
By Michael W. Evans

Introduction

The Economic Growth and Tax Relief Reconciliation Act of 2001 (the Act)\(^1\) has generated many controversies. One involves the Act’s “sunset” provision, which provides that the Act’s tax cuts expire by the end of 2010.\(^2\)

Ever since the Act was signed into law, there has been significant sentiment to repeal the sunset, by making either all or some of the tax cuts permanent. The first bill that would accomplish this was introduced less than two weeks after the president signed the Act into law;\(^3\) many others were introduced subsequently,\(^4\) several passed the House,\(^5\) and one was enacted.\(^6\) The president’s budgets for 2003 and 2004 called for Congress to make the tax cuts permanent, and the president himself has frequently urged Congress to do so.\(^7\)

Whatever one thinks of the sunset as a matter of tax or budget policy, its enactment was not the result of some mistake or trick. Rather, it was the result of a long series of deliberate decisions, beginning with the enactment of the Congressional Budget Act of 1974, unfold-
ing during the debate about the consideration of "extraneous" provisions in budget legislation during the 1980s, and culminating with the application of the budget reconciliation process to the budget situation that existed from 1994-2001.

This article is intended to describe this series of decisions in some detail. By doing so, I hope to provide further context for those engaged in the continuing debate about whether the sunset provision should be modified or repealed, and also the debate about whether future reconciliation tax bills are likely to include similar sunset provisions.

Specifically, I start by describing the basic operation of the Budget Act, and how it modifies the ordinary Senate process. Then I describe the critical debate about how the Budget Act's reconciliation process applies to a bill that cuts taxes. Then I shift into a detailed discussion about the Senate's "Byrd rule," which is designed to keep extraneous provisions from being included in a budget reconciliation bill; eventually, the discussion focuses on the specific provision of the Byrd rule that is critical here: subparagraph (E). Hoping to pull all of this together, I then discuss the 2001 debate, including both the debate over the budget resolution, which established the procedure for consideration of the tax cut, and the development of the sunset itself.

**The Budget Act and Senate Procedure**

In the Budget Act of 1974, Congress established a system of procedural restrictions governing the consideration of certain bills and amendments that have significant fiscal consequences. This system includes the process that came to be called "reconciliation."

The reconciliation process that was enacted was somewhat different than the one that evolved. As enacted, the budget process was supposed to feature two budget resolutions, one passed early in the year that set overall targets, and a second passed late in the year that made adjustments — reconciliation — necessary to reflect actions that Congress had taken during the year. In other words, reconciliation was designed to allow a sort of "mid-course correction" to reconcile the target established in the first budget resolution with the congressional actions reflected in the second.

But this form of reconciliation failed, and the process evolved. A mid-course correction was inadequate for budget resolutions that themselves had little binding effect. By 1980, Congress began to modify the budget system. Most significantly, Congress began to use the reconciliation process not to reconcile a first budget resolution with a second, but, instead, to reconcile the (first and only) budget resolution with reality by turning overall budget targets into the concrete changes in law necessary to achieve them.

In the Senate, the result is a profound change in the process by which legislation is considered. To put this change in perspective, it is necessary to understand the ordinary process for Senate debate. That process is slow and deliberate, and a minority can prevent a raw numeric majority from quickly passing legislation. The process is embodied in a story told often on the Senate floor: When Jefferson returned from his service as the American representative to France, he asked Washington why the Constitutional Convention had created the Senate. Washington responded by tipping some of his hot tea into his saucer. "The House will respond to the passions of the moment," Washington said. "But the Senate will be like the saucer, where there will be a cooling of reason, and the result will be a stronger, more stable government."\(^{11}\)

The key to this "cooling" process is what Senator Robert C. Byrd, D-W.Va., has called "Senators' constitutional rights . . . to freely debate and amend."\(^{12}\) Debate goes on until it has run its full course. As another senator recently said, you have "the right to debate as long as you want and as long as you can."\(^{13}\) Senator Byrd also put it this way:

The right of extended and even unlimited debate is the main cornerstone of the Senate's uniqueness. It is also a primary reason that the United States Senate is the most powerful upper chamber in the world today. Without the right of unlimited debate, of course, there would be no filibusters, but there also would be no Senate as we know it.\(^{14}\)

There is an important exception to the right of unlimited debate: The cloture procedure under Senate Rule XXII, which allows the Senate to bring debate to a close and thereby end a filibuster. Cloture, however, requires 60 votes. The practical effect is that, for a controversial measure to pass the Senate, it must receive 60 votes rather than merely a majority of those voting.

