

# How to Win Protections for Immigrants in Reconciliation

Advisory Memorandum  
November 5, 2021



Senate Democrats have the power under existing rules to protect millions of immigrants. The Presiding Officer of the Senate — which typically is the Vice President, but could be the Senate President pro tempore or a designee — can rule that providing a pathway to citizenship in the reconciliation bill **does not violate the Byrd Rule**, despite the parliamentarian's contrary and non-binding advice. While this is not an authority regularly invoked, this memo sets forth the compelling political reasons for why — and the pathway under *existing* procedural rules for how to do so.

No precedent in the Senate would stop Democrats from exercising the power to disregard the parliamentarian's advisory opinion. The question before the Senate — whether a pathway to citizenship may be included in a reconciliation bill — must ultimately be adjudicated by members of the Senate, not the parliamentarian. On the specific question of the authority of the Presiding Officer to disregard the advice of the Parliamentarian, *only 41 Senators are needed* for the measure to succeed. *But note:* Once the measure succeeds, Democrats must remain united with a simple majority as Republicans try to amend the reconciliation bill.

# Contents

<b>The Pathway to Citizenship in Five Steps</b>	<b>1</b>
<b>The Imperative to Act</b>	<b>1</b>
<b>The Presiding Officer’s Power in Reconciliation</b>	<b>2</b>
The Vice President’s Role in Reconciliation	2
The Need for a United Democratic Front	4
Questions and Answers	5
Q. Is the Senate bound by the parliamentarian’s advisory opinion?	5
Q. How many votes would this take?	6
Q. If the Presiding Officer (the Vice President or the President pro tempore) finds that including a pathway to citizenship in reconciliation does not violate Senate rules, how many votes would it take to overturn that ruling?	6
Q. Who is the Presiding Officer of the Senate?	6
Q. Has the parliamentarian’s advice always been followed?	6
Q. But didn’t the parliamentarian get it right?	7
Q. Some Democrats worry that Republicans would exercise a “nuclear option” and throw out existing rules requiring a supermajority to overturn the Chair. Is this a real concern?	7
Q. What’s to stop Republicans from stripping citizenship through an amendment with 51 votes?	7
Q. How many times can Senators raise a point of order on the immigration provision?	8
Talking Points	8
<b>Procedural Roadmap</b>	<b>11</b>
Summary	11
The Pathway Begins in the House	12
Navigating the Senate Rules	14
<b>Addressing the “Nuclear option” Concerns</b>	<b>15</b>
Leadership’s Hollow Threat	15
Step-by-Step Guide to GOP Nuking Rules	16
Step-by-Step Guide to GOP Offering Amendment to Strike	17
Bottom Line	17
<b>Support from Key Progressives</b>	<b>18</b>

## I. The Pathway to Citizenship in Five Steps

This memo sets forth Democrats' power under existing Senate rules to create a pathway to citizenship through a reconciliation bill. There are several points to discuss on each of the steps below, but the process will basically come down to five steps:

1. Pass Democrats' immigration language in the House bill.
2. Make sure the immigration language is in the final section of the House bill to prevent future issues with amendments, if they are needed.
3. Coordinate Senate Democrats to defeat every anti-immigrant amendment during vote-a-rama.
4. When Republicans (or moderate Democrats) raise a point of order to exclude the immigration language, the Presiding Officer rules that the immigration language is allowed.
5. Sustain the Presiding Officer's ruling with 41 votes in the Senate.

## II. The Imperative to Act

Susie Lujano is a Deferred Action for Childhood Arrivals (DACA) recipient who grew up knowing that her family could be separated. As Susie recently [wrote in an op-ed](#):

[S]tability has rarely, if ever, been something I've known. Shuffled from court to court, my future and the ability to continue building my life with my family in the US have always felt contingent on whether DACA will be here tomorrow. . . . [A]s I've come to learn, stability for me cannot be possible without stability for my entire family. Even if DACA were to remain in place, it continues to exclude people like my parents, leaving them vulnerable to the threat of deportation.

Earlier this year, Susie had the chance to meet with Vice President Kamala Harris at the White House. When Susie shared that she was pregnant with her first child, the Vice President made a commitment to Susie: **“Vice President Harris looked in my eyes and promised she would fight for me. She would fight**

**for my undocumented parents. And she would fight to keep my family together.”**

Now is the moment for Vice President Harris to deliver on that promise. Senate Democrats can provide a pathway to citizenship in the reconciliation bill. They just need Vice President Harris — or the Presiding Officer — to rule that the provision is appropriate for a reconciliation bill, regardless of the Senate parliamentarian’s opinion.

Democrats have the chance to provide stability for families like Susie’s. They must use the Senate Rules to their full advantage.

### III. The Presiding Officer’s Power in Reconciliation

#### A. The Presiding Officer

Under the Constitution, the Vice President is the Presiding Officer of the Senate. Federal statutes also refer to the Presiding Officer as the “Chair.” In the Vice President’s absence, the Senate President pro tempore serves as Presiding Officer or can designate another Senator to fill this role.<sup>1</sup>

This memo uses the term “Presiding Officer” unless directly quoting a statute or rule that uses the term “Chair.” To clarify, the Presiding Officer would likely be Vice President Harris on the day of the reconciliation vote, but it also could be Senator Patrick Leahy (the Senate President pro tempore), or another Democratic Senator designated by him, in Vice President Harris’s absence.

