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BACKGROUNDER

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A Parliamentary Guide to Enforcing the Byrd Rule in the Reconciliation Process

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Abstract

Determining how the Byrd Rule should be enforced in the reconciliation process is not straightforward. Applying the restrictions in the rule's "merely incidental" test to the effort to repeal and replace Obamacare requires interpreting both the statutory language that created the rule and the targeted provision in the underlying bill. In contrast, the Byrd Rule clearly assigns responsibility for its enforcement to the Senate's Presiding Officer, who is charged with determining whether or not a provision is eligible to be included in reconciliation. By extension, the Presiding Officer is not required to follow the advice of the Senate's Parliamentarian regarding how the rule should be applied in particular parliamentary situations. Determining how to enforce the Byrd Rule in such situations where the meaning of the Senate's rules is ambiguous or silent is consistent with the institution's past practice.

Congress is stuck in a procedural morass of its own making. The effort to repeal and replace Obamacare is proving more difficult than many anticipated. Lacking a filibuster-proof supermajority in the Senate, the chamber's Republicans have turned to the special budget process known as reconciliation in order to overcome anticipated obstruction. They did so because debate time on reconciliation bills is limited to 20 hours. Such measures cannot be filibustered (i.e., blocked), and the support of a simple majority of Senators is sufficient to overcome an effort by the minority to delay an up-or-down vote on their final passage.

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Key Points

- Congress created the reconciliation process in 1974 to make it easier to align existing revenue and spending with levels specified in the congressional budget resolution.
- The Senate adopted the Byrd Rule in the mid-1980s to stop the use of reconciliation to circumvent the filibuster.
- The Byrd Rule does not provide clear guidance on how to evaluate budgetary impact when assessing the rule's "merely incidental" test.
- Applying this test requires the Senate to interpret both the statutory language that created the rule and the legislative language in the underlying bill.
- The rule's statutory language charges the Senate's Presiding Officer with determining whether a provision violates the "merely incidental" test.
- Adjudicating how to enforce the Byrd Rule in a situation where its meaning is ambiguous or silent is consistent with Senate rules.
- Doing so would create a new precedent that provides additional guidance regarding how to define "merely incidental" in the future.

This paper, in its entirety, can be found at **http://report.heritage.org/bg3206**

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get resolution, but the new process was also used frequently in the period immediately after its creation to pass policies unrelated to the federal budget. In response, the Senate adopted the so-called Byrd Rule in the mid-1980s to stop reconciliation from being used to circumvent the filibuster. Under the rule, provisions that are deemed extraneous (essentially those that are unrelated to the federal budget) to the reconciliation instructions contained in the applicable budget resolution are not eligible for inclusion in a reconciliation bill.[1]

The Byrd Rule's prohibition on extraneous provisions could complicate the effort to repeal and replace Obamacare by using the reconciliation process. For example, the Senate might not be able to repeal some of Obamacare's most damaging provisions, like its major insurance regulations, through reconciliation according to one (albeit flawed) interpretation of the rule.[2] Given such difficulties, the feat represented by getting a reconciliation bill through the Senate has been equated with "trying to force a giraffe through a keyhole."[3]

But the Senate has a say in determining the size of the keyhole, because the question of how the Byrd Rule should be enforced in the reconciliation process is not straightforward. Applying its strict restrictions to particular provisions of Obamacare requires interpreting both the statutory language that created the rule and the legislative language in the underlying bill (or amendment). In contrast, the Byrd Rule is clear as to who is ultimately responsible for enforcing its terms during the reconciliation process. The Senate's Presiding Officer is charged with evaluating particular provisions to determine whether or not they are compatible with the rule and thus whether or not they are eligible to be included in the reconciliation bill.

Often overlooked in debates like this one is the fact that it is appropriate for the Senate to determine how to apply the Byrd Rule as well as other precedent-defined requirements in its written rules in specific situations in which those rules are silent. Furthermore, the Presiding Officer is not required to accept the advice of the institution's Parliamentarian regarding how the rule should be interpreted. To understand this fact of the Byrd Rule and the relationship between the Senate's Presiding Officer and its Parliamentarian, one must first understand how the institution's written rules and its precedents differ.

