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CONGRESS

SPENDING RESTRAINT GOES OUT THE WINDOW

At the beginning of the Reagan administration — two and a half decades ago — the total federal debt was slightly less than a trillion dollars — and total federal revenues were \$599 billion.

So a Republican Congress that inherited a surplus from a liberal Democratic president could have been forgiven for quaking at the prospect of raising the debt limit to \$9 trillion last month — representing an 800% increase in federal liabilities since 1980, or an average 31% noncompounded annual increase for every year since 1980.

Even more alarming — far from being concentrated in defense, antiterrorism, or even entitlements — the spending increases during the first seven years of the Bush administration have been more or less across the board. In fact, with the exception of Agriculture, every budget category has witnessed at least a 3% annual increase. And with the additional exceptions of Interest, Community Development, and Housing, every budget category has climbed by at least 6% during the Bush administration.

All of this has led to a mini-rebellion by conservatives in both the House and the Senate.

In the House, the discontent produced the \$39.6 billion “reconciliation bill” that has now been thrown into the courts. [More about this, later.] But, for House Republican backbenchers who didn’t regard their \$50 billion spending cut demand — much less the \$39.6 billion “compromise” figure — as anything more than a “first start,” there is bad news.

At press time, Senate Budget Committee Chairman Judd Gregg (R-N.H.) had given up on the possibility of using the once-a-year nonfilibusterable budget-balancing “reconciliation bill” for any-

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thing other than forcing drilling in the Alaska National Wildlife Refuge (ANWR). This reflects Gregg’s assessment that there is absolutely no appetite for spending restraint in the Senate during this off-term election year.

Instead, Gregg is offering discontented Republican Senate budget-cutters an opportunity at “budget process reform” measures — none of which would cut a single penny, but which would supposedly set the stage for easier budget cuts in future years.

This has, in theory, met with a surprisingly favorable response by Senate conservatives, who have become frustrated with their unsuccessful attempts to convince the Senate to cut even the most scandalous programs — even when the money would be diverted, not to deficit reduction, but to spending on other popular programs. The “Bridge to Nowhere” — the \$200+ million Alaskan bridge that would have cost \$8 million for every person served — is repeatedly cited by frustrated Senate staff.

But this leaves the question of what type of systemic reform would constitute any more than “window dressing.” And it has become increasingly clear that the budget-cutters lack the fundamental parliamentary sophistication necessary to figure out how to impose budgetary discipline.

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The first mistake: Initially, columnists and conservative leaders with no understanding of the budget process jumped on the bandwagon of “earmark reform” – the idea of eliminating special riders to appropriations (money) bills for particular projects. The problem was that the legislation that was crafted for this purpose would also have eliminated all appropriations riders imposing restrictions on federal funding for abortion—a result that conservative leaders clearly did not support.

In addition, the prohibition on statutory “earmarks” did not prohibit appropriators from preparing lists of projects to be funded – lists that, in practice, would have been every bit as binding as actual statutory language.

The second mistake: Probably the most successful Senate parliamentary tool for blocking the creation of expensive new programs is the “hold letter” – a confidential letter to the Majority or Minority Leader asking that pending legislation be allowed to die without being brought up on the Senate floor.

But, on March 28, the Senate voted, 84-to-13, to outlaw the use of the hold letter—at least as it is currently used. The legislation is not airtight. But henceforth, if the provision is not dropped in conference, it will be more difficult to prevent the creation of new programs in the Senate.

So—having endangered the most important budget-balancing tool at their disposal – the Senate budget-cutters set about finding other proposals for systemic reform of the congressional budget process—particularly the 1974 budget act—that would actually have some effect in slowing spending.

Budget Process Reform

For anyone expecting that congressional Republicans will become born-again budgeteers, there is yet more bad news. The underlying bill that the Senate will consider—S. 2381, introduced by Majority Leader Bill Frist (R-Tenn.) and co-sponsored by 28 senators—is a fairly anemic “line item veto” proposal. The president would be empowered to send up a list of proposed rescissions that would take effect only if Congress, under expedited procedures, enacted legislation to implement them.

