K&L GATES

Taxing Expectations:
Tax Policy After the TCJA

Budget Reconciliation

A Primer

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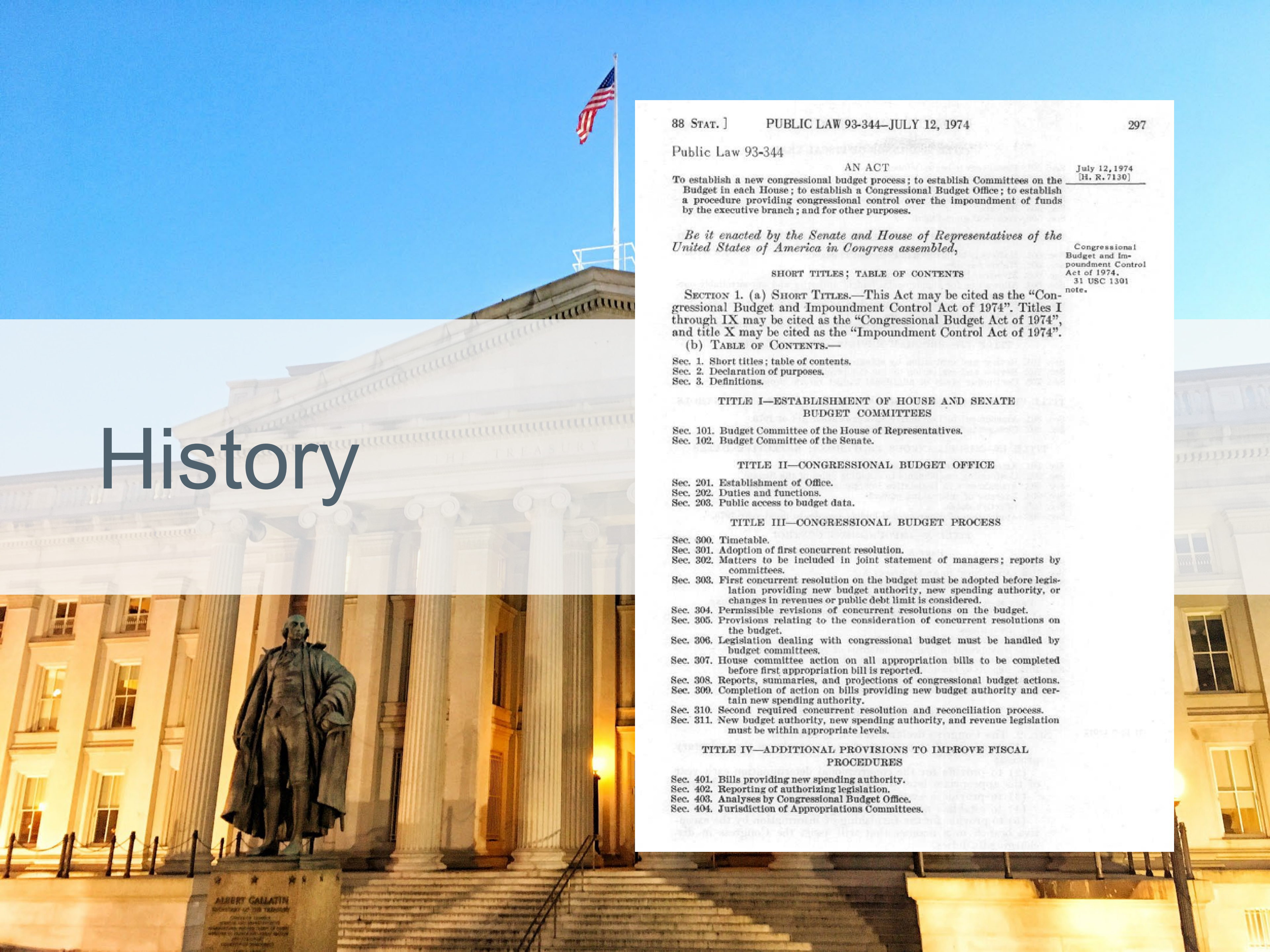
History



Public Law 93-344

July 12, 1974
[H. R. 7130]

AN ACT

To establish a new congressional budget process; to establish Committees on the Budget in each House; to establish a Congressional Budget Office; to establish a procedure providing congressional control over the impoundment of funds by the executive branch; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Congressional Budget and Impoundment Control Act of 1974.
31 USC 1301 note.

SHORT TITLES; TABLE OF CONTENTS

SECTION 1. (a) SHORT TITLES.—This Act may be cited as the "Congressional Budget and Impoundment Control Act of 1974". Titles I through IX may be cited as the "Congressional Budget Act of 1974", and title X may be cited as the "Impoundment Control Act of 1974".

(b) TABLE OF CONTENTS.—

The Congressional Budget Act

- In 1974, for the first time, Congress established a process for writing an overall budget for the federal government.
- This process included the development of an annual Congressional budget resolution, written primarily by the newly-established House and Senate Budget Committees.
- The budget resolution would establish overall targets for federal spending (both discretionary and non-discretionary), for federal revenue, and for federal debt.
- Applies to both H & S, must be identical, resolution is not law or binding.

