

Why the Limited Reconciliation Process is the Wrong Vehicle for Sweeping Health Care Reform

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By Judd Gregg

What used to be an inside-the-beltway Washington word – “reconciliation” – has popped up more frequently in the glossary of government terms used in the media across the country. Reconciliation, especially in the context of health care reform, has been labeled “a parliamentary maneuver,” “advanced legislative acrobatics,” “byzantine procedural loophole,” and “controversial strong-arm tactic.” Creative synonyms to be sure, but to really understand reconciliation and its utter inappropriateness when it comes to health care reform, one must understand its simple origin as part of the Congressional budget process.

Budget Resolution and Reconciliation Combine to Set and Carry Out Fiscal Policy

In the late 1960s and early 1970s, the case-by-case nature of congressional actions to deal with spending control and other budgetary issues highlighted the inadequacy of House and Senate procedures for making budget policy. In 1972, Congress created the Joint Study Committee on Budget Control, which was tasked with reporting on, among other things, a “full study and review of ...the procedures which should be adopted by the Congress for the purpose of improving congressional control of budgetary outlay and receipt totals...”

A year and a half later, in response to the Joint Study Committee’s recommendations and Congress’ battle with President Nixon over power of the purse, Congress enacted the Congressional Budget and Impoundment Control Act of 1974 (CBA), creating the House and Senate Budget Committees and the Congressional Budget Office. The primary duty and function of the Budget Committees set forth in the CBA is the development, execution, and enforcement of an annual congressional budget resolution, which is the annual framework for subsequent congressional action on spending, revenue and debt limit legislation. Since it is not a law, the congressional budget that sets out the nation’s fiscal policy goals must have tools and mechanisms available to it to achieve a new fiscal course for the nation.

Sometimes Congress determines that the course of fiscal policy needs to change. When that occurs, the budget resolution, *and only the budget resolution*, can initiate an adjunct procedure to the budget resolution’s plan for fiscal policy – the expedited legislative mechanism known as reconciliation. The CBA created the option of the reconciliation process to give Congress a tool to make it more likely that Congress will enact laws that will bring revenue, spending, and debt-limit levels into conformity with the fiscal course set out in the budget resolution.

A Tool When Quick Action on Fiscal Policy is Necessary

How does reconciliation work? It changes the way Congress (and especially the Senate) conducts its business, working in two stages. First, while Congressional budgets always assume some changes in policy relative to current law, House and Senate committees are not always eager to pass legislation to implement those policy changes, especially if the proposed changes would reduce spending or increase taxes. While the CBA gives the budget resolution privileged status so that it can be debated in a limited time period and adopted by simple majority vote in the House and the Senate, what good would it be to be able to set out changes in our fiscal path in a budget resolution if the subsequent legislation that would bring those changes about would never come to a vote in either chamber (because committees don't act or a Senate filibuster cannot be shut off)? To improve the odds that committees will legislate in accord with the budget plan, the budget resolution can include reconciliation instructions. These instructions direct one or several authorizing committees to develop legislation that achieves desired budgetary outcomes (in dollar terms) and to report that legislation by a certain date. The timeframe for achieving reconciliation targets can be no longer than the timeframe covered by the budget resolution containing the instructions. Since the instructions are numerical targets and not policy directives, how a committee chooses to comply with a reconciliation instruction is limited only by its jurisdiction.

Second, reconciliation legislation is considered in the Senate under expedited procedures. Usually when any other legislation is considered in the Senate, there is unlimited debate time on a motion to proceed to consideration of the subject matter as well as on the subject matter itself, and Senators may offer amendments that are not related to the topic under consideration. Sixty votes are required to end a filibuster and guarantee a vote under the Senate's cloture procedures. But under the expedited procedures of reconciliation, the motion to proceed is not debatable, and debate on the subject matter is limited to 20 hours; amendments that are not germane or that include extraneous matter are not in order; and a vote on the reconciliation legislation is guaranteed and requires only a simple majority to pass. These procedures significantly change every Senator's unfettered right to debate complex issues at length and to offer amendments to be debated and considered by the Senate as a whole—the very reasons why the United States Senate is considered to be the world's most deliberative legislative body.

