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# Democrats' Strategy to Avoid Filibuster Carries Serious Risks

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Aug 21, 2009

With prospects for a bipartisan deal dimming, Democrats are considering the use of Byzantine budget rules this fall to ram through their own version of health care overhaul legislation without fear of a Republican filibuster.

The gambit is laden with parliamentary hurdles that could give GOP opponents plenty of opportunities to block key sections, and it might even require the Democrats to split the plan into two separate bills and try to pass them back-to-back in a politically-charged atmosphere.

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"Reconciliation has the appeal of reducing the number of votes needed to get something passed," said Michael F. Cannon, director of health policy studies at the Cato Institute, a libertarian think tank. "But it adds so many other challenges that I'm not sure, on balance, it will make it easier for the Democrats to pass a health care reform bill."

Although several committees have passed health overhaul bills, none of the proposals has gained Republican support. A six-member bipartisan negotiating team headed by Senate Finance Committee Chairman Max Baucus, D-Mont., is struggling to meet a Sept. 15 deadline for completing work on a bill to overhaul the nation's health care system and extend coverage to many of the 47 million uninsured Americans.

But with Sen. Charles Grassley, the ranking committee Republican, and other GOP leaders now urging President Barack Obama and the Democrats to scale back or postpone action on legislation this year, Democratic strategists are poised to pursue the special budget rules when Congress returns from recess next month, according to House and Senate aides.

"We can get a lot through if we do the packaging right," a senior House Democratic leadership aide said yesterday in an interview. "But it's a strategy that everyone would have to embrace at the administration and leadership levels."

Obama says that he remains "absolutely confident" that Congress will pass legislation this year and that "I hope it's bipartisan." The administration and Democratic leaders probably won't

make a decision on whether to shift legislative strategies for several weeks, at the earliest. And while a decision by the Obama administration, House Speaker Nancy Pelosi, D-Calif., and Senate Majority Leader Harry Reid, D-Nev., to push through a Democratic package would appease many liberals, it would risk alienating moderate Democrats who share many of the Republicans' concerns about health care reform.

### **A Simple Majority Could Pass the Bill**

This alternative approach likely would require the use of arcane "budget reconciliation" rules to try to negate the possibility of a GOP filibuster in the Senate, which would take 60 votes to overcome. Under reconciliation, the Democrats would need only a simple 51-vote majority to pass the bill, which means they could prevail without Republican support, even with a few Democratic defections.

Or the leadership might split the measure in two, with the more controversial provisions such as a government-run public insurance entity or co-op included in the first bill considered under budget reconciliation rules and more popular or non-controversial proposals packaged in the second bill and passed with 60 votes.

With the help of two allied Independents, Democrats hold a 60-vote majority in the Senate, but they may not be able to count on the vote of Sen. Edward M. Kennedy, D-Mass., who is battling brain cancer, or the ailing Sen. Robert C. Byrd, D-W.Va.. At most, they can hope to pick up support from two or three moderate Republicans, but there could be a few defections among more conservative Democratic members. House Democratic leaders command a 257-to-178 vote majority and have more leverage in passing legislation on the floor. Yet many of their moderate-to-conservative members have reservations about the health care proposals, and passing any bill will be a challenge.

Resorting to budget reconciliation is the legislative equivalent of breaking out heavy artillery in a pitched battle. Since the early 1980s, budget reconciliation has been used 19 times, primarily to steer controversial fiscal and budgetary policies through the Senate, including former President Bill Clinton's fiscal 1994 deficit reduction and tax package and President George W. Bush's major tax cuts.

Under the procedures for reconciliation bills, the Senate is limited to 20 hours of debate (hardly time for senators to collectively clear their throats), and the measure can be passed with a majority of senators present and voting.

Yet the use of this extraordinary rule carries many risks. Lawmakers and policy experts on both sides of the aisle warn that the strategy could backfire on Obama and the Democrats by leaving important provisions of the bill vulnerable to a parliamentary challenge and by making the Democrats appear overly partisan and high-handed.

"It makes the issue clearly partisan and creates an aura of ramming something through, even though it's a majority vote," said Robert D. Reischauer, president of the Urban Institute and a former director of the Congressional Budget Office.

There could be technical problems as well, including questions about the timing of the measure. The budget resolution covers five years, but most of the calculations for spending and saving in the health overhaul are based on a 10-year horizon. Trying to marry those two timeframes could result in thorny "sunset" questions about whether elements of the health

reform would be phased out after five years and then need to be reauthorized by Congress.

