



To: Interested Parties
From: Heritage Action for America
Date: July 28, 2015
Subject: How to Repeal All of Obamacare with Reconciliation

Three years ago, Senate Republicans committed to using the budget reconciliation process to repeal Obamacare. As such, it is no surprise the Republican budget conference agreement "affirms the use of reconciliation for the sole purpose of repealing the President's job-killing health care law."

Today, Senate Majority Leader Mitch McConnell and Senator Mike Lee issued a joint press release pledging to, as McConnell said, "continue our effort to use reconciliation -- as the budget makes clear -- to fulfill the promise we made to our constituents." Earlier this month, McConnell sought to downplay expectations by saying the Senate would "consider using budget reconciliation for repealing as much of Obamacare as is reconcilable" but cautioned "there are certain rules that have to be applied to what is reconcilable." His comments raised concerns -- especially among conservative House members -- that the Senate is procedurally unable to place a reconciliation bill that fully repeals Obamacare on the president's desk.

Those concerns are overblown as a clear path forward exists.

The path starts in the House. House consideration of a reconciliation measure is relatively straightforward.¹ The House could draft, take up and pass a simple one-provision reconciliation bill that fully repeals Obamacare in a matter of days.

Overcoming the Byrd rule in the Senate. The reconciliation process in the Senate can be convoluted and based on subjective criteria. The Byrd rule, established in 1985 and made permanent in 1990, sets up a six part test to ensure 'extraneous' provisions are not added to a reconciliation measure.² However, a House-passed one-provision reconciliation bill that fully repeals Obamacare would withstand scrutiny.

Jurisdiction. If the Senate were to originate a reconciliation bill, there would likely be an intense debate with the parliamentarian over jurisdiction. The backroom debate could threaten to derail the bill before it ever came to the floor. However, consideration of a House-passed reconciliation bill would alleviate that problem. By acting first, the House can preempt one of the major Senate obstacles.

¹ It is worth noting that Section 310 of the Congressional Budget Act prohibits House adjournment for more than three days if action on reconciliation legislation hasn't been completed. However, on June 24, the House adopted H. Res. 333, which would waive that requirement "during the month of July, 2015."

² <http://fpc.state.gov/documents/organization/52675.pdf>

Deficit. Some have pointed to a recent score from the Congressional Budget Office (CBO) to suggest full repeal of Obamacare would increase the deficit and thus would not be permissible in the Senate. The Congressional Research Service explains that “Determinations of budgetary levels for purposes of enforcing the Byrd rule are made by the Senate Budget Committee.”³ In other words, for determining the budgetary impact of a reconciliation measure the CBO is not the official scorekeeper.

As the ultimate “scorekeeper” of the reconciliation bill, the Senate Budget Committee Chair should request an estimate from the CBO on the Medicare double count -- a budget gimmick that Republicans rightly condemned in 2009 and 2010. With that number in hand (at least \$550 billion over the ten-year budget window) the chairman could accurately assert that full repeal actually reduces the deficit absent the double count gimmick. The Congressional Research Service notes that there is precedent for not using the official CBO score:

Although the Budget Committee and each instructed committee receives cost estimates from CBO and the JCT, it is the Budget Committee’s responsibility and prerogative to assess committee compliance on the basis of spending or revenue levels. In measuring compliance, the Budget Committee sometimes will make adjustments to the estimates provided by CBO or the JCT. One such adjustment, which occurred in 1995, involved a change in the enactment date assumed by CBO, which shortened the time available in FY1996 for the sale of the Naval Petroleum Reserves.⁴

Extraneous. Based on the text of the Byrd rule itself and previous precedent, a one-provision reconciliation bill that fully repeals Obamacare would not include any extraneous provisions. There would be one “provision,” and it would clearly be budgetary in nature. Some have suggested that the parliamentarian would “look behind” the single provision in the reconciliation measure, but doing so would break with precedent.

Many forget that the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (i.e. welfare reform) was passed using reconciliation. That bill converted low-income assistance programs, including the Aid to Families with Dependent Children (AFDC), into a single block grant under the new Temporary Assistance for Needy Families (TANF) program.

AFDC, which contained provisions that had both budgetary and non-budgetary effects, was authorized under Title IV-A of the Social Security Act. The welfare reform bill repealed the entire program with one provision:

SEC. 103. BLOCK GRANTS TO STATES.

(a) IN GENERAL.—Part A of title IV (42 U.S.C. 601 et seq.) is amended—

(1) by striking all that precedes section 418 (as added by section 603(b)(2) of this Act) and inserting the following:

**“PART A—BLOCK GRANTS TO STATES FOR
TEMPORARY ASSISTANCE FOR NEEDY FAMILIES”**

³ <http://fpc.state.gov/documents/organization/52675.pdf>

⁴ <http://fpc.state.gov/documents/organization/52675.pdf>

When Senator James Exon (D-NE) submitted a list of extraneous provisions under the Byrd Rule on July 22, 1996, he did not include the section referenced above even though the section was extremely controversial at the time.⁵ There was clearly a budgetary consequence to the repeal of AFDC and therefore it did not violate the Byrd rule prohibiting reconciliation measures that do not change outlays or revenues even though repeal of individual elements under AFDC would have.

Based on past precedent, a simple, one-provision repeal of Obamacare will withstand any Byrd rule challenge on extraneous provisions.

The path forward is clear. Aside from finally acting on promises past and present, there is a compelling case to be made for moving forward, even though President Obama still wields the veto pen.⁶

First, forcing a presidential veto of a bill repealing Obamacare will cause every presidential candidate to answer a simple question: What would you have done? Without exception, every candidate serious about securing the Republican nomination will answer: "I would have signed it in a heartbeat."

Second, the process of drafting and passing the reconciliation measure through both chambers will serve as a trial run. More importantly, it will reaffirm the Republican-controlled Congress's commitment to sending a bill repealing Obamacare to the president's desk in 2017 — when it will hopefully be signed into law.

Third, every insurance company, hospital, industry group and boutique lobbying firm with a vested interest in Obamacare will know the law remains unsettled. Continued uncertainty ensures the law will not calcify.

Congress can begin to secure a historic conservative policy victory and put forward a compelling campaign narrative by using the reconciliation process to send repeal to the president's desk. There are no procedural excuses for not moving forward. The only reason for delay and inaction is an unwillingness to deliver on a five-year old promise to fully repeal Obamacare.

⁵ At least 23 Democrats voted against both the Senate-reported reconciliation bill and the final conference report, including the Democratic Leader, Senator Tom Daschle (D-SD) and the Finance Committee ranking member, Senator Patrick Moynihan (D-MA).

⁶ According to the Congressional Research Service, 20 reconciliation measures have been enacted into law since 1980 and three have been vetoed <http://fas.org/sgp/crs/misc/RL30458.pdf>