There is still a chance that conservatives will add Senate floor amendments to S. 2381 that will actually have some impact in controlling spending. But that is unlikely. Of the 26 ideas contained in the list prepared by Senate Republican staff, most are generally ineffectual—or even counterproductive. They include

- biennial budgeting;
- a resurrection of the Gramm-Rudman budget-balancing act;
- term limits for Appropriations Committee members;
- protection against a government shutdown, should appropriations lapse;
- expedited firing procedures for civil service employees;
- a statutory limit on all government spending;
- across-the-board “meat-ax” cuts; and
- supermajority vote requirements for spending increases.

Four of the 26 proposals on the Republican list would, if passed, achieve genuine budget austerity. But there are probably not enough Senate votes for any of them:

- “Scoring” reform: Each year, Congress begins with a “baseline” – the assumption that spending will continue to skyrocket and that budget “increases” or budget “cuts” are nothing more than indications of whether the inexorable spending hikes are larger or smaller than expected. In addition to establishing these “baselines,” budget “scoring” also assumes that tax “cuts” (i.e., cuts in tax increases) will simply disappear

and will have no feedback effect on the economy or on federal revenues. By overhauling these budgetary assumptions, “scoring” reform would attempt to rework budget assumptions to establish a more accurate picture of whether spending is actually going up or down— together with a more realistic assessment of the positive economic impact of tax cuts.

- “Sunset”: The concept of “sunsetting” has been around for 30 years—but has never gained much traction in the past. Under this proposal, all or part of the federal government would automatically terminate unless Congress took affirmative action to keep it in business.
- “Domestic Base Closure Commission”: Currently, a federal Base Closure Commission periodically reviews military installations and makes recommendations for the elimination of bases and shipyards. With the approval of the Secretary of Defense, the recommendations automatically go into effect, unless vetoed by Congress. Under comparable proposals for domestic programs, nonmilitary spending would be reviewed and weeded out through much the same process.
- “Limits on Programs that Can Be Appropriated”: Particularly attractive to Republicans is a draft that would prevent programs from receiving funding unless they had been authorized. The problem is that the parliamentary tool that has successfully blocked authorizations for the past 30 years is the “hold letter” — which has now been outlawed. Without a viable “hold” procedure, limits on unauthorized appropriations are meaningless.

The bottom line? Congressional Republicans have shown no appetite for budget austerity in this off-term election year. And, while they may try to pass a face-saving “reform” bill, nothing that stands any chance of passage would have any meaningful impact on spending.

Neglect for the Rules Catches Up with Senate Leadership (Again)

Two months ago, the *Watch Report* chronicled the long, painful process of finalizing the \$39.6 billion budget-balancing “reconciliation bill”:

- how conservative House Republicans rebelled against the tepid fiscal discipline

of then-House-Majority-Leader-in-abeyance Tom DeLay—forcing a commitment to shave \$50 billion off federal spending;

- how this led to a counterrebellion by House liberal Republicans—ultimately forcing the deletion of provisions in the bill allowing drilling in the Alaska National Wildlife Refuge (ANWR);
- how this led to a counter-counterrebellion by mercurial Senator Ted Stevens (R-Alaska)—who briefly threatened to hold up the reconciliation bill before relenting and sticking his ANWR drilling provisions on his Defense Appropriations bill (thereby triggering a filibuster of that legislation);
- how the “head-counters” in the House were forced to stick on a series of provisions to buy out wavering members, in order to obtain the votes necessary for their narrow 216-214 victory;
- how these “deals” made the bill out-of-order in the Senate—thereby forcing changes in the Senate that, since House members had left for the year and since Democrats refused to allow passage by “unanimous consent,” threw the vote on final passage into January 2006.

Well, it turns out that the nightmare over that bill for the House and Senate Republican leadership is not over yet. Opponents have now gone to court—contesting the proposition that it was ever actually enacted.

And none of this is the least bit surprising to those familiar with the parliamentary fumbles of Senate Majority Leader Bill Frist (R-Tenn.).

