

Consequential Decisions on Reconciliation and the Byrd Rule

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KEY TAKEAWAYS

Budget reconciliation is meant to provide a fast-track budget process—not to be weaponized to pass controversial policies unrelated to revenues and spending.

Democrat leadership is considering exploiting reconciliation by attempting to include unprecedented non-budgetary policies in a COVID-19 “stimulus” package.

Congress should reject this “nuclear option” to change the rules, which would pave the way for the Left to impose their radical agenda.

Under the pretext of responding to COVID-19, Members of Congress are advocating for a purely partisan path forward to enact a wide-ranging progressive policy agenda through the budget reconciliation process.¹

The budget resolution that would be used to start the process would provide reconciliation instructions to add \$1.9 trillion in deficits by the House Committees on Ways and Means; Energy and Commerce; Financial Services; Agriculture; Education and Labor; Foreign Affairs; Homeland Security; Natural Resources; Oversight and Reform; Science, Space, and Technology; Small Business; Transportation and Infrastructure; and Veterans’ Affairs. Likewise, the Senate would utilize the committees on Finance, Health, Education, Labor and Pensions, Banking, Housing and Urban Affairs, Agriculture, Commerce,

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Science and Transportation, Environment and Public Works, Foreign Relations, Homeland Security, Indian Affairs, Small Business, and Veterans' Affairs.² These committees collectively have authority over trillions of dollars' worth of existing programs and jurisdiction over virtually every major policy issue.

Advocates for this path have been suggesting that the reconciliation bill ultimately produced by this process will include many provisions that would be considered extraneous and out of order on a reconciliation bill.³ The potential of this strategy raises questions about setting new precedents for what would be permitted under the expedited reconciliation process that cannot be filibustered.

The Budget Reconciliation Process

Budget reconciliation was created by the 1974 Congressional Budget Act (CBA) to provide a fast-tracked process to amend the law so that it would align with Congress's budget plans.⁴ In the Senate, where the filibuster can slow down or stop the consideration of bills, reconciliation is a particularly powerful tool because it is both "privileged" and debate is limited to 20 hours. This means that the Senate can proceed to the bill and vote on final passage with only a simple majority (usually 51 affirmative votes).

Because reconciliation is so powerful—and because it has been used in the past to make sweeping reforms that are far outside the budget process—the Senate has curbed the use of reconciliation for policies that do not make direct changes to spending or revenue.⁵ Furthermore, reconciliation is restricted to proposals that affect the deficit by making changes to revenue or actual—not just budgeted—spending. Those restrictions are codified within § 313 of the CBA, but are known colloquially as the Byrd Rule.

Availability. Reconciliation is not automatically available because it is linked directly to the production of a budget resolution. Therefore, to turn on the availability of reconciliation, both the House and the Senate must adopt a budget resolution that provides instructions for how Congress plans to use the process. Once the budget resolution is adopted, the committees with reconciliation instructions can begin producing legislative recommendations, which are then packaged together into a single reconciliation bill by the House and Senate Budget Committees that can be considered under expedited procedures.

Purpose. The declaration of purpose inserted by Congress into the CBA states that "it is essential to assure effective congressional control over the budgetary process; [and] to provide for the congressional determination

each year of the appropriate level of Federal revenues and expenditures.”⁶ The CBA also attempted to give Congress more control over the budgetary process, which had been dominated by the executive since 1921.⁷ An important way that the CBA attempts to rectify this is by instituting a formal legislative budget process that includes Congress adopting a concurrent resolution on the budget. The budget resolution establishes levels of budget authority; projected spending (outlays); revenues; public debt; and other budget levels for the upcoming fiscal year and subsequent years. The CBA then defines a process and a timetable for Congress to enact legislation effectuating the budget.

Paths. There are two main paths to ensure that legislation carrying out the budget is passed by Congress. The first is the annual appropriations process for discretionary spending (or annual appropriations). The House is expected to complete action on the annual appropriations bills by June 30 each year, with the final bills being enacted by the beginning of the fiscal year on October 1, but this rarely occurs in practice. At the time the Budget Act was enacted, discretionary spending was the most substantial component of the federal budget, making up 67 percent, compared to the 33 percent of the budget that was mandatory spending. (Now the proportions are reversed.)⁸

Second, reconciliation provides a way to effectuate the provisions and requirements of the budget for mandatory spending, revenues, and the public debt. Under the Budget Act’s timeline, Congress is supposed to complete action on reconciliation by June 15.

