

# Policy Memo: The Repeal Of Obamacare

## A STRATEGY TO HOLD SENATE REPUBLICANS ACCOUNTABLE IN THEIR PLEDGE TO REPEAL OBAMACARE USING BUDGET RECONCILIATION

### *Key Points*

- Following the Supreme Court's *NFIB v. Sebelius* decision in 2012, Senate Republican Leader Mitch McConnell instructed his staff to develop a plan to repeal ObamaCare using budget reconciliation. In his reelection campaign, McConnell promised to repeal ObamaCare "root and branch."
- Reconciliation allows the Senate to avoid a filibuster and pass legislation with only 51 votes. The Byrd Rule prohibits the inclusion of extraneous materials in a reconciliation bill by providing a surgical point of order in the Senate to strike any extraneous provisions.
- A week before the 2014 election, McConnell began to make excuses for why a Senate Republican majority would not be able to repeal ObamaCare in the next Congress.
- One month ago, Senate Republican leadership incorrectly publicized the Senate Parliamentarian's initial indication that a single sentence reconciliation repeal bill would not work to repeal ObamaCare.
- Two weeks ago, Senate Republican leadership conveyed their intent to forego using reconciliation to repeal ObamaCare this year and instead use the process to respond if the Supreme Court ruled, in *King v. Burwell*, that the IRS had illegally issued tax subsidies through the federal exchanges.
- Senate Republican leadership's excuses are setting the stage to allow them to break Republican promises to the American voters. The American people need to make their voices heard to make sure that Senate Republicans keep their promise.
- Neither the Parliamentarian's ruling nor the Byrd Rule should deter Republicans from using reconciliation to pass a repeal bill this year. Much of ObamaCare can still be repealed with a well-designed strategy, such as that outlined in this paper.
- Republicans should also take advantage of the fact that the budget act allows for passage of two separate budget resolutions and, with each budget resolution, a separate reconciliation bill or series of reconciliation bills. Therefore, the "either/or" choice of using reconciliation to either pass a repeal and replace bill or a *King* response, is a false choice. Republicans can pass both bills this year.
- The advantage of this strategy will prove Republicans can govern. It will prove Republicans have a better health care reform alternative than ObamaCare. It will prove that, contrary to repeated statements by the President, the President is not open to better health care reform ideas.

## INTRODUCTION

Senate Majority Leader Mitch McConnell (R-KY) has been hailed as a master of Senate procedure. In his 2014 reelection campaign, he promised to repeal ObamaCare, “root and branch” using budget reconciliation, an arcane procedure to pass legislation in the Senate with only 51 votes rather than the 60 votes needed to overcome a filibuster.<sup>1</sup> Following the Supreme Court’s 2012 decision in *NFIB v. Sebelius*<sup>2</sup> – a case in which the Court upheld ObamaCare’s individual mandate - McConnell told his staff: “Figure out how to repeal this through reconciliation. I want to do this.”<sup>3</sup> McConnell reportedly “ordered a repeal plan ready in the event the GOP took back control of the Senate in November [of 2012].”<sup>4</sup>

Less than one week before the 2014 elections, which saw Republicans pick up nine Senate seats and the Senate Majority for the first time since January 2007, McConnell retreated from his “root and branch” repeal promise, stating: “It would take 60 votes in the Senate. Nobody thinks we’re going to have 60 Republicans.”<sup>5</sup> Conservatives responded by accusing McConnell of “backpedaling” and “surrendering” on what has become *the* litmus test issue for Republicans over the past five years.

Several weeks ago, McConnell was dealt a setback when the Senate Parliamentarian gave a preliminary indication that McConnell’s plan to repeal ObamaCare with a one-sentence reconciliation bill would not work.<sup>6</sup> The Parliamentarian holds an appointed position in the Senate and it is his or her role is to advise Senators about the Senate Rules; laws affecting the operation of the Senate - such as budget reconciliation; and related precedents. While the advice of the Parliamentarian is often not binding, Senators typically follow the advice, in order to preserve stability and continuity in the Senate. This is particularly true when the advice involves interpretation of statutes affecting Senate procedure, as is the case with budget reconciliation.

The current Parliamentarian was appointed by Senate Democrats in 2012. Despite the Republicans’ new majority in 2015, Sen. McConnell allowed the Parliamentarian to keep her post under the Republican majority. The ruling, and McConnell’s decision to retain the Democrats’ choice as Parliamentarian are problematic for McConnell for two reasons. First, even though McConnell had 971 days between the Supreme Court’s June 2012 *NFIB* decision (when McConnell reportedly instructed his staff to get to work on a reconciliation repeal plan) and the Parliamentarian’s ruling in February 2015, McConnell has yet to develop a workable strategy to repeal ObamaCare using reconciliation. Second, McConnell’s decision to retain the Democrats’ Parliamentarian following a change in party control has backfired on him, the Senate Republican caucus, and their Republican colleagues in the House of Representatives.