The niceties of Civics 101 law-making has never been a particular forte of any of the Republican leadership in the Senate. When the Senate Commerce Committee, under former Chairman John McCain (R-Ariz.), passed aviation security legislation in the wake of 9/11, a committee staffer sat at his computer and drafted much of the bill from scratch—after the committee had voted to report it.

The leadership has tried repeatedly—generally without much success—to obtain unanimous consent requests to “deem” House legislation to have passed the Senate when it reaches the Senate, even though the legislation may not even exist in either House when the unanimous consent request is entered.

So it can hardly come as a surprise that—when the Senate passed last year’s \$39.6 billion budget-balancing “reconciliation bill”—a Senate clerk had no problem making an itsy-bitsy \$2 billion “inadvertent adjustment” in the language the Senate had just passed, before sending the bill to the House. The change—of one number—extended from 13 to 36 months the limit on government-subsidized leases of durable medical equipment like wheelchairs and oxygen tanks under the Medicare program.

After the House passed the bill with the clerk’s 36-month limit, rather than the Senate-passed 13-month figure, at least two plaintiffs—the liberal group Public Citizen and an Alabama lawyer—brought suit, arguing that a bill not passed in identical form in the Senate and the House never became law.

Because the “reconciliation bill” passed the Senate only by virtue of the vice president’s tie-breaking vote—and passed the House by a slender 216-to-214 margin—the Republican leadership did not relish the notion of sending a second bill through the legislative process. This is particularly true because the bill was passed under special once-a-year filibuster-proof procedures. And the idea of trying to invoke the special limited-debate rules for a second time in a single year is, at best, uncharted territory.

In court, the Senate and House leadership would almost certainly lose on the merits. So the issue comes down—as it frequently does—to whether the plaintiffs have standing to sue and whether they are barred by the political question doctrine.

In 1896, the court threw out, on justiciability grounds, a challenge to a law that was certified by the Senate and House leadership in a different form than it appeared in their version of what is now called the *Congressional Record*. But a lot has happened since 1896—most notably, for these purposes, *Baker v. Carr*, 369 U.S. 186 (1963), and *Powell v. McCormack*, 395 U.S. 486 (1966).

So the feckless Senate leadership is holding its breath and biting its nails—hoping doctrines of judicial abstention will substitute for a seventh-grade understanding of Article I.

Congress Has Second Thoughts about Some of the More Draconian Elements of “Lobby Reform”

Four months after former Congressman “Duke” Cunningham pled guilty to corruption charges—and three months after the scandal involving

lobbyist Jack Abramoff broke, in full force, onto the front pages of the national press—Congress, at press time, remained deadlocked over what to do about preventing corruption in the future.

Over the last few months, the *Watch Report* has chronicled the tortured evolution of efforts by politicians to dodge political retribution for the proliferating scandals. The initial response was nothing short of an ethical “nuclear option”—eliminating Congress’s ability to make policy on appropriations (money) bills and requiring lobbyists to report on the exercise of their constitutional right to shape public opinion.

With the release of Rules Committee Chairman David Dreier’s (R-Cal.) “leadership draft” of ethics legislation, however, it appears the Republican leadership has taken a cold, hard look at some of the more draconian proposals—and has taken a step backward:

- **“Earmark Reform”: The Senate Draft:** The version of “earmark reform” introduced by Republican John McCain (R-Ariz.) and adopted by the Senate Republican leadership, would allow all “legislative” language to be deleted from appropriations conference reports. Since virtually all congressional policy decisions are increasingly contained in these legislative appropriations riders, the McCain language would fundamentally repeal the way Congress does business.

The House Draft: The Dreier language would require that “earmarks” in appropriations bills be listed—and nothing else.

- **“Grassroots Lobbying”: The Senate Draft:** The McCain draft would require that aggregates for “grassroots lobbying” spending be publicly reported.

The House Draft: The Dreier language would delete the requirement for reporting “grassroots lobbying.”

