



"Knowledge is Good" - Emil Faber

THE SIMPLE COMPLEXITIES OF DEEMING RESOLUTIONS

What happens if the deeming resolution as a game of "let's pretend" becomes "let's not pretend after all"?

The failure of Congress to agree to a concurrent resolution on the budget for a fiscal year has become so commonplace as to merit little comment under normal circumstances. Ignoring for the moment that the "normal budget process" now includes the word "failure" - the cycle for fiscal year 2017 is not a typical year. How this is the case, and the implications for the technical application of the budget rules and laws, is worthy of inspection (and, for those directly involved, perhaps introspection as well).

The U.S. Senate already has a budget resolution in place for fiscal year 2017 because the necessary elements for one were deemed to have force and effect by section 102 of the Bipartisan Budget Act of 2015 (BBA 2015). In March, the House Budget Committee reported a Concurrent Resolution the Budget For Fiscal Year 2017 (H. Con. Res. 125), but prospects of the House ever passing it are dim and growing dimmer.

Conventional wisdom dictates the House must pass a budget resolution before the Congressional Easter break. If it does not do so, the legislative dynamic begins to gravitate against an agreement: The weather warms, interest wanes, attention fades, forgetfulness rises, and worst, hot dogs, little caps, and small white balls appear. "Budget? Didn't we do that? Corndog?"

Events Historic

If the House does not pass a budget resolution for fiscal year 2017, it will not be historic as the first time - it will be historic as the second (though the first with a GOP majority). After the tumult Congress suffered during the enactment of the Affordable Care Act in 2010, and the budget resolution was central to that task, not much energy or interest was left to adopt another budget for the following year.

In the Second Session of the 111th Congress, the House Budget Committee, in another historic first, did not report a concurrent resolution on the budget for fiscal year 2011. Now in the 114th Congress, a House failure to pass a budget resolution for fiscal year 2017 will just be the latest in the slow move away from the original process of the Congressional Budget Act of 1974 as enacted by the 93rd Congress.

BUMBLE QUERY: WHAT IS SEC. 3(d)(3)?

When the 112th Congress began, a form of "Lockbox" was put in the House Rules - not the standing rules, but rather the "Separate Orders" which are a kind of addendum. They do not have the permanence of the "Standing" Rules, but otherwise operate exactly the same way. As such, they are found in Section 3 of H. Res. 5 (114th Congress). This lockbox is in section 3(d) and requires a "Spending Reduction Account" (SRA) to be included in each appropriation bill. The lockbox operates so an amendment decreasing spending can be dedicated to an SRA as a display of deficit reduction. It only lasts for the duration of the bill's consideration (it has no lasting impact). Thus, this sec. 3(d)(3) point of order prohibits amendments unless offset. Before sec. 3(d)(3), a budget resolution set an allocation and prevented amendments with costs. With this point of order, an allocation is not required and so a budget resolution is not needed to ward off amendments increasing spending.

Two budget resolutions for a fiscal year used to be required, but done away with in 1985. In 1998, the two Budget Chairmen, Sen. Pete Domenici and Rep. John Kasich, deadlocked and no budget resolution was adopted for fiscal year 1999. This was the first year without a budget, but not the last. Annual budget resolutions are now sporadic, with fiscal years 2011 through 2015 seeing none.

#### What is a “Votarama”?

This is one of the more unpleasant events in the passage of a budget resolution for a fiscal year that afflicts the U.S. Senate. Debate on budget resolutions are time limited in the Senate (only 51 votes needed, no filibustering or complaining about filibustering), but when they were writing the Budget Act (sec. 310) someone forgot to mention voting on amendments. Debate on amendments is limited, but voting on them is not. All amendments offered get a vote, and once started, it keeps going and going, and the Votarama is on.

*Alternate Spellings:* “Votarama”, “Votorama”, “Votearama”.

stood in for the budget resolution for fiscal years 1986 and 1991 respectively, but on a limited basis. Those resolutions provided the allocations needed for the Appropriations Committee, but did not serve as full stand-in budget resolutions. Even so, the precedent was set and sufficient for the House to draw upon for fiscal year 1999. On June 19, 1998, H. Res. 477 (105<sup>th</sup> Congress) set the allocations needed for the House Appropriation Committee to allow its bills to move forward (but only those and no other aspect of a budget). At the end of that Congressional session, two things happened: First, no one any longer pretended a fiscal year 1999 budget resolution was a possibility; and second, when the gavel came down on the 105<sup>th</sup> Congress, the deeming resolution died (budget resolutions survive the end of a Congress, deemers do not). The 106<sup>th</sup> Congress met on January 6, 1999 and passed the organizing resolution (H. Res. 5) with language tucked inside that authorized the House Budget Chairman (the aforementioned Kasich) to place budgetary levels in the Congressional Record to approximate a budget resolution for procedural purposes. On March 3, 1999, levels were placed, set at baseline amounts, and served as tantamount to a policy-free budget resolution.