## Procedure Designed to Curb Spending

Budget reconciliation, a byproduct of the 1974 Congressional Budget Act, was conceived by lawmakers as a way to rein in spending and bring down the deficit by easing the path for budget and tax deals. Howard H. Baker Jr., the Republican Senate Majority Leader during the Reagan era, once described reconciliation as a way to pass a comprehensive package “resistant to the type of special interest pressures that would have scuttled the savings if they had been proposed in piecemeal fashion.”

To be sure, Congress has used reconciliation occasionally to rewrite health-care and welfare policy, as the Republican majority did in passing major welfare reform in 1996. But the authors of budget reconciliation never envisioned the rule as a fast-track system to enact complicated social policy measures. Indeed, Byrd, the patriarch of the Senate and a master of its rules, helped design a set of six conditions under which any portion of a reconciliation measure could be deemed “extraneous” to the budget -- neither adding to or subtracting from the deficit -- and excised unless it garnered at least 60 senators.

The so-called “Byrd Rule” has been invoked 53 times against 19 bills and sustained 43 times since 1985, according to figures compiled by the Congressional Research Service. President Clinton contemplated using reconciliation to try to pass his controversial health care legislation in 1993, but Byrd objected, and the president backed down.

Byrd protested again this spring when House and Senate Democratic leaders proposed amending the fiscal 2010 budget resolution to leave open the possibility of using reconciliation to pass Obama’s health care program in expedited fashion. “Using reconciliation to ram through complicated, far-reaching legislation is an abuse of the budget process,” Byrd said in an April 29 statement. “This is a very messy way to achieve a goal like health care reform.” But Pelosi and Reid were adamant about holding reconciliation in reserve, and the budget resolution was written to reflect that.

G. William Hoagland, a former Republican staff director of the Senate Budget Committee, cautioned that with Republicans and some Democrats likely to raise objections on the floor, any number of key provisions of a health care package could fall. “Everyone knows if you go the partisan route there’s a very high likelihood (opponents) could pick a large bill like this to pieces on the floor by extracting this or that section,” said Hoagland, who is now head of CIGNA Corporation’s Public Policy Group. “You might end up with Swiss cheese coming off the floor.”

Or, as some have suggested, the Democrats might preemptively strip out the policy and regulatory changes that are a certain magnet for challenges under the Byrd rule and stick them in a separate bill that they would try to pass later on, under normal Senate and House rules. That would mean having to draft and pass two highly controversial bills in the space of a few weeks, with no reason to believe the second bill would be any easier to pass than the first, with the real possibility of a GOP filibuster.

One idea under consideration is to package most of the more controversial measures overhauling the health care system in a reconciliation bill, according to a senior House aide. Those measures would include some expansions and some cost savings in Medicare and Medicaid programs, creation of a new insurance exchange, a public insurance program to

compete with private insurers or a private co-op, federal premium subsidies for low-income families, and tax measures to off-set some of the cost.

The second bill would contain less controversial or contested measures, especially most of the insurance industry regulatory reforms that are strongly favored by the Obama administration, Democrats and many Republicans. Foremost among those reforms would be an end to the insurance industry's practice of denying coverage to applicants with pre-existing medical conditions, as well as a cap on out-of-pocket expenses. The Wall Street Journal first reported some of these proposals on Thursday.

### **'Political Risks Are Huge'**

"It's a terrible idea, but [the Democrats] may do it and I think it would be a disaster," said Sen. John Cornyn, R-Texas, the chairman of the National Republican Senatorial Committee. "I think the risks politically are huge for them. If they want to do something as complex and controversial as health care strictly on a partisan basis, I think they're going to own it, lock, stock and barrel, and that's a high risk proposition" in the event the public turns against it.

Even Senate Budget Committee Chairman Kent Conrad, D-N.D., who is working with Baucus to try to negotiate a bipartisan health care deal, says that "I don't think reconciliation is particularly helpful."

Whether Democrats follow regular order in attempting to pass health care legislation this fall or resort to a reconciliation shortcut largely depends on the outcome of the Finance Committee deliberations over the next few weeks. Three House committees and the Senate Health, Education, Labor and Pensions Committee completed work on health care legislation before the August recess, while the half-dozen Finance Committee Democrats and Republicans have labored on, to the growing consternation of the Obama White House and Senate Democratic leaders.

Sen. Charles E. Schumer, D-N.Y., said recently that Democrats will have a contingency in place in case Grassley and the other Republican negotiators fail to agree to a compromise bill. "These plans will be considered only as a last resort," Schumer said. "But make no mistake, they are on the table."

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