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The Bush Tax Cuts of 2001 and 2003

A Brief Legislative History

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President Bush proposed major tax cuts in 2001 and 2003, the first temporarily cutting individual rates and repealing the estate tax, and the second temporarily cutting taxes on corporate dividends and extending the original individual tax cuts. Although they were proposed in different economic situations, both tax cuts fared similarly: the House, under Republican control, was favorably disposed, but the closely-divided Senate created a political bottleneck, and the ultimate size of the tax cut was determined by the limits imposed by Senate moderates from both parties, especially those on the Senate Finance Committee. The processes were relatively unconstrained by PAYGO rules, which had been weakened, but Budget Act points of order came into play in both chambers. Throughout the entire three-year process, the Byrd Rule, which attempts to impose order on the budget reconciliation process by precluding consideration of provisions that would increase the deficit or affect Social Security, as well as those that have not passed through committee properly or are unrelated to revenue and spending, was unchallenged.

The 2001 Tax Cut

The year 2001 began with a relatively positive economic forecast, but with some concern of a recession, both of which were cited as reasons to cut taxes.[1] In early 2001, the Congressional Budget Office (CBO) projected GDP growth of about 2.4 percent for

[1] Steven Pearlstein, *Fed-Induced Euphoria Begins to Fade*, WASH. POST, Jan. 5, 2001. Mike Allen & Glenn Kessler, *Bush Says Tax Cut Open To Talks and a Speedup*, WASH. POST, Jan. 5, 2001.

the coming year, and an average of 3 percent per year from 2002-2011.[2] The President's budget released in early 2001 projected a 10-year on-budget surplus of $3 trillion (i.e., exclusive of Social Security),[3] slightly less than the CBO's on-budget forecast of $3.1 trillion.[4]

Concerns about increasing the deficit were magnified by the fact that by 2001, PAYGO had been weakened in both houses of Congress. The Pay-As-You-Go system (PAYGO) is a statute and system of rules that originally required new mandatory spending and revenue legislation to be deficit-neutral.[5] Statutory PAYGO in both houses was enforced by sequestration, that is, across-the-board cuts of the amount necessary for deficit-neutrality, and spending was tracked on a 'scorecard.' In 2001 and other years, however, Congress directed the Director of the Office of Management and Budget (OMB) to set the scorecard to zero, effectively waiving sequestration.[6] The House and Senate also employ a set of rules referred to as "rules-based PAYGO," which allow a point of order against any legislation that would increase the deficit in the next ten years, and which can be waived, but in the Senate only by a 60-vote supermajority.[7] House rules-based PAYGO did not exist in 2001 and 2003, but other House rules disciplined the

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[2] CONGRESSIONAL BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2002-2011 (Jan. 2001), *available at* http://cbo.gov/doc.cfm?index=2727&type=0&sequence=1 (last visited May 4, 2008).
[3] The President's Budget, 2001, pg. 7, *available at* http://www.whitehouse.gov/news/usbudget/blueprint/budtoc.html (last visited May 5, 2008). Alan J. Auerbach & William G. Gale, *Tax Cuts and the Budget*, TAX NOTES, Mar. 26 2001, at 16.
[4] CONGRESSIONAL BUDGET OFFICE, *supra* note 2 at xii.
[5] *See generally* CRS Report RL34300, ROBERT KEITH, PAY-AS-YOU-GO PROCEDURES FOR BUDGET ENFORCEMENT (Congressional Research Service, updated Dec. 31, 2007), *available at* http://www.rules.house.gov/CRS_Rpt/RL34300.pdf (last visited May 5, 2008). 2 USCS § 641(e)(2), 2 USCS § 636(b)(2), (4).
[6] CONGRESSIONAL BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2004-2013 116 (Jan. 2003), *available at* http://www.cbo.gov/ftpdocs/40xx/doc4032/EntireReport_WithErrata.pdf (last visited May 4, 2008).
[7] KEITH, *supra* note 5, at 6.

budget process.[8] In 1999, the Senate began allowing on-budget surpluses to be used to offset tax cuts or spending increases, which, along with the reset scorecard, allowed the 2001 tax cut to pass without being significantly constrained by PAYGO.[9] Additionally, Senate reconciliation process rules limit debate on reconciliation bills to 20 hours,[10] which prevents a minority from filibustering and reduces its ability to block large spending bills.

I. The President's Plan.

a. The Plan and Its Background.

The 2001 tax cut process officially began when President Bush released his tax relief agenda on February 8, 2001, although its components had been promoted throughout the campaign and proposed by Congressional Republicans in 2000.[11] Cutting individual income taxes was a major priority, promoted both to stimulate the economy and to simplify the tax system. The top two brackets would be cut from 39.6 and 36 percent to 33 percent, and the next two from 31 and 28 percent to 25 percent. The lowest existing bracket would remain at 15 percent, but a new 10 percent bracket would be

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[8] Id. at 7; *infra* note 167.

[9] ELLEN BRADFORD & MICHAEL SCOGIN, PAYGO RULES AND SEQUESTRATION PROCEDURES 3, 14, Harvard Law School Federal Budget Policy Seminar, Mar. 31, 2008 (updated by Avery Day & David Weiler), *available at* http://www.law.harvard.edu/faculty/hjackson/budget.php (last visited May 6, 2008). Congressional Budget Office, Statement of Peter R. Orszag, Director, Issues in Reinstating a Statutory Pay-As-You-Go Requirement, before the Committee on the Budget U.S. House of Representatives, Jul. 25, 2007, *available at* http://www.cbo.gov/doc.cfm?index=8385&type=0 (last visited May 4, 2008).

[10] CRS Report RL33030, ROBERT KEITH & BILL HENIFF, JR., THE BUDGET RECONCILIATION PROCESS: HOUSE AND SENATE PROCEDURES 7 (Congressional Research Service, updated Aug. 10, 2005), *available at* http://assets.opencrs.com/rpts/RL33030_20050810.pdf (last visited May 5, 2008). 2 USCS § 641(e)(2).

[11] Remarks on Transmitting Proposed Tax Cut Plan to Congress, 271 WEEKLY COMP. PRES. DOC. 37 (Feb. 8, 2001), *available at* http://www.whitehouse.gov/news/releases/20010208.html (last visited May 5, 2008). For campaign and previous proposals see, e.g., Lizette Alvarez & Steven A. Holmes, *Bush Tax Cut Loses Appeal for Republicans in Congress*, N.Y. TIMES, Sept. 14, 2000; Citizens FOR TAX JUSTICE, SUMMARY AND ANALYSIS OF GEORGE W. BUSH'S TAX PLAN, updated Aug. 2000, *available at* http://www.ctj.org/html/bush0800.htm (last visited May 5, 2008).

added for the first $6,000 of income, $12,000 for married couples. The proposal would also increase the child tax credit from $500 to $1,000 per child and make part of it applicable against the Alternative Minimum Tax (AMT).[12] No other significant changes to the AMT were proposed, despite calls to raise the AMT eligibility threshold.[13] The plan would reduce the marriage penalty by reinstating the 10 percent deduction for two-earner couples. The President also proposed eliminating the estate tax entirely and making the charitable deduction available to non-itemizers.

The President projected a tax reduction of $1,600 to the average family.[14] The plan was pitched as a stimulus and a marginal rate reduction for low-earning taxpayers, because they would receive income tax cut, increased child tax credit, marriage penalty reduction, and charitable deduction increase. The President argued that the distribution was fair because the greatest percentage reduction went to low-income families.[15] The fairness claims met with resistance on the left, and became a key political issue as it became clear that the largest cuts by dollar amount, though not by percentage of current tax burden, would go to the wealthy.[16] The Administration did not release a dynamic analysis, but estimated the static cost at $1.6 trillion over 10 years.[17]

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[12] DEPARTMENT OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2002 TAX RELIEF PROPOSALS 1-3, 5, 12, 6-8, Apr. 2001, *available at* http://www.ustreas.gov/press/releases/reports/bluebk01.pdf (last visited May 5, 2008).

[13] *See, e.g.*, Richard W. Stevenson, *Suggesting Smaller Cuts, Democrats Say Republican Tax Plan Is Too Risky*, N.Y. TIMES, Jan. 25, 2001.

[14] The President's Agenda for Tax Relief 4, *available at* http://www.whitehouse.gov/news/reports/taxplan.html (last visited May 5, 2008).

[15] WEEKLY COMP., *supra* note 11.

[16] CITIZENS FOR TAX JUSTICE, CTJ ANALYSIS OF BUSH PLAN UPDATED TO 2001 LEVELS, Feb. 27, 2001, *available at http://www.ctj.org/html/gwbin01.htm* (last visited May 5, 2008).

[17] The President's Budget, *supra* note 3. Department of the Treasury, *supra* note 12, at 58-60. MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 179 (2005).

b. Early Estimates and Responses to the President's Plan.

Congressional Democrats immediately criticized the President's proposal. Estimating the cost of interest on the borrowing that would partially fund the tax cut, and of reserving parts of the surplus for additional spending and debt reduction, Senate Minority Leader Daschle and House Minority Leader Gephardt advocated a tax cut no larger than $900 billion.[18] The Senate was evenly split between parties, so Republicans were in control, and could count on the support of Democratic Sen. Zell Miller, but several Republican senators' support for a large tax cut was uncertain. Senate Republicans and the President knew a compromise would be required, and the views of moderates and Senate Democrats shaped the debate from the outset.

Outside groups began estimating the cost of the tax plan as early as 2000. In August 2000, Citizens for Tax Justice (CTJ) estimated the cost at $1.9 trillion over 10 years.[19] Economists William Gale and Alan Auerbach of University of California-Berkeley and the Brookings Institution released a study evaluating the surplus at $2.3 trillion, adjusting the $3.1 trillion on-budget surplus downward for Medicare, retirement funds and other mandatory spending.[20] Adjusting for renewal of the AMT and other expiring tax provisions produced a surplus of $2.1 trillion.[21] Gale and Auerbach priced the tax cut at $2.2 trillion as of March 2001, [22] and CTJ priced it at $2.4 trillion.[23] In January 2001, Robert Greenstein at the Center for Budget and Policy Priorities (CBPP) raised the concern that CBO's assumption that legislation would sunset as scheduled had

[18] GRAETZ, *supra* note 17, at 178-79.
[19] Citizens FOR TAX JUSTICE, *supra* note 11. This estimate did not include an AMT adjustment.
[20] Auerbach & Gale, *supra* note 3, at 9.
[21] *Id.*
[22] *Id.* at 21.
[23] CITIZENS FOR TAX JUSTICE, NEW ESTIMATES SHOW COST OF BUSH TAX PLAN CONTINUES TO RISE, Mar. 8, 2001, *available at* http://www.ctj.org/html/gwbcrev.htm (last visited May 5, 2008).

given the impression of a larger surplus than actually existed. Greenstein estimated the 10-year surplus at $1.5 to $2 trillion, and suggested that in light of the Social Security issue, it would be unwise to devote the entire surplus to tax cuts.[24] Greenstein priced the 2001 tax cut at $2.1 trillion, pointing out that 10-year estimates from 2001 for a tax cut effective in 2002 only included 9 years of the cut, artificially lowering the perceived cost.[25] The Heritage Foundation (Heritage) quickly responded to Greenstein's estimate, arguing that it did not reflect the dynamic improvement in the economy that would likely result, and that Greenstein had assumed that the AMT would be adjusted and that the tax cut would be retroactive, but the President's plan did not include those proposals.[26] Heritage estimated the tax cut at $940 billion, using dynamic analysis. CBPP disputed the dynamic effect, suggesting that the tax cut would reduce national saving (as compared the government saving the surplus), outweighing any potential GDP growth.[27]

As many had expected, Republican Sens. Jeffords and Chafee announced in February that the proposed tax cut was larger than they could support, but Democratic Sen. Miller supported it, so both sides could aspire to a majority or substantial leverage.[28] Moderates in both parties expressed concern over the size of the package as early as March.[29] Alan Greenspan came out in support of a tax cut designed for short-term

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[24] ROBERT GREENSTEIN, CAN THE NEW SURPLUS PROJECTIONS ACCOMMODATE A LARGE TAX CUT?, Center on Budget and Policy Priorities, Jan. 4, 2001, *available at* http://www.cbpp.org/1-4-01bud.htm (last visited May 5, 2008).