Reconciliation

- A budget resolution also could go further. It could direct (or “instruct”) various congressional committees to make changes, in the laws within their respective jurisdictions, necessary to meet the targets established in the budget resolution. In other words, the committees would report legislation that would “reconcile” the targets in the budget resolution with the necessary changes in law. The Budget Committee then would combine the legislation recommended by the various committees into an omnibus budget reconciliation bill.
- Given the importance of this process, the CBA provided that both a budget resolution and a budget reconciliation bill are considered on a “fast track,” subject to short time limits on debate, and, accordingly, they cannot be filibustered in the Senate. (Practical impact: 51 votes)

Reconciliation: Key Points

- 2-step process: budget resolution (with instructions)/reconciliation bill
- “Vote-o-rama” both times
- Overcomes Senate filibuster
- Subject to the Byrd Rule and other restrictions

"High Reconciliation"

- In the 1980s, as federal budget deficits were projected to rise sharply, Congress resorted repeatedly to budget reconciliation bills in order to significantly reduce the deficit:
  - TEFRA (1983)
  - DEFRA (1984)
  - COBRAs, OBRAs
- These were bipartisan bills (exception: Clinton 1993, which was partisan) that significantly reduced the budget deficit, through a combination of cuts in non-discretionary spending and tax increases.

1998-2001: The Fundamental Shift

- Between 1998 and 2001, Republicans argued that, although budget reconciliation bills usually had been used to reduce the federal budget deficit, the text of the Congressional Budget Act did not require that they do so.
- The text required, instead, only that a provision of a reconciliation bill *relate* to the budget, and, Republicans argued, provisions that *increased* the deficit were just as related to the budget as provisions that *reduced* the deficit. Hence, a reconciliation bill could increase the deficit by cutting taxes.
- After great controversy, the Republicans prevailed, and their view was adopted as the formal position of the Senate.

Partisan Reconciliation

- With that, the gloves were off. When one party held "the trifecta" (House, Senate, White House), it would aggressively use the budget reconciliation process to pass major budget-related portions of its agenda over the objections of the minority.
  - 2001 and 2003 tax cuts
  - Part of the Affordable Care Act
  - 2015/2017 "Repeal" of the ACA (failed)
  - 2017 Trump tax bill
  - 2021 American Rescue Plan
  - 2022 Inflation Reduction Act

Likelihood?

- If there is a “trifecta,” with one party controlling the White House, the House, and the Senate, partisan reconciliation is highly likely.

- If there is a division of control, reconciliation is less likely, but still possible: Remember bipartisan reconciliation from 1983-1990.

Digging Into the Details

The "Frumin Rule"

- Parliamentarian Alan Frumin ruled that there is an implicit limit on the number of reconciliation bills that can derive from a single budget resolution: one spending bill, one tax bill, and one debt limit bill.
- Exception: the "two budget resolution" move. Sometimes, at the beginning of a calendar year, there is "unused" authority to pass a budget resolution left over from the previous Congress. By using both this unused authority and the new authority that comes with a new fiscal year, it is possible to pass two budget resolutions, with attendant reconciliation instructions, in a single calendar year. Both Republicans and Democrats have done this (2017, 2021-2022).
- Possible additional resolutions: Section 304 revisions.

The Power of the Parliamentarian

- The Parliamentarian's recommendations are advisory, not binding:
  - The Presiding Officer has the power to reject the advice of the Parliamentarian and rule otherwise.
  - Further, if the Presiding Officer follows the advice of the Parliamentarian, upon an appeal of the ruling of the Presiding Officer, the full Senate can, by majority vote, overturn the ruling.
- That said, there are important practical and institutional reasons for both parties to follow the Parliamentarian's advice.

The Byrd Rule

Robert C. Byrd Center for Congressional History and Education, Shepherd University, Shepherdstown, West Virginia.

The Byrd Rule

- Early in the period of "high reconciliation," committees would festoon their budget reconciliation bills with pet legislation that was completely unrelated to the budget and, in some cases, outside a committee's jurisdiction.
- Example: In 1982, the Senate Finance Committee reported reconciliation provisions that not only increased the taxes supporting the federal airways program, but also substantively revised the program.

The Byrd Rule (Cont.)

- This angered, among others, Senator Robert C. Byrd, a great protector of the unique procedures of the Senate.
- Senator Byrd, with the support of the bipartisan Senate leadership, began to offer amendments to strike all "extraneous" provisions of reconciliation bills.
- In 1984, Senator Byrd's position was codified, with the Congressional Budget Act amended to include section 313—the Byrd Rule.

“I believe that including such extraneous provisions in a reconciliation bill would be harmful to the character of the U.S. Senate. It would cause such material to be considered under time and germaneness provisions that impede the full exercise of minority rights. It would evade the letter and spirit of [the cloture rule]. It would create an unacceptable degree of tension between the Budget Act and the remainder of Senate procedures and practice.