Turning to the amending process, amendments ordinarily need not be germane or even relevant to the subject matter of the bill being amended. One Senate leader, looking back at his early years in the Senate, said he had discovered that another senator who had an interest in a particular issue would wait until the right moment, and then "regardless of what we were debating, that senator would try to get the floor and offer an amendment or resolution regarding [the particular issue of interest to him]."\(^{15}\) Further, in recent years, the unlimited right to amend has prevented the majority from completely controlling the Senate agenda because, if the majority refused to schedule a particular matter for consideration on the Senate floor, the

\(^{9}\)The early history of the budget process is explained in A. Schick, *Reconciliation and the Budget Process* 1-8 (1981).
\(^{10}\)Id.
\(^{11}\)Although this story is often told on the Senate floor, see, e.g., 120 Cong. Rec. 12077 (daily ed. Nov. 28, 2001) (remarks of Sen. Gramm), it may be apocryphal. See Congressional Research Service, *Respectfully Quoted* 61 (1992).
\(^{13}\)Id.
\(^{14}\)147 Cong. Rec. 3050 (daily ed. April 5, 2001).
\(^{15}\)Id.
minority could insist on its right to offer that matter as an amendment to an unrelated bill.\(^{16}\)

In comparison to this ordinary Senate process, the reconciliation process stands in sharp contrast. The Budget Act imposes two tight restrictions. First, it limits debate — in the case of the budget resolution, to 50 hours, and in the case of an ensuing reconciliation bill, to 20 hours. In each case, the effect is to prevent a filibuster and, accordingly, reduce the number of votes needed to pass a controversial measure from 60 to a bare majority.

Second, the Budget Act limits amendments. Most significantly, amendments must be germane. While there is no bright-line test for determining germaneness, the leading commentator has said that “the precedents interpreting germaneness have generally imposed a more restrictive standard than simple relevancy.”\(^{17}\) In any event, the standard clearly is much tighter than the usual “anything goes” Senate approach.

The Tax Cut Question

After the federal deficit rose sharply in the early 1980s, the budget debate was mainly about how to reduce the deficit, through a combination of spending cuts and tax increases. There was a steady stream of reconciliation tax bills; in fact, with a few notable exceptions, most major tax bills enacted between 1980-1993 were reconciliation bills.\(^{18}\)

Reconciliation changed the process by which tax legislation was considered, and many were critical of the change, with one senior practitioner, former Assistant Treasury Secretary John Nolan, regretting that “we have departed from an orderly and predictable process for identifying the legislative issue[s] in advance and dealing with them in some well-organized way through the process.”\(^{19}\) However, no one seriously questioned whether the reconciliation process was an appropriate vehicle for tax increases that were part of an overall strategy to reduce the deficit.

Throughout this period, as a practical matter, tax cuts were pretty much out of the question (with the notable exception of 1981). This changed in the mid-1990s. With the succession of deficit reduction bills and with a rapidly growing economy, the longstanding deficit was projected to end and be replaced by a surplus. Policymakers pondered the projected surplus. As they did, tax cuts were on the table.

This raised an important procedural question. It had become common to use the reconciliation process, with its strict procedural limitations, to consider bills that reduced the budget deficit by raising taxes (and cutting spending). Could the reconciliation process also be used to cut taxes? A sharp disagreement arose, and persisted through the debate on the 2001 Act.

The issue had come up briefly in 1975, soon after the Budget Act had been enacted, but had not been resolved.\(^{20}\) The issue came up again in 1995-96. Republicans had recently taken control of Congress for the first time in many years. As Congressional Quarterly describes it, “[a]mid protests from Democrats, congressional Republicans rallied behind a bold seven-year plan to balance the federal budget by making massive reductions in spending, and at the same time providing for the largest tax cut since the Reagan era.”\(^{21}\)

In 1995, the resulting reconciliation bill had been vetoed. In 1996, congressional Republicans tried again. The budget resolution instructed the Ways and Means and Finance Committees to report reconciliation legis-


\(^{20}\)In 1975, the second concurrent budget resolution for the next fiscal year instructed the Finance and Ways and Means Committees to report legislation to decrease federal revenue by approximately $6.4 billion. H. Conf. Rep. 94-698, 94th Cong. 1st Sess. 1 (1975). The same day that the conference report passed the House, the Senate Finance Committee reported legislation that cut taxes by the requisite amount, and, when the bill came up on the Senate floor three days later, the Chairman of the Finance Committee, Senator Long, said that “[t]he bill now before the Senate . . . is the reconciliation bill in response to the second budget resolution.” 1975 Cong. Rec. 40540 (Dec. 15, 1975). However, Long’s assertion was sharply challenged by another senator, 1975 Cong. Rec. 40544-46 (remarks of Senator Hartke), and the issue was never ruled on by the presiding officer or the full Senate. Moreover, the Finance Committee amendment that Senator Long asserted was a reconciliation bill was an amendment to a House bill that clearly was not a reconciliation bill — indeed, it had passed the House several months before the budget resolution containing the reconciliation instruction passed either chamber. Thus, the 1975 bill was, at best, an ambiguous precedent for the proposition that a reconciliation bill could be used to cut taxes.