In addition, Dreier’s H.R. 4975 would

- require quarterly lobbying reports, require electronic filing, and create a public database of lobbying report information—extending disclosure requirements to include information about contributions and gifts to candidates;
- extend, to seven years, the disclosure requirement for former legislative and executive branch employees;

- increase disclosure penalties from \$50,000 to \$100,000;
- impose disclosure requirements on members of Congress negotiating over employment opportunities after leaving office;
- outlaw the “K Street Project” – whereby Republican officeholders tried to convince Washington corporate offices to hire more Republicans;
- prohibit members of Congress from accepting gifts of privately funded travel, or traveling on reimbursed private flights with lobbyists, or receiving cut-rate skybox tickets;
- give the House inspector general responsibility for reviewing lobbying reports;
- treat political organizations organized under section 527 of the Internal Revenue Code (527’s) like PACs;
- specify rules for apportioning federal and state contributions; and
- take away pensions from errant Congressmen.

The Dreier legislation sidesteps some of the significant pitfalls of the Senate draft. But, like the Senate, it does crack down on the Democratic “shadow government” of 527’s, which, during the last election cycle, outspent Republican 527’s by a two-to-one margin—with a difference of \$110 million.

We Told You So: Asbestos Reform on Life Support

Previously, we reported that a strange-bedfellows coalition of fiscal conservatives and pro-union Democrats in the Senate were planning parliamentary obstacles to Senate Judiciary Committee Chairman Arlen Specter’s (R-Pa.) asbestos litigation legislation.

Many liberals opposed the potential cap on liability. Conservatives pointed to the congressional study finding that, although revenue sources of the victims’ compensation fund would raise a maximum of \$140 billion, liabilities could easily reach \$150 billion or more.

Last month, the process reached its expected culmination when, falling 2 votes short of the 60 needed, the Senate failed to waive a provision in

last year’s budget resolution that limited spending programs with large outlays outside of the five-year budget “window.” This, notwithstanding the fact that bill supporters bombarded the New Hampshire home of Budget Committee Chairman Judd Gregg (R-N.H.) from as far away as Boston—leaning heavily on spots featuring veterans arguing that Congress had an obligation to the military to pass the bill.

In the Senate, nothing is really “dead” until the gavel comes down and the body adjourns *sine die* at the end of the year. Nevertheless, despite the Bush administration’s active support for “asbestos reform,” its chances, at this point, would have to be regarded as slim.

The Bureaucracy

Federal Election Commission (FEC) Moves To Minimize *Shays* Ruling; Congress Acts To Overrule Judge

The latest round in the ongoing bout over the McCain-Feingold campaign finance reform legislation has come to a head during the past month. The judges’ decision? Some fancy footwork, but no punches.

To review the bidding:

- The McCain-Feingold election reform legislation was enacted in the 107th Congress to outlaw major broadcast communications within 60 days of a general election that mention a candidate in a favorable or unfavorable light. The Republican manager, Mitch McConnell (R-Ky.), put in less than a stellar performance as opposition manager – perhaps in the expectation that whatever Congress did would surely be overturned by the courts in a landmark case bearing McConnell’s name.
- There was, in fact, a landmark Supreme Court decision bearing McConnell’s name – *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003). And, in that case, McConnell was judicially massacred – with the Court upholding McCain-Feingold, virtually in its entirety.
- Faced with a far-reaching intrusion on political speech that the courts had upheld, the conservative Federal Election Commission (FEC) promulgated a series of interpretations to narrowly interpret the statute. In particular, the FEC largely exempted the

Internet from the regulation of broadcast communications mentioning candidates pursuant to McCain-Feingold.

