



Background

Republicans hold a trifecta of control after winning the White House, US Senate, and US House of Representatives for the 119th Congress. They will aim to pass an agenda backed by President Trump that is focused on tax cuts, energy, and immigration. Healthcare policies are likely to be used as savers and to produce reductions in mandatory spending. With slim margins in both the House and Senate, Republicans will need to use the budget reconciliation process to bypass the Senate filibuster and advance their partisan priorities.

This document provides an overview of the reconciliation process, explains the Byrd rule, and illustrates recent examples of healthcare-related Byrd rule challenges.

What Is Reconciliation?

The Congressional Budget Act of 1974 created the budget reconciliation process. Reconciliation has historically been used to decrease the deficit, but it can also be used to advance policies that increase the deficit through tax cuts or spending increases. Pay-as-you-go budget rules, which require Congress to offset the cost of any legislation that increases spending, can be waived in the reconciliation process. Congress can pass up to three reconciliation bills in a fiscal year: one to address spending, one on tax provisions, and one to address the debt limit. Alternatively, lawmakers can pass a reconciliation package with provisions addressing all three areas (spending, tax, and the debt limit), but they then must wait until the next fiscal year to pass another reconciliation bill.

Reconciliation is a partisan process. It is mostly used in times of one-party control in Congress to bypass the Senate filibuster, which requires a supermajority of 60 votes, and to instead enact policies with a simple majority in the Senate. The Senate typically follows rules set forth in the Congressional Budget Act of 1974. The Congressional Budget Office (CBO) provides cost estimates (known as scores) for policies that committees are considering in a reconciliation bill. Lawmakers have used reconciliation to enact laws 23 times, and an additional four reconciliation bills have been vetoed.

Reconciliation Steps

The reconciliation process has three major steps:

1. **Budget Resolution.** The House and Senate Budget Committees create a budget with reconciliation instructions for authorizing committees, known as the budget resolution. The budget resolution directs certain committees, based on their jurisdiction, to change spending or revenue laws by a specific amount, and it can direct areas in which those changes should be made. As a hypothetical example, the budget resolution could direct the House Energy & Commerce Committee to find \$500 billion in mandatory savings, which most certainly implies the Medicaid program. The House and Senate then must pass the budget resolution and must be aligned on the resolution's language. The final reconciliation bill can achieve savings larger than the amount projected in the resolution, as long as it saves at least the amount specified.
2. **Committee Work.** The relevant committees produce substantive legislation within their jurisdiction that meets the budget resolution's instructions. The budget resolution determines the number of committees that produce legislation.



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3. **Votes.** The House and Senate Budget Committees collate the final reconciliation bill from the various committee pieces and bring it to the House and Senate floors. Senate debate on the reconciliation bill is limited to 20 hours, but senators can continue offering amendments after debate concludes. The House typically follows its routine procedure by adopting a rule to limit debate time and only including a few amendments for floor consideration. The legislation requires a simple majority vote in both chambers before moving to the president's desk.

The Byrd Rule

The Byrd rule, created by Senator Robert Byrd in 1985, was adopted to prevent budget reconciliation from weakening the power of the filibuster in the Senate. Budget reconciliation bills were increasingly including extraneous legislative provisions to bypass the 60-vote threshold. Byrd implemented a test to determine whether a provision was extraneous and should therefore be excluded from the reconciliation bill. Under the Byrd rule, a provision is regarded as extraneous if it:

1. **Does not produce a change in outlays or revenues.** If, according to CBO, the provision has no budgetary impact, it can be struck.
2. **Produces an outlay increase or revenue decrease when the instructed committee is not in compliance with its instructions.** If a committee receives an instruction but does not meet it, the entire bill loses its protected status. An example would be if the Senate Budget Committee instructed a committee to cut a certain amount of mandatory spending from its jurisdiction, and they did not cut enough to reach the specified amount.
3. **Is outside the jurisdiction of the committee that submitted the title or provision for inclusion in the reconciliation measure.** For example, if a provision amends the Public Health Service Act, the committee of jurisdiction (the Senate Health, Education, Labor, & Pensions Committee or the House Energy & Commerce Committee) must be the one to submit the provision. To do so, the committee must have been included in the reconciliation instructions.
4. **Produces a change in outlays or revenues that is merely incidental to the non-budgetary components of the provision.** This is the area of greatest controversy and the most difficult to define, since "merely incidental" is highly subjective.
5. **Would increase the deficit for a fiscal year beyond those fiscal years covered by the reconciliation measure.** This stipulation is why the recent tax cuts enacted under reconciliation are only temporary. If they were permanent, they would increase the deficit outside the reconciliation budget window.
6. **Recommends changes in Social Security.** There is no way to amend the Social Security program under reconciliation.

When a reconciliation bill is presented for Senate floor consideration, it is open to challenges under the Byrd rule. This phase is referred to as the "Byrd bath." Before the reconciliation bill is brought up for a final vote, the majority and minority bring their disputes and make their arguments to the parliamentarian, a non-partisan official who advises the Senate on rules and procedural issues. The current parliamentarian is Elizabeth MacDonough. Just before the final vote, the minority may make points of order that provisions in the bill violate the Byrd rule, and the parliamentarian makes a final ruling. If she determines that a provision does not meet the Byrd rule test, even if it is an individual sentence, it can be struck from the bill. The parliamentarian is not an expert on the substance of the provisions, so she bases her rulings on her understanding of the arguments made and how they comport with the Budget Act.



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The majority or minority party in the Senate can choose to challenge the parliamentarian's ruling at any time. However, doing so successfully requires 60 votes. The parliamentarian's ruling has been challenged on the Senate floor 69 times over the years but has been waived in only nine instances. The majority party in the Senate does not have to abide by the Byrd rule and the parliamentarian's rulings, but that radical action has never been taken.

Byrd Rule Case Studies

Case Study 1

Section 6043 of the Deficit Reduction Act of 2005: The provision at issue related to Medicaid emergency room copayments for non-emergency care. It stated, "no hospital or physician shall be liable in any civil action or proceeding for the imposition of cost-sharing under this section absent a finding by clear and convincing evidence of gross negligence by the hospital or physician."

Question: Is a negligence standard for hospitals and physicians who treat Medicaid patients extraneous to the score of the provision?

Arguments: The minority argued that raising the threshold for legal action against providers when treating Medicaid patients would not impact the federal budget directly. The majority argued that if the negligence standard was raised, providers would be more willing to treat Medicaid patients, therefore increasing the utilization of these services, which would impact the budget by increasing the amount paid to physicians by the federal government.

Ruling: In favor of the minority. The provision was removed from the bill.

Case Study 2

Section 1203 of the Health Care and Education Reconciliation Act of 2010: The provision at issue altered payment formulas for disproportionate share hospitals.

Question: Are changes in payment formulas extraneous to the score of the provision?

Arguments: The minority argued that altering the way payments are calculated would not directly alter the actual amount of the outlays. The majority argued that the calculation would determine the amount of the payments, which would impact the outlays.

Ruling: In favor of the majority. The provision remained in the bill.

Considerations for Stakeholders

President Trump and congressional Republicans intend to enact their top priorities in one comprehensive reconciliation package this year. Even if that plan shifts to include multiple bills instead of a single package, Congress aims to complete consideration of legislation via the reconciliation process this year. Stakeholders seeking to have policies included or excluded should keep in mind the Byrd rule and the intricacies of reconciliation. To be included, a provision must follow the budget resolution instructions, have a score, and ensure that any policy attached to it is associated with the score. Stakeholders who support a policy should also assess whether the provision at issue would still function and have the same score if a section or sentence was removed. Those opposing certain policies should evaluate whether they violate the Byrd rule in any way.



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For more information, please contact [Maddie News](#), [Rodney Whitlock](#), [Katie Waldo](#), [Erica Stocker](#), [Debbie Curtis](#), [Rachel Stauffer](#), or [Julia Grabo](#).

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