“Reconciliation was never meant to be a vehicle for an omnibus authorization bill. To permit it to be treated as such is to break faith with the Senate's historical uniqueness as a forum for the exercise of minority and individual rights.”

- Senator Byrd

The Shield Becomes a Sword

- At first (during the period of high reconciliation), the Byrd Rule was used to police the bipartisan reconciliation process, shielding reconciliation bills from extraneous provisions.
- As reconciliation became partisan, the shield became a sword, with the offended minority wielding the Byrd Rule to slow down and disrupt the majority's march towards reconciliation:

"You wanna pass a reconciliation bill over our objection? Oh yeah? Well, wait till we hit you with some serious Byrd Rule!"

The "Byrd Rule"-- CBA Section 313

- An extraneous provision is subject to a point of order, which can be waived only by 60 votes.
- A provision is extraneous if it meets any one of the following tests:
  - It does not have a budgetary effect (subparagraph (A)).
  - It is outside the jurisdiction of the committee reporting the relevant title of the bill (subparagraph (C)).
  - It has a budgetary effect that is merely incidental to the non-budgetary effect (subparagraph (D)).
  - It increases the deficit in the "out-years" (subparagraph (E)).
  - It affects the Social Security program (subparagraph F)).

No Budgetary Effect (subparagraph (A))

- BFZ: “Big Fat Zero.”
- CBO/JCT are the arbiters.
- What is a “provision”?
- The “term or condition” test: a provision that does not have a budgetary effect is permissible (that is, not extraneous) if it is a necessary term or condition of a provision that *does* have a budgetary effect.
- A *necessary* term or condition is a higher standard than a *nice* term or condition.
- The “penalty fix,” and its limits.

Jurisdiction (subparagraph (C))

- A provision is extraneous if it is outside the jurisdiction of the committee reporting the relevant title.
- This requires tight jurisdictional screening, which Senate staff often are not used to (because of the predominance test for the referral of Senate legislation).
- The basic theory: if you knock on the agency's door, does the agency have to open it?
- Work arounds. E.g. IRA energy tax provisions (jurisdiction and bonus system).

Merely Incidental (subparagraph (D))

- A provision is extraneous if its budgetary impact is merely incidental to its non-budgetary impact.
- This is a subjective test, which requires the Parliamentarian to make difficult decisions.
- Extensive litigation, great controversy, many precedents.
- Basic test: on one side of the scale, you weigh the *extent* and *character* of the *budgetary* effect; on the other side, you weigh the *extent* and *character* of the *non-budgetary policy* effect.

Sunset/Out Years (subparagraph E)

- Deeply counterintuitive: a provision can increase the deficit inside the budget window, but not outside it.
- Derivation: to prevent “gaming” such as bringing a tax payment date inside the budget window or pushing a payment date outside the window.
- Very powerful: provisions that increase the deficit must expire at the end of the budget period.
- This is why many of the 2017 tax bill provisions expire at the end of 2025.

Social Security (subparagraph (F)/section 313(g))

- This was an addition to the original Byrd Rule
- Democrats wanted to prevent cutting Social Security benefits in a reconciliation bill.
- Has been construed broadly: it applies to any provision that affects the Title II SS program, including benefits, taxes, and program operation.
- This has surprisingly broad implications. E.g., payroll taxes, administration of a family leave benefit.

Sources of Authority

- CBA statutory text/legislative history
- Formal Senate precedents
- Formal parliamentary inquiries
- Written guidance from the Parliamentarian (e.g., Frumin letter)
- Specific guidance from the Parliamentarian (i.e., Byrd Bath decisions)
- Section 313(c) Lists
- The inclusion of similar provisions in prior reconciliation bills, particularly if there is a longstanding pattern

The "Byrd Bath"

Process: The "Byrd Bath"

- Both parties have an opportunity to consult, in advance, with the Parliamentarian.
- Once the majority proposes specific text, the minority must indicate which specific provisions it wishes to challenge (and the basis for the challenge).
- If the Parliamentarian concludes that there is a reasonable basis for a challenge, each party submits memos explaining its position.
- In close cases, the two parties, together, present their arguments to the Parliamentarian, who then advises the parties of the recommendation she will make to the Presiding Officer.

Byrd Rule Tip Sheet

1. Is the provision within the jurisdiction of the Senate committee responsible for that title of the bill?
2. Does the provision have a budgetary effect?
   - Says who?
   - If not, is it a necessary term or condition of a provision that does have a budgetary effect?
   - Note: The acronym "NTC" stands for necessary term or condition, not nice term or condition.
3. If a provision does have a budgetary effect, is the budgetary effect merely incidental to the non-budgetary policy effect?
   - The test is whether the extent and character of the budgetary effect is vastly outweighed by the extent and character of the non-budgetary effect
4. Does the provision affect the Social Security program?
   - Benefits
   - Taxes
   - Operation
5. Does the provision increase the deficit in the out-years?

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