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<sup>1</sup> “McConnell at CPAC: Repeal ObamaCare ‘root and branch’”, *Salon*, March 15, 2013. [http://www.salon.com/2013/03/15/mcconnell\\_at\\_cpac\\_repeal\\_obamacare\\_root\\_and\\_branch/](http://www.salon.com/2013/03/15/mcconnell_at_cpac_repeal_obamacare_root_and_branch/)

<sup>2</sup> *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012).

<sup>3</sup> “The Secret Republican Plan to Repeal ‘ObamaCare’”, March 27, 2013, *National Journal*. <http://www.nationaljournal.com/daily/the-secret-republican-plan-to-repeal-obamacare-20130327>

<sup>2</sup> *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012).

<sup>3</sup> “The Secret Republican Plan to Repeal ‘ObamaCare’”, March 27, 2013, *National Journal*. <http://www.nationaljournal.com/daily/the-secret-republican-plan-to-repeal-obamacare-20130327>

<sup>4</sup> *Id.*

<sup>5</sup> “ObamaCare Repeal Pressure building on Mitch McConnell, John Boehner,” *Washington Times*, November 2, 2014. <http://www.washingtontimes.com/news/2014/nov/2/obamacare-repeal-pressure-building-on-mitch-mcconn/?page=all>.

See also, Mitch McConnell Surrenders on ObamaCare Repeal, Senate Conservatives Fund, October 29, 2014. <http://www.senateconservatives.com/site/post/2916/mitch-mcconnell-surrenders-on-obamacare-repeal>

<sup>6</sup> “GOP Gets Bad News On ObamaCare Repeal,” *The Hill*, February 24, 2015. <http://thehill.com/homenews/senate/233582-gop-gets-bad-news-on-obamacare-repeal-plan>

McConnell's blunders have clearly put Senate and House Republicans in a difficult position. McConnell's tactical errors also raise several questions. Can Republicans, particularly in the Senate, deliver on the promise made to voters a few short months ago to repeal and replace ObamaCare? Can Senate Republicans show that they can "govern" by developing a workable alternative to ObamaCare? Can Senate Republicans demonstrate their resolve to move their alternative bill through the Senate this Congress, regardless of whether Obama will veto it? If the answer to any of these questions is "no," then Republicans run the risk of voter backlash in 2016, an election that presents an already difficult election map for Senate Republicans. It also means Republicans will be vulnerable to Democrats' accusations that Republicans have no plan, or worse that Republicans want to take the country back to a time where people could not obtain insurance due to a pre-existing condition.

This paper will examine the budget reconciliation process and the statutory limitations on reconciliation found in the so-called "Byrd Rule." It will outline a process to allow Republican Leadership to keep their promise to repeal and replace ObamaCare. Finally, it will explain how Congressional Republicans can: (1) take advantage of the Congressional Budget Act of 1974 ("Budget Act" or "CBA") to pass two rounds of spending reconciliation bills in a given year; (2) use reconciliation to pass a bill to repeal and replace ObamaCare; and (3) use reconciliation to respond to the Supreme Court's upcoming decision in *King v. Burwell*, a case challenging improper ObamaCare tax expenditures by the Internal Revenue Service ("IRS").

## **BUDGET RECONCILIATION & THE BYRD RULE**

Congress created the reconciliation process, which is found in Section 310 of the Budget Act.<sup>7</sup> The process provides the Senate with "an expedited means to change federal spending programs, revenues and public debt levels [under] parliamentary rules that substantially diminish the procedural rights normally enjoyed by Senators."<sup>8</sup> In the Senate, debate on reconciliation "bills [all] amendments... and debatable motions and appeals [including debate on the motion to proceed, is] limited to not more than 20 hours."<sup>9</sup> In other words, the reconciliation process permits the Senate majority to use reconciliation to overcome the threat of filibuster, including on the motion to proceed, when considering legislation that would bring federal spending, revenue and debt in line with the most recently adopted budget resolution. A reconciliation bill needs only a simple majority – 51 votes – to pass in the Senate.

