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Breaking Faith and Violating the Congressional Budget Act: TANF Reauthorization Doesn't Belong in Budget Reconciliation Legislation

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Reconciliation was never meant to be a vehicle for an omnibus authorization bill. To permit it to be treated as such is to break faith with the Senate's historical uniqueness as a forum for the exercise of minority and individual rights.
—Senate Majority Leader Howard Baker (R-TN)

Overview

It has been nearly four years since the Bush Administration unveiled its controversial and wide-ranging plan to rework the bipartisan welfare reform law of 1996. Unable to enact the Administration's proposal under normal Congressional procedures—and apparently unwilling to modify the proposal in response to widespread criticism from states, local governments, and others—House Republican leadership is now trying to circumvent the standard legislative process by tucking the TANF measure into its massive budget reconciliation bill.

In a bill that is supposed to be limited to budgetary provisions, the laundry list of TANF *policy* provisions, few of which have any impact on federal spending, stick out like a sore thumb. As Jonathan Weisman recently noted in the *Washington Post*, the TANF and related policy modifications to the 1996 welfare reform law occupy 71 pages of the 830-page House-passed reconciliation bill.²

Senators have not included any changes to TANF in their version of reconciliation legislation and the full Senate has yet to consider or vote on legislation that would reauthorize TANF. Over the next few weeks, a conference committee may decide whether to include changes to TANF in final reconciliation legislation.

Budget reconciliation operates under expedited procedures that limit debate and depart from other customary rules of Congressional procedure. The House leadership likely is hoping to take advantage of the reconciliation process to enact an “off center” TANF proposal that would not survive if it were subject to the usual deliberative process of debate and amendment in the Senate. In contrast to the fast-track reconciliation process, normal Senate rules generally allow for full and careful deliberation on controversial or difficult

¹ We thank Richard Blum, Don Friedman, Mark Greenberg, Richard Kogan, Deborah Weinstein, and others for their helpful comments and input on drafts of this analysis.

² “House Bill Raises Work Requirements,” *Washington Post*, November 27, 2005.

issues.³

The major *bipartisan* organizations representing the interests of state and local governments—the National Governors Association, the National Conference of State Legislators, the American Public Human Services Association, the National Association of Counties, the League of Cities, and the U.S. Conference of Mayors—have all come out publicly in opposition to the reauthorization of welfare reform in reconciliation. In a recent letter to Congress, NCSL stated, “the place to accomplish a balanced and reasonable reauthorization is not in a budget reconciliation bill.”⁴ The other bipartisan organizations give similar reasons for their opposition.

This paper provides additional support for the argument made by state and local governments that the place to accomplish sound TANF reauthorization “is not in a budget reconciliation bill.” Our basic contention is that using the reconciliation process to make extensive policy changes to the 1996 welfare reform law—changes that have *never been subject to debate or amendment on the floor of the Senate*—would fundamentally undermine the Senate’s role in the legislative process. The end result is very likely to be substandard and undemocratic legislation. In addition, the public would have little input into this important set of policy decisions. In effect, key elements of our nation’s policies for providing support for low-wage working families would be decided “under the radar” and without the benefit of a full and informed debate.

More narrowly, we argue that using the reconciliation process to make extensive and fundamental alterations to the 1996 welfare reform law would violate section 313 of the Congressional Budget Act—a provision commonly referred to as the “Byrd Rule.” Section 313 gives individual senators the power to raise a “point of order” against any provision that is “extraneous” to budget reconciliation—typically because it has no impact on federal spending or is merely incidental to non-budgetary elements of a provision—and to strike such provision if their point of order is sustained.

We conclude that most of the changes to the TANF program in the House-passed reconciliation bill—including an extensive set of controversial provisions that more than 40 states have said “would cause them to make fundamental changes to their state welfare reform strategies”⁵—should be considered extraneous under section 313 of the Budget Act and, therefore, should be subject to exclusion from the bill. More generally, the TANF provisions taken as a whole (the TANF provisions in Title II, Subtitle A, Parts 1-2 and Title VIII, Subtitle A of the House-passed reconciliation bill), including those provisions that may not violate the letter of section 313(b) of the Budget Act, should be excluded from final reconciliation legislation because they are inconsistent with the spirit of the Congressional Budget Act and the rules of the Senate.

