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The Lies and Reconciliation Commission



By Marty Kaplan

If Democrats decide to use the procedural move that Congress calls “reconciliation” to pass health care reform, get ready for a war of words. It will be won not by the biggest guns, but the biggest mouths. What’s true won’t matter; what’s loudest, what’s catchiest, will. That’s democracy in the age of newsertainment.

Start with the fact that few people know what reconciliation is. It sounds like something from family law, or how Nelson Mandela got South Africans to put apartheid behind them. Politicians love a blank slate; it’s a great opportunity to define — that is, poison — the debate. Hello, death panels.

The reason that reconciliation has come up now is the prior war over filibusters, supermajorities and cloture. (I didn’t say this would be simple.) Until 1975, a majority of the Senate — 51 votes — was what you needed to pass. Only two situations required more: votes of two-thirds specified in the Constitution (like ratifying treaties), and votes that the Senate’s internal rules — which senators can make and change as they want — peg to a number more than 51.

For years, one of those rules — Rule 22 — said that Senators can speak as long as they want, and sometimes talk a bill to death (filibuster), and that the only way to close down a filibuster (cloture) was to round up 67 votes, which was really, really hard. In the 1960s, the filibuster was used to block civil rights legislation. In the 1970s, Alabama Republican Senator Jim Allen used it to deep-six whatever he didn’t like — a federal consumer protection agency, a Legal Services Corporation, electoral college reform.

But some deft and tense maneuvering in 1975 by an uppity senator named Walter Mondale led to a change in Rule 22, lowering cloture to three-fifths: 60 votes, a supermajority. (Mondale says that “the procedural exchanges grew so dense that at one point we were voting on the following: A motion to table a motion to reconsider a vote to table an appeal of a ruling that a point of order was not in order against a motion to table an other point of order against a motion to bring to a vote the motion to call up the resolution.”)

Both Democrats and Republicans used filibusters. But starting in 2007 their number spiked, doubling, when Senate Republican leader Mitch McConnell began using it, like Jim Allen, to bottle up anything he didn't like. It's basically been that way ever since. Worse, no one has to pull a Jimmy Stewart/*Mr. Smith* all-nighter any more; the mere threat of a filibuster is enough to make the other side cave, unless they actually have a hard count of 60 votes, which is almost never. You can't get a bill to the floor for an up-or-down majority vote without a preceding procedural vote, and if you filibuster the procedural vote — which is what Republicans are now doing day in and day out — then doing anything at all requires a supermajority.

Democrats have nothing like the party discipline that Republicans do, so the “filibuster-proof supermajority” that the press decided they got in the 2008 election was never real. Senators like Joe Lieberman and Ben Nelson could be counted on for nothing, especially cloture votes. So the Republican strategy worked. Sixty became the new majority. If the media effectively nailed Republicans for hyperpartisan obstructionism, I missed it.

Enter reconciliation. Every year, Congress passes a budget resolution. Every year, Congress passes laws that break the budget. Reconciliation is the policing process Congress uses to force itself to stay on budget. It instructs congressional committees to change current laws until they square with the budget's revenue, spending and debt-limit levels. And because the Senate set things up this way, votes on reconciliation can't be filibustered. You don't have to climb Mitch McConnell's mountain to pass it; it takes only a simple majority.

Over the years, reconciliation has been used to end-run filibusters on all kinds of legislation. Clinton used it to pass welfare reform in 1996. George W. Bush used it to ram through his tax cuts in 2001 and 2003. Both parties have used it to pass laws that couldn't make it to an up-or-down majority vote any other way.

Now Republicans are howling that using reconciliation to pass health care is an unprecedented, dastardly abuse. But as Sara Rosenbaum, chair of George Washington University's Department of Health Policy Reconciliation, told NPR, here are some of the health care reforms that were passed via reconciliation: COBRA, the law that lets you keep your employer's insurance, though at a steep price, after you've left a job; SCHIP, the children's health insurance program; Medicare expansions like cancer screenings, protections for nursing home patients, and the hospice benefit. It's harder to find past health policy changes that weren't done through reconciliation, than ones that were.

But in this debate, the facts won't matter. Republicans are calling reconciliation “the nuclear option,” and are threatening to stop it with a tsunami of diabolically clever amendments that will drown Democrats in procedural hell and force them to vote for terrorism and against apple pie.

But as a former Senate parliamentarian points out, reconciliation is designed to be a 20-hour process, and the person who gets to decide whether Republican procedural tactics are out of order is the vice president, in this case Joe Biden, whom the Constitution makes the president of the Senate.

It's conceivable that reconciliation will result in the passage of health care reform. But whether the public will think of that as a triumph of legislative skill, or a commie coup by death panel-y Democrats, will depend on who wins the battle of sound bites, not who has history on their side.

This is my column from The Jewish Journal of Greater Los Angeles. You can read more of my columns here, and e-mail me there if you'd like.

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