Michael D. Tanner

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The Reconciliation Rulebook

Even Sen. Robert Byrd, one of the original authors of the Senate's reconciliation rule, is wary about using it to pass a health care reform plan.

Even as President Obama prepares to convene a televised summit on health care reform designed to showcase his newfound commitment to "bipartisanship," the White House and congressional Democrats have been finalizing their plans to ram through a health care bill using a little-known and seldom-used parliamentary gimmick known as "reconciliation."

For those not versed in the arcane rules of the U.S. Senate, reconciliation is not what a divorced couple attempts when they visit Dr. Phil. It is a mechanism for avoiding filibusters on certain budgetary issues. If Democrats can find a way to apply it to health care reform, they could pass a bill with just 51 votes, negating the election of Massachusetts Senator Scott Brown and the loss of the 60-seat supermajority.

Reconciliation was established in 1974 to make it easier for Congress to adjust taxes and spending in order to "reconcile" actual revenues and expenditures with a previously approved budget resolution. Thus, at the end of the year, if Congress found that it was running a budget deficit higher than previously projected, it could quickly raise taxes or cut spending to bring the budget back into line. Debate on such measures was abbreviated to just 20 hours (an eyeblink in Senate terms), and there could be no filibuster.

As Robert Byrd, (D-W.V.), one of the original authors of the reconciliation rule, explained, "Reconciliation was intended to adjust revenue and spending levels in order to reduce deficits...it was not designed to…restructure the entire health care system." He warns that using reconciliation for health care would "violate the intent and spirit of the budget process, and do serious injury to the Constitutional role of the Senate." In fact, in 1985, the Senate adopted the "Byrd rule," which prohibits the use of reconciliation for any "extraneous issue" that does not directly change revenues or expenditures. Clearly, large portions of the health care bill, ranging from mandates to insurance regulation to establishing "exchanges," do not meet that requirement.

With Republicans threatening to challenge any provision that violates the Byrd Rule, Democrats have been contemplating a variety of ways around it, including having Vice President Joe Biden, in his role as president of the Senate, overrule the nonpartisan Senate parliamentarian. But no vice president has overruled a parliamentarian since Nelson Rockefeller in 1976, and doing so now, in defense of a bill opposed by 58 percent of voters, risks a significant backlash.

Given the difficulties, therefore, no one expects the Democrats to try to pass a whole new bill. Instead, the House of Representatives would pass the already approved Senate health care bill without any changes. However, because the Senate bill is unacceptable to both liberal and moderate House members, they would simultaneously pass a separate bill under reconciliation procedures that would make changes demanded by the House. Theoretically, those changes would be less likely to run afoul of the Byrd rule and would therefore need just 51 votes to pass.

But this approach is problematic too. Some changes demanded by the House, such as exempting union workers from the 40 percent excise tax on "Cadillac" insurance plans, would likely pass the Byrd Rule test. Others, like abortion restrictions or ending the anti-trust exemption for insurance companies, would not.

There are other procedural hurdles as well. For example, any legislation passed under reconciliation cannot increase budget deficits by even one cent between 2010 and 2014.

Moreover, it cannot increase deficits by more than $1 billion beyond 2014—not just overall, but in any single year. Nor can it increase deficits by more than $5 billion over any 10-year period. That is a very hard standard to meet. Indeed, that is why the Bush tax cuts expire.

Reconciliation also cannot impose unfunded mandates on states or businesses in excess of $69 million for states or $139 million for business. The Congressional Budget Office has already noted that health care reform exceeds those ceilings, and expanding Medicaid eligibility or extending the mandate for employers to provide insurance to their workers is another likely dealbreaker.

This puts House Democrats in a real bind. Without a guarantee that the changes they want would actually pass the Senate, would House members really pass a deeply unpopular bill that many of them hate? And would the Senate be willing to defy public sentiment by blatantly abusing the reconciliation procedure?

This all seems to depend on how determined—or desperate—this administration is.

Michael D. Tanner is a senior fellow at the Cato Institute.