



South Dakota Legislative Research Council

Issue Memorandum 96-29

CONSTITUTIONAL FOUNDATION OF THE TWO-THIRDS VOTE REQUIREMENT

In the case of most legislation it takes a majority vote of the members-elect of the House of Representatives and of the Senate to enact a law. However, in a few instances, a super-majority vote of two-thirds of the members-elect is required. These super-majority vote requirements have been placed on the Legislature by the people in the state's constitution. This memorandum will review those cases where the constitution requires more than a majority vote for a bill to pass.

Emergency Clause

Probably the most common type of bill that requires a two-thirds vote for passage is a bill which the Legislature determines needs to go into effect immediately upon the signature of the Governor or less than ninety days from the end of the legislative session. This two-thirds vote requirement was part of the original constitution adopted in 1889 and has remained unchanged ever since. Article III, section 22, of the state's constitution provides the following:

§ 22. No act shall take effect until ninety days after the adjournment of the session at which it passed, unless in case of emergency, (to be expressed in the preamble or body of the act) the Legislature shall by a vote of two-thirds of all the members elected of each house,

otherwise direct.

However, a true emergency must exist for this section of the constitution to apply. Language in Section 1 of Article III of the constitution which was adopted by the voters in 1898 has been used by the courts as the standard to determine when an emergency truly exists. That section of the constitution provides that laws enacted by the Legislature may be referred to a vote of the people unless the laws are necessary for immediate preservation of public peace, health, or safety of the state or are necessary for support of state government and its existing public institutions. If the Legislature determines that one of these two situations exists, an emergency clause is attached to the end of the bill.

An emergency clause may take two different forms. An emergency clause for the immediate preservation of public peace, health, or safety reads as follows:

Whereas, this Act is necessary for the immediate preservation of the public peace, health, or safety, an emergency is hereby declared to exist, and this Act shall be in full force and effect from and after its passage and approval.

This emergency clause is generally used when a bill is regulatory in nature and it is necessary to begin the regulation

immediately to preserve the public safety. An emergency clause for the support of state government reads as follows:

Whereas, this Act is necessary for the support of the state government and its existing institutions, an emergency is hereby declared to exist, and this Act shall be in full force and effect from and after its passage and approval.

This emergency clause is used when a bill relating to taxation, the raising of revenue, or appropriations needs to go into effect immediately since the revenue is needed to continue to operate the activities of the government.

There is a tendency for legislators to place an emergency clause on a bill if they know that they can achieve the two-thirds vote requirement so that it will go into effect as soon as possible. However, unless the bill meets one of the two requirements spelled out in Section 1 of Article III, a true emergency does not exist and any act so passed is subject to a challenge in the courts.

Appropriations

The other most common type of bills that require a two-thirds vote are appropriations. This super-majority vote is required by Section 2 of Article XII of the state's constitution which reads as follows:

§ 2. The general appropriation bill shall embrace nothing but appropriations for ordinary expenses of the executive, legislative and judicial departments of the state, the current expenses of state institutions, interest on the public debt, and for common

schools. All other appropriations shall be made by separate bills, each embracing but one object, and shall require a two-thirds vote of all the members of each branch of the Legislature.

This two-thirds vote requirement was also part of the original constitution adopted in 1889 and has remained unchanged. This section of the constitution provides that only the regular, ongoing expenses of state government are to be funded through the general appropriation bill, which only needs a majority vote to pass, and all other appropriations must be in separate bills which must have a two-thirds majority vote of each house of the Legislature to pass.

There are actually three different types of appropriations bills that must have a two-thirds majority vote to be adopted as provided in this section of the constitution.

Special Appropriations

This type of appropriation bill appropriates a specific amount of money for an extraordinary purpose. A one-time appropriation to build a building or an appropriation to finance the presidential primary are examples of appropriations which are not an ordinary expense of state government and are required to be in a separate bill. A bill which creates a new program and appropriates funds to provide for the administration of the program is another example of a special appropriation bill. Also, any on-going annual appropriation which, for any reason, is not included in the general appropriation bill comes under the phrase "all other appropriations" and requires a two-thirds vote of each house of the Legislature for passage even if it constitutes an ongoing and ordinary governmental expense. Examples

of this type of special appropriation bill in the past are the separate appropriation bills which appropriated money for the general state aid to education program.

Continuous Appropriations

This type of appropriation bill contains a continuous or on-going appropriation of revenue. The state highway fund under the control of the Transportation Commission and the department of game, fish and parks fund under the control of the Game, Fish and Parks Commission are examples of funds that have been continuously appropriated by past legislatures. These laws were passed by a two-thirds majority of the Legislature. SDCL 41-2-35 is a good example of how a continuous appropriation might read:

§ 41-2-35. All moneys in the department of game, fish and parks fund are hereby annually appropriated to be used with any moneys otherwise appropriated to pay the necessary expenses of effectuating the purposes of this title.