#### B. The Role of the Presiding Officer

The Presiding Officer has the power to rule on a “Byrd” point of order under federal statute. 2 U.S.C. § 644. He or she is not bound by the Senate parliamentarian’s advisory opinion. The Presiding Officer can rule that the immigration language passes the Byrd rule and should remain in the bill.

Senators can try to reverse the decision of the Presiding Officer, but they would need 60 votes: “A motion to waive the Byrd rule, or to sustain an appeal of the ruling

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<sup>1</sup> See Senate Rule I (“In the absence of the Vice President, the Senate shall choose a President pro tempore, who shall hold the office and execute the duties thereof during the pleasure of the Senate and until another is elected or his term of office as a Senator expires. . . . The President pro tempore shall have the right to name in open Senate or, if absent, in writing, a Senator to perform the duties of the Chair, . . . and the Senator so named shall have the right to name in open session, or, if absent, in writing, a Senator to perform the duties of the Chair.”)

of the chair on a point of order raised under the Byrd rule, requires the affirmative vote of three-fifths of the membership (60 Senators if no seats are vacant).”

[Congressional Research Service](#), “The Budget Reconciliation Process: The Senate’s ‘Byrd Rule.’”

The Presiding Officer’s authority in this situation is widely acknowledged. Republicans have had their own disagreements with the parliamentarian in the past. Sen. Ted Cruz [previously stated](#): “You don’t have to override the parliamentarian or get a new parliamentarian. Under the statute, it is the Vice President who rules. The parliamentarian advises on that question.”

Congressional Research Service: “A point of order may be raised on the floor against legislation that is alleged to violate these rules at the time it is being considered. In general, the presiding officer may rule on whether the point of order is well taken and, thus, whether the measure, provision, or amendment is in order.” ([Source](#))

Congressional Research Service: “As a staff official, neither parliamentarian is empowered to make decisions that are binding on the House or Senate. The parliamentarians and their deputies/assistants only offer advice that the presiding Representative or Senator may accept or reject.” ([Source](#))

CQ Roll Call: “In the past, presiding officers have almost always followed the advice of the parliamentarian. But the authority to make the call rests with the presiding officer.” ([Source](#))

Coalition on Human Needs: Vice President Harris could rule that a provision (for example, raising the minimum wage) was allowable, and it would take 60 votes to overrule that decision. By the infrequency of this move, it is clear it would not be done lightly. ([Source](#))

Once the Presiding Officer makes his or her determination, the 60-vote threshold to overrule is well-established. The [Congressional Research Service](#) notes that “many points of order under the CBA of 1974 require a three-fifths vote of the membership to waive.” *See also* Martin B. Gold, *Senate Procedure & Practice* (4th Ed. 2018) at 159 (“most points of order created by the Budget Act require sixty votes to overturn the presiding officer on appeal”). For example, a point of order in 1993 [claimed](#) a provision in a reconciliation bill was extraneous because its budgetary impact was merely incidental. The Presiding Officer agreed. After an appeal to the Senate, the Presiding Officer’s decision was upheld by a vote of 43 YEAs (to overrule) and 57 NOs (to sustain).

The [parliamentarian's advisory opinion](#) actually supports the idea that a contested provision can remain in the reconciliation bill and go to the Senate for a vote. In her opinion, she references the 2005 immigration provisions in a reconciliation bill, which Democrats cited as precedent for including immigration legalization in a reconciliation bill. The parliamentarian noted there was no point of order or ruling on these provisions. In other words, provisions that were potentially “extraneous” remained in the bill for the Senators’ consideration. The law contemplates that Senators will make their own determinations and use one of the many processes available to them to modify bills (such as points of order and the amendment process).

The so-called “Byrd Lists” are another reminder that the parliamentarian’s opinions are **advisory**; they are part of a non-binding analysis that takes place before the Senate votes. Byrd Lists — a set of provisions flagged by the Senate Budget Committee as potentially running afoul of the Byrd Rule — are merely advisory in nature, just like the parliamentarian’s advice, and they do not bind the Presiding Officer in any way. *See* [2 U.S.C. 644\(c\)](#) (requiring Senate Budget Committee to issue “for the record” a list of potentially “extraneous” provisions); [Congressional Research Service, The Budget Reconciliation Process: The Senate’s “Byrd Rule,” May 4, 2021, pg. 4](#). (“When a reconciliation measure, or a conference report thereon, is considered, the Senate Budget Committee must submit for the record a list of potentially extraneous matter included therein. This list is **advisory**, however, and does not bind the chair in ruling on points of order.” (emphasis added)).

There is ample precedent for the Presiding Officer disregarding the parliamentarian’s advice. In fact, this is the method Congress followed in the last three most recent instances that it declined to follow the parliamentarian’s findings.

