



THE PERIODIC COUNSEL ADVISORY



"Knowledge is Good" - Emil Faber

The End of Legislative History

Don't worry, they'll make more ... eventually ... maybe ...

In the all-important task of deciding on a book for summertime beach reading, not many folks pick up a potboiler committee report on a budget process bill, perhaps having just passed the House or Senate. The reasonable justification would be "Oh, I heard they're making it into an animated Disney musical and I want to see it without knowing how it ends." The less obvious reason is because not many such reports to be read exist, not from this millennium.

A question immediately arises: "Who cares?" In particular, the "budget" is usually a spring time topic of discussion. It is then revisited in the Fall when the fiscal year ends and attention turns to the possibility of not going on a White House Tour or the "closed" sign on the Washington Monument. That's just a flippant way of whispering "government shutdown." If it's a special year, and not infrequently, it is, the debt limit will be about to be reached and the additional darkly enjoyable apocalypticana of a potential default on the national debt is bemoaned. With all that to look forward to, why worry about budget legislative history?

Along with the transition of the budget process from competent and existent to something other than that, has come a diminution of material explaining two of the big English class questions: Why and how is the budget process changing? The who, what, and when are not exactly clear either from the public material on the issue. (The "where" is left out here.)

BUMBLE QUERY: WHAT'S WITH THE BUDGET TEST FOR THE FIRST YEAR?

The first-year test in both sections 302(a) (for spending) and 311 (for revenue) have a test that requires spending or tax bills be within a certain level for the first year. Another test is applied for the period covered by the budget resolution. The reason for having the two tests is two-fold: The first is conceptual, since a budget resolution is being adopted for a particular budget year (usually – not so much for fiscal year 2017) and bills should have budget effects in that year. The second reason is more hard-headed: The clever counsels dealing with the Budget Act didn't want legislators to spend money now with promises of later offsetting reductions. Call it the "Wimpy Factor" – as in "I'll glad you pay you Tuesday for some increases in budget authority to-day." Avoid this? Try a change of date, and those effects can be pushed out a year. Sec. 303 comes to block ... a fun point of order.

If these explanatory reports do not exude trenchant *bon mot*, replete with shadowy Byronic flourish, nor even are they made more readable by a turn of phrase or two, they are supposed to be serious documents. The ordinary typically banal committee report should explain, workman-like, the legislation and add contextual meaning to the “plain meaning” verbiage.

WHAT DO THE CONFEREES INTEND?

Joint Statements accompanying conference reports used to include the phrase “the conferees intend” with an indication of their expectations. After a search for the phrase, even on the new dismal Congressional website, the is used less often. Three budget-related examples have not worked well: (1) the President’s budget submission in BEA 1990 has been ignored (see “The Spirit and the Letter” in box). (2) The BEA 1997 stated: “The conferees intend to clarify that section 303(a) is a gross test ...” The House Parliamentarians ignore it completely and apply a “net” test. In BEA 1997 for section 314: “The conferees intend that [spending] adjustments only apply while the legislation that meets the terms ... is under consideration ... this could necessitate that the Chairman reverse the adjustments ... after the pending legislation is disposed of.” This reversal of adjustments does not generally happen, and adjustments for emergency spending, important then, does not occur. That spending is simply no longer counted.

The overall quality of budget-related reports has, unfortunately, declined over the past several decades. Though recent writing style and competence has been mixed, preferring the reports from the 1970s and 1980s (or 1870s or 1880s) might be explained by two factors: First, Congressional staff have gotten out of the habit of writing budget reports. They are not written as often and hence not as well. Because no budget conferences were agreed to for the five years before fiscal year 2016, no one wrote any joint explanatory statements. Even the one written for that particular year, while printed on paper and having the letters “GPO” on it, comes as close to saying nothing as the years none exist at all.

The House committee reports for fiscal years 2016 and 2017 showed good work, good ideas, but the overall coordination was weak and included much retreaded filler. The tendency toward filler brings up the second reason: The evident fear of making anything public having the potential for political or rhetorical use. That wipes out just about all of the interesting parts of budget process reports. It observes the sad pap principle: Don’t say anything memorable.

