

Beginning the repeal of ObamaCare through budget reconciliation

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Following the election of Donald Trump and the return of Republican majorities in Congress, speculation abounds about wholesale repeal of the Affordable Care Act through budget reconciliation. Politics lines up with policy and, many believe, with procedure. Nothing in Congress is quite that simple, and few mechanisms are more nuanced than the reconciliation process.

To assert greater influence over the nation's finances, Congress passed the Congressional Budget and Impoundment Control Act of 1974, establishing important new budgeting tools. Each year, Congress would adopt a budget resolution, its fiscal blueprint for government expenditures, taxation, and level of public surplus or debt.

To ensure that spending and revenue provisions in federal law matched this blueprint, the Budget Act provided for a budget reconciliation bill to align them. The bill would be subject to expedited procedures, preventing a Senate filibuster from derailing this crucial legislation.

When Congress and the President concur on fiscal direction, reconciliation is an immensely powerful instrument. Here is how it works. The budget resolution instructs congressional committees to make changes in spending or revenue laws, and to do so by a specified deadline. The instructions give fiscal targets only, leaving policy decisions to the committees.

When the legislation is ready, it goes to the floor on a fast track. It cannot be filibustered. Because cloture is unnecessary, support from a simple majority of senators voting is sufficient. Unlike almost every other bill, there is no debate on

proceeding to its consideration. Debate on the merits is limited to twenty hours. All amendments must be germane. After statutory debate time has lapsed, senators can still offer amendments. The Senate will grant unanimous consent for further debate, but under extremely limited conditions. As the late Sen. Robert C. Byrd often said, two great rights of senators are the right to debate and the right to amend. To satisfy fiscal policy imperatives, budget reconciliation sharply curtails both these rights.

Such restrictions invite possible abuse. So Byrd drafted procedures barring extraneous from reconciliation bills. In major part, the Byrd Rule defines these as provisions that have no effect on the federal budget, ones where the budgetary effect is merely incidental to the non-fiscal purposes of the provision, and measures that worsen the long-term financial position of the government in the years past the five or ten-year period covered by the Budget Resolution. The 2001 Bush tax cuts are an example of deficit-ballooning provisions that had to be sunset after ten years to avoid a Byrd Rule point of order.

With assistance from the Budget Committee, and after hearing arguments from both sides of every contested question, the Senate Parliamentarian will advise the Presiding Officer on possible Byrd Rule violations. The Parliamentarian and her assistants are non-partisan.

The Byrd Rule can be used to strike down committee-reported provisions and to stop floor amendments. It can also knock out provisions in conference reports. The rule is a barrier, not a straightjacket. It can be waived with 60 votes, but these are often difficult to gather.

Most of the Affordable Care Act was not built through budget reconciliation, even though after the Act passed, Congress used reconciliation to make small adjustments in the law. For Majority Leader Harry Reid, reconciliation was a fallback, which he did not want to use because of Byrd Rule problems. Seeking cohesive legislation, Reid kept sixty Democrats on board, avoiding resort to reconciliation.

That which could not be comprehensively built through reconciliation cannot be fully dismantled and completely redone by the same method. Reconciliation is an important step along the path, but there is no silver bullet. Repeal and replacement of the ACA will be a multi-faceted process. It will begin, but not end, with a reconciliation bill very early in the next Congress.

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