- The most recent instance of disregarding the Parliamentarian likely occurred in 1975. This instance, and the two before, involved the Vice President singularly disregarding the Parliamentarian’s advisory opinion.
- The Vice President disregarded the parliamentarian’s ruling three times in the 1960s and 1970s. ([Source](#))
- “[Vice President Nelson] Rockefeller did it in 1975 and according to parliamentarian Robert Dove, Vice President [Hubert] Humphrey did [it] routinely.” ([Source](#)) “In making his controversial ruling, Rockefeller had notified the Senate parliamentarian that he was making the decision on his own, contrary to the parliamentarian’s advice.” (Senate Historical Office’s profile on [Nelson Aldrich Rockefeller, 41st Vice President \(1974-1977\)](#)). A

primary source from former Parliamentarian Dove outlines all three instances in detail. ([Source](#))

### C. The Need for a United Democratic Front

The Presiding Officer cannot go into this fight alone — whether it's Vice President Harris or a Democratic Senator filling the crucial role. The Presiding Officer will need all Democratic Senators to back this effort.

Before bringing the Reconciliation Bill to the floor for a vote, Senate leadership should agree on a provision for the pathway to citizenship. Once on the Senate floor, this will generate an objection (a “point of order”) from a Republican Senator (or perhaps a moderate Democrat) on the ground that the legalization provisions are “extraneous” because (following the parliamentarian’s advisory opinion) they will argue they have an “incidental budgetary impact.”

The Presiding Officer could then rule against the Republican Senator (and in effect disregard the parliamentarian’s advisory ruling), saying that the legalization provisions are actually not “extraneous,” and in fact comply with the Byrd Rule. 2 U.S.C.A. § 644(a) requires that a point of order be sustained by the Presiding Officer.

The Republican Senator would then appeal the decision. The Senate could overrule the Presiding Officer, but only if there are 60 votes supporting the appeal.

Two things to note here:

1. Whether it's the Vice President or the Senate President pro tempore (now Senator Leahy), the Presiding Officer can make a ruling on the objection unilaterally, without needing to find 51 votes. This goes to the point made below, which [notes](#) that the parliamentarian “is not empowered to make decisions that are binding on the House or Senate”; “parliamentarians . . . only offer *advice* that the presiding . . . Senator may accept or reject. (emphasis added).”
2. The lynchpin to this strategy is: (a) that Senate leadership agrees now — before the Reconciliation bill is brought to the floor — to include a legalization provision; and (b) the White House commits that Vice President Harris (or whoever is Presiding Officer during the vote) will rule in favor of retaining the legalization provision. (The [White House recently released a budgetary report](#) that could offer a rationale for that ruling. The case is also made in an August [Roll Call piece](#) from Marshall Fitz.)

## D. Questions and Answers

### **Q. Is the Senate bound by the parliamentarian's advisory opinion?**

A. No. The Presiding Officer of the Senate rules on points of order. The parliamentarian's role is simply to offer non-binding advice. The Presiding Officer is the Vice President when present; in her absence, it is the Senate's President pro tempore (Senator Patrick Leahy) or a Senator designated by the President pro tempore.

Ultimately, it is the Senate that has the authority to advance legislation, regardless of whether the parliamentarian has concerns. While there are various mechanisms to effectively decline to follow the parliamentarian's [advisory opinion](#), the simplest entails the Presiding Officer rendering an independent ruling contrary to the parliamentarian's advice.

This is the decision-making structure established by the Congressional Budget Act ("CBA") at 2 U.S.C.A. § 644(a) (stating that an objection that a proposed provision is "extraneous" requires that "the point of order is sustained by the Chair" [namely, the Presiding Officer]). Indeed, there is no statute that authorizes the parliamentarian to issue opinions that would bind the Senate to any particular course of action.

### **Q. How many votes would getting the pathway to citizenship language included in the bill take?**

A. One. It is up to the Senate's Presiding Officer. If a bill that includes a pathway to citizenship reaches the floor, we can assume that a Senator will raise a challenge to its inclusion under the Byrd Rule. Regardless of what the parliamentarian recommends, the Presiding Officer can make an independent determination that including an immigration provision such as citizenship in reconciliation does not violate Senate rules.

### **Q. If the Presiding Officer (the Vice President, President pro tempore, or designee) finds that including a pathway to citizenship in reconciliation does *not* violate Senate rules and should be kept in the bill, how many votes would it take to overturn that ruling and kick the language out of the bill?**

A. 60. To overcome the Presiding Officer's decision, 60 Senators would have to vote to overturn it.

These two steps — the ruling by the Presiding Officer and the failure to overrule it — are only possible if the language for the pathway to citizenship is included in the bill that reaches the Senate floor. If the language is not included by the House, it would require a more challenging affirmative vote by the Senators to first insert the pathway before these two steps can be taken, as described next.

