

BYRD RULE ANNOTATED

INCLUDING
SECTION 313 OF
THE CONGRESSIONAL BUDGET ACT

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UNITED STATES SENATE

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COMMITTEE ON THE BUDGET

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INTRODUCTION

This volume sets forth the law governing the Byrd Rule,¹ section 313 of the Congressional Budget and Impoundment Control Act of 1974,² as amended by the Budget Enforcement Act of 1990³ and the Balanced Budget Act of 1997.⁴

This volume reprints the statutory language, explains references found there, points out precedents in the Senate interpreting the law, and incorporates some legislative history material. It magnifies the details with the hope that seeing more will also allow the reader to understand the process better. Footnotes set forth sections that subsequent laws have repealed.

With regard to congressional interpretation of these statutes, this work focuses on the Senate's precedents. The author defers to his colleagues on the House side of the Capitol for interpretation of the law in that Body. Several sources exist for research on precedents in the House.⁵

This volume builds on three earlier editions, called the *Congressional Budget Act Annotated*,⁶ *Budget Process Law Annotated*,⁷ and *Budget Process*

¹ Section 20001 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 20001, 100 Stat. 82, 390-91 (Apr. 7, 1986), *amended by* the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 7006, 100 Stat. 1874, 1949-1950 (Oct. 21, 1986), *and amended by* the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, § 205, 101 Stat. 754, 784-85 (Sept. 29, 1987), *amended by* the Budget Enforcement Act of 1990, Pub. L. No. 101-508, § 13214, 104 Stat. 1388, 1388-621 to -623 (Nov. 5, 1990), *and amended by* the Balanced Budget Act of 1997, Pub. L. No. 105-33, § 10113(b)(1), 111 Stat. 251, 688 (Aug. 5, 1997) (codified as amended at 2 U.S.C. § 644).

² The Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (July 12, 1974) (codified as amended at 2 U.S.C. §§ 601-688).

³ Pub. L. No. 101-508, tit. XIII, 104 Stat. 1388, 1388-573 to -630 (Nov. 5, 1990) (codified as amended in scattered sections of 2 U.S.C., 15 U.S.C. § 1022, 31 U.S.C §§ 1105, 1341, 1342).

⁴ Pub. L. No. 105-33, 111 Stat. 688 (Aug. 5, 1997).

⁵ *See, e.g.*, WILLIAM HOLMES BROWN, CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, 106th Cong., 2d Sess. (2001) (H. Doc. No. 106-320); WILLIAM HOLMES BROWN, HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS AND PROCEDURES OF THE HOUSE 173-96 (1996); DESCHLER-BROWN, PROCEDURE IN THE U.S. HOUSE OF REPRESENTATIVES ch. 13 (1987); 3 LEWIS DESCHLER, DESCHLER'S PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES ch. 13, § 21 (1977).

⁶ WILLIAM G. DAUSTER, CONGRESSIONAL BUDGET ACT ANNOTATED (Feb. 1990) (S. Print No. 101-86).

⁷ WILLIAM G. DAUSTER, BUDGET PROCESS LAW ANNOTATED (Apr. 1991) (S. Print No. 102-22).

Law Annotated: 1993 Edition.⁸ This volume supersedes the earlier ones with regard to section 313.

The author expects that the reader will not so much read this volume as consult it. Consequently, footnotes often repeat information that relates to several different sections. The author hopes that what the volume thus loses to bulk it makes up in ease of access to information.

GUIDE TO SIGNALS

The citations in this volume follow the rules of *The Bluebook: A Uniform System of Citation*.⁹

No signal	before a citation means that the cited authority states the proposition, identifies the source of the quotation, or identifies an authority identified in the text.
<i>E.g.</i> ,	before a citation means that the cited authority, among other authorities, states the proposition.
<i>See</i>	before a citation means that the cited authority directly supports the proposition.
<i>See also</i>	before a citation means that the cited authority constitutes additional source material that supports the proposition. Authorities that state or directly support the proposition will precede this signal.
<i>Cf.</i>	before a citation means that the cited authority supports a proposition different from the cited proposition, but sufficiently analogous to lend support.
<i>See generally</i>	before a citation means that the cited authority presents background material related to the proposition.
<i>See supra</i> p. ____	means that the authority referred to or direct support appears above at the page cited.
<i>See infra</i> p. ____	means that the authority referred to or direct support appears below at the page cited.

⁸ WILLIAM G. DAUSTER, *BUDGET PROCESS LAW ANNOTATED: 1993 EDITION* (Oct. 1993) (S. Print No. 103-49).

⁹ HARVARD LAW REVIEW ASS'N, *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* 22-24, 39-42 (17th ed. 2000).

Id. means see the immediately preceding authority cited.

In addition to these signals, this volume also includes symbols to highlight two subjects to which participants in the process frequently refer: points of order and controlled time.



means that the text sets forth a point of order in the Senate. (As the number of possible points of order is nearly infinite, this volume does not mark all possible points of order.)



means that the text sets forth a procedure for controlled time in the Senate.

ACKNOWLEDGMENTS AND DISCLAIMERS

The author owes particular thanks to his collaborator, Allison Parent, Counsel to the Senate Budget Committee, and the Chief Counsel to the Senate Budget Committee Gail Millar, who by virtue of having worked at the office of the Senate Parliamentarian, the Congressional Budget Office, and the Department of the Treasury, is among those most familiar with the budget process.

The Budget Committee, under the leadership of Chairman Judd Gregg, Ranking Democratic Member Kent Conrad, Staff Director Scott Gudes, Democratic Staff Director Mary Naylor, and Democratic Counsel Lisa Konwinski, as well as the Finance Committee, under the Leadership of Chairman Charles Grassley, Ranking Democratic Member Max Baucus, Staff Director Kolan Davis, Democratic Staff Director Russ Sullivan, Deputy Staff Director Ted Totman, budget analyst Steve Robinson, and Democratic budget analyst Alan Cohen, and, of course, Senator Robert C. Byrd, himself, deserve the ultimate credit for this work.

The author of this volume has collected many of the precedents that appear here from the Rules database of the LEGIS computerized legislative information system once available to Senate offices. Often the author has merely paraphrased the headnote of the Parliamentarian's notation of a precedent in that database. Consequently, this book owes much — if not all — to the Senate Parliamentarian, Alan Frumin (who wrote the lion's share of the entries in the Rules database), and his excellent and helpful staff, Pete Robinson, Elizabeth MacDonough, and Leigh Hildebrand. Thanks are due, too, to former Parliamentarian Bob Dove and other former staff of the office of the Parliamentarian who have assisted the author over the years: Kevin Kayes (now Chief Counsel to the Democratic Leader), Jim Weber, Beth Smerko, Jennifer Smith, and Sally Goffinet.

Thanks are due to Finance Committee intern Jacob Kuipers. Thanks are due, as well, to those formerly associated with the Budget Committee who authorized and assisted earlier editions of this volume: Senator Jim Sasser of Tennessee, Larry Stein, John Callahan, Agnes Bundy, Nell Mays, Louise Echols, Michael Higginbotham, Doug Kilday, Alex Rogers, Rita Graf, Jackie King, Kelly Hines, Buck White, Alex Green, Rick Brandon, Steve Bell, John Hilley, Nell Payne, Carol Hartwell, and Austin Smythe.

Bob Keith of the Congressional Research Service, Sandy Davis of the Congressional Budget Office and formerly of the Congressional Research Service, Tom Armstrong of the General Accounting Office, and Jack Conway of the Senate Appropriations Committee also provided valuable component parts of this volume.

Although the author has imposed on each of these people named above for material for this volume and for help in its writing, none bears responsibility for its content. The annotations included here do not necessarily reflect the views of the Senate Budget Committee, the Senate Finance Committee, or of anyone other than the author, although, as do most authors, the author does hope that others will share the views expressed here.

The author would be remiss not to thank his dear spouse Ellen Weintraub for her patience in putting up with endless discussions of this volume. Finally, the author owes a debt to Martin Gardner, whose work¹⁰ has undoubtedly inspired many an annotation,¹¹ and perhaps a few laws.

W.G.D.

¹⁰ MARTIN GARDNER, *THE ANNOTATED ALICE: ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS* (1960).

¹¹ For other annotations, see, e.g., LAWRENCE RAINEY *THE ANNOTATED WASTE LAND WITH ELIOT'S CONTEMPORARY PROSE* (2005); MARIA TATAR, *THE ANNOTATED BROTHERS GRIMM* (2004); MICHAEL PATRICK HEARN, *THE ANNOTATED CHRISTMAS CAROL: A CHRISTMAS CAROL IN PROSE* (2003); DAVID M. SHAPARD, *THE ANNOTATED PRIDE AND PREJUDICE* (2003); DOUGLAS A. ANDERSON, *THE ANNOTATED HOBBIT* (2002); MARIA TATAR, *THE ANNOTATED CLASSIC FAIRY TALES* (2002); MICHAEL PATRICK HEARN, *THE ANNOTATED HUCKLEBERRY FINN* (2001); MICHAEL PATRICK HEARN, *THE ANNOTATED WIZARD OF OZ* (2000); WILLIAM S. BARING-GOULD, *THE ANNOTATED SHERLOCK HOLMES* (1992); ROLAND MCHUGH, *ANNOTATIONS TO FINNEGANS WAKE* (1991); DON GIFFORD, *ULYSSES ANNOTATED* (1989).

**CONGRESSIONAL
BUDGET AND
IMPOUNDMENT
CONTROL ACT
OF 1974**

EXTRANEOUS MATTER IN RECONCILIATION LEGISLATION¹²

§313(a) **SEC. 313.¹³ (a) IN GENERAL.¹⁴ — When the Senate is considering a reconciliation bill or a reconciliation resolution¹⁵ pursuant to section 310,¹⁶ (whether that bill or resolution originated in the Senate or the House¹⁷) or section 258C¹⁸ of the Balanced Budget and Emergency**

¹² Section 13214(b)(2)(A) of the Budget Enforcement Act added the heading here.

¹³ Section 313 is codified as amended at 2 U.S.C. § 644. This section is often called “the Byrd Rule,” after its principal sponsor, Senator Robert C. Byrd of West Virginia.

Section 13214(b)(1) of the Budget Enforcement Act transferred this section here from section 20001 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 20001, 100 Stat. 82, 390-91 (Apr. 7, 1986), *as amended* by the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 7006, 100 Stat. 1874, 1949-1950 (Oct. 21, 1986), *and as amended* by the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, § 205, 101 Stat. 754, 784-85 (Sept. 29, 1987). For legislative history of this section, see *infra* note 69 (at the end of the section). For an excellent discussion of the section, see ROBERT KEITH, *THE BUDGET RECONCILIATION PROCESS: THE SENATE’S “BYRD RULE”* (Apr. 7, 2005) (Cong. Res. Serv. rep. no. RL30862).

¹⁴ Section 13214(a)(1)(A) of the Budget Enforcement Act inserted the heading “IN GENERAL. —” here.

¹⁵ Section 310(b) defines “reconciliation resolution.”

¹⁶ Section 310 sets forth the reconciliation process in the context of Congress’s annual cycle of concurrent resolutions on the budget. For other budget process legislation dealing with reconciliation, see section 300 (budget timetable, including that for reconciliation); section 301(b)(2) & (3) (empowering budget resolutions to include reconciliation instructions, as well as a provision providing for delayed enrollment of legislation pending completion of reconciliation); section 305 (procedures for budget resolutions and reconciliation bills); section 904(c) & (d) (supermajority requirements for points of order and appeals, including those for reconciliation); Gramm-Rudman-Hollings section 258C (providing a special Gramm-Rudman-Hollings reconciliation process to achieve savings in lieu of an impending sequester); section 5 of Executive Order 12857 (reconciliation recommendations in special direct spending message); and section 16005 of H.R. 2264, 103d Cong., 1st Sess., 139 CONG. REC. H3029, H3199-201 (daily ed. May 27, 1993) (as passed by the House of Representatives) as applied to the House by H. Res. 235, 103d Cong., 1st Sess., 139 CONG. REC. H6122 (daily ed. Aug. 3, 1993) (reconciliation procedures in response to special direct spending message).

¹⁷ Section 13214(a)(1)(B) of the Budget Enforcement Act inserted the parenthetical “(whether that bill or resolution originated in the Senate or the House).”

The Budget Enforcement Act language codifies the understanding of the law held by the Chairman of the Budget Committee (that this rule applies to reconciliation bills or reconciliation resolutions passed by the House when the Senate considers them) as expressed in the debate of October 4, 1989:

(continued...)

Deficit Control Act of 1985 upon a point of order¹⁹ being made by any

¹⁷(...continued)

RECONCILIATION QUESTIONS

Mr. SASSER. Mr. President. The distinguished Republican leader gave notice yesterday of his intent to propound four parliamentary inquiries of the Chair regarding the reconciliation process pursuant to the Congressional Budget Act of 1974. I rise today to address these inquiries from the perspective of the Committee on the Budget.

. . . .

Mr. President, the distinguished Republican Leader asked a second question, and it was this:

“Can the Byrd rule, the extraneous rule, be used to attack the House language on capital gains?” That was the question.

We in the Committee on the Budget would submit that the answer to that is yes. The Byrd rule, by its term[s], applies to a “reconciliation bill.” If the Senate were to take up the House-reported reconciliation bill, it would be considering a “reconciliation bill” pursuant to the Byrd rule.

The procedures regarding reconciliation would apply, including that debate would be limited to 20 hours, that no amendment that is not germane would be received, and that the bill would be out of order if it proposed changes in Social Security.

Likewise, the Byrd rule on what is extraneous would apply. Otherwise, the Senate would be forced to take up a measure to which the Senate’s own rules would not apply. Clearly, a gigantic loophole would be created and the result would be unacceptable, in that the Senate’s own rules could not be used to determine its actions.

Mr. President, what is the effect of a Byrd rule point of order against a provision in the House bill? The text of Senate Resolution 509 from the second session of the 99th Congress, I think, provides some guidance. The effect would be just the same as if the Senate had adopted an amendment striking the offending provision. This is, after all, the effect of the Byrd rule on provisions of Senate reported reconciliation bills.

135 CONG. REC. S12,589 (daily ed. Oct. 4, 1989) (statement of Budget Committee Chairman Sasser). (The Republican leader never propounded of the Chair the inquiries that he said he would.) The Budget Enforcement Act incorporated the Senate Resolution to which the Chairman referred as subsection (d) of this section. *See infra* pp. 24-26.

¹⁸ Section 258C provides for a special fast-track reconciliation procedure as a substitute for sequestration. Section 13214(a)(1)(B) of the Budget Enforcement Act inserted the reference “or section 258C of the Balanced Budget and Emergency Deficit Control Act of 1985.”

¹⁹ Congressional Budget Act prohibitions are not self-enforcing, and require points of order from the floor for their enforcement.

Senator against material extraneous to the instructions to a committee which is contained in any title or provision of the bill or resolution²⁰ or offered as an amendment to the bill or resolution,²¹ and the point of



²⁰ A Senator may not raise a point of order against a provision of a committee-reported bill while an amendment to that bill is pending. 142 CONG. REC. S6295 (daily ed. June 25, 1997) (Senator Rockefeller attempted to raise a point of order against section 5001 of the committee-reported bill on Medicare balance billing while his amendment 478 was pending). Before the Senator makes such a point of order, the Senator may ask unanimous consent that the Senate temporarily lay aside all pending amendments. See 143 CONG. REC. S6092-93 (daily ed. June 23, 1997) (statement of Sen. Durbin on his point of order against sec. 5611 of the committee-reported bill raising the age of Medicare eligibility).

²¹ The Parliamentarian has advised (in August of 2005) that by virtue of the specific language of this subsection, a Senator may raise a point of order against a provision of an amendment, and need not raise a point of order against the entire amendment.

An amendment is subject to points of order under the Congressional Budget Act even if the Senate has specified by unanimous consent that the amendment is one of the amendments in order and the yeas and nays have been ordered.