[25] *Id.*, section entitled Where the Bush Tax Cut Fits In.

[26] THE HERITAGE FOUNDATION, WHY THE CENTER ON BUDGET AND POLICY PRIORITIES IS WRONG ABOUT THE COST OF BUSH'S TAX PLAN, Feb. 16, 2001, *available at* http://www.heritage.org/Research/Taxes/WM5.cfm (last visited May 5, 2008).

[27] CENTER ON BUDGET AND POLICY PRORITIES, MARGINAL TAX RATE REDUCTIONS AND THE ECONOMY: WHAT WOULD BE THE LONG-TERM EFFECTS OF THE BUSH TAX CUT?, *available at* http://www.cbpp.org/3-19-01tax.htm (last visited May 5, 2008).

[28] Alison Mitchell, *2*[sic] *Moderate Republicans Oppose Bush Tax Plan as Democrats Offer Their Own*, N.Y. TIMES, Feb. 16, 2001.

[29] Susan Crabtree, *Despite Tax Plea, Bush May Not Have the Votes; Daschle Declares Rate Cut Plan Has Expanded, Hints That More GOP Defections Will Be Coming*, ROLL CALL, Mar. 1, 2001.

stimulus, as long as it would not add to the deficit.[30] Clinton Administration Treasury Secretary Robert Rubin and former Fed Chairman Paul Volcker advocated for a smaller and shorter-duration cut.[31]

Criticisms of the plan's distributive fairness developed concurrently. The President emphasized that his plan provided the greatest percentage tax reduction to lower-income taxpayers,[32] but that argument was quickly rejected as disingenuous: because the individual income tax is already progressive, lower-income taxpayers pay little in taxes, so a cut of only a few dollars can be a relatively large percentage of their tax burden. In August 2000, CTJ announced that 60 percent of the Bush campaign's proposed cut would go to the wealthiest 10 percent of taxpayers, and that 43 percent would go to the wealthiest 1 percent, those making more than $319,000 per year. The average annual tax cut for those taxpayers would be $46,000, compared with an average of only $227 for the bottom 60 percent of taxpayers.[33] The Administration responded with arguments contrasting low-income taxpayers' share of the nationwide tax burden with their share of the tax cut, saying that low-income taxpayers paid only 2.5 percent of income taxes but would receive a 38 percent cut, while high-income taxpayers paid 43 percent of income taxes and would receive only an 8.7 percent cut.[34] CBPP released a study showing that the after-tax income of high-income taxpayers had increased

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[30] Richard W. Stevenson, *In Policy Change, Greenspan Backs a Broad Tax Cut*, N.Y. TIMES, Jan. 26, 2001.
[31] *Big Guns Join Attack on Bush's Tax Proposal*, N.Y. TIMES, Mar. 13, 2001.
[32] The President's Agenda for Tax Relief 4, *supra* note 14.
[33] CITIZENS FOR TAX JUSTICE, *supra* note 11. CTJ's analysis of the actual proposal was similarly regressive. CITIZENS FOR TAX JUSTICE, *supra* note 16.
[34] *President's Tax Relief Plan Gives Greatest Relief to Lowest Income Taxpayers*, White House Press Secretary, Mar. 8, 2001, *available at* http://www.whitehouse.gov/news/releases/2001/03/20010309-5.html (last visited May 5, 2008).

significantly in recent years, and that the Administration's plan would not do enough to compensate for this wealth disparity.[35]

II. Congressional Action.

a. Preliminary Hearings.

Congress held a series of hearings on the President's proposal, breaking it down into separate bills. The House Ways and Means Committee held a hearing to discuss the individual rate cut proposal.[36] Treasury Secretary Paul O'Neill defended the President's plan, presenting the Administration estimate of $1.6 trillion as an upper limit. Rep. Rangel (D-NY), the Committee's Ranking Member and House Democrats' leader and manager for the tax cut process, was concerned because the plan did not include an increase in the minimum eligibility threshold for the AMT, which would mean that some taxpayers at the threshold would not benefit from the tax cut, in particular, those in New York and other cities where high cost of living makes an AMT-qualifying salary worth less than in other locations. O'Neill agreed that the AMT problem existed, but emphasized that no taxpayers would experience a tax increase because of the Bush plan, and later cast the AMT issue as a progressive feature because it would limit the size of the tax cut for upper-income taxpayers. Rep. Levin (D-MI) estimated the tax cut and related borrowing costs at $2 trillion, suggesting it was imprudently large.

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[35] CENTER ON BUDGET AND POLICY PRIORITIES, HOW STRONG IS THE CASE FOR MAJOR RATE REDUCTIONS FOR HIGH-INCOME TAXPAYERS?**,** Mar. 8, 2001 *available at* http://www.cbpp.org/3-8-01tax.htm (last visited May 5, 2008).

[36] *President's Tax Relief Proposals: Individual Income Tax Rates: Hearing Before the H. Comm. on Ways and Means*, 107th Cong. (2001)*, available at* http://waysandmeans.house.gov/legacy.asp?file=legacy/fullcomm/107cong/2-13-01/107-1final.htm (last visited May 5, 2008).

Professor Martin Feldstein of Harvard discussed revenue-increasing static effects of the tax cut (modifications in taxpayer behavior, such as working more, with a background assumption of fixed GDP), and estimated the cost at $1.2 trillion. Robert Greenstein of CBPP priced the tax cut at $2.1 trillion, including debt service, and about $2.3 trillion with an AMT adjustment. Greenstein disputed the plan's fairness, saying that the relevant context for analyzing fairness was the bill as a whole, and after estate tax reductions, the nonrefundable increase in the child tax credit, and existing non-progressive taxes (e.g. payroll), the tax cut is not progressive, not even providing marriage penalty relief to low-income families. His preference was a smaller tax cut in case the full projected surplus does not materialize. Kevin Hassett of the American Enterprise Institute supported a tax cut to ameliorate bracket creep and stave off recession. He did not think a recession would reduce the surplus significantly.

At the Senate Finance Committee's preliminary hearing,[37] Chairman Hatch pushed for AMT reform, but Secretary O'Neill was unwilling to include it if it would raise the cost of the tax cut above $1.6 trillion. Ranking Member Baucus suggested that the tax cut was too costly in light of Medicare and other budget contingencies, and Sens. Breaux and Torricelli asked for more progressiveness. Ultimately, the core of the debate was the prudence of the tax cut in light of uncertain surplus projections and the likelihood of AMT adjustments and other spending that President's plan did not take into account. O'Neill did not attempt to make a strong case for the tax cut as stimulus.[38]

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[37] *Revenue Proposals and Tax Cuts in the President's Budget: Hearing Before the S. Comm. on Finance*, 107th Cong. (2001), *available at* http://www.senate.gov/~finance/71985.pdf (last visited May 5, 2008).
[38] Richard W. Stevenson, *At Hearings, Cracks Appear in Bush's Party Line*, N.Y. TIMES, Jan. 20, 2001.

b. Preliminary Bills.

The House began by breaking the President's plan down by category and drafting separate bills. After the preliminary bills had passed the House and Senate Finance had had time to consider and negotiate, House Republicans created H.R. 1836.

i. H.R. 3, The Economic Growth and Tax Relief Act of 2001 (EGTRA).

H.R. 3 was introduced in the House on February 28, 2001. As introduced, [39] it reduced individual income taxes gradually to 10, 15, 25, and 33 percent, almost as low as the President had proposed. It also made EITC and the additional-child tax credit refundable against the AMT, which the President had not proposed but several Senators and Members from both parties supported.[40] Heritage priced the bill as introduced at $634 billion, dynamically scoring JCT's static estimate of $948 billion.[41] The House Ways and Means Committee reported the bill essentially unchanged, and it passed the House in a vote of 230-198, gaining the support of ten Democratic Members.[42] Rep. Rangel offered a more progressive substitute bill that would create a new 12 percent bracket without otherwise reducing rates, and reduce the marriage penalty through an increase in the standard deduction for married couples and exempting that deduction from

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[39] H.R. 3 (2001) as introduced in the House, and CRS summary, both available at Thomas.loc.gov.

[40] *See, e.g.*, David E. Rosenbaum, *The Fine Print -- Alternative Minimum Tax; Democrats and Republicans Switch Roles on a Tax*, N.Y. TIMES, Apr. 20, 2001.

[41] D. MARK WILSON, WILLIAM W. BEACH & REA S. HEDERMAN, JR., THE ECONOMIC AND BUDGETARY EFFECTS OF H.R. 3, THE ECONOMIC GROWTH AND TAX RELIEF ACT OF 2001 1, Heritage Foundation, Mar. 7, 2001, *available at* http://www.heritage.org/Research/Taxes/CDA01-02.cfm (last visited May 5, 2008). For a clear and comprehensive explanation of the bill, *see* DESCRIPTION OF THE ECONOMIC GROWTH AND TAX RELIEF ACT OF 2001, SCHEDULED FOR MARKUP BEFORE THE S. COMM. ON FINANCE ON MARCH 7, 2001, JOINT COMMITTEE ON TAXATION, JCX-6-01, at Mar. 6, 2001.

[42] CRS summary of H.R. 3 (2001), available at Thomas.loc.gov. House R.C. Vote 45, Mar. 8, 2001. The primary changes were to accumulated corporate earnings, withholding, and supplemental wage payments.

the AMT,[43] but it inevitably failed, losing even one-quarter of the Democratic Members. CTJ priced H.R. 3 as passed at $1.2 trillion, including debt service, and the Rangel alternative at approximately $600 billion.[44]

Committee and Floor discussion touched on the idea of a debt trigger, either preventing future tax cuts if the future surplus was insufficient, or providing a refund if a future surplus developed above a certain level, but nothing was written into the bill.[45]

ii. H.R. 6, The Marriage Penalty and Family Tax Relief Act of 2001.