- The sponsors of the legislation went to court, challenging the FEC's narrow interpretation, and, in 2004, Judge Colleen Kollar-Kotelly effectively ordered the FEC to go back to the drawing board and expand its regulation of the Internet. [*Shays v. Federal Election Commission*, 337 F. Supp. 2d 28 (D.C. 2004)]

Within the past month, two things have happened:

- First, the FEC has issued its Internet rules: In a unanimous vote, the commission effectively granted media status to Internet users who maintain Web logs and engage in other political Internet activity. Said Chairman Michael Toner, the new rules "totally exempt individuals who engage in political activity on the Internet from restrictions of the campaign finance laws." The rule does regulate paid advertisements on the Internet, but it exempts political activity with corporate and union computers, so long as the activity is not "under orders" from the corporation or union – and is not done "on the clock."
- It is an indication of the power of Internet users that even liberal public interest groups that normally push for expansive federal authority over elections concluded that the FEC's unanimous action "strikes the correct balance."
- Second, the House postponed action on H.R. 1606, which would totally exempt the Internet from regulation under federal election laws.
- Nevertheless, with the explicit threat that any effort to further challenge the FEC's pro-Internet rule will be outlawed, it appears that McCain-Feingold-backers have lost this round.

Trucks To Face New Fuel Economy Rules

After a catastrophic first try, the National Highway Traffic Safety Administration (NHTSA) is back with new Corporate Average Fuel Economy (CAFE) standards for trucks.

Last August, NHTSA unveiled its plan to increase the previous 22.2 mile per gallon (MPG) standard during each year between 2007 and 2011 – dividing "light trucks" into six sub-categories. Smaller "light trucks" like the Toyota RAV4 might have been required to achieve a 28.4 MPG average, while the largest "light trucks" – like the Ram 1500 Quad Cab – might have been required to reach only a 21.3 MPG level.

Although the regulations would have cost the already-ailing automobile industry \$6 billion – and would have hit American Sport Utility Vehicle manufacturers particularly hard – environmentalists were unimpressed. Dan Loshof of the National Resources Defense Council argued that NHTSA "missed a critical opportunity" – and that its "focu[s] on the . . . structure of CAFE regulations] . . . masks the . . . paltry increase in fuel economy." As a result, the proposal was withdrawn.

The rewritten system would be based on an index number calculated by measuring the wheelbase and track of the truck. In addition, heavy-duty models, such as the Hummer H2, would be subject to CAFE standards for the first time.

The Courts

The Supreme Court

Not Suprisingly – Except to Virtually Every Law Professor in the Country – the Court Refuses to Eviscerate the Spending Clause

Not since – well, ever – has such an aggregation of legal talent been so totally wrong about such an obvious issue.

Not only did the Supreme Court unanimously reject the arguments of every "prestige" law school in a case directly affecting them in which they were – at least indirectly – parties. The opinion of the Court – written by John Roberts – lectured the professors as though they were errant children.

The case was:

Rumsfeld v. Forum for Academic and Institutional Rights
No. 04-1152
from the Third Circuit Court of Appeals
argued December 6, 2005

In *Rumsfeld*, an organization founded by 30 "prestige" law schools challenged the Solomon Amendment – an appropriations rider that denied

federal funds to an entire university, based on its law school's refusal to allow on-campus access for military recruiters.

The law schools argued that the military's "Don't ask, don't tell" policy was a violation of their institutional policies prohibiting job recruiters from access to institutions that discriminated on the basis of sexual preference.

There is a threshold irony here. Law schools receive relatively few federal dollars, but medical schools depend on them. The policy of defunding medical schools because of the misbehavior of law schools was not preordained, but was, rather, invented by liberal law professors in 1984 in order to put "teeth" into four federal civil rights statutes. The resultant legislation—the Civil Rights Restoration Act—was enacted in 1988 after a grueling four-year battle in which conservatives vigorously protested defunding an entire university because of the misbehavior of one part.

So, unable to forgo the federal largesse to which universities have now become addicted, the law schools, through the Forum for Academic and Institutional Rights, sued.

And, while it was possible to argue the case on narrow statutory grounds, the law professors who crafted the schools' arguments wanted to "make history." So they argued that the Solomon Amendment abrogated the schools' First Amendment rights of "expression" and association.

They based their arguments on, *inter alia*, the infamous *Wooley v. Maynard*, 430 U.S. 705 (1977), case, in which the state of New Hampshire—ironically and unsuccessfully—went to court to force all of its residents to display the motto "Live Free or Die" on their license plates. But they had to contend with recent cases restricting the reach of the First Amendment, including a holding by the late Chief Justice Rehnquist that the right not to engage in governmental speech was never protected by the First Amendment.