If *budget resolution* explanatory material is limited in usefulness, one might naturally look to the other substantive form of legislative budget activity: the budget reconciliation process. Unfortunately, these reports historically have not been good places to find useful budget process information. When they do, it is the exception. Up until



1997, reconciliation bills were major multi-committee policy documents, massive in size, with mostly technical names: “Omnibus Budget Reconciliation Acts” (1980, 1981, 1993, etc.) They mixed it up a bit with COBRA 1985, but generally to-the-point names. The reports constitute many thousands of pages and major work from various committees, all overseen by the Budget Committees. They are tasked with juggling a vast array of intertwining policies, paper, and politics. Among these, two reconciliation bills having major process importance are the two “Budget Enforcement Acts” – the first from 1990 and the second from 1997. They were included as title XIII of the Omnibus Budget Reconciliation Act of 1993 and title X of the Balanced Budget Act of 1997, respectively. The first made an important contribution in rewriting budget processes and the second, while not creating much explicitly new, updated and effected the way budget law exists in statute. The reports accompanying these bills are important reference tools for a deeper more contextual understanding of the changes made in budget law.

For the past twenty years or so, though, reconciliation reports have been largely irrelevant as they relate to the budget process. The 2001 and 2003 reconciliation bills must be discounted not because they were not important but rather because they were essentially tax reform/reduction bills using reconciliation as an enactment process, not broad-based budget bills. The two most recent ones, the Health Care Education Reconciliation Act of 2010 (HCERA – the Obama health “sidecar”), and the 2015 bill repealing that health care law (its short title was removed), differed from each other, but had two things in common: Both had House reports for them that were utterly useless and neither had conference reports at all.

In a truly bipartisan example of awful Budget Committee role-mangling, these two bills were only put through the

SOME THINGS DON'T
CHANGE, THOUGH FDR
MUST HAVE:

“Former Assistant Secretary of the Navy, Franklin D. Roosevelt, when a candidate for the Vice-Presidency, devoted much of his attention on the stump to the need for administrative reorganization in the Federal Government. One of his favorite illustrations of the absurdity of present conditions was the case of the bears in Alaska, which are under the protection of four different departments, War, Interior, Agriculture, and Commerce. Doubtless, however, the same bear is rarely entitled to protection by more than one department at a time, and probably under some circumstances it is more convenient for one department to afford protection than for another.”

Arthur N. Holcombe
“Administrative Reorganization in the Federal Government,” *Annals of the American Academy of Political and Social Science*, Vol. 95, Taxation and Public Expenditures (May, 1921)



reconciliation process to serve expedient legislative ends rather than the process serving to expedite legislation meant to “reconcile” spending and revenue with a plan set forth in the budget resolution. This is the point of the word “reconciliation.”

When the House Budget Committee met on HCERA in 2010, it entertained the expected motions and debated the health care law-to-be. The bill placed on the dais was long, dense, complicated, and utterly meaningless. It was not the bill to be brought up before the whole Chamber nor even remotely associated with what would become law. The real bill had been written elsewhere and later replaced the dummy bill voted on by the Committee, which participated only because the law so required. The bill marked up went straight from the committee hearing room into the recycling bins. The report on the bill followed the same path –certain requirements needed to be met, and so they were, but it was hollow.

VOICE FROM THE PAST:

“It seems to me that the first step toward providing this is to supply ourselves with a systematic method of handling our estimates and expenditures and bringing them to the point where they will not be an unnecessary strain upon our income or necessitate unreasonable taxation; in other words, a workable budget system.”

Woodrow Wilson *Message to Congress* (8th Message), December 1920.

The 2015 Republican bill, designed to overturn the above 2010 bill, was similar. It was marked up in Committee, but again the real version was written elsewhere by House and Senate Leadership offices. The Committees on Ways and Means and Finance participated as well. The House Budget Committee, though, was cut out of the process. Adding to that bad form, the report itself is poorly done, it might sadly be the worst prepared report by the House Budget Committee. Once marked-up by a committee, a reconciliation report does not have to do much: It comprises report language submitted by the reconciled committees and then is pieced together to produce a report. This one produced mostly a mess. It does include an interesting analysis about how the reconciliation process worked that year and the relation of the bill to the budget resolution, but the way this reconciliation bill evolved is the only instructive element about it. After page 11, the report is basically a jumbled, difficult to follow text and table collage of scanned images.

