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**The Budget Reconciliation
Process**

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I. Introduction

The budget reconciliation process is simultaneous one of the most mysterious and least understood parts of the federal budget process, while at the same time being perhaps the most wide-ranging and powerful. While the federal budget process usually limits itself to making policy through budgetary allocations and subsequent appropriations, the budget reconciliation process creates a legislative fast-track for substantive policy making through the Congressional budget process. It is this legislative fast-tracking around the Senate filibuster that gives the budget reconciliation process its power compared to the normally laborious process of achieving change through traditional legislative means. Budget reconciliation has been used to make policy changes ranging from the trivial to the dramatic in areas from taxes to student loans to social policy and almost everything in-between. This briefing paper will examine the budget reconciliation process from its inception in the Congressional Budget Act of 1974¹ through fiscal year (“FY”) 2008.

II. A Brief History of Budget Reconciliation and What It Is

Since the Congressional Budget Act of 1974 the Congress has attempted to bind itself to pass a yearly budget each year². This has for the most part been successful, at least to the extent that Congress has produced budgets in all but four years in the past thirty-three: FYs 1999, 2003, 2005, 2007³. However simply laying out budgetary caps was not enough, Congress wanted to create a mechanism whereby legislative changes could be made to match the fiscal goals of the budget. However to make the changes

¹ Congressional Budget Act of 1974, Titles I-IX dealing codified at 2 U.S.C.A. 621-692 (2005).

² *See Id.*

³ *See* Bill Heniff Jr. & Justin Murray, Congressional Budget Resolutions: Selected Statistics and Information Guide, CRS Report for Congress RL30297, 6 n. f, h, i, j (last updated Feb. 26, 2008).

required for the budget every year, Congress needed to create a fast-tracked, tightly-controlled legislative superhighway: the budget reconciliation process.

The budget reconciliation process is an optional process supplementary to the yearly federal budget process⁴. The budget committees in both the House and Senate meet and send reconciliation instructions to individual issue-area committees to reduce or increase spending and/or revenues by set amounts. These committees then submit substantive legislation from their respective issue-areas to meet these targets. This legislation then gets fast-tracked in a budget reconciliation bill through their respective chambers.

Since budget reconciliation became an option in the Congressional Budget Act of 1974 there have been twenty-two reconciliation acts passed by the Congress in thirty-three years⁵. Given that the first reconciliation act was not passed until FY 1981⁶ and four years since that point have not had an underlying budget, budget reconciliation has been passed in twenty-two out of twenty-four years since it began to be used, while there was a budget in place, for a passage rate of approximately 92%⁷. Nineteen of these acts

⁴ Bill Heniff Jr., *Budget Reconciliation Legislation: Development and Consideration*, CRS Report for Congress 98-814, 1, (last updated Dec. 8, 2006).

⁵ See Bill Heniff Jr. & Justin Murray, *Congressional Budget Resolutions: Selected Statistics and Information Guide*, CRS Report for Congress RL30297, 29-30, (last updated Feb. 26, 2008).

⁶ There is some controversy surrounding whether FY 1976 H.R. 5559 was considered under budget reconciliation procedures. The relevant primary source evidence supports the conclusion that it was not considered under reconciliation procedures in the House but was then considered under reconciliation procedures in the Senate. Congress itself has chosen to classify FY 1981 as the first year budget reconciliation was officially used because of the participation of both houses and perhaps more importantly, planned budget reconciliation legislative and not just use of the procedures. See Floyd M. Riddick and Alan S. Frumin, *RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES*, 622-23, (1992); Sen. Long & Senate Presiding Officer, *Cong. Record*, vol. 121, 40540, (Dec. 15, 1975); see also *id.* at 40544-50. The bill was vetoed by President Ford on Dec. 17, 1975. Bill Heniff Jr. & Justin Murray, *Congressional Budget Resolutions: Selected Statistics and Information Guide*, CRS Report for Congress RL30297, 29, (last updated Feb. 26, 2008).

⁷ See *Supra* note 5.

have become law and three have been vetoed⁸. This is an astounding record of passage for substantive legislation, especially considering the controversial topics and difficult fiscal decisions made by many of these bills⁹. This record reveals both the power and flexibility of the budget reconciliation process. The process is flexible enough to almost always get something passed and powerful enough to force though often controversial legislation. From these basic statistics it is clear why the budget reconciliation process is attractive as a legislative vehicle.

Interestingly the purpose of the budget reconciliation process seems to have shifted over time. From FY 1981 through FY 1999 the budget reconciliation process resulted in net decreases in the deficit over baseline budget projections every year a budget reconciliation bill was passed¹⁰. During these years the budget reconciliation process was consistently used to reduce spending or raise revenues, and often for both. However from FY 2000 until the present every budget reconciliation process has resulted in a net increase in the deficit over baseline projections, sometimes in amounts dwarfing previous budget reconciliation process¹¹. This shows how the budget reconciliation process has been used for tax cuts in the past decade instead of deficit reduction¹².

⁸ *Id.*

⁹ *See infra* note 10 at 4-5.

¹⁰ *See* Robert Keith & Bill Heniff Jr., Budget Reconciliation Process: House and Senate Procedures, CRS Report for Congress RL33030, 23-29 (last updated Aug. 10, 2005) for statistical basis of calculations made.

¹¹ *Id.* Note the numbers necessary to make this calculation for FY 2008 were not available and not included in this calculation.

¹² The sunset provisions in the two large George W. Bush tax cuts are widely credited with being forced to sunset because of the Byrd rule provisions about increasing the deficit outside the fiscal years covered by the budget.

III. An Overview of Budget Reconciliation Process Procedure

A. Content of a Budget Reconciliation Resolution

Reconciliation is fundamentally a two-stage process. Stage one involves reconciliation instructions imbedded in the yearly budget which direct the appropriate committee or committees of jurisdiction to develop legislation to reach the directed budgetary outcomes¹³. Stage two involves full House and Senate consideration of the legislation directed under stage one under special expedited procedures¹⁴.