What reconciliation is about in the first place. When this budget resolution came to the Senate floor, the Democratic leader, Senator Thomas A. Daschle, D-S.D., objected. “This,” he argued, “is the first budget resolution that will instruct a committee to produce a reconciliation measure that actually increases the deficit [and] . . . therefore calls into question what reconciliation is about in the first place.” He then explained his view that the reconciliation process was limited to bills that reduced the deficit. He said:

We all know what reconciliation was designed to be and what it has been. We all know that we pass budget resolutions with reconciliation instructions to ensure that the authorizing committees hit deficit reduction targets. Some way of enforcing deficit reduction on committees is the sole reason for being of the highly privileged vehicle we call reconciliation. We deprive senators of their normal rights to debate and amend only because we seek to ensure that the committees follow through in the crucial business of exercising fiscal responsibility.

Unless the reconciliation process was limited to bills that reduced the deficit, Daschle argued, the process could undermine the fundamental nature of the Senate, allowing the majority to characterize its top agenda items, whatever they might be, as reconciliation bills, thereby stripping the minority of its rights of unlimited debate and amendment. Summing up, he said that it is with great concern that I call attention to what I consider to be a very, very dangerous set of legislative circumstances mandated by this budget resolution. I think it is a fundamental abuse of the budget process. It is such an abuse that it calls into question whether the document before us actually constitutes a budget resolution.

I would argue that it does not. I argue that, because it creates a budget reconciliation bill devoted solely to worsening the deficit, it should no longer deserve the limitations on debate of a budget resolution.

Accordingly, Daschle raised a point of order under the Senate rules, asking the presiding officer to rule that “the pending resolution is not a budget resolution.”

Before the presiding officer ruled, the Chair of the Budget Committee, Senator Pete V. Domenici, R-N.M., responded to Daschle. He devoted most of his argument to justifying the decision to call for several reconciliation bills rather than a single bill. Beyond that, he cited precedents for reconciliation measures that did not reduce the deficit.

The presiding officer then ruled on Senator Daschle’s point of order, saying that the budget resolution “is appropriate and the point of order is not sustained.” Daschle appealed the ruling, but the appeal was rejected by a vote of the full Senate. During the debate about the appeal, Daschle asked several detailed questions of the presiding officer. In answer to one, the presiding officer said that “if the senator’s question is, can the budget resolution direct the creation of a reconciliation bill which lowers revenues, the answer is yes.”

Eventually, the immediate budget controversy was resolved, when Congress and President Clinton negotiated the Balanced Budget Act of 1997. But the procedural controversy persisted. In turn, triggered questions about the application of the Byrd rule, to which this article now turns.

The Byrd Rule: In General

In the 1980s, as Congress took up a succession of omnibus reconciliation bills, senators saw that they might be able to sidestep some of the obstacles inherent in the conventional Senate procedure by adding their pet provision to a reconciliation bill; that way, the provision could not be filibustered, and amendments were limited. Accordingly, it became common for committees to include, in their response to reconciliation instructions, provisions that were unrelated to the overall budgetary objective of those bills. Looking back, Senator Byrd later said:

Reconciliation legislation often contained many provisions that were extraneous to implementing budget resolution policies. Reconciliation submissions by committees have included things that had no budget effect, that increased spending or reduced revenues when the reconciliation instructions called for reduced spending or increased revenues, or that violated another committee’s jurisdiction.

An example occurred in 1982. The Senate Finance Committee was instructed, by the budget resolution, to increase taxes and user fees. It responded with reconciliation legislation that not only increased the user fees that supported the Airport and Airways Trust Fund, but also made significant revisions to the programs operated under the trust fund. When the bill came to

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24Id.
25Id.
26Id. at S5415-17.
the Senate floor, Senator Byrd objected. After reading the text of the Finance Committee provision, he said: "I believe that including such extraneous provisions in a reconciliation bill would be harmful to the character of the U.S. Senate. It would cause such material to be considered under time and germaneness provisions that impede the full exercise of minority rights. It would evade the letter and spirit of [the cloture rule]. It would create an unacceptable degree of tension between the Budget Act and the remainder of Senate procedures and practice. Reconciliation was never meant to be a vehicle for an omnibus authorization bill. To permit it to be treated as such is to break faith with the Senate's historical uniqueness as a forum for the exercise of minority and individual rights. For principally these reasons, I have labored with [the] distinguished minority leader, with the chairman and ranking minority member of the Budget Committee, and with other committee chairman to develop a bipartisan leadership amendment. This amendment will strike from the bill subject matter which all these parties can agree is extraneous to the reconciliation instructions . . . . What will remain in the bill is directly responsive to these instructions, has a budgetary savings impact, and plainly belongs in a reconciliation measure."

The amendment was adopted, as were similar amendments over the next few years.

