THE PERIODIC COUNSEL ADVISORY

"Knowledge is Good" - Emil Faber

THE DOWNWARD (OR UPWARD) SPIRAL

Budge Irresolution: After all, tomorrow is another legislative day.

The 114th Congress recently came to an inglorious end and almost immediately the House ushered in the 115th Congress. With the advent of a new Congress, reflection and projection are in order, so to speak. Three Congressional measures are worth pondering: the continuing resolution (H. J. Res. 254), the Houses organizing resolution (H. Res. 5), and the replacement for the failed fiscal year 2017 budget resolution (S. Con. Res. 3). The short of it is that optimism is warranted, but the initial budgeting in the House seems likely to be done on a short-term basis. In that regard, the House Budget Committee's recent poor performance has led to changes in the rules making it kissing distance to irrelevance.

The three measures mentioned, best read in conjunction, collectively serve as a denouement, coda, or a merciful *coup de grâce,* whichever is least harsh, to the 114th Congress and its dismal array of budgetary mishaps. At the same time, this end brings new opportunities, even a possible return to budgeting.

Even so, the adoption of this fiscal year 2017 budget resolution is not cause for celebration. S. Con. Res. 3 is not a budget. Much like popcorn is often eaten not for its nutritional value, but rather as a salt and butter delivery vehicle, this budget resolution is mostly budget free, but serves as a reconciliation bill manufacturing device. The resolution itself makes no budgetary decisions, states no policies, has no real policy assumptions (apart from the repeal of the previous President's health care system) and none of the procedures in

BUMBLE QUERY: *What is the Holman Rule … because it sounds really arcane.*

It is, sort of. It comes from the 19th Century. Former Chair David Obey was smart, if not always puppies and rainbows, and during his tenure, his committee published a report, which included this description:

To reduce spending, the House simply changed its rules. From 1837 until 1876, Rule 120 restricted the contents of general appropriation bills by requiring a formal authorization to precede any appropriation. The rule was an attempt to prevent the addition of unauthorized appropriations on the floor during amendment proceedings, known as "riders." In 1876, Appropriations Committee member William Holman of Indiana proposed a major change to Rule 120 which allowed amendments for reductions in expenditures in appropriations bills to be presented by the committee to the full House. Holman argued that this new power would reduce spending and prohibit any amendments to the committee's bill that would increase funding. "[This] leaves the question of increasing expenditures as the question of retrenchment existed heretofore," Holman insisted. "It just exactly reverses the practice heretofore existing for so many years under the one hundred and twentieth rule of the House."

A Concise History of the Appropriations Committee, House Committee on Appropriations, Committee Print, December 2010, p. 7.

its text are truly necessary. S. Con. Res. 3 is best read, if time, inclination, and a tolerance for a tedious slog through resolution text allows, with H. Res. 5 in hand.

Between these two resolutions, the main reasons for the House Budget Committee to exist have not been quite erased, but it is easy to see the preparations if another budget failure on par with fiscal year 2017 occurs. The House can proceed without much inconvenience if it happens since budget policies ordinarily found in budget resolutions have made their way into H. Res. 5 (counsels, parliamentarians, and jurisdiction junkies take note).

The first thing noticeable about H. Res. 5[1] is what it does not contain. It has no language deeming a budget in place. At first glance this seems reasonable. If S. Con. Res. 3 was coming down the pike, why bother? After all, an actual real-live budget resolution is on deck. Who wants to clog up the organizing resolution with deeming language? It is not easy to write after all.

Three reasons: First, *every* H. Res. 5 of a new Congress when the session before did not adopt a budget resolution, has had deeming language. This has been the case since 1999 (106th Congress) when this first happened. Not having any is *historic,* which is a term bandied about in budget circles (yes, there are those circles – it often entails go around in them).

Second, *every* H. Res. 5 with deeming text uses time limiting language making it effective only "until such time as a concurrent resolution on the budget is agreed to …", or something similar in it. It is not too important that a new resolution was expected since deeming text would not have interfered if written with even a modicum of competence. Then again that "modicum" never seems to be around when you really need it.

The third reason is sort of the important one. It is because S. Con. Res. 3 is the barest of bones budget, designed to do one thing only: Create a reconciliation vehicle for Obamacare repeal. The House is understandably interested in getting a majority vote in the Senate, since such a rarity means a great deal. As the thinnest of budgets, S. Con. Res. 3 has very little of the procedural infrastructure usually contained in budget resolutions, such as the point of order against advance

[1] H. Res. 5 has been the H. Res. number of choice for organizing resolutions for several decades, though H. Res. 6 shows up twice in 25 years.

appropriations. That's why that one is replicated in the Separate Orders of H. Res. 5 (temporary rules lasting the duration of a Congress). This was not necessary because all the normal budget stuff left out of S. Con. Res. 5 could have been deemed in force.