H.R. 6 was introduced in the House on March 15, 2001. As introduced, it would reduce the marriage penalty by allowing married couples filing jointly a standard deduction equal to twice the unmarried individual deduction, by adjusting brackets for single and married taxpayers, and by increasing the amount of EITC available to married couples. It also increased the allowed amount of nonrefundable personal credits against the AMT.[46] House Ways and Means made the child tax credit refundable for any number of children, and allowed EITC and the child tax credit against the AMT.[47] JCT priced

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[43] 147 CONG. REC. 793-94 (2001). For a comparison of H.R. 3 and Rangel's bill, *see* CITIZENS FOR TAX JUSTICE, HOUSE COMMITTEE APPROVES BUSH INCOME TAX RATE CUTS; REPUBLICANS AND DEMOCRATS DISAGREE ON TAX BREAKS FOR RICH, Mar. 2, 2001, *available at* http://www.ctj.org/html/hwm301.htm (last visited May 5, 2008).
[44] CITIZENS FOR TAX JUSTICE, *supra* note 43.
[45] *President's Tax Relief Proposals: Hearing Before the H. Comm. on Ways and Means*, 107th Cong. (2001) (questioning after the statement of Paul O'Neill, Secretary, U.S. Dept. of the Treasury).
147 CONG. REC 752 (2001). Although some Senate moderates briefly supported the idea of a debt trigger, leadership of both parties opposed it, thinking it would be ineffective and undermine stimulus by creating uncertainty. David E. Rosenbaum, *Plan to Tie Tax Cut to Surplus Gains; G.O.P. Tries to Stop It*, N.Y. TIMES, Mar. 8, 2001. Glenn Kessler & Juliet Eilperin, *Tax Cut Is Given A Hurdle To Clear; 11 Senators to Seek A Debt Cut Trigger*, WASH. POST, Mar. 8, 2001.
[46] CRS summary of H.R. 6 (2001) as introduced in the House, *available at* Thomas.loc.gov.
[47] H.R. REP. NO. 107-29 6-14 (2001), *available at* http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr029&dbname=107& (last visited May 5, 2008).

H.R. 6 as reported from Ways and Means at $399.3 billion.[48] The committee version soon passed the House essentially unchanged. Again, on the floor, Rep. Rangel unsuccessfully offered a smaller substitute bill, but the bill passed on party lines and was reported to the Senate, where no action was taken.[49] At this point, the House had passed tax cuts totaling approximately $1.4 trillion (H.R. 3 and H.R. 6), raising concerns about how the proposals would be made to fit within the President's limit of $1.6 trillion.[50]

iii. <u>H.R. 8, The Death Tax Elimination Act of 2001</u>.

H.R. 8, the estate tax bill, was introduced on March 14, 2001.[51] It would fully repeal the estate, gift, and generation-skipping transfer taxes over ten years, and would increase the unified estate and gift tax credit to $1.3 million. House Ways and Means increased the estate tax exclusion for land conservation easements, and allowed larger partnerships to pay the estate tax in installments. It also made the exclusion of capital gain on sale of a primary residence available to some heirs.[52] JCT priced the bill as reported at $186 billion.[53] Some Republicans had wanted to completely repeal the estate tax,[54] but JCT estimated that option at $662.2 billion, quashing it.[55] Rep. Rangel offered

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[48] CONGRESSIONAL BUDGET OFFICE, COST ESTIMATE, H.R. 6 MARRIAGE PENALTY AND FAMILY TAX RELIEF ACT OF 2001, AS ORDERED REPORTED BY THE HOUSE COMMITTEE ON WAYS AND MEANS 1, Mar. 26, 2001.
[49] 147 Cong. Rec. 1301-27 (2001). House R.C. Vote 73, Mar. 29, 2001. Rep. Rangel's bill would have created a new 12 percent bracket, and offered similar marriage penalty and AMT relief but in smaller amounts. CRS summary of H.R. 6 (2001), *available at* Thomas.loc.gov.
[50] GRAETZ, *supra* note 17, at 183.
[51] H.R. 8 (2001); *see, e.g.*, H.R. 627, H.R. 546 (2001), *available at* Thomas.loc.gov.
[52] CRS summary of H.R. 8 (2001) as reported to the House from the Ways and Means Committee, *available at* Thomas.loc.gov.
[53] JOINT COMMITTEE ON TAXATION, ESTIMATED REVENUE EFFECTS OF H.R. 8, THE "DEATH TAX ELIMINATION ACT OF 2001," AS REPORTED BY THE COMMITTEE ON WAYS AND MEANS, JCX-23-01, Apr. 3, 2001.
[54] *See, e.g.*, S. 82 (2001), introduced by Sen. Lugar; S.Amdt 3833 to H.R. 8 (2001), offered by Sen. Gramm, 147 Cong. Rec. 5412, Jun. 12, 2001.

as substitute a much simpler bill costing only $40 million, which increased the estate tax credit only to $2.5 million.[56] The substitute failed, and H.R. 8 passed with the support of one-quarter of the Democratic caucus.[57]

The bill entered the Senate on the floor rather than in committee. Senate Democrats proposed an amendment similar to Rangel's, but a point of order was raised against it under Section 311 of the Budget Act, which prohibits consideration of legislation that would cause revenues to fall below the level set in the budget resolution.[58] After much debate, the bill remained on the Senate calendar.

iv. Other Bills That Entered H.R. 1836.

The House started several smaller bills which ultimately were included in the 2001 tax cut. H.R. 622, the Hope for Children Act, increased the tax credit for adoption, made it available to more middle-income taxpayers, made it refundable and allowed it as a credit against the AMT.[59] H.R. 206 would have increased the amount of employment-related expenses subject to the dependent-care tax credit, for low-income taxpayers,[60] and H.R. 1126 would have increased the dependent-care credit and removed the employment-related requirement altogether.[61] Several additional bills were proposed to modestly increase the child tax credit, and to make it refundable and available to more middle-

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[55] GRAETZ, *supra* note 17, at 181. Graetz explains that the estimated cost exceeded the revenue typically generated by the estate tax because repeal would create the opportunity to avoid other taxes by bequeathing property.

[56] 147 CONG. REC. 1424-58 (2001). Printing and discussion of Rangel's amendment begins at pg. 1445, Apr. 4, 2001.

[57] House R.C. Vote 84, Apr. 4, 2001. GRAETZ, *supra* note 17, at 185.

[58] 2 USCS § 641(d)(2). 147 CONG. REC. 5412-34 (2001). Dorgan-Durbin-Carnahan S.Amdt. 3832. Senate R.C. Vote 149, Jun. 12, 2001. A similar amendment, S.Amdt.3831 (Conrad), and Sen. Gramm's amendment to permanently repeal the estate tax, S.Amdt. 3833, *supra* note 54, both failed in the same way.

[59] CRS summary of H.R. 1836 (2001) as passed, *available at* Thomas.loc.gov.

[60] CRS summary of H.R. 206 (2001), *available at* Thomas.loc.gov.

[61] CRS summary of H.R. 1126 (2001), *available at* Thomas.loc.gov.

income taxpayers, with the determined support of Sens. Snowe, Lincoln, and Jeffords and over the objections of some Republicans who viewed it as welfare.[62]

A variety of bills addressed higher education. Two would make employer- or school-provided educational funds not taxable.[63] Another set would increase the education IRA credit,[64] and another bill would remove the time limit on student loan interest deductions.[65] These education provisions and more would survive in the final tax cut. For retirement savings, one bill successfully proposed a tax credit for retirement contributions and retirement plan startup costs for small employers.[66] Another bill reduced taxes for multi-employer retirement plans. Other proposals included an exclusion for sale of certain farmland[67] and a tax cut for small businesses' health insurance and pension-related costs.[68] All of these were incorporated in the final bill in some form.

c. <u>The Emergence of H.R. 1836, the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA)</u>.

i. <u>The Political Situation</u>.

The House had passed a budget resolution setting the size of the tax cut at $1.64 trillion,[69] with the possibility of a further cut should revenues permit,[70] and the Senate

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[62] HR 387, HR 1153 (2001), *available at* Thomas.loc.gov. John F. Harris & Dan Balz, *Delicate Moves Led To Tax Cut; Moderates Were Key In Bill's Negotiations*, WASH. POST, May 27, 2001.
[63] H.R. 249, H.R. 1483, S. 133 (2001), *available at* Thomas.loc.gov. See also H.R. 1308, S. 763 (2001).
[64] H.R. 676, H.R. 1308, S. 763 (2001), *available at* Thomas.loc.gov.
[65] H.R. 686 (2001), *available at* Thomas.loc.gov.
[66] H.R. 1498 (2001), *available at* Thomas.loc.gov.
[67] H.R. 627 (2001), *available at* Thomas.loc.gov.
[68] H.R. 546 (2001), *available at* Thomas.loc.gov.
[69] H.Con.Res. 83 as passed by the House, § 2(1)(B) (2001), *available at* Thomas.loc.gov.
[70] H.Con.Res. 83 as passed by the House, § 10 (2001), *available at* Thomas.loc.gov.

had passed its budget resolution setting the overall tax cut at $1.12 trillion.[71] The budget resolution expressed the sense of the Senate that individual taxes should be cut up to $1000 per couple for taxpayers, and up to $500 for those who have no income tax liability, considerably less than the President's proposal of $1600 per family.[72] Senators Jeffords, Chafee and Specter had openly opposed a $1.6 trillion tax cut,[73] and Majority Leader Lott had given written assurance that the cost would not rise above $1.25 trillion in reconciliation.[74] Sixty-five Senators, including all 50 Republicans, voted in favor of the budget resolution, ending any hope of a larger cut.[75]

The stage was set for a battle over the size of the tax cut. Because the Senate Republicans held only the smallest possible majority (50 Senators plus the Vice President), with three Senators opposed to a large cut and only a handful of potential Democratic votes,[76] they had little room to maneuver. Sen. Baucus (D-MT), however, held the key position of Finance Committee Ranking Member and was relatively tax-cut-friendly, and he and Chairman Grassley eventually worked out a deal, over the objections of many Senators on both sides, and with Sen. Jeffords as a pivotal vote.[77] The political situation in the Senate caused House Republicans to reconsider how large a package they could realistically expect, while Rep. Rangel continued to make proposals for a smaller

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[71] H.Con.Res. 83 as passed by the Senate, § 101(1)(B), (2) (2001), *available at* Thomas.loc.gov.
[72] GRAETZ, *supra* note 17, at 185. H.Con.Res. 83 (2001) as passed by the Senate, Senate R.C. Vote 86, Apr. 6, 2001.
[73] GRAETZ, *supra* note 17, at 185. See Chafee, Jeffords and Specter's votes in favor of the Harkin Amdt. 185 to H.Con.Res. 83, "To make certain that no child is left behind and to maintain fiscal discipline by making a major investment in education and a commensurate reduction in the share of tax relief given to the wealthiest one percent of Americans," Senate R.C. Vote 69, Apr. 4, 2001. 147 CONG. REC. 3382-96.
[74] GRAETZ, *supra* note 17, at 186.
[75] H.Con.Res. 83 as passed by the Senate (2001), Senate R.C. Vote 86, Apr. 6, 2001.
[76] John F. Harris & Dan Balz, *Delicate Moves Led To Tax Cut; Moderates Were Key In Bill's Negotiations*, WASH. POST, May 27, 2001.
[77] *Id.* Helen Dewar, *Bush, Allies Scramble for Tax Cut Votes; GOP Effort to Win Over Jeffords, Nelson Stalls in Senate; Cleland Is Next Target*, WASH. POST, Apr. 6, 2001.

cut.[78] Ultimately the President and both parties announced agreement on a $1.25 trillion plan, plus retroactive tax relief making the total $1.35 trillion.[79] A joint budget resolution soon followed, which set the spending level slightly higher than the President had wanted, increasing political pressure to reduce the size of the tax cut.[80]

ii. S. 896, The RELIEF Act.

