



## THE PERIODIC COUNSEL ADVISORY



*"Knowledge is Good" - Emil Faber*

### SOUVENIRS FROM BUDGET LAW PAST

*Provisions of law that disappeared from the budget process: Forgotten by most, known by some, talked about by few (if any).*

The summer of 2016 is proving to be something out of the ordinary: Appropriation bills are proceeding apace, the budget resolution failure singularity is barely noticed, and the budget process has apparently found comfortable demise for the year. The time for looking forward is the best time for looking back. The recent past, the events of the 114<sup>th</sup> Congress and their signal budgetary ruin, are important and should not be forgotten, but also the more distant past is worth some review too. Dusty items in the nooks and crannies of budget law, mostly forgotten, might give up some food for thought (even if approximating a peculiar culinary acquired taste).

Certainly the complexities of the current budget process allow for rich historical inquiry. Though seldom mentioned, each one of these complexities came about for a reason, and while "it seemed like a good idea at the time" is not admirable justification, it is often more than is available today in explanation as to why budget law is the way it is.

The Budget Act, in the years since enactment, has been strengthened in numerous ways, like the expansion of Budget Committee legislative jurisdiction, comprehensive reconciliation procedures and better articulated points of order as they apply to changes in spending and revenue. All have been improvements.

Still, in other ways, losses have occurred. Congress made changes that lessened accountability, smoothed the path toward spending money, and in particular deemphasized the way authorizing legislation is considered. While great attention has

BUMBLE QUERY: *Why is the Cutgo point of order sometimes said to be a 5 and 10-year test and sometimes a 6 and 11-year test?* The answer is as odd as the question: It is always a test covering six and eleven years, but at certain times of the year, the first year of the period is in the past. At any point in the year, the test is to add up the "current year", the "budget year" and the four and nine outyears for two periods (6 and 11). The CY is always the fiscal year preceding the BY, and the OYs always follow the BY. A budget year is always a fiscal year set on the Congressional calendar. When September 30 turns to October 1, Congress enters the budget year, and the "current year" while current on the calendar, is now in the past. Since no one has figured out how to score the cost of a bill to a year already gone by (the lawyers are working on it), it *effectively* becomes a 5 and 10-year test. On January 3 (or whatever day Congress first meets), the fiscal year that is the "budget year" for Cutgo purposes (not Budget Act), moves forward a year and we are back to 6 and 11.

All clear? This will come up in a bar conversation – you know it will.

been given to the procedures governing discretionary appropriations, less is required of authorizing committees than use to be the case. These vanished ways may be a bit surprising. This is just a short review of some of the procedures gone by the wayside (section numbers that follow are references to the *Congressional Budget Act of 1974*).

As is commonly known in budget law, section 300 sets out the timetable, which is a table of dates by which important tasks must be accomplished: The President's budget arrives by the first Monday in February, the budget resolution is adopted by April 15; Congress finishes reconciliation measures by June 15, and the House passes all its appropriation bills by June 30.

*Wishful thinking from the century before last:* "It is of the first importance that one strong, intelligent committee should have supervision of the whole work of drafting and putting in shape the bills for the appropriation of public money. That committee ought, every year, to present to Congress and the country a general and connected view of what we may fairly call our budget, showing not only the aggregate of expenditures, but the general distribution of revenue to the several objects to be supported. To accomplish this work thoroughly and comprehensively is all that any one committee can do; and any attempt to load general legislation upon their bills will be disastrous not only to general legislation, by making it fragmentary and incomplete, but especially so to the proper management of our fiscal affairs."

Representative James Garfield  
"National Appropriations and  
Misappropriations"  
*The North American Review*,  
Vol. 128, No. 271  
(Jun., 1879), pp. 572-586

In revising the original timetable over the years, Congress dropped one date of note. As originally enacted, authorizing action had to meet a May 15 deadline. Committees were required to "report bills and resolutions authorizing new budget authority" by May 15 of each year. In addition to that, by the "7th day after Labor Day ... Congress completes action on bills and resolutions providing new budget authority and new spending authority." This latter term has been eliminated, but generally meant entitlement authority and other forms of direct spending.

