

Senate parliamentarian's ruling appears to expand budget reconciliation options for Democrats, but questions persist

In a potentially notable development, a spokesperson for Senate Majority Leader Charles Schumer, D-N.Y., indicated this week that the Senate parliamentarian apparently has ruled that congressional Democrats can leverage a little-known provision under section 304 of the Congressional Budget Act of 1974 to “revise” the fiscal year 2021 budget resolution – that is, the budget plan that Democrats used to tee up the filibuster-proof reconciliation process for consideration of President Biden’s \$1.9 trillion American Rescue Plan enacted last month – in a way that authorizes another round of reconciliation legislation pursuant to that same budget. But questions remain about how that process would work, whether Democrats can agree on using reconciliation to move the president’s new infrastructure plan, and what that plan should look like.

The news follows recent reports that Schumer’s office was in contact with the parliamentarian to better understand whether the provision – which has never been leveraged before in that way – could give Democrats more opportunities (that is, in addition to setting up another round of reconciliation pursuant to a budget resolution for upcoming fiscal year 2022) to advance legislation without GOP support.

“The parliamentarian has advised that a revised budget resolution may contain budget reconciliation instructions. This confirms the leader’s interpretation of the Budget Act and allows Democrats additional tools to improve the lives of Americans...,” the Schumer spokesperson said on April 5. “While no decisions have been made on a legislative path forward using section 304 and some parameters still need to be worked out, ...this key pathway is available to Democrats if needed.”

Questions...

As the week wore on, though, questions persisted about the specifics of the parliamentarian’s ruling – which has not been released publicly – and whether it included any constraints that may be relevant to Democrats’ use of section 304.

Others questioned whether, as a practical matter, Democrats even have time to set up more than one more reconciliation package this year.

“I think the appetite for another reconciliation bill is good. I think the appetite for a third reconciliation bill starts to diminish,” said Rep. Jackie Speier, D-Calif., said on April 7. “Regardless of what the parliamentarian has said, I think we recognize that we have a limited time and limited opportunity to achieve these goals.”

There is also the threshold issue that setting up another filibuster-proof reconciliation process – whether by revising the fiscal year 2021 budget through section 304 of the Budget Act or by adopting a new budget for fiscal year 2022 – will very likely require the support of all 50 Senate Democrats, given what has been steadfast GOP opposition. (If Republicans remain united, Democrats would need all 50 of their members, plus the tie-breaking vote of Vice President Kamala Harris to move forward.) And some moderate Democrats are already starting to express unease with a legislative approach that again bypasses Republicans.

“We will not solve our nation’s problems in one Congress if we seek only partisan solutions,” Sen. Joe Manchin, D-W.Va., said in an op-ed published April 7. “Instead of fixating on eliminating the filibuster or shortcutting the legislative process through budget reconciliation, it is time we do our jobs.”

Winning over Republicans?

If Democrats were to advance the president’s proposal without reconciliation protections, they would need to gain support from at least 10 Republicans to overcome the potential threat of a filibuster. But as Republican leaders ramped up their criticism of the president’s proposal this week, it is apparent that a bill that could win votes from any of them would have to look extremely different – in size, scope, and pay-fors – than what the president has proposed. (Biden’s plan calls for upwards of \$2 trillion in spending, some for traditional infrastructure and some for items Republicans have said look more like “a progressive wish list,” that would be offset by significant corporate tax hikes, such as an increase in the corporate tax rate, an overhaul of the rules affecting US multinationals, and an end to – or new limits on – various current-law tax incentives. For an overview of the president’s proposal, see *Tax News & Views*, Vol. 22, No. 16, Apr. 2, 2021. Also see separate coverage in this issue for details of a Treasury Department report that elaborates on some key elements of the plan.)

URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210402_1.html

Manchin has made clear that he would prefer a bipartisan approach to infrastructure investment – though he said this week that his Republican colleagues “can’t just be against everything.”

Another Democrat – Sen. Chris Coons of Delaware – indicated this week that he believes there could be support from some in the GOP for a more modest bill. Coons said during a Punchbowl online event April 7 that he thinks if the White House’s infrastructure proposal were to be broken up, then a bill directly targeting “hard infrastructure” (read: traditional roads and bridges) and costing “hundreds of billions of dollars” (versus more than \$2 trillion) would stand a chance of gaining bipartisan support. He went on to say that he has spoken to “several fairly seasoned senior Republicans” who are willing to spend up to \$1 trillion and raise some taxes to do so – but it appears the taxes in question are quite different from those President Biden has proposed.

“There are some Republicans saying they’re willing to raise the gas tax,” he said, adding that there are also some who are willing to impose a vehicle miles traveled (VMT) fee, as long as the revenue is dedicated to improving road infrastructure.

Both a gas tax increase and a VMT have been discussed for a number of years as potential ways to fund infrastructure improvements, but the administration and Democratic congressional leaders have not backed either.

Coons also raised the notion of scaling back both the spending and the tax sides of the legislation.