S.896, The Restoring Earnings to Lift Individuals and Empower Families (RELIEF) Act, was the Senate's reconciliation bill. Again, Sens. Grassley and Baucus negotiated a draft, which was referred to the Finance Committee. It cut income taxes slightly less, leaving the top bracket at 36 percent, increased the child tax credit only to $1000, and repealed the estate tax but left the gift tax untouched. After the estate tax repeal expired in 2010, the bill would allow step-up basis for property received from a decedent to up $1.3 million, $3 million for spouses, i.e., that amount of the estate would not be taxed.[81] The conservation easement tax benefit was also included. In addition, the bill increased the tax exemption for certain educational expenses, allowed larger tax-free education IRA contributions, excluded certain education grants and payments from gross income, and extended the student loan interest deduction. Pension and retirement plans and contributions also would receive better tax treatment, and child tax credits would be

[78] H.R. 1264 and 1398 (2001), *available at* Thomas.loc.gov.
[79] GRAETZ, *supra* note 17, at 187, Richard W. Stevenson & David E. Rosenbaum, *Panel Reaches Deal on Budget Framework*, N.Y. TIMES May 9, 2001.
[80] GRAETZ, *supra* note 17, at 187. H.Con.Res. 83, Senate R.C. Vote 98, May 10, 2001, House R.C. Vote 104, May 9, 2001. Richard W. Stevenson & David E. Rosenbaum, *Deal is Reached on U.S. Spending*, N.Y. TIMES, May 3, 2001.
[81] S.896 § 1022 (2001), *available at* Thomas.loc.gov. For a more accessible explanation of the Senate's estate tax proposal, see JOINT COMMITTEE ON TAXATION, MODIFICATIONS TO THE CHAIRMAN'S MARK FOR THE "RESTORING EARNINGS TO LIFT INDIVIDUALS AND EMPOWER FAMILIES ACT OF 2001," 43, JCX-43-01, May 15, 2001.

made fully refundable.[82] The AMT exemption amount would also be increased by $2,000. However, the AMT change and college tuition deductions were only to last a few years, and income and estate tax cuts would occur later than the President wanted, in order to fit the bill under $1.35 trillion. The proposal also reduced the tax credit for state estate taxes, pushing some of the cost onto the states.[83]

Overall, it was a smaller and slightly more progressive bill than the House had passed, made so by a bipartisan group of Senate Finance moderates (Sens. Snowe, Baucus, Breaux, Lincoln and Jeffords).[84] As CBPP pointed out,[85] the bill was designed to delay and sunset most tax cuts in order to keep down the 10-year cost, and did not include as large or as long-lasting an AMT adjustment as was thought to be inevitable. The bill emerged from Finance almost unaltered and with the support of four Democrats, Sen. Breaux leading the moderates' coalition.[86] JCT scored it at $1.347 trillion,[87] and CBPP estimated the real cost at $1.7 trillion in the first ten years, and $4.1 trillion in the second decade.[88]

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[82] GRAETZ, *supra* note 17, at 189-91, JOINT COMMITTEE ON TAXATION, *supra* note 81, at 43.

[83] GRAETZ, *supra* note 17, at 189-90.

[84] Glenn Kessler, *Senators Unveil Plan to Modify Tax Cut's Tilt*, WASH. POST, May 12, 2001. Glenn Kessler, *Panel Aims To Rejigger Tax Relief; Senators Likely to Tilt Cut to Lower Brackets*, WASH. POST, May 6, 2001.

[85] "If the proposal were not designed in such a way as to artificially lower its cost by leaving out various tax-cut measures whose enactment is inevitable and sunsetting others measures before 2011, it would cost $1.7 trillion over the ten years from 2002 to 2011 . . . . The bill would cost *approximately $4.1 trillion* during the second ten years, far more than its cost during the first ten years and close to what the Bush plan would cost in the second ten years. (The Bush plan is estimated to cost $4.4 trillion in the second ten years.)" (itals. in original). RICHARD KOGAN, JOEL FRIEDMAN & ROBERT GREENSTEIN, SENATE FINANCE PROPOSAL MASKS FULL COST: CHAIRMAN'S MARK IS NEARLY AS LARGE AS BUSH TAX CUT IN SECOND TEN YEARS, Center on Budget and Policy Priorities 1-2, May 15, 2001, *available at* http://www.cbpp.org/5-14-01tax2.htm (last visited May 5, 2008).

[86] GRAETZ, *supra* note 17, at 190. Alison Mitchell, *Centrist Senator Found Middle Ground*, N.Y. TIMES, Apr. 7, 2001. Dick Morris, *John Breaux Takes Command*, THE HILL, Apr. 11, 2001.

[87] JOINT COMMITTEE ON TAXATION, ESTIMATED BUDGET EFFECTS OF THE "RESTORING EARNINGS TO LIFT INDIVIDUALS AND EMPOWER FAMILIES ('RELIEF') ACT OF 2001," AS ORDERED REPORTED BY THE COMMITTEE ON FINACE ON MAY 15, 2001 8, JCX-46-01, May 16, 2001.

[88] KOGAN ET AL., *supra* note 85, at 2.

iii. H.R. 1836, The Economic Growth and Tax Relief Reconciliation Bill (EGTRRA).

As Senate Finance worked, House Republicans produced a starter reconciliation bill, H.R. 1836, consolidating the preliminary bills and trimming to come within the agreed-upon $1.35 trillion. As discussed supra, the PAYGO scorecard had been reset so there was no fear of sequestration, and the surplus was being allowed to offset spending and tax cuts on the scorecard.[89] Under the rules resolution for the bill, the House had waived points of order.[90] H.R. 1836 as passed by the House cut individual income taxes as the President had proposed, relieved the marriage penalty, and allowed the additional-child tax credit and EITC against the AMT. It cut the top individual income tax rate to 33 percent, conflicting with the Senate's 36 percent.[91] The bill passed the House on May 16 without amendment, with all Republicans and 13 Democrats voting in favor,[92] and was sent to the Senate while still quite brief and admittedly incomplete, as time was of the essence and the Senate stood ready to add previously negotiated provisions.

The Senate spent a week debating its version of H.R. 1836. Because it was a reconciliation bill, Section 305 of the Budget Act applied, limiting debate to 20 hours and requiring that amendments be germane, or be accompanied by a motion to recommit.[93] Although Senators from both parties offered hours of time-consuming motions and

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[89] KEITH, *supra* note 5.
[90] H.Res. 142 (2001), *available at* Thomas.loc.gov. DAVID BURD & BRAD SHRON, ANALYSIS & CRITIQUE OF SPECIALIZED RULES: DISCRETIONARY CAPS, SPENDING TARGETS, AND COMMITTEE ALLOCATIONS 5, Harvard Law School Federal Budget Policy Seminar, Mar. 9, 2008 (updated by Lee Hochbaum & Derek Lindblom), *available at* http://www.law.harvard.edu/faculty/hjackson/budget.php (last visited May 6, 2008).
[91] H.R. 1836 (2001) as passed by the house, and CRS summary thereof, *available at* Thomas.loc.gov. GRAETZ, *supra* note 17, at 193.
[92] House R.C. Vote 118, May 16, 2001. CRS summary of H.R. 1836 as passed by the House (2001), *available at* Thomas.loc.gov.
[93] KEITH & HENIFF, *supra* note 10.

amendments,[94] all but three of those amendments were either voted down or fell to Budget Act points of order,[95] Democrats being unable to muster a majority for their amendments or the 60 votes necessary to overcome a point of order, and unable to filibuster due to the 20-hour debate limit and the lack of political will within their party.[96] Ultimately, the tax cut passed essentially it had been drafted as S. 896, winning the support of Sens. Specter, Jeffords and Chafee, and of twelve Democrats.[97] CBO and JCT priced the bill at $1.35 trillion, approximately the same as S. 896.[98]

iv. Conference.

Entering conference, the major remaining differences were the size of the individual tax cut, the House version being larger by $134 billion[99] and a $40 billion disparity in the size of the estate tax cut.[100] As conference approached, Sen. Jeffords of Vermont announced his decision to switch parties, which would hand Democrats control of the Senate after the tax legislation was completed. Although they remained technically the minority for conference purposes,[101] this strengthened Democrats' hand considerably. Ultimately, the conference agreement was written by Grassley, Baucus, Breaux, and Rep.

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[94] Glenn Kessler & Helen Dewar, *Tax Cut Hits Senate Snag; Angry Democrats Offer Amendments to Slow Bill's Progress*, WASH. POST, May 23, 2001. The amendments were to further reduce the top bracket tax cut, retain the state estate tax credit, and to reduce the estate tax rather than repealing it. Richard W. Stevenson, *Dogged Fight by Senate Democrats Delays Tax Cut Bill*, N.Y. TIMES, May 23, 2001.

[95] 147 CONG. REC. 5243-5494, Senate R.C. Votes 121, 127, 140, 145, 156, 160, May 21-23, 2001, *available at* Thomas.loc.gov.

[96] Supra debate limit. Senators' political unwillingness to filibuster was evidenced by the fact that 12 Democratic Senators ultimately voted in favor of essentially the same bill as the final conference agreement. Senate R.C. Vote 170, May 26, 2001.

[97] GRAETZ, *supra* note 17, at 192-93, Senate R.C. Vote 170, May 26, 2001.

[98] JOINT COMMITTEE ON TAXATION, COMPARISON OF ESTIMATED BUDGET EFFECTS OF H.R. 1836 AS PASSED BY THE HOUSE AND SENATE 8, May 24, 2001, *available at* http://www.house.gov/jct/x-49-01.pdf (last visited May 6, 2008).

[99] *Id* at 1.

[100] GRAETZ, *supra* note 17, at 193.

[101] David E. Rosenbaum, *Senate Approves Cut in Income Tax in Bipartisan Vote*, N.Y. TIMES, May 24, 2001.

