

# Budget Reconciliation

## A Primer/Part 2

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# The Budget Reconciliation Process: Key Points

- Two-step process: budget resolution (with instructions)/reconciliation bill
- “Vote-a-rama” both times
- Overcomes Senate filibuster
- Subject to the Byrd Rule and other restrictions
- Probably can be two rounds in 2025.

## Step 1: The Budget Resolution

- The budget resolution is a general framework. It establishes numerical targets and provides reconciliation “instructions” to House and Senate committees.
- There is a vote-a-rama in the Senate.
- A budget resolution is passed only by Congress. It is NOT presented to the President.

# Timing (Budget Resolution)

- 2017 (S. Con. Res. 3)
  - Introduced 1/3
  - Passes Senate 1/12
  - Passes House 1/13
  
- 2021 (S. Con. Res. 7)
  - Introduced 2/2
  - Passes Senate 2/5
  - Passes House 2/4

# Budget Resolution Contents: 2017

## SEC. 2001. RECONCILIATION IN THE SENATE.

(a) COMMITTEE ON FINANCE.—The Committee on Finance of the Senate shall report changes in laws within its jurisdiction to reduce the deficit by not less than \$1,000,000,000 for the period of fiscal years 2017 through 2026.

(b) COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS.—The Committee on Health, Education, Labor, and Pensions of the Senate shall report changes in laws within its jurisdiction to reduce the deficit by not less than \$1,000,000,000 for the period of fiscal years 2017 through 2026.

(c) SUBMISSIONS.—In the Senate, not later than January 27, 2017, the Committees named in subsections (a) and (b) shall submit their recommendations to the Committee on the Budget of the Senate. Upon receiving all such recommendations, the Committee on the Budget of the Senate shall report to the Senate a reconciliation bill carrying out all such recommendations without any substantive revision.

## Step 2: The Reconciliation Bill

- Must comply with budget resolution instructions
- May not contain any impermissible material
- Consists of statutory text
- Contents subject to strict procedural limitations, particularly the Byrd Rule

# Timing (Reconciliation)

- 2017 (HR 1638)
  - Reported in House 2/24
  - Passes House 5/4
  - Senate floor debate ends 7/28
- 2021 (H.R. 1319)
  - Passes House 2/27
  - Passes Senate 3/6
  - Signed into law 3/11

# The 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.

## 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.
- The NBE must *vastly* outweigh the BE.

## 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.

# 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.

# Reconciliation Jeopardy!



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