Senate Rules and Precedents

The overall structure of Senate procedure is derived from five primary sources:

- The Constitution;
- The Standing Rules of the Senate;
- Standing orders;
- Statutory rules passed by Congress; and
- Informal precedents.[4]

Confusion associated with enforcing the Byrd Rule's restrictions in the context of the effort to repeal and replace Obamacare results from a flawed understanding of the proper role of each component and how they interact to order the decision-making process in the Senate on a daily basis. Put differently, enforcing the Byrd Rule is made unnecessarily restrictive when the Senate's written rules (whether Standing Rules or statutory rules) and the institution's historical precedents are treated as interchangeable.

The Constitution contains relatively few provisions regarding the internal operation of the Senate. For example, the Senate Composition Clause sets membership qualifications and term lengths and gives each state two Senators who vote per capita.[5]

1. The Byrd Rule is named after former Senator Robert C. Byrd (D–WV). See Alan S. Frumin and Floyd Riddick, *Riddick's Senate Procedure* (Washington: U.S. Government Printing Office, 1992), p. 624.
2. Obamacare's major insurance regulations include those provisions of the law relating to requirements regarding pre-existing conditions, essential health benefits, community rating, actuarial value, medical loss ratios, and preventative care coverage.
3. Bob Bryan, "'Trying to Force a Giraffe Through a Keyhole': An Obscure Senate Rule Could Kill the GOP's Obamacare Replacement," *Business Insider*, March 10, 2017, http://www.businessinsider.com/byrd-rule-obamacare-replacement-trumpcare-senate-2017-3 (accessed March 13, 2017).
4. While it is the interaction of each of these component parts that forms the procedural architecture within which the decision-making process unfolds in the Senate, an analysis of standing orders is beyond the scope of this paper.
5. U.S. Const., art. I, § 3, cl. 1, 3.

Article I, section 3, clauses 4 and 5 designate the Vice President as the President of the Senate (i.e., Presiding Officer or Chair) and authorize the Senate to choose a President Pro Tempore to serve as its Presiding Officer in the Vice President's absence.[6] Additionally, the Presentment Clause establishes a process for considering presidential veto messages.[7]

Of these constitutional provisions, the Rules and Expulsion Clause is the most important because it gives the Senate plenary power over its rules of procedure. The clause explicitly stipulates: "Each House [of Congress] may determine the Rules of its Proceedings."[8] Pursuant to this authority, the Senate created the procedural architecture that governs how it makes decisions today. The institution's formal structure is provided primarily by its Standing Rules and any statutory rules authorized by law.

Currently, there are 44 Standing Rules of the Senate that govern everything from noncontroversial issues like the oath of office (Rule III) to more controversial issues like the cloture process to end debate (Rule XXII). For the most part, the Senate's Standing Rules are very general and do not address circumstances that may arise in specific parliamentary situations. Illustrative of this is the fact that the institution's official rule book totals only 70 pages in length.

These rules remain in effect from one Congress to the next according to the concept that the Senate is a continuing body. Rule V stipulates: "The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."[9] To that end, Senate Rule XXII requires an affirmative vote of "three-fifths of the senators duly chosen and sworn" to invoke cloture, or end debate, on any "measure, motion, or other matter pending before the Senate...except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the senators present and voting...."[10] It is thus difficult to change the Senate's rules, because the threshold to invoke cloture on proposals to do so (two-thirds, typically 67) is higher than that required to end debate on other measures (three-fifths, typically 60).

The Senate may also create a new written rule when Congress passes legislation that is subsequently signed into law by the President.[11] For example, the Congressional Budget and Impoundment Control Act of 1974 (Public Law 93-344) created many of the procedures that govern the consideration of budget-related legislation in Congress today.[12] This statute's impact on the Senate's decision-making process can be observed in the institution's periodic consideration of budget resolutions and reconciliation bills. With regard to the latter, the Omnibus Budget Reconciliation Act of 1990 (Public Law 101-508) amended the Congressional Budget Act to make permanent the Byrd Rule prohibition on including extraneous provisions in reconciliation bills.