Stage one begins with budget reconciliation directives included as parts of the budget resolution that contain instructions to either a committee or multiple committees to reach desired budgetary levels of spending¹⁵. The directives themselves usually consist of four basic components: (1) committees chosen; (2) types of changes with amounts; (3) applicable fiscal period, and (4) a time deadline¹⁶.

1. Choosing Committees to Receive Reconciliation Directions

First, the Budget Committees specify which committee or committees is the target of a reconciliation directive¹⁷. This had varied in the past from one committee in both the House and the Senate in FYs 2002 and 2004 to a maximum of fourteen Senate

¹³ Robert Keith & Bill Heniff Jr., Budget Reconciliation Process: House and Senate Procedures, CRS Report for Congress RL33030, 2, (last updated Aug. 10, 2005).

¹⁴ *Id.*

¹⁵ Robert Keith, The Budget Reconciliation Process: Timing of Legislative Action, CRS Report for Congress RL30458, (last updated Dec. 28, 2007)., 2, (last updated Dec. 28, 2007).

¹⁶ Robert Keith & Bill Heniff Jr., Budget Reconciliation Process: House and Senate Procedures, CRS Report for Congress RL33030, 13, (last updated Aug. 10, 2005).

¹⁷ *Id.*

committees and fifteen House committees in one year, both in FY 1982¹⁸. This process has touched nearly every committee at least once¹⁹.

2. Specifying Type and Amount of Budget Reconciliation Activity

Second, the Budget Committees must lay out which of the three possible types of reconciliation directives are being used, which committees each of the reconciliation directives apply to, and the amount of each reconciliation directive²⁰. The three different kinds of directives are: (1) changes in spending authority; (2) changes in revenue raising authority; and (3) changes to the statutory limit on the public debt²¹. All three of these possible changes can occur in either direction, giving six different possible options for a budget reconciliation directive²². These instructions have sometimes simply demanded a general level of deficit reduction, leaving the proper combination of increasing revenues and reducing spending to the assigned committee's discretion²³. The instructions are net revenue adjustments, thus a directed reduction in spending can be achieved as part of an overall budget reconciliation committee product that includes some increases in spending or revenue reductions²⁴. This flexibility allows for small projects or tax reductions to be added as sweeteners to induce members to vote for an overall package of net spending reductions or revenue increases.

¹⁸ *Id.* at 16.

¹⁹ Robert Keith & Bill Heniff Jr., Budget Reconciliation Process: House and Senate Procedures, CRS Report for Congress RL33030, 15, (last updated Aug. 10, 2005).

²⁰ Robert Keith, The Budget Reconciliation Process: Timing of Legislative Action, CRS Report for Congress RL30458, (last updated Dec. 28, 2007)., 2, (last updated Dec. 28, 2007); *Id.* at 13.

²¹ Robert Keith & Bill Heniff Jr., Budget Reconciliation Process: House and Senate Procedures, CRS Report for Congress RL33030, 14, (last updated Aug. 10, 2005).

²² *Id.*

²³ *Id.* at 15.

²⁴ *Id.*

The amounts are expressed as floors and ceilings: directed spending reductions and increases in revenue are expressed as a minimum amounts required while spending increases or revenues are expressed as a ceiling²⁵. This reflects the thinking that Congress will have to be limited in the budget process from increasing spending/decreasing revenues too much, but required to reach a certain amount to get spending reductions/revenue increases.

Senate Finance and House Ways and Means have a statutorily conferred advantage codified in 310(c) of the Congressional Budget Act of 1974, known commonly as the “fungibility rule”²⁶. The fungibility rule allows Senate Finance and House Ways and Means to take the sum of any spending or revenue adjustments and move up to 20% of that amount between spending and revenue to each of the directed adjustments²⁷. For example, if \$70 million in revenue increases and \$30 million in decreased spending is directed to either of these committees, they are still bound by the overall \$100 million in deficit reduction but have up to \$20 million in “fungibility” for how that reduction takes place. They can come up with a package of \$90 million in revenue increases and \$10 million in reduced spending, or \$50 million in revenue increases and \$50 million in reduced spending.

The Budget Committee reconciliation instructions are usually given in aggregate amounts. However, in the early days of budget reconciliation, they have laid out specific areas of a committee’s jurisdiction for spending reduction – for example demanding

²⁵ *Id.*

²⁶ Congressional Budget Act of 1974, §310(c); Robert Keith & Bill Heniff Jr., Budget Reconciliation Process: House and Senate Procedures, CRS Report for Congress RL33030, 8, (last updated Aug. 10, 2005).

²⁷ Congressional Budget Act of 1974, §310(c).

specific cuts in subsidies to the U.S. Postal Service in FY 1981²⁸. This practice was quickly curtailed on May 19th, 1982 when the Senate Chair, in response to a point of parliamentary inquiry from the floor, ruled that reconciliation directions cannot force a committee to achieve spending or revenue adjustments in a specific way²⁹. However, since this point, the budget committees have responded by still indicating possible options to influence the debate³⁰. However these recommended options no matter how detailed they may be, are not mandatory on the committees who receive the directives. This preserves significant powers within the budget reconciliation directive recipient committees as they retain complete control of where the spending and/or revenue adjustments will occur. If this power had been left with the Budget Committees they would have grown sizable in importance in accordance with the new breadth of their control across all issue areas in budget reconciliation. The current process preserves the traditional committee jurisdictional system.

Although rarely done, committee directives can be made contingent on future events. This has included two different types of possible contingencies. The first is a budget resolution providing for possible change in budget reconciliation directives, committee spending allocations, and overall budget levels if a committee reaches a certain amount of excess outlay reduction³¹. The second makes a reconciliation directive completely contingent on certification by the Congressional Budget Office (“CBO”); e.g. if the CBO did not certify that the proposed reductions would lead to a balanced by a

²⁸ See First Concurrent Resolution on the Budget Fiscal Year 1981 (to accompany H.Con.Res. 307), H. Report 96-1051, 6, (May 23, 1980).