Thomas, House Democrats' exclusion reflecting their relative lack of power under House rules.[102] The conference agreement closely matched the Senate bill, as it would have to be approved by the Senate, and also matched, not coincidentally, the Senate Democrats' offer in conference.[103]

The substance of the conference agreement was as follows.[104] Individual tax rates would be reduced, the lowest bracket to 10 percent and the highest to 35 percent. The child tax credit would be increased to $1,000, adoption benefits would be increased, and childcare and dependent care expenses would qualify for a credit. The marriage penalty would be eliminated in the standard deduction and phased out in the 15 percent bracket, and more EITC benefits would be available to married filers. Various education loans, expenses, and assistance would be tax-preferred, and the student loan interest deduction eligibility limits would be raised. The estate and generation-skipping transfer taxes would be gradually though temporarily repealed, and the gift tax rate would be cut to top individual rates. State estate tax credits would be repealed, and conservation easements in estates would be treated more favorably. The AMT exemption amount would be increased by $4,000 to $49,000, by $2,000 to $35,750 for single filers. To reach agreement in conference, the tax cuts were set to expire nine months earlier, trimming the

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[102] GRAETZ, *supra* note 17, at 196.
[103] GRAETZ, *supra* note 17, at 200.
[104] JOINT COMMITTEE ON TAXATION, SUMMARY OF PROVISIONS CONTAINED IN THE CONFERENCE AGREEMENT FOR H.R. 1836, JCX-50-01, May 26, 2001. *See also* JOINT COMMITTEE ON TAXATION, GENERAL EXPLANATION OF TAX LEGISLATION IN THE 107TH CONGRESS 5, JCS-1-03, Jan. 24, 2003, *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2003_joint_committee_on_taxation&docid=f:83912.pdf (last visited May 6, 2008).

cost slightly.[105] CBO and JCT priced the conference agreement at $1.35 trillion.[106] In its early years it would be equal to about 0.5% of GDP, growing to 1.16% by 2010.[107]

The conference agreement passed the House on May 26 with some Democratic support[108] and passed the Senate on the same day with the support of 12 Democrats, losing only Republican Sens. Chafee, who had opposed the cut in his own re-election campaign,[109] and McCain, who was unhappy with the size of the top-bracket cut relative to the middle brackets' cut.[110] The President signed the finished bill on June 7, 2001. Rep. Rangel and other Democrats decried the final product, objecting to the size and distribution of the cuts as well as the procedure, especially House Democrats being left out of conference.[111] Overall, the tax cut was viewed by many as a victory for President Bush, though not without concessions to the significant Democratic representation in the Senate.[112]

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[105] GRAETZ, *supra* note 17, at 201. For a discussion of tax sunsets generally, *see* Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 Ga. L. Rev. 335, 375 (2006).

[106] CONGRESSIONAL BUDGET OFFICE PAY-AS-YOU-GO ESTIMATE, H.R. 1836 ECONOMIC GROWTH AND TAX RELIEF RECONCILIATION ACT OF 2001, AS CLEARED BY THE CONGRESS ON MAY 26, 2001 5, Jun. 4, 2001. JOINT COMMITTEE ON TAXATION, COMPARISON OF ESTIMATED BUDGET EFFECTS OF H.R. 1836 AS PASSED BY THE HOUSE AND SENATE 8, May 24, 2001, *available at* http://www.house.gov/jct/x-49-01.pdf (last visited May 6, 2008).

[107] LEONARD E. BURMAN, WILLIAM G. GALE, & MATTHEW HALL, THE EFFECTS OF ECONOMIC GROWTH AND TAX RELIEF RECONCILIATION ACT OF 2001 ON RETIREMENT SAVINGS AND INCOME SECURITY: FINAL REPORT 16, AARP, Dec. 9, 2004.

[108] House R.C. Vote 149, May 26, 2001.

[109] David E. Rosenbaum, *Republicans Admit Lack of Votes for Full Bush Tax Plan in Senate*, N.Y. TIMES, Apr. 6, 2001.

[110] Senate R.C. Vote 170, May 26, 2001. 147 CONG. REC. 5789, May 26, 2001.

[111] GRAETZ, *supra* note 17, at 203. David E. Rosenbaum, *Congress Agrees on Final Details for Tax-Cut Bill*, N.Y. TIMES, May 26, 2001.

[112] *See*, e.g., Glenn Kessler & Juliet Eilperin, *Congress Passes $1.35 Trillion Tax Cut; Lawmakers Hand Bush A Big Legislative Victory*, WASH. POST, May 27, 2001. Dana Milbank, *Victory Nears With Impressive Speed, and Some Costs*, WASH. POST, May 22, 2001.

III. Retrospectives of EGTRRA.

Substantial, often critical retrospectives of EGTRRA began to emerge in early 2002, as early proposals for the 2003 tax cut and budget developed and the economy worsened after September 11, 2001. Left-leaning economists argued that the revenue-enhancing effect was close to zero.[113] JCT suggested that the rebate included in the 2001 tax cut did provide "modest stimulus to consumption,"[114] but CBPP found that any effect was "quite small,"[115] and another study found that EGTRRA actually reduced employment during 2001 and stimulated consumption by less than 0.5 percent.[116] Over the ten-year window, some estimates even found that EGTRRA reduced the size of the economy due to its deficit financing, which reduced government saving even though it increased private saving slightly, and therefore arguably reduced capital stock and raised interest rates.[117] Some economists estimated an increase in private saving of about 0.5 percent of GDP[118] and a reduced net national savings rate of 1.16 percent[119] of GDP. Even when analyzed with a dynamic model, the national savings rate was projected to fall.[120] CBPP economists also suggested that the structure of EGTRRA contributed to its failure to stimulate the economy, because the cuts happened so late in the ten-year

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113 William G. Gale & Samara R. Potter, *An Economic Evaluation of the Economic Growth and Tax Relief Reconciliation Act of 2001*, 55 NATIONAL TAX JOURNAL 133, 135 (2002) *available at* http://www.brookings.edu/~/media/Files/rc/articles/2002/03useconomics_gale/200203.pdf (last visited May 6, 2008).
114 JOINT COMMITTEE ON TAXATION, OVERVIEW OF PAST TAX LEGISLATION PROVIDING FISCAL STIMULUS AND ISSUES IN DESIGNING AND DELIVERING A CASH REBATE TO INDIVIDUALS 3, JCX-4-08, Jan. 21, 2008.
115 William G. Gale, Peter R. Orszag, *Bush Administration Tax Policy: Short-Term Stimulus*, TAX NOTES, Nov. 1, 2004, at 750.
116 William G. Gale & Peter R. Orszag, *An Economic Assessment of Tax Policy in the Bush Administration, 2001-2004*, 45 B.C. L. Rev. 1157, 1210-13 (2004).
117 Gale & Potter, *supra* note 113, at 134.
118 WILLIAM G. GALE & SAMARA R. POTTER, THE BUSH TAX CUT: ONE YEAR LATER 4-5, The Brookings Institution, Jun. 2002. BURMAN ET AL., *supra* note 107, at 15.
119 BURMAN ET AL., *supra* note 107, at 17.
120 Alan J. Auerbach, *The Bush Tax Cut and National Saving*, 55 NATIONAL TAX JOURNAL 387, 396, 399 (2002).

window and because the tax cuts were regressive, giving the largest tax break to the taxpayers least inclined to spend the money.[121] Democrats were sadly vindicated in June 2001, when the Administration admitted that the surplus would fall short of their projections.[122] As a consensus began to emerge around a slight reduction in national savings and little or no effect on economic growth, the debate shifted to the President's new tax cut proposal.

The 2003 Tax Cut

In 2003, CBO acknowledged that the economy was recovering from the recession of 2001, but was still weak in the business sector, and projected a deficit of $199 billion, including Social Security, if current policies remained in place.[123] In February 2003, the government reached its $6.4 trillion debt limit, and in April the debt ceiling was increased to $7.39 trillion.[124] Between proposed tax cuts and military spending, the White House estimated that the 2003 federal deficit could reach a record-setting $300 billion.[125] Conditions in Congress were relatively open to expansion of the deficit. Again, Congress had reset the PAYGO scorecard,[126] so statutory PAYGO was not a factor. Rules-based

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[121] Gale & Orszag, *supra* note 115, at 751. DAVID KAMIN & ISAAC SHAPIRO, STUDIES SHED NEW LIGHT ON EFFECTS OF ADMINISTRATION'S TAX CUTS 2, Center on Budget and Policy Priorities 1, Sept. 13, 2004.
[122] Richard W. Stevenson, *Budget Surplus Could Dwindle, Bush Aide Says*, N.Y. TIMES, Jun. 30, 2001.
[123] CONGRESSIONAL BUDGET OFFICE, *supra* note 6, at 116.
[124] *Government Hits National Debt Ceiling*, CNN.com, Feb. 20, 2003. CRS REPORT RS21519, ROBERT KEITH & BILL HENIFF, JR., LEGISLATIVE PROCEDURES FOR ADJUSTING THE PUBLIC DEBT LIMIT: A BRIEF OVERVIEW 5 (Congressional Research Service, Feb. 11, 2005), *available at* http://digital.library.unt.edu/govdocs/crs//data/2005/upl-meta-crs-7625/RS21519_2005Feb11.pdf (last visited May 6, 2008).
[125] Edmund L. Andrews, *White House Suggests Budget Deficit May Set a Record and Exceed $300 Billion*, N.Y. TIMES, Jan. 29, 2003.
[126] Supra that note.

PAYGO in the Senate still existed,[127] but the budget resolution specifically allowed consideration of agreed-upon revenue reductions.[128] PAYGO, therefore, was even less of a factor than it had been in 2001.[129] Largely the same Budget Act rules were in place, limiting reconciliation debate to 20 hours.[130]

The ink was not dry on the 2001 tax cut before conservatives began calling for an extension of parts of EGTRRA and reductions in corporate and capital gains taxes, which they had proposed in 2001.[131] While some had been pleased with EGTRRA, many had criticized its expiration, which set them up to fight the same battle again in 10 years, and argued that the budget and reconciliation rules had distorted tax policy, causing needless complexity and a counterproductive short-term focus.[132]

I. The President's 2003 Proposal.

a. The Proposal.

The President announced his second major tax cut plan on January 7, 2003 before a meeting of the Economic Club of Chicago.[133] Presenting it as a plan to stimulate the

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[127] Supra http://www.rules.house.gov/CRS_Rpt/RL34300.pdf, at Summary.
[128] H.Con.Res. 95, §§ 202, 505. William G. Dauster, *The Congressional Budget Process*, *in* FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY 14 (Elizabeth Garrett, Elizabeth A. Graddy, & Howell E. Jackson, eds., 2008).
[129] Congressional Budget Office, *supra* note 9.
[130] KEITH, *supra* note 5.
[131] David E. Sanger, *President's Signature Turns Broad Tax Cut, and a Campaign Promise, Into Law*, N.Y. TIMES, Jun. 8, 2001. Richard W. Stevenson, *Quiet on the Lobbying Front; Sudden Halt to Coalition's Bid for Corporate Tax Breaks*, N.Y. TIMES, Feb. 23, 2001. Kerry Kantin, *Armey Eyes Reduction in Capital Gains Tax*, THE HILL, Jun. 6, 2001.
[132] Glenn Kessler, *Tax Cut Disappoints Conservatives, Who Decry Gimmicks, Trade-Offs*, WASH. POST, Jun. 7, 2001.
[133] *Fact Sheet: President Bush Taking Action to Strengthen America's Economy*, White House Press Secretary, Jan. 7, 2003, *available at* http://www.whitehouse.gov/news/releases/2003/01/20030107.html, last visted May 6, 2008). For a more detailed discussion, see CRS IB10110, DAVID L. BRUMBAUGH & DON C. RICHARDS (COORDINATORS), MAJOR TAX ISSUES IN THE 108TH CONGRESS (Congressional Research Service, updated Apr. 17, 2003), *available at* http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-5400:1 (last visited May 6, 2008).

limping economy, he asked Congress to accelerate the individual, child tax credit, and marriage penalty provisions of the 2001 tax cut, making the acceleration retroactive to the current year to provide taxpayers with $70 billion in short-term stimulus. Second, he proposed repealing the individual income tax on dividends (dividends paid to corporations already receive a partial or complete deduction)[134] and permitting a step-up basis for capital gains resulting from retained earnings, as well as tripling the expensing allowance for small businesses to $75,000. Additional smaller proposals were for a new, more flexible retirement savings vehicle, health care and long-term care insurance deductions for non-itemizers, and, originating in the 2001 proposal, a charitable deduction for non-itemizers and an extension of the research and development tax credit. For extra short-term stimulus and to make the proposal more progressive, he also proposed extending unemployment benefits and providing aid to state governments.[135] The dividend cut was pitched as a tax cut primarily for senior citizens, and the Senate Special Aging Committee duly held a hearing,[136] but although people over 65 would receive 41% of the dividend tax cut's benefits, only 5.5% of the benefit would go to senior citizens with incomes of less than $50,000.[137] Overall, the President predicted that the proposal, not including the 2001 extensions, would reduce taxes by $670 billion.