The *Merriam-Webster Dictionary* definition of “reconcile” is “to make consistent or congruous.”⁹ The House Budget Committee described the purpose of a reconciliation bill as being “designed to amend existing law to reflect the assumptions underlying the budget resolution from which it has commenced; that is, it reconciles current law to the budget resolution framework.”¹⁰

Shell Budgets. Given this context about the purpose of reconciliation, utilizing a so-called shell budget to begin the reconciliation process (as has become more common), makes little sense. A shell budget may technically meet all the requirements of a budget resolution, but since the levels in the budget are simply consistent with the underlying baseline, there are no *changes* in law needed to meet the assumptions of the budget.

More practically, while using a shell budget can make beginning the reconciliation process politically easier, the lack of a clear goal for the outcome of reconciliation in the form of a budget can create problems in completing the reconciliation process. Because there is no agreed-upon framework

from which to work from on the front end, this can lead to varying expectations from stakeholders that can make it more difficult to get the necessary votes to pass the reconciliation bill on the back end.

An example of this process playing out is the fiscal year 2017 reconciliation process, which began with a shell budget featuring *de minimis* reconciliation instructions being passed in early January 2017. Many congressional Members believed that the reconciliation would resemble the Obamacare repeal reconciliation bill that had been vetoed the year prior. After the goal of reconciliation morphed into crafting a replacement for Obamacare, the House and Senate were unable to enact a reconciliation bill.

The Byrd Rule

Named for its author, Senator Robert Byrd (D–WV), the Byrd Rule dates to 1985. The Byrd Rule lays out requirements for provisions in reconciliation bills considered in the Senate by defining what constitute “extraneous matters.”

Prior to the codification of the Byrd Rule, reconciliation bills began to include legislative provisions that were outside the budget process. While introducing the amendment that became the first iteration of the Byrd Rule, Senator Byrd decried this development:

[W]e are in the process now of seeing...the Pandora’s box which has been opened to the abuse of the reconciliation process.... It was never foreseen that the Budget Reform Act would be used in that way. So if the budget reform process is going to be preserved, and more importantly if we are going to preserve the deliberative process in this U.S. Senate—which is the outstanding, unique element with respect to the U.S. Senate, action must be taken now to stop this abuse of the budget process.¹¹

The Byrd Rule has been modified a handful of times since its introduction and was permanently codified in 1990 as § 313 of the Congressional Budget Act of 1974.¹²

Conditions. There are six tests under the Byrd Rule. If a provision of a reconciliation bill meets *any* of the conditions, it is subject to a point of order raised by a Senator. Under the Byrd Rule, a provision of a reconciliation bill is extraneous if it:

1. Does not produce a change in outlays or revenues or a change in the terms and conditions under which outlays are made or revenues are collected;

2. Produces an outlay increase or revenue decrease when the instructed committee is not in compliance with its instructions;
3. Is outside the jurisdiction of the committee that submitted the title or provision for inclusion in the reconciliation measure;
4. Produces a change in outlays or revenues that is merely incidental to the non-budgetary components of the provision;
5. Would increase the deficit for a fiscal year beyond the “budget window” covered by the reconciliation measure; or
6. Recommends changes in Social Security.¹³

Discretionary Spending. Although not explicitly prohibited by the Byrd Rule, it is widely understood that discretionary spending does not qualify for reconciliation. This is because the Byrd Rule is enforced upon *outlays*, not *budget authority*—or, put more simply, on actual projected spending, not budget levels provided to agencies. There are a number of examples in which there is budget authority, but no actual spending results, from that authority. Therefore, reducing budget authority would have no meaningful effect on the deficit or financial position of the government.

