

Points of Order, Rulings, and Appeals in the Senate

Valerie Heitshusen

Specialist on Congress and the Legislative Process

April 7, 2017

Congressional Research Service

7-5700

www.crs.gov

98-306

Congressional Operations Briefing— Capitol Hill Workshop

Congressional Operations Briefing and Seminar

The definitive overview of how Congress works.

This intensive course is offered as a
3-day public Briefing and as a tailored
on-site 3, 4 or 5-day program.

Public Briefings are offered throughout the year in Washington, DC.
Space is limited.

Dates, Agenda, Previous Faculty, and Secure Online Registration:

TCNCHW.com

On-site Congressional Briefings and
Capitol Hill Workshops for agencies:

CLCHW.com

703-739-3790 TheCapitol.Net



Non-partisan training and publications that show how Washington works.™

PO Box 25706, Alexandria, VA 22313-5706
703-739-3790 • www.thecapitol.net



TheCapitol.Net is on the
GSA Schedule, 874-4,
for custom on-site training.
GSA Contract GS02F0192X



Courses approved for CEUs from George Mason University

All of our courses and workshops include extensive interaction with our faculty, making our courses and workshops both educational as well as mini-consulting sessions with substantive experts.

Our Upcoming Schedule of Courses can be seen online on our web site or at TCNCourses.com.

All of our courses and any combination of their topics can be customized for on-site training for your organization—we are on GSA Advantage, Contract GS02F0192X.

thecapitol.net
703-739-3790

The Senate's presiding officer typically does not have responsibility for proactively ensuring that matters under consideration comply with the rules. Instead, Senators may enforce the Senate's legislative rules and precedents by making points of order whenever they believe that one of those rules or precedents is, or is about to be, violated. Under some circumstances, a ruling by the presiding officer determines whether or not the point of order is well taken. Under others, the Senate itself decides the point of order, usually by majority vote.¹

Senate Rule XX states in part that “[a] question of order may be raised at any stage of the proceedings, except when the Senate is voting or ascertaining the presence of a quorum, and, unless submitted to the Senate, shall be decided by the Presiding Officer without debate, subject to an appeal to the Senate.”

Points of Order

Under most circumstances, a Senator may make a point of order against a question (whether it be a bill, amendment, motion, or something else) at any time that the question is pending before the Senate.² The primary exception arises when the Senate is debating a question—usually an amendment or motion—under a unanimous consent agreement that limits the time for debating it. Under this circumstance, no point of order can be made until all time for debating the question has expired or has been yielded back.³ Although Senate rules preclude debate on points of order on which the presiding officer rules, the presiding officer may, by precedent, entertain discussion at his or her discretion.⁴

Rulings

In most situations, the presiding officer rules on points of order.⁵ Under two circumstances, however, the point of order is decided by the Senate. First, the presiding officer may, in rare instances, decline to rule and, instead, submit the point of order directly for the Senate to decide. The presiding officer is most likely to do so when the procedural question has not arisen before, and there is no Senate rule or precedent on which to base a ruling. Second, only the Senate, not its presiding officer, is empowered to decide certain points of order. Under Rule XVI, for example, the question of whether a legislative amendment to an appropriations bill is germane is usually submitted to the Senate to decide (in the form of a “defense of germaneness”).⁶ Also, by

¹ In some circumstances, reaching a vote on the point of order or appeal may require a super-majority of the Senate to agree to end debate on the question. The fact that most appeals and submitted points of order are 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 Richard S. Beth, and CRS Report R43331, *Majority Cloture for Nominations: Implications and the “Nuclear” Proceedings of November 21, 2013*, by Valerie Heitshusen.

² A Senator cannot raise a point of order unless he or she has the floor. See Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure*, 101st Cong., 2nd sess., S. Doc. 101-28 (Washington: GPO, 1992), p. 993.

³ *Riddick's*, pp. 1356-1359.

⁴ *Riddick's*, p. 989.

⁵ Assuming no action has been taken on the amendment on which a point of order has been raised, the presiding officer may, by precedent, allow modification to the amendment prior to ruling on the point of order. See *Riddick's*, pp. 65, 988.