For examples of the application of this rule to amendments, see, e.g., 133 CONG. REC. S17,600 (daily ed. Dec. 10, 1987) (Byrd motion to waive for Byrd-Dole, Kassebaum, and Gramm amendments approved 81-13; no point of order raised); 136 CONG. REC. S15,731-38 (daily ed. Oct. 18, 1990), ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE 625 (1992) (Sasser point of order under subsection (b)(1)(A) against Graham amendment to develop a risk-based deposit insurance system; Graham motion to waive rejected on a voice vote; point of order sustained; amendment fell); 136 CONG. REC. S15,808-10, S15,815 (daily ed. Oct. 18, 1990), ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE 626 (1992) (Bentsen point of order under subsection (b)(1)(A) against Symms amendment to require deposit of increase in motor fuel taxes in the Highway Trust Fund; Symms motion to waive rejected by a 48-52 vote; point of order sustained; amendment fell); 139 CONG. REC. S7898-901, S7920 (daily ed. June 24, 1993) (Sasser point of order under subsection (b)(1)(A) against Domenici-Nunn amendment regarding caps on domestic, international, and defense discretionary spending; motion to waive rejected by a 53-45 vote; point of order sustained; amendment fell); *id.* at S7901-04, S7920-21 (daily ed. June 24, 1993) (Sasser point of order under subsection (b)(1)(A) against Bradley amendment proposing a legislative line-item veto using separate enrollment of appropriations and tax expenditure sections; motion to waive rejected by a 53-45 vote; point of order sustained; amendment fell); *id.* at S7919, S7924 (daily ed. June 24, 1993) (Sasser point of order under subsection (b)(1)(A) against Gramm amendment regarding restoration of fixed deficit targets; Gramm motion to waive rejected by a 43-55 vote; point of order sustained; amendment fell); 141 CONG. REC. S15,831 (daily ed. Oct. 26, 1995) (Domenici point of order against Dorgan amendment ending deferral for U.S. shareholders on income of controlled foreign corporations attributable to imported property; Exon motion to waive rejected 47-52; point of order sustained; amendment fell); *id.* at S16,016 (daily ed. Oct. 27, 1995) (Exon point of order under subsection (b)(1)(A) against Specter amendment expressing the sense of the Senate regarding a flat tax; Specter motion to waive rejected 17-82; point of order sustained; amendment fell); *id.* at S16,025 (daily ed. Oct. 27, 1995) (Domenici point of order under subsection (b)(1)(A) against Bumpers amendment prohibiting counting the proceeds of asset sales; Exon motion to waive rejected 49-50; point of order sustained; amendment fell); *id.* at S16,026 (daily ed. Oct. 27, 1995) (Domenici point of order under

(continued...)

order is sustained by the Chair, any part²² of

²¹(...continued)

subsection (b)(1)(A) against Byrd-Dorgan amendment to increase the time limit on debate in Senate on reconciliation legislation; Exon motion to waive rejected 47-52; point of order sustained; amendment fell); 142 CONG. REC. S8332-33 (daily ed. July 19, 1996) (Dodd point of order under subsection (b)(1)(A) against Frist amendment expressing the sense of Congress that the President should ensure approval of state welfare reform waiver requests; Frist motion to waive rejected 55-43; point of order sustained; amendment fell); 143 CONG. REC. S6298 (daily ed. June 25, 1997) (Domenici point of order under subsection (b)(1)(A) against Levin amendment allowing vocational educational training to be counted as a work activity under the Temporary Assistance for Needy Families program; Levin motion to waive rejected 55-45; point of order sustained; amendment fell); *id.* at S6307-08 (daily ed. June 25, 1997) (Domenici point of order under subsection (b)(1)(E) against Lautenberg for Kennedy amendment reducing fees on student loan programs; Dodd motion to waive rejected 43-57; point of order sustained; amendment fell); *id.* at S6316-17 (daily ed. June 25, 1997) (Domenici point of order implicitly under subsection (b)(1)(A) against Lautenberg for Kennedy amendment to immediately transfer to Medicare part B certain home health benefits; Kennedy motion to waive rejected 38-62; point of order sustained; amendment fell); *id.* at S6673-74 (daily ed. June 27, 1997) (Lautenberg point of order under subsection (b)(1)(A) against Gramm amendment to create balanced budget enforcement procedures; Gramm motion to waive rejected 37-63; point of order sustained; amendment fell); *id.* at S6674-75 (daily ed. June 27, 1997) (Domenici point of order implicitly under subsection (b)(1)(A) against Bumpers amendment to prohibit scoring, for budget purposes, revenues from sale of certain federal lands; Bumpers motion to waive rejected 48-52; point of order sustained; amendment fell); *id.* at S6675-76 (daily ed. June 27, 1997) (Lautenberg point of order under subsection (b)(1)(A) against Craig amendment to change the pay-go procedures by establishing a 60-vote point of order against using tax increases to pay for new mandatory spending increases; Craig motion to waive rejected 42-58; point of order sustained; amendment fell); *id.* at S6677 (daily ed. June 27, 1997) (Lautenberg point of order under subsection (b)(1)(A) against Brownback amendment to create balanced budget enforcement procedures; Brownback motion to waive rejected 57-43; point of order sustained; amendment fell); *id.* at S6678 (daily ed. June 27, 1997) (Lautenberg point of order under subsection (b)(1)(A) against Frist amendment to create balanced budget enforcement procedures; Frist motion to waive rejected 59-41; point of order sustained; amendment fell); *id.* at S6679-80 (daily ed. June 27, 1997) (Lautenberg point of order under subsection (b)(1)(A) against Abraham amendment to ensure that future revenue windfalls to the Federal treasury are reserved for tax or deficit reduction; Abraham motion to waive rejected 53-47; point of order sustained; amendment fell); 145 CONG. REC. S9887, S9889 (daily ed. July 30, 1999) (Domenici point of order under subsection (b)(1)(A) against Bingaman amendment to express the sense of the Senate on investment in education; Bingaman motion to waive rejected 48-52; point of order sustained; amendment fell); *id.* at S9891 (daily ed. July 30, 1999) (Baucus point of order under subsection (b)(1)(A) against Frist amendment to express the sense of the Senate regarding the Medicare Reserve Fund; Frist motion to waive rejected 54-46; point of order sustained; amendment fell); 146 CONG. REC. S6804 (daily ed. July 14, 2000), *id.* at S7045 (daily ed. July 17, 2000) (Moynihan point of order under subsection (b)(1)(E) against Roth amendment to strike the sunset provision in the committee-reported bill; Roth motion to waive rejected 48-47; point of order sustained; amendment fell); *id.* (Roth point of order implicitly under subsection (b)(1)(E) against Roth amendment to strike the sunset provision in the Democratic substitute; covered by same Roth motion to waive as previous point of order; point of order sustained; amendment fell); 149 CONG. REC. S6431 (daily ed. May 15, 2003) (Baucus point of order implicitly under subsection (b)(1)(E) against Sessions amendment applying sunset provision to revenue increase provisions; Sessions motion to waive rejected 51-49; point of order sustained; amendment fell).

²² During the debate on the amendment that would later become section 313, Senator Johnston asked the principal sponsor, Senator Byrd, what “part” meant:

(continued...)

²²(...continued)

Mr. JOHNSTON. Mr. President, will the Senator yield for a question?

Mr. BYRD. I yield.

Mr. JOHNSTON. I say I support very strongly what the Senator is trying to do, but for purpose of setting the legislative record, I would like to get an understanding what happens in some instances.

First of all, according to the amendment when a matter is not within the jurisdiction of the committee or is extraneous to the instructions, that matter shall be deemed stricken from the bill. Now the question is: Where you have a whole provision, some of which is germane and some of which is not, does the Parliamentarian go through that and excise those sentences or clauses or subsections which are nongermane or extraneous and leave the rest, or does he excise the entire section as to which there is offending language?

Mr. BYRD. I am not sure I can answer that question with respect to what the Parliamentarian will do.

It might depend upon whether or not the language is divisible. I do not know. Perhaps the distinguished Senator would want to address his question to the Chair on this particular question.

Mr. JOHNSTON. When it says, "Any part of a bill not in the jurisdiction of the committee," I am just wondering what the intent of the authors is with respect to "any part of a bill." Does it mean the entire portion of the bill reported by a committee, or just as the offending extraneous or nongermane language?

Mr. BYRD. If it is any part of the bill that is not within the jurisdiction of the reporting committee, it would fall. If it is not within the jurisdiction of the —

Mr. JOHNSTON. When you say "part," if you have, let us say, a 30-page section of legislation as to which there is one subsection that is not germane, would you simply knock out the subsection or would you take the whole 30-page section?

Mr. BYRD. I think the Senator may be confusing — let me say this: the Senator is talking about germaneness?

Mr. JOHNSTON. The Senator is correct.

Mr. BYRD. And also talking about legislation that has been reported by a committee which does not have jurisdiction over the subject matter. So there are two different things.

The language, I think, would explain the answer. Any part of the bill not in the jurisdiction of the reporting committee, whether it is germane or not, any part that is not within the jurisdiction of the reporting committee, would fall.

Mr. JOHNSTON. For example, we usually put a severability clause in legislation which means that if any section of the bill is declared unconstitutional by the Court, then the rest of the bill does not fall.

I am asking, I guess, whether you intend for there to be, in effect, a severability clause here, or whether the whole section as to which there is any

(continued...)

said title or provision that contains material extraneous to the instructions to said Committee as defined in subsection (b)²³ shall be deemed stricken from the bill and may not be offered as an amendment from the floor.²⁴

§ 313(b)(1)(A) **(b)²⁵ EXTRANEOUS PROVISIONS.²⁶ — (1)(A) Except as**

²²(...continued)
offending language falls.

Mr. BYRD. I say any part of the bill that is not within the jurisdiction of the reporting committee would fall.

Mr. JOHNSTON. You can take out that part and in effect rewrite the bill by striking sentences, clauses, subsections.

Mr. BYRD. That are not within the jurisdiction of the reporting committee.

131 CONG. REC. S14,034 (daily ed. Oct. 24, 1985).

²³ See *infra* pp. 8-50. Section 13214(b)(4)(B) of the Budget Enforcement Act changed this reference from (d) to (b) to conform with the redesignation of subsection (d) as subsection (b) made by section 13214(b)(2)(C) of the Budget Enforcement Act.

²⁴ Section 13214(b)(2)(B) of the Budget Enforcement Act repealed what used to be the last sentence of subsection (a), which read as follows:

An affirmative vote of three-fifths of the Members, duly chosen and sworn, shall be required to sustain an appeal of the ruling of the Chair on a point of order raised under this section, as well as to waive or suspend the provisions of this subsection.

Section 904(d) supersedes this sentence by listing sections 313 and 904(d) among those sections for which 60 Senators must vote affirmatively to sustain an appeal.

²⁵ Section 13214(b)(2)(C) of the Budget Enforcement Act redesignated as subsection (b) what used to be subsection (d). Section 13214(b)(2)(B) of the Budget Enforcement Act repealed what used to be subsection (b), which read as follows:

(b) No motion to waive or suspend the requirement of section 305(b)(2) of the Congressional Budget Act of 1974, as it relates to germaneness with respect to a reconciliation bill or resolution, shall be agreed to unless supported by an affirmative vote of three-fifths of the Members, duly chosen and sworn, which super-majority shall be required to successfully appeal the ruling of the Chair on a point of order raised under that section, as well as to waive or suspend the provisions of this subsection.

Section 904(c) supersedes this old subsection (b) by listing sections 313 and 904(c) among those sections requiring 60 Senators to waive. For an early example of a motion to waive this section see, *e.g.*, 132 CONG. REC. S13,047 (daily ed. Sept. 19, 1986).

²⁶ Section 13214(a)(2) of the Budget Enforcement Act inserted the heading “EXTRANEOUS PROVISIONS. —” here.

(continued...)

²⁶(...continued)

During the debate on the amendment that would later become section 313, Senator Johnston asked the principal sponsor, Senator Byrd, what “extraneous” meant:

Mr. JOHNSTON. My final question has to do with the meaning of the word “extraneous” and what your intention is as to how that is interpreted. Frequently, in fact, usually directions are given by the Budget Committee in the very broadest of terms, and the authorizing committees report legislation which is detailed and which, in one sense, might contain matter that is extraneous. It might be germane to the instructions, but extraneous in the sense that it is not specifically called for within the four corners of the instructions from the Budget Committee to the authorizing committee. Could the Senator tell me what he means by “extraneous” in this context of that question?

. . . .

Mr. JOHNSTON. If I may repeat it. The question is as to the meaning of the word “extraneous,” as used in this amendment. . . .

. . . . But the question is: What is the meaning of the word “extraneous”? Do you mean that it must be contained within the four corners of the instructions from the Budget Committee, or may the Budget Committee supplement those instructions by filling out the spirit of the instructions within the jurisdiction of that committee and all within the germaneness rule, if the Senator understands the question?

Mr. BYRD. The word “extraneous” here would be interpreted in the future just as it is presently being interpreted. And I understand that, at the present time, “extraneous,” in the context, is determined by whether or not the language contributes to reducing the deficit and balancing the budget; otherwise, it is extraneous. So the same interpretation that is now given to the word “extraneous” would continue to be given.

Mr. JOHNSTON. So, for example, a committee would be able to go beyond the instructions and save more money?

Mr. BYRD. Well, if such language does not serve to balance the budget or to reduce the deficit, the language would be extraneous — then it would be up to the Chair to determine whether or not the point of order is well taken.

. . . .

Mr. DOMENICI. Mr. President, will the distinguished minority leader [Senator Byrd] permit me to respond to what “extraneousness” means thus far in its evolution in the Senate? Let me suggest that, going back to 1981, we have evolved these four definitions, and I believe they are used by minority and majority members of the committee now. I would just read them quickly:

One, provisions that have no direct effect on spending and which are not essential to achieving the savings.

Two, provisions which increase spending and are not so closely related to saving provisions that they cannot be separated.

Three, provisions which extend authorizations without saving money, and which are not so closely related to saving provisions that they

(continued...)

provided in paragraph (2),²⁷ a provision of a reconciliation bill or reconciliation resolution²⁸ considered pursuant to section 310 shall be considered extraneous if such provision does not produce a change in outlays²⁹ or revenues, including changes in outlays and revenues brought about by changes in the terms and conditions under which outlays are made or revenues are required to be collected³⁰ (but a provision in which outlay decreases or revenue increases exactly offset outlay increases or revenue decreases shall not be considered extraneous

²⁶(...continued)

cannot be separated.

Four, provisions which invade another committee's jurisdiction, whether or not they save money.

And I am not saying that is all inclusive, but, up to this point, that is what we have been using. . . .

131 CONG. REC. S14,034-35 (daily ed. Oct. 24, 1985).

²⁷ See *infra* pp. 22-23. Paragraph (2) provides exceptions to paragraph (1)(A) upon the certification of the Chairman and Ranking Minority Member of the Budget Committee and the Chairman and Ranking Minority Member of the Committee that reported the provision.

²⁸ Section 310(b) defines "reconciliation resolution."

²⁹ Section 3(1) defines "outlays." To "produce a change in outlays" within the meaning of this subparagraph, a provision must cause a different level of outlays to result without further legislative action. Thus a cut in the level of appropriations authorized would not "produce a change in outlays" in this context, as later appropriations action would be necessary to achieve the reduction in outlays.

³⁰ Within the meaning of this subparagraph, the words "including changes in outlays and revenues brought about by changes in the terms and conditions under which outlays are made or revenues are required to be collected" modify the words "a change in outlays or revenues." Thus, the reader should understand this subparagraph to state that "a provision of a reconciliation bill . . . shall be considered extraneous if such provision does not produce [either: (1)] a change in outlays or revenues [or (2) a] change[] in the terms and conditions under which outlays are made or revenues are required to be collected."

Examples of terms and conditions include mechanisms to enforce changes in outlays or revenues and procedures for collecting outlays or revenues. The drafter cannot use this "terms and conditions" language as an artifice to attach extraneous language unrelated to the language that produces a change in outlays or revenues. The language setting forth the terms and conditions must deal with the same issue as does the language that produces the change in outlays or revenues and must have a logical link to that language. The Parliamentarian analyzes language with a view to whether inclusion of the language would be an abuse of the fast-track procedures under reconciliation. The Parliamentarian asks why language asserted to be a term or condition is integral to the change in outlays or revenues, why it is essential or necessary to achieving the change in outlays or revenues.

by virtue of this subparagraph);³¹

³¹ Paragraph (2) provides exceptions to this subparagraph upon the certification of the Chairman and Ranking Minority Member of the Budget Committee and the Chairman and Ranking Minority Member of the Committee that reported the provision. *See infra* pp. 22-23.