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[134] 18 USCS § 243.
[135] Edmund L. Andrews, *Bush to Propose Coupling Tax Cuts With Aid to States*, N.Y. TIMES, Jan. 4, 2003.
[136] *President Discusses Strong and Growing Economy*, White House Press Secretary, Jan. 6, 2003, *available at* http://www.whitehouse.gov/news/releases/2006/01/20060106-7.html (last visited May 6, 2008). *Tax Fairness: Does Double Taxation Unfairly Target Older Americans?: Hearing Before the S. Special Comm. On Aging*, 108th Cong. (2003), *available at* http://aging.senate.gov/hearing_detail.cfm?id=271404& (last visited May 6, 2008).
[137] William G. Gale, *The President's Tax Proposal: First Impressions*, TAX NOTES, JAN. 13, 2003 at 268.

b. Early Estimates and Responses to the President's Plan.

Republican Senators McCain and Chafee called the President's proposal too expensive almost immediately.[138] Congressional Democrats also criticized the plan, as they had EGTRRA, for the deficit spending or benefit cuts it would require, for its regressive distribution, and for not including the inevitable AMT fix, projected to cost $600 billion to $1 trillion.[139] JCT priced the proposal, including EGTRRA acceleration provisions, at $1.575 trillion.[140]

Left-affiliated economists quickly panned the President's proposal as fiscally irresponsible, overly regressive, and ill-designed for stimulus, and for failing to include the AMT fix.[141] The dividend cut was criticized for further distorting tax policy because some dividends received by corporations would still be taxed, so corporations would pay dividends depending on their shareholders' taxability rather than on profitability or business concerns.[142] They priced the new proposals at $925 billion, including debt service, over 10 years, and argued that the proposal could even reduce the size of the economy in the long term, because of its effect on national savings due to deficit financing.[143] CTJ called the plan "a big fat zero" for the poorest third of American

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[138] Dana Milbank & Jim VandeHei, *Key GOP Senators Object to Bush Plan; President Has Difficult Sell on Tax Package*, WASH. POST Jan. 11, 2003.

[139] *President's Economic Growth Proposals: Hearing before the H. Comm. On Ways and Means*, 108th Cong. 90 (2003), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:91630.pdf (last visited May 6, 2008). Carl Hulse & Sheryl Gay Stolberg, *Democrats Say the Nation Heads 'in Wrong Direction'*, N.Y. TIMES, Jan. 29, 2003. Dana Milbank & Chris L. Jenkins, *Bush Defends Tax Cut Proposal; Plan Draws Ire Of Democrats, GOP Moderates,* WASH. POST, Jan. 10, 2003.

[140] JOINT COMMITTEE ON TAXATION, ESTIMATED REVENUE EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN THE PRESIDENT'S FISCAL YEAR 2004 BUDGET PROPOSAL 3-4, JCX-15-03, Mar. 4, 2003, *available at* http://www.house.gov/jct/x-15-03.pdf (last visited May 6, 2008).

[141] William G. Gale, *The President's Tax Proposal: First Impressions*, TAX NOTES, JAN. 13, 2003 at 265.

[142] William G. Gale & Peter R. Orszag, *The Administration's Proposal to Cut Dividend and Capital Gains Taxes*, TAX NOTES, Jan. 20, 2003 at 415-16.

[143] William G. Gale & Peter R. Orszag, *The President's Tax Proposal: Second Thoughts*, TAX NOTES, Jan. 27, 2003, at 605.

taxpayers.[144] CBPP priced the new portions of the plan at $726 billion, plus $624 billion for extensions of the 2001 tax cuts and $658 for the expected AMT adjustment.[145] From the right, Heritage's dynamic estimate of the new proposals was a mere $274 billion.[146]

II. Action in Congress.

a. Preliminary Hearings.

Congressional action began with a series of hearings on the FY2004 budget and the tax proposal. In the House Budget Committee, Democrats criticized the tax cut as irresponsible deficit spending,[147] and for excluding the AMT adjustment.[148] Treasury Secretary Snow defended the proposal, saying that the tax cut and its deficit financing were a much-needed economic stimulus, but agreed that the package would increase the deficit by about $2 trillion.[149]

Hearings in House Ways and Means lasted three days. Rep. Matsui critiqued the tax cut as irresponsibly large, and for its inconsistent treatment of dividends.[150] James Glassman of AEI testified that the dividend tax cut would encourage companies to pay dividends, which would lead to better investments and reduce dividend volatility, and that the acceleration of the EGTRRA cuts would stimulate the economy.[151] William Gale of

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[144] CITIZENS FOR TAX JUSTICE, BUSH 2003 TAX PLAN A BIG FAT ZERO FOR A THIRD OF NATION'S TAXPAYERS, Jan. 27, 2003.
[145] JOHN SPRINGER, ADMINISTRATION TAX CUT PROPOSALS WOULD COST $2.7 TRILLION THROUGH 2013, Center on Budget and Policy Priorities, Mar. 10, 2003. These figures do not include debt service.
[146] NORBERT MICHEL & ANDREW OLIVASTRO, SCORING PRESIDENT BUSH'S FULL TAX PROPOSAL, The Heritage Foundation, Mar. 7, 2003, *available at* http://www.heritage.org/Research/Taxes/wm218.cfm (last visited May 6, 2008).
[147] *Department of the Treasury Budget Priorities for Fiscal Year 2004: Hearing Before the H. Comm on the Budget*, 108th Cong. 4 (2003), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:84884.pdf (last visited May 6, 2008).
[148] *Id.* at 6.
[149] *Id.* at 8-9, 16-17.
[150] *President's Economic Growth Proposals, supra* note 139, at 14-15.
[151] *Id.* at 54-59.

the Brookings Institution testified that any stimulation was unlikely because the short-term cuts were so small, and that by making corporate equities a more attractive form of investment, the proposal would cause an investment reduction and slowdown in other sectors. He advocated broadening the corporate tax base, and criticized the unrealistic assumption that AMT relief would not occur.[152] Gale estimated the cost of the tax cut proposal plus AMT reform at 2.3-2.7 percent of GDP, and the cost of making needed changes to Social Security and Medicare at less than 2 percent of GDP.[153] John Schaefer, President of Morgan Stanley, suggested that the dividend cut would reduce the tax code's bias towards retained earnings, and make U.S. companies more competitive internationally, bringing the tax structure in line with that of other countries.[154] Alan Hevesi, New York State Comptroller, testified that the proposal would increase state deficits in 41 states due to state tax coupling, estimating New York's loss at $3.3 billion over 10 years.[155] The hearing record also included a letter from over two hundred economists, including ten Nobel laureates, opposing the President's proposal because it would not stimulate the economy as the President claimed, and would increase inequality and worsen the deficit.[156]

The Senate Finance Committee held a hearing as well. Democratic Sens. Breaux and Baucus and Republicans Snowe and McCain signed a letter stating their opposition to a tax cut larger than $350 billion, unless the cost was offset elsewhere.[157] Because the Senate was so closely divided, with 48 Democrats (counting Sen. Jeffords, an

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152 *Id.* at 65-71.
153 *Id.* at 91.
154 *Id.* at 133, 152 (statement of Ronald Stack, Managing Director, Lehman Bros).
155 *Id.* at 156.
156 *Id.* at 106-118.
157 David E. Rosenbaum, *G.O.P. Senators Oppose Size of Bush Tax Cut*, N.Y. TIMES, Mar. 14, 2003.

Independent) and 52 Republicans, Republican leadership could ill afford to lose the support of Sens. Snowe and McCain, especially after Sens. Chafee and Specter had shown their willingness to oppose tax cuts.[158] Under those circumstances, Sen. Grassley eventually agreed to the $350 billion limit.[159]

In separate committee hearings in House Financial Services and Senate Banking, Alan Greenspan expressed his view that further tax cuts were not necessary to ensure economic growth, and should not be allowed to increase the deficit, but he did support the idea of a dividend cut within that constraint.[160]

b. <u>H.R. 2, The Jobs and Growth Tax Relief Act of 2003 (JGTRA)</u>.

The legislative process for the 2003 tax cut was much simpler than for EGTRRA. House Republicans introduced H.R. 2 on February 27. The first version was relatively simple. In addition to gradually repealing the dividend tax for individual shareholders, as requested, it accelerated EGTRRA provisions for individual tax cuts, the marriage penalty reduction, and the child tax credit, which the President had made a priority. The AMT minimum was increased to $58,000 from $49,000, which the President had not requested. However, the accelerated EGTRRA provisions still sunsetted as originally scheduled, and the AMT relief sunsetted in 2006.[161] H.R. 2 also fulfilled President Bush's request to triple the small business expensing limitation for small businesses.[162]

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[158] Supra that.
[159] Kysar, *supra* note 105, at 380. Elisabeth Bumiller, *In a Concession, Bush Lowers Goal of Tax Cut Plan*, N.Y. TIMES, Apr. 16, 2003.
[160] David E. Rosenbaum, *Greenspan Says Tax Cut Without Spending Reductions Could Be Damaging*, N.Y. TIMES, MAY 1, 2003. Richard W. Stevenson & Edmund L. Andrews, *Greenspan's Doubts Prod Bush Defense Of Tax Cuts* N.Y. TIMES, Feb. 13, 2003.
[161] HR 2 §§ 107, 108 (2003), as introduced in the House, *available at* Thomas.loc.gov.
[162] *Id.* at § 106.