In 1985, the practice was codified. When the Senate was debating a reconciliation bill for fiscal year 1986, Senator Byrd offered an amendment to the Budget Act. He explained that it was necessary because the Senate was again, opening “the Pandora’s box” of extraneous amendments. Unless the Senate imposed some restraint, he continued, a committee could bring to the Senate floor “any measure, no matter how controversial,” with the protection of “an ironclad built-in time agreement that limits debate.” The Budget Act, he said, was never intended to operate this way. Therefore, “to preserve the deliberative process in this U.S. Senate,” Byrd proposed an amendment to the Budget Act. He said that “this amendment provides that if a point of order is raised and upheld against extraneous matter in the reconciliation bill . . . then all such matter that is in the bill will fall and is not subject to being offered as a further amendment thereto.”

In 1987, the original Byrd rule was expanded to include the provision that is critical here.

Senator Domenici endorsed the amendment, and it was approved by a vote of 96-0, eventually becoming section 313 of the Budget Act — commonly known as the Byrd rule.

The Byrd rule created a point of order, which could be waived only by 60 votes, against any provision of a reconciliation bill that was “extraneous.” A provision was extraneous if it met any one of the following standards:

(A) [the provision] does not produce a change in outlays or revenues . . . ;

(B) [in the case of a provision that increases outlays or decreases revenues] the net effect of provisions reported by the Committee . . . is that the Committee fails to achieve its reconciliation instructions;

(C) [the provision] is not in the jurisdiction of the Committee with jurisdiction over [the] title . . . ;

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30 Cong. Rec. 17003 (daily ed. July 20, 1982). In a related vein, the chairman of the Senate Budget Committee, Senator Domenici, later gave an example in which the chairman of the Commerce Committee “took a little, tiny instruction that told that committee to charge a fee . . . [and] wrote a whole reauthorization of the [telecommunications] bill.” 147 Cong. Rec. S3507 (daily ed. April 5, 2001).


32 Id.


(D) [the provision] produces changes in outlays or revenues which are merely incidental to the non-budgetary components of the provision.\textsuperscript{36}  

The Byrd rule has had a significant impact on the Senate’s consideration of reconciliation bills, by exposing extraneous provisions to a potential point of order that can be waived only by 60 votes. Between its enactment in 1985 and 2001, it was successfully invoked more than 40 times, and this fails to measure its impact in discouraging senators from proposing extraneous provisions in the first place.\textsuperscript{37}  

\textit{Subparagraph (E)}  

In 1987, the original Byrd rule was expanded to include the provision that is critical here.  

Concerns had arisen about the use of provisions that increased revenue or reduced spending during the period covered by a reconciliation bill, but that had the opposite effect afterwards. For example, such concerns had arisen about provisions that accelerated the collection or payment times for federal taxes or federal payments so that the deficit was reduced within the reconciliation period — but increased thereafter.\textsuperscript{38}  

In response to these practices, Congress added subparagraph (E) to the Byrd rule, which rendered a provision of a reconciliation bill extraneous if “it increases . . . net outlays . . . or if it decreases . . . revenues during a fiscal year after the fiscal years covered by [the] reconciliation bill. . . .” Thus, if a provision increased revenues by accelerating a scheduled payment forward into the period covered by the bill, it probably violated the Byrd rule, because it also would “decrease . . . revenues . . . after the fiscal years covered by [the] reconciliation bill.”\textsuperscript{39}  

For several years after it was enacted, subparagraph (E) was seldom, if ever, invoked. However, as the budget situation improved, and the deficit became a surplus, that changed. As described above, the Senate began to debate whether the reconciliation process could be used to cut rather than increase taxes. As it did so, questions arose about the application of subparagraph (E).  

The first skirmish occurred in 1995. When the conference report on that year’s controversial reconciliation bill came to the Senate floor, the ranking minority member of the Senate Budget Committee, Senator James Exon, D-Neb., challenged it, arguing that the tax cuts, which were permanent, violated subparagraph (E) because they “continue in the out-years to dig us into a deeper and deeper hole.” Further, he argued, “the majority could have prevented this drain on the Treasury in the out-years by sunsetting the tax provi-

\textsuperscript{36} Id.  


\textsuperscript{38} The chair of the Senate Finance Committee, Senator Roth, later said: “I remember a military pay installment was once moved from the last day of one fiscal year to the first day of the next year, which was outside the window, to achieve budgetary savings in the earlier years.” 145 \textit{Cong. Rec.} S9479 (daily ed. July 28, 1999).  