⁶ On such a question of germaneness to an appropriations bill, the presiding officer does not submit the point of order itself to the Senate, but rather, a “defense of germaneness” response to a point of order, which is not subject to debate. Agreeing to the defense of germaneness requires only a simple majority vote. Only if the defense of germaneness fails (or is tabled) does the presiding officer rule on the point of order (*Riddick's*, pp. 162-163). Since 1979, the presiding (continued...)

precedent, if a Senator makes the point of order that the question pending before the Senate is unconstitutional, then the Senate must decide that question.⁷ When the presiding officer submits a point of order (but not a defense of germaneness) to the whole Senate to decide, it is typically debatable under the regular rules of the Senate.⁸ A submitted point of order is, however, subject to a nondebatable motion to table (or kill) the matter; agreeing to the motion to table disposes of the point of order permanently and adversely.⁹ Finally, note that a submitted point of order is not subject to debate when the Senate is operating post-cloture, pursuant to Rule XXII.

Appeals

In most cases, rulings made by the presiding officer in response to points of order are subject to appeal.¹⁰ When the presiding officer rules on a question of order, any Senator who disagrees with the ruling may challenge it. That Senator rises and states, “Mr. President, I appeal from the decision of the Chair.” Such an appeal typically is debatable, though the Senate may end the debate and dispose of the appeal by agreeing to a motion to table (or kill) it, which would uphold the ruling of the chair. Absent a successful motion to table, debate on the appeal usually is subject to extended consideration under the regular rules of the Senate.¹¹ When the Senate is operating under cloture, however, appeals are to be decided without debate, pursuant to Rule XXII (paragraph 2).¹² In addition, debate on an appeal may also be limited in certain situations when provisions of a unanimous consent agreement limit consideration of the underlying matter, and debate of appeals made during consideration of certain budgetary measures is limited by caps on consideration of the measure (pursuant to provisions of the Budget Act).¹³

After any debate on the appeal, the Senate votes on whether “the decision of the Chair will stand as the judgment of the Senate.” Senators who support the ruling vote “aye”; those who oppose it vote “no.” Appeals usually are decided by simple majority vote. A three-fifths vote of the entire Senate—60 if no vacancies—is needed to overturn rulings by the presiding officer on most budget process points of order.¹⁴

(...continued)

officer typically only submits the question to the Senate for decision if the amendment meets a minimum threshold test; see *Riddick's*, pp. 167-168 for additional information.

⁷ CRS Report R40948, *Constitutional Points of Order in the Senate*, by Valerie Heitshusen, provides more information on Senate rules and practices relevant to constitutional points of order, as well as analysis of Senate disposition in recent cases.

⁸ *Riddick's*, pp. 716, 736. Only a majority vote is required to sustain a submitted point of order, but in this circumstance, ending debate on the point of order (so that a vote may occur) may require a three-fifths vote to invoke cloture. See CRS Report RL30360, *Filibusters and Cloture in the Senate*, by Richard S. Beth and Valerie Heitshusen, for discussion of the operation of the cloture provisions of Rule XXII.

⁹ *Riddick's*, pp. 52-54, 989.

¹⁰ By precedent, decisions of the presiding officer concerning recognition of Senators are not subject to appeal; see *Riddick's*, p. 147.

¹¹ *Riddick's*, p. 725. Under this circumstance, while a majority vote is required to overturn the ruling of the chair, ending debate on the appeal may require a three-fifths vote to invoke cloture, pursuant to Rule XXII.

¹² The appeal may also be decided without debate in certain circumstances when made in connection with a non-debatable question. See *Riddick's*, p. 725, 726. Also see CRS Report R43331, *Majority Cloture for Nominations: Implications and the “Nuclear” Proceedings of November 21, 2013*, by Valerie Heitshusen.

¹³ *Riddick's*, pp. 1356-1359, and the Congressional Budget Act of 1974, as amended (Titles I-IX of P.L. 93-344, 2 U.S.X. 601-661).

¹⁴ The three-fifths threshold is required for those points of order for which a three-fifths vote would be required for a (continued...)

Precedents

Rulings by the presiding officer invariably reflect the advice that the Senate Parliamentarian gives based on his or her examination of how presiding officers decided similar questions in the past.¹⁵ The presiding officer follows these precedents, and in similar fashion, new rulings become precedents on which presiding officers will rely in the future.

