

consider any bill, joint resolution, amendment,⁵⁰⁷ motion,⁵⁰⁸ or conference report⁵⁰⁹ providing new budget authority⁵¹⁰ for such fiscal year, providing new entitlement authority⁵¹¹ effective during such fiscal year, or reducing revenues for such fiscal year,⁵¹² if —

§ 311(a)(1)(A) (A)⁵¹³ the enactment of such bill or resolution as reported,⁵¹⁴

⁵⁰⁷ An amendment is subject to points of order under the Congressional Budget Act even if the Senate has specified by unanimous consent that the amendment is one of the amendments in order and the yeas and nays have been ordered. *Cf. supra* note 295 (regarding section 303).

The Senate Budget Committee estimates the costs of an amendment based on the assumption that Congress has already enacted the pending bill (to which the amendment has been offered) into law. Thus, when the current level exceeds the outlay ceiling, and a bill is pending that would reduce outlays by less than the amount by which the current level exceeds the outlay ceiling, an amendment that would increase outlays at all (net of outlay reductions in the amendment) will cause outlays to exceed the outlay ceiling.

⁵⁰⁸ Section 13207(a) of the Budget Enforcement Act added the word "motion" here. *See infra* p. 723. For a discussion of the motivation for the addition, see *supra* note 235.

⁵⁰⁹ Section 13207(a)(1)(E)(i) of the Budget Enforcement Act struck the words "bill, resolution, or amendment" here and inserted "bill, joint resolution, amendment, motion, or conference report." *See infra* p. 723.

⁵¹⁰ Section 3(2) defines "budget authority." *See supra* pp. 11-13.

⁵¹¹ Section 3(9) (*see supra* p. 18) defines "entitlement authority" to mean that authority described in section 401(e)(2)(C) (*see infra* p. 252). For a discussion of language that ensures that authority will not constitute entitlement authority, *see infra* note 652.

⁵¹² Section 13207(a)(1)(E)(ii) of the Budget Enforcement Act struck the words "or any conference report on any such bill or resolution" here, but did not strike the comma at the end of that parenthetical. *See infra* p. 723.

⁵¹³ Section 13303(d)(1) of the Budget Enforcement Act redesignated what used to be section 311(a)(1) as section 311(a)(1)(A). *See infra* p. 758.

⁵¹⁴ By virtue of the words "as reported," a point of order will not lie under section 311(a)(1) against a deficit-neutral bill that has been amended by an amendment that reduces revenues below the revenue floor. 131 CONG. REC. S8806 (1985); Senate Precedent PRL19850626-001 (June 26, 1985) (LEGIS, Rules database) (inquiry of Sen. Chafee). In other words, no point of order will lie under section 311(a)(1) even though the bill as
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⁵¹⁴(...continued)

amended would cause revenues to fall below the revenue floor, if the bill as reported would not have done so. *See id.* This precedent creates a limited window of applicability for section 311(a)(1): A Senator must raise a point of order against an amendment during the pendency of the amendment, or forever lose the right to question under section 311(a)(1) the deficit-increasing effect of the bill as amended. Note, however, that by virtue of the differing language of section 311(a)(2) (*see infra* p. 186) a point of order will lie under that subsection even when it will not lie under this subsection.

Note the following series of inquiries by Senator Chafee of the Chair (Senator Humphrey of New Hampshire):

The PRESIDING OFFICER. This amendment reduces revenues below the level expressed in the second budget resolution, and therefore the point of order is well taken.

Mr. CHAFEE. I ask the Chair if the entire bill before us does not do the same. We just adopted an amendment of the Senator from Pennsylvania that reduced revenues by \$25 million. Will the Chair offer his opinion on that situation?

The PRESIDING OFFICER. The bill as reported is revenue neutral for the fiscal year 1985. Therefore, it is not subject to a point of order.

Mr. CHAFEE. Would the President be good enough to explain? We just adopted on the floor an amendment by a voice vote that cost \$25 million. Is that de minimis or does that not count? Is that not real dollars?

The PRESIDING OFFICER. That amendment likewise would have been subject to a point of order, but the amendment having been agreed to, the point of order is now moot.

Mr. CHAFEE. But the amendment is now part of the bill. So is the whole bill not subject to a point of order?

The PRESIDING OFFICER. The Parliamentarian advises the bill is treated on the basis on which it was reported from committee.

Mr. CHAFEE. That is parliamentary jargon that I do not quite understand.

Mr. PACKWOOD. Mr. President, I ask what the Chair is ruling: Is it that first we look at the bill as introduced and since the bill is revenue neutral, it is not subject to a point of order? Each amendment as it comes along may or may not be subject to a point of order, but you do not impute it backward to the bill when it is added. Do I understand the ruling correctly?

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⁵¹⁴(...continued)

The PRESIDING OFFICER. The Senator is correct.