**Q. What happens if the House bill does not include the immigration provision?**

A. If the House bill does not include the immigration provision, this will require a more challenging affirmative vote by the Senators during the reconciliation “vote-a-rama.” The debate is limited to 20 hours, and Senators must vote on any amendments offered. A Democratic Senator will need to offer an amendment from the floor during vote-a-rama to add the immigration provision. Any amendment offered on the Senate floor that includes the immigration provision will be subject to a point of order. Thus, the Democratic Senator’s amendment will trigger the point of order process described above. The Presiding Officer will rule on the point of order, and a Republican Senator will appeal his or her ruling.

**Q. Who is the Presiding Officer of the Senate?**

A. Vice President Kamala Harris. Under the Constitution, the Vice President is the President of the Senate. The Constitution also allows the Senate to choose a “President pro tempore” to perform the duties of the President of the Senate in his or her absence. The President pro tempore is Senator Patrick Leahy. The President pro tempore can designate another Senator from his or her party to carry out the duties of the Presiding Officer.

**Q. Has the parliamentarian’s advice always been followed?**

A. No. There is ample precedent for the Presiding Officer making judgments on points of order independent of the parliamentarian’s advisory opinions, including from 1967, 1969, and 1975. In fact, Vice President Hubert Humphrey reputedly did so “routinely.” And when it happened in the past, the move was so uncontroversial that it did not even appear on C-SPAN and barely appeared in the news. (Of course, opponents were upset, but no one questioned the Vice President’s authority to ignore the parliamentarian.)

The parliamentarian works for the Senate, and it’s worth noting the Majority Leader can dismiss the parliamentarian. This happened in 2001 when the Senate was evenly divided between Democrats and Republicans. Republicans wanted to pass a series of tax cuts through budget reconciliation, but parliamentarian Robert Dove

blocked key provisions of the bill on procedural grounds. In response, Senate Majority Leader Trent Lott directed the Secretary of the Senate to dismiss Dove. ([Source](#))

**Q. But didn't the parliamentarian get her advice right about the language?**

A. No. The Senate parliamentarian's advisory opinion was riddled with flawed reasoning and consideration of irrelevant and political factors that "[made it abundantly clear how eager she was to get to 'no,'](#) despite ample precedent and a strong rationale that would allow for the immigration proposal to be included in a reconciliation bill."

Not only does a pathway to citizenship satisfy the "Byrd Rule," but it is a "[perfect fit for reconciliation.](#)" Charles Kamasaki has written that the [Senate has passed immigration-related provisions on at least five previous reconciliation bills,](#) and a fair, impartial analysis of these precedents should have led the parliamentarian to find that including a pathway to citizenship in reconciliation would not violate Senate rules.

**Q. Some Democrats worry that if the Presiding Officer disregards the parliamentarian, Republicans would exercise a "nuclear option" and throw out existing rules requiring a supermajority to overturn the Presiding Officer (i.e., making it easier to overrule the Presiding Officer). Is this a real concern?**

A. No. Republicans don't need to change the rules to challenge the inclusion of a pathway to citizenship in reconciliation through a simple majority. They can (and likely will) simply propose an amendment to strip the provision out of the bill. To be successful, they would need at least one Democrat to vote with them to strip out the citizenship language (i.e., Republicans would need 51 votes).

**Q. What's to stop Republicans from stripping citizenship through an amendment with 51 votes?**

A. Once a pathway to citizenship is included in the bill by the Presiding Officer and the Senate moves on to "vote-a-rama," Republicans would need to find at least one Democrat to vote for their amendment to strip citizenship, just as they would need to find one Democrat to vote for any of the other harmful, anti-immigrant amendments we are expecting them to offer, as they have offered in past vote-a-ramas. Democrats are in the strongest position to fend off bad amendments if the Vice President is the presiding officer who decides to disregard the advice of the Parliamentarian, since that would increase political pressure for Democrats to keep

the policy language in the bill. However, with a continued effort to coordinate this strategy, Democrats can still coalesce regardless of whether it is the Vice President or another Senator acting as the Presiding Officer. There is no way around this: At the end of the day, we need all 50 Senate Democrats plus the Vice President to be on board with this strategy, and we need their votes to defeat bad amendments and win on final passage.

### **Q. How many times can Senators raise a point of order on the immigration provisions?**

A. Only once. After a Senator raises a point of order on the immigration provision and the Presiding Officer rules, the issue is exhausted and will not be entertained again.

## **E. Talking Points**

→ Democrats **don't need to follow the parliamentarian's advice.** The parliamentarian works for elected officials, not the other way around. Her advice is just that — advice. Vice President Kamala Harris, acting as Presiding Officer of the Senate, or the pro temp designee, can make an independent decision about whether a pathway to citizenship can be included in the reconciliation bill. This is a question of political will, not Senate procedure.