²⁹ Congressional Record (daily ed.), vol. 128, p. S5506, (May 19, 1982).

³⁰ Robert Keith & Bill Heniff Jr., Budget Reconciliation Process: House and Senate Procedures, CRS Report for Congress RL33030, 13, (last updated Aug. 10, 2005).

³¹ See e.g. Concurrent Resolution on the Budget Fiscal Year 1998 (to accompany H.Con.Res. 84), H. Report 105-116, § 104(d), 16-17, (June 4, 1997).

certain date seven years in the future than the reconciliation directive would not take effect and would not be included in the final reconciliation bill³². While these possibilities have not been put into place very often, they seem to pass muster in the budget process based on previous precedents of their use³³.

This opens up all sorts of possible contingent reconciliation directives in the future. The first type of reconciliation directive could increase the Budget Committees power in respect to other committees by using the ability to place constraints on committee amounts if certain desired specific cuts are not made. The second type may be even more powerful as directives could be written based on both short-range cyclical economic changes and long-range budgetary goals as certified by the CBO. This offers the Budget Committee a powerful planning tool if they decided to use it on a regular basis. However, neither of these tools has been utilized to anywhere near their full potential, making the boundaries of their possible use unclear and an area ripe for further discovery.

3. Specifying the Applicable Fiscal Period in the Reconciliation Directives

The third part of a budget reconciliation directive is a section specifying the applicable fiscal years for their consideration. This forces the directed committees to look at budgetary authorizations for not just the current budget cycle, but all the years covered by the conciliation instructions³⁴. The budget reconciliation directives fiscal year considerations have followed the budgets fiscal year inclusions³⁵. This is an interesting

³² See Concurrent Resolution on the Budget Fiscal Year 1996 (to accompany H.Con.Res. 67), H. Report 104-159, §§ 105(b), § 205, 29-30, 94-95, (June 26, 1995).

³³ See e.g. *Supra* notes 31 & 32.

³⁴ This also will affect the Senate's Byrd rule as described later.

³⁵ Compare Bill Heniff Jr. & Justin Murray, Congressional Budget Resolutions: Selected Statistics and Information Guide, CRS Report for Congress RL30297, 29-30, (last updated Feb. 26, 2008) *with Id.* at 34-35.

potential for the budget committee to try to specify differing fiscal year instruction, but there has been no attempt made in this area.

4. Specifying Deadlines with Reconciliation Directives

The budget cycle begins officially each year when the President submits his budget to Congress on first Monday in February followed by the CBO submitting the economic and budget outlook report to the Budget Committees on Feb 15th³⁶. The 1985 revisions to the Congressional Budget Act of 1974 contains a deadline for adoption of the budget resolution by April 15th from which two months were allowed for budget reconciliation to be completed by June 15th. However, as seen from the inclusion of a deadline other than June 15th in every single budget reconciliation directive, the real deadline appears to be the one given for return in the reconciliation instructions themselves, which are generally observed by directed committees, albeit with extensions from time to time³⁷. This deadline feature allows the budget committee to structure the process so smaller reconciliation years with fewer committees are given less time where large legislative reconciliation vehicles are given more time.

Of the 22 reconciliation bills between 1980 and 2008, the average time for the reconciliation process was 142 days, or over twice as long as initially contemplated in the original deadlines³⁸. This difference includes a wide variety of timing including a low of a mere twenty-seven days to a high of 384 days³⁹. This wide variety shows both the

³⁶ Bill Heniff Jr., CRS Report for Congress, The Congressional Budget Process Timetable, 98-472, 1, (last updated March 20, 2008).

³⁷ Robert Keith, The Budget Reconciliation Process: Timing of Legislative Action, CRS Report for Congress RL30458, 10, (last updated Dec. 28, 2007).

³⁸ *Id.* at 6.

³⁹ *Id.* It should be noted that this average is altered somewhat by the additional days added in by the traditional Congressional august recess that affected approximately half the reconciliation bills. These are days Congress is “on vacation” and working in their districts and are not legislative days. *See Id.* 3-4 (Note years 1981, 1983, 1987, 1988, 1990, 1991, 1996, 2000, 2008 on the chart found on pages 3-4).

flexibility and complexity of the budget reconciliation process and how the Budget Committees have evolved a non-statutory deadline assignment tradition to best fit both challenges.

B. Statutory Basis for Budget Reconciliation

The statutory basis for budget reconciliation legislation to be included in the budget resolution is specifically found in section 301 of the Congressional Budget Act of 1974⁴⁰. Section 310(a) and 310(b) set out the basic procedures and existence of budget reconciliation⁴¹. 310(a) empowers the content of the resolution and its ability to affect any combination of spending, revenues, and the public debt limit. 310(b) sets up the basic committee reporting structure: the budget committee sends out reconciliation directives, and when it is only to one committee, that committee reports the reconciliation bill straight to the floor⁴². In the case of two or more committees, they report their portions of the reconciliation bill back to the budget committees, who then incorporate all the committee reports, “without any substantive revision” into an omnibus measure which is then reported to the full body⁴³.

There are other statutory rules specific to the House and the Senate that will be covered in upcoming sections, including 313 (a.k.a. the “Byrd Rule”) but there are a few more universally applicable statutory provisions. 310(g) prohibits consideration of any special reconciliation measure whatsoever that contains any change in the Social Security program. 301(b)(4), or as it is more commonly known, “the elastic clause”, provides that the “concurrent resolution on the budget may — ... (4) set forth such other matters, and

⁴⁰ 2 U.S.C.A 632 (2008).

⁴¹ The Congressional Budget Act of 1974, §310, 2 U.S.C.A. 641 (2008).

⁴² The Congressional Budget Act of 1974, §310(b), 2 U.S.C.A. 641(b) (2008).

⁴³ *Id* at 310(b)(2).

require such other procedures, relating to the budget, as may be appropriate to carry out the purposes of this Act”⁴⁴. This aptly-named provision allows the Congress to legislate procedure through the initial budget resolution⁴⁵.