There are, however, limitations to the reconciliation process – including what can be included in a reconciliation bill. One of the major limitations is found in the Byrd Rule. The Byrd Rule, named after former Senator Robert C. Byrd (D-WV), first came into being in 1981 by an agreement of Senators. It was eventually codified as Section 313 of the Budget Act. Under the Budget Act, a provision is "extraneous" and therefore not permitted in a reconciliation bill if the provision: (1) has no budgetary effect, meaning that it does not produce a change in spending (outlays) or revenue; (2) increases spending or reduces revenue if it was reported by a committee that did not achieve its reconciliation instructions; (3) is a provision that falls under the jurisdiction of a committee other than the committee that reported the provision; (4) produces only incidental savings compared to the overall non-budgetary effects of the provision; (5) causes a loss in revenue or increase

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<sup>7</sup> Public Law 93-344 (2 U.S.C. §§601-688). Reconciliation is permitted by Sec. 310 (2 U.S.C. §641).

<sup>8</sup> Gold, Martin B., *Senate Procedure and Practice*, Rowman & Littlefield Publishers, 2004. At 149.

<sup>9</sup> Riddick, Floyd M., revised and edited by Frumin, Alan S., "Riddick's Senate Procedure," U.S. Government Printing Office, Washington 1992. At 529, quoting Section 310(e)(2) of the Budget Act.

in spending in excess of savings outside of the current budget window; or (6) proposes changes in the Social Security program.

The Byrd Rule operates to limit the scope of reconciliation by creating a point of order, applicable only in the Senate, that allows any Senator to strike “extraneous” provisions from a reconciliation bill, resolution or conference report. The Byrd Rule is often called a “surgical point of order.” It does not kill the reconciliation measure, but rather works only to strike the offending extraneous provision from the measure.

In the past, the Senate Parliamentarian has stated that in order for a provision to avoid classification as extraneous under the Byrd Rule - thereby preventing its inclusion in a reconciliation bill - the entirety of the provision, including each section, paragraph or clause, must likewise not be extraneous. This imposes a high hurdle as relates to reconciliation and ObamaCare repeal. The Byrd Rule may operate to block the repeal of certain ObamaCare provisions in a reconciliation bill. In fact, the Byrd Rule may have been the basis upon which the Parliamentarian had indicated that McConnell’s single sentence reconciliation bill repealing ObamaCare was not likely to work under the Budget Act.

## **OBAMACARE REPEAL & RECONCILIATION**

One of the individuals regularly credited as being the first to suggest repealing ObamaCare using budget reconciliation is Keith Hennessy, a former White House Director of the National Economic Council for the final 15 months of the George W. Bush Administration. In February 2011, Hennessy wrote:

“Reconciliation is a procedural tool primarily used to change spending and revenues, deficits and debt. Repeal of the subsidies, the individual mandate, the insurance provisions, and the Medicaid expansions would, in each case, directly affect spending and revenues, so it would be a straight-up-the-middle use of reconciliation for deficit reduction.”<sup>10</sup>

Hennessy reasoned it unlikely that *all* of ObamaCare could be repeal using reconciliation. He wrote: “A few minor odds and ends could not be repealed in reconciliation” but dismissed these provisions as “strategically unimportant.” Given these comments, as well as the operation of Section 313 of the Budget Act, any person with knowledge about the Byrd Rule would conclude, as Hennessy did in 2011, that all of ObamaCare could not be repealed using reconciliation. Consequently, this logic would lead one to the conclusion that a single sentence repeal bill was unworkable given the constraints of the Byrd Rule.

The Madison Project’s (“Madison” or “MP”) staff recognized the limitations of reconciliation. In July 2012, we urged Republican leaders to begin to lay the groundwork for a bill to repeal as much of ObamaCare as possible using reconciliation. At the time, we advocated that leadership: (1) draft a reconciliation bill that would individually repeal each remaining section of ObamaCare; (2) submit this draft legislation to the Congressional Budget Office (“CBO”) and the Joint Committee on Taxation (“JCT”) to determine the budgetary impact of each provision (known as “scoring” in federal budget parlance); (3) present the draft to the Parliamentarian so the draft could be subjected to Byrd Rule scrutiny (called a “Byrd Bath”) to determine which provisions are extraneous and, therefore, could not be repealed using reconciliation; and (4) introduce a bill that contains all of the provisions that survived the

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<sup>10</sup> “How to Repeal ObamaCare,” Keith Hennessy, February 2, 2011. <http://keithhennessy.com/2011/02/02/how-to-repeal-obamacare/>

Byrd Bath, thus creating a benchmark defining the maximum scope of what provisions of ObamaCare could be repealed using reconciliation.