The Byrd Rule stipulates that a provision is extraneous if it meets one or more of the following six tests:[13]

1. It does not produce a change in outlays or revenues;
2. The net effect of the provisions reported by the committee reporting the title containing the provision is that the committee fails to achieve its reconciliation instructions;
3. It is not in the jurisdiction of the committee with jurisdiction over said title or provision;
4. It produces changes in outlays or revenues which are merely incidental to the non-budgetary components of the provision;

6. Ibid., art. I, § 3, cl. 4–5.
7. Ibid., art. I, § 7, cl. 2.
8. Ibid., art. I, § 5, cl. 2.
9. "Rule V: Suspension and Amendment of the Rules," *Standing Rules of the Senate* (Washington: U.S. Government Printing Office, 2007), p. 4.
10. "Rule XXII: Precedence of Motions," *Standing Rules of the Senate*, p. 16.
11. A supermajority vote is effectively required to create a statutory rule because the legislation creating it may be filibustered (or vetoed and subsequently overridden by Congress).
12. For more information on the statutory rules that govern the consideration of budget resolutions and reconciliation bills in Congress, see *Compilation of Laws and Rules Relating to the Congressional Budget Process* (Washington: U.S. Government Printing Office, 2012).
13. Ibid., p. 39, Section 313(b)(1) of the Congressional Budget Act.

5. It increases net outlays or decreases revenues during a fiscal year after the fiscal years covered by such reconciliation bill, and such increases or decreases are greater than outlay reductions or revenue increases resulting from other provisions in such title in such year;

6. It recommends changes to the Social Security program (old age and disability).[14]

A Senator may raise a point of order against any provision in a reconciliation bill on the basis that it is extraneous according to one or more of these six tests. Section 313(e) gives the Senate's Presiding Officer the authority to decide whether or not the point of order is valid.[15] If the Presiding Officer sustains the point of order, the targeted provision is stricken from the bill. Section 313(e) also stipulates that any Senator may move to waive the point of order before the Presiding Officer rules. Like other Budget Act points of order, those raised under the Byrd Rule may be waived by an affirmative vote of three-fifths of the Senators duly chosen and sworn (typically 60 if all 100 seats are filled).

The actual text of the Byrd Rule allows for a significant degree of discretion on the part of the Senate and its Presiding Officer when determining whether or not a provision is extraneous. First, the statute does not define the term "provision." Instead, it simply allows any Senator to raise a point of order against one provision or multiple provisions at the same time.[16] The statute then stipulates that it is the responsibility of the Presiding Officer to determine whether the point of order should be sustained as to some or all of the targeted provisions.

In addition, section 313(c) requires the Budget Committee to submit for the record a list of extraneous provisions in a reconciliation bill (or conference report) prior to its consideration on the Senate floor. But the statute states clearly that "the inclusion or exclusion of a provision shall not constitute a determination of extraneousness by the Presiding Officer of the Senate."[17] The law gives the Presiding Officer, and only the Presiding Officer, the authority to determine whether a provision violates the Byrd Rule.

The Byrd Rule's six tests do not bestow on the Presiding Officer the same degree of discretion in determining whether or not a particular provision is extraneous. For example, section 312(a) stipulates that the Budget Committee determines outlay and revenue levels in a given fiscal year.[18] This information is given to the Presiding Officer in order to assist in evaluating a provision's budgetary impact to determine whether it passes the Byrd Rule's first, second, and fifth tests. Similarly, the Byrd Rule's third test can be evaluated by examining the jurisdictions of the Senate's committees as specified in Rule XXV.[19] The Byrd Rule's sixth test can be discerned with relative ease by examining a provision's legislative language for direct evidence that it amends Title II of the Social Security Act.

Determining whether or not a provision passes the Byrd Rule's fourth test, however, is not as straightforward. As a consequence, the Presiding Officer has considerable discretion in enforcing the rule in specific parliamentary situations. Because the Byrd Rule does not explicitly define what "merely incidental" means, determining whether or not a particular provision is extraneous under this test can be difficult. Instead of defining the term, the statute requires that the Presiding Officer make a determination by weighing the non-budgetary components of a provision against its budgetary impact. If the Presiding Officer determines that the non-budgetary components outweigh a provision's budgetary impact, then it is stricken from the reconciliation bill.