IV. Budget Reconciliation Rules and Procedures in the House

A. House Committee Procedure

Procedure among the House committees functions along the same basic 310(b) reconciliation bill reporting structure detailed above. However there are some special rules specific to House committees. House committees often begin this process by holding hearing on items for possible adjustment in the budget reconciliation process⁴⁶. The most basic rule of House committees when dealing with reconciliation directives comes from the Standing Rules of the House that a committee must meet with a majority quorum present to report its reconciliation recommendations⁴⁷. The legislative text is then read in full unless waived by unanimous consent or a majority vote⁴⁸. This underlying text can be either draft legislation prepared specifically by the committee staff to meet the needs of budget reconciliation or a pre-existing bill picked by the committee to be used for this purpose⁴⁹. Amendments are then considered under a five minute rule for debate, followed immediately by a vote⁵⁰. The committee then finishes markup and submits the measure either to the floor (if it is the only committee with reconciliation

⁴⁴ The Congressional Budget Act of 1974, §301(b)(4), 2 U.S.C.A.632 (2008).

⁴⁵ See e.g. Concurrent Resolution on the Budget – Fiscal Year 2006 (to accompany H.Con.Res. 95), H. Rept 109-62, 21, (Apr. 28, 2008) (Requiring a three-fifths majority to overrule or waive points of order dealing with unfunded mandates but provided that these changes did not apply during consideration of budget reconciliation legislation).

⁴⁶ Robert Keith & Bill Heniff Jr., Budget Reconciliation Process: House and Senate Procedures, CRS Report for Congress RL33030, 32, (last updated Aug. 10, 2005).

⁴⁷ Standing Rules of the United States House of Representatives, Rule XI, Clause 2(h)(1).

⁴⁸ Robert Keith & Bill Heniff Jr., Budget Reconciliation Process: House and Senate Procedures, CRS Report for Congress RL33030, 32, (last updated Aug. 10, 2005).

⁴⁹ *Id.* at 33.

⁵⁰ *Id.* at 32-33.

instructions), or to the budget committee (if multiple committees have reconciliation instructions)⁵¹.

B. From the Directed Committee, Through the Budget Committee, to the Floor

Where there are multiple committees in the House directed in the budget reconciliation process, as is usually the case, the directed committees submit their reports to the House Budget Committee which then submits a complied reconciliation bill to the floor⁵². Although the House does not have a concrete precedent like the Senate's May 1982 ruling⁵³, it has abided roughly by the same restrictions only using suggested adjustments instead of any mandatory direction above and beyond the simple categories of adjustment (spending, revenue, debt ceiling) and aggregate amounts⁵⁴. However this may be because the powerful backend controls in the House through the Rules Committee already supply considerable control.

Although House committees have missed the deadlines without severe consequences in the past, in 1995 nine of twelve reconciliation instructed committees turned their reports in late without any discernable consequences; the consequences are much more severe for failure to return a report⁵⁵. If a House committee does not return a budget reconciliation directed report to the Budget Committee then under 310(d)(5) the House Rules Committee can make in order amendments that provide the language of their choice in lieu of the absent committee report⁵⁶. This has occurred in both FY 1981

⁵¹ *Supra* notes 42 & 43.

⁵² *Supra* Note 42.

⁵³ *Supra* Note 28.

⁵⁴ Robert Keith & Bill Heniff Jr., Budget Reconciliation Process: House and Senate Procedures, CRS Report for Congress RL33030, (last updated Aug. 10, 2005). - 13

⁵⁵ *Id.* at 35.

⁵⁶ The Congressional Budget Act of 1974, §310(d)(5), 2 U.S.C.A. 641(d)(5) (2008).

and FY 1995⁵⁷. In the FY 1995 case, the non-compliant directed committee tried and failed to pass reconciliation directions out of the House Agriculture Committee⁵⁸. The House Rules Committee simply put in the desired language into the final reconciliation bill in the Rules Committee substitute⁵⁹. This powerful backend control in the House ensures that committees will almost always pass something so as to retain control over legislation in their issue-area instead of having it wiped away by the House Rules Committee.

The Budget Committee retains slightly more backend control. Although it does not alter the substance bills itself because of 310(b)(2)⁶⁰, it has developed a possibility of making and voting motions to the chair to ask the House Rules Committee to make desired amendments and alterations to the reconciliation legislation compiled from the directed committee reports⁶¹. Depending on the relationship between the House Budget Committee and the House Rules Committee – and given the tight control House Leadership exercises over the House Rules Committee, that includes the House Leadership – this can be a way for the House Budget Committee to make backend amendments, albeit with the blessing of the House Rules Committee.

C. Reconciliation Measures on the House Floor

Unlike the Senate, the House does not have any prohibitions on initial budget reconciliation measures of mixed types⁶². Reconciliation measures have always been

⁵⁷ Robert Keith & Bill Heniff Jr., Budget Reconciliation Process: House and Senate Procedures, CRS Report for Congress RL33030, 35-36, (last updated Aug. 10, 2005).

⁵⁸ David Hosansky, *Panel Rejects Farm Overhaul In a Rebuke to Leadership*, Congressional Quarterly Weekly Report, 2875-78, (Sep. 23, 1995).

⁵⁹ *Supra* note 57 at 36 n. 36.

⁶⁰ *See Supra* Note 43.

⁶¹ *See e.g.* House Budget Committee, Balanced Budget Act of 1997 (report to accompany H.R. 2015), H. Rept. 105-149, 1620-25, (June 24, 1997).

⁶² *E.g.* altering two or more of the three basic categories of spending, revenues and the debt ceiling.

brought up under a special rule and never under an open rule to allow for unlimited amendments⁶³. In practice the process is very tightly controlled, with either a closed rule and no amendments or very few amendments⁶⁴. This tight control continues with the time for debate, which has varied for as little as an hour to as much as ten hours – still never exceeding half the minimum required time in the Senate for debate on reconciliation measures⁶⁵. To further tighten the House leadership’s control most rules waive all points of order, very often including any and all Congressional Budget Act of 1974 points of order⁶⁶. The only opposition amendment or motion allowed under the rules is ever present final motion to recommit required by both House rules and tradition and that has been allowed under every special rule for Budget reconciliation⁶⁷.