\textsuperscript{39} However, the presiding officer rejected the point of order.\textsuperscript{40}  

The question recurred in 1996, with a very different result. After President Clinton’s veto of the 1995 bill, congressional Republicans pressed forward with another controversial budget resolution. Once again, the resolution instructed the Ways and Means and Finance Committees to report reconciliation legislation that cut taxes substantially.\textsuperscript{41}  

As described above, when the resolution came to the Senate floor, Daschle, raised a point of order against the budget resolution, arguing that it was not legitimate because it instructed the Finance Committee to cut taxes (the point of order, again, was rejected). In the course of doing so, Daschle asked the presiding officer several questions. One series of questions pertained to the Byrd rule. After describing subparagraph (E) prohibition against provisions that increase the deficit in years beyond the period covered by the bill, Daschle asked: “If this . . . reconciliation bill does not find a way to end or offset its tax cuts in the years beyond 2002 [the last year covered by the bill], would the bill violate the Byrd rule?” The presiding officer replied, “Yes, it would.” Further, Daschle asked whether it was correct that “[t]he reconciliation bill triggered by this resolution would not be in order . . . if it failed either to offset the tax cuts or to sunset them after fiscal year 2002.” The presiding officer replied: “That is correct.”\textsuperscript{42}  

With that response, the stage was set. As Republicans pressed ahead to use the reconciliation process for tax cuts, Democrats responded by, among other things, invoking the Byrd rule.  

The first time subparagraph (E) was invoked successfully, however, it was done in the context of a spending increase. In 1997, Senator Domenici made a point of order against a health amendment offered to a reconciliation bill by Senator Edward M. Kennedy, D-Mass., on the ground that “it violates the Byrd rule because it increases spending in the year 2002 [which was beyond the period covered by the bill] and therefore without any offsets,” and the point of order was sustained.\textsuperscript{43}  

Subparagraph (E) was next invoked successfully in 1999. Over strenuous Democratic objections, the Republican Congress passed a budget resolution calling for a tax cut and instructing the Ways and Means and Finance Committees to report reconciliation legislation
implementing it.44 When Congress began work on the reconciliation legislation, the Byrd rule became an important issue in the Senate debate.45 Senate Democrats put the Republicans on notice that they would raise a Byrd rule point of order against the bill unless the tax cuts expired at the end of the 10-year period covered by the bill, and the Senate Parliamentarian apparently indicated that he would advise the presiding officer to sustain the point of order.46

Anticipating a Byrd rule objection, the Finance Committee included two provisions in the reconciliation bill. The first, section 1501, sunsets the tax cuts on December 31, 2009 (the last day covered by the bill), thereby complying with the Byrd rule. The second, section 1502, revived all of the tax cuts one day later. With this combination of provisions, the committee shifted the focus of a Byrd rule point of order away from the entire bill and onto the single provision, section 1502, that revived the tax cuts.

When the Senate floor debate began, the ranking Democratic member of the Finance Committee, Senator Daniel Patrick Moynihan, D-N.Y., announced that he would raise the Byrd rule point of order. Before doing so, he put the procedural dispute in context, explaining that “the budget reconciliation process was devised to expedite consideration of deficit reduction measures,” whereas “the bill before us uses those same expedited procedures to secure enactment of a deficit-increasing measure.” Then, he raised the specific objection:

[H]e is the Byrd rule provides that any provision in any reconciliation bill which would decrease revenues used beyond the budget window — in this case beyond the year 2009 — may be automatically stricken from the bill upon a point of order being raised. Section 1502 of the bill before us provides for permanent continuation of tax cuts in the years beyond 2009, causing revenue losses of hundreds of billions of dollars.47

Shortly after Senator Moynihan spoke, the chairman of the Senate Finance Committee, Senator William V. Roth, R-Del., moved to waive the Byrd rule and responded to Moynihan:

[T]he point of order against section 1502 is made necessary by the antiquated provisions of the Budget Act whose provisions were drawn to function in an era of deficits. . . . Nevertheless, we must contend with the language of (subsection (E)), which forbids any reconciliation bill from achieving a net reduction in revenue beyond the 10 years for which the committee was instructed.

Of course, achieving a net reduction in revenues is our goal, as well as our instructions. Moreover, the Budget Act provision in question was not written with this situation in mind. It was not written to hinder refunds of a budget surplus. Rather, it was written to bar creative accounting provisions, such as those offered on this floor to delay the timing of expenditures, or, to be accurate, the timing of revenue. . . . No provision of that sort is contained in this bill. Rather, the question here is whether any tax relief can be permanent except for a very small percent of tax provisions.