Despite the limitations of reconciliation, and the obvious prospect that a single sentence repeal bill would work, Senator McConnell, the so-called “master of Senate procedure” and his staff appear to have pursued an unworkable strategy – and they did so for nearly four years. They also ignored the strategy proposed by Madison Project that would have put Republicans in a position to put forward a reconciliation repeal bill as part of their first budget once they regained the majority. While Republicans have lost more than four years in crafting a reconciliation bill, it is not too late for Senate conservatives to do what leadership has, heretofore, been incapable of doing – and that is to craft an ObamaCare reconciliation repeal bill.

### **HAS THE SENATE ALREADY SURRENDERED ON RECONCILIATION & REPEAL?**

On March 11, 2015, Senate Majority Whip John Cornyn (R-TX) indicated the Senate Republican’s fiscal year 2016 budget would contain few details on reconciliation.<sup>11</sup> Cornyn hinted that Republicans were saving reconciliation to respond if the Supreme Court issued a decision in *King v. Burwell*, striking down subsidies in federal exchanges. Cornyn stated, “We’re going to try to keep it as broad as possible, so we have as much flexibility” as possible.<sup>12</sup> Cornyn indicated that the reconciliation “instructions will be broad enough that we can then make decisions after the *King* decision on how best to maximize our ability to use that. So it won’t be particularly specific or limited in the terms of the budget.”<sup>13</sup>

Cornyn’s comments should trouble conservatives for three reasons. First, it signals that Senate Republicans, led by Mitch McConnell, are not planning on keeping the promise to use reconciliation to repeal and replace ObamaCare this year. Second, it suggests that Senate Republicans are planning on using reconciliation to potentially throw ObamaCare a life-line, preserving aspects of the law should the Supreme Court rule against the Administration and the IRS that providing subsidies in federal exchanges was not allowed by law. Third, the current position of Senate Republicans demonstrates that they are either not knowledgeable about the tools at their disposal or they are unwilling to use them.

The Budget Act contemplates the possibility of *two* separate budget resolutions in a given fiscal year and allows for reconciliation in both budget resolutions. Section 3, subsection (4) of the Budget Act defines the term “concurrent resolution on the budget” to include a concurrent resolution under Section 301 of the Budget Act *as well as* “any other concurrent resolution revising the congressional budget... for a fiscal year as described in [S]ection 304.”<sup>14</sup>

When Congress has acted in recent years to adopt a budget, Congress has adopted a Section 301 budget resolution. Section 301(a) includes a list of items that must be included in the budget. Section 301(b) includes a list of items that “may” be included in the budget. As written, Section 301(b) makes the inclusion of these items in the budget permissive, not mandatory. Among the permissive provisions of a budget resolution, Section 301(b)(2) allows for “reconciliation directives described in Section 310.”<sup>15</sup> While rarely used in recent years, the Budget Act also allows Congress to adopt a second budget resolution in a given

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<sup>11</sup> “Republicans Mull Reconciliation, Await Supreme Court Ruling,” *Politico*, March 11, 2015.

<http://www.politico.com/story/2015/03/republicans-reconciliation-budget-supreme-court-obamacare-115996.html>

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See Budget Act, §3.

<sup>15</sup> Budget Act §301(b)(2).

fiscal year. The second resolution is permitted by Section 304 and is adopted for the purpose of “revis[ing] or reaffirm[ing] the [prior] concurrent resolution on the budget.”<sup>16</sup> The second budget resolution, the Section 304 resolution, is also a “concurrent resolution on the budget.” As a result, the Budget Act very clearly allows for two budget resolutions in a given year.

Section 310 of the Budget Act provides for reconciliation on matters involving spending,<sup>17</sup> revenue<sup>18</sup> and the statutory debt limit<sup>19</sup> – as separate legislation or legislation dealing with one or more of these topics in a single bill.<sup>20</sup> Section 310 of the Budget Act provides that each of these reconciliation topics can be addressed in a “concurrent resolution on the budget” – a definition that includes both a Section 301 and Section 304 budget resolution. As a result, the Budget Act clearly provides that Congress is **not** limited to **only one** set of reconciliation bills in a single year but can instead enact **two** sets of reconciliation bills in a given year provided that Congress adopts a second budget resolution.

Consequently, Congress need not, as Senator Cornyn suggests, forego using reconciliation to repeal ObamaCare in order to preserve the use of reconciliation to respond to a Supreme Court decision in the *King* case. Instead, Congress can, and should, use the reconciliation process twice in the 2016 fiscal year.