V. Budget Reconciliation Rules and Procedures in the Senate

A. Senate Committee Budget Reconciliation Procedures

Senate committee budget reconciliation procedures do not diverge considerably from normal Senate committee procedures. Each Senate committee with reconciliation instructions receives the guidelines and scoring instructions from the Senate Budget Committee⁶⁸. These committees usually hold hearings on the matter and then follow Senate procedural rules in reporting out the matter, including a majority necessary for a quorum and a majority vote necessary for passage out of the committee⁶⁹. If the committee does not follow the Senate procedural rules it is subject to a motion from the

⁶³ Robert Keith & Bill Heniff Jr., Budget Reconciliation Process: House and Senate Procedures, CRS Report for Congress RL33030, (last updated Aug. 10, 2005). - 38

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 39.

⁶⁷ *Id.* at 41.

⁶⁸ Robert Keith & Bill Heniff Jr., Budget Reconciliation Process: House and Senate Procedures, CRS Report for Congress RL33030, 60, (last updated Aug. 10, 2005).

⁶⁹ United States Senate Rule XXVI.

floor to prevent consideration which would require a three-fifths majority to overturn⁷⁰. After the committee markup the bill either goes to the floor, or to the Budget committee if they are multiple committees assigned reconciliation instructions.

Senate rules vary from House rules in that the reconciliation measures put to the Senate floor can only be of one of the three main types of measures (spending, revenues, debt limit) unless it is a conference report⁷¹. This increases the likelihood that a Senate committee – especially Finance given its exclusive jurisdiction over taxation issues – will report straight to the floor and not through the Senate Budget Committee.

B. From the Directed Committee, Through the Budget Committee, to the Floor

The Senate Budget Committee still retains the central role of receiving and accepting most committee reports (or often in the Senate, committee prints⁷²). The Budget Committee is still limited at the front end by the May 19th, 1982 Senate Chair ruling that reconciliation directions cannot force a committee to achieve spending or revenue adjustments in a specific way⁷³. It is limited at the backend by 310(b)(2) which prevents “any substantive revision” by the Budget Committee after receiving the language from the other committee⁷⁴. The Budget Committee does make technical corrections that can sometimes verge on the substantive, but these are almost always at the behest of the committee from which the reconciliation language just emerged to fix unexpected language and policy intersections⁷⁵. Overall, because of the absence of a

⁷⁰ *Id.*; Robert Keith & Bill Heniff Jr., Budget Reconciliation Process: House and Senate Procedures, CRS Report for Congress RL33030, 61, (last updated Aug. 10, 2005).

⁷¹ *Id.* at 17.

⁷² *See Id.* at 67 for technical procedure reasons for the Senate to label these committee reports as prints instead of the traditional committee reports.

⁷³ Congressional Record (daily ed.), vol. 128, p. S5506, (May 19, 1982).

⁷⁴ The Congressional Budget Act of 1974, §310(b), 2 U.S.C.A. 641(b) (2008).

⁷⁵ *See e.g.* Senate Budget Committee, Personal Opportunity, Work Opportunity, and Medicaid Restructuring Act of 1996, S.Prt. 104-58, 12-13, (July, 1996).

counterpart to the power House Rules Committee in the process, the Senate Budget Committee cannot make as many changes nor have nearly as powerful a role in shaping the reconciliation once it comes out of the directed committees.

Perhaps reflecting this power reality, the Senate Budget Committee treats tardy and absent measures differently than its House counterpart. Instead of negotiating deadlines and extensions with the power of the House Rules Committee in the background, the Senate Budget Committee has, for simplicity's sake and to avoid motions to prevent consideration on the floor, simply made reconciliation reports and prints ripen as they are received⁷⁶. The one stick the Senate Budget Committee has used is its evaluation of costs estimates of reconciliation language to see if it complies with the original reconciliation instructions. Although the Senate Budget Committee receives cost estimates from the CBO and Joint Committee on Taxation ("JCT"), the final ruling for compliance rests with the Budget Committee subject to Byrd rule motions on the floor⁷⁷. The Senate Committee has used this power to squeeze in projects that CBO estimates do not have meeting the budget reconciliation assigned aggregate numbers⁷⁸.

C. Reconciliation Measures on the Senate Floor

1. Non-Byrd Rule Procedural Rules on the Senate Floor

Although the Byrd rule is the most famous, well known, and powerful rule for Senate budget reconciliation procedure, others do exist which impact the procedure on the Senate floor. Normal Senate budget rules also cover Senate budget reconciliation legislation and limit debate to twenty hours on budget reconciliation measures and ten

⁷⁶ The Congressional Budget Act of 1974, §310(b)(2), 2 U.S.C.A. 641(b)(2) (2008).

⁷⁷ Robert Keith & Bill Heniff Jr., Budget Reconciliation Process: House and Senate Procedures, CRS Report for Congress RL33030, 65-67, (last updated Aug. 10, 2005).

⁷⁸ See e.g. Senate Budget Committee, Balanced Budget Reconciliation Act of 1995, S. Prt. 104-36, 3, (Oct. 1995).

hours on budget reconciliation conference reports⁷⁹. This is the key provision that gives budget reconciliation its true power and makes it such a desirable vehicle for legislation. By falling under the section 305 time limits for budgetary debate and being a privileged motion to start debate, budget reconciliation legislation avoids the filibuster, and with it, the sixty vote requirement to cut off debate. Budget reconciliation becomes a way, the only way under regular Senate procedure, to pass substantive legislation through a majority, instead of through a sixty vote requirement.