Formal consideration of H.R. 2 was delayed until May, when budget process had progressed. House Ways and Means Chairman Thomas coordinated the markup draft, increasing some parts of the tax cut but omitting the President's centerpiece dividend tax repeal. The markup increased the AMT limit further to $64,000. For small business, the expensing amount was increased to $100,000 and the net operating loss carryback period was extended from two to five years. Rather than repealing the dividend tax, the markup reduced capital gains tax rates from 10 and 20 percent to 5 and 15 percent, and allowed dividends to be taxed at the reduced net capital gains rate, but only until 2012. House Ways and Means approved the marked-up version on party lines. JCT priced it at $550 billion: $234 billion for acceleration of EGTRRA, $39 billion for small business, and $277 billion for the dividend tax cut.[163]

As it was 2003, statutory PAYGO had expired, and the House agreed to waive points of order for floor consideration of H.R. 2.[164] A brief procedural struggle ensued because the rules resolution did not provide for consideration of a minority-sponsored alternative bill.[165] Rep. Rangel argued that Chairman Thomas had not waived points of order, and therefore consideration of the majority's bill was out of order. Rep. Simpson, acting as Speaker of the House pro tempore, insisted that points of order had been waived, so Rangel moved to recommit the bill to committee with instructions to report it back amended to extend unemployment insurance and delay the tax cuts until the federal budget had been balanced. Chairman Thomas raised a point of order under House rules,

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[163] JOINT COMMITTEE ON TAXATION, ESTIMATED REVENUE EFFECTS OF A CHAIRMAN'S AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 2, THE "JOBS AND GROWTH TAX ACT OF 2003" 2, JCX-41-03, May 5, 2003, *available at* http://www.house.gov/jct/x-41-03.pdf (last visited May 6, 2008).
[164] Supra paygo section. H.Res.227 (2001), *available at* Thomas.loc.gov.
[165] H.Res. 227 (2001), *available at* Thomas.loc.gov.

calling Rangel's motion not germane, being insufficiently related to taxation.[166] Rangel argued that his motion was germane, but Rep. Simpson, as Chairman, ruled that it was not. Rangel appealed, but was outvoted.[167] The bill then passed the House as it had been drafted, on party lines.[168]

The Heritage Foundation applauded the House version, projecting 828,000 additional jobs, increased GDP growth, and increased personal savings. They estimated the cost, dynamically, at $314 billion rather than the static estimate of $549 billion.[169] Peter Orszag of CBPP projected that national savings (the sum of governmental and personal savings) would show a net decrease, and that no long-term increase in jobs would result.[170] Because of Sen. Grassley's commitment to $350 billion, of course, it was widely anticipated that the House bill would be cut back significantly.[171]

c. S. 1054, The Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA).

Meanwhile, the Senate had been developing its reconciliation bill, S. 1054, in Finance Committee, and had set $350 billion as the maximum tax cut in its budget resolution.[172] As introduced by Sen. Grassley, S. 1054 accelerated certain EGTRRA

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[166] House Rule XVI, clause 7, Germaneness ("No motion or proposition on a subject different from that under consideration shall be admitted under color of amendment,"), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_house_rules_manual&docid=hrulest-73.pdf (last visited May 6, 2008).
[167] House R.C. Vote 180, May 9, 2003.
[168] CRS summary of H.R. 2 (2003) as passed by the House, *available at* Thomas.loc.gov. House R.C. Vote 182, May 9, 2003.
[169] THE HERITAGE FOUNDATION, JOBS AND GROWTH TAX ACT OF 2003: HIGHLIGHTS OF THE CDA'S ANALYSIS OF CHAIRMAN THOMAS'S TAX LEGISLATION, May 7, 2003.
[170] Peter R. Orszag, NEW JOINT COMMITTEE ON TAXATION STUDY FINDS NEGATIVE LONG-TERM ECONOMIC EFFECTS FROM HOUSE TAX BILL, The Brookings Institution, May 14, 2003.
[171] David E. Rosenbaum, *Negotiators Reach Rare Deal on Tax Cut*, N.Y. TIMES Apr. 10, 2003. Bumiller, *supra* note 158.
[172] David E. Rosenbaum, *Senate Approves $2.2 Trillion Budget* N.Y. TIMES, Mar. 27, 2003.

provisions, increased the small business expense limit only to $75,000, and increased the AMT minimum to $61,000. The draft proposed a limited dividend tax exclusion for individuals, $500 plus 10 percent of dividends above that amount, increasing 20 percent after 2007. It also included an attempt to curtail tax shelters, a concern raised after the collapse of Enron, and $20 billion in aid to state governments, in part to secure the support of Sen. Ben Nelson (D-NE).[173] The original Senate version had been priced at $433 billion,[174] but after revisions CBO and JCT priced the Finance Committee version at the agreed-upon $350 billion, including some outlays but not including debt service.[175]

The House and Senate bills were significantly different at this point. The House version had a differently structured dividend cut, allowing dividends to be taxed at a lower rate and then not at all, rather than excluding a portion of each dividend from taxation. The Senate bill had a lower AMT threshold and no net operating loss carryback increase for small businesses, but included aid to state governments. Upon receiving H.R. 2 from the House, the Senate struck its entire contents and inserted the text of S. 1054.[176] Senate Floor consideration was brief, rules-based PAYGO points of order being unavailable because the tax cut had been approved in the budget resolution, and the filibuster lost to the 20-hour debate limit applicable to reconciliation bills.[177] The Senate passed the bill in a vote of 51-49, with Democratic Sens. Miller, Bayh, and Ben Nelson

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[173] David Firestone, *With Plan for State Aid, Senate Republicans Gain Crucial Democratic Vote on Tax Cut*, N.Y. TIMES. May 15, 2003.
[174] Shailagh Murray, *Senate Republicans Defend Tax-Cut Provisions*, WALL STREET JOURNAL, May 9, 2003.
[175] CONGRESSIONAL BUDGET OFFICE COST ESTIMATE, S. 1054, JOBS AND GROWTH TAX RELIEF RECONCILIATION ACT OF 2003, AS REPORTED BY THE SENATE COMMITTEE ON FINANCE ON MAY 13, 2002 1, May 14, 2003.
[176] HR 2 (2003), CRS summary of all congressional actions, *available at* Thomas.loc.gov.
[177] 149 CONG. REC. 6451, May 15, 2003. H.Con.Res. 95, §§ 202, 505. DAUSTER, *supra* note 128.

voting in favor, and Republicans Chafee, McCain and Snowe voting against.[178] The stage was set for negotiations over the amount of the small business expense limit and the amount and structure of the dividend tax cut. Kevin Hassett of AEI declared "Tax Cut Victory" at this point, commenting that it was difficult to say whether the Senate or House proposal was preferable.[179] Implicit in AEI's press release, but made explicit by CBPP's was the suggestion that the Senate's tax cut would not actually expire. CBPP priced the Senate's version with the non-expiring dividend tax cut at $660 billion, the dividend provision alone being $380 billion.[180]

d. JGTRRA's Conference and Passage.

The conference agreement was reached with heavy involvement by the Vice President, and firmly limited to $350 billion when Sen. Voinovich (R-OH) joined the existing coalition of moderates insisting on that figure.[181] The agreement was as follows: EGTRRA accelerations were retained, but the 10-percent bracket disappeared after 2005 and the child tax credit was refundable only for families earning at least $10,500.[182] Businesses were allowed an additional 50% depreciation deduction for property acquired between 2003 and 3005, and were allowed to expense property purchases up to $100,000. A dividends and capital gains compromise was created, under which the House's capital gains rate cut, from ten and 20 percent to five and 15 percent would prevail until 2009, with long-term capital gains not taxed at all in 2008. Dividends would be taxed at the

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178 Senate R.C. Vote 179, May 15, 2003.
179 KEVIN HASSETT, TAX CUT VICTORY, American Enterprise Institute, May 16, 2003.
180 CENTER ON BUDGET AND POLICY PRIORITIES, SENATE APPEARS POISED TO APPROVE TAX CUT WITH ACTUAL COST OF $600 BILLION, May 15, 2003.
181 Beckett G. Cantley, *The New Dividend Tax Cut: Bush's Prescription for Rescuing the Economy*, 19 Akron Tax J. 25, 25 (2004). David E. Rosenbaum & David Firestone, *$318 Billion Deal is Set in Congress for Cutting Taxes*, N.Y. TIMES, May 22, 2003.
182 David Firestone, *Senators Negotiate on Pact To Extend Child Tax Credit*, N.Y. TIMES, Jun. 5, 2003.

same rate, five and 15 percent, but not at all in 2008, returning to prior tax rates in 2009. In addition, the agreement created a $10 billion state fiscal relief fund, to ameliorate the state-level problems caused by the tax cut[183] and by the economic downturn generally, and added $10 billion for Medicaid.[184] Sacrificed in the compromise were the AMT exemption, which was increased only to $58,000 and only until 2005, the Senate's attempt at a tax shelter fix, despite Sen. Grassley's support, and the refundable child tax credit for some 6.5 million of the poorest families, for which Democrats continued to advocate later in 2003.[185] The conference agreement was priced at $350 billion,[186] much less than the House had approved but meeting the target set by Sens. McCain and Snowe. The dividend tax cut was priced at $148 billion, the EGTRRA acceleration and AMT adjustment at $171 billion, and the small business provisions at $10 billion.[187]

The conference agreement passed the House on party lines, and the Senate approved it in a tense vote of 50-50, attracting Democratic Sens. Miller and Nelson, but nevertheless losing Republican Sens. Chafee, McCain, and Snowe, the last due to dissatisfaction with the widespread use of sunsets to come in under $350 billion.[188] Democratic Senators decried the individual income tax cuts in the conference agreement as regressive, and called the bill irresponsible and an ineffective attempt at stimulus.[189] Democrats regained the support of Sen. Bayh, but could not attract Sens. Ben Nelson,

[183] *President's Economic Growth Proposals, supra* note 139, at 156.
[184] JOINT COMMITTEE ON TAXATION, SUMMARY OF CONFERENCE AGREEMENT ON H.R. 2, THE "JOBS AND GROWTH TAX RELIEF RECONCILIATION ACT OF 2003," JCX-54-03, May 22, 2003.
[185] 149 CONG. REC. 7072, May 23, 2002. David Firestone, *Bush Presses House Republicans on Credits for Poor* N.Y. TIMES, Jun. 10, 2003. David Firestone, *Democrats Urge Bush To Press Hard On Tax Credit*, N.Y. TIMES, Jun. 26, 2003.
[186] JOINT COMMITTEE ON TAXATION, *supra* note 184. Some newspaper articles listed the cost at $318 billion; the disparity is probably explained by excluding the aid to state governments and the increase in tax credit refundability, which can be characterized as an outlay rather than a tax cut. Rosenbaum & Firestone, *supra* note 181.
[187] JOINT COMMITTEE ON TAXATION, *supra* note 184.
[188] 149 CONG. REC. 7081, Senate R.C. Vote 196, May 23, 2003. Kysar, *supra* note 105, at 382.
[189] 149 CONG. REC. 7072-74, 7081, 7083-84, May 23, 2003.

Specter, or Miller for what was, after all, a smaller cut than the three had supported as S. 1054.[190] The President signed the bill on June 2.

In the immediate aftermath, CBPP criticized the tax cut as unfair and expensive, estimating that its cost could exceed $1 trillion if extended, and that most households would receive less than $100 in 2003.[191] Heritage applauded the bill, projecting 800,000 new jobs in 2004 alone, an additional GDP increase of $73.4 billion, 1.7 extra percentage points of personal savings in 2004, and increased investment overall. Of course, as the tax cuts expired, so would many of their economic benefits.[192] Republicans called for further tax cuts, and Democrats for the extension of the more progressive cuts and an expansion of the child tax credit to all income levels.[193]

III. Retrospectives.

Assessment of the cost and effects of JGTRRA emerged early in 2004, but little consensus existed. In the context of the President's subsequent plan to extend some present cuts and create still more tax deductions for health insurance and other taxpayer expenses,[194] which some priced at $1.9 trillion over 2005-2014,[195] and Sen. Kerry's

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[190] Senate R.C. Vote 196, May 23, 2003. CONGRESSIONAL BUDGET OFFICE, *supra* note 175.