In sum, everyone thought we were instructed to achieve permanent tax relief. That was the commonsense understanding. That is the better tax policy. I urge support for the waiver to protect this legislation against an arcane budget rule never intended to apply in this situation.48

The argument continued. Senator Kent Conrad, D-N.D., said that “Senator Byrd crafted the Byrd rule to prevent abuse of reconciliation’s expedited procedures. He did that to protect the fiscal integrity of the United States,” and that the motion to waive the Byrd rule, accordingly, was “a move to undermine the fiscal integrity of the process.”49 Senator Phil Gramm, R-Texas, responded that, in this context, the Byrd rule was “a technicality” that would create instability in the tax code and that, although the Byrd rule technically applied to section 1502, “the logic of it does not apply.”50 Minority Leader Daschle responded that the Byrd rule “is a lot more than a technicality,” and pointed out that Senator Roth’s motion to waive the point of order applied not only to the reconciliation bill before the Senate, but also to any subsequent conference report.51

Others spoke for or against the merits of the tax cut. When the votes were cast, 51 Senators — all Democrats — voted in favor of waiving the Byrd rule; 48 — all Democrats and three Republicans — voted against. Since 60 votes were required, the motion to waive the Byrd rule failed, a point of order was made and sustained, and section 1502 was stricken. As a result, in accordance with section 1501, all of the tax cuts were scheduled to expire at the end of the period covered by the bill; the eventual conference report retained the provision.52

After the 1999 reconciliation bill was vetoed congressional Republicans tried again, proposing tax cuts in 2000.53 Once again, the sponsors included a sunset provision in the bill but tried to strike the provision on

44Secs. 104 and 105 of H. Con. Res. 68 (106th Cong., 1st Sess.).
45As would also be the case later, the Byrd rule, which creates a point of order only under Senate rules but not House rules, was not an issue during the House debate.
the floor. And once again they failed to waive the point of order.

Pulling all this together, between 1995 and 2000, the Senate had narrowly concluded that the reconciliation process could be used to protect tax cuts but also had concluded that, under subparagraph (E) of the Byrd rule, those tax cuts must expire at the end of the period covered by the bill.

The 2001 Debate

After the 2000 election, President Bush took office with tax cuts at the top of his legislative agenda. At the same time, the election left the Senate with the narrowest division in history: 50 Republicans, 50 Democrats, and Vice President Cheney breaking ties.

Given the situation, it probably was predictable that Republicans would decide to again use the reconciliation process as the vehicle for the tax cut. After all, Republicans had already tried the same approach several times before, over Democratic objections.

After invoking Herodotus, Xerxes, and the Magna Carta, Senator Byrd described the narrow political division in the country and the Senate.

Given the strong feelings over the substance of a tax cut, and given that Senate Democrats were only one vote short of Senate control, it probably also was predictable that Democratic objections would intensify. The intensity became apparent on February 15, 2001, a few weeks after the Senate convened. That day, Senator Byrd took the Senate floor to denounce the use of reconciliation to consider bills that did not reduce the deficit. In a long speech, he explained how the reconciliation process had developed as a tool to reduce federal deficits and how, in his view, the 1999 and 2000 bills process had developed as a tool to reduce federal deficits.

The procedural controversy came to a head on April 5, 2001. Senator Domenici proposed a budget resolution on the Senate floor, and then proposed an amendment instructing the Finance Committee to report a reconciliation bill “that consists of changes in laws within its jurisdiction sufficient to reduce the total level of revenues for . . . fiscal years 2001 through 2011” by $1.6 trillion. Two hours were set aside to debate the amendment.

As the debate began, Domenici deferred to Senator Gramm, who explained his effort to negotiate a compromise procedure for handling the tax cut and briefly argued in favor of using the reconciliation process to cut taxes. Then Domenici made the case for his amendment. Acknowledging that the reconciliation process was a sharp departure from the Senate’s normal procedure, Domenici argued that the Budget Act had fundamentally changed the rules and, further, that the Senate had repeatedly applied the reconciliation process in similar circumstances. Like many Republicans, he cited the 1993 reconciliation bill — the “Clinton tax increase” — as a principal example. He also relied on recent precedents:

[T]here was an occasion in 1996 when the other side of the aisle challenged a proposal in a budget resolution to reduce taxes. They actually raised the point of order that it wasn’t permitted under [Budget Act]. The Parliamentarian agreed that it was . . . . The Chair was sustained by a partisan vote. . . . The Senate decided you could use reconciliation to reduce taxes, as they were in 1996. I might suggest [that was] done again in 1997 and no challenge was made. . . .

The ranking minority member of the Budget Committee, Senator Conrad, rebutted Senator Domenici’s main points. Then Senator Byrd spoke against the Domenici amendment, pulling out all the stops. After invoking Herodotus, Xerxes, and the Magna Carta, Senator Byrd described the narrow political division in the country and the Senate. Then he turned to a detailed discussion of the budget process. “Reconciliation was established only for reducing deficits,” he argued. Accordingly, those who sought to use it to cut taxes have “abused and distorted beyond all recognition the original, very limited purpose of the reconciliation procedure.” As a result, reconciliation “is being turned on its head.”

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See “Senate Leaders Push Dove Out,” Roll Call, May 7, 2001; see also 147 Cong. Rec. S4544 (daily ed. May 9, 2001) (remarks of Senator Feingold, expressing “dismay with the majority leader’s decision . . . summarily to fire the Senate Parliamentarian because of his advice on a number of budget-related issues”).


Id. at S3499.

