The Permanent Filibuster Returns to Washington

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Senator-elect Scott Brown is no Mr. Smith. He is an experienced state legislator, a polished campaigner, and, unlike the famous Jimmy Stewart character, he actually won his Senate seat in an election. But Brown's name, much like Mr. Smith's, will be associated with the word ''filibuster,'' at least for the next nine months. Brown's victory in the Massachusetts special election will likely have a much larger impact on the real Washington than Stewart's Mr. Smith had on the fictional capital city in *Mr. Smith Goes to Washington*.

Eighteen months ago, a 60-seat majority in the Senate seemed unattainable even to a Democratic Party on the rise. As Martin Sullivan points out, getting to 60 seats required a great deal of luck (Franken's 300-vote victory in Minnesota), several major upsets (Liddy Dole and Ted Stevens losing what should be safe Republican seats), and an unexpected shift (Arlen Specter crossing party lines because he was trailing Republican challenger Pat Toomey in polls). But 18 months ago, it also didn't seem as though the Democrats would need every one of those seats to accomplish their goals. The congressional GOP has shown an almost unshakable unity. And that unity has been growing stronger. Not a single Republican — not even the moderate Sen. Olympia Snowe from Maine — voted for either healthcare bill. And now Brown, as everyone is aware, will be the 41st Republican in the Senate.

Even with 60 seats, the Democrats had trouble passing tax bills in 2009. In his analysis, Sullivan writes that Brown's win will affect every piece of the Democrats' tax agenda. Sullivan predicts that healthcare reform is now in severe jeopardy and that tax reform will no longer be on President Obama's radar. He thinks the bank tax might still be alive, but deficit reduction using tax increases is probably off the table. In short, Sullivan concludes that Congress's full tax slate will be even harder to work through now that Republicans can block most legislation in the Senate. (For Sullivan's article, see p. 419. For Brown's impact on healthcare reform, see p. 432.)

Taxes will be a big part of politics in Washington this year. The estate tax, the pay-fors for healthcare, the bank tax, and even ''extenders'' could all become key election-year issues. Brown's historic upset is likely to embolden Republican leaders to continue their permanent filibuster strategy in the Senate — a move that might make the Democratic Congress seem unable to govern and threaten even more incumbents this fall. But one would think that sooner or later the GOP will have to compromise on something. (Extenders and the estate tax might be the most likely candidates for bipartisanship.) Won't voters eventually catch on to the fact that Republicans have staked their return to power simply on Obama failing and not on any true program of reform? The president and the congressional majority certainly hope so.

Economic Substance in the Courts

Using Suzanne Somers's Tax Court case as an example, Lee Sheppard wonders whether courts are too quick to use the economic substance doctrine in son-of-BOSS tax shelter cases (p. 421). The government's record in these kinds of cases is impressive, but Sheppard argues that courts should be looking more at the underlying partnerships and partners. An overreliance on economic substance makes decisions easier to reverse at the appellate level and also allows parties to the next tax shelter scheme to rely on the fact that their partnerships might be respected, according to Sheppard. Her analysis also extends to the recent *G-I Holdings* decision by a district court.

Jasper Cummings, Jr., shares Sheppard's concern. In What Were They Thinking?, he criticizes the development of the economic substance doctrine into a positive rule of law (p. 521). Also looking at the Somers case, Cummings concludes that the IRS tends to rely on the economic substance doctrine whenever it can and that courts find the doctrine attractive because they are more comfortable with it than with ever-changing tax laws and complicated fact patterns. Much like Sheppard, Cummings finds that courts could reach the same result while using more traditional methods. He hopes that the Supreme Court ultimately addresses the issue.

Commentary

Economic stimulus and net operating losses have become closely intertwined concepts. For whatever reason, Congress seems to believe that one of the best ways to provide stimulus to business is to extend or expand the usefulness of NOLs for taxpayers. The American Recovery and Reinvestment

Act of 2009 was no exception. It contained provisions extending the NOL carryback period from two years up to five years for NOLs incurred in 2008 and 2009. ARRA limited the NOL carryback expansion to certain businesses, but a bill passed in November 2009 provides similar benefits to