³ In a recent book, Jacob Hacker and Paul Pierson, political scientists at Yale University and the University of California respectively, explore how far-right leaders in Congress have been able to enact what they call “off center” policies that have little mainstream support. According to Hacker and Pierson, a key tool has been the use of procedural stratagems, including using budget reconciliation and partisan conference committees, to prevent Democrats and moderate Republicans in Senate from using the powers they have under the normal rules of the Senate to moderate legislation. Jacob Hacker and Paul Pierson, *Off Center: The Republican Revolution and the Erosion of American Democracy* (Yale, 2005).

⁴ For links to the NCSL letter and to the statements opposing inclusion of TANF in reconciliation from the other organizations, see www.inclusionist.org/node/42.

⁵ National Governors Association and American Public Human Services Association, “Welfare Reform Reauthorization: State Impact of Proposed Changes in Work Requirements, Survey Results,” April 2002, p. 3. The study is posted on the internet at www.inclusionist.org/node/42.

Breaking Faith: Including TANF Reauthorization in Reconciliation Would Undermine the Senate's Role in the Legislative Process

House leadership is attempting to use the reconciliation process to make extensive and controversial policy changes to the 1996 welfare reform law—changes that have *never been subject to debate or amendment on the floor of the Senate*. If successful, this stratagem would deeply undermine the Senate's role in the legislative process, deny the public a full and fair debate over important federal policy questions, and produce an inferior and undemocratic set of changes to the 1996 welfare reform law.

According to Senate Majority Leader Frist, the two “paramount values” of the Senate are “unlimited debate and minority rights.”⁶ The budget reconciliation process is a “fast-track” process that strictly limits debate and imposes other limitations on the Senate's deliberations in order to make changes to federal spending. These limitations are particularly strict when it comes to the final version of reconciliation produced by a House-Senate conference committee. For example, debate on the final version of the reconciliation bill—a bill that may be 800 or more pages—is *limited to just 10 hours*. In addition, if recent past is prologue, the final version of reconciliation legislation will likely be the product of a conference committee in which minority members of the Senate play no meaningful role.⁷

Obviously, these limitations are in conflict with the paramount Senate values of unlimited debate and minority rights. Over the years since establishment of the reconciliation process, senators on a bipartisan basis have cautioned against the misuse of reconciliation in ways that would unnecessarily undermine these values and limit the Senate's role in our constitutional system of checks and balances.

In 1981, Senator Howard Baker (R-TN), then the Majority Leader of the Senate, and Senator Robert Byrd (D-WV) successfully offered an amendment to strike non-budgetary and other extraneous matter from that year's Omnibus Reconciliation Act. In support of the amendment, Senator Baker explained, “reconciliation was never meant to be a vehicle for an omnibus *authorization bill*. To permit it to be treated as such is to break faith with the Senate's historical uniqueness as a forum for the exercise of minority and individual rights.”⁸

During the same debate, Senator Byrd further explained that the prohibition on including non-budgetary changes in reconciliation helps to “preserve the principle of free and unfettered debate that is the hallmark of the U.S. Senate” by ensuring that reconciliation is not used as a means to “shield *controversial* or *extraneous* legislation from free debate.”⁹

These concerns are particularly relevant to the reauthorization of TANF. The House TANF provisions

⁶ Martin B. Gold, *Senate Procedure and Practice* (Rowman and Littlefield, 2004).

⁷ According to political scientists Hacker and Pierson, “these conferences have become the leaders' private playground, presenting unrivaled opportunities for moving policy outcomes as far to the right as possible. . . . As [research by political scientist Robert van Houweling] documents, in recent years there has been a rapid increase in the use of conference committees for highly partisan purposes. Membership of the committees is stacked with supporters of the leadership. At the same time, even within these committees more and more of the real work is done in secret settings—among a small group made up of GOP leadership, hand-picked legislators, and administration officials. . . .” *Off Center*, p. 154.

⁸ 127 Cong. Rec. S666466 (1981); Senate Precedent PRL19810622-001 (June 22, 1981) (LEGIS, Rules database).