→ **The parliamentarian got it wrong.** Her opinion was out of bounds and inaccurate. Despite the fact that the Senate has passed immigration-related provisions on at least four previous reconciliation bills,<sup>2</sup> she claims that those measures were “less fraught” because they were “bipartisan.” Nowhere in the budget criteria does it require legislation on reconciliation be “less fraught” or “bipartisan.” She didn't stop Republicans in 2017 when they used reconciliation to pass a \$2 trillion dollar tax cut and tried to kill the Affordable Care Act. Neither was “less fraught” or or more “bipartisan.” Immigration is budgetary. Since the parliamentarian got it wrong, it is

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<sup>2</sup> OBRA 1990, PRWORA 1996, BBA 1997, and DRA 2005. OBRA 1990 amended the Social Security Act to “decriminaliz[e] the use of social security numbers by LPR's who had obtained their legal status specifically through a direct Act of Congress”; PRWORA 1996 was “a series of free-standing provisions . . . that changed the definitions of eligibility for a range of federal benefits”; BBA 1997 “further amended PRWORA's eligibility standards with respect to SSI benefits and Food Stamps.” [Parliamentarian's advisory opinion](#), Sept. 19, 2021 (as posted by NPR). The DRA contained “several relevant immigration provisions,” including “a new process to ‘recapture’ permanent employment-based immigrant visas (i.e., green cards) not used in previous fiscal years, up to 90,000 visas per year.” Philip E. Wolgin, “A Pathway to Citizenship and Economic Growth Through Budget Reconciliation,” [Center for American Progress](#), July 1, 2021.

the Presiding Officer or Vice President’s responsibility to set aside her poorly reasoned advice.

***Resources to support this conclusion:***

*The Hill*, Cecilia Muñoz: The Senate parliamentarian’s advisory opinion was riddled with flawed reasoning and consideration of irrelevant and political factors that “[made it abundantly clear how eager she was to get to ‘no,’](#) despite ample precedent and a strong rationale that would allow for the immigration proposal to be included in a reconciliation bill.”

*Roll Call*, Marshall Fitz: Not only does a pathway to citizenship satisfy the “Byrd Rule,” but it is a “[perfect fit for reconciliation.](#)”

*Medium*, Charles Kamasaki: The [Senate has passed immigration-related provisions on at least five previous reconciliation bills](#), and a fair, impartial analysis of these precedents should have led the parliamentarian to find that including a pathway to citizenship in reconciliation would not violate Senate rules.

*The Hill*, Professor Daniel Hemel and 92 law scholars: “[For the Senate to reach its own conclusion on the Byrd Rule’s application to Title VII should not be seen as an “overruling” of anyone.](#) Rather, it would recognize that elected members of Congress are ultimately responsible for deciding whether to enact legislation, in accord with statutory constraints, the advice of civil servants, the voices of their constituents, and their own considered judgment”

→ A pathway to citizenship has **overwhelming public support**. President Biden, Democrats in Congress, and 70% of Americans strongly support creating pathways to citizenship for undocumented immigrants. We refuse to walk away empty-handed. This is the year to translate our society’s consensus into legislative results that transform lives, and Senate procedure supports reconciliation as the legislative vehicle.

→ **Immigrant communities mobilized to elect Democrats.** Democrats control the Senate, House of Representatives, and the White House. We expect Democrats to use every tool at their disposal to deliver on their promise of a pathway to citizenship. President Biden pledged to provide a pathway to citizenship for the 11 million undocumented immigrants during his campaign and his administration has an opportunity through reconciliation to fulfill that promise.

→ We cannot “**build back better**” without a pathway to citizenship.<sup>3</sup> Immigrants have been on the frontlines of the pandemic response. Putting them and other undocumented immigrants on a pathway to citizenship would increase U.S. GDP by up to \$1.7 trillion over the next decade, raise wages for all Americans, and create hundreds of thousands of new jobs, advancing the country’s economic recovery.<sup>4</sup>

→ The Biden-Harris administration has come under fire for **a series of challenges on immigration** — from inhumane camp conditions in Del Rio, Texas, to images of Border Patrol agents abusing Haitian migrants. Politico has characterized this failure as “a crack in the Democratic coalition that threatens the party’s morale and unity in advance of the 2022 midterms.” The Biden-Harris administration’s legacy on immigration, as it stands, is in a dire state. By being in a position to clear the way for a pathway to citizenship, Vice President Harris has a unique opportunity to turn the tide and put the legacy of the Biden-Harris administration — and possibly the Democratic party, too — on the right track.

## IV. Procedural Roadmap

### A. Summary

<p><b>(1) The reconciliation bill comes to the Senate floor from the House with the immigration provision at the end</b></p>
<p>This can include Plan A — legalizing young people, farm workers, essential workers, TPS holders — or the registry date change (Plan B)</p>
<p><b>(2) Anti-immigrant amendment introduced</b></p>
<p>A Republican Senator will introduce an amendment to strip citizenship language from the bill</p>
<p><b>(3) Senate votes on amendment</b></p>
<p>All 50 Senate Democrats + Vice President vote the amendment down (51 votes)</p>
<p><b>(4) Point of order raised</b></p>
<p>A Republican Senator will raise a point of order to exclude the pathway to citizenship, arguing that it violates the Byrd Rule</p>

<sup>3</sup> “Build Back Better” refers to a key component of the Biden Administration’s domestic agenda, which it describes as “an ambitious plan to create jobs, cut taxes, and lower costs for working families – all paid for by making the tax code fairer and making the wealthiest and large corporations pay their fair share.”