The Congressional Research Service reports that “[i]n current practice, reconciliation may include mandatory spending legislation, but does not include discretionary spending.”¹⁴ The Committee on the Budget describes in “Byrd Rule Annotated” that “the Parliamentarian casts a particularly suspicious eye on language that makes appropriations.”¹⁵ A former Budget Committee staff director has also pointed out that authorizing budget authority without an associated effect on outlays also could run afoul of the change in outlays test.¹⁶

Prior to the enactment of the Byrd Rule, the Appropriations Committee received reconciliation instructions in two budget resolutions—but this has not occurred since fiscal year 1982.¹⁷ This fact is worth noting due to the Byrd Rule, which considers extraneous provisions that are outside the jurisdiction of the committee that submits a legislative recommendation for a reconciliation bill. Because the Senate Appropriations committee has jurisdiction on discretionary spending, if such spending is included in a reconciliation bill, when the Appropriations Committee does not receive reconciliation instructions, the provisions could be subject to a point of order.¹⁸

Applicability. An important feature of the Byrd Rule is that it is only applicable in the Senate. The rule only makes available a point of order “when the Senate is considering a reconciliation bill or a reconciliation resolution.”¹⁹ No comparable provision exists for House consideration of a reconciliation bill. However, because a bill must be passed by the House and the Senate in identical form in order to be enacted into law, the restrictions of the Byrd Rule have an important effect on what the House includes in a reconciliation bill.

Points of Order. The Byrd Rule allows a Senator to raise a point of order against one or more extraneous provisions of a reconciliation bill or an amendment offered to a reconciliation bill. If the point of order is sustained by the Senate Presiding Officer, the provision shall be deemed stricken from the bill. Byrd Rule points of order are considered to be “a surgical strike, meaning the offending matter is removed from the legislative text, but the rest of the bill remains.”²⁰ The Byrd Rule is not self-enforcing: A Senator must raise a point of order against an extraneous provision in order to strike it from a bill.

The Byrd Rule requires the Senate Budget Committee to submit a list of provisions considered to be extraneous to a reconciliation bill when such a bill is discharged from the Budget Committee, as well as for a conference report on a reconciliation bill. However, the list is not binding. The Rule specifies that “[t]he inclusion or exclusion of a provision shall not constitute a determination of extraneousness by the Presiding Officer of the Senate.”²¹ This reinforces the fact that the Presiding Officer has the responsibility to determine Byrd Rule violations and enforce the Rule when a point of order is raised.

The Presiding Officer is empowered to decide the validity of a point of order. Because not every term of the Byrd Rule is well defined in law, there is some discretion afforded the Presiding Officer in ruling on points of order, but the Presiding Officer is of course expected to faithfully apply the law.²² The Senate Parliamentarian advises the Presiding Officer, including on past precedent relevant to a point of order.

Precedent. Precedent plays an important role in the Senate as a complement to the written rules and laws that govern the chamber. Heritage Foundation experts have previously described the formation of precedents in the Senate:

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.... 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. 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.²³

Waivers. Before the Presiding Officer rules on a point of order, the Byrd Rule provides the opportunity for any Senator to make a motion to waive the point of order. A three-fifths vote of Senators (60) is required to support such a motion to waive the point of order. If the point of order is waived, the text in question is retained. If the motion to waive fails, the Presiding Officer will then rule on the point of order.

Conference Reports. When considering a conference report on a reconciliation bill in the Senate, if a provision of the conference report is stricken due to a point of order for a Byrd Rule violation, the Senate then considers the question of sending the conference report without the stricken language to the House. The Byrd Rule “has been invoked only six times during consideration of a conference report.”²⁴ The enforcement of the Byrd Rule on conference reports has led to contention between the House and Senate.²⁵ That said, the Byrd Rule is not self-enforced, which means that if Members do not raise a point of order it does not imply the absence of provisions in the reconciliation bill that would violate the Byrd Rule.

The “Merely Incidental” Test of the Byrd Rule

The “merely incidental” test of the Byrd Rule deserves further consideration. The relevant subparagraph of the Byrd Rule reads: “[A] provision shall be considered extraneous if it produces changes in outlays or revenues which are merely incidental to the non-budgetary components of the provision.”²⁶ The terms “merely incidental,” “non-budgetary components,” and “the provision,” are all left without further definition within the Byrd Rule itself.

As described by the former Chief Counsel of the Committee on the Budget in “Byrd Rule Annotated,” application of merely incidental “language calls for the exercise of judgment. The Parliamentarian has not laid down any bright-line test to aid that judgment, and reserves the right to consider each individual case on its merits.”²⁷

Interpretation. How should the Presiding Officer interpret the merely incidental test and exercise her judgment? By looking to the plain text of the rule and understanding its original meaning.