In addition, the notion that the universities' politically motivated policy was speech at all was a risky argument (and one that was ultimately rejected by the Court). Finally, the so-called unconstitutional conditions doctrine—the notion that you can't grant or withhold federal funds based on the voluntary relinquishment of constitutional rights—would come as a surprise

to anyone who's read *Buckley v. Valeo*, 424 U.S. 1 (1976), and to anyone involved in fights over the Hyde Amendment and other various money-related spending restrictions on abortion recipients.

As a result, it was not surprising that the Federal District Court for the District of New Jersey rejected these arguments and denied a preliminary injunction, although, perhaps unduly awed by the aggregation of legal talent, the Third Circuit reversed.

By this time, a few of the brighter lights of legal academia were beginning to become alarmed. Harvard Professor Laurence Tribe—no rabid conservative—was quoted by journalist Kristin Eliasberg as saying, "There is no guarantee that the Supreme Court would write an opinion with the degree of delicacy required to strike down the Solomon Amendment in a way that does not endanger the vigorous use of Title 6 and Title 9 to enforce antidiscrimination."

So, while Tribe alone seemed to understand the connection between the 1988 Civil Rights Restoration Act and the Solomon Amendment that was patterned after it, he could have gone even further. Increasingly, as the use of Senate "holds" has killed all but the most important "authorization" (i.e., "policy-oriented") bills, the 13 large appropriations (i.e., "money") bills have been used as vehicles for virtually all congressional policy.

Huge numbers of direct and indirect federal funding recipients—from the Salvation Army to legal services providers to Planned Parenthood—currently are subject to conditions limiting their constitutional rights as the price for receiving federal funding. For the Court to have ruled in a manner the law professors seemed to regard as a foregone conclusion would have invalidated most of the significant policy provisions of current law enacted during the last 10 to 20 years.

So the 8-to-0 rejection of the professors' arguments, written by the new Chief Justice, could have hardly come as a surprise to anyone—except, perhaps, to the plaintiffs/respondents.

But what is remarkable was Chief Justice Roberts' ability to produce an opinion on an important First Amendment issue without dissenting or concurring views.

RECENT PUBLICATIONS

IMMIGRATION LAW PRIMER FOR THE CORPORATE EXECUTIVE

Authors: Paul W. Virtue, Hogan & Hartson, LLP, and Natalie S. Tynan, Associate Counsel with the Department of Homeland Security

This *BRIEFLY* . . . is a guide for the corporate executive to navigate the maze of U.S. immigration law. The authors first provide a synopsis of the executive branch structure for the administration and enforcement of immigration law. They continue by detailing the essential elements for understanding the law.

THE FIRST 72 HOURS OF A GOVERNMENT INVESTIGATION: A GUIDE TO IDENTIFYING ISSUES AND AVOIDING MISTAKES

Author: Sheila Finnegan, Mayer, Brown, Rowe & Maw LLP

This study identifies the key issues that arise for in-house counsel in the initial hours after a government investigation, service of a subpoena or execution of a search warrant. Failure to understand all the ramifications of actions can result in costly mistakes for the corporation. This monograph provides guidance for in-house counsel to quickly spot critical issues and understand the ramifications of potential decisions.

DROWNING IN ZUBULAKE: THE PITFALLS OF ELECTRONIC DISCOVERY

Author: Geoffrey A. Vance, McDermott Will & Emery LLP

This *BRIEFLY* . . . discusses the pitfalls associated with electronic data, including costs associated with identifying, preserving, and ultimately producing electronic information. The author analyses the seminal decision in this area – *Zubulake v. UBS Warburg LLC*, and the significance of post-*Zubulake* case law and rule changes. For example, many of the mistakes committed by the defendant in *Zubulake* were also committed by Morgan Stanley, which suffered a \$1.45 billion judgment based in large part on failure to properly preserve and produce electronic information. The *Zubulake* case foreshadows a day where discovery of electronic information will be as routine and uneventful as the discovery of paper files.

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