Under 310(d) floor amendments to budget reconciliation, legislation must be deficit neutral, with the exception of a Senate motion to strike which is always allowed⁸⁰. It takes a three-fifths majority to overrule or waive this rule, and this rule is automatically suspended in times of war⁸¹. Budget reconciliation legislation is still subject to a plethora of other budget points of order objects including: 302 points of order for exceeding a committee's spending allocation, 311 points of order for failing to reach a revenue floor, and 306 points of order for policy or procedural matter outside the relevant committee's jurisdiction⁸². Proposed measures and amendment also must be germane under 305(b)(2) Senate budget rules⁸³. This can be passed on previous amendments which are then used to justify the germaneness but if the underlying amendment or portion is struck, the previous germane language based on it is automatically struck as well⁸⁴. Finally section 310(g) bars any amendments to social security through budget reconciliation process⁸⁵.

⁷⁹ § 310(e) applies the time limits in § 305 on budget debate to budget reconciliation debate as well. The Congressional Budget Act of 1974, §§ 305, 310(e), 2 U.S.C.A., 636, 641(e) (2008).

⁸⁰ *Id.* at 310(d).

⁸¹ *Id.*

⁸² The Congressional Budget Act of 1974, §§ 302, 306, 311, 2 U.S.C.A. 633, 637, 642 (2008)

⁸³ *Id.* at 305(b)(2), 2 U.S.C.A. 636 (2008).

⁸⁴ *Id.*

⁸⁵ *Id.* at 310(g), 2 U.S.C.A. 641 (2008).

Any Senate budget reconciliation bill is already facing a formidable wall of points of order triggering sixty vote majorities to either overrule the chair to allow or waive the rule on. However because of the built in time limits and privileged motion to go to budget reconciliation legislation, a unanimous consent resolution (“UC”) is almost always agreed to splitting time for debate.

2. The Byrd Rule

i. How the Byrd Rule Works Procedurally

Named after its famous long-serving sponsor Sen. Robert Byrd (D-W.Va.), the Byrd rule serves to protect budget reconciliation from being used as an end-around the normal legislative process and its sixty vote requirement. The Byrd rule accomplishes this preservation by banning so-called “extraneous” material from budget resolutions under section 313(a)⁸⁶.

Any piece of budget reconciliation legislation is subject to a point of order under 313(e) to strike the offending provisions⁸⁷. Conversely, any Senator can move to waive the Byrd rule⁸⁸. Both a motion to strike and a waiver motion can apply to either one specific or multiple elements and can be sustained as to none, some, or all of the elements to which it applies⁸⁹. The Byrd rule is “nearly unique” among points of order in that it can strike down solely the offending provisions and not the entire bill⁹⁰. This facet of the Byrd rule allows Senators to trim budget reconciliation by attacking parts they dislike without fear of bringing the whole bill down on procedural grounds. Either overruling

⁸⁶ The Congressional Budget Act of 1974, § 313(a), 2 U.S.C.A. 644(a) (2008).

⁸⁷ The Congressional Budget Act of 1974, § 313(e), 2 U.S.C.A. 644(e) (2008).

⁸⁸ *Id.*

⁸⁹ Robert Keith, *The Budget Reconciliation Process: The Senate’s “Byrd Rule”*, CRS Report for Congress RL30862, 5, (last updated Mar. 20, 2008).

⁹⁰ Robert Keith & Bill Heniff Jr., *Budget Reconciliation Process: House and Senate Procedures*, CRS Report for Congress RL33030, 80, (last updated Aug. 10, 2005).

the Chair who has found a provision extraneous under section 313 or waiving the Byrd rule requires a three-fifths majority⁹¹.

The key question brought up forward by the Byrd rule is what exactly constitutes “extraneous” material? The Senate Budget Committee has defined “extraneous” as a “term of art”⁹². The Byrd rule itself clearly defines extraneous is 313(b)(1) in six different possible categories⁹³:

- (A) Does not produce a change in outlays or revenues;
- (B) Produces an increase in outlays or decrease in revenues and the net effect of the provisions reported by the Committee reporting the title containing the provisions fail to achieve the Committee’s reconciliation instructions;
- (C) Outside the jurisdiction of the Committee that reported it;
- (D) Produces a change in outlays or revenues that is merely incident to the non-budget component of the provision;
- (E) Would increase the deficit for a fiscal year beyond those covered by the reconciliation measure
- (F) Recommends changes in social security (unlike 310(g), this just cuts out the provision instead of defeating the entire bill)⁹⁴

⁹¹ *Supra* note 89.

⁹² *See* Concurrent Resolution on the Budget, FY 1994 (to accompany S. Con. Res. 18), S. Rept. 103-19, 49, (Mar. 12, 1993).

⁹³ The Congressional Budget Act of 1974, § 313(b)(1)(A-F), 2 U.S.C.A. 644(b)(1)(A-F) (2008)

⁹⁴ Robert Keith & Bill Heniff Jr., Budget Reconciliation Process: House and Senate Procedures, CRS Report for Congress RL33030, (last updated Aug. 10, 2005). - 81

These provisions serve the Byrd rule’s general design of protecting the traditional prerogatives of Senate, including the right to filibuster legislation that is not strictly budget-based, and protecting the rights of committees over legislation in their jurisdiction⁹⁵.

There two sets of exceptions to these provisions, neither of which is nearly as extensive as the provisions themselves. The first requires agreement between the Chair and Ranking Member of the Budget Committee, and Chair and Ranking Member of the Committee of jurisdiction over that provision:⁹⁶

- (A) mitigates direct effects clearly attributable to a provision changing outlays or revenues and both provisions together produce a net reduction in the deficit, or
- (B) Will likely reduce outlays or increase revenues, in one or more fiscal years beyond those covered by reconciliation measure; or
- (C) Will likely reduce outlays or increase revenues based on new regulations, court ruling on pending leg, stipulated statutory triggers not considered in CBO projections, or
- (D) Will likely reduce outlays or increase revenues but reliable estimates cannot be made due to insufficient data

All of these exceptions require the agreement of the Chair and Ranking Member of both the Budget Committee and the Committee of jurisdiction, not an easy feat to achieve with anything but truly bi-partisan legislation. Consequently, unless you can convert two key

⁹⁵ These provisions also apply to conference reports. *See* The Congressional Budget Act of 1974, § 313(d), 2 U.S.C.A. 644(d) (2008).