⁹ Senator Byrd, 127 Cong. Rec. S666466 (1981); Senate Precedent PRL19810622-001 (June 22, 1981) (LEGIS, Rules database).

are both extensive (as noted above, they take up 71 pages in the reconciliation bill) and controversial. TANF reauthorization legislation has never been debated on the Senate floor, which means, among other things, that senators have never had the opportunity to offer amendments to such legislation on the Senate floor.¹⁰ Thus, including TANF reauthorization measures in a final reconciliation bill would deprive individual senators of the opportunity to fully debate these policy provisions or attempt to amend them.

Since its introduction, the Bush Administration's proposal to make extensive changes to TANF—nearly all of which are included in the House-passed language—as part of the TANF reauthorization process has been highly controversial. The fact that the Administration's proposal has languished in Congress for some four years now suggests this much. These proposed changes have run into opposition not only from centrists and liberals, but also from major conservative organizations and from Republicans in the Senate.

- ?? Paul Weyrich of the Free Congress Foundation and former Reagan welfare advisor Robert Carleson have argued for several years that TANF should simply be reauthorized without any changes.
- ?? Michael Tanner of the Cato Institute has criticized the "marriage promotion" provisions in the legislation. In an op-ed piece in the *New York Times*, Tanner argued that, "if liberals had introduced this costly big-government social experiment, conservatives would be outraged, and they would be right."¹¹ Similarly, R. Kent Weaver, a welfare expert at the nonpartisan Brookings Institution, has said that while "marriage is a good thing and kids do better in two-parent families, we really don't have a clue about how to do it." According to Weaver, marriage promotion provisions are driven more by politics than by sound policy considerations.¹²

TANF reauthorization has had a low profile recently, but when it was in the news, numerous editorial boards of major newspapers across the country were critical of the Administration's approach to welfare reform reauthorization:

Bush's plan would limit participation in job training and treatment programs to no more than three months in any three-year period—a proposal that appears to have been constructed in La-La Land.

—*Chicago Tribune*, "Fixing What Ain't Broke," May 12, 2002

The president's latest proposal undermines rather than improves on efforts to overhaul public assistance... If lawmakers want to build on the hopeful gains made since 1996, they must reject Bush's proposal. They must approve a bill that supports education and job-training programs. Without them, welfare recipients will end up in state workfare programs instead of jobs that offer livable wages and opportunities to advance. They must support child-care subsidies, so that women can afford safe, quality care for their children. They must give states the flexibility to provide food stamps, transportation subsidies and medical insurance so they can make the transition to work even if their first jobs are low-skill, low-paying positions.

—*Fort Wayne Journal Gazette*, "Two Steps Back for Welfare Reform," January 24, 2003

¹⁰ A version of TANF reauthorization legislation was briefly taken up on the floor in 2004; there was little debate, however, because Republican leadership abruptly pulled the bill from consideration when it became clear that Democrats planned to offer an amendment that would have raised the minimum wage.

¹¹ Michael Tanner, "Wedded to poverty," *New York Times*, July 29, 2003.

¹² "Bush welfare plan stresses work, matrimony for the poor," *Houston Chronicle*, February 27, 2002, p. A4.

The House bill mandates that more recipients work 40 hours a week, all the while providing inadequate child care assistance and ignoring the fact that even skilled workers are losing jobs in the current economic downturn... Education pays in higher income, less crime, better help and more civic involvement. Kentucky cannot afford to lose what leverage it has to change the lives of poor women and their children.

—*Lexington Herald-Leader*, “Welfare Reform: Education, Job Training should be Preserved,” June 26, 2002

It may not be class warfare, but it's breathtakingly provocative. One week after President Bush proposed billions in tax breaks for fretful stock owners, he revived a plan to wring an additional 10 hours of work each week from women with small children who are managing to hold a job under the federal welfare reform program. The program was hailed as an early success in reducing the welfare rolls. But it is now being threatened with ideological wrenching under the Bush proposal. Not only would the marginal working mother on welfare face a 40-hour week—six hours more than the national average for all women with young children—but funding would be frozen for child care, transportation and all the other things she needs to make it possible for her to work in the first place.

—*New York Times*, “Then There are the Poor,” January 22, 2003

If it passes, the U.S. House of Representatives' welfare plan would negatively affect local businesses—by reducing the quality of the labor supply... Employers want to hire welfare recipients who are prepared to go to work and have the skills to stay and succeed on the job. Employers lose money and confidence if they hire someone off the welfare rolls who does not possess the necessary job skills. If the public and nonprofit systems are no longer able to provide welfare recipients with basic education or skills training, employers will cease to tap into this important labor pool.