14. Ibid., p. 36. Section 310(g) of the Congressional Budget Act stipulates that "it shall not be in order in the Senate or the House of Representatives to consider any reconciliation bill…or any amendment thereto or conference report thereon, that contains recommendations with respect to the old-age, survivors, and disability insurance program established under Title II of the Social Security Act."
15. Ibid., pp. 40–41, Section 313(e) of the Congressional Budget Act.
16. Ibid.
17. Ibid., p. 40, Section 313(c) of the Congressional Budget Act.
18. Ibid., p. 38. Section 312(a) of the Congressional Budget Act states that "the levels of new budget authority, outlays, direct spending, new entitlement authority, and revenues for a fiscal year shall be determined on the basis of estimates made by the Committee on the Budget of the House of Representatives or the Senate, as applicable."
19. "Rule XXV: Standing Committees," *Standing Rules of the Senate*, pp. 19–30.

As this analysis of the Byrd Rule's "merely incidental" test highlights, the standing and statutory rules that together represent the Senate's written rules may require a significant degree of interpretation when they are applied to specific parliamentary situations. This is not out of the ordinary in the Senate.

Historically, the Senate has operated on a day-to-day basis by largely adhering to informal rules established pursuant to its past behavior as detailed in a collection of precedents. According to the late Senator Robert C. Byrd (D–WV), these precedents "reflect the application of the Constitution, statutes, the Senate rules, and common sense reasoning to specific past parliamentary situations."[20] Former Senate Parliamentarian Floyd M. Riddick argued that precedents embody the practices of the Senate pursuant to the Constitution, its Standing Rules, and any relevant statutory rules. These practices "fill in the gaps" contained in the institution's written rules when they fail to address specific parliamentary situations.[21] In this sense, the impact of precedents on Senate procedures is similar to that of judicial decisions in case law: Both have the force of formal laws and are thus binding in the same way on future action.

But precedents are meant to complement the Senate's written rules. That is, they are meant to serve as important reference points by which future Senators can inform their understanding of a particular parliamentary situation when the meaning of the written rules is ambiguous or otherwise silent. The difficulties associated with enforcing the Byrd Rule's "merely incidental" test in specific situations highlights the constructive role that precedents should play in ordering the legislative process in the Senate more generally. Because the statute does not specify what "merely incidental" means, its definition is based on instances in the past when the Senate adjudicated such points of order.

A similar example is provided by questions of germaneness. The definition of germaneness utilized by the Senate today when considering amendments is largely a creature of precedent. Rule XXII makes only a passing reference to the question of germaneness. It stipulates: "No dilatory motion, or dilatory amendment, or amendment not germane shall be in order" during post-cloture consideration of legislation.[22] However, like the Byrd Rule's "merely incidental" test, Rule XXII also fails to define the key criteria of germaneness. Rather, the very next sentence states that the Presiding Officer shall decide "questions of relevancy" without debate and that the full Senate will determine whether or not the amendment is germane on appeal of the initial ruling.

Both the effect of the Presiding Officer's rulings and any subsequent appeals create precedents that flesh out and define this germaneness standard. To that end, the Senate adjudicated 213 questions of order between 1965 and 1986. During this period, 159 (74.6 percent) involved determinations as to whether particular amendments were in order for floor consideration. Of these, 15.5 percent determined the germaneness of amendments proposed post-cloture or under unanimous consent agreements requiring that all amendments be germane. It is the cumulative outcome of these adjudicated questions of order that provides the definition of germaneness used in the Senate today.[23]

As with the Senate's germaneness standard, the standard against which "merely incidental" is given meaning and assessed is defined by precedent, but unlike questions of order involving the former, the Senate has not adjudicated the latter nearly as frequently. As a consequence, there are very few past precedents with which the Senate can inform its understanding of how to apply the "merely incidental" test today.