“Another option, quite frankly, is for us to not fully pay for it,” he said. “In the choice between raising taxes significantly, and simply looking at each other and saying, ‘We need a robust recovery,’ I think it’s more likely

that we will have a package that is not paid for, and that is less robust but still putting hundreds of billions of dollars into infrastructure,” he said. (Any discussions about not fully offsetting the cost of the package likely would have to take into a recent report from the Congressional Budget Office indicating that the federal budget deficit for the first six months of fiscal year 2021 was \$1.7 trillion.)

URL: <https://www.cbo.gov/system/files/2021-04/57018-MBR.pdf>

Coons, a longtime friend of the president, said he believes President Biden is willing to spend the next month or so negotiating on a possible bipartisan package but added that there is also “a real sense of urgency.”

“If we get to Memorial Day and there isn’t a clear ‘this group of Republicans is willing to work on this menu with these pay-fors and on this timeline,’ I think Democrats just roll it up into a big package and move it,” he said.

Divisions among Democrats

But even as Coons and some other Democrats raise the possibility of a smaller package and Republicans denounce the president’s proposal as far too broad and expensive and not directly focused on infrastructure improvements, there are Democrats from the left wing of the party who argue that the \$2 trillion plan doesn’t go nearly far enough. Rep. Alexandria Ocasio-Cortez, D-N.Y., this week sent out a fundraising e-mail urging supporters to back a \$10 trillion investment, and Rep. Pramila Jayapal, D-Wash., chair of the Congressional Progressive Caucus, called the administration’s plan “a welcome first step.” (President Biden is set to roll out a second large bill sometime this month, dubbed the American Families Plan, that is expected to focus on health care, child care, and education, paid for with tax increases on upper-income households.)

Even if Manchin eventually concedes that reconciliation is the necessary path forward for infrastructure legislation, he has signaled his own differences with the president’s blueprint – and he won’t be the only one in his party in a position to make demands. The 50-50 divide in the Senate, with Democrats holding the majority only because they can rely on Vice President Harris to cast a tie-breaking vote, means Majority Leader Schumer doesn’t have a single vote to spare if Republicans stand united in opposition.

Manchin this week said in a radio interview that he does not support the proposed corporate rate hike to 28 percent and believes the bill’s focus should be narrowed – and he made clear that he knows how much sway one senator holds right now.

“If I don’t vote to get on it, it’s not going anywhere,” Manchin told West Virginia Metro News host Hoppy Kercheval April 5. “So we’re going to have some leverage here. And it’s more than just me, Hoppy, there’s six or seven other Democrats that feel very strongly about this.”

Manchin said he thinks a corporate tax rate of 25 percent is “fair” but said the US has “to be competitive, and we’re not going to throw caution to the wind.”

President Biden, for his part, said during an April 7 Q&A session with reporters following remarks on his infrastructure plan that he is “wide open” to negotiating the corporate tax rate if lawmakers are willing to make up the revenue elsewhere.

“I’m willing to listen to that..., but we’ve got to pay for this. We’ve got to pay. There’s many other ways we can do it, but I’m willing to negotiate that,” he said.

Sen. Mark Warner, D-Va., meanwhile, expressed concerns about the administration’s process for advancing its tax-and-spending plan, telling reporters April 5 that he wants to have more input on the legislation stemming from the president’s proposal than he has had so far.

“I’ve had some outreach from the White House, but it was more heads-up than input into the development of the package. So I’ve already expressed some concerns,” said Warner, who didn’t share his specific issues but said was communicating them to the administration.

Over in the House, four Democrats from New York and New Jersey have already said they will not vote for a tax bill that does not repeal the \$10,000 cap on the state and local tax (SALT) deduction that was enacted in 2017’s Tax Cuts and Jobs Act (P.L. 115-97), and congressional watchers have their eyes on a variety of other members who could draw their own lines in the sand as the legislation moves through the chamber. (For details on some of the recent discussions around the SALT deduction, see *Tax News & Views*, Vol. 22, No. 16, Apr. 2, 2021.)

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Potential defections are a source of concern to House Democratic leaders since the Democrats’ margin of control in that chamber is nearly as tight as it is in the Senate. With the recent death of Rep. Alcee Hastings, D-Fla., Democrats now hold 218 seats in the chamber. Across the aisle, the GOP will hold 212 seats once Rep.-elect Julia Letlow of Louisiana is sworn in to Congress the week of April 12. (Letlow recently won a special election to fill the vacancy created by the death of her husband, Luke Letlow, who was elected to the House last November but died before taking office.)

These latest changes in the headcount mean that House Speaker Nancy Pelosi, D-Calif., will be able to lose just two of her own votes in that chamber if she wants to advance legislation without having to rely on Republican support.

More discussions to come...

President Biden released his infrastructure package just after Congress adjourned for its two-week spring recess. Debate among lawmakers in both chambers over the contents of his proposal and how to advance it likely will intensify once the legislative session resumes the week of April 12.

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