—*San Francisco Chronicle*, “Welfare Proposals Bad for Business,” July 2, 2002

This is not the time for the federal government to skimp on welfare programs, or to burden states with additional expenses. If Bush truly wants to help people become and remain independent, protect children and strengthen families, he will soften his approach.

—*San Jose Mercury News*, January 17, 2003

And, state and local governments, the entities that would actually have to implement any TANF policy changes passed by Congress, have continually expressed concerns about the Bush Administration's proposal.

?? In a 2002 survey conducted jointly by the National Governors Association and the American Public Human Services Association, 41 states (out of 47 that responded) reported that the Bush Administration's TANF reauthorization proposal “would cause them to make fundamental changes to their state welfare reform strategies and/or redirect resources... Several states noted that evaluations of their programs have given them evidence that they are pursuing successful strategies that would require

fundamental change if the Administration's proposal became law.”¹³

- ?? A July, 2003 article in the *Kansas City Star* quotes the secretary of the Kansas Department of Social and Rehabilitative Services as saying “We were happy with the reform that occurred in 1996... Why fix what isn’t broken?”¹⁴
- ?? Joel Potts, who runs Ohio’s TANF program for Governor Bob Taft (R), has been a vocal critic of the House plan. Potts seems to reflect the sentiment of many when he says, “Not messing with it for another five years would be just fine by me. I’d be doing back flips down the hall.”¹⁵

Despite these widespread criticisms, House leadership has made essentially no alterations to Administration’s TANF proposal, despite having numerous opportunities to do so over the past several years. By contrast, the Senate Finance committee has repeatedly passed much more moderate reauthorization legislation, and in 2002 a number of Republican senators specifically endorsed the Senate’s alternative approach.¹⁶ More recently, it has been reported that Senator Olympia Snowe (R-ME) “has vowed to fight any reconciliation package that would cut welfare programs or that lacks a sizable increase for child care funding.”¹⁷

In short, including TANF provisions in reconciliation—particularly provisions that have never been subject to debate or amendment on the floor of the Senate—would undermine the role of the Senate in our democratic process of governance and almost certainly result in inferior and “off center” legislation.

Violating Federal Budget Process Laws: Including TANF Reauthorization in Reconciliation Would Violate Section 313 of the Congressional Budget Act

The Congressional Budget Act includes an important prohibition on including extraneous material in reconciliation. The purpose of this provision—section 313 of the Budget Act, known as the “Byrd Rule” after its author, Senator Robert Byrd—is to ensure that the reconciliation process is not misused in ways that limit the Senate’s role in democratic governance. According to a former top aide to Majority Leader Frist, “By limiting debate, imposing germaneness requirements, and mandating deficit neutrality for amendments, reconciliation significantly intrudes on the normal exercise of senators’ rights and is especially burdensome to whichever party happens to be in the minority at the moment. ... [Section 313] provides a critical protection for the minority.”¹⁸

In general, a provision included in a reconciliation bill should be considered extraneous under section

¹³ National Governors Association and American Public Human Services Association, “Welfare Reform Reauthorization: State Impact of Proposed Changes in Work Requirements, Survey Results,” April 2002, p. 3. The study is posted on the internet at www.inclusionist.org/node/42.

¹⁴ “Welfare reform, part two; Follow-up plan has social service workers concerned,” *The Kansas City Star*, July 27, 2003, p. A12.

¹⁵ “Ohio welfare chief fears impact of Bush proposals,” *Plains Dealer*, June 26, 2003, p. A19.

¹⁶ Senators Bennett (R-UT), Chafee (R-RI), DeWine (R-OH), Dominici (R-NM), and Voinovich (R-OH) signed a letter endorsing the “tri-partisan” Finance Committee TANF reauthorization bill. Senators Collins (R-ME) and Fitzgerald (R-IL) sent separate letters expressing a similar position.

¹⁷ “House to begin rewrite of 1996 welfare law; senate remains opposed,” *CQ Today*, October 18, 2005.

¹⁸ Martin B. Gold, *Senate Procedure and Practice* (Rowman and Littlefield, 2004).