Health Care Reform is Not Fiscal Policy

The 2010 budget resolution included reconciliation instructions to reduce the deficit by a total of \$2 billion over the next five years. In the Senate, the Finance Committee and the Health, Education, Labor and Pensions (HELP) Committee each received an instruction to report legislation by October 15, 2009 that reduces the deficit by \$1 billion, in anticipation that health care reform would be done through reconciliation. Given such an instruction, it is appropriate to ask, "When the budget resolution was adopted, baseline on-budget outlays and revenues were estimated to be \$26 trillion over 2010-2014. Does a \$2 billion, or 8/1000ths of a percent, reduction in these totals really represent a change in the fiscal course for the nation?" In my judgment, no – in fact, even members who voted for the budget resolution would say no. It is clear that reconciliation instructions were included in the 2010 budget resolution not for fiscal policy purposes, but for some other strategic purpose.

Health Care Reform Should Not Be Rushed

We all agree that the health care sector of our economy must be reformed. Nationwide, the health sector involves trillions of dollars in spending and revenue, comprising one-sixth of the American economy – yet for many, health outcomes are deficient. The federal government’s involvement in health care is threatening to crumble under its own weight. To reform health care, we must proceed carefully, deliberately, and cooperatively. We must listen to all sides, so that we hear about the good ideas out there to find out what works and enact them to replace current practices that we know result in waste and inefficiency.

Yet the Democratic majority is threatening to use reconciliation. Remember that the deficit-reduction instruction is a *net* number; the instructed authorizing committees can respond to the reconciliation instructions by including huge *gross* public policy changes in reconciliation legislation that the Senate will not be able to amend or fully debate. House Democrats want to write the bill themselves, without input from Republicans and with only limited any input from Senate Democrats, since a reconciliation bill is likely to be considered in the Senate without any Senate committee having acted.

It’s not as if Senate Finance and HELP Committee members don’t want to participate. Twenty-one members of the HELP Committee filed 838 amendments prior to the bill being marked up by that committee, a markup which lasted a full 12 days. Twenty-two members of the Finance Committee filed 564 amendments prior to that markup, which ended up lasting eight days.

Yet if reconciliation is used for health reform, the measure will speed through the Senate in a few days, and most amendments (unless they simply change a date or a number) will likely be ruled out of order. Amendments to a reconciliation bill receive a high level of scrutiny; their content is restricted in several ways, including a strict germaneness test, budgetary tests, and Byrd rule tests.

But At Least We Have the Budget Rules To Help Protect Members’ Rights Under Such Strong-Arm Tactics...

As in past years when reconciliation was used for actual fiscal policy purposes, this year’s reconciliation legislation will also receive the highest level of green-eyeshade scrutiny. Reconciliation legislation will be evaluated against no fewer than 19 budget points of order, enforcement tools designed to keep Congress on the fiscal path agreed to in the budget resolution.

First, the legislation must comply with the reconciliation directives but cannot make any changes to the Social Security program. If the reported legislation affects spending, each committee’s new level of spending must fit within the committee’s spending allocation set by the budget resolution for 2010 and 2010-2014. Further, the legislation must not cause total spending to exceed the levels set in the budget resolution for 2010. If the reconciliation legislation affects revenues, net revenues must not fall below the floor set in the budget resolution for 2010 or 2010-2014.

Reconciliation legislation will be subject to a budget point of order if it contains an unfunded governmental mandate of more than \$69 million in 2010, 2011, 2012, 2013 or 2014. The legislation will be subject to a point of order if it contains matter within the jurisdiction of the Budget Committee, if it contains any provision designated as an “emergency” (to avoid statutory paygo enforcement or to avoid

budget points of order) or if it increases the deficit by more than \$10 billion in any one year from 2010 through 2014, unless such deficit increase is fully offset over the 2010-2014 period.

And even though the reconciliation instructions cover only the years through 2014, other budget enforcement tools that apply to the reconciliation bill have a much longer time horizon. The legislation must comply with the Senate's paygo point of order, which, as of March 3, 2010, means it cannot add a penny to the deficit for 2010-2014 or increase the deficit over the 2010-2019 timeframe by more than \$4.081billion.