This brings up a good question. If one were to include deeming language, what would it be? What exactly would you deem? The House never even passed a budget resolution, though one did make it out of Committee. Still, nothing was ever previously deemed in force, as was uniformly the case up to last session, to serve as a budget. This is a strong point, but so is the response. The House has not actually been without a budget resolution – S. Con. Res. 11 has stayed in force for the entire second session of the 114th Congress. It might be easy to forget the 2016 budget resolution, but it never went away. Since it was never replaced by a newer version, as a valid, if technically sloppy, concurrent resolution on the budget it transferred over by the resolving clause in H. Res. 5. This clause says that concurrent resolutions carry over from one Congress to the next and don't expire like everything else. The problem here is not that it has shoddy production values as a budget resolution – it is because it is way, way out of date. Still, it could have been used for deeming purposes.

A Technicality from the Omnibus CR: FY2017 spending has been extended through April 28, 2017, so the Powers-That-Be postponed the discretionary sequestration report on the spending limits normally due after a session's end. In doing this, they also postponed the report of the Statutory Paygo Act of 2010, even though it only applies to direct spending and revenue. It doesn't matter, since a S-Paygo sequestration is not going to happen since language has been added to bills to keep budget effects from going on the scorecards. It is a bad habit to keep sequestration from happening since it lessens its effectiveness as a deficit or spending control.

TTD List: OMB also stated that "non-defense programs currently exceed the 2017 limit by $1.4 billion. If the current levels are left unchanged, OMB's final sequestration report for 2017 would include an order to eliminate this breach of the spending limit through a sequestration of nonexempt programs in the non-defense category. OMB currently estimates that the uniform percentage reduction to non-exempt non-defense programs would be approximately 0.3 percent."

Since it was not, it does bring up yet another consideration. With the adoption of S. Con. Res. 3, which as a concurrent resolution on the budget is rulemaking and considered equal to the House Rules, it supplants some but not all of S. Con. Res. 11. In fact, S. Con. Res. 3 specifically exempts in two places certain legislation from a long-term point of order found in S. Con. Res. 11. Logically, if it is necessary to put in an exemption to it, the resolution must otherwise still be in force.

As a tangent, the two places are redundant (and repeated also in H. Res. 5), and in such a short resolution it indicates that this was written probably in pieces, in different places, by different people, and sort of plopped into the same XML file without much close unified reading. The best guess is that it was written in components by Senate Budget Committee (they have a very able Counsel there), the House Parliamentarians (they do most of the hard, technical budget drafting when House Budget is not up to it), and the Senate Parliamentarian (who had to clear this whole thing for Reconciliation purposes and procedural privilege).

What *is included* in H. Res 5 is naturally as important as what is not. Some items meriting attention:

Section 2(c) adds this to the rule XXI of the House Rules:

> "(g) An amendment to a general appropriation bill shall not be in order if proposing a net increase in the level of budget authority in the bill."

This might seem to anyone who has followed appropriation bills as almost a statement of the obvious – every amendment to an appropriation bill must be offset so it nets to zero. Right?

That seems comforting. This is just a restatement of the way things already work? Well, yes and no. Yes, amendments must be offset, but no, it does not *always* work that way (it would not be budget process if it were simple). The appropriators are not so lacking in appreciation for the amount allocated to them by a budget resolution that they do not use every dollar of it. The point of order already exists to assure they do not go over the amount – embodied in the 302(b) suballocation. So the answer to the question: In practice? Yes, net increases are not allowed. In theory? No, an amendment might increase the net spending of a bill. The appropriators could conceivably be under the

WISDOM FROM THE LAST CENTURY: From the *Commission on Economy and Efficiency* on "The "Need for a national Budget" describing the relationship between Congress and the President:

"Budgetary practice has been influenced by the constitutional relations existing between the executive and legislative branches of government. .... In the United States, however, the legislature is usually regarded as the authority which initiates and determines a policy which it is the duty of the Executive to carry out. The effect of this conception of the relations of the Legislature to the Executive has been that the budget has been primarily an affair of the Congress rather than of the President. The Congress makes use of administrative officers in order to obtain the information which it must have to determine the important questions of policy devolved upon it by the American system. These administrative officers are acting as the ministerial agents of the Congress rather than as representatives of the President. The result is that while in most other countries the budget is in the nature of a proposal or program submitted on its responsibility by the executive to the legislature, in the United States the Book of Estimates, our nearest approach to a budget, is rather a more or less well-digested mass of information submitted by agents of the Legislature to the Legislature for the consideration of legislative commit tees to enable the Legislature both to originate and to determine the policy which is to be carried out by the Executive during the coming budgetary period."

suballocation, or a prior amendment could cut the amount in the bill, thereby opening room.