The repercussions for missing this target were more significant than not meeting the budget resolution date (which is the least of Budget Committee problems right now). Tardiness caused a bill to have a point of order against it. Under then section 402, it was not in order to consider any bill that "directly or indirectly, authorizes the enactment of new budget authority for a fiscal year, unless that bill or resolution is reported in the House or the Senate, as the case may be, on or before May 15."

As today, this requirement could be waived, but the process was then more significant than is currently the case. Presently, blanket waivers of all points of order are generously provided to all bills coming to the House floor. In the Senate, 60-vote waivers can be obtained without too much strain. Under what



was section 402(b), a specific process for waiving this point of order was set out: “If the Committee on Rules of the House of Representatives determines that emergency conditions require a waiver of [the point of order] the House may consider and adopt, a resolution waiving the application of [the point of order] in the case of such bill or resolution.”.

In the Senate, the hurdle was even more significant – with no Rules Committee the authorizing committee desiring the waiver had to report a resolution “stating the reasons why the waiver is necessary” which the Senate Budget Committee would then consider and report if meritorious (section 303(c)(1)).

This is not to say this was a silver age of budget compliance and strict controls over entitlement spending – the points of order were weaker then, and Committees at the time, as now, sought to evade the strictures. Senator Henry Bellmon (R-OK) noted attempts to circumvent the process. In a statement for the Congressional Record, impressive in its command of the intricacies of budget law, he complained about this in December of 1980:

There is a serious loophole in the May 15 deadline for reporting authorization bills. Committees are increasingly adopting the practice of filing incomplete bills, and even dummy bills, to satisfy the formal requirement. They then rely on committee floor amendments, often accepted without real debate, to clean up the bills.

*Plus ça change ...*

Another example of accountability for those seeking to move spending legislation can be found in the original section 301(c) where Committees must provide their “Views and Estimates” to the Committees on the Budget. While currently, these tend to be insubstantial and politically rhetorical, as originally designed, they were to be submitted by March 15 and provide an “estimate of the total amounts of new budget authority, and budget outlays resulting therefrom, to be provided or authorized in all bills and resolutions within the jurisdiction of such committee which such committee intends to be effective during the fiscal year beginning on October 1 of such year.”

*Foresight of Years Gone By:* A former Budget Chair warned against disconnecting appropriations from the budget resolution, making the following statement 34 years ago:

“One proposal to improve the system has been to allow appropriations bills, supported by enacted authorizations, to move forward without a budget resolution in place. I feel such a solution would defeat the need for a congressional budget. Permitting revenue and spending bills to go forward prior to adoption of a concurrent resolution on the budget would subvert the usefulness of the resolution. Such a proposal would eliminate the impetus for adoption of a congressional budget. As a consequence, Congress could lose the role in budget policy which it regained through passage of the Congressional Budget Act of 1974.”

Rep. James Jones (R-OK)  
House Budget Chairman  
*Proposed Improvements in the Congressional Budget Act of 1974*

Hearing of the Senate Budget Committee (September 1982)



While not the pithiest sentence ever conjured, this means Committees were tasked with explaining what their budget intentions were for the year – and doing so before the budget resolution was adopted. Needless to say, section 301 on the “Views and Estimates” no longer includes this not so pithy sentence.

A third lost-in-the-basement-somewhere item, also related to accountability, was the requirement that Committees explain their budget objectives in their legislative reports. While not in the current compendium of budget laws for the very good reason that it is no longer in current budget law, it can be found in section 308(a)(1)(B) of the *Congressional Budget Act of 1974*, not as enacted, but rather as amended by the *Balanced Budget and Emergency Deficit Control Act of 1985*. The provision established a system different than the one today. Committees did not simply drop a CBO estimate into their reports and hence deemed to comply with budget rules.