According to the Senate Budget Committee, “The drafters of this subparagraph wished to prohibit provisions in which policy changes plainly overwhelmed deficit changes.”²⁸ Senator Byrd spoke to his intentions on the matter when he stated, “The procedures that drive the reconciliation bill set limits on the normally unfettered process of debate and amendment, because policy matters that do not have clear and direct budgetary consequences are supposed to remain outside its scope.”²⁹

Heritage Foundation experts have previously explained that:

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.³⁰

Just because a provision has a budgetary impact does not insulate it from violating the merely incidental test.³¹ Provisions that make changes to budget authority (but not spending) or overturn court decisions are viewed by the Senate Parliamentarian “as strong indicia that the language attempts to do something that the drafters of section 313 did not contemplate Congress would do in the fast-track reconciliation process.”³²

Behavior Modification. Additionally, provisions that “modify behavior” are often considered to be examples of extraneous provisions.³³ For example, if a provision made changes to payments for Medicaid (a mandatory health entitlement program), those direct changes to payments for the program would be considered budgetary and in-order pursuant the Byrd Rule. However, if a provision encouraged *states*, who administer Medicaid, to change their own behavior without directly affecting payments and that change had an effect on the number of people eligible for the program, the budgetary effects of the provision modifying behavior would be “incidental,” and thus not allowed under the Byrd Rule.

A Byrd Rule Case Study: Increasing the Minimum Wage

It has been reported that certain Members of Congress are considering an attempt to increase the minimum wage to \$15 per hour by reconciliation.³⁴

This policy change would be extremely harmful, particularly during the pandemic and government shutdowns that have hit lower-wage industries

the hardest.³⁵ Enacting a one-size-fits-all nationwide policy would have disproportionate impacts across the country, as *a \$15 minimum wage in Mississippi is the equivalent to \$35.74 per hour in Washington, DC*.³⁶ Increasing the minimum wage would be a job killer, with potentially millions of jobs eliminated. It would expedite automation, drive up prices, and shrink the economy.³⁷ As Heritage Foundation expert Rachel Greszler has written, “to pay higher hourly wages without running in the red, most businesses will have to raise prices (which can lower business volume) or cut costs. The latter is done through layoffs, reducing workers’ hours or benefits, raising prices, or forgoing investments in the business.... Everyone wants workers to make good money, but not if it means no jobs or lower incomes for others.”³⁸

Increasing the minimum wage will not pass muster under the Byrd Rule, and it will not qualify for reconciliation. While there are very limited fiscal impacts that would occur due to the policy change, the changes in outlays from increasing the minimum wage are merely incidental to the non-budgetary components of the provision.

CBO Analyses. The Congressional Budget Office (CBO) has, for decades, consistently estimated that increasing the minimum wage has no significant direct effect on the federal budget, but the policy would impose very significant mandates on the private sector. In April 2019, the CBO prepared a cost estimate for H.R. 582, the Raise the Wage Act.³⁹ The Raise the Wage Act would have increased the federal minimum wage to \$15 per hour over a six-year period. The CBO stated that the Raise the Wage Act:

*would directly affect the federal budget by raising the pay of a small group of federal employees who are paid an hourly wage. This estimate accounts only for those direct effects on the budget. H.R. 582 also would indirectly affect the budget by boosting the prices of some goods and services that the government purchases. Tax receipts and federal spending for health and income security programs also would be indirectly affected as income increases for some people and falls for others.*⁴⁰

The direct fiscal impacts of the bill are limited. The CBO estimated that the Raise the Wage Act would “increase direct spending by less than \$150,000 per year over the 2023–2029 period, with a cumulative cost of about \$700,000 over the 2020–2029 period” by increasing the costs for “about 100” Postal Services employees.⁴¹ Over the 2020 to 2029 period, the CBO’s baseline estimate is that federal outlays would total more than \$57 trillion.⁴²

The CBO also estimates that discretionary spending subject to appropriation would increase by \$76 million over fiscal years 2020–2029 by requiring costs to increase for some federal employees. The number of federal employees affected is very small—fewer than 7,000 by the end of 2029 (out of a total 2.8 million executive branch civilian federal employees).⁴³ As has been previously noted, discretionary spending does not qualify for reconciliation.