The first use of reconciliation, reconciliation under a Section 301 budget resolution, should be broad with the goal of repealing and replacing as much of ObamaCare as is permissible given the limits of reconciliation and the Byrd Rule. Republicans can use the first round of reconciliation to show what they are for and to pass legislation containing free market healthcare reforms that preserve the sanctity of the doctor-patient relationship and which put patients in control of their health care dollars.<sup>21</sup> Given President Obama’s vision of healthcare, there is a strong likelihood that he will veto this bill. If Obama does veto, he does so at the Democrats’ peril. A veto will destroy the Democrats’ narrative that Republicans have no plan and that they don’t care about the needs of American families. It will turn the tables to show that Obama and the Democrats are the obstructionists when it comes to meaningful reform.

After the Supreme Court rules in *King*, Congress can adopt a second budget resolution and include in that resolution the necessary reconciliation instructions needed to pass legislation to respond.<sup>22</sup> Some Republicans have suggested that the legislation passed in response to *King* should be bipartisan - enough to garner 67 votes to override a Presidential veto. If that were the goal, then reconciliation would be unnecessary. Any bill lacking 60 votes in the Senate to overcome a filibuster, thereby requiring use of reconciliation, will not magically obtain 67 votes a few weeks later to override a Presidential veto. Rather,

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<sup>16</sup> Budget Act §304(a).

<sup>17</sup> Budget Act §310(a)(1).

<sup>18</sup> Budget Act §310(a)(2).

<sup>19</sup> Budget Act §301(a)(3).

<sup>20</sup> Budget Act §301(a)(4).

<sup>21</sup> This process will require that Senate Republicans outwork the Senate Democrats. They will have to find out how much of ObamaCare can be repealed using reconciliation. This will require the drafting of a section-by-section repeal bill. Republicans will have to have the bill scored by CBO and JCT. It will require conducting numerous rounds of Byrd Baths in the Parliamentarian’s office to determine what is extraneous versus what can be repealed using reconciliation. The final product will have to again be scored by CBO and JCT so that the budget resolution can include the appropriate reconciliation instructions – by amount, as to outlays, budget authority and revenue. Congress will have to adopt a conference report for the budget. Congress will have to pass the reconciliation bill.

<sup>22</sup> The second reconciliation bill could include the following: (1) a King fix; (2) block grant Medicaid to states that have not adopted the Medicaid expansion (and for states that had adopted the expansion but subsequently repeal the state law that approved the expansion); (3) expand use of health savings accounts; (4) suspend the individual mandate – this could even be targeted for states that have not established a state or joint exchange (and for states that had created such an exchange but repeal the enacting legislation).

reconciliation is the tool of the Senate majority to pass legislation when there are less than 60 votes in the Senate.

The use of reconciliation does, necessarily, suggest the possibility that President Obama might veto the reconciliation bill enacted in response to *King*. Alternatively, it might force the President's hand, leaving him no choice but to sign the bill into law. The prospect of a second veto would harm more than 8 million Americans according to some estimates. The blame for this harm would lie solely with the President – first, because he created the problem and, second, because he refused to work with Republicans in Congress to find a solution. A second veto would deny assistance to people who, through no fault of their own, are hurting due to the Obama Administration's failure to faithfully implement the law. It would deny the American people the only constitutionally permitted response to address the crisis created by the Obama Administration's wanton disregard for the law.

## **CONCLUSION**

Budget reconciliation, a process created in the Congressional Budget Act, allows the Senate majority to bypass a filibuster in order to pass reconciliation legislation effecting changes in spending and revenue by a simple majority vote. There are limitations on the use of reconciliation and one set of limitations is found in the Byrd Rule, which prohibits the inclusion of "extraneous" measures in the reconciliation bill.

Senate Majority Leader Mitch McConnell had promised to repeal ObamaCare and instructed his staff to develop a plan to do so using reconciliation. McConnell and his staff have bungled this effort, as evidenced by the fact that McConnell had 971 days to develop a reconciliation bill to repeal ObamaCare, and still has yet to come up with a strategy or workable plan. More recently, McConnell and his Whip, John Cornyn, backed off promises to use reconciliation to repeal and replace ObamaCare using reconciliation. Instead, they have created a false narrative, suggesting that they cannot use reconciliation to try to enact broader ObamaCare repeal because they are saving reconciliation for other purposes.

The Budget Act does not require the "either/or" strategy put forth by Senate Republican Leadership. The Budget Act allows for two separate budget resolutions in a given fiscal year and allows for the use of reconciliation under both resolutions. Accordingly, Congress could adopt two resolutions this year and then could pass two separate reconciliation bills. The first bill could repeal and replace as much of ObamaCare as is possible under the Byrd Rule. The second, if necessary, could be used to respond to the Supreme Court's *King* decision. Congressional Republicans should use all of the tools in their toolbox to send as many reconciliation bills as possible to the President.