313 if it meets one of the following two criteria:¹⁹

- ?? *The provision does not change federal spending* Section 313(b)(1)(A) of the Congressional Budget Act provides that a provision “shall be considered extraneous if such provision does not produce a change in outlays or revenues.”
- ?? *The provision changes federal spending, but the change in spending is “incidental” to policy changes made by the provision.* Section 313(b)(1)(D) of the Budget Act provides that a provision “shall be considered extraneous if it produces changes in outlays to revenues which are merely incidental to the non-budgetary components of the provision.”

Under section 313, any Senator may object (the technical term is “raise a point of order”) to extraneous material in a reconciliation bill or conference report. If the Chair sustains the objection, the provision must be removed from the bill.²⁰ It is important to note that section 313 is not “self-executing.” That is, an extraneous provision will not be removed from reconciliation legislation absent a senator’s objection.

There is only one way to prevent removal of an extraneous provision at this point. A senator may make a motion to “waive” the objection and retain the extraneous material. If 60 or more senators vote in support of the waiver motion, the extraneous material will remain in the bill. According to the Congressional Research Service, waiver motions are rarely successful.²¹

TANF is a block grant that states receive as a fixed level of funding each year to provide various benefits and services to families with children. In general, changes made to the legislation authorizing TANF—other than changes that directly reduce or increase the level of block grant funding provided to states—have no effect on federal spending or the deficit. As the Congressional Budget Office explains in its cost estimate of the TANF provisions in the House reconciliation bill, the extension of TANF has “no cost” relative to CBO’s baseline.

Congressional Budget Office staff report that only 7 of the 26 sections in TANF subtitle of the House-passed reconciliation bill would have any impact at all on the federal budget. There should be little question that provisions in the 19 other TANF sections of the reconciliation bill are extraneous under section 313 and subject to exclusion from the bill.²²

As for the 7 sections that include provisions that CBO has concluded will have a budget impact, we believe that several provisions in these sections, including provisions that change the work-related requirements that states must meet in their TANF programs, also are extraneous. Several provisions in these sections have budgetary effects that are “merely incidental” to non-budgetary components of the provisions.

¹⁹ There are some additional grounds under which a provision can be considered extraneous, but these two are the most relevant to the question of whether the inclusion of TANF provisions in reconciliation violates federal law.

²⁰ The Senate Parliamentarian decides whether a provision is correctly categorized as extraneous under section 313. The chair will uphold the objection if the Senate Parliamentarian agrees that the challenged provision is extraneous.

²¹ According to CRS, only 41 waiver motions have ever been made and only 9 have been successful. Robert Keith, “The Budget Reconciliation Process: The Senate’s “Byrd Rule,” Congressional Research Service, February 19, 2004, <http://www.rules.house.gov/archives/RL30862.pdf>.

²² These sections are sections 8001, 8002, 8003, 8004, 8101, 8102, 8108, 8109, 8111, 8112, 8113, 8114, 8116, 8117, 8118, 8119, 8120, 8121, and 8122.

The next section of this analysis discusses in greater detail why the work-related TANF provisions in the House reconciliation bill should be categorized as extraneous because any budgetary effects they have are incidental to the non-budgetary components of the provisions.

Changes to TANF Work Rules Would Violate Section 313(b) of the Budget Act

Section 8110 would require states to have an increasing percentage of TANF recipients participate in work activities while receiving cash assistance and continue to subject states to penalties for the failure to meet those requirements. In discussing the provision, CBO found that “any penalties for failing to meet the new requirements would total less than \$500,000 annually” and did not include any specific estimate of savings associated with the penalties.

There should be little question that such changes are extraneous under the Budget Act because they “merely incidental” to the extensive non-budgetary policy changes included in section 8110. Several Senate precedents support this conclusion. For example, in 1990, the Chair sustained a point of order under section 313(b)(1)(D) against provisions that would have raised revenues by imposing criminal penalties, including fines, under the Occupational Safety and Health Act.²³ The point of order was sustained because the budgetary effect was merely incidental to the policy change to the policy change made by the provision.

The changes that would be made to the TANF work rules are more extensive than the changes being proposed to the OSH Act in the 1990 reconciliation legislation. Moreover, like the OSH Act changes, the changes to TANF are not being made in order to increase federal revenues or reduce federal outlays.