An amendment that has no budgetary effect violates this subparagraph. *See* 139 CONG. REC. S7920 (daily ed. June 24, 1993) (Sasser point of order against Domenici-Nunn amendment regarding caps on domestic, international, and defense discretionary spending; motion to waive rejected by a 53-45 vote; point of order sustained; amendment fell); *id.* at S7921 (daily ed. June 24, 1993) (Sasser point of order against Bradley amendment proposing a legislative line-item veto using separate enrollment of appropriations and tax expenditure sections; motion to waive rejected by a 53-45 vote; point of order sustained; amendment fell).

Nonbinding sense-of-the-Senate language has no budgetary effect and therefore is out of order under this subparagraph. *See* 141 CONG. REC. S16,016 (daily ed. Oct. 27, 1995) (Exon point of order against Specter amendment expressing the sense of the Senate regarding a flat tax; Specter motion to waive rejected 17-82; point of order sustained; amendment fell). The Parliamentarian has advised (in summer of 1993) that congressional findings, sense of the Congress, and sense of the Senate provisions violate this subparagraph. Although tables of contents and short titles would fall under the same logic, the Parliamentarian advised (in summer of 1993) that he does not view such provisions as violations, apparently under the theory that the Rule does not cover trifling matters. Definitions defy categorization; they may violate the subparagraph, or they may serve as terms and conditions for changing outlays or revenues. Under this subsection, the Parliamentarian strictly scrutinizes provisions that authorize appropriations or change the terms under which appropriations are authorized, as well as reporting requirements, unless those requirements are necessary to achieve a change in outlays or revenues.

Provisions that have budgetary effects that the Congressional Budget Office cannot estimate do not necessarily violate the subsection. *See* 139 CONG. REC. S10,659-62 (daily ed. Aug. 6, 1993) (Chair sustained on appeal by a 43-57 vote). Thus, during consideration of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993), Senator Danforth raised a point of order that provisions of the bill regarding Medicaid pediatric immunization violated this subparagraph:

Mr. DANFORTH. Mr. President, I am concerned about the state of the Byrd rule, which is a rule that I think is extremely important in the Senate, and concerned that budgetary effects which are incapable of estimation have been used to justify what I would think to be extraneous provisions in this bill, I would like now to make two inquiries of the Chair.

First, is a provision of the budget reconciliation bill extraneous under section 313(b)(1)(A) of the Budget Act, the Byrd rule, if it produces no changes in outlays or revenues that can be estimated?

The PRESIDING OFFICER. Such a provision would not necessarily be out of order.

Mr. DANFORTH. Would not necessarily be out of order.

....

Mr. DANFORTH. Mr. President, I now wish to raise a point of order, and do raise a point of order under sections 313(b)(1)(A) and 313(b)(1)(D) of the Budget Act, known as the Byrd rule; that title XIX, section 1928(d)(4)(B) in the conference agreement, section 13631(b) is extraneous to the reconciliation bill because it produces no change in the outlays or revenues or produces changes in

(continued...)

³¹(...continued)

outlays or revenues which are merely incidental to the nonbudgetary components of the provision.

The PRESIDING OFFICER. The point of order is not well taken.

139 CONG. REC. S10,659 (daily ed. Aug. 6, 1993). The Senate went on to sustain the Chair on appeal by a vote of 43-57. *See id.* at S10,662.

For other examples of application of this subparagraph, see, *e.g.*, 136 CONG. REC. S15,731-38 (daily ed. Oct. 18, 1990); ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE 625 (1992) (Sasser point of order against Graham amendment no. 3025 to develop a risk-based deposit insurance system; Graham motion to waive rejected on a voice vote; point of order sustained); 136 CONG. REC. S15,782 (daily ed. Oct. 18, 1990); ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE 626 (1992) (Stevens point of order against sections 4003-4016 of the Energy Committee-reported title, regarding management of the Tongass National Forest in Alaska; sustained without vote); 136 CONG. REC. S15,808-10, S15,815 (daily ed. Oct. 18, 1990); ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE 626 (1992) (Bentsen point of order against Symms amendment to require deposit of increase in motor fuel taxes in the Highway Trust Fund; Symms motion to waive rejected by a 48-52 vote; point of order sustained); 136 CONG. REC. S15,821 (daily ed. Oct. 18, 1990); ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE 626 (1992) (D'Amato point of order against subtitle B of title III of the committee-reported bill to establish a national aviation noise policy; Ford motion to waive succeeded by a 69-31 vote); 139 CONG. REC. S7906-07, S7922 (daily ed. June 24, 1993) (point of order against section 1105(c) of committee-reported language regarding bovine growth hormone; motion to waive rejected by a 38-60 vote; point of order sustained); *id.* at S7926, S7928 (daily ed. June 24, 1993) (Packwood point of order against scattered committee-reported language regarding childhood immunizations and tax-return-preparer standards; sustained without vote as to most provisions challenged); *id.* at S7898-901, S7920 (daily ed. June 24, 1993) (Sasser point of order against Domenici-Nunn amendment regarding caps on domestic, international, and defense discretionary spending; motion to waive rejected by a 53-45 vote; point of order sustained); *id.* at S7901-04, S7920-21 (daily ed. June 24, 1993) (Sasser point of order against Bradley amendment proposing a legislative line-item veto using separate enrollment of appropriations and tax expenditure sections; motion to waive rejected by a 53-45 vote; point of order sustained); *id.* at S7919, S7924 (daily ed. June 24, 1993) (Sasser point of order against Gramm amendment regarding restoration of fixed deficit targets; Gramm motion to waive rejected by a 43-55 vote; point of order sustained); 141 CONG. REC. S15,999 (daily ed. Oct. 27, 1995) (Kennedy point of order against section 7171 of the committee-reported bill raising the age of Medicare eligibility; no motion to waive; point of order sustained); *id.* at S16,016 (daily ed. Oct. 27, 1995) (Exon point of order against Specter amendment expressing the sense of the Senate regarding a flat tax; Specter motion to waive rejected 17-82; point of order sustained); *id.* at S16,020-21 (daily ed. Oct. 27, 1995) (Chafee point of order against section 7191(a) of the committee-reported bill barring Federal funding of abortions under Medicaid; Nickles motion to waive rejected 55-45; point of order sustained); *id.* at S16,025 (daily ed. Oct. 27, 1995) (Domenici point of order against Bumpers amendment prohibiting counting the proceeds of asset sales; Exon motion to waive rejected 49-50; point of order sustained); *id.* at S16,026 (daily ed. Oct. 27, 1995) (Domenici point of order against Byrd-Dorgan amendment to increase the time limit on debate in Senate on reconciliation legislation; Exon motion to waive rejected 47-52; point of order sustained); *id.* at S16,026, S16,049-53 (daily ed. Oct. 27, 1995) (Exon point of order under subsection (b)(1)(A) and other subparagraphs against 49 provisions; Domenici motion to waive for some of the provisions rejected 53-46; point of order sustained against 46 provisions, which were stricken; not sustained against 3 provisions, which remained in bill); *id.* at S17,315-27 (daily ed. Nov. 17, 1995) (Exon point of order under subsections (b)(1)(A) and (b)(1)(D) against sections 8001 and 13301 of the bill as proposed by the conference report on application of antitrust rule to provider-sponsored organizations (Medicare Plus) and exemption of physician office laboratories; Abraham motion to waive rejected 54-45; point of order sustained); 142 CONG. REC. S8332-33 (daily ed. July 19, 1996) (Dodd point of order

(continued...)

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against Frist amendment expressing the sense of Congress that the President should ensure approval of state welfare reform waiver requests; Frist motion to waive rejected 55-43; point of order sustained); *id.* at S8423-24 (daily ed. July 22, 1996), *id.* at S8506-09 (daily ed. July 23, 1996) (Exon point of order under subsections (b)(1)(A), (b)(1)(C), and (b)(1)(D) raised July 22 against 25 provisions; Domenici motion to waive on 3 provisions for which the point of order applied under subsection (b)(1)(A) — on a family cap for welfare benefits rejected 42-57, on allowing delivery of social services through religious charities approved 67-32, on abstinence education programs rejected 52-46; point of order sustained July 23 against 23 provisions, which were stricken from the bill, not sustained against 1 provision, which remained in the bill, and waived for 1 provision, which remained in the bill); 143 CONG. REC. S6092-93 (daily ed. June 23, 1997), *id.* at S6113-32 (daily ed. June 24, 1997) (Durbin point of order July 23 against sec. 5611 of the committee-reported bill raising the age of Medicare eligibility; Roth motion to waive approved 62-38 July 24); *id.* at S6298 (daily ed. June 25, 1997) (Domenici point of order against Levin amendment allowing vocational educational training to be counted as a work activity under the Temporary Assistance for Needy Families program; Levin motion to waive rejected 55-45; point of order sustained); *id.* at S6295, S6303-04 (daily ed. June 25, 1997) (Rockefeller point of order against section 5001 of the committee-reported bill on Medicare balance billing; Domenici motion to waive approved 62-37); *id.* at S6316-17 (daily ed. June 25, 1997) (Domenici point of order implicitly under subsection (b)(1)(A) against Lautenberg for Kennedy amendment to immediately transfer to Medicare part B certain home health benefits; Kennedy motion to waive rejected 38-62; point of order sustained); *id.* at S6316, S6318 (daily ed. June 25, 1997) (Murray point of order against sec. 1949(a)(2) of the committee-reported bill barring the use of Federal funding for abortions under Medicaid; point of order withdrawn); *id.* at S6336 (daily ed. June 25, 1997), *id.* at S6393, S6446-48 (daily ed. June 26, 1997) (Brownback point of order June 25 against section 602 of the committee-reported bill on incentives conditioned on District of Columbia government reform; Roth motion to waive withdrawn June 26; point of order sustained); *id.* at S6673-74 (daily ed. June 27, 1997) (Lautenberg point of order against Gramm amendment to create balanced budget enforcement procedures; Gramm motion to waive rejected 37-63; point of order sustained); *id.* at S6674-75 (daily ed. June 27, 1997) (Domenici point of order implicitly under subsection (b)(1)(A) against Bumpers amendment to prohibit scoring, for budget purposes, revenues from sale of certain federal lands; Bumpers motion to waive rejected 48-52; point of order sustained); *id.* at S6675-76 (daily ed. June 27, 1997) (Lautenberg point of order against Craig amendment to change the pay-go procedures by establishing a 60-vote point of order against using tax increases to pay for new mandatory spending increases; Craig motion to waive rejected 42-58; point of order sustained); *id.* at S6677 (daily ed. June 27, 1997) (Lautenberg point of order against Brownback amendment to create balanced budget enforcement procedures; Brownback motion to waive rejected 57-43; point of order sustained); *id.* at S6678 (daily ed. June 27, 1997) (Lautenberg point of order against Frist amendment to create balanced budget enforcement procedures; Frist motion to waive rejected 59-41; point of order sustained); *id.* at S6679-80 (daily ed. June 27, 1997) (Lautenberg point of order against Abraham amendment to ensure that future revenue windfalls to the Federal treasury are reserved for tax or deficit reduction; Abraham motion to waive rejected 53-47; point of order sustained); *id.* at S6691-93 (daily ed. June 27, 1997) (McCain point of order against section 702(d) of the committee-reported bill on intercity passenger rail funding; Roth motion to waive approved 77-21); *id.* at S8449-51 (daily ed. July 31, 1997) (Durbin point of order against section 1604(f)(3) of the conference committee-reported bill crediting a new cigarette tax against the global settlement; Roth motion to waive approved 78-22); 145 CONG. REC. S9887, S9889 (daily ed. July 30, 1999) (Domenici point of order against Bingaman amendment to express the sense of the Senate on investment in education; Bingaman motion to waive rejected 48-52; point of order sustained); *id.* at S9891 (daily ed. July 30, 1999) (Baucus point of order against Frist amendment to express the sense of the Senate regarding the Medicare Reserve Fund; Frist motion to waive rejected 54-46; point of order sustained).

Section 13214(a)(3) of the Budget Enforcement Act inserted in this subparagraph the parenthetical “(but a provision in which outlay decreases or revenue increases exactly offset
(continued...)”

§ 313(b)(1)(B) **(B) any provision producing an increase in outlays³² or decrease in revenues shall be considered extraneous if the net effect of provisions reported by the Committee reporting the title containing the provision is that the Committee fails to achieve its reconciliation instructions;³³**

§ 313(b)(1)(C) **(C) a provision that is not in the jurisdiction of the Committee with jurisdiction over said title or provision shall be considered extraneous;³⁴**

§ 313(b)(1)(D) **(D) a provision shall be considered extraneous if it produces**

³¹(...continued)

outlay increases or revenue decreases shall not be considered extraneous by virtue of this subparagraph.”

³² Section 3(1) defines “outlays.”

³³ For examples of the application of this subparagraph, see, *e.g.*, 132 CONG. REC. 24,907 [S13,047-49] (1986); Senate Precedent PRL19860919-008 (Sept. 19, 1986) (LEGIS, Rules database); ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE 625 (1992) (Gramm point of order against committee-reported provision on energy conservation that would have caused outlays to increase; Metzenbaum motion to waive rejected 32-61); 142 CONG. REC. S8081 (daily ed. July 18, 1996) (Lott point of order against committee-reported provision on Medicaid supplemental umbrella fund that would have increased outlays; no motion to waive; provision stricken).

The Congressional Budget Act makes no exception for violations of negligible amounts.

³⁴ Subsection (b)(3) provides exceptions to this paragraph. See *infra* pp. 23-50.

For Senate committee jurisdictions generally, see Senate Standing Rule XXV.

For examples of the application of this subparagraph, see, *e.g.*, 132 CONG. REC. S13,047 (daily ed. Sept. 19, 1986) (Thurmond point of order against two provisions regarding program fraud civil remedies; Cohen motion to waive succeeded by a 79-15 vote); 136 CONG. REC. S15,462-75 (daily ed. Oct. 17, 1990); ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE 625 (1992) (Baucus point of order against Finance Committee-reported provisions apportioning highway funds among the states that fell within the jurisdiction of the Environment and Public Works Committee; sustained without vote); 142 CONG. REC. S8423-24 (daily ed. July 22, 1996), *id.* at S8506-09 (daily ed. July 23, 1996) (Exon point of order under subsections (b)(1)(A), (b)(1)(C), and (b)(1)(D) raised July 22 against 25 provisions; Domenici motion to waive on 3 provisions for which the point of order applied under subsection (b)(1)(A) — on a family cap for welfare benefits rejected 42-57, on allowing delivery of social services through religious charities approved 67-32, on abstinence education programs rejected 52-46; point of order sustained July 23 against 23 provisions, which were stricken from the bill, not sustained against 1 provision, which remained in the bill, and waived for 1 provision, which remained in the bill); 143 CONG. REC. S6320 (daily ed. June 25, 1997) (Daschle point of order apparently under subsection (b)(1)(C) against sec. 5713 (“No Waiver Required for Provider Selectivity”), sec. 5833 (“Clarifying Provision Relating to Base Periods”), and sec. 5987 (repealing various provisions of education laws) of the Finance Committee-reported bill; no motion to waive; point of order sustained).

changes in outlays³⁵ or revenues which are merely incidental to the non-budgetary components of the provision;³⁶

³⁵ Section 3(1) defines “outlays.”

³⁶ This subparagraph contributes much of the ambiguity created by this section. Its language calls for the exercise of judgment. The Parliamentarian has not laid down any bright-line test to aid that judgment, and reserves the right to consider each individual case on its merits.

The drafters of this subparagraph wished to prohibit provisions in which policy changes plainly overwhelmed deficit changes. For example, a nationwide abortion prohibition might marginally reduce Government spending, but would constitute a much more significant policy change than budgetary action. The application of this subparagraph, however, has ranged wider than such plain cases.

The Parliamentarian has advised (in summer of 1993) that his office begins its analysis by scrutinizing a provision for any “non-budgetary components.” This analysis is linked to that under subsection (b)(1)(A). *See supra* pp. 8-11. If a component produces no change in outlays or revenues or the terms and conditions by which the Government obtains outlays or revenues, then the component is non-budgetary. In other words, if a component would violate subsection (b)(1)(A) if it stood alone as a provision, then it contributes to a violation of this subsection when viewed in conjunction with other components. Once the Parliamentarian has identified a non-budgetary component, he then weighs that component or that and other non-budgetary components against the budgetary components, asking whether the latter are “merely incidental” to the former.

The Parliamentarian’s analysis does not end with a simple components test. Budgetary effect, without more, does not insulate a provision from violating the subsection. Provisions that reduce the deficit may nonetheless violate the subparagraph. For example, the Chair sustained a point of order under this subparagraph against provisions that would have imposed criminal penalties (thus raising revenues) under the Occupational Health and Safety Act. *See* 136 CONG. REC. S15,771 (Oct. 18, 1990); ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE 625 (1992).