The CBO further estimated that the Raise the Wage Act would impose significant private-sector mandates, adding \$48 billion in annual costs to private-sector employers.⁴⁴ Comparing the limited budgetary impact to this substantial non-budgetary impact shows that the non-budgetary components outweigh the budgetary.

In 2019, the CBO also conducted an analysis of the economic effects of increasing the federal minimum wage. In contrast to the very limited effects on the federal budget related to the increased costs of a limited number of federal employees, the policy change of increasing the federal minimum wage would have very significant effects on the private sector, affecting tens of millions of workers, including causing more than *1 million job losses*.⁴⁵

In 2006, the CBO answered questions about the potential effects of an increase in the federal minimum wage in a letter to the House Ways and Means Committee Chairman.⁴⁶ In response to a question about how an increase in the minimum wage would affect federal spending on work support programs, the CBO said that the increase in the minimum wage could affect federal spending, but the CBO “judges that those effects would be small.”

The CBO further wrote that the “CBO’s estimate of the potential effects of an increase in the minimum wage on federal revenues is similar to that for spending—the impact would be small and of indeterminate direction.” The CBO also included a cost estimate in their letter, which stated that a bill increasing the minimum wage “would have no significant effects on the federal budget.” Nonetheless, the CBO estimated that increasing the minimum wage would impose significant private-sector mandates “because it would require employers to pay higher wages than they are required to pay under current law.”⁴⁷

In 2004, the CBO prepared a cost estimate for the Fair Minimum Wage Act of 2004.⁴⁸ The CBO estimated that increasing the minimum wage as proposed “would have no significant effect on the federal budget.” The CBO also estimated that the proposal would have significant private-sector mandates.⁴⁹

The Raise the Wage Act. On January 26, 2021, House Committee on Education and Labor Chair Bobby Scott (D–VA), along with 190 original co-sponsors, and Senate Budget Committee Chair Bernie Sanders (I–VT), along with 37 original co-sponsors, introduced an updated version of the Raise the Wage Act in an attempt to increase the federal minimum wage to \$15 in four years.⁵⁰

The bill amends the Fair Labor Standards Act (FLSA), which, according to the Department of Labor, “establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments.”⁵¹ The FLSA is administered and enforced by the Wage and Hour Division of the Department of Labor. In the CBO’s September 2020 baseline, the Wage and Hour Division only had two budget accounts: a discretionary account for Salaries and Expenses and a mandatory account for H-1 B and L Fraud Prevention and Detection.⁵² The bill makes no changes to either spending account.

The bill does not make any direct appropriations, it does not provide entitlement authority, and it does not make any changes to the revenue code.

While some may attempt to point to CBO reports showing that increasing the minimum wage has an effect on the federal budget as evidence that the policy could be eligible for a reconciliation bill, this is unpersuasive. As the former Chief Counsel to the Senate Budget Committee has written, “Budgetary effect, without more, does not insulate a provision from violating the [extraneous provisions] subsection. Provisions that reduce the deficit may nonetheless violate” the merely incidental test.⁵³

The evidence is clear. Comparing the non-budgetary components of increasing the minimum wage against its budgetary impact shows that the non-budgetary policy change vastly outweighs the limited budgetary effects. Even the Chairman of the House Budget Committee, John Yarmouth (D–KY), who is leading the effort to include the controversial provision in the reconciliation bill, called the gambit a “stretch.”⁵⁴ A minimum-wage increase would be considered extraneous in a reconciliation bill.

When Is a Reconciliation Bill Not a Reconciliation Bill?

Under most circumstances in the Senate, a cloture vote of three-fifths of Senators (usually 60) is required to end debate. In contrast, a budget reconciliation bill is privileged in the Senate. This means that the motion to proceed to a reconciliation bill is not debatable. Once the Senate has begun consideration of a reconciliation bill, the CBA limits debate to 20

hours in the Senate.⁵⁵ Therefore, a vital step for considering legislation in the Senate is determining the terms of consideration for the bill. Is a bill before the Senate a reconciliation bill or not?