Bills that would increase revenues to funds that have been continuously appropriated are in effect an additional appropriation subject to a two-thirds vote requirement. A good example of this type of bill is one that would increase motor vehicle license fees. A portion of motor vehicle license fees have been, by law, distributed to the Local Government Highway and Bridge Fund and that fund has been continually appropriated to counties, municipalities, and townships by SDCL 32-11-34. An increase in motor vehicle license fees results in an automatic additional appropriation of revenue from that fund. This additional appropriation is a form of “other appropriations” covered by Section 2 of Article XII.

Special Funds

This type of appropriation bill is one which sets aside state funds in a special fund. A bill of this type may establish a fee for a certain program and place that fee in a special fund for the administration of that program. Whether or not the resulting funds are specifically or continuously appropriated, this revenue is no longer available for the ordinary expenses of state government since it has already been set apart; consequently, it is a form of “other appropriations” covered by Section 2 of Article XII. A good example of setting aside revenue for a special purpose are the funds established to administer each of the professional or occupational boards or commissions. License fees go into these funds and are used by the board or commission to perform its functions. These revenues are no longer available for the Legislature to appropriate for the “ordinary expenses” of state government. Any bill which segregates funds which would otherwise go into the general fund falls under the definition of “other appropriations” and thus the two-thirds vote requirement.

Taxes

There are now two sections of the state’s constitution which require tax measures to have a two-thirds affirmative vote of each house of the Legislature. The first requirement was adopted by the people in 1978. That requirement is found in Section 13 of Article XI and reads as follows:

§ 13. The rate of taxation imposed by the State of South Dakota on personal or corporate income or on sales or services, or the allowable levies or the percentage basis for determining valuation as fixed by law for purposes of

taxation on real or personal property, shall not be increased unless by consent of the people by exercise of their right of initiative or by two-thirds vote of all the members elect of each branch of the Legislature.

This section, however, did not apply to increasing severance or excise taxes or to other new forms of taxation. These tax increases or the imposition of new taxes needed only a simple majority vote of each house of the Legislature for approval.

Constitutional Amendment B on this year's general election ballot questioned the logic of having a different vote requirement to approve different types of taxes. That amendment, which was overwhelmingly approved by the voters, added Section 14 to Article XI. That section reads as follows:

§ 14. The rate of taxation imposed by the State of South Dakota in regard to any tax may not be increased and no new tax may be imposed by the State of South Dakota unless by consent of the people by exercise of their right of initiative or by two-thirds vote of all the members elect of each branch of the Legislature.

This section now requires any bill which contains a tax increase or a new tax to be approved by a two-thirds majority vote of each house of the Legislature. The practical effect of ratifying Section 14 is that the provisions of Section 13 are largely superseded. Only the provisions about levies and valuation are not included in Section 14.

However, these two sections of the constitution do not affect the creation or elimination of exemptions from a tax. For example, all goods and services are subject to a sales or use tax unless specifically exempted by the Legislature. A simple majority vote is all that is required to add or eliminate an exemption for the sales tax. In addition, license fees and user fees do not come under the definition of a tax and are not covered by these two sections of the constitution. Consequently, the Legislature can create a fee or increase a fee and, as long as it goes to the state general fund for appropriation by the general appropriation bill, the Legislature can do so with a simple majority vote. These sections of the constitution also do not apply to local governments; therefore, a bill to allow a local government to establish or increase a tax or fee would not require a two-thirds vote to be approved by the Legislature. For example, a bill to allow municipalities to increase their municipal sales tax rate would need only a simple majority to be approved by the Legislature.

Certain Salary Increases

Any bill to increase the salaries of legislators or constitutional officers is required by the constitution to be approved by a two-thirds vote. Originally the constitution provided fixed salaries for the constitutional officers of the state, with limited authority in the Legislature to increase the salaries of the Governor and the judges of the supreme and circuit courts. In 1945, Article XXI, Section 2, of the state's constitution was amended to its current form which reads as follows:

§ 2. The Legislature by two-thirds vote of each branch thereof at any regular session may fix the salary of any or all constitutional officers

including members of the Legislature. In fixing any such salary the Legislature shall determine the effective date thereof and may in its discretion decrease or increase the salary of any officer during his term.

Until 1992 the salaries of constitutional officers were only changed by an act of the Legislature, as those salaries were set in statute. In 1992 a law was passed (SDCL 3-8-2.1) providing that pay increases for constitutional officers and judges would automatically be adjusted upward each fiscal year by the amount of the across-the-board increase provided for in the state salary policy for that year. Some would argue that the provisions of SDCL 3-8-2.1 do not satisfy the standards of Article XXI, Section 2. However, the statute has not been challenged in court. Any bill to increase salaries for constitutional officers above this amount would require a two-thirds vote of

each house of the Legislature. The salaries of legislators continue to be set by statute.

Summary

The people, through the constitution, have required certain legislative acts to be approved by a two-thirds majority vote of each house of the Legislature. These legislative acts include legislation which needs to be implemented immediately to address an emergency situation, legislation which makes an appropriation outside the general appropriation bill, legislation which establishes or increases a state tax, and legislation which would increase the salaries of legislators or constitutional officers.

This issue memorandum was written by David L. Ortbahn, Principal Research Analyst for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.