Provisions that increase the deficit do not necessarily violate the subparagraph. Thus, after careful review, the Parliamentarian advised (in summer 1993) that the provisions of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993), regarding the earned income tax credit (*id.* § 13131), empowerment zones (*id.* §§ 13301-13303), and food stamps (*id.* §§ 13901-13971), each of which substantially increase the deficit, did not violate this subsection. Thus this subparagraph can have its perverse effects. A Senator can find it easy to defend as budgetary a provision that does nothing but spend a great deal of money. On the other hand, a provision that actually reduces the deficit but does so through the device of an extensive policy change will receive strict scrutiny. The language of the subparagraph dictates this result, however, as it does not address itself to how the provision affects the budget, merely to its so doing.

Provisions that have budgetary effects that the Congressional Budget Office cannot estimate do not necessarily violate the subsection. *See* 139 CONG. REC. S10,659-62 (Chair sustained on appeal by a 43-57 vote). Thus, during consideration of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993), Senator Danforth raised a point of order that provisions of the bill regarding Medicaid pediatric immunization violated this subparagraph:

Mr. DANFORTH. Mr. President, I am concerned about the state of the Byrd rule, which is a rule that I think is extremely important in the Senate, and concerned that budgetary effects which are incapable of estimation have been used to justify what I would think to be extraneous provisions in this bill, I would like

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³⁶(...continued)

now to make two inquiries of the Chair.

....

The second question is: If the impact on outlays or revenues cannot be estimated, are they merely incidental to a nonbudgetary component under section 313(b)(1)(D) of the Byrd rule?

The PRESIDING OFFICER. Once again, that would not necessarily be the case.

Mr. DANFORTH. Mr. President, I now wish to raise a point of order, and do raise a point of order under sections 313(b)(1)(A) and 313(b)(1)(D) of the Budget Act, known as the Byrd rule; that title XIX, section 1928(d)(4)(B) in the conference agreement, section 13631(b) is extraneous to the reconciliation bill because it produces no change in the outlays or revenues or produces changes in outlays or revenues which are merely incidental to the nonbudgetary components of the provision.

The PRESIDING OFFICER. The point of order is not well taken.

Mr. DANFORTH. Mr. President, I appeal the ruling of the Chair.

....

Mr. DANFORTH. Mr. President, as I stated earlier, my concern is about the efficacy of the Byrd rule which I think is very important in keeping extraneous matters from reconciliation bills. . . .

The Congressional Budget Office was asked by me for the budgetary effects of this particular provision which has to do with the so-called State option provision of the immunization portion of the bill. The relevant part of the answer of Mr. Reischauer was as follows:

The paragraph referenced in your letter would allow States to purchase additional quantities of vaccines at the CDC price and would, therefore, affect the prices the Federal Government would pay. While the paragraph cited was a consideration in developing our estimate of section 13631, we do not have the ability to estimate its budgetary effects separately.

So, in other words, the quantity of vaccine purchased would affect price, but CBO is unable to make that estimation.

What has happened in this particular provision of the bill is that there is a major substantive change in the law, a major substantive provision appears in the bill and CBO is unable to estimate what the consequences of that provision would be. It is the position of this Senator that if CBO cannot make that estimate, then clearly at the very least the revenue consequences or the budgetary consequences are merely incidental and that that provision should not be allowed to stand.

....

So my point is very simply this, Mr. President. If CBO is unable to estimate the amount, then the budgetary consequences are so minimal and so

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³⁶(...continued)

tangential to the bill that they do not justify substantive changes in the law. And therefore, if the Byrd rule has any real meaning, if it is truly a rule, then these provisions should be stricken.

....

.... I would simply point out that when the Byrd rule was adopted in the debate, Senator BYRD said, and this is a quote, "Because policy matters that do not have clear and direct budgetary consequences are supposed to remain outside its scope."

....

Mr. RIEGLE. . . .

....

But in the final paragraph of that letter, the director of the Congressional Budget Office, Dr. Reischauer says: "The paragraph referenced in your letter would allow States to purchase additional quantities of vaccines at the CDC price" and here is the critical language "and would therefore affect the prices the Federal Government would pay."

That is the whole issue here. States come in and combine their purchasing with the Secretary in terms of the national purchasing effort of vaccines. That will have an effect on the price, and therefore the total cost of this effort.

So the Budget Office has clearly established the relationship that makes it proper within this bill and means that, of course, it does conform to the Byrd rule.

....

Mr. DANFORTH. . . . What the letter does say is that the quantity of vaccine that is purchased has some effect on the price. But it says that the CBO cannot estimate what the effect is. That is exactly the nature of the question, two questions that I put to the Chair.

If budgetary impacts cannot be estimated, if no number can be put on them, then it is the position of this Senator that they are so ethereal, so lacking in form as not to constitute the kind of clear and direct budgetary consequences that Senator BYRD spoke of in the debate when the Byrd rule was first created.

....

Mr. RIEGLE. . . .

....

In fact, the CBO letter, to my reading, sustains the argument that I am making, that there is a relationship between quantity of vaccines being negotiated for and purchased and therefore the price and therefore the cost. Depending upon where that works out, it has a direct budgetary impact. That is the clear message of the letter from the Director of the Congressional Budget Office.

It obviously means that this does meet the Byrd rule. It is germane in
(continued...)

³⁶(...continued)

every sense, and proper. That is what the Parliamentarian has ruled.

139 CONG. REC. S10,659-61 (daily ed. Aug. 6, 1993). The Senate went on to sustain the Chair on appeal by a vote of 43-57. *See id.* at S10,662. (Note that, under subsection 312(a), the Budget Committee, not the Congressional Budget Office, provides the estimates for purposes of this title of the Budget Act.)

In connection with this subparagraph, the Parliamentarian casts a particularly suspicious eye on language that makes appropriations and language that overturns court decisions. The Parliamentarian appears to view these events as strong indicia that the language attempts to do something that the drafters of section 313 did not contemplate Congress would do in the fast-track reconciliation process.

The Chair did not sustain a point of order raised under this subparagraph against a provision regarding requirements for the domestic content of cigarettes that the Congressional Budget Office estimated would reduce outlays (when taken together with other provisions in the same section) by \$29 million over 5 years. *See* 139 CONG. REC. S10,675-78 (daily ed. Aug. 6, 1993) (Brown point of order; Chair's ruling sustained on appeal in a 43-57 vote, three-fifths of the Senators not having voted in the affirmative).

The Chair sustained a point of order raised under this subparagraph against a provision that the maker of the point of order characterized as "a \$2 billion blank check for one State" and that Senator said: "would require the Secretary of Health and Human Services to approve the privatization of all Federal and State health and human services benefit programs in the State of Texas." 143 CONG. REC. S6177-80 (daily ed. June 24, 1997), *id.* at S6291, S6308 (daily ed. June 25, 1997) (Conrad point of order made June 24 against sec. 5822 of the committee-reported bill; Roth motion to waive withdrawn; point of order sustained June 25; provision stricken).

For other examples of the application of this subparagraph, see, *e.g.*, 141 CONG. REC. S17,315-27 (daily ed. Nov. 17, 1995) (Exon point of order under subsections (b)(1)(A) and (b)(1)(D) against sections 8001 and 13301 of the bill as proposed by the conference report on application of antitrust rule to provider-sponsored organizations (Medicare Plus) and exemption of physician office laboratories; Abraham motion to waive rejected 54-45; point of order sustained); 142 CONG. REC. S8423-24 (daily ed. July 22, 1996), *id.* at S8506-09 (daily ed. July 23, 1996) (Exon point of order under subsections (b)(1)(A), (b)(1)(C), and (b)(1)(D) raised July 22 against 25 provisions; Domenici motion to waive on 3 provisions for which the point of order applied under subsection (b)(1)(A) — on a family cap for welfare benefits rejected 42-57, on allowing delivery of social services through religious charities approved 67-32, on abstinence education programs rejected 52-46; point of order sustained July 23 against 23 provisions, which were stricken from the bill, not sustained against 1 provision, which remained in the bill, and waived for 1 provision, which remained in the bill).

§ 313(b)(1)(E) **(E)³⁷ a provision shall be considered to be extraneous if it increases, or would increase, net outlays,³⁸ or if it decreases, or would decrease, revenues during a fiscal year after the fiscal years covered by such reconciliation bill or reconciliation resolution,³⁹ and such increases or decreases are greater⁴⁰ than outlay reductions or revenue increases resulting from other provisions in such title⁴¹ in such year;⁴² and**

³⁷ Section 205(b) of the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987 added subparagraph (E). Pub. L. No. 100-119, § 205(b), 101 Stat. 754, 784-85 (1987). For excerpts from the joint statement of managers accompanying the conference report on that bill, see *infra* note 42.

³⁸ Section 3(1) defines “outlays.”

³⁹ Section 310(b) defines “reconciliation resolution.”

⁴⁰ The Congressional Budget Act makes no exception for violations of negligible amounts.

⁴¹ This basis of extraneousness depends on the balance of the title in which the drafters locate a provision. Consequently, attentive drafters can avoid this violation by combining or rearranging the contents of titles so as to ensure that no title worsens the deficit in any out-year.

Even though points of order under this subparagraph depend on the title of the bill, a Senator can successfully raise this point of order against an amendment that would cause the relevant title to worsen the deficit in the out-years. *See, e.g.*, 143 CONG. REC. S6307-08 (daily ed. June 25, 1997) (Domenici point of order against Lautenberg for Kennedy amendment reducing fees on student loan programs; Dodd motion to waive rejected 43-57; point of order sustained; amendment fell); 146 CONG. REC. S6804 (daily ed. July 14, 2000), *id.* at S7045 (daily ed. July 17, 2000) (Moynihan point of order against Roth amendment to strike the sunset provision in the committee-reported bill; Roth motion to waive rejected 48-47; point of order sustained; amendment fell); *id.* (Roth point of order implicitly under subsection (b)(1)(E) against Roth amendment to strike the sunset provision in the Democratic substitute; covered by same Roth motion to waive as previous point of order; point of order sustained; amendment fell); 149 CONG. REC. S6431 (daily ed. May 15, 2003) (Baucus point of order implicitly under subsection (b)(1)(E) against Sessions amendment applying sunset provision to revenue increase provisions; Sessions motion to waive rejected 51-49; point of order sustained; amendment fell).

⁴² As a consequence of this subparagraph, reconciliation tax bills have made tax cuts sunset in the last year covered by the reconciliation instructions. Democratic Leader Daschle identified this consequence in an exchange with the Presiding Officer on May 22, 1996. The budget (continued...)

⁴²(...continued)

resolution for fiscal year 1997 included instructions for a third reconciliation bill that would reduce revenues. During the consideration of that resolution, Leader Daschle and the Presiding Officer interpreted this subparagraph as follows:

Mr. DASCHLE. Mr. President, the Byrd rule forbids legislation that will increase the deficit in years beyond those covered in the budget resolution. If this third reconciliation bill does not find a way to end or offset its tax cuts in the years beyond 2002, would the bill violate the Byrd rule?

The PRESIDING OFFICER. Yes, it would.

Mr. DASCHLE. Is it not true, unless the budget resolution assumes that the tax cuts will sunset in 2002, or be offset by tax increases thereafter, the resolution calls for a reconciliation bill that would violate the Byrd rule?

The PRESIDING OFFICER. The resolution cannot make assumptions beyond the years which are instructed.

Mr. DASCHLE. That is not the question, Mr. President.

What I am asking is that under the Byrd rule there must be a determination that the deficit is not increased by actions taken in the reconciliation instructions in the out-years, in the years beyond the window.

The PRESIDING OFFICER. The Byrd rule does not apply to reconciliation instructions. It applies to a reconciliation bill.

Mr. DASCHLE. That is my point, Mr. President. This resolution assumes that a reconciliation bill will be triggered that will violate the Byrd rule unless it is terminated at the end of 2002 or else subsequently offset.

The assumption of the resolution is that tax cuts will sunset in the year 2002 or be offset by tax increases thereafter in order for it not to be in violation of the Byrd rule, is that not correct?

The PRESIDING OFFICER. The budget resolution makes no assumptions.

Mr. DASCHLE. Mr. President, let me ask you this: Would the reconciliation bill be in order if the budget resolution did not address the issue of deficit reduction beyond that 6-year timeframe?

The PRESIDING OFFICER. I read to you under extraneous provisions [section 313(b)(1)](E):

A provision shall be considered to be extraneous if it increases or would increase net outlays or if it decreases or would decrease revenues during a fiscal year after the fiscal years covered by such a reconciliation bill or reconciliation resolution.

This only applies to reconciliation bills.

Mr. DASCHLE. Let me then phrase my question another way, because I think we can now clarify this.

The reconciliation bill triggered by this resolution would not be in order,
(continued...)

⁴²(...continued)

in other words, if it failed either to offset the tax cuts or to sunset them after fiscal year 2002, is that not correct?

The PRESIDING OFFICER. That is correct.

Mr. DASCHLE. Mr. President, let me just note parenthetically, if that is correct, that the majority party is the same party that has criticized the President's budget because the President sunsets his tax cuts. But now the majority comes before us with a reconciliation instruction that requires either that their tax cuts be abruptly sunsetted in the year 2002 or that taxes be increased dramatically after that point to pay for the continuing tax cuts.

142 CONG. REC. S5418 (daily ed. May 21, 1996).

For examples of the application of this subparagraph, see, *e.g.*, 143 CONG. REC. S6307-08 (daily ed. June 25, 1997) (Domenici point of order against Lautenberg for Kennedy amendment reducing fees on student loan programs; Dodd motion to waive rejected 43-57; point of order sustained); 145 CONG. REC. S9478-84 (daily ed. July 28, 1999) (Lott point of order against section 1502 of the committee-reported bill on general extension of revenue-reduction provisions; Roth motion to waive rejected 51-48; point of order sustained; section stricken); 146 CONG. REC. S6784 (daily ed. July 14, 2000), *id.* at S7043 (daily ed. July 17, 2000) (Roth point of order July 14 under section 313 and apparently subsection (b)(1)(E) against section 4 of the conference committee-reported bill on the earned income tax credit; Roth motion to waive approved by unanimous consent July 17); *id.* at S6804 (daily ed. July 14, 2000), *id.* at S7045 (daily ed. July 17, 2000) (Moynihan point of order against Roth amendment to strike the sunset provision in the committee-reported bill; Roth motion to waive rejected 48-47; point of order sustained); *id.* (Roth point of order implicitly under subsection (b)(1)(E) against Roth amendment to strike the sunset provision in the Democratic substitute; covered by same Roth motion to waive as previous point of order; point of order sustained); 149 CONG. REC. S6431 (daily ed. May 15, 2003) (Baucus point of order implicitly under subsection (b)(1)(E) against Sessions amendment applying sunset provision to revenue increase provisions; Sessions motion to waive rejected 51-49; point of order sustained).

Section 205(b) of the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987 added subparagraph (E). Pub. L. No. 100-119, § 205(b), 101 Stat. 754, 784-85 (1987). The joint statement of managers in the conference report on that bill stated with regard to subparagraph (E):

6. Extraneous Provisions in Reconciliation Legislation

Current Law

Title XX of the Consolidated Omnibus Budget Reconciliation Act of 1985 (P.L. 99-272), as amended by Section 7006 of the Omnibus Budget Reconciliation Act of 1986 (P.L. 99-509), established a temporary rule in the Senate — referred to as the “Byrd Rule” — to exclude extraneous matter from reconciliation legislation. The rule specifies the types of provisions considered to be extraneous, provides for a point of order against the inclusion of extraneous matter in reconciliation measures, and requires a three-fifths vote of the Senate to waive or appeal the point of order. The rule expires on January 2, 1988.

Senate Amendment

The Senate amendment (Section 228) amends the Byrd Rule (which applies only in the Senate) to include in the definition of extraneous matter provisions which increase net outlays or decrease revenues during a fiscal year beyond

(continued...)

§ 313(b)(1)(F) **(F)⁴³ a provision shall be considered extraneous if it violates section 310(g).**

§ 313(b)(2) **(2) A Senate-originated⁴⁴ provision shall not be considered extraneous under paragraph (1)(A)⁴⁵ if the Chairman and Ranking Minority Member of the Committee on the Budget and the Chairman and Ranking Minority Member of the Committee which reported the provision certify that:**

§ 313(b)(2)(A) **(A) the provision mitigates direct effects clearly attributable to a provision changing outlays⁴⁶ or revenues and both provisions**

⁴²(...continued)

those fiscal years covered by the reconciliation measure and which result in a net increase in the deficit for that fiscal year. The Senate amendment also extends the expiration date of the Byrd Rule to September 30, 1992.