⁹⁶ The Congressional Budget Act of 1974, § 313(b)(2)(A-D), 2 U.S.C.A. 644(b)(2)(A-D) (2008)

members of the other party, these exceptions will prove no use in pushing controversial partisan legislation through the Byrd Rule.

The remaining set of exceptions apply only to 313(b)(1)(C). They include an exception if the provision was an integral part of the greater provision that if introduced as a bill would have been assigned to that Committee, and the original provision sets forth the procedure to carry out or implement the part of the provision that would fall in the jurisdiction of the Committee. The second and final 313(b)(1)(C) exception is for a specific provision stating an exception to a greater provision that would fall within the committee's jurisdiction. This set of exceptions is very specific and more a refinement of the committee jurisdiction rule than a real hole in the Byrd rule of any sort.

ii. History and Application of the Byrd Rule

The Byrd rule was created by Robert Byrd to try to curtail the erosion of Senatorial rights and traditions, including the filibuster. During the first few years budget reconciliation was used, Representatives and Senators quickly realized the power of this fast-track through the normally arduous and lengthy legislative process and began to use it for non-budget related legislation⁹⁷. Reconciliation reports from committees began to include items with either zero or negative budgetary effects and committee's began to use the budget reconciliation process as a way to step on each other's jurisdiction⁹⁸.

The Byrd Rule originated on October 24, 1985 with an amendment to omnibus budget reconciliation act that was adopted 96-0⁹⁹. Originally consisting of a provision in statute applying to initial Senate consideration of a measure and a Senate resolution

⁹⁷ Robert Keith, *The Budget Reconciliation Process: The Senate's "Byrd Rule"*, CRS Report for Congress RL30862, 1, (last updated Mar. 20, 2008).

⁹⁸ *Id.*

⁹⁹ See William G. Dauster, *Budget Process Law Annotated – 1993 Edition*, 103rd Cong. 1st Sess., S. Prt. 103-49, 229-46, (Oct. 1993).

extending that to conference reports from 1985-90, the Byrd rule was then slightly modified and continued until 1990 when it was incorporated into the Congressional Budget Act of 1974 permanently as section 313¹⁰⁰. Today the Byrd rule is firmly part of the statutory structure of the budget and budget reconciliation process.

Since the Byrd rule went into effect, seventeen budget reconciliation measures in twenty-two years have passed through the Congress. During that period there have been fifty-three Byrd Rule points of order made and forty-two Byrd rule waiver motions attempted¹⁰¹. Eighty-eight of the ninety-five Byrd rule actions taken were taken during the Clinton presidency (only five occurred beforehand and four since), showing the increased use of the budget reconciliation process during that era¹⁰². Every one of the six Byrd rule definitions of extraneous has been used at least once except for (F) dealing with social security¹⁰³. The most commonly used definition is no change in outlays or revenues, which has been used thirty-two times by itself and three more as a secondary objection¹⁰⁴.

¹⁰⁰ For a full history of the seven different iterations of the Byrd rule *see* Robert Keith, The Budget Reconciliation Process: The Senate’s “Byrd Rule”, CRS Report for Congress RL30862, 3, (last updated Mar. 20, 2008); P.L. 99-272, Consolidated Omnibus Budget Reconciliation Act of 1985, 100 Stat. 390-91, § 2001 (Apr. 7, 1986); S.Res. 286, 99th Cong., 1st Sess., (Dec. 19, 1985); S.Res. 509 99th Cong., 2nd Sess., (Oct. 16, 1986); P.L. 99-509, Omnibus Budget Reconciliation Act of 1986, 100 Stat. 1949-50, § 7006, (Oct. 21, 1986); P.L. 100-119, Increasing the Statutory Limit on the Public Debt, 101 Stat. 784-85, § 205, (Sep. 29, 1987); P.L. 101-508, Omnibus Budget Reconciliation Act of 1990, 104 Stat. 1388-621-23, § 13214 Nov. 5, 1990); P.L. 105-33, Balanced Budget Act of 1997, 111 Stat. 688, § 10113(b)(1), (Aug. 5, 1997).

¹⁰¹ Robert Keith, The Budget Reconciliation Process: The Senate’s “Byrd Rule”, CRS Report for Congress RL30862, 9, (last updated Mar. 20, 2008).

¹⁰² For basis of calculations *see Id.* at 10-11.

¹⁰³ *Id.* at 12.

¹⁰⁴ *Id.*

	# of Successes	# of Failures	Total Percentage of Contested Actions Prevented by the Byrd Rule
Attempted Byrd Rule Motions	43	10	81.1%
Attempted Byrd Rule Waivers	9	33	78.6%

¹⁰⁵.

As the above box shows, the Byrd rule is indeed a powerful tool for excluding “extraneous” matter from the budget reconciliation process, without even considering its even more powerful deterrent effect for possible extraneous matters ever being included in budget reconciliation legislation or budget reconciliation conference reports in the first place¹⁰⁶.

VI. Budget Reconciliation Rules and Procedures in Conference

Budget reconciliation rules in conference are not as complex or involved as the Byrd rule but still form an important backend to the budget reconciliation process. Conference has been used in twenty-one out of twenty-two reconciliation measures (in FY 1984 the Senate directly passed a House bill)¹⁰⁷. Instead of conference the chambers can bounce reconciliation bills back and forth between themselves as they did in FY 1985 nine times¹⁰⁸. Budget reconciliation conferences have varied greatly in size: in the FY 2000 conference the House and Senate each had three conferees, while in the FY 1982

¹⁰⁵ For basis of calculations see *Id.* at 12-13.

¹⁰⁶ See e.g. Robert Keith, *The Budget Reconciliation Process: The Senate’s “Byrd Rule”*, CRS Report for Congress RL30862, 16, (last updated Mar. 20, 2008). – for a listing of twenty-nine items removed from the conference in order to comply with the Byrd rule before any challenges were ever made *in one year*.