<sup>4</sup> Giovanni Peri and Reem Zaiour, “Citizenship for Undocumented Immigrants Would Boost U.S. Economic Growth,” Center for American Progress, June 14, 2021.

**(5) The Presiding Officer issues ruling**

The Presiding Officer (which could be the Vice President), rules that the legislative text providing a pathway to citizenship does not violate the Byrd Rule.

**(6) Republican appeals the ruling**

A Republican Senator will appeal the ruling of the Presiding Officer, but the appeal requires 60 votes to overturn the Presiding Officer. The vote fails, and the Presiding Officer’s ruling stands – leaving a pathway to citizenship in the legislation.

**(7) Senate votes on reconciliation bill**

All 50 Democrats + the Vice President as tie-breaker vote to pass the reconciliation bill.

**B. The Pathway Begins in the House**

The House may include a provision in the reconciliation bill that potentially violates the Senate’s rules (e.g., the Byrd Rule) because the Senate rules do not apply to the House. **The offensive provision can only be addressed when the reconciliation bill arrives in the Senate.** It is always harder to remove something from a bill than it is to add it, so House Democrats must make sure the pathway to citizenship is already in the budget bill when it goes to the Senate.

A bill cannot be amended in two places at once. It would require unanimous consent for the Senate to consider an amendment that changed a bill in more than one place. As explained in *Riddick’s Senate Procedure*:

When an amendment is pending, it is not in order to consider another amendment unless it is to the pending amendment or to language affected thereby. . . An amendment consisting of two or more parts to amend the bill at two or more places, and that not being contiguous, is in fact two or more amendments and cannot be offered as one amendment if a point of order is raised against it and sustained, except by unanimous consent.<sup>5</sup>

The effort to disregard the parliamentarian will go better if the House places the immigration language at the beginning or end of the bill (preferably the end). The minimum wage fight illustrates why. When the previous reconciliation bill came to the Senate earlier this year, Senator Schumer proposed an amendment that struck everything and added in new text with several provisions that Democrats wanted. Notably, this amendment did not include the minimum wage provision, which the House had placed in the middle of its bill. Senator Sanders proposed an amendment to

<sup>5</sup> [Riddick’s Senate Procedure](#) at 112.

add the minimum wage to Schumer's amendment, but this resulted in a Byrd Rule point of order, and the Sanders amendment— which required affirmatively adding in the minimum wage language — failed.

Had the House instead placed the minimum wage provision at the end of the bill, it would have provided Senator Sanders the option to respond to the Schumer amendment by proposing an almost identical amendment — which contained all the provisions that Senate Democrats wanted — but that left the minimum wage provision at the end. This would have forced Senate Democrats to vote between two alternatives: keep the House's minimum wage provision (the Sanders amendment) or strike it (the Schumer amendment). Senators who were wavering on minimum wage could not hide behind the technicality of the Byrd Rule.

Instead, however, the minimum wage provision was in the middle of the House bill, not the end. Schumer's amendment omitted minimum wage from the middle of the bill, while also making substantive changes before and after the minimum wage provision. Schumer could do this without violating the rule against amending a bill in multiple places at once, because he wasn't actually changing multiple provisions — he was striking the entire text and replacing it with something else, all at once. Sanders presumably wanted most (or all) of the provisions in Schumer's amendment, but without striking the minimum wage provision.

Sanders was unable to accomplish this by offering a substitute amendment to compete with the Schumer amendment because such an amendment would have required changing the House bill in more than one place — both *before* the minimum wage provision, and also *after* the minimum wage provision, which is prohibited under Senate rules and precedent.

As a result, Senator Sanders' only option was to offer an amendment to the Schumer amendment that affirmatively added minimum wage back in. The Presiding Officer, a Democratic Senator, had already ruled that the minimum wage provision violated the Byrd Rule. The Senators voted accordingly. The Sanders amendment failed on a technical ground (for violating the Byrd Rule), creating a precedent that would preclude minimum wage from future reconciliation bills. The outcome left the Senate with no minimum wage and a precedent on record that will make future efforts to alter the minimum wage in reconciliation much harder.

Contrast this outcome with the earlier hypothetical: had the House placed the minimum wage provision at the end of its bill, Senator Sanders could have introduced a substitute amendment to include everything from Schumer's amendment, while also stopping short of striking the minimum wage provision at the end. This amendment would have touched the House bill in only one place (with “one place” meaning the entire bill before the minimum wage provision), and thus would not have violated

Senate rules. It would have contained all the provisions that Senate Democrats wanted in the bill. The only difference would be that minimum wage remained at the end.

In that scenario, it would have been much harder for minimum wage to be left out of the Senate bill. Senators would have decided between two substitute amendments — one with minimum wage, the other without — making it harder for them to hide behind the Byrd Rule. In other words, they would have to go on record: Do they support minimum wage or not? The vote would have been about minimum wage, not the Byrd Rule.