Under section 308 as it was then written in the mid-Reagan era, if a bill created or expanded entitlements or direct spending, its report had to include “an identification of any new spending authority described in section 401(c)(2) which is contained in such measure and *a justification for the use of such financing method instead of annual appropriations*” [emphasis added]. The reference to section 401(c)(2) is to a definition of entitlements and direct spending. This set forth a relatively simple requirement: Committees were asked to explain why they were creating new “mandatory” spending instead of having it reviewed each year by Congress through the appropriation process.

This was jettisoned by the *Budget Enforcement Act of 1997* (the name of the budget process title of the *Balanced Budget Act of 1997* (Pub. L. 105-33)). Ironically, but not surprisingly, a detailed explanation, or any explanation at all, as to why this was eliminated is nowhere explained in the explanatory statement of managers on the conference report on that measure.

A fourth way that authorizing committees were relieved of certain responsibilities came in the form of their allocations. In today’s Congress, allocations provided under section 302(a) of the Budget Act are considered in the context of the Appropriation Committees. This allocation is then suballocated among the subcommittees under section 302(b). Most of those interested in budget law also know, of course, that all committees with spending authority receive 302(a) allocations. What is not commonly known is that originally all committees were also required to suballocate this amount to their subcommittees just like the Appropriators must do now.



For committee allocations, the enforcement structure was very different in the 1970s and 1980s in terms of application of points of order. Even so, the very practice of requiring committees to divide spending into its various component parts required each committee to report to its House suballocations. This not only put committees on record as to how they planned on proceeding during the year, but it also required them to think through their programs and then explain what they intended to do. This is a very different mindset than in today's Congress. It has been some years since any authorizing committee reported a set of 302(b) suballocations, but they used to do so, and hence we know a bit more about what these committees had in mind several decades ago than really we do now.

The original Budget Act had a fifth method by which new entitlement spending could be in some sense controlled, or at least explained. Section 301 set, as it does now, the authority of the Budget Committees to include provisions in budget resolutions to enhance budget enforcement. One such provision, section 301(b)(1), explicitly allowed for "a procedure under which all or certain bills and resolutions providing new budget authority or providing new [entitlement spending]" could be held back and not sent on in the legislative process until a reconciliation bill had been completed. This essentially meant that all the spending reductions intended to be included in reconciliation bills would have to be done first before any new spending could move to enactment.

As an example, H. Con. Res. 307 (96<sup>th</sup> Congress), the Concurrent Resolution on the Budget for Fiscal Year 1981, included just such a provision. It stated that "No bill or resolution providing [new entitlement authority] first effective in fiscal year 1981 which exceeds the appropriate allocation or subdivision made pursuant to section 302 of such Act shall be enrolled until after Congress has completed action on any reconciliation legislation".

While this is somewhat complicated, effectively it meant that any bill increasing direct spending in violation of the budget resolution, if it passed the House and Senate, could not be sent to the President until Congress had completed its consideration of the reconciliation bill. The Enrolling Clerk would have to sit on the bill until that time.

This is quite a different approach than the current attitude where rules are made to be waived. Though this authority then set forth in section 301 is no longer specifically in the Budget Act, such a process could still be included in a budget resolu-



tion. Were that to occur, or even proposed, objections would likely be heard loud and unpleasant from the usual places, in particular from the Committee on Rules in the House and others with limited imaginations.

It bears repeating that this trek down lost memory lane is not a nostalgic parable of a misty past Avalon of pristine budget enforcement. Those reasons for the complexity of the current budget process mentioned earlier came about because that time was distinctly *not* that. The flaws of the process in force in those days led to the jerry-rigged, hasty-patched and duct-taped process that has puttered, sometimes sputtered, along for years, the very same one one that was so botched this year. Still, ideas, procedures, attitudes, were lost along the pathway to where we are now, and worth pondering as the path forward is considered and ultimately made.

#### Quote of the Day

*“In budget law, if it ain’t broke, fix it anyway. If it’s sort of broke, amend it. If it’s completely broke, raise the debt limit.”*

Budget Counsel Saying

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