Conference Agreement

The House recedes and concurs in the Senate amendment. This rule applies only in the Senate.

It is the intent of the conferees that expiration after the reconciliation period of a revenue increase or extension provided for in a reconciliation bill would not, of itself, be considered a revenue decrease for purposes of this provision. It could, however, contribute to a finding that a spending increase or a positive revenue decrease in that legislation violated this rule.

H.R. CONF. REP. No. 100-313, 100th Cong., 1st Sess. 65 (1987), *reprinted in* 1987 U.S.C.C.A.N. 739, 765.

⁴³ Section 13214(a)(6) of the Budget Enforcement Act added subparagraph (F). As a result of this addition, a Senator may raise a point of order under this section that would result in excising only the offending provision, whereas raising the point of order under section 310(g) itself against a provision in the bill would result in killing the entire bill.

The Parliamentarian's office has advised (in August of 2005) that extending the payroll taxes (FICA contributions) that fund Social Security coverage would violate both section 310(g) and this subparagraph of the Byrd rule. Extending the payroll taxes that fund the Hospital Insurance coverage only, and not Social Security, could conceivably be done without violating 310(g) or 313(b)(1)(F).

⁴⁴ Section 13214(a)(7) of the Budget Enforcement Act added the words "Senate-originated." For House-originated provisions, this paragraph did not clearly indicate which chairmen held responsibility. This change makes clear that the exception does not apply for House-originated provisions.

⁴⁵ Paragraph (1)(A) concerns provisions without deficit effect. *See supra* p. 8.

⁴⁶ Section 3(1) defines "outlays."

together produce a net reduction in the deficit;⁴⁷

§ 313(b)(2)(B) **(B) the provision will result in a substantial reduction in outlays⁴⁸ or a substantial increase in revenues during fiscal years after the fiscal years covered by the reconciliation bill or reconciliation resolution;⁴⁹**

§ 313(b)(2)(C) **(C) a reduction of outlays⁵⁰ or an increase in revenues is likely to occur as a result of the provision, in the event of**

new regulation authorized by the provision or likely to be proposed,

court rulings on pending litigation, or

relationships between economic indices and stipulated statutory triggers pertaining to the provision,

other than the regulations, court rulings or relationships currently projected by the Congressional Budget Office for scorekeeping purposes; or⁵¹

§ 313(b)(2)(D) **(D) such provision will be likely to produce a significant reduction in outlays⁵² or increase in revenues but, due to insufficient data, such reduction or increase cannot be reliably estimated.**

§ 313(b)(3) **(3) A provision reported by a committee shall not be considered extraneous under paragraph (1)(C)⁵³ if**

⁴⁷ Section 3(6) defines “deficit.”

⁴⁸ Section 3(1) defines “outlays.”

⁴⁹ Section 310(b) defines “reconciliation resolution.”

⁵⁰ Section 3(1) defines “outlays.”

⁵¹ Section 13214(b)(4)(C) of the Budget Enforcement Act added the conjunction “or” here. This is how this section had been understood prior to the enactment of the Budget Enforcement Act.

⁵² Section 3(1) defines “outlays.”

⁵³ See *supra* p. 14.

§ 313(b)(3)(A) **(A) the provision is an integral part of a provision or title, which if introduced as a bill or resolution would be referred to such committee, and the provision sets forth the procedure to carry out or implement the substantive provisions that were reported and which fall within the jurisdiction of such committee; or**

§ 313(b)(3)(B) **(B) the provision states an exception to, or a special application of, the general provision or title of which it is a part and such general provision or title if introduced as a bill or resolution would be referred to such committee.**

§ 313(c) **(c)⁵⁴ EXTRANEOUS MATERIALS. — Upon the reporting or discharge of a reconciliation bill or resolution pursuant to section 310 in the Senate, and again upon the submission of a conference report on such a reconciliation bill or resolution, the Committee on the Budget of the Senate shall submit for the record a list of material considered to be extraneous under subsections (b)(1)(A), (b)(1)(B),⁵⁵ and (b)(1)(E) of this section to the instructions of a committee as provided in this section.⁵⁶ The inclusion or exclusion of a provision shall not constitute a determination of extraneousness by the Presiding Officer of the Senate.**

§ 313(d) **(d)⁵⁷ CONFERENCE REPORTS — When the Senate is consider**

⁵⁴ There once were two subsections (c), here and what is now subsection (d), *infra* pp. 24-26. The Budget Enforcement Act added both at the end of what used to be the Byrd Rule.

Section 13214(a)(8) of the Budget Enforcement Act added this subsection and section 13214(b)(2)(C) of the Budget Enforcement Act redesignated it as subsection (c). Section 13214(b)(2)(B) of the Budget Enforcement Act repealed what used to be subsection (c), which read as follows:

(c) This section shall become effective on the date of enactment of this title and shall remain in effect until September 30, 1992.

By virtue of this repeal of the expiration provision, the Byrd Rule is permanent law.

⁵⁵ The Parliamentarian has advised (in July of 1993) that he considers it impossible to apply section 313(b)(1)(B) to conference reports.

⁵⁶ For examples of such lists, see, *e.g.*, 139 CONG. REC. S15,832 (daily ed. Oct. 26, 1995).

⁵⁷ Section 10113(b)(1)(A) of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, 688 (Aug. 5, 1997), struck “(c) When” and inserted “(d) CONFERENCE REPORTS — When” here. Formerly section 313 had two subsections (c), here and *supra* p. 24. The Budget Enforcement Act added both at the end of what used to be the Byrd Rule. Section 13214(b)(3) of the Budget Enforcement Act transferred this subsection from Senate Resolution 286 (99th Congress, 1st Session), as amended by Senate Resolution 509 (99th Congress, 2d Session). For

(continued...)

ing a conference report on, or an amendment between the Houses in relation to, a reconciliation bill or reconciliation resolution⁵⁸ pursuant to section 310, upon —

§ 313(d)(1)

(1) a point of order being made by any Senator against extraneous material meeting the definition of subsections (b)(1)(A),⁵⁹ (b)(1)(B),⁶⁰ (b)(1)(D),⁶¹ (b)(1)(E),⁶² or (b)(1)(F),⁶³ and



§ 313(d)(2)

(2) such point of order being sustained,⁶⁴ such material

⁵⁷(...continued)

the history of these Senate Resolutions, see *infra* note 65. Section 13214(b)(2)(B) of the Budget Enforcement Act repealed what used to be subsection (c), which read: “(c) This section shall become effective on the date of enactment of this title and shall remain in effect until September 30, 1992.” The Byrd Rule is thus permanent law.

⁵⁸ Section 310(b) defines “reconciliation resolution.”

⁵⁹ Subsection (b)(1)(A) concerns provisions without deficit effect. *See supra* p. 8. For examples of the application of this subsection to conference reports, see, *e.g.*, 141 CONG. REC. S17,315-27 (daily ed. Nov. 17, 1995) (Exon point of order under subsections (b)(1)(A) and (b)(1)(D) against sections 8001 and 13301 of the bill as proposed by the conference report on application of antitrust rule to provider-sponsored organizations (Medicare Plus) and exemption of physician office laboratories; Abraham motion to waive rejected 54-45; point of order sustained); 143 CONG. REC. S8449-51 (daily ed. July 31, 1997) (Durbin point of order against section 1604(f)(3) of the conference committee-reported bill crediting a new cigarette tax against the global settlement; Roth motion to waive approved 78-22).

⁶⁰ Subsection (b)(1)(B) concerns provisions that worsen the deficit where the title fails to comply with instructions. *See supra* p. 14. Section 13214(b)(4)(E) of the Budget Enforcement Act added this reference. The Parliamentarian has advised (in July of 1993) that he considers it impossible to apply subsection (b)(1)(B) to conference reports.

⁶¹ Subsection (b)(1)(D) concerns provisions with deficit effects “which are merely incidental to the non-budgetary components of the provision.” *See supra* p. 14. For examples of the application of this subsection to conference reports, see, *e.g.*, 141 CONG. REC. S17,315-27 (daily ed. Nov. 17, 1995) (Exon point of order under subsections (b)(1)(A) and (b)(1)(D) against sections 8001 and 13301 of the bill as proposed by the conference report on application of antitrust rule to provider-sponsored organizations (Medicare Plus) and exemption of physician office laboratories; Abraham motion to waive rejected 54-45; point of order sustained).

⁶² Subsection (b)(1)(E) concerns provisions that worsen the deficit in the out-years beyond the reconciled years. *See supra* p. 19. Section 13214(b)(4)(E) of the Budget Enforcement Act added this reference.

⁶³ Subsection (b)(1)(F) concerns provisions that deal with Social Security. *See supra* p. 22. Section 13214(b)(4)(E) of the Budget Enforcement Act added this reference.

⁶⁴ For examples of the application of this section to conference reports, see, *e.g.*, 141 CONG. REC. S17,315-27 (daily ed. Nov. 17, 1995) (Exon point of order under subsections (b)(1)(A) and (b)(1)(D) against sections 8001 and 13301 of the bill as proposed by the conference report on application of antitrust rule to provider-sponsored organizations (Medicare Plus) and exemption

(continued...)

contained in such conference report or amendment shall be deemed stricken, and the Senate shall proceed, without intervening action or motion, to consider the question of whether the Senate shall recede from its amendment and concur with a further amendment, or concur in the House amendment with a further amendment, as the case may be, which further amendment shall consist of only that portion of the conference report or House amendment, as the case may be, not so stricken. Any such motion in the Senate shall be debatable for 2 hours. In any case in which such point of order is sustained against a conference report (or Senate amendment derived from such conference report by operation of this subsection), no further amendment shall be in order.⁶⁵



⁶⁴(...continued)

of physician office laboratories; Abraham motion to waive rejected 54-45; point of order sustained); 143 CONG. REC. S8449-51 (daily ed. July 31, 1997) (Durbin point of order against section 1604(f)(3) of the conference committee-reported bill crediting a new cigarette tax against the global settlement; Roth motion to waive approved 78-22).

⁶⁵ Section 13214(b)(3) of the Budget Enforcement Act transferred this subsection (c) from Senate Resolution 286 (99th Congress, 1st Session), as amended by Senate Resolution 509 (99th Congress, 2d Session).

On December 19, 1985, Senator Simpson, on behalf of Senators Armstrong, Roth, and Domenici, introduced a Senate Resolution 286 to apply the Byrd Rule to conference reports. As agreed to that day, that resolution read as follows:

S. RES. 286

RESOLVED, That when the Senate is considering a conference report or House amendment with respect to a reconciliation bill or reconciliation resolution pursuant to section 310 of the Budget Act, upon a point of order being made by any Senator against extraneous material meeting the definition of subsections (d)(1)(A) and (d)(1)(D) of section 1201 of the Consolidated Omnibus Budget Reconciliation Act of 1985, and such point of order is sustained, any part of such report or amendment containing such material shall be deemed stricken, but it shall be in order to continue consideration of the remainder under the Rules and practices of the Senate and applicable law. An affirmative vote of three-fifths of the Members, duly chosen and sworn, shall be required to sustain an appeal of the ruling of the Chair on a point of order raised under this resolution, as well as to waive or suspend the provisions of this resolution.

The provisions of this resolution shall remain in effect until the date of termination of section 1201 of the Consolidated Omnibus Budget Reconciliation Act of 1985.

131 CONG. REC. S18,255 (daily ed. Dec. 19, 1985).

Senator Roth described the resolution:

Mr. ROTH. Mr. President, the purpose of this resolution is to remedy a
(continued...)

⁶⁵(...continued)

possible unintended result of the Byrd amendment to the reconciliation bill, section [20001] of the Consolidated Omnibus Budget Reconciliation Act of 1985.

That provision imposes a discipline upon this body which is not imposed on the other body. Basically, it requires that Senators not place extraneous provisions in reconciliation bills and resolutions.

However, if Members of the other body are free to load up their bills and resolutions with extraneous provisions, I fear that our body will be at a disadvantage within respect to the other body. Since we cannot tell the other body how to conduct its business, the solution is to create a new Senate procedure for handling extraneous material originating in the other body and coming to us as part of a House amendment or a conference report. The situation is analogous to that in the other body when we send provisions to them which would violate their rule on germaneness if offered there rather than here.

The other body's response to that situation has been to adopt clauses 4 and 5 of rule XXVIII of the House rules. The remedy proposed here is similar. It would permit a point of order to be raised against the extraneous material in House amendments or conference reports. With respect to a House amendment, if such point of order is sustained, the effect will be like that of a successful motion to strike out the offending language, and the Senate will be able to consider and act upon the remainder, if any, of the amendment.

With respect to a conference report, if such point of order is sustained, the effect will be like that under rule XXVIII of the House rules; the Senate will be able, for example, to request further conference or to insist on its disagreement or to recede and concur in the House amendment with an amendment incorporating the remainder of the text of the conference report or any other permissible variation which does not revive the provision deemed stricken by the successful point of order.

It should be noted that points of order may be made only with respect to two of the four categories of extraneous material in [the Byrd Rule]. This is because the two categories omitted are not applicable to matters to be transacted between the Houses. Moreover, it is intended that the remaining two categories be applied without reference to any instructions that may have been given to committees. Thus points of order may be raised against a provision which does not produce a change in outlays or revenues or which produces a change which is merely incidental to the nonbudgetary components of the provision.

I believe that this resolution is a necessary step to protect the prerogatives of this body. With this protection, the Byrd amendment will be able to achieve a necessary reform without disadvantaging this body.

131 CONG. REC. S18,255 (daily ed. Dec. 19, 1985). The Senate then agreed to the resolution by a voice vote. *See id.*

Clauses 4 and 5 of House Rule XXVIII (to which Senator Roth referred) provide:

4. (a) With respect to any report of a committee of conference called up before the House containing any matter which would be in violation of the provisions of clause 7 of Rule XVI if such matter had been offered as an amendment in the House, and which —

(1) is contained in any Senate amendment to that measure
(continued...)

⁶⁵(...continued)

(including a Senate amendment in the nature of a substitute for the text of that measure as passed by the House) accepted by the House conferees or agreed to by the conference committee with modification; or

(2) is contained in any substitute agreed to by the conference committee; it shall be in order, at any time after the reading of the report has been completed or dispensed with and before the reading of the statement, or immediately upon consideration of a conference report if clause 2(c) of this rule applies, to make a point of order that such nongermane matter, as described above, which shall be specified in the point of order, is contained in the report.

For the purposes of this clause, matter which —

(A) is contained in any substitute agreed to by the conference committee;

(B) is not proposed by the House to be included in the measure concerned as passed by the House; and

(C) would be in violation of clause 7 of Rule XVI if such matter had been offered in the House as an amendment to the provisions of that measure as so proposed in the form passed by the House;

shall be considered in violation of such clause 7.

(b) If such point of order is sustained, it then shall be in order for the Chair to entertain a motion, which is of high privilege, that the House reject the nongermane matter covered by the point of order. It shall be in order to debate such motion for forty minutes, one-half of such time to be given to debate in favor of, and one-half in opposition to, the motion.

(c) Notwithstanding the final disposition of any point of order made under paragraph (a), or of any motion to reject made pursuant to a point of order under paragraph (b), of this clause, it shall be in order to make further points of order on the ground stated in such paragraph (a), and motions to reject pursuant thereto under such paragraph (b), with respect to other nongermane matter in the report of the committee of conference not covered by any previous point of order which has been sustained.

(d) If any such motion to reject has been adopted, after final disposition of all points of order and motions to reject under the preceding provisions of this clause, the conference report shall be considered as rejected and the question then pending before the House shall be —

(1) whether to recede and concur in the Senate amendment with an amendment which shall consist of that portion of the conference report not rejected; or

(2) if the last sentence of paragraph (a) of this clause applies, whether to insist further on the House amendment.

If all such motions to reject are defeated, then, after the allocation of time for debate on the conference report as provided in clause 2(a) of this Rule, it shall be in order to move the previous question on the adoption of the conference report.

(continued...)