In order to qualify for the expedited procedures, a bill must be recognized as a reconciliation measure. This is particularly important for the House to take into consideration, even though the Byrd Rule does not directly apply in the House.⁵⁶ If a bill is loaded with provisions that would be considered extraneous under the Byrd Rule, it would not be considered a reconciliation bill—and would thus require a 60-vote threshold cloture vote to end debate on a motion to proceed to the bill. If a bill generally complies with the Byrd Rule or if the violations could be cured through the floor process, it could be recognized as a reconciliation bill.

Another important consideration for determining privilege is compliance with the reconciliation instructions. If a provision in a bill is outside the jurisdiction of the Senate committees given reconciliation instructions, the bill may not qualify for reconciliation procedures.⁵⁷

Ultimately, the responsibility for faithfully applying the law and rules of the Senate lies with the Senate Presiding Officer. The Presiding Officer will receive advice from the Senate Parliamentarian, who considers the preponderance of the provisions of the bill in determining if a bill qualifies as a reconciliation bill or should be considered under regular order.

The Importance of the Filibuster and the Consequences of Expanding the Bounds of Reconciliation

The Senate's legislative filibuster is an essential tool that prevents the "tyranny of the majority" by requiring a supermajority in the Senate for most controversial issues.⁵⁸ The filibuster protects the right to extended debate, which has been a defining feature of the Senate's legislative process for centuries.⁵⁹ This promotes a more accountable and stable lawmaking environment by forcing additional deliberation, encouraging compromise across factions, and protecting the rights of underrepresented minorities.

The filibuster is particularly vital when one party has extremely narrow majorities in both chambers of Congress as well as control of the White House. The supermajority requirement can then provide an essential check on the most outlandish impulses of the majority. Because the default posture of the Senate requires supermajority support, if not consensus, the simple majoritarian nature of reconciliation means that the process has, especially in recent years, been used for partisan legislative ends. Because reconciliation is a one-party exercise, it can encourage the most aggressive elements of the party in power.

This has led some policymakers to consider employing the “ultimate power move”⁶⁰—abusing reconciliation to set off the nuclear option by ignoring the rules and redefining the meaning of words.

Forcing Through Controversial Measures. Many of the policies currently under consideration for reconciliation, such as regulatory requirements or private-sector mandates such as increasing the minimum wage and paid family leave, would not qualify for reconciliation.⁶¹ It has been noted that more than half of President Joe Biden’s stimulus proposal would be subject to points of order under the Byrd Rule.⁶² The reason these policies are being considered for reconciliation is because they are controversial and therefore unlikely to garner 60 votes to be passed through regular order, *not* because the policies would reduce the deficit (the intended purpose of the reconciliation process).

As described above, discretionary spending does not qualify for reconciliation. Despite this, some Members are considering intruding on the jurisdiction of the Appropriations Committees, which control the defense and non-defense discretionary spending through the annual appropriations process. However, Roll Call reports that under the current plan, “the Appropriations committees won’t get reconciliation instructions, but they’ll work with the authorizing committees on large portions of the bill that will contain discretionary funds. The authorizers will include discretionary spending in their legislative portions.”⁶³ Such a controversial step would not only make the federal budget more unsustainable—but it could also further derail the annual appropriations process, jeopardizing funding for critical priorities such as national defense.

If new precedent is set to ignore the common understanding of the Byrd Rule, the floodgates will open. Policies that previously were out of order under reconciliation could then be passed through the Senate by a majority vote. Issues as wide-ranging and controversial as immigration, adding new states to the Union, taxpayer funding of abortion, and the Green New Deal could be on the table. Other issues that could potentially be fair game under reconciliation if the bounds of what is permitted are dramatically expanded could include repealing burdensome regulations that affect the economy, overturning court decisions, or making changes to defense or non-defense spending.

As Senator Byrd warned, if reconciliation was abused to allow extraneous policy matters:

What controversial measure will not be viewed as a future candidate for inclusion in a reconciliation bill? Perhaps a wholesale reform of the election process

will find its way into reconciliation legislation or a major reorganization of the executive branch. Under those circumstances, the legislative process could become an abomination. The rights of the minority and of each Senator would be trampled.⁶⁴

Conclusion

If a reconciliation bill is brought before the Senate that includes significant provisions that are extraneous, the Senate should not consider the bill a reconciliation bill. Doing otherwise would risk undermining the rule of law and overruling decades of precedent in a move that would be the equivalent of detonating the nuclear option on the legislative filibuster.

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