That is all well and good for 1999, but that was 17 year ago. Why is that important now? Apart from the scintillating historical aspect, it matters because ever since, concurrent resolutions on the budget have not always been so “concurrent” since that would require the same policies to be agreed to by both House and Senate. That’s not going to happen for fiscal year 2017 (but that’s been known, if not openly stated, since the enactment of the BBA 2015 when the Senate got its “get out of Votarama free” card in the section 102 deemer). For budget resolutions, the thing that has remained consistent through the years is this second part – the passage of a deeming resolution. For fiscal year 2017, with each passing day, the chances of the House adopting the committee-passed resolution (H. Con. Res. 125) fade a little more. To be sure, budget resolutions have been adopted later. For the previously mentioned fiscal year 1999, the

#### Comes A Deemer

This begs a question: What happens with no budget resolution? Before 1999, they were considered an integral element in the operation of Congress. Many things that are absolutely necessary remain so only until proof materializes that they are not. In 1999, even without a budget resolution, appropriation bills still needed to be considered, passed and enacted. Something needed to be done and something was. Someone with experience and knowledge (those things come in handy in Congress once in a while), knew that back in 1985 and 1990, when the budget resolutions were late in arriving, the House passed “deeming resolutions” each of those years. These allowed the House Appropriations Committee to move ahead with its bills while waiting for the budget resolutions to be finished (which they were).

While budget negotiations continued, H. Res. 649 (99<sup>th</sup> Congress) and H. Res. 413 (101<sup>st</sup> Congress)



House did pass a budget resolution before the implosion of the process, but not until June 4, 1998. The circumstances for that year were not quite as dire as those facing the House this year. The deadlock over how much discretionary spending should be allowed is as vexing as it was foreseeable.

### The Clarity of Opposition

The first indication that opposition to the fiscal year 2017 budget resolution would be a problem occurred right from the beginning when the deal for a new discretionary spending level was made. It was baked right into the BBA 2015. Similar to its namesake, the *Bipartisan Budget Act of 2013* (BBA 2013), it lacked a vital feature: The contours and deal procedures were dictated from the Speaker's Office rather than as part of an open negotiation between the two Budget Chairs (then Budget Chair Paul Ryan and Sen. Patty Murray). Every Democrat voted in favor of BBA 2015, but only 79 Republicans. A very large GOP majority, 167 Members, voted no. Presumably this opposition extended to spending levels for fiscal years 2016 and 2017, the latter set in H. Con. Res. 125.

**Voice From A Century Ago (almost):** "The legislature must make proper provision for the consideration of the budget and for taking the action required upon its proposals. In respect to this, the most important consideration is that responsibility for the consideration of the budget shall be concentrated in the hands of a single committee. Failure to do this will destroy the unity of the budget and thus defeat one of the main purposes of a budgetary system."\*

Expressed nearly 100 years ago, the idea of a Budget Committee has been around a while. In 1918, the proponents of this notion likely did not foresee the current budget travails facing Congress and the Committee responsible for the "consideration of the budget." Concept and execution are not always on speaking terms.

\*W. F. Willoughby, "The Budget as an Instrument of Political Reform": Proceedings of the Academy of Political Science in the City of New York, Vol. 8, No. 1, National Conference on War Economy (Jul., 1918), pp. 62-63.

asked for their votes, they ask: "I opposed this spending back when the deal was made and no one cared. Why should I vote for it now?" The answer to this question, if one exists, is unclear.

Again, what has *this* got to do with a deeming resolution? Everything really. If a budget resolution is not written well enough to garner the votes to pass in the first place, how will a resolution giving it force and effect pass in the second place? Until now, deeming resolutions were needed if the House and Senate failed to agree. Now one is needed because the House has failed to agree with itself. Historic. The only surprising thing about the less than staunch Republican support for this budget resolution would be if anyone is actually surprised by it.

### The Writing of a Deeming Resolution

Budget resolutions can be, and have been, badly written. It is quite easy to do really. The ideas might be poorly conceived, the syntax mangled, terminology



and definitions improperly used, enforcement procedures inconsistent and incoherent, and the structure poorly integrated into the budget law context. While bad budget resolutions can be found with ease, section 301 of the Budget Act provides an easy to follow guide to follow. Are bad resolution written? Yes that happens, and has recently. Still, one has to work hard to fail at making it basically work. Dust off an old resolution, change the dates, and boom: it may be ugly, but it likely will meet the legal requirements.

Deeming resolutions? Those are not easy. With as many deeming resolutions as have been written, no off-the-shelf template exists. Each situation is different, each case has different facets and factors that must be taken into account. A few of these come to mind: (1) Deeming resolutions only apply to one Chamber of Congress; (2) in the House, they die at the end of a Congress and must be refashioned in the new Congress, usually in H. Res. 5, the organizing resolution; (3) the reasons it is needed. This last is a thicket of variety. For fiscal year 2005, a House/Senate Conference completed work on a report, which was duly filed. The end was in sight, but Congress could not get the Senate votes and the conference report on S. Con. Res. 95 was deemed in force; (4) in the House, both the resolution *and* the report must be deemed since the 302(a) allocations are in the latter.