⁶⁵(...continued)

5. (a)(1) With respect to any amendment (including an amendment in the nature of a substitute) which —

(A) is proposed by the Senate to any measure and thereafter —

(i) is reported in disagreement between the two Houses by a committee of conference; or

(ii) is before the House, the stage of disagreement having been reached; and

(B) contains any matter which would be in violation of the provisions of clause 7 of Rule XVI if such matter had been offered as an amendment in the House;

it shall be in order, immediately after a motion is offered that the House recede from its disagreement to such amendment proposed by the Senate and concur therein and before debate is commenced on such motion, to make a point of order that such nongermane matter, as described above, which shall be specified in the point of order, is contained in such amendment proposed by the Senate.

(2) If such point of order is sustained, it then shall be in order for the Chair to entertain a motion, which is of high privilege, that the House reject the nongermane matter covered by the point of order. It shall be in order to debate such motion for forty minutes, one-half of such time to be given to debate in favor of, and one-half in opposition to, the motion.

(3) Notwithstanding the final disposition of any point of order made under subparagraph (1), or of any motion to reject made pursuant to a point of order under subparagraph (2), of this paragraph, it shall be in order to make further points of order on the ground stated in such subparagraph (1), and motions to reject pursuant thereto under such subparagraph (2), with respect to other nongermane matter in the amendment proposed by the Senate not covered by any previous point of order which has been sustained.

(4) If any such motion to reject has been adopted, after final disposition of all points of order and motions to reject under the preceding provisions of this clause, the motion to recede and concur shall be considered as rejected, and further motions —

(A) to recede and concur in the Senate amendment with an amendment, where appropriate (but the offering of which is not in order unless copies of the language of the Senate amendment, as proposed to be amended by such motion, are then available on the floor when such motion is offered and is under consideration);

(B) to insist upon disagreement to the Senate amendment and request a further conference with the Senate; and

(C) to insist upon disagreement to the Senate amendment;

shall remain of high privilege for consideration by the House. If all such motions to reject are defeated, then, after the allocation of time for debate on the motion to recede and concur as provided in clause 2(b) of this Rule, it shall be in order to move the previous question on such motion.

(continued...)

⁶⁵(...continued)

(b)(1) With respect to any such amendment proposed by the Senate as described in paragraph (a) of this clause, it shall not be in order to offer any motion that the House recede from its disagreement to such Senate amendment and concur therein with an amendment, unless copies of the language of the Senate amendment, as proposed to be amended by such motion, are then available on the floor when such motion is offered and is under consideration.

(2) Immediately after any such motion is offered and is in order and before debate is commenced on such motion, it shall be in order to make a point of order that nongermane matter, as described in subparagraph (1) of paragraph (a) of this clause, which shall be specified in the point of order, is contained in the language of the Senate amendment, as proposed to be amended by such motion, copies of which are then available on the floor.

(3) If such point of order is sustained, it then shall be in order for the Chair to entertain a motion, which is of high privilege, that the House reject the nongermane matter covered by the point of order. It shall be in order to debate such motion for forty minutes, one-half of such time to be given to debate in favor of, and one-half in opposition to, the motion.

(4) Notwithstanding the final disposition of any point of order under subparagraph (2), or of any motion to reject made pursuant to a point of order under subparagraph (3), of this paragraph, it shall be in order to make further points of order on the ground stated in subparagraph (1) of paragraph (a) of this clause, and motions to reject pursuant thereto under subparagraph (3) of this paragraph, with respect to other nongermane matter in the language of the Senate amendment, as proposed to be amended by the motion described in subparagraph (1) of this paragraph, not covered by any previous point of order which has been sustained.

(5) If any such motion to reject has been adopted, after final disposition of all points of order and motions to reject under the preceding provisions of this paragraph, the motion to recede and concur in the Senate amendment shall be considered as rejected, and further motions —

(A) to recede and concur in the Senate amendment with an amendment, where appropriate (but the offering of which is not in order unless copies of the language of the Senate amendment, as proposed to be amended by such motion, are then available on the floor when such motion is offered and is under consideration);

(B) to insist upon disagreement to the Senate amendment and request a further conference with the Senate; and

(C) to insist upon disagreement to the Senate amendment;

shall remain of high privilege for consideration by the House. If all such motions to reject are defeated, then, after the allocation of time for debate on the motion to recede and concur in the Senate amendment with an amendment as provided in clause 2(b) of this Rule, it shall be in order to move the previous question on such motion.

(c) If, on a division of a motion that the House recede and concur, with or without amendment, from its disagreement to any such Senate amendment as described in paragraph (a)(1) of this clause, the House agrees to recede, then, before debate is commenced on concurring in such Senate amendment, or on concurring therein with an amendment, it shall be in order to make and dispose of points of

(continued...)

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order and motions to reject with respect to such Senate amendment in accordance with applicable provisions of this clause and to effect final determination of these matters in accordance with such provisions.

RULES OF THE HOUSE OF REPRESENTATIVES Rule XXVIII(4) & XXVIII(5) (1988).

On October 16, 1986, Senator Simpson introduced another Senate Resolution, on behalf of Senators Roth, Domenici, and Chiles, modifying the earlier resolution. That resolution (S. Res. 509, 99th Cong., 2d Sess, 132 CONG. REC. S16,415 (daily ed. Oct. 16, 1986)) read much as does subsection (d) now.

Again, Senator Roth explained the resolution:

Mr. ROTH. Mr. President, on December 19, 1985, the Senate adopted Senate Resolution 286, which I authored. The purpose of Senate Resolution 286 was to extend the prohibition against extraneous matter in reconciliation bills and resolutions, popularly known as the Byrd rule after its distinguished author, to House language coming over to us either in a conference report or as a House amendment. But for Senate Resolution 286, the Senate would have been in a position of imposing a much needed discipline on itself while facing the prospect that the House could load down reconciliation bills and resolutions with all kinds of extraneous matter.

When the Senate considered Senate Resolution 286, I noted its similarity to rule XXVIII of the House rules by which the House seeks to protect itself against Senate provisions that would violate House rules on germaneness if offered there. Under Senate Resolution 286, when the point of order against extraneous matter is made and sustained, the offending language is deemed stricken and the Senate is permitted to consider the remainder "under the rules and practices of the Senate and applicable law."

In contrast, in the analogous situation under rule XXVIII of the House rules, after the offending language is deemed stricken, the opportunity to debate and to make further amendments is restricted under the rule and the practices of the House. In practical terms this means that one making a point of order does not have to overcome the burden that his or her success might unravel all the negotiations that led up to the conference report or amendment in question.

Therefore, on reflection, it is my considered opinion that Senate Resolution 286 needs to be amended so that successful points of order intended to surgically remove offending language, do not provide the occasion for unraveling the remaining language of conference reports which Senate conferees have worked out in conference.

The amendment to Senate Resolution 286 would preserve the original purpose of that resolution but would further refine the implementation, in the case of conference reports or House amendments, by limiting debate and, in the case of conference reports, by precluding amendments.

Conference reports as such are not subject to amendment. It would be highly inappropriate, therefore, to allow such language to become amendable once extraneous matter is removed by a successful point of order. Unfortu[na]tely, that result would occur without the adoption of the pending resolution because a conference report falls as a matter of parliamentary law when a successful point of order is made against it. And when the conference report falls, the last amendment or amendments are before this body subject to further debate and further action.

(continued...)

§ 313(e)

(e)⁶⁶ GENERAL POINT OF ORDER. — Notwithstanding any other

⁶⁵(...continued)

But this result is contrary to the special purpose of Senate Resolution 286. Such a result would make it more difficult to police our policy against extraneous matter. For if a Senator desiring to make a point of order against extraneous matter realizes that his success could cause the entire conference agreement to become amendable, then he would be inclined to go forward guided more by his position on the substance of the conference agreement than by his desire to enforce Senate policy on extraneous matter. That would be unfortunate.

The pending resolution would change that result. It would allow a successful point of order to excise the offending language in a conference report and would, in effect, treat the remaining language in the same way we treat conference reports, that is, as not subject to amendment.

House amendments, like conference reports, would be subject to the provision limiting debate. However, House amendments would be subject to further amendment since, unlike a conference report, they have not been agreed to by the Senate.

The resolution also treats the situation where the House has sent us an amendment containing extraneous matter and the Senate is considering a Senate amendment to the House amendment containing such extraneous matter. This kind of Senate amendment is included within the phrase “amendment between the Houses” in the pending resolution. This kind of Senate amendment to a House amendment would be subject to the same procedure as would the House amendment.

It should also be noted that more than one point of order may be made against a conference report or amendment between the Houses. In the case of Senate consideration of conference reports, it should be noted that a second point of order would be made against the resulting Senate amendment created by operation of this resolution upon a successful point of order being made. It cannot be made against the conference report because it is no longer before the body. That is why the phrase “Senate amendment derived from such conference report by operation of this resolution” is included in the resolution; such amendments are basically treated under the procedure for conference reports. This means they are not amendable.

In my opinion, the procedural refinements contained in the pending resolution are necessary to implement the original purpose of Senate Resolution 286 and should be adopted.

132 CONG. REC. S16,415 (daily ed. Oct. 16, 1986). The Senate then agreed to that resolution by a voice vote. *See id.*

⁶⁶ Section 10113(b)(1)(B) of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, 688 (Aug. 5, 1997), redesignated this subsection from subsection (d) to subsection (e). Section 13214(a)(8) of the Budget Enforcement Act added this subsection and section 13214(b)(2)(C) of the Budget Enforcement Act redesignated it as subsection (d). Section 13214(b)(2)(C) of the Budget Enforcement Act also redesignated what used to be subsection (d) as subsection (b). *See supra* pp. 8-24.

Section 10113(b)(1)(B) of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, 688 (Aug. 5, 1997), also struck what used to be subsection (e). Prior to enactment of
(continued...)

law or rule of the Senate, it shall be in order for a Senator to raise a single point of order that several provisions of a bill, resolution, amendment, motion, or conference report violate this section.⁶⁷ The Presiding Officer may sustain the point of order as to some or all of the provisions against which the Senator raised the point of order. If the Presiding Officer so sustains the point of order as to some of the provisions (including provisions of an amendment, motion, or conference report) against which the Senator raised the point of order, then only

⁶⁶(...continued)

the Balanced Budget Act of 1997, subsection (e) read:

(e) DETERMINATION OF LEVELS. — For purposes of this section, the levels of new budget authority, budget outlays, new entitlement authority, and revenue for a fiscal year shall be determined on the basis of estimates made by the Committee on the Budget of the Senate.

Since enactment of section 10113(a) the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, 687-88 (Aug. 5, 1997), section 312(a) addresses determinations by the Budget Committees.

⁶⁷ For examples of general points of order, see, *e.g.*, 139 CONG. REC. S7926, S7928 (daily ed. June 24, 1993) (Packwood point of order under subsection (b)(1)(A) against scattered committee-reported language regarding childhood immunizations and tax-return-preparer standards; sustained without vote as to most provisions challenged); 141 CONG. REC. S16,026, S16,049-53 (daily ed. Oct. 27, 1995) (Exon point of order under subsection (b)(1)(A) and other subparagraphs against 49 provisions; Domenici motion to waive for some of the provisions rejected 53-46; point of order sustained against 46 provisions, which were stricken; not sustained against 3 provisions, which remained in bill); *id.* at S17,315-27 (daily ed. Nov. 17, 1995) (Exon point of order under subsections (b)(1)(A) and (b)(1)(D) against sections 8001 and 13301 of the bill as proposed by the conference report on application of antitrust rule to provider-sponsored organizations (Medicare Plus) and exemption of physician office laboratories; Abraham motion to waive rejected 54-45; point of order sustained); 142 CONG. REC. S8423-24 (daily ed. July 22, 1996), *id.* at S8506-09 (daily ed. July 23, 1996) (Exon point of order under subsections (b)(1)(A), (b)(1)(C), and (b)(1)(D) raised July 22 against 25 provisions; Domenici motion to waive on 3 provisions for which the point of order applied under subsection (b)(1)(A) — on a family cap for welfare benefits rejected 42-57, on allowing delivery of social services through religious charities approved 67-32, on abstinence education programs rejected 52-46; point of order sustained July 23 against 23 provisions, which were stricken from the bill, not sustained against 1 provision, which remained in the bill, and waived for 1 provision, which remained in the bill); 143 CONG. REC. S6320 (daily ed. June 25, 1997) (Daschle point of order apparently under subsection (b)(1)(C) against sec. 5713 (“No Waiver Required for Provider Selectivity”), sec. 5833 (“Clarifying Provision Relating to Base Periods”), and sec. 5987 (repealing various provisions of education laws) of the Finance Committee-reported bill; no motion to waive; point of order sustained).

Even before enactment of subsection (e), the Senate frequently addressed extraneous matter in reconciliation bills in an omnibus fashion, usually by unanimous consent. *See, e.g.*, 127 CONG. REC. 13,209-11 [S6664-66] (1981); Senate Precedent PRL19810622-001 (June 22, 1981) (LEGIS, Rules database); ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE 624 (1992) (omnibus leadership amendment); 135 CONG. REC. S13,349-57 (daily ed. Oct. 13, 1989); ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE 624 (1992) (same); 136 CONG. REC. S15,771 (daily ed. Oct. 18, 1990); ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE 625 (1992) (two Metzbaum points of order considered en bloc, without objection). For debate on the omnibus leadership amendments, see *infra* note 69.

those provisions (including provisions of an amendment, motion, or conference report) against which the Presiding Officer sustains the point of order shall be deemed stricken pursuant to this section. Before the Presiding Officer rules on such a point of order, any Senator may move to waive such a point of order as it applies to some or all of the provisions against which the point of order was raised. Such a motion to waive is amendable in accordance with the rules and precedents of the Senate.⁶⁸ After the Presiding Officer rules on such a point of order, any Senator may appeal the ruling of the Presiding Officer on such a point of order as it applies to some or all of the provisions on which the Presiding Officer ruled.⁶⁹

⁶⁸ After disposition of any such general motion to waive, further motions to waive the Rule with regard to particular provisions are still in order. See 141 CONG. REC. S16,051-53 (daily ed. Oct. 27, 1995) (Exon point of order against 49 provisions; Domenici motion to waive for some of the provisions rejected 53-46). On October 27, 1995, after the Senate rejected a Domenici general motion to waive the Rule for several provisions against which Senator Exon had raised a general point of order, the following exchange took place:

The PRESIDING OFFICER. Will the Senator withhold for the Chair to state one problem?

Mr. DOLE. The Chair is not going to rule.

The PRESIDING OFFICER. No, but I wish to state that the Chair has been informed that each of these extraneous provisions is subject to a motion to waive. It would be incumbent on the Chair somehow to get an agreement with the Senate how to handle this. We have never handled such a massive list of extraneous provisions before.

....

Mr. DOLE. Mr. President, I think rather than take further time of the Senate tonight, we can knock all the other provisions out in conference with the Byrd rule, the very selective list sent up by the Democrats. We can take care of the other provisions in a conference. They are also subject to the Byrd rule. So, I think rather than do that here this evening, we will take care of those in conference. Let the Chair rule, en bloc.

The PRESIDING OFFICER. The Chair is prepared to rule pursuant to the general order provisions that were added to the Byrd rule in 1990. And the Chair, on the advice of the Parliamentarian, does rule that of the 49 items listed on extraneous provisions, 46 are well taken, 3 are not.

Id.

⁶⁹ The Senate has struggled with the nature of a reconciliation bill. On the one hand, reconciliation presents an opportunity to bundle together in one bill much of the Congress's deficit reduction plan. Committees more willingly agree to take steps to reduce the deficit in areas within their jurisdiction if they know that other committees will also share the sacrifice.

As well, reconciliation allows the Congress to make changes in entitlement law by changing the underlying law. Without reconciliation, discretionary programs and the Ap-

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propriations process would be forced to bear a disproportionate burden of deficit reduction.

On the other hand, reconciliation is one of the few exceptions to the general rule in the Senate of unlimited debate. It is extremely difficult to amend the reconciliation bill. The Senate should be somewhat circumspect about what it allows itself to consider under these kinds of restrictions.

This tension between the good purposes of the reconciliation bill and the strict procedures governing it has led to efforts to prohibit what has been come to be known as “extraneous” matter on the bill.

Origins of the Byrd Rule

For example, as early as June 22, 1981, the bipartisan leadership offered an amendment to strike extraneous matter from the bill. On that day, during consideration of S. 1377, the Omnibus Reconciliation Act of 1981, Majority Leader Baker offered the amendment for himself and Democratic Leader Robert C. Byrd, Budget Committee Chairman Domenici, and the Ranking Minority Member of that committee, Senator Hollings. The debate that day included the following:

Mr. BAKER. . . .