The "Section-by-Section Analysis" inserted in the *Congressional Record* provision explains it this way:

> Subsection (c) codifies the standing order from the 112th, 113th, and 114th Congresses prohibiting an amendment to a general appropriation bill proposing a net increase in budget authority in the bill.

This has truth in it, but the search party better have the hounds in good shape to track it down. The "standing order" (they mean "separate order") they are talking about codifying is an enforcement tool related to "Spending Reduction Accounts". At the beginning of the 112th Congress when determining how to write a "lockbox" so that Members could be given the opportunity to reduce the overall spending level of an appropriation bill, "Spending Reduction Accounts" were settled on as the method.

A Spending Reduction Account shows the amount of budget authority by which a bill on the floor is under its 302(b) suballocation limit (derived from the budget resolution). The SRA process is still in H. Res. 5, but updated by adding this new subparagraph: "(B) if no such [302(b)] allocation is in effect, "$0"." It expressly puts this new provision so the SRAs will work if there is a failure to get either a budget resolution *or a deemer*. That does not exactly herald confidence.

The original SRA subsection always assumed a budget resolution, though it unintentionally made it easier to run the House without one. During the 114th Congress, fiscal year 2017 appropriation bills were brought to the floor, governed by the overall discretionary level set by the Bipartisan Budget Act of 2015, not by a budget resolution. The SRA point of order was retooled in each rule providing for the consideration of an appropriation bill to allow it to work in a "no budget, no deemer" world.

That is what the provision codifies. The SRA component was formally codified to make it easier to do without a budget resolution, when that was not anyone's intent when writing the SRA procedure, nor what the language specifically says. For the 115th Congress and onward, all that is needed is a deal on an overall discretionary spending amount (which occurred in 2011, 2013, and 2015), and this point of order, and no retooling is necessary, and neither is a budget resolution.

Perhaps the clearest example of the House preparing, or at least setting the stage, for a time when no budgeting is done at all, like last session of Congress, is the inclusion of section 3(q). This writes budget scorekeeping into House Rules for a specified policy. The legislation given special treatment would transfer Federal lands to state and local governments. The merit of the policy here is not the point, the process is. It states that any bill conveying Federal property "shall not be considered as providing new budget authority, decreasing revenues, increasing mandatory spending, or increasing outlays." Apart from using "mandatory spending" rather than "direct spending" which is a little sloppy but shows up occasionally, this is quite clearly written, and is completely a roughshod run over the House Budget Committee.

If the second session of the 114th Congress taught anything, it was that budget resolutions have become dispensable – not replaced by a better model, but an easier to use one. If one has a great computer that will do all kinds of nifty things with Microsoft Word and Excel and XML, but the thing will not boot, and your IT guys are not capable of getting it running, and are out to lunch anyway, the old manual typewriter begins to look pretty good.

The positive aspect of this is that a new Congress is here, and when reaching bottom, perhaps *up* does not look like such a bad direction in which to go. The House will have a new Budget Chair, likely Mrs. Black who has been formally elected, though is still called "interim" since Mr. Price has yet to depart for parts Health and Human Services. When coming on permanently, the new Chair will bring new ideas, new perspectives, and the well-worn word for a reason, new *leadership*. Repairing the battered reputation of budgeting and the Budget Committee in the House presents a formidable task. A concurrent resolution on the budget for fiscal year 2018 is coming soon, though, and represents a great opportunity in that regard.

The danger right now is the possibility that the fiscal year 2018 concurrent resolution again will be a popcorn budget with no real substance to it apart from carrying directives to generate another reconciliation bill. While reconciliation is an important procedural budgetary tool, a budget resolution was meant to be an expression of the policy, principle, and will of Congress.

The Appropriators usually think in terms of the upcoming fiscal year, which is natural since the central task of their Committee is to provide budget authority for that year, and

determining how to divide up always tight amounts is not easy. The Rules Committee has the central responsibility of putting together the resolutions which govern how bills are considered on the floor – a bill-by-bill mindset is not ideal for Congressional budgeting. The budget resolution was supposed to set forth the budget rules that would last for at least a session of Congress and enforce levels for a ten-year period.

For Congress, this has been a 100-year project – building the right edifice, the right system for exerting the most fundamental of Congressional powers. The budget resolution was supposed to be central to this endeavor, but the current system has ceased to properly function. This is an excellent reason for budget process reform and the significant amount of effort and skill that entails. Until then, rebuilding, gathering up and patching the ruins, will be an arduous task. A reputation for competence, once lost, is hard to get back.

Quote of the Day

If at first you don't succeed, be sure to lower your standards before you figure out if your going to try, try again.

Former (hopefully) budgeting
principle in the 114th Congress

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