Not last, not least, but the hardest part of writing a deeming resolution is answering the question: What is it supposed to do? Some, like the fiscal year 2003 budget (H. Con. Res. 353), will just pretend the House-passed resolution passed the Senate too. Fiscal year 2015 was harder. The deemer put in H. Res. 5, which organized the 114<sup>th</sup> Congress, was far different, incorporating pieces like a 2-year old budget (H. Con. Res. 25), a law (BBA 2013), new provisions (like a reserve fund for Highways), entirely different numbers, et al.

So will there be a fiscal year 2017 deemer? This is a more important question than whether a budget resolution passes, because a full conference will not happen. If the budget resolution does come up for a vote, you can bet the real vote will be on its rule, because that is where a deemer will be.

The House Budget Committee filed H. Con. Res. 125 on March 23, 2016. In an attempt to persuade reluctant Members, it included language promising additional spending reductions to make up for the increase in discretionary

#### ADJUSTING THE BUDGET FOR THE BBA 2015:

Budget deals between Congress and the President happen every year in order for bills to be enacted. For fiscal year 2016, as happens sometimes, a deal was reached in the form of the *Bipartisan Budget Act of 2015* (BBA 2015). Very often, such a deal is incorporated into the annual budget resolution, such as in the *Balanced Budget Act of 1997* or the *Bipartisan Budget Act of 2013*. This did not happen with the BBA 2015. In fact the budget resolution (S. Con. Res. 11) was entirely ignored, as were the Congressional Budget Committees and their Chairmen.

With a curious penchant for doing the unnecessary, the House Budget Committee insisted on adjusting S. Con. Res. 11 to reflect the deal it had no part in making. In the budget process, bills are supposed to conform to the budget resolution, not the other way around. This adjustment's only consequence would be to erase the Budget Act violations of the final Omnibus Appropriation bill (H. R. 2029), since the new fiscal year 2016 discretionary spending level was much higher than allowed in the budget resolution. Thus, the rule (H. Res. 566) providing for its consideration seemed perfect, not least because it would be adopted before the spending bill came up, thus clearing the points of order in a timely fashion. Funny problem – Members of the minority party do not vote for rules as a matter of course. They must command support from a majority of Republicans. As would happen with the budget resolution a few months later, the rule could not get enough votes if it included the adjustment confirming the new spending level. So where to put the adjustment? Put it in the Omnibus itself since that would get plenty of Democratic votes.

Of course doing that was too late to erase the points of order. The procedural fix gate was closed after the legislative horse of the Omnibus had left the barn. It did not work. The good news is that embarrassment in budget matters often are obscured because the process is so complicated. They sometimes are clear only to those who know the process.



spending. The provisions they included have no real effect beyond indications of intent. Placed in title II, they are really “sense of Congress” style sections without any substantive procedure that might expedite legislation reducing spending. Section 202 does include reconciliation instructions having substantive effect, but they if the Senate also passes them. This is simply not going to happen for fiscal year 2017.

With the chances of such acceptance somewhat bleak, with the Appropriation Committee forging ahead on its bills, and even if a budget resolution passes, perhaps with real spending reductions connected to it, the important question is whether a new historic first will occur – *the failure to adopt a deeming resolution*. Will the House act to at least pretend it has passed a budget? The accepted convention has been that this pretense is necessary, and moreover remains as a justification for the efforts involved in producing an annual budget resolution.

Should a deeming resolution not pass, how will budget enforcement proceed? At one time, appropriation bills required a budget resolution because the Appropriation Committee needed an allocation of budget authority, provided under section 302(a) of the *Congressional Budget Act of 1974*. Suballocating the amount using section 302(b) of the Act, sponsors could fend off amendments proposing spending increases on programs with a Budget Act point of order (sec. 302(f)) instead of taking inconvenient votes. This is no longer necessary since section 3(d)(3) of the Separate Orders of H. Res. 5, effectively the House Rules, allows them to do this without the Budget Act (see box on page 1).

Though less well known, Budget resolutions also provide authorizing committees with 302(a) allocations. These have generally assumed large reductions in spending, the main result being that any authorizing bill coming to the floor must either not increase direct spending or, if doing so, be offset. Despite significant differences, the Cutgo point of order (clause 10 of rule XXI) has a similar effect and it applies whether a budget resolution is in effect or not.

What about taxes? Revenue, under the Budget Act, must follow a first-year and ten-year test. Until supplanted, S. Con. Res. 11 keep going, and while its fiscal year 2016 test will be irrelevant, the ten-year test will continue to apply – no net decrease in revenue would be allowed should no deeming resolution pass.

If this happens, it would be a first certainly (historic). It might also demonstrate how the current attitude toward the budget resolution has deteriorated – seeing it as a vehicle for talking points rather than a guide for legislative decisions. Passing a deeming resolution, colloquially speaking, is pretending a budget has passed. Like the pretense of competence or professionalism, however, pretending something is relevant is not sustainable. On Capitol Hill, the opposite of love is not hate, nor is it indifference – it is irrelevance.

### Quote of the Day

*“Better to keep a Rule closed and have people think you are a fool than to have an open one and remove any doubt.”*

House Floor Management Principle

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