Aside from its salutary impact on the budget, reconciliation also has implications for the Senate as an institution. So long as a preponderance of its subject matter has a budgetary impact, a reconciliation bill could contain non-budgetary amendments to substantive law, and still be protected under the Budget Act. That notwithstanding, 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 rule XXII [regarding precedence of motions, including the procedures for cloture]. 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 distinguished minority leader, with the chairmen and ranking minority member of the Budget Committee, and with other committee chairmen 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 set forth last month in House Concurrent Resolution 115. What will remain in the bill is directly responsive to these instructions, has a budgetary savings impact, and plainly belongs in a reconciliation measure.

. . . .

Mr. ROBERT C. BYRD. Mr. President, if the reconciliation bill is adopted in its present form, it will do violence to the budget reform process. The reconciliation measure contains many items which are unrelated to budget savings. This development must be viewed in the most critical light, to preserve the principle of free and unfettered debate that is the hallmark of the U.S. Senate.

. . . .

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The ironclad parliamentary procedures governing the debate of the reconciliation measure should by no means be used to shield controversial or extraneous legislation from free debate. However, language is included in the reconciliation measure that would enact routine authorizations that have no budget impact whatsoever. In other cases, legislation is included that makes drastic alterations in current policy, yet, has no budgetary impact.

....

The reconciliation bill, if it includes such extraneous matters, would diminish the value of rule XXII. The Senate is unique in the way that it protects a minority, even a minority of one, with regard to debate and amendment. The procedures that drive the reconciliation bill set limits on the normally unfettered process of debate and amendment, because policy matters that do not have clear and direct budgetary consequences are supposed to remain outside its scope.

....

The amendment offered by the majority leader and me omits several non budget related authorizations which should also be stricken from this bill. The fact that they were not included in this amendment should not be construed as accepting their inclusion in the bill.

....

We have gone as far as we can go in this amendment, but we have not gone as far as we should go.

127 CONG. REC. S6664-66 (1981); Senate Precedent PRL19810622-001 (June 22, 1981) (LEGIS, Rules database). That day, the Senate agreed to the amendment by a voice vote. *See id.*

Adoption of the Byrd Rule

On October 24, 1985, the Senate debated and adopted the Byrd Rule as an amendment to the Consolidated Omnibus Budget Reconciliation Act of 1985. Excerpts from the debate that day follow:

Mr. BYRD. Mr. President, I send to the desk an amendment sponsored by myself, Mr. Dole, Mr. Chiles, Mr. Stevens, and Mr. Domenici.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from West Virginia [Mr. Byrd], for himself, Mr. Dole, Mr. Chiles, Mr. Stevens, and Mr. Domenici, proposes an amendment numbered 878:

At the appropriate place add the following: When the Senate is considering a reconciliation bill upon a point of order being made and sustained by any Senator, any part of the bill not in the jurisdiction of the reporting committee or extraneous to the instructions given that committee shall be deemed stricken from the bill and may not be offered as

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a floor amendment. No motion to waive germaneness on reconciliation bills shall be agreed to unless supported by three-fifths of the Senators duly chosen and sworn, which super majority shall be required to successfully appeal the ruling of the Chair on these matters.

Mr. BYRD. Mr. President, the amendment speaks for itself. I would just say that we are in the process now of seeing, if we have not seen earlier, the Pandora's box which has been opened to the abuse of the reconciliation process. That process was never meant to be used as it is being used. There are 122 items in the reconciliation bill that are extraneous. Henceforth, if the majority on a committee should wish to include in reconciliation recommendations to the Budget Committee any measure, no matter how controversial, it can be brought to the Senate under an ironclad built-in time agreement that limits debate, plus time on amendments and motions, to no more than 20 hours.

It was never foreseen that the [Congressional Budget] Act would be used in that way.

So if the budget reform process is going to be preserved, and more importantly if we are going to preserve the deliberative process in this U.S. Senate — which is the outstanding, unique element with respect to the U.S. Senate, action must be taken now to stop this abuse of the budget process.

....

Mr. President, the Senate is a deliberative body, and the reconciliation process is not a deliberative process. It [is] not a deliberative process. Such an extraordinary process, if abused, could destroy the Senate's deliberative nature. Senate committees are creatures of the Senate, and, as such, should not be in the position of dictating to the Senate as is being done here. By including mater[ial] not in their jurisdiction or matter which they choose not to report as separate legislation to avail themselves of the nondeliberative reconciliation process, Senate committees violate the compact which created both them and the reconciliation process.

....

The Senate must protect itself from this attack by its own committees, and, if necessary, the reconciliation bill will be amended to the extent necessary to achieve a preponderance of nonreconciliation matters and thus return this bill to a nonprivileged status.

Under the [Congressional Budget] Act, other committees are mandated to make recommendations to the Budget Committee — those committees make their recommendations to the Budget Committee, and the Budget Committee cannot add to or subtract from those instructions. It cannot amend the instructions. It cannot take from those instructions. It cannot add its own. It merely is to perform an administrative function — and that is, to put all such recommendations into a single package which, when sent to the floor and taken up, is covered by an overall 20-hour time limit.

Normal cloture is but an infinite speck on the horizon as compared to this kind of cloture. Under normal cloture, we have 100 hours. Each Senator has 1 hour, theoretically. But under the restrictions of the Budget Act, 20 hours is all there is on a reconciliation bill.

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We saw a moment ago how much time can be taken by one amendment. First there is the waiver. That is an hour. Then there is the amendment. That is 2 hours. Then there is an amendment to the amendment. That is another hour.

So, when all is boiled down, we have not only an abuse of the budget process by way of which other committees recommend to the Budget Committee any controversial bill they want — repeal of the Hobbs Act, acid rain, you name it — but also, when reconciliation comes to the floor, one or two Senators can offer an amendment, and consume at least 4 hours out of the 20 hours, if they want to take all the time that is available with regard to the waiver, the amendment, the amendment to the amendment, quorum calls, and so on.

So, Mr. President, I have offered this amendment, which is being cosponsored by the other Senators whose names have been stated, in order to correct this abuse in the future.

This provides that if a point of order is raised and upheld against extraneous matter in the reconciliation bill or matter that has been recommended by a committee wh[i]ch does not have jurisdiction over the subject matter, then all such matter that is in the bill will fall and is not subject to being offered as a further amendment thereto.

....

Mr. DOMENICI. . . .

As I read the amendment, I say to the distinguished minority leader, the second part of this amendment — “No motion to waive germaneness on reconciliation bills shall be agreed to unless,” — I understand that this applies to an amendment offered on the floor by a Senator. Is the Senator from New Mexico correct?

Mr. BYRD. The Senator is correct and I was incorrect.

....

Mr. DOMENICI. Mr. President, I wish to ask one further question of the principal sponsor and drafter of the amendment, the distinguished minority leader. I wonder if he intended to include in the second part of the amendment, “no motion to waive germaneness.” I wonder if he wanted that to be just germaneness, whereas before, when we were speaking of striking what a committee sent us, the Senator used two descriptions: He used germaneness and he used extraneous. It appears to me he might want, in the second part, “no motion to waive germaneness or extraneousness,” and then provide for the supermajority. Otherwise, you make extraneous material subject to a point of order, but the point of order could be waived by a simple majority.

Mr. BYRD. Mr. President, the distinguished Senator from New Mexico makes an excellent point. I agree with him and think it should be so strengthened and I modify my amendment so to accomplish that purpose.

....

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The PRESIDING OFFICER. The minority leader has a right to modify his amendment. If he will send it to the desk, the amendment will be so modified.

The amendment, No. 878, as modified, reads as follows:

At the appropriate place add the following:

When the Senate is considering a reconciliation bill, upon a point of order being made by any Senator and sustained, any part of the bill not in the jurisdiction of the reporting committee or extraneous to the instructions given that committee shall be deemed stricken from the bill and may not be offered as a floor amendment. No motion to waive germaneness on reconciliation bills shall be agreed to unless supported by three-fifths of the Senators duly chosen and sworn, which supermajority shall be required to successfully appeal the ruling of the Chair on these matters which include the points of order on extraneous matters and matter not properly reported from a committee.

. . . .

Mr. JOHNSTON. . . .

My question is, Can you appeal the ruling of the Chair, make a point of order, that a matter is not extraneous, or is germane, have the Chair rule against you and then reverse that on a simple majority vote, and overruling the ruling of the Chair? Or do you mean for that also to be three-fifths?

Mr. BYRD. Would the Senator ask that question again?

Mr. JOHNSTON. The Parliamentarian strikes from the bill a matter which is extraneous or which is nongermane. I am interested in the matter, and I make a point of order that the matter is not extraneous or is germane to the bill. The Parliamentarian, the Chair, rules against me. I appeal the ruling of the Chair. Can we thereby overturn the Chair by simple minority vote?

Mr. BYRD. No.

Mr. JOHNSTON. Can you challenge the ruling of the Chair at all? If so, how?

Mr. BYRD. The Senator can appeal the ruling of the Chair.

Mr. JOHNSTON. Appeal the ruling of the Chair, but what vote would that require?

Mr. BYRD. Three-fifths.

Mr. JOHNSTON. I think in view of the earlier answer that this motion to waive germaneness applies only to amendments offered on the floor — it would apply to both — and committee action?

Mr. BYRD. Yes.

(continued...)

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Mr. JOHNSTON. The automatic ruling out as well as an amendment offered on the floor?

Mr. BYRD. That is correct.

Mr. DOMENICI. I think the distinguished sponsor had answered previously that the supermajority requirement for a waiver applied only to committee reported language, but when we exchanged views here, he clearly indicated that it applies to waivers of the germaneness requirement or the extraneous language point of order or appeals to rulings of the Chair.

Mr. JOHNSTON. I wonder if this language is specific enough to apply to an appeal from the ruling of the Chair. It speaks in terms of a motion to waive germaneness of reconciliation. I think it might be rewritten a bit to make that clear.

Mr. BYRD. Mr. President, that is the intent of the sponsor. If I need to modify it to make it clear, I will do so.

....

Mr. McCLURE. I think the Senator from Louisiana has raised perhaps a good point because we have interchangeably talked here of the opportunity of a Member who does not like a ruling of the Chair being able to appeal the ruling of the Chair, and we have not clearly distinguished that from the opportunity to make a motion to suspend pursuant to the Budget Act. Maybe the answer to that question is to make certain that either an appeal from the ruling of the Chair or a motion with respect to germaneness should have to have a three-fifths vote.

I think that would make it clear because in our practice here earlier today it was not an appeal from the ruling of the Chair. As a matter of fact, it was not even a ruling of the Chair. But I think the Senator is very clear in his explanation that it is intended to cover both. Perhaps we ought to make a further statement in the amendment to make certain that it states that.

....

Mr. DOMENICI. Mr. President, I want to compliment the distinguished minority leader for the amendment. I think we have a suggestion for a further modification. We will talk with the Senator from Louisiana. We are working on it. I think there are a couple of words we ought to add.

....

Mr. DOMENICI. Mr. President, as I was saying, I commend the distinguished minority leader. Frankly, as the chairman of the Budget Committee, I am aware of how beneficial reconciliation can be to deficit reduction. But I am also totally aware of what can happen when we choose to use this kind of process to basically get around the Rules of the Senate as to limiting debate. Clearly, unlimited debate is a prerogative of the Senate that is greatly modified under this process.

I have grown to understand that this institution, while it has a lot of shortcomings, has some qualities that are rather exceptional. One of those is the fact it is an extremely free institution, that we are free to offer amendments,

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that we are free to take as much time as this U.S. Senate will let us to debate, and have those issues thoroughly understood both here and across this country.

I do not like to see committees put amendments on reconciliation that they have not been able to pass for years, or in the process of doing reconciliation just add untold numbers of amendments in order to be immune from unlimited debate.

....

Mr. EVANS. Mr. President, I commend the majority and minority leaders, and the chairman and ranking member of the Budget Committee for what they are attempting to do. I think it represents a major step forward in correcting an evil we fell into today which is being well recognized. . . .

. . . . As I understand the language, and the minority leader . . . can correct me if I am in error, do I understand correctly that the proposal made, if it had been in the law prior to today, would have meant that the textile bill as proposed would have been ruled out of order from this proposal?

Mr. BYRD. If a point of order were made against that bill with respect to germaneness and if the point of order were upheld, then it would take a three-fifths vote to overrule the Chair, under my amendment.

....

Mr. EVANS. I thank the minority leader.

Let me add briefly that this is a splendid move forward. If there had been any real progress made today, perhaps this is the best progress we have made for the long-term future of the Senate.

....

Mr. BYRD. . . .

The amendment (No. 878), as further modified, is as follows:

At the appropriate place add the following: "When the Senate is considering a reconciliation bill, upon a point of order being made by any Senator, and sustained, any part of the bill not in the jurisdiction of the reporting committee or extraneous to the instructions given that committee shall be deemed stricken from the bill and may not be offered as a floor amendment. This provision may be waived by three-fifths of the Senators duly chosen and sworn. No motion to waive germaneness on reconciliation bills shall be agreed to unless supported by three-fifths of the Senators duly chosen and sworn, which super majority shall be required to successfully appeal the ruling of the Chair on these matters which include the points of order on extraneous matters and matter not properly reported by a committee."

Mr. DOLE. Mr. President, I want to thank my colleague. I think the debate we have had on this amendment has been very helpful. As I look at the votes today, if it had been in effect now, this amendment would not be pending

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⁶⁹(...continued)

and that would be an improvement on the reconciliation bill. It was never intended as the answer for every amendment whether it is the Hobbs Act, abortion, prayer in school, or anything else. Ordinarily, you just wait for the reconciliation bill to come up every year and put anything on reconciliation. Obviously, that was not the purpose of the Budget Act.

131 CONG. REC. S14,032-37 (daily ed. Oct. 24, 1985). The Senate went on to adopt the Byrd amendment by a unanimous vote of 96-0. *Id.* at S14,038. (Senators Eagleton, Hatfield, Simon, and Stennis were necessarily absent. *Id.*)

A Stringent Application

On October 13, 1989, the Senate exercised a stringent application of the Byrd Rule and the spirit of the rule. Majority Leader Mitchell, on behalf of himself and Senators Dole, Sasser, Domenici, Byrd, Bentsen, and Packwood, offered a leadership amendment to strike extraneous provisions from the reconciliation bill (S. 1750). The amendment went further than the text of the Byrd Rule in its definition of extraneousness. The debate proceeded as follows:

Mr. MITCHELL. Mr. President, the purpose and effect of this amendment may be summed up in a single sentence. The purpose of the reconciliation process is to reduce the deficit. I repeat, the purpose of the reconciliation process is to reduce the deficit.

The amendment is lengthy, consisting of many pages, words, and numbers, but it has that fundamental objective. As I said when I addressed the Senate a week ago Thursday, the reconciliation process has in recent years gone awry. The special procedures included in the Budget Act as a way of facilitating deficit reduction items became a magnet to other legislation which is unrelated to the objective of reducing the deficit.

....

But it is time now to restore the reconciliation process to its original objective. That is what this amendment does. It asks sacrifice of every Senator. It asks discipline of every Senator. It asks that the regular legislative process be restored to the dignity it once had.

....

Mr. DOLE. . . .

....

The bottom line, as I see it, is discipline. Do we have the will to be responsible, to really reduce the Federal deficit or do we undercut the process by piling on important programs, taxes, and other legislative goodies that cost the taxpayers millions in the name of deficit reduction? Many of these provisions have never even had a hearing, never had a hearing, and not one witness from anyplace came in to testify for or against most of the provisions.

....

So [the Caucus] in [e]ffect directed the leader to have the staff put together something that went beyond the Byrd rule; something that extended — I guess you would call it an extension of the Byrd rule. . . .

(continued...)

⁶⁹(...continued)

....

I believe the proposal such as the rural health care package and others are meritorious in their own right and can withstand the test of the normal legislative process, and they should. Reducing the deficit is a priority; the deficit keeps climbing, and we have not had much success in getting it down. I am not certain everybody in America understands all the inside baseball that goes on around here, whether they understand reconciliation and conference committees and motions to strike, but I do believe the American people recognize responsibility when they see it, and tonight they are seeing responsibility in action.

