(remarks of Rep. Weiner).

an extraordinary majority for the most important governmental decisions (*e.g.*, amending the Constitution or impeaching the President) and that the "same high standard" should be required to raise taxes.[24] However, critics have contended that the Constitution currently requires an extraordinary majority for "process issues" (*e.g.*, amending the Constitution or overriding a presidential veto) and that a two-thirds vote requirement should not be extended to "policy determinations."[25]

[24] 145 *Cong. Rec.* H2082 (daily ed. Apr. 15, 1999)(remarks of Rep. Hall, of Texas).

[25] *Id*. at H2077 (remarks of Rep. Cardin).

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