[191] CENTER ON BUDGET AND POLICY PRIORITIES, TRUE COST OF NEW TAX LEGISLATION MAY REACH $1 TRILLION, May 28, 2003.

[192] WILLIAM W. BEACH, ALFREDO GOYBURU, & REA S. HEDERMAN, ECONOMIC IMPACT ANALYSIS OF THE JOBS AND TAX RELIEF RECONCILIATION ACT OF 2003, The Heritage Foundation, May 23, 2003.

[193] David Firestone, *With Tax Cut Bill Passed, Republicans Call for More*, N.Y. TIMES, May 24, 2003. David Firestone, *A Big Tax Cut For Business Is Proposed In Congress*, N.Y. TIMES, Jul. 26, 2003. Jim VandeHei, *Kerry, Dean Sharpen Debate Over Tax Cuts; Candidates Spar on How Much to Repeal*, WASH. POST, Jul. 31, 2003. Edward Walsh & Jim VandeHei, *President Talks Up Tax Policy for Boosting Economy; Bush Calls for Expanding Child Credit, but GOP Is Wary*, WASH. POST Jul. 25, 2003.

[194] State of the Union Address, 40 Weekly Comp. Pres. Doc. 94 (Jan. 20, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html (last visited May 6, 2008). William G. Gale & Peter R. Orszag, *Bush Administration Tax Policy: Revenue and Budget Effects*, TAX NOTES, Oct.

campaign proposal for a tax cut of only $500 billion,[196] the debate was vigorous. Against a background of weak employment and GDP growth,[197] many observers found the tax cuts costly and ineffective in both the short and long run.[198] In the absence of positive economic data, conservative economists praised the dividend tax cut for bringing consistency to the tax code because it removed some double taxation of corporate profits and reduced distortion by removing the bias in favor of retained earnings,[199] and for its potential to increase long-term growth.[200] Others disagreed, pointing out that the dividend tax cut was structured so that some corporate earnings would be taxed twice, but others not even once.[201] Economists criticized it as overly complex, and likely to create distortions due to its use of sunsets.[202] The deficit financing was also criticized for its effect on the national savings rate and long-term growth.[203] The immediate effect on dividends was unclear. Some studies found that both special and regular dividends rose in the beginning of 2004.[204] Others argued that although dividends increased in dollar terms, relative to other measures of growth they fell, and that other factors such the

4, 2004, at 105. Beckett G. Cantley, *The New Dividend Tax Cut: Bush's Prescription for Rescuing the Economy*, 19 Akron Tax J. 25, 44 (2004).

195 Gale & Orszag, *supra* note 194, at 106.

196 Robert Pear, *Bush and Kerry Push Domestic Plans, Leaving Off Price Tags*, N.Y. TIMES, Oct. 13, 2004.

197 *See, e.g.*, ISAAC SHAPIRO & JOEL FRIEDMAN, TAX RETURNS: A COMPREHENSIVE ASSESSMENT OF THE BUSH TAX CUTS xiii-xiv, Center on Budget and Policy Priorities, Apr. 14, 2004.

198 *Id.* at 31-41.

199 Katherine Pratt, *Deficits and the Dividend Tax Cut: Tax Policy as the Handmaiden of Budget Policy*, 41 Ga. L. Rev. 503, 524-27 (2007).

200 Cantley, *supra* note 194, at 40.

201 Pratt, *supra* note 199, at 568-74.

202 Susan Kalinka, *Highlights of the 2003 Jobs and Growth Tax Relief Reconciliation Act: Economic Stimulus or Long-Term Disaster*, 64 La L. Rev. 219, 264 (2004).

203 Pratt, *supra* note 199, at 538-40.

204 NORBERT J. MICHEL & RALPH A. RECTOR, DIVIDEND POLICY AND THE 2003 TAX CUT: PRELIMINARY EVIDENCE, The Heritage Foundation, Oct. 25, 2004.

maturity of the internet sector, not the tax cut, explained the nominal increase in dividends.[205]

Evaluations of EGTRRA and JGTRRA combined were equally contentious, although subsequent tax bills began to muddy the picture. CBPP estimated that in 2004 alone, the tax cuts combined cost $276 billion, plus $20 billion in interest, and cost the states $9 billion in 2002-2005.[206] Furthermore, much of the cost was still in the future, since the tax cuts were heavily back-loaded to keep down the official costs. In the short term, Heritage economists pointed to a decrease in unemployment and an upturn in GDP growth and business investment,[207] but others pointed out that job growth fell far short of Administration projections.[208] Some economists found an immediate decrease in investment and GDP growth relative to trend, and a very small aggregate effect on consumption.[209] The tax cuts' fairness was also an issue, with some estimates finding a net tax cut for one-quarter of households, and a net increase for the rest, when the effects of deficit financing were included.[210] Economists Peter Orszag and William Gale concluded that in 2004, the tax cut reduced revenues by 2.5 percent of GDP and raised GDP by only 0.6 percent.[211] The tax cuts' impact on long-term growth was also disputed,

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[205] Pratt, *supra* note 199, at 531-38 (2007).
[206] SHAPIRO & FRIEDMAN, *supra* note 197, at 5-9.
[207] BILL BEACH, REA HEDERMAN, & TIM KAINE, THE 2003 TAX CUTS AND THE ECONOMY: A ONE-YEAR ASSESSMENT, The Heritage Foundation, Jul. 21, 2004.
[208] KAMIN ET AL., *supra* note 121, AT 2.
[209] Gale & Orszag, *supra* note 115, at 748-50.
[210] William G. Gale, Peter R. Orszag, & Isaac Shapiro, *Distribution of the 2001 and 2003 Tax Cuts and Their Financing*, TAX NOTES, Jun. 21, 2004, at 1539. Greg Lieserson & Jeffrey Rohaly, The Distribution of the 2001-2006 Tax Cuts: Updated Projections, Nov. 2006 3-4, Urban Institute and Brookings Institution Tax Policy Center, Nov. 2006.
[211] Gale & Orszag, *supra* note 115, at 753.

with some arguing that the deficit financing would create a drag on the economy, and others arguing that the tax cuts would have a strong positive impact if extended.[212]

Analysis continued as EGTRRA and JGTRRA were fully phased in, often in the context of discussions about further tax cuts. In 2006, Treasury estimated that without those two bills, "by the second quarter of 2003, the economy would have created as many as 1.5 million fewer jobs and GDP would have been as much as 2 percent lower, and by the end of 2004, the economy would have created as many as 3 million fewer jobs and real GDP would be as much as 3.5 to 4.0 percent lower."[213] Disagreeing, CBPP found that the tax cuts were "more likely to reduce long-term growth than to increase it,"[214] and that the total cost approached $2.2 trillion.[215] In CBPP's analysis, the tax cuts combined were, as predicted, regressive, reducing taxes by 3.6 percentage points for the top quintile and only 1.6 for the bottom quintile.[216] In 2008, Heritage economists acknowledged that the 2001 tax cut failed to stimulate and enlarge the economy, but pointed to increases in employment and GDP growth following the 2003 cuts.[217] The waters having been muddied by subsequent tax cuts and the beginning of the scheduled expirations,

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212 William G. Gale, Peter R. Orszag, *Bush Administration Tax Policy: Effects on Long-Term Growth*, TAX NOTES, Oct. 18, 2004, at 416. BEACH ET AL., *supra* note 107.

213 OFFICE OF TAX ANALYSIS, U.S. DEPARTMENT OF THE TREASURY, A DYNAMIC ANALYSIS OF PERMANENT EXTENSION OF THE PRESIDENT'S TAX RELIEF 6, Jul. 25, 2006, *available at* http://www.ustreas.gov/press/releases/reports/treasurydynamicanalysisreporjjuly252006.pdf (last visited May 6, 2008).

214 RUTH CARLITZ & RICHARD KOGAN, CBO DATA SHOW TAX CUTS HAVE PLAYED MUCH LARGER ROLE THAN DOMESTIC SPENDING INCREASE IN FUELING THE DEFICIT, Center on Budget and Policy Priorities, Jan. 31, 2005, *available at* http://www.cbpp.org/1-25-05bud.htm (last visited May 6, 2008).

215 AVIVA ARON-DINE, EXTENDING THE PRESIDENT'S TAX CUTS AND AMT RELIEF WOULD COST $4.4 TRILLION THROUGH 2018, Center on Budget and Policy Priorities, Mar. 28, 2008, *available at* http://www.cbpp.org/1-31-07tax.htm (last visited May 6, 2008).

216 AVIVA ARON-DINE, HAVE THE 2001 AND 2003 TAX CUTS MADE THE TAX CODE MORE PROGRESSIVE, Center on Budget and Policy Priorities, Mar. 19, 2007, *available at* http://www.cbpp.org/3-19-07tax.htm (last visited May 6, 2008).

217 BRIAN M. REIDL, WHY TAX REDUCTIONS ARE MORE STIMULATIVE THAN REBATES: LESSONS FROM 2001 AND 2003, The Heritage Foundation, Jan. 18, 2008, *available at* http://www.heritage.org/Research/Economy/wm1776.cfm (last visited May 6, 2008).

consensus on the economic effects remained elusive.

IV. Conclusion.

Ultimately, the legislative process for both tax cuts was strikingly similar. In both cases, the President and the Republican-controlled House opened with a costly proposal, and the closely-divided Senate set a price limit and succeeded in enforcing it within a few billion dollars. Various amendments were ruled out of order under the Byrd rules or PAYGO, but the underlying legitimacy and purpose of those systems was not challenged at any point during the process. Cost estimates, especially those provided by CBO and JCT played an important role in the negotiations, but the lack of consensus among the outside groups during the process meant that each side had its think-tank numbers and little genuine discussion resulted from them.

The tax cuts differed in that EGTRRA was primarily an individual rate cut designed to stimulate the economy, while JGTRRA initially aspired to fundamentally change the tax system from double taxation of corporate earnings to single taxation, and to stimulate the economy as well. However, because of rules and political pressure to keep the cost of the bill down, JGTRRA could not be large enough to fundamentally change the system and ended up more like a lengthy dividend tax holiday. Because dividend cut expired in only a few years, and because individual taxpayers and corporations did not necessarily believe the dividend cut would be extended due to the deficit and the possible change in party control of Congress and the Presidency, it was unlikely to have changed taxpayer behavior in any fundamental way. Because of the expiration dates and delayed phase-in in for several years, the tax cuts' other provisions' short-term stimulative effect was limited. The delayed phase-in allowed each tax cut to appear small for the 10-year forecasting window while, by its internal terms, imposing a large, permanent cut. In this way, the budget rules could be said to have distorted the process, but from another perspective, they succeeded in preventing a major alteration to the tax system from slipping through the 10-year window in the guise of a short-term stimulus. The choice of deep but late-starting and temporary cuts can be seen as a product of political pressure for a fundamental change, dividend tax repeal, combined with the poor economic forecast, which demanded that some portion of the cost be devoted to immediate stimulus, and created political unwillingness to pay for permanent repeals.