Similarly, in 1997, the Chair sustained a point of order raised by Senator Pete Domenici (R-New Mexico) against an amendment that would have broadened the definition of “work activity” for purposes of the work participation rates by allowing up to 24 months of vocational educational training to count as a work activity. (A motion by Senator Carl Levin (D-Michigan) to waive the point of order was rejected on a 55-45 vote.)²⁴ The changes that the House-passed reconciliation bill would make to the TANF work rules are of a similar nature to the change that was struck down as a violation of section 313 in 1997. And, like the change proposed in 1997, the more extensive changes in the current reconciliation bill are not being made with any intent to increase federal revenues or reduce federal outlays.

Using the Reconciliation Process to Establish a New Federal “Marriage Promotion” Program would be Inappropriate and May Violate Section 313(b)

Section 8103, which includes provisions that would authorize and provide funding for a new federal marriage promotion program, deserves special consideration. In general, provisions establishing new federal programs, particularly those that entail the establishment of ongoing entitlement spending, should be

²³ 136 Cong. Rec. S15,771 (Oct. 18, 1990); see Alan S. Frumin, *Riddick’s Senate Procedure* 625 (1992).

²⁴ 143 Cong. Rec. S6298 (daily ed. June 25, 1997).

considered under normal Senate procedures, rather than under the expedited rules of the fast-track reconciliation process. Section 8103 is no exception to this rule.

The two changes in Section 8103 would have an extremely modest fiscal impact, reducing outlays by \$28 million over five years. This fiscal impact is “merely incidental” to the policy change involved in eliminating the non-marital birth reduction bonus and replacing it with a new federal program designed to promote healthy marriage. The primary purpose of the provision is not to reduce federal outlays, but rather to create a new federal program designed to promote marriage.

As such, the provisions in section 8103 represent a paradigm case of the type of provisions that do not belong in a reconciliation bill. This is clear from the debate surrounding the amendment that was one of the precursors to the current prohibitions on including extraneous language in budget reconciliation. As we have already noted, Senate Majority Leader Howard Baker (R-TN) said during the 1981 OBRA debate that, “reconciliation was never meant to be a vehicle for an omnibus *authorization bill*. To permit it to be treated as such is to break faith with the Senate’s historical uniqueness as a forum for the exercise of minority and individual rights.” (Emphasis added).

The section also includes provisions that may violate section 313 of the Budget Act. According to a Senate staffer who is an expert on Section 313: “... The Parliamentarian casts a particularly suspicious eye on language that makes appropriations The Parliamentarian appears to view [this as a strong indicator] that the language attempts to do something that the drafters of section 313 did not contemplate Congress would do in the fast-track reconciliation process.”²⁵

The controversial nature of the proposed “marriage” provision also argues against including it in budget reconciliation legislation. In the same 1981 OBRA debate, Senator Byrd explained that reconciliation should not be used as a means to “shield controversial or extraneous legislation from free debate.” In short, using budget reconciliation to establish a marriage promotion program would undermine the Senate’s role in shaping the terms of that new federal entitlement program. In addition, it would be inconsistent with the spirit of the Budget Act, and some provisions may violate the letter of the Act.

Conclusion

Over the past four years House leadership and administration officials have promoted an extensive set of policy changes to the 1996 welfare reform law. To the best of our knowledge, they have never stated or even implied that these changes are motivated by budgetary or fiscal considerations. Using the reconciliation process to make an extensive set of policy changes to the 1996 welfare reform law—changes that have *never been subject to debate or amendment on the floor of the Senate*—would fundamentally undermine the Senate’s role in the legislative process, and violate both the letter and the spirit of section 313 of the Congressional Budget Act.

If successful, this stratagem would undermine the Senate’s role in the legislative process, deny the public a full and fair debate over important federal policy questions, and produce an inferior and undemocratic set of changes to the 1996 welfare reform law. In addition, the public would have little input

25 Dauster, William G., with Parent Allison, *Byrd Rule Annotated Including Section 313 of the Congressional Budget Act*, 109th Congress, First Session.

into an important set of federal policy decisions. In effect, key elements of our nation's policies for supporting low-wage working families would be decided "under the radar" and without benefit of a full and informed debate. The Senate should oppose this cynical maneuver and refuse to accede to the inclusion in budget reconciliation legislation of TANF reauthorization provisions that have never been debated or subject to amendment on the floor of the Senate.