That is the whole purpose of this amendment. The authors will oppose any effort to add back individual provisions, and I certainly urge our colleagues to support those efforts. That does not mean that a provision that some Senator might have — and I will speak to this side of the aisle — will not be picked up in another revenue bill or in a separate piece of legislation. We are not here to pass judgment on what Senators may have in mind as far as legislation is concerned. On this package, it is going to be a reconciliation bill in the finest sense of the word.

....

Mr. SASSER. Mr. President, with this amendment we are firing a shot, I believe, for fiscal responsibility, a shot that I think will be heard throughout the corridors of this Congress. . . . With this amendment, we are putting a deficit reduction bill back in the category of being a deficit reduction bill. It is an amendment that sets this body's priorities straight.

What we are seeking to do is to remove from this reconciliation vehicle, all extraneous matter, everything that does not either reduce Federal spending or raise Federal revenues will be stricken. That is the purpose of a reconciliation bill. Extraneous matters have been accumulating on these reconciliation bills now for a number of years, to the point that they are on the verge of sinking the reconciliation bill, and in so doing, defeating the budget process.

At some point in the not too distant future, if we continue down the path that we have been going, the Parliamentarian, on a point of order, will be forced to rule that a so-called reconcil[i]ation bill is not a reconcil[i]ation bill at all, that it is simply a vehicle for so much extraneous matter that deficit reduction has become a subordinate and wholly incident[a]l purpose for which a so-called reconciliation bill will be offered in the future. I do not say that to impugn the worth of many extraneous matters on this reconciliation bill.

....

Mr. DOMENICI. . . .

....

There are a few things about the U.S. Senate that people understand to be very, very significant. One is that you have the right, a rather broad right, the most significant right, among all the parliamentary bodies in the world to amend freely on the floor. The other is the right to debate and to filibuster.

(continued...)

⁶⁹(...continued)

When the Budget Act was drafted, the reconciliation procedure was crafted very carefully. It was intended to be used rather carefully because, in essence, Mr. President, it vitiated those two significant characteristics of this place that many have grown to respect and admire. Some think it is a marvelous institution of democracy, and if you lose those two qualities, you just about turn this U.S. Senate into the U.S. House of Representatives or other parliamentary body.

....

.... If the House Rules Committee clears a bill, it makes no difference to them whether it is on reconciliation or freestanding. They set the rules for debate in that institution then and there. We do not have that. The only Rules Committee we have is the floor of the U.S. Senate and a relatively new one called reconciliation.

Today we have met the enemy. As Pogo says "We met the enemy and he is us." We are going to use the process available under the Budget Act to strip from this bill not only those matters which the Parliamentarian would call extraneous but also those which were never intended because they are not pure deficit reduction matters. Thus, they are broader than the Byrd rule, irrelevant and extraneous, and we are going to strike them.

....

Mr. GORTON. . . .

First, we are doing what we ought to do. As the distinguished majority leader said earlier during the course of this debate, the purpose of a reconciliation bill is to reduce the budget deficit. . . .

Second, and equally important, by this course of action this evening we are not doing what we ought not to do. The distinguished minority leader pointed out that many of the extraneous elements in this resolution before this amendment include good legislation. From a brief review of that legislation, I know this Senator agrees with well over half of those pieces of substantive legislation. But all of them, whether this Senator agrees with them or not, share one feature in common: They have not been debated on the floor of the Senate and cannot be effectively debated as a part of a reconciliation bill. They cannot effectively be amended as a part of a reconciliation bill.

Thus, their inclusion, whether they are good, bad, or indifferent, would utterly destroy the very purpose of the Senate of the United States, as so eloquently described by the President pro tempore last Sunday. It is absolutely essential that, even with this legislation, we have the right to debate and the right to amend.

....

Mr. RUDMAN. . . .

I would say it was informally advanced beyond the Byrd rule by what we have now adopted. I guess I would call it an informal Dole-Mitchell-Sasser-Domenici-Packwood-Bentsen amendment which simply said: If it does not raise revenue or save money, we do not want it in here.

(continued...)

⁶⁹(...continued)

I wish the distinguished President pro tempore might offer that as a formal amendment. It would save us a lot of grief in the coming years.

Mr. President, there ought to be a lesson in what happened here today and yesterday and last week. . . .

. . . .

The net result of that, Mr. President, is what the distinguished President pro tempore said on Sunday about this body, which has the ability to debate and amend and consider legislation. I will tell my colleagues, if there is a great disappointment to this Senator in my 8 years here, it is that some of the most important issues we can discuss we never have the chance to debate and amend on this floor because we are totally immersed in this budget process from January to December; maybe this year shorter.

. . . .

Mr. BYRD. Mr. President, John Stuart Mill said, "On all great subjects, much remains to be said." This is a great subject, the reconciliation bill, and much remains to be said. . . .

I have seen the Senate many times when it gave me reason to be concerned about its future. I have also seen it on some occasions when it gave me reason to be proud. . . .

Tonight I think that we should pause to reflect upon this institution to which Gladstone, that great English statesman who lived during the long reign of Queen Victoria and who was Prime Minister of England four times, referred when he spoke of the U.S. Senate as "that remarkable body, the most remarkable of all the inventions of modern politics." That is what this institution is. . . .

. . . .

The U.S. Senate is the centerpiece of the great compromise. It is the masterpiece of the men who wrote the Constitution. . . . They were wise men, and they saw the need for a system of checks and balances, and the Senate was the balance wheel of that system. The Senate was given extraordinary powers. . . . But the basic cement that was the very foundation of this balance wheel were two in number, the right to debate and the right to amend. The other body may amend, but the other body may also issue a rule which, if agreed to, will confine amendments to one in number or two in number or three or none and direct that a certain Member will be the only Member who will offer that one amendment or those two amendments.

The House has the previous question, but not the Senate. The Senate allows unrestricted debate. We now and then restrict ourselves through the cloture motion, which first was created in 1917. But the right to debate and to amend is why we should be proud of this institution, why we should revere it.

The Constitution, in section 7 of article I, says that measures that raise revenues shall begin in the House of Representatives, but it also says that the Senate may propose or concur with amendments as on other bills. So there is a constitutional right reposed in the Senate to amend eve[n] revenue bills.

(continued...)

⁶⁹(...continued)

The Senate and the House have their tensions between them, as do the executive and the legislative, all these with the built-in tensions that the forefathers took great care to fashion in order to make this a system of checks and balances.

But in the reconciliation bill, we were about to inflict our own mortal wound, as Brutus did with the same dagger that he had plunged into Caesar's blood, bringing a bill of such magnitude here which contained scores of measures, on any one of which the Senate should have had the opportunity to debate at full length and to amend. What hidden pieces of legislation might come to the floor in a package of this size? What hidden legislation we might vote upon and come to regret at a later time?

This is an institution for the protection of minorities, an institution in which the minority can put a bridle on the majority for at least a while until the country can be awakened to the mistakes that might otherwise be visited upon the people. We should not view this Senate lightly, and never should be party to weakening this institution, with which we have been blessed.

Yes, there were limitations on debate in 1919 in the League of Nations debate, and in 1926 in the World Court debate, limitations through the cloture rule, but their price was substantial concessions by the majority.

The Senate is . . . the only forum in which minorities are protected against the sudden waves of passion that might sweep over the Nation.

A reconciliation bill is a super gag rule, the foremost ever created by this institution. Normal cloture is but an infinite speck on the distant horizon when compared with a reconciliation bill. Cloture may be invoked on any measure, motion, or matter. Sixteen Senators sign a cloture petition; parts of 3 days transpire before cloture is invoked; and when it is invoked, it is invoked on only one matter or one measure or one motion. Then there are 30 hours of debate. The provision is within that rule that that time may be extended by a three-fifths majority vote to whatever — 40 hours, 50, 75 or 100 hours. But not so with reconciliation. Reconciliation comes to the floor. There is no opportunity to debate a motion to proceed, whereas, under cloture, an attack can be made by the minority even on the motion to proceed. The minority ought to be zealous in protecting that right; the minority may be on this side of the aisle tomorrow, as it was yesterday.

Under reconciliation there is no motion provided to extend that time beyond 20 hours, but there is a motion that is nondebatable and can be invoked by only a majority of Members to reduce the time, and it can be reduced to 10 hours or to 5 hours or to 2 hours or to 1 hour without debate. Only a majority vote is needed to reduce it to no time:

Mr. President, I move that the time remaining on reconciliation be reduced to no time. What can you do about it? Weep. Reconciliation is one real beartrap.

And so it has been with sorrow that some of us have seen what has been happening on reconciliation. It is a process which has gotten out of hand and, if continued, it will undermine the deliberative nature of the institution.

It is a process by which committees of the Senate may dictate to the Senate. You take what we give you. There is not a thing you can do about it.

(continued...)

⁶⁹(...continued)

Oh, yes, you can strike. But you take what we give you.

And within those committees that determination is made by a majority. There is a 17-member committee, and 9 members of the committee can determine that.

Send that to the Budget Committee, and the Budget Committee has no alternative but to send it to the Senate, and here we are faced with a super, super, colossally super, gag rule.

So we ought to take the utmost care in handling this legislative weapon.

Mr. President, I have had my faith renewed in this institution in these recent hours. . . .

. . . .

Yes, there were important measures wrapped into this reconciliation bill. But I hope that this is the beginning of the end of the abuse of the reconciliation process. I hope that it will be a lesson learned by all of us that we might in the future take heed, and remember not to put that measure that is so dear to our hearts into the reconciliation package. . . .

Mr. President, I close by saying, as I began, that human ingenuity can always find a way to circumvent a process. And reconciliation is a process. It has been abused terribly. But I have regained my faith. We are told in the Scriptures:

Remove not the ancient landmark, which thy fathers have set.

The Constitution is the old landmark which they have set. And if we do not rise to the call of the moment and take a stand, take a strong stand against our own personal interests or against party interests, and stand for the Constitution, then how might we face our children and gran[d]children when they ask of us as Caesar did to the centurion,

How do we fare today?

And the centurion replied,

You will be victorious. As for myself, whether I live or die, tonight I shall have earned the praise of Caesar.

I not only compliment, but I also thank Members who have risen in this moment to do the responsible thing. We are going to look back on this day. So when you go with pride to meet the other body in conference, go with strong hearts, with confidence, and a determination that you are going to uphold the principles that our forefathers, men of this institution, stood for. Yours is an equal body — the Senate.

When Aaron Burr walked out of the Old Senate Chamber on March 4, 1805 after had sat in the Chair, and presided over the impeachment trial of Supreme Court Justice Samuel Chase — Burr had killed Alexander Hamilton in a duel at Weehawken, NJ. He sat in that chair as though nothing had ever

(continued...)

⁶⁹(...continued)

happened. Warrants had been issued in the State of New Jersey and New York for his arrest. But he presided over that trial with a degree of fairness that was commended by friend and foe alike.

As Burr bade goodbye to the Senate over which he has presided for 4 years, this is what he said. And I close with his words because I think they may well have been written for a moment like this. He said:

This House is a sanctuary; a citadel of law, of order, and of liberty, and it is here —

It is here —

in this exalted refuge — here, if anywhere, will resistance be made to the storms of political phrensy and the silent arts of corruption; and if the Constitution be destined ever to perish by the sacrilegious hands of the demagogue or the usurper, which God averts, its expiring agonies will be witnessed on this floor.

135 CONG. REC. S13,349-56 (daily ed. Oct. 13, 1989). The Senate went on to adopt the leadership amendment by a voice vote. *See id.* at S13,557.

Preemptive Editing of the Conference Report

In 1993, at the direction of the Majority Leader, the Parliamentarian and Budget Committee staff examined all proposed language of the conference agreement on the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993), causing the removal of any language that might violate the Rule. The Budget Committee Chairman explained the process:

Mr. President, first, with regard to the Byrd rule, we worked very hard and very faithfully over a period of well over a week in going over this bill to try to clarify and remove items that might be subject to the Byrd rule.

As the distinguished ranking member indicated, I think over 150 items were removed from the reconciliation instrument here, because it was felt that they would be subject to the Byrd rule. And we furnished our friends on the other side of the aisle, the distinguished staff colleagues on the Senate Budget Committee, copies of the draft language so that we would each know where we were, and there would be no surprises as we worked together to try to expunge the Byrd rule problems from the reconciliation conference report.

Our efforts here were not totally altruistic, because we knew that if there were items left in here that were subject to a valid challenge under the Byrd rule, that would simply, for all practical purposes, kill this reconciliation conference report; that we simply could not reconstitute a conference, come up with another conference report, and we could not send it back to the House of Representatives. So we were very careful and as true as we could be to the letter of the Byrd rule and to the intent of it.

I want to express my profound gratitude and appreciation to the Senate Parliamentarian, Mr. Alan Frumin and his staff, Kevin Kayes, Jim Weber, and Beth Smerko who worked long and hard with us day and night — I might say, Saturday and Sunday included — to try to expunge what could have conceivably been called Byrd rule problems here.

(continued...)

⁶⁹(...continued)

So I hope there is no suggestion here that there was not a conscientious effort to try to adhere as rigidly as possible to the Byrd rule, or adhere to it as rigidly as required by the rules of the Senate to the Byrd rule, because we worked very, very hard to do that.

I might say some of our House colleagues could not understand, and I do not blame them because there were a number of things that were pulled out of this budget reconciliation that had been voted on and passed by large majorities in both houses. But simply because they violated the Byrd rule, we had to go to the chairmen of the appropriate House committees and tell them they had to come out. They simply did not understand it. I think it made them perhaps have a little less high esteem for some of us here in the Senate, and we had to go to them and request they do it. In the final analysis, their leadership had to demand that some of these provisions subject to the Byrd rule come out.

So I think we have all worked very hard and in good faith on both sides of the aisle really to try to be true to the Byrd rule.

139 CONG. REC. S10,662 (daily ed. Aug. 6, 1993). For press accounts of the process, see Mary Jacoby, *Senate Parliamentarian Purges Budget Bill of Measures that Could Violate Byrd Rule*, ROLL CALL, Aug. 5, 1993, at 9; Richard E. Cohen, *Running Up Against the "Byrd Rule,"* 25 NAT'L J. 2151 (1993).

In the wake of that experience, the Chairman of the House Budget Committee criticized the Rule, arguing that it impedes legislation necessary to reduce the deficit. Chairman Sabo has introduced legislation to repeal the Rule. See Mary Jacoby, *Sabo Bill Would Kill Byrd Rule for Good*, ROLL CALL, July 25, 1994, at 12.

Omnibus Point of Order Followed by Editing in Conference

In the 1995 reconciliation bill, Senator Exon raised an omnibus point of order during floor consideration of the bill.

In reaction to the raising of that point of order, Republican conferees on the reconciliation bill set about purging Byrd Rule violations, much as the Democrats had done in 1993. See, e.g., Christopher Georges, *Byrd Procedural Rule Is Threatening to Derail Substantial Portions of the Republican Agenda*, WALL ST. J., Nov. 8, 1995, at A22. That process spawned the terminology described in the "Reliable Source" column in the *Washington Post* as follows:

Byrds of a Feather . . .

Today, class, as the House and Senate struggle to reconcile their budgets, let's learn about the Byrd Rule.

Zany Republican House Budget Committee staffers — anticipating that Senate Dems will skirt the rule that bars anything but taxing, spending and savings measures from reconciliation bills — have penned a cheeky glossary to boost morale and keep Dems on the defensive about a law written, named after and adroitly used by Sen. Robert Byrd (D-W.Va.) when Dems ruled the Capitol Hill roost.

Clearly the last thing the GOP wants during debate on the 2,000-page budget reconciliation bill (which may not pass till Christmas) is a Dem drive to save the Commerce Department or slow welfare overhaul. Thus the phrases: Big Byrd (an obvious rule violation), Byrd Brain (an expert in all rule nuances), Dodo Byrd (a gross rule misinterpretation) and Byrd Droppings

(continued...)

⁶⁹(...continued)
(deleted bill provisions resulting from a violation).

Actually, GOP senators already seem to know their stuff. Pete Domenici (R-N.M.) recently voiced “the greatest respect and some degree of sorrow” in nailing Byrd himself for breaking the rule. Byrd proposed an amendment to extend reconciliation debate from 20 hours to 50, a no-no because it dealt with procedure, not money.

Ann Gerhart & Annie Groer, *Byrds of a Feather*, WASH. POST, Nov. 8, 1995, at B3.

For further history and discussion of the Byrd Rule, see ROBERT KEITH, THE BUDGET RECONCILIATION PROCESS: THE SENATE’S “BYRD RULE” (Apr. 7, 2005) (Cong. Res. Serv. rep. no. RL30862).

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