Id. at S3500.

Id. at S3503-04.
He then countered Republicans’ precedents with some of his own. In 1981, he said, “[t]he Senate Republican leadership ... chose to do the right thing by bringing the Reagan tax cut bill to the Senate as a freestanding measure rather than use [reconciliation] procedures.” Accordingly, he said, the 1981 bill “was thoroughly aired.”

**Senator Byrd’s argument, Domenici said, ‘is 27 years too late.’**

Then he explained how, in 1993, he himself had thwarted a Democratic president and the Democratic Senate leadership when they had tried to use the reconciliation process for consideration of the massive health care reform bill. “I could not, I would not, and I did not allow that package to be handled in such a cavalier manner,” Byrd said. Further, he said that “[i]t was the threat of the use of the Byrd rule that bolstered my position.”

After attacking the policy justification for the tax cut, Byrd turned to the heart of Senator Domenici’s argument — that the Budget Act was neutral between tax increases and tax cuts, and therefore that the reconciliation process could be used for either. Senator Byrd conceded that, as enacted in 1974, the Budget Act might have been “neutral in its purpose.” However, he continued, “several amendments...have made it quite clear that the purpose of reconciliation was for deficit reduction.”

After Senator Byrd concluded, a few other senators spoke briefly, and then Senator Domenici responded. Senator Byrd’s argument, Domenici said, “is 27 years too late,” because it was the 1974 Budget Act that imposed the constraints that Byrd complained of. Further, Domenici continued, the Budget Act indeed was neutral. “I was a part of the whole thing,” he said, and “I think it remains neutral. . . . It doesn’t say . . . that you can [use reconciliation] only if you are reducing deficits. It just doesn’t say it. [Senator Byrd] interprets it that way. I don’t interpret it that way.”

Senator Domenici then responded to Senator Byrd’s argument that Democrats had refrained from using the reconciliation process to protect the 1993 health care bill. The reason, Domenici explained, was not so much self-restraint as the practical impact of Byrd rule. “Guess what the Byrd rule would have done if they would have brought President Clinton’s health care bill to the floor[?]” Domenici asked. “Any Senator could have raised a point of order under . . . the Byrd rule.”

At that point, the chair of the Senate Finance Committee, Senator Charles Grassley, R-Iowa, spoke. He focused most of his remarks on the substance of the proposed tax cut, explaining why he thought the tax cut was necessary. Towards the end of his remarks, he turned to the use of the reconciliation process. In arguing that the process was justified, Grassley said that reconciliation “is the only way we are going to get a tax cut for the American people in a timely manner.” He also compared the Republicans’ current use of the reconciliation process with the Democrats’ use of the process in 1993:

> **[W]ith a new president and majorities in both Houses, Democrats used reconciliation, to raise taxes. [T]hey used reconciliation within their right to further their president’s program, a partisan-designed major tax increase.**

Eight years later, we are faced with a similar situation. . . . Republicans, by a razor-thin edge, have control of Congress and the Presidency. The core of President Bush’s program, much as President Clinton’s program 8 years ago, involves taxes. . . . Republicans did not object to use of reconciliation in 1993; Democrats should not object to Republicans’ use of reconciliation today.

A short time later the ranking Democratic member of the Finance Committee, Senator Max Baucus, D-Mont., spoke. Unlike virtually all previous Democratic speakers, he supported a tax cut along the lines proposed by Republican senators. But he opposed using reconciliation procedures to consider it. The problem, Baucus explained, was how the use of reconciliation in the context of a tax cut would affect the Senate as an institution. He said:

> It has been argued on the other side that reconciliation is policy neutral. If we believe that, then we believe that anything can be in reconciliation.

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62Id. at S3504.
63Specifically, Senator Byrd argued that — Section 310 of the act was amended by the [1995 Gramm-Rudman-Hollings Act] to prohibit amendments to reconciliation bills that reduced revenues, if the amendment caused a committee to fail to meet its reconciliation instruction. This prohibition would make no sense if committees could be instructed to reduce net revenues. It only makes sense if a committee could be instructed to increase revenues. Furthermore, the Byrd rule was added as section 313 of the Budget Act. It prohibits as extraneous any provision reported by a committee that reduces revenues if that committee failed to meet its reconciliation instructions. The Byrd rule also prohibits as extraneous a provision that results in net revenue losses in the years beyond the budget resolution, the outyears, unless those losses are compensated for by outlay reductions. Again these provisions make no sense if committees could be given a reconciliation instruction to reduce net revenues. They only make sense if committees could only be instructed to increase revenue. It should also be noted that section 310 was amended in 1990 to specifically authorize a reconciliation instruction “to achieve deficit reduction.” Thus, there is explicit and there is implicit language standing for the principle that the purpose of reconciliation is for deficit reduction. There is nothing in the . . . Budget Act stating that reconciliation can be used to reduce revenues. The only conclusion that can be drawn is that this process is for deficit reduction. Id. at S3505.