By the same token, when the presiding officer submits a point of order for the Senate to decide, or when the Senate decides a point of order by overruling the decision of the chair on appeal, that decision of the Senate also becomes a guiding precedent. In 2000, for example, the Senate determined (through a successful appeal from a ruling of the chair) that sense-of-the-Senate or sense-of-Congress amendments (sometimes called precatory amendments) to appropriations bills must comply with Rule XVI regarding germaneness, just as substantive amendments to appropriations must.¹⁶ Similarly, in 2011, the Senate overturned a ruling of the chair that motions to suspend the rules were not dilatory when the Senate was operating post-cloture. In both 2013 and 2017, the Senate overturned a ruling of the chair in regard to the required vote threshold for cloture on certain nominations.¹⁷ Nevertheless, although it is not unusual for Senators to appeal the rulings of the chair, the Senate only rarely overturns the rulings of its presiding officer.¹⁸ To routinely do so would undermine the continuity of Senate rules and the consistency of rule interpretation essential to legislative work.

The most authoritative precedents are those established by vote of the Senate itself. Rulings of the chair on which the Senate does not vote are of somewhat less probative value. Still weaker as precedents are statements and opinions by presiding officers in reply to parliamentary inquiries. A parliamentary inquiry is a question posed by a Senator to the chair about the Senate's procedures or the current procedural situation. The presiding officer's reply is not a ruling, so it is not subject to appeal. In addition, successful motions to *waive* a Budget Act point of order do not establish precedents. A successful motion to table would likewise not establish a precedent because the Senate would not have voted directly on the question or appeal. It could, however, have precedential value if it allowed a ruling of the chair to stand.

For additional information, see *Riddick's Senate Procedure* (Washington: GPO, 1992), especially pages 145-149 ("Appeals") and 987-996 ("Points of Order"). In using *Riddick's*, care should be exercised in distinguishing between references supported by footnotes using the phrase "see" or "see also," and those which do not use such terms. Footnotes with "see" or "see also" refer to

(...continued)

waiver. For more information on budget points of order, see CRS Report 97-865, *Points of Order in the Congressional Budget Process*, by James V. Saturno.

¹⁵ In addition, rulings on certain budget points of order require examination of estimates supplied by the Senate Budget Committee, which monitors the compliance of measures with the Congressional Budget Act of 1974, as amended (Titles I-IX of P.L. 93-344; 2 U.S.C. 601-688).

¹⁶ According to the Majority Leader, who raised the point of order, no chair rulings or votes on appeal had previously subjected sense-of-the-Senate and sense-of-Congress amendments to this germaneness requirement for appropriations bills. Sen. Trent Lott, "Military Construction Appropriations," remarks in the Senate, *Congressional Record*, vol. 146, May 17, 2000, pp.8283-8286.

¹⁷ See CRS Report R43331, *Majority Cloture for Nominations: Implications and the "Nuclear" Proceedings of November 21, 2013*, by Valerie Heitshusen, and floor debate on April 6, 2017 (and associated Roll Call Votes #105 through #110).

¹⁸ See CRS Congressional Distribution Memorandum, *Senate Decisions Reversing a Ruling of the Presiding Officer, 1965-March 31, 2017*, by Elizabeth Rybicki and Valerie Heitshusen (available on request from the authors).

statements by the chair in response to parliamentary inquiries. Footnotes without such forms refer to rulings of the chair or decisions of the Senate by vote in response to points of order.

Author Contact Information

Valerie Heitshusen
Specialist on Congress and the Legislative Process
vheitshusen@crs.loc.gov, 7-8635

Acknowledgments

Paul S. Rundquist, former Specialist in American National Government at CRS, wrote an early version of this report. The listed author updated this report and is available to respond to inquiries on the subject.

Useful Links

Congress by the Numbers

CongressByTheNumbers.com

Leadership of Congress

CongressLeaders.com

Congressional Schedule

CongressSchedules.com

Congress Seating Charts

CongressSeating.com

Terms and Sessions of Congress

TermsofCongress.com

Senate Classes: Terms of Service

SenateClasses.com

Congressional Glossary

CongressionalGlossary.com

You have 2 cows

YouHave2Cows.com