Mr. CHAFEE. That is a bit of ingenuity that I am afraid I have not mastered. Let us take that slowly. You can add innumerable amendments to the bill that cost millions or billions, and if a point of order is not raised to each amendment at the time and is adopted, the whole measure itself, which now involves these billions above any budget limitations that were there, is perfectly all right? Could the Chair lead me through that Alice in Wonderland safely?

The PRESIDING OFFICER. The Senator's analysis is correct.

Mr. CHAFEE. That is the way it works?

The PRESIDING OFFICER. That is what the law says.

Mr. CHAFEE. So the law says you do not pay any attention to the final product.

The PRESIDING OFFICER. The Senator's analysis is correct.

Mr. CHAFEE. Is that what the law says, Mr. President?

The PRESIDING OFFICER. The Chair will read the provision. "The enactment of such bill or resolution as reported." The Chair advises that with respect to points of order in this wise the bill is not affected by amendments.

Mr. CHAFEE. If that is the law I refer the President to Charles Dickens' definition of the law.

Id. (Sen. Chafee refers, respectively, to LEWIS CARROLL (CHARLES L. DODGSON), ALICE'S ADVENTURES IN WONDERLAND (1865), and to Mr. Bumble's definition in CHARLES DICKENS, OLIVER TWIST ch. 51 (1838).)

Compare the language of section 301(i), *supra* p. 82; section 303(a), *supra* p. 107; section 401(a), *infra* p. 247; section 401(b)(1), *infra* p. 249; section 402(a), *infra* p. 260; which contain the magic words "as reported."

Contrast the language of section 302(c), *supra* p. 92; section 302(f)(2), *supra* p. 97; section 306, *supra* p. 143; section 310(g), *supra* p. 176; and section 311(a)(2), *infra* p. 186; which *do not* contain the magic words "as reported." Under the logic of this precedent, points of order under section 302(f), for example, *will* apply to bills as amended by amendments against which points of order would lie under section 302(f). (For a table comparing the language of points of order, see below in this note.)

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In contrast to the ruling of the Chair, the clause of section 311 listing

- (1) the enactment of such bill or resolution as reported;
- (2) the adoption and enactment of such amendment; or
- (3) the enactment of such bill or resolution in the form recommended in such conference report

appears merely to state the Congress's attempt to cover the complete legislative process at all stages on the floor.

The legislative history of section 311 supports the interpretation that points of order apply to bills as amended by amendments that offend the rule. The report of the Senate Committee on Rules and Administration on the Congressional Budget Act makes clear that the drafters of section 311 wanted the point of order to cover bills as reported and *as amended*:

Sec. 311.

After all regular annual bills and resolutions providing new budget authority for a fiscal year have been enacted and, if a reconciliation bill is required to be reported under Section 310(c) such a bill has been enacted, it shall not be in order in either House to consider *any bill or resolution* providing additional new budget authority for such fiscal year, any amendment to any such bill or resolution or any conference report thereon if the enactment of the bill or resolution *as reported, as amended or as recommended in the conference report* would cause the appropriate levels of new budget authority or total outlays, as set forth in the budget resolution then in effect, to be exceeded.

In recent years supplemental and, to a lesser extent, deficiency appropriations have been of such magnitude as to have serious impact on the Federal spending picture. In addition, the spending needs being met with supplemental appropriations are most often unanticipated at the time the regular appropriations are being considered and enacted. For these reasons it is considered necessary to require that *any measure* providing new budget authority for a fiscal year *after* the budget process for such year has been completed shall be within the appropriate levels set forth in the then-effective budget resolution.

S. Rep. No. 93-688, 93d Cong., 2d Sess. 53-54 (1973) (some emphasis added).

The report of the Senate Committee on Government Operations for the Budget Act used the broad term *any measure*:

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⁵¹⁴(...continued)

Once the budget process for a fiscal year has been completed and appropriations have been effected by a triggering provision described, it shall not be in order to consider *any measure* providing new budget authority for such fiscal year or any conference report thereon if the result of such a measure would be to cause the limitations on new budget authority or on total outlays then in effect to be exceeded.

In recent years supplemental and, to a lesser extent, deficiency appropriations have been of such magnitude as to have serious impact on the Federal spending picture. In addition, the spending needs being met with supplemental appropriations are most often unanticipated at the time the regular appropriations are being considered and enacted. For these reasons the Committee believes it necessary to require that *any measure* providing new budget authority for a fiscal year *after* the budget process for such year has been completed shall be within the limitations set forth in the then-effective budget resolution.

S. Rep. No. 93-579, 93d Cong., 1st Sess. 55 (1973) (some emphasis added).

The conference report for the Budget Act spoke in the general terms *legislation* and *measures*:

The Senate amendment provided that after adoption of all regular appropriations and a required reconciliation bill, Congress could not consider budget authority *legislation* in excess of the appropriate levels in the most recent concurrent resolution.