64Id. at S3507.
65Id. at S3511.
that in any way affects outlays or revenues — anything; the highway bill, the former health care bill that has been mentioned. That is what that argument means.

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What is right is to use reconciliation where it should be used, in reducing deficits. It should not be used to craft anything else under the sun.66

After a few other senators spoke, the Domenici amendment was approved, by a vote of 51-49 (every Republican voted in favor of the amendment; every Democrat but one voted against it).67 With that vote, the Senate had re-affirmed that the reconciliation process could be used to protect a bill that cut taxes. By doing so, the Senate also had implicitly agreed that, as a reconciliation bill, the tax cut would be subject to the Byrd rule, requiring the bill’s proponents to either sunset the tax cuts at the end of the period covered by the bill or, alternatively, to muster the 60 Senate votes necessary to waive the rule.

The House-Senate conference on the budget resolution retained reconciliation instructions. Therefore, it was settled that when the tax bill was taken up in the Senate, it would be protected by reconciliation procedures: there would be limits on debate and amendments; as a practical matter, it would not take 60 votes to pass the bill, but only a majority; and the Byrd rule would apply, including the subsection (E) provision requiring the tax cuts to expire at the end of the period covered by the bill.

The lack of controversy did not necessarily reflect support for the sunset as a matter of tax policy. Rather, it reflected the inextricable connection between the reconciliation process and the Byrd rule. Republicans had sought to use the reconciliation process to protect the tax cut from the ordinary rules of Senate debate. That decision was controversial. Democrats objected, arguing that reconciliation was limited to bills that reduced the deficit. Further, they insisted that if the reconciliation process was used, all of the procedural limitations of the Byrd rule would apply, and a strict application of the Byrd rule would require tax cuts to expire at the end of the period covered by the bill. Thus, those who advocated the use of the reconciliation process understood, however grudgingly, that doing so would require the tax cuts to sunset.

As the reconciliation process unfolded and the tax bill was considered, several of these protections had a significant impact. During the Senate floor debate, the 20 hours of debate expired long before all amendments had been disposed of, so the last several hours of debate consisted of a marathon session in which more than a dozen amendments were disposed of with little debate (the Budget Act time limits apply only to the time it takes to debate, not to the time it takes to vote, so it is quite possible for there to be hours of rollcall votes after all time for debate has expired). More significantly, several amendments, including Minority Leader Daschle’s alternative tax cut, received more than 40 votes — demonstrating that the bill’s opponents may have been able to muster the votes necessary to sustain a filibuster by defeating cloture if they had the procedural opportunity to do so. The restrictions on amendment also had a vivid impact, with 27 amendments being stricken in response to various points of order raised under the Budget Act.

The application of subparagraph (E) of the Byrd rule, in contrast, was something of an anticlimax. Once the Senate turned to the business of writing the reconciliation bill,68 there was little further discussion of the Byrd rule. When the Senate Finance Committee met to consider the bill, Chairman Grassley offered an amendment to bring the bill into compliance with the Byrd rule by providing, in section 811, that “[a]ll provisions of, and amendments made by, this [bill] which are in effect on September 30, 2011 shall cease to apply as of the close of September 30, 2011,” and the amendment was adopted. On the Senate floor, there was no challenge to the sunset provision, and a modified version with a different date was incorporated into the House-Senate conference.

Thus, with little or no further controversy, the sunset was included in the conference report, and all of the tax cuts were scheduled to expire.

Conclusion

The lack of controversy did not necessarily reflect support for the sunset as a matter of tax policy. Rather, it reflected the inextricable connection between the reconciliation process and the Byrd rule. Republicans had sought to use the reconciliation process to protect the tax cut from the ordinary rules of Senate debate. That decision was controversial. Democrats objected, arguing that reconciliation was limited to bills that reduced the deficit. Further, they insisted that if the reconciliation process was used, all of the procedural limitations of the Byrd rule would apply, and a strict application of the Byrd rule would require tax cuts to expire at the end of the period covered by the bill. Thus, those who advocated the use of the reconciliation process understood, however grudgingly, that doing so would require the tax cuts to sunset.

Looking ahead, the sunset can be repealed, either in its entirety or regarding particular provisions, and there have been many proposals to do so. However, a repeal provision that is included in a reconciliation bill is subject to the Byrd rule; alternatively, a repeal provision that is not included in a reconciliation bill can be filibustered, requiring cloture; thus, as a practical matter, repeal probably requires a 60-vote majority in the Senate.

More generally, there may continue to be debates about whether to use the reconciliation process for tax cuts and, if so, how the Byrd rule should apply in that context. As it currently stands, the Byrd rule would continue to require that any tax cuts (or spending increases) included in a reconciliation bill expire at the close of September 30, 2011.

66Id. at S3512.
67Id. at S3516.