The real difficulty associated with recent budget law and the accompanying material is that the agreements, when they occur, generally have been without written reports. Evaluating a product that does not exist presents difficulties. Of the major



budget process bills since the Balanced Budget and Emergency Deficit Control Act of 1985 (BBEDCA) effectively expired after 2002 (it fully expired in 2006), written reports have been largely absent. The Statutory Pay-As-You-Go Act of 2010 was a debt limit increase bill on which the major budget elements were attached late in the process and has no official written report on the final product. The same is true of the Budget Control Act of 2011. These two laws effectively reconstituted the expired BBEDCA. That law, in contrast, had not just one but two extensive conference reports (H. Rept. 99-433 and H. Rept. 100-313). The second was for the sequel bill, the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987 (Pub. L. 100-119), which cured the Supreme Court's problem with BBEDCA and also refined other elements of the law, all neatly described in its Joint Explanatory Statement.

The most recent budget deal, the Bipartisan Budget Act of 2015 also did not have a written report. The bill was stitched together and grafted onto an existing bill and sent on. Both the House and Senate Budget Committees were again excluded from the legislation so while a report was prepared internally by the House Budget Committee, it was never issued as a committee print or made public.

The Law: The Spirit and the Letter

"The conference agreement includes a provisions permitting the President to delay submission to Congress of the Budget of the United States Government from the present requirement of 'on or before the first Monday after January 3 of each year' to not later than the first Monday in February. The conferees intended that this increased flexibility be used very rarely to meet only the most pressing exigencies. An orderly and timely budget process requires that Presidential submissions be made on or before the first Monday after January 3 whenever possible. The conferees expect that Presidential submission dates will comply with the January deadline." *Budget Enforcement Act of 1990*, H. Rept. 101-964 (Conference Report), 101st Congress, 1st Session, October 27, 1990.

The conferees expectations were not fulfilled. The President has never met the January deadline after the change was made, and in recent years, compliance with the deadline that exists has been spotty.

"On or before the first Monday after January 3 of each year ..., the President shall submit to both Houses of Congress the estimated budget outlays and proposed budget authority that would be included in the budget for the following fiscal year if programs and activities of the United States Government were carried on during that year at the same level as the current fiscal year without a change in policy." 31 U.S.C. § 1109 (2016). (Current law on the "current services baseline")

Since 1990, regardless of political party, the President has never submitted the "current services" baseline by this legally required January date.



Two bright spots do exist: the House Budget Committee Print for the Bipartisan Budget Act of 2013 (February 2014) and the Committee Report on the Sequester Replacement Reconciliation Act of 2012 (SRRA 2012). The first describes in detail how the BBA 2013 came to be enacted. It includes the important things like the changes in law (Ramseyer), the CBO estimate, section-by-section, and other material. The second report explained the SRRA 2012 (H. Rept. 112-470). It does what a reconciliation report is supposed to do – combine numerous reports into a single multifaceted complex document – and did so in an easily understood and organized manner.

The report on the BBA 2013 merits applause, if only for one simple fact: It exists. No report of any kind explaining the deal reached between then Budget Chairman, now Speaker, Paul Ryan and Senator Patty Murray was legally required, but they did one anyway, if only to explain what they did and why. The report on the SRRA 2012, while nicely done, was on an ill-fated bill. It was not a “real” reconciliation bill since it did not stem from a full budget resolution. It was never considered by the Senate and died there. While the quality of the work is impressive, the bill’s importance, and thus its report, is limited.

Comprehensive budget process reforms occurred three times in the 20th Century: The Budget and Accounting Act of 1921, the Congressional Budget and Impoundment Control Act of 1974, and the Balanced Budget and Emergency Deficit Control Act of 1985. In each case, thousands of pages of legislative history exist, all carefully compiled, and may be studied today. The conclusion that this era of legislative history is over is unwarranted, but the recent past is not encouraging. If the same lackluster approach continues, the loss will be hard to fathom. Still, if the entire budget process is rebuilt, restructured from a new foundation, perhaps the way it is done will be captured for history. Perhaps travelling with it will be voluminous explanatory material on the law. Even if it does not have a turn of phrase, at least one might be able to turn a page.

Quote of the Day

“Congress is like junior high – you get recess, have cafeterias, and you can’t stand ‘back to school’ sales because it means summer break is coming to an end.”

Congressional Staffer at twenty-five.