The conference substitute provides that after adoption of the second concurrent resolution and completion of the reconciliation process, it shall not be in order to consider any new budget authority or entitlement *measure* that would cause the appropriate level of total budget authority or outlays in the most recent budget concurrent resolution to be exceeded. Nor would it be in order to consider a *measure* that would reduce total revenues below the appropriate levels in the budget resolution.

S. Conf. Rep. No. 93-924, 93d Cong., 2d Sess. 64 (1974) (emphasis added).

Similarly, the conference report for Gramm-Rudman-Hollings, which added the language of the maximum deficit amount point of order, spoke of a point of order that covered *legislation*, using that general term:

(a) *Legislation Subject to Point of Order.* — This subsection prohibits consideration in the House or the Senate of *legislation* providing budget authority or entitlement authority, or reducing revenues for the fiscal year to which the most recently agreed to budget resolution applies if enactment of such *legislation* would cause the totals for such authorities, or for revenues, or the total for budget outlays
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⁵¹⁴(...continued)

set forth in such budget resolution to be breached. A point of order also lies in the Senate against *legislation* that would cause the maximum deficit amount to be exceeded.

H.R. Conf. Rep. No. 99-433, 99th Cong., 2d Sess. 110 (1985) (some emphasis added).

Thus the legislative history contemplates a point of order against any legislation or measure that offends the rule. No provision seems to have been made requiring the point of order to lie only at certain points along the way.

Note also that the Chair's interpretation of the words "as reported" results in another anomaly. Even though the precedent causes a point of order not to lie against a bill amended by an amendment that offends section 311, the terms of section 311 apply to conference reports. Consequently, a point of order would lie against a conference report that contained nothing in substance other than an amended bill that would not be subject to a point of order.

The drafters of the Congressional Budget Act worded its points of order inconsistently, creating anomalies and perhaps loopholes. The table below illustrates the types of legislation covered by points of order:

APPLICABILITY OF POINTS OF ORDER TO TYPES OF LEGISLATION				
Point of Order	Bills		Resolutions	
	As Reported	All	As Reported	All
301(i)	-	-	X	*
301(g)	-	-	X	X
302(c)	X	X	X	X
302(f)	X	X	X	X
303(a)	X	-	X	-
304(b)	-	-	X	X
305(d)	-	-	X	X
306	X	X	X	X
310(e)	X	X	-	-
310(g)	X	X	X	X
311(a)(1)	X	-	X	-
311(a)(2)	X	X	X	X
401(a)	X	-	X	-
401(b)(1)	X	-	X	-
402(a)	X	-	X	-

(continued...)

§ 311(a)(1)(B) **(B)⁵¹⁵ the adoption and enactment of such amendment; or**

§ 311(a)(1)(C) **(C)⁵¹⁶ the enactment of such bill or resolution in the form recommended in such conference report,**

would cause the appropriate level of total budget authority⁵¹⁷ or total budget outlays⁵¹⁸ set forth in the most recently agreed to concurrent resolution on the budget for such fiscal year to be exceeded, or would cause revenues⁵¹⁹ to be less than the appropriate level⁵²⁰ of total revenues set forth in such concur-

⁵¹⁴(...continued)

* applies by virtue of H. Con. Res. 287, 102d Cong., 2d Sess. § 12(b) (1992) (adopted).

The "as reported" language also prevents a point of order from lying against a bill during the pendency of a committee amendment that would correct the violation that gives rise to the point of order.

⁵¹⁵ Section 13303(d)(1) of the Budget Enforcement Act redesignated what used to be section 311(a)(2) as section 311(a)(1)(B). See *infra* p. 758.

⁵¹⁶ Section 13303(d)(1) of the Budget Enforcement Act redesignated what used to be section 311(a)(3) as section 311(a)(1)(C). See *infra* p. 758.

⁵¹⁷ Section 3(2) defines "budget authority." See *supra* pp. 11-13.

⁵¹⁸ Section 3(1) defines "budget outlays." See *supra* p. 11.

⁵¹⁹ *E.g.*, 131 CONG. REC. S8806-07 (1985); Senate Precedent PRL19850626-001 (June 26, 1985) (LEGIS, Rules database) (point of order raised by Sen. Packwood).

If the current level is below the revenue floor for a fiscal year, legislation that would result in a loss of revenues for that year would violate section 311. 131 CONG. REC. S6367-68 (1985); Senate Precedent PRL19850516-001 (May 16, 1985) (LEGIS, Rules database) (inquiry of Sen. Metzenbaum).

⁵²⁰ The Congressional Budget Act makes no exception for very small amounts; even a "negligible" revenue loss can subject legislation to a point of order under section 311(a). 122 CONG. REC. S17,709-10 (1976); Senate Precedent PRL19761001-001 (Oct. 1, 1976) (LEGIS, Rules database) (point of order by Sen. Haskell).