¹⁰⁷ Robert Keith & Bill Heniff Jr., *Budget Reconciliation Process: House and Senate Procedures*, CRS Report for Congress RL33030, 83, (last updated Aug. 10, 2005).

¹⁰⁸ *Id.*

conference the House sent 184 conferees and the Senate sent 69 conferees¹⁰⁹. It is worth noting that the FY 1982 conference had fifty-eight separate sub-conferences – a good indication of how much legislation was passing through the budget reconciliation process before the Byrd rule came into existence¹¹⁰. Budget reconciliation has never seen a further conference for the same piece of legislation¹¹¹.

The procedure rules for conferences on budget reconciliation are very similar to the normal conference rules. Key points include to be valid in the House a majority of total conferees must sign the conference report, while to be valid in the Senate a majority of both Senate conferees and a majority of House conferees must sign the conference report¹¹². After that the conference report is considered in the House where the blanket conference rule is used, and the Senate where it is a privileged motion limited to ten hours of debate and still under the Byrd rule¹¹³.

VII. The Budget Reconciliation Process and Reform

A. Viewpoints on Budget Reconciliation and the Byrd Rule

As seen from above, the budget reconciliation process has seen its share of action over the past twenty-eight years. Most of the criticism and disagreement about the budget reconciliation process has centered on the Byrd rule. This is likely because it is in its interactions in the Senate that the budget reconciliation process fundamentally changes the normal rules of the legislative game. Any House leadership with a dependable majority of one can ram through its agenda. The Senate has been, and continues to be a

¹⁰⁹ *Id.* at 85.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 88.

¹¹² *Id.* at 87.

¹¹³ *Id.* at 87-88.

different story however – sixty votes is required to achieve cloture in the face of a filibuster to get anything truly controversial passed.

The budget reconciliation process changes all those rules by only requiring a bare majority to passed substantive legislation in the Senate. The Byrd rule reinstates a sixty vote requirement for a significant amount of possible legislation. In that way the debates about the Byrd rule stem from debates about how easy should it be to pass laws related to the budget in the Senate and what should require a sixty vote majority and what should only need a simple majority of 50+1?

Sen. Robert Byrd himself characterized the Byrd rule as essentially one that closed “the Pandora’s box which has been opened to the abuse of the reconciliation process. That process was never meant to be used as it is being used”¹¹⁴. Senator Byrd viewed himself as protecting “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”¹¹⁵.

Against Sen. Byrd’s guardianship of traditional deliberative process and the rights on minorities and individual Senators stand more pragmatic concerns about being able to accomplish a majority agenda. Long-time Ways and Means Chairman Dan Rostenkowski expressed this viewpoint: “As a result of this procedural rule, policies that would have significantly improved the Medicare Program could not even be considered”¹¹⁶. Chairman Rostenkowski went on to say that even “more absurd is the fact that most of the items stripped were minor and technical provisions that received

¹¹⁴ Sen. Byrd, Cong. Record (Daily Ed.), S14032, (Oct. 24, 1985).

¹¹⁵ *Id.*

¹¹⁶ Rep. Rostenkowski, Cong. Record (Daily Ed.), H6126, (Aug. 5, 1993).

bipartisan support when they passed both the House and the Senate last year”¹¹⁷. The Chairman concluded by saying, “I sincerely hope that this rule will be reconsidered before we ever return to the reconciliation process again”¹¹⁸.

Senator Byrd and Chairman Rostenkowski make perfect foils for each other – one a high-minded idealist about Senatorial debate, the other a bare-knuckled Chicago politician focused on pragmatic achievements – and underlie the very tension at the heart of the Byrd rule and filibuster itself.

B. Proposals for Byrd Rule Reform

Since its adoption the Byrd rule has only seen one serious attempt at reform/destruction. After a high-point of Byrd rule controversy in late 1993 and early 1994 during a very ugly budget reconciliation process, the Joint Committee on the Organization of Congress was directed to make recommendations on changes in the budget process¹¹⁹. House Budget Committee Chairman Martin Sabo (D-MN) began lobbying the committee vigorously and publicly to eliminate, or at least limit, the Byrd rule¹²⁰. Chairman Sabo went so far as to introduce and publicly push his own bill, H.R. 4780, that would eliminated the Byrd rule for conference reports and thus prevent it from eliminating items won by the House in conference¹²¹.

The Senators on the Joint Committee pushed hard for a preservation of the Byrd rule in its entirety and against Sabo’s bill¹²². In the end, the disagreement provoked a

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 16.

¹²⁰ Public letter from Rep. Sabo to Rep. Hamilton, (Oct. 26, 1993); Karen Foerstel, “Byrd Rule Ware Erupts Once Again,” *Roll Call*, 1, 13, (Feb. 24, 1994).

¹²¹ H.R. 4780, 103rd Congress, First Sess.; *See* Mary Jacoby, “Sabo Bill Would Kill Byrd Rule For Good,” *Roll Call*, 12, (July 25, 1994).

¹²² *See* Organization of the Congress, Final Report of the Senate Members of the Joint Committee on the Organization of Congress, S. Rept. 103-215, vol. I, 14-15, (Dec. 1993).

deadlock and no budgetary reconciliation reform bills passed and the Byrd rule was preserved, in its entirety¹²³.

VIII. Conclusion

While opinions on the value of Byrd rule vary along the Byrd-Rostenkowski spectrum, one thing is clear: the budget reconciliation process opened a torrent of legislative activity when it first began to be used. This activity was then significantly curtailed by the introduction of the Byrd rule. However, still to this day, some of the most important domestic policy items, including the two major George W. Bush tax cuts are made through the gauntlet of Byrd rule objections and reflect the limitations imposed by that rule. Major initiatives such as the tax cuts, and the many Democratic initiatives that preceded them, would not have been possible without the legislative superhighway that is the budget reconciliation process. The Byrd rule may be a significant and powerful speed-bump on that superhighway, but it is a road still traveled by important, fast-tracked legislation.

¹²³ See *Supra* note 119.

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