According to a recent Congressional Research Service report, the Senate has adjudicated 127

20. Robert C. Byrd, *The Senate, 1789–1989: Addresses on the History of the United States Senate* (Washington: U.S. Government Printing Office, 1991), p. 52.
21. Floyd M. Riddick, "Floyd M. Riddick, Senate Parliamentarian," Oral History Interviews, Senate Historical Office, Washington, D.C., https://www.senate.gov/artandhistory/history/oral_history/Floyd_M_Riddick.htm (accessed March 22, 2017).
22. "Rule XXII: Precedence of Motions," *Standing Rules of the Senate*, p. 16.
23. Stanley Bach, "The Appeal of Order: The Senate's Compliance with Its Legislative Rules," paper presented at the Annual Meeting of the Midwest Political Science Association, April 13–15, 1989, pp. 14–15.

points of order or motions to waive them under the Byrd Rule.[24] However, not all of these instances concerned the "merely incidental" test. The most common basis for raising one of these points of order (or moving to waive) was that the provision in question failed the Byrd Rule's first test (i.e., it did not produce a change in outlays or revenues). The second most common basis was that the provision in question failed the Byrd Rule's third test (i.e., it was outside of the reporting committee's jurisdiction). In contrast, the Senate adjudicated points of order on the basis that the targeted provision violated the "merely incidental" test a mere 10 times.[25] The small number of precedents on which the definition of "merely incidental" is based complicates the ability of the Presiding Officer, as well as the Parliamentarian, to assess whether a provision is extraneous on this basis alone.

Precedents can be created by one of three methods in the Senate. First, they can be established pursuant to rulings of the Presiding Officer, or Chair, on points of order against violations of the Senate's rules, as in the germaneness example discussed above. These rules are not self-enforcing, and violations that do not elicit points of order do not necessarily create new precedents. The second method by which a precedent can be created is pursuant to a vote of the full Senate on an appeal of the Presiding Officer's ruling on a point of order. Finally, responses by the Presiding Officer to parliamentary inquiries may also create new precedents.[26] It is important to note that such precedents are not considered as binding on the institution as those established pursuant to a definitive action like a ruling of its Presiding Officer or a vote of the full Senate.

The Parliamentarian

Since at least the end of the 19th century, the Senate has had assistance in keeping track of its precedents and extracting from them generalizable principles of parliamentary behavior that can be applied to new situations. For example:

- The first collection of Senate precedents, *A Compilation of Questions of Order and Decisions Thereon*, was prepared in 1881 by Chief Clerk of the Senate William J. McDonald.[27] The compilation was organized alphabetically by topic and briefly covered the procedures governing such issues as offering amendments, floor debate, and voting. It was a short 25 pages in length.

- Another compilation, *Precedents Related to the Privileges of the Senate*, followed in 1893. This 350-page volume was compiled by the clerk of the Senate Committee on Privileges and Elections, George P. Ferber.

- Ferber's compilation was augmented in 1894 by Henry H. Smith, the clerk of the Committee to Investigate Attempts at Bribery, etc. This expanded collection of precedents totaled 975 pages in length and was titled *Digest of Decisions and Precedents of the Senate and House of Representatives of the United States.*

The first collection of precedents that resembled the volume utilized in the contemporary Senate was published in 1908 by Chief Senate Clerk Henry H. Gilfry. Gilfry's compilation, *Precedents: Decisions on Points of Order with Phraseology in the United States Senate*, was updated in 1914, 1915, and 1919. These