Given Democrats' public statements, it would have been very difficult for them to oppose the Sanders amendment if it was otherwise identical to the Schumer substitute amendment. At that point, the only reason to oppose the Sanders amendment would be because a senator opposed the minimum wage provision. The Schumer substitute amendment vote would come after the Sanders amendment vote. If Sanders' amendment passed, there would be no reason to vote for the Schumer amendment.

Of course, this difference alone would not have guaranteed passage of the minimum wage provision. Proponents of the minimum wage entered the fight with a major disadvantage when the Presiding Officer, a Democrat, accepted the parliamentarian's opinion — without any precedent for the parliamentarian's opinion — and sided with Republican Senator Lindsay Graham on a Byrd Rule point of order. The lesson for the immigration provision is:

(1) Coordinate with the Presiding Officer to make sure we can obtain a favorable ruling on the Byrd Rule point of order.

(2) Coordinate with the House to place the immigration provision at the end of the bill. That way, Senator Schumer can make whatever changes he wants to the House-passed reconciliation bill. He just needs to leave the immigration provision alone at the end. During the subsequent vote on the Schumer amendment, Senators cannot raise a Byrd Rule point of order challenging the immigration provision, because the immigration provision would not be part of Schumer's amendment.

Senate Democrats will need to defend the immigration provision as vote-a-rama continues. However, if the House places the language at the end of its bill, Senate Democrats will be in the stronger position of defending the immigration language instead of the harder position of trying to offensively include the language.

One other note: while it is preferable to have the House immigration language match the Senate, that does not affect the tactical decisions described above (i.e., where to place the language). For instance, the House might include registry language

that is not identical to the citizenship language preferred by the Senate. Assuming Senate Democrats can get a favorable ruling on a Byrd Point of order and defend the immigration provision during the amendment process on the Senate floor, they presumably could then amend the immigration provision on the Senate floor. However, it will be cleaner and simpler to get the language right in the House. The Senate amendment process will be complicated enough without also having to fix the immigration language passed in the House.

### C. Navigating the Senate Rules

Senate rules are not self-enforcing. That means a senator must raise a point of order against a provision to remove it in the reconciliation process. Alternatively, a senator may offer an amendment to strike the provision or to substitute the text of the reconciliation bill with new text that does not include the provision (this is what happened in the minimum wage example earlier this year). If a senator does not make a point of order or remove the provision by offering an amendment to strike it, the provision remains in the reconciliation bill.

In the point of order scenario, a senator can force the issue by raising a point of order for a ruling by the Chair. In the substitute amendment scenario, only a simple Senate majority must vote to remove the provision from the reconciliation bill.

Debate on reconciliation bills is often called “vote-a-rama” because the Senate must vote on any proposed amendments and cannot use procedural tactics to avoid the votes. It’s important that all Democrats remain united during this process to block any extraneous amendments.

## V. Addressing the “Nuclear option” concerns

### A. Leadership’s Hollow Threat

The “nuclear option” refers to the number of votes needed to overrule the Presiding Officer. On a motion by Senators Schumer or McConnell, the Senate could vote to change the standard for waiving a point of order, requiring only 50 votes instead of the current requirement of 60 votes. This is the “nuclear option” for Republicans: permanently changing the rules so that, in this instance, Senate Democrats couldn’t succeed in keeping the pathway to citizenship in the reconciliation bill.

The nuclear option has never been used for legislation. In 2013, Democrats used it to eliminate the 60-vote threshold for President Obama’s judicial nominations. At the time, Senator Manchin voted against using the nuclear option.

Senate leadership might say that Democrats cannot follow the strategy outlined in this memo because it would provoke Republicans to invoke the nuclear option. However, **that scenario presents serious risks that Republicans would want to avoid.**

Republicans are highly unlikely to use the nuclear option because it would change the rules for all future votes — not just this one. **Nuking the rules has long-term, extremely adverse consequences for Republicans**, and the Senate GOP conference will act in its own self-interest.

Also, Republican opponents do not need to nuke the rules to remove the disputed provision. **They can instead offer an amendment to strike the provision from the bill (and such an amendment would need 51 votes to pass, which Republicans don’t have unless they recruit one Democrat).** Offering an amendment to strike the language is much easier than nuking the rules. This prediction carries a tactical problem for Senate Democrats: they must outmaneuver Republicans on the amendment process by staying united to vote against all negative amendments. But a tactical problem doesn’t raise the same precedential concerns argued by leadership (“If we follow this path, Republicans might change the rules forever.”). The strategy in this memo doesn’t shatter Senate norms or provoke Republicans to nuke the rules — it’s a policy fight within the existing rules of the Senate.

## B. Step-by-Step Guide to GOP Changing the Rules

1. GOP senator raises a point of order that immigration provision violates the Byrd Rule.
2. Vice President Harris (or the Senate’s Presiding Officer) rules that the point of order is not valid. The Vice President does not have to heed the parliamentarian’s advice.
3. GOP senator appeals the ruling of the chair on the immigration provisions.
4. The appeal fails because fewer than 60 senators vote to overturn the chair (a statutory requirement in this instance).