But wait, there's more. The "reconciliation for deficit reduction only" point of order will be tripped if the legislation increases the deficit by any amount for the years 2010-2014 or 2010-2019. Shall we look even farther out? The "long-term deficit" point of order will be violated if the reconciliation bill would cause an increase in the deficit of more than \$5 billion in any of the four consecutive 10-year periods after 2019 (2020-2029, 2030-2039, 2040-2049, or 2050-2059).

...Though the Majority Decided to Make Some Rules Go Away

The Democratic majority was thinking ahead - over Republican objections during the Budget Resolution debate, a special reserve fund was included in the resolution to adjust away five of the budgetary hurdles a health reform reconciliation bill would have to overcome.

Reserve funds in the 2010 budget resolution allow the Chairman of the Budget Committee to adjust away three of the points of order described above (committee spending allocation, total spending aggregate, and total revenue aggregate), for any legislation qualifying for a reserve fund adjustment, provided the legislation is deficit neutral over the periods 2010-2014 and 2010-2019. If the Chairman employs the health reform reserve fund for a health reform reconciliation bill, he can also adjust away two more enforcement mechanisms: the paygo and short-term deficit points of order, provided the legislation is deficit neutral over the 2010-2019 period and "reduces excess cost growth in health care spending and is fiscally sustainable over the long term."

Senator Byrd Created Rules to Prevent Gaming the System

The majority may be able to adjust away several important budget rules, but we do have the Byrd rule. The first few times Congress exercised the reconciliation process, the legislation contained many provisions that were irrelevant to the purpose of implementing the fiscal policy assumed in the budget resolution (as committees sought to sneak through the expedited, privileged process of reconciliation many policy changes and other riders that did not affect the budget but which could not have been enacted as easily through regular order). For example, those early reconciliation submissions of committees included provisions that had no budgetary effect but did have major public policy effects, increased spending or reduced revenues when the reconciliation instructions called for reduced spending or increased revenues, or dealt with matters in another committee's jurisdiction, all of which otherwise would have been subject to the 60 votes required for cloture under normal Senate procedures. So in 1985, most Senators agreed with the rule's author, Senator Robert C. Byrd, that there should be a way to preclude such irrelevant, or extraneous, provisions from being attached to expedited reconciliation legislation.

In fact, it was Senator Byrd who stood firm in 1993 and convinced the Democratic majority at the time not to use reconciliation for President Clinton's health reform plan.

The Byrd rule operates differently than most other budget points of order. When most other budget points of order are raised and sustained, the measure being debated falls in its entirety. If a Byrd rule point of order is raised and sustained, only the offending language is stricken from the legislation, and debate on the remaining legislation continues. Each provision in reconciliation legislation must be carefully dissected and examined for Byrd rule violations. A provision will violate the Byrd rule if it has no budgetary impact. If an instructed committee reports reconciliation legislation but fails to meet its overall instruction, all provisions reported by that committee that increase outlays or reduce revenue violate the Byrd rule. A provision will be ruled extraneous if it is not in the jurisdiction of the committee reporting the title. A provision will violate the Byrd rule if it has a budgetary impact which is merely incidental to the policy components of the provision. If a provision increases outlays or decreases revenues in any one year after 2014 and that offense is not netted at least to zero by other outlay reductions or revenue increases in that title of the bill in that year, the provision violates the Byrd rule. Finally, if a provision includes changes in Social Security, it is extraneous under the Byrd rule.

Reconciliation is Not What the Doctor Ordered

The reconciliation process is a complicated budgetary exercise designed to allow Congress to carry out its plan to alter the fiscal path of the federal government on the margin. Health care reform is a massive, sweeping exercise to dramatically change the structure, incentives, and delivery of health care consumption, which accounts for about one-sixth of all economic activity in the U.S. While some view reconciliation as a magic bullet for ramming through partisan legislation, the origins, requirements, and limitations of reconciliation make it ill-matched for sweeping policy measures such as comprehensive health care reform.

It is important that Americans remember a few things about reconciliation: the decision to enable the reconciliation process this year was political and strategic, not based on budget considerations; the process benefits only the members who support the policy changes in the legislation; the use of reconciliation to achieve fiscal or policy goals requires an adept hand when drafting legislation at navigating through the myriad rules and requirements that accompany the process; and finally, your voice may not be heard, since your elected representative will have few options to offer alternatives when the measure is debated in Congress.

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