

New Federal Initiatives Project

Reconciliation and Health Care

**By
Martin B. Gold***

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Inside the Beltway and, increasingly, throughout the country, budget reconciliation is now a prime topic of interest. It may be the device by which Congress finally gets a healthcare bill to the President's desk. But reconciliation would not be a topic at all but for what Senator Orrin Hatch has called "an inconvenient truth of an electoral rebuke." Last year, Democrats rejected reconciliation as a tool to pass their version of healthcare reform. Some worried that the process was fraught with procedural potholes. Others thought resorting to it would abuse the Senate. And with all 60 members of the Democratic Conference coalescing around Majority Leader Harry Reid's Christmas Eve bill, cloture was invoked to rebuff Republican objections. Regardless of whether reconciliation would have been appropriate, it was unnecessary.

The plan had been for the Democratic Leadership in both Houses to agree upon a set of amendments for the House to add to the Christmas Eve bill. Such provisions would enable the House to accept the Reid legislation as amended. In Congressional parlance, the House would vote to concur in the Senate bill with a further amendment. Leader Reid was to take that legislation back to the Senate and move to concur in the House amendment. Facing unified Republican resistance to the proposal, and the certainty of a filibuster, Reid would lock out amendments and file cloture on his motion to concur. If the Senate performed as it did on Christmas Eve, the 60 members of the Democratic Conference would vote to invoke cloture. The Republican filibuster would end. The Senate would concur in the House amendment. Bicameral agreement would be had. And the bill would be on its way to the White House.

What happened in Massachusetts on January 19 disrupted the plan.

Senator Scott Brown's election meant that Democrats could no longer muster a filibuster-proof majority within their own Conference. Republican resistance to a deal struck solely between Democrats was not only certain, but certain to succeed. To pass healthcare reform, Democrats would have to adapt to this new reality.

Senate rules empower minority parties and individual Senators. This arrangement is very much opposite the House, where the rules, precedents, and mechanisms strongly favor majority control. In the House, there is primacy of the offense. In the Senate, there is primacy of the defense. This disparity is essential to promote checks and balances within the Legislative Branch. If the House and Senate were to be more alike, both favoring the offense, no doubt lawmaking would be more efficient. But the key constitutional objective of checks and balances, envisioned by the Framers, would be seriously impaired.

Minority rights in the Senate serve to moderate or block overreaching legislation. Unlike the House minority, the Senate minority cannot easily be rolled. In the Senate, account must be taken of minority views. Dissent matters. The exercise of minority rights can promote mainstream legislation.

When a filibuster-proof majority disappeared on January 19, two basic responses were possible. One would have been to explore in earnest the elements of a bipartisan

agreement, certain to be different from the Senate's Christmas Eve bill. The other was to find a way to work around the election. To take the latter road, Democrats revisited budget reconciliation.

Reconciliation involves a set of special, restrictive rules set out in the 1974 Congressional Budget Act. Those rules enable the Senate to quickly conform revenue and entitlement spending laws to Congressional budget policies. Such policies are set out in the annual Concurrent Budget Resolution. If tax and spending laws are not reconciled with the new budget, then the budget would be an empty document. The reconciliation process offers an expedited, filibuster-proof way to bring the law and the budget in line.

Under reconciliation, no debate is allowed on a motion to consider the bill and only 20 hours of debate is permitted on its merits. Debate on a conference report cannot exceed 10 hours. Amendments must be germane and meet a range of stringent budget tests. Special points of order exist that inhibit floor amendments. The minority's sole meaningful protection is the Byrd Rule, which bars inclusion of extraneous legislation that does not exclusively or dominantly affect the federal budget. Provisions that do not have a federal fiscal effect or ones in which the fiscal impact is merely incidental to non-budgetary policy effects cannot be included. It takes 60 votes either to waive application of the Byrd Rule or to overturn a ruling of the Presiding Officer sustaining a Byrd Rule point of order. The Senate Parliamentarian advises the Presiding Officer on questions of order. The Presiding Officer is customarily a majority party Senator, but can be the Vice President.

Senate deliberations, which can normally be quite extended on controversial legislation, become greatly compressed under reconciliation. As with all legislation, passage of a reconciliation bill requires a simple majority. But reconciliation bills cannot be filibustered, so a consensus of 60 is not needed to end debate. Reconciliation converts the Senate into a miniature House.

Since 1974, 22 reconciliation bills have passed, of which 19 have become law. Most have been enacted with significant bipartisan consensus and have served purposes envisioned in the Budget Act. On several occasions, as with enactment of welfare reform or children's healthcare expansion, reconciliation was used as a mechanism of convenience, based on agreement between the parties, between the Houses, and between the Branches. Reconciliation has not been employed to facilitate far-reaching social reform on a completely partisan basis, over the strenuous objections of the minority party.

If reconciliation had been used in the first place to pass healthcare reform, Byrd Rule objections against non-fiscal policy changes would have turned the bill into Swiss cheese. But because Leader Reid had a filibuster-proof majority, he could pass the Christmas Eve bill through regular procedures. So resort to reconciliation now will be on a narrower bill that will make as many fixes as necessary to secure House acquiescence.

House and Senate Democrats will agree on reconciliation provisions that will supersede text in the Christmas Eve bill. If the President signs the Christmas Eve bill first, and the reconciliation bill thereafter, reconciliation provisions would prevail to the extent of any inconsistency.

These reconciliation fixes are not merely technical, but are quite substantive. Without them, healthcare reform will fail. Otherwise, the House would simply have concurred in the Christmas Eve bill, and healthcare reform would already be law.

Thus, while the reconciliation bill will not be extraordinary in size, it will have extraordinary impact. Standing alone, it has no meaning. No one can judge it without considering the broader context of what it is designed to do. Reconciliation is the tool by which the Congressional majority will obviate an election result to pass highly controversial legislation. For all the complexities of the reconciliation process, the reality is as simple as that.

Healthcare reform has already produced a divisive debate. Use of reconciliation to avoid the effects of Senator Brown's election will make that division more bitter. At issue is more than arguments about the wisdom of healthcare legislation. Questions of process will loom nearly as large as questions of substance. The majority party sees reconciliation as a necessary path through the legislative thicket. The minority sees it as a procedural abuse to contradict an election fairly won. Moreover, the discord over reconciliation is but the harbinger of a larger debate already begun on the scope and importance of minority rights. To muffle minority voices means to muffle not just the Senators but the constituents for whom they speak. The essence of the debate concerns the meaning of checks and balances and could lead to a seismic shift in the Senate's constitutional place and responsibilities.

*Martin Gold is a partner in Covington & Burling's Washington office and is co-chair of the firm's Legislative Practice Group.

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“Reconciliation for Health Care Should Not Be an Issue”

By Stan Collender, April 21, 2009, Capital Gains and Games

<http://www.capitalgainsandgames.com/blog/stan-collender/865/reconciliation-health-care-should-not-be-issue>