5. GOP senator raises a *different* point of order that the Constitution (or Senate rules) requires a simple majority of senators to overturn the chair’s ruling, not 60 votes.
6. Vice President Harris (or Presiding Officer) rules that the point of order is not valid.
7. GOP senator appeals the ruling of the chair on the Senate’s rules or the Constitution.
8. GOP succeeds when a simple majority of senators (typically 51 but anywhere from 26 to 51 depending on how many senators are present) votes to overturn the chair’s ruling.<sup>6</sup> This permanently changes the Senate rules to require only a simple majority to overrule the Senate Chair’s decisions.
9. GOP senator then raises the original point of order again — now that Republicans would have changed the rules — arguing the immigration provision violates the Byrd Rule, this time under the new rules requiring only a simple majority to overrule the Chair.
10. Vice President Harris (or Presiding Officer) rules that the point of order on the immigration provision is not valid.
11. GOP senator appeals the ruling of the chair.
12. GOP appeal succeeds when a simple majority of senators votes to overturn the chair’s ruling.
13. The immigration provision is removed from the bill.

### C. Step-by-Step Guide to GOP Offering Amendment to Strike

1. GOP senator offers a simple amendment to strike the immigration provision from the bill. The Senate will have to vote on this amendment.<sup>7</sup>

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<sup>6</sup> The “simple majority” needed on this particular motion is variable depending on the number of senators present. Elsewhere in the memo, we have said that “51 votes” are necessary on other measures, because different rules apply to those votes. On those measures, the number of votes required will not vary depending on the number of senators present; Democrats must hold together their entire caucus and reach 51 votes.

<sup>7</sup> Amendments to strike are always made in order. The only limit to amendments during vote-a-rama is the 20-hour time limit. The Majority Leader won’t be able to block the Republicans’ amendment through procedural maneuvers — as he or she might during a normal Senate debate — because the reconciliation “vote-a-rama” follows different rules.

2. Senate votes on GOP amendment to strike — immediately if during vote-a-rama.
3. GOP amendment is adopted if a simple majority of senators vote for it. In this case, GOP Senators would need just one Democrat to side with them to strike the language from the bill.
4. The targeted provision is removed from the bill.

## D. Bottom Line

***Legislators always follow the path of least resistance.*** If the GOP can get 51 senators to nuke the Budget Act of 1974 (something that Democrats could use against them when GOP is in majority again in the future), the GOP definitely can get the 51 votes needed to remove the immigration provision via amendment. And the latter is quick, straightforward and does not open the Pandora's box of uncertainty moving forward that the nuclear option would. The GOP has to pick off just *one* Democrat in order to get either of these things done.

With that in mind, it's crucial that our coalition lobby all Senate Democrats to ensure that Republicans cannot get to 51 votes. Every single Senate Democrat must hold the party line without exception:

- First, House Democrats **MUST** include the immigration language in the House bill, because it's always harder to remove a provision than add it. We should give ourselves a strong starting position. Don't wait for Senate Democrats to add immigration language at the end of the process.
- Senate Democrats are **NOT** at risk of provoking Republicans to nuke the rules. This is not a fight about preserving the Senate as an institution; it's a policy debate — one that leadership may try to avoid.
- If our side does everything right, this fight will likely end with a simple amendment by Republicans that Democrats must defeat with 51 votes (all 48 Senate Democrats, 2 Independents who caucus with Democrats, and the VP as tiebreaker). We need to apply maximum pressure to both progressives and moderates within the Democratic caucus, as well as the VP.

## VI. Support from Key Progressives

In the wake of the Parliamentarian's striking of the \$15 minimum wage in the American Rescue Plan of 2021, twenty-three Democratic representatives [wrote a letter](#) urging President Biden to override the parliamentarian's advisory opinion. Rep. Omar went further, [calling for the firing of the current Parliamentarian](#).

Rep. Ro Khanna (CA-17) was one of the Democrats who called on the White House to disregard the parliamentarian's opinion. Rep. Khanna released a [statement](#) shortly after the parliamentarian's ruling:

The vice president, acting as the Senate's presiding officer, disregarded the parliamentarian's ruling three times in the 1960s and 1970s. Any senator could appeal the decision, but 60 votes would be required to overrule the chair. Given this high bar, the vice president's decision is the final say on the matter.

Several other House Democrats released similar statements:

- “We are urging Vice President Kamala Harris to use her power as president of the United States Senate to push back against an archaic procedure and overrule the Senate Parliamentarian's advice on the Byrd Rule.” (Rashida Tlaib)
- “I'm proud to join Rep. Khanna and others in calling for Vice President Harris to use her authority to overrule the parliamentarian.” (Jamaal Bowman)
- “The Senate Parliamentarian's advice is just that — advice.” (Cori Bush)
- “We cannot allow for an unelected parliamentarian and arcane Senate rules to stand in our way. It is imperative that Vice President Harris refutes the Byrd Rule and uses her power to raise the minimum wage.” (Marie Newman)
- “Vice President Harris has the power to overrule the Parliamentarian's recommendation.” (Mondaire Jones)

House progressives will be an important part of the coalition as we unite the Democratic caucus around a plan.