24. The Senate adjudicated 70 points of order and 57 motions to waive under the Byrd Rule. See Bill Heniff Jr., "The Budget Reconciliation Process: The Senate's 'Byrd Rule'," Congressional Research Service *Report for Members and Committees of Congress*, November 22, 2016, pp. 7, 10, https://fas.org/sgp/crs/misc/RL30862.pdf (accessed March 22, 2017). The data compiled in the CRS report "reflect[] only those instances when specific reference was made to Section 313 of the [Congressional Budget] act or to the Byrd Rule and may undercount the number of actions potentially involving the rule." See ibid., p. 8, note 14.
25. Ibid., pp. 20–33. The basis of each point of order and motion to waive and its disposition is detailed in Table 4, "Listing of Actions Under the Senate's Byrd Rule, by Act: 1985–2015."
26. The word *see* in *Riddick's Senate Procedure* designates precedents resulting from parliamentary inquiries.
27. Thomas Jefferson compiled a similar rule manual that included information on precedents during his tenure as Vice President of the United States and President of the Senate (1797–1801). Jefferson's intention was to give members of the Senate additional procedural guidance in situations for which the institution's first 24 Standing Rules did not provide explicit direction. In the absence of such guidance, Jefferson feared that the Senate's deliberations would fluctuate between chaos and heavy-handed majority rule. He discerned "general parliamentary law" by consulting the Constitution, the Senate's rules, "and where these are silent…the rules of Parliament." Thomas Jefferson, *A Manual of Parliamentary Practice for the Use of the Senate of the United States* (Washington: U.S. Government Printing Office, 1993), p. xxviii.

volumes averaged around 700 pages in length. Like McDonald's earlier compilation, Gilfry's *Precedents* was organized alphabetically and served as a useful reference work for Senators.

Notwithstanding the Clerk's increased role in advising members on what the Senate did in past parliamentary situations, it would be incorrect to infer that members presiding over the Senate during this period simply deferred to the Clerk's advice because they lacked the requisite institutional knowledge of applicable precedents necessary to adjudicate questions of order. The Senate's Presiding Officer was not always dependent on, much less required to follow, this procedural advice when ruling on points of order. According to Riddick, "Senators felt that they had knowledge of the job and they didn't need a Parliamentarian whispering in their ear when they were presiding as to how the Senate should be run."[28]

In 1935, the Senate formally created the position of Parliamentarian and charged its occupant with helping the Presiding Officer to apply the institution's written rules and, when those were silent, its precedents to specific parliamentary situations. According to the Senate's website:

> The Parliamentarian is the Senate's *advisor* on the interpretation of its rules and procedures. Staff from the Parliamentarian's office sit on the Senate dais and *advise* the Presiding Officer on the conduct of Senate business. The office also refers bills to the appropriate committees *on behalf of* the Senate's Presiding Officer.[29]

The Parliamentarian also continued the Clerk's practice of maintaining records of the Senate's precedents.

The first Parliamentarian, Charles L. Watkins, and his assistant, Dr. Floyd M. Riddick, prepared the most recent compilation of Senate precedents in 1954.[30] This collection, *Senate Procedure: Precedents and Practice*, was updated in 1964, 1974, and 1981. By the middle of the 20th century, there already were hundreds of thousands of precedents governing the legislative process. This number has grown to over a million today. As a point of comparison, Riddick spent a year reading over 30,000 pages of precedents on legal-sized stationary in preparation for compiling the first edition of *Senate Procedure* in the early 1950s.[31] The most recent edition of *Riddick's Senate Procedure* was updated in 1992 by Alan Frumin and is over 1,600 pages in length. Riddick himself estimated that this lengthy tome was based on over a million precedents that govern the legislative process in the Senate today.[32]

Adding to the sheer volume of precedents is the fact that by their very nature, many of them are not well documented and easily accessible. The implication is that Senators do not have the time necessary to learn all of the applicable precedents on a given parliamentary question. By the late 1970s, Riddick had come to believe that it was simply impossible for individual Senators to truly master all of these precedents while simultaneously balancing the other competing demands of their office.[33] It is precisely this lack of time that today encourages members to defer to the Parliamentarian and the advice she provides.

Yet despite such deference, the underlying relationship between the Senate's Presiding Officer and its Parliamentarian remains unchanged. A comparison common today is to equate the role played by the Parliamentarian in the legislative process with the role played by an umpire in a baseball game.[34] In reality, the two roles are quite different. Unlike an umpire, the Parliamentarian has no independent authority with which to enforce the Senate's rules and ensure that the Presiding Officer's decisions are acceptable. Instead, the Parliamentarian's role is to advise the Presiding Officer and individual Senators

28. Riddick, Oral History Interviews, 1978.
29. United States Senate, "Glossary," https://www.senate.gov/reference/glossary_term/parliamentarian.htm (accessed March 15, 2017). Emphasis added.
30. Charles L. Watkins was named the first official Senate Parliamentarian on July 1, 1935.
31. Riddick, Oral History Interviews, 1978.
32. See James I. Wallner, "Parliamentary Rule: The U.S. Senate Parliamentarian and Institutional Constraints on Legislator Behavior," *The Journal of Legislative Studies*, Vol. 20, No. 3 (2014), pp. 380–405. Precedents established in the years since 1992 have not yet been published.
33. Riddick, Oral History Interviews, 1978.
34. See, for example, David Lightman, "Senate Parliamentarian: He's the Only One Both Parties Trust," McClatchy Newspapers, D.C. Bureau, March 24, 2010, http://www.mcclatchydc.com/news/politics-government/article24577774.html (accessed March 22, 2017).

on what the institution's rules say and how best to use lessons learned from its past behavior to answer parliamentary questions in the present. This relationship is reflected in the Senate's precedents, which explicitly state, "The Chair rules on points of order, not the Parliamentarian; the parliamentarian merely advises the Chair."[35] In short, the Presiding Officer may choose to disregard the Parliamentarian's advice regarding how to apply a precedent to a specific parliamentary situation when the rules are silent.

Given this, the Presiding Officer is under no obligation to follow the procedural advice provided by the Parliamentarian in determining whether or not the budgetary impact of a particular provision in a reconciliation bill is "merely incidental" to its underlying policy impact. In this context, any advice provided by the Parliamentarian is necessarily limited by the same dearth of precedents that also complicates the Presiding Officer's ability to discern the meaning of "merely incidental" simply by referring to past practice.

The Parliamentarian may also rely on informal conversations in the so-called Byrd Bath process to inform her understanding of how to apply the test to a particular provision, but any consensus reached in such discussions lacks precedential authority to the extent that they did not involve a majority of Senators and were never adjudicated on the Senate floor.[36] As a consequence, it is inappropriate to view such discussions as binding Senate precedents, equivalent to an act of the full Senate under the Constitution's Rules and Expulsion Clause. Under the Constitution, only those decisions made by the Presiding Officer or by the full Senate should carry precedential weight.

Conclusion

Congress should not use the Byrd Rule as an excuse for its inability to repeal and replace Obamacare in its entirety. In reality, the question of how the Byrd Rule should be enforced in the reconciliation process is not that straightforward. Arguments that the law's most damaging provisions, like its major insurance regulations, cannot be repealed through reconciliation are based on a flawed understanding of how the rule's "merely incidental" test is enforced. Applying Byrd Rule restrictions to the insurance regulations requires the Senate to interpret both the statutory language that created the rule and the legislative language in the underlying bill.

In contrast, identifying who is ultimately responsible for enforcing the Byrd Rule is straightforward. The statute requires that the Senate's Presiding Officer determine whether or not a particular provision is compatible with the rule and thus eligible to be included in the reconciliation bill. Furthermore, the statute does not require the Presiding Officer to accept the advice of the Senate Parliamentarian before making a determination as to how the "merely incidental" standard should be interpreted.

Finally, there is nothing inappropriate, illegal, or otherwise inconsistent with the rules about the Senate determining how to enforce the Byrd Rule in a specific parliamentary situation when its meaning is ambiguous or silent. Making such a determination in this context would, if successful, simply create a new precedent that would provide additional guidance to the Senate regarding what "merely incidental" means. It would not, however, violate any specific written rule.

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35. Frumin and Riddick, *Riddick's Senate Procedure*, p. 989.
36. The Byrd Bath process occurs when the Parliamentarian meets with both majority and minority staff to identify and remove any extraneous provisions in a reconciliation bill prior to its consideration on the Senate floor. Paul M. Krawzak, "Senate Democrats: Many Byrd Rule Problems in Obamacare Repeal," Congressional Quarterly News, March 23, 2017, http://www.cq.com/doc/news-5067976?2&srcpage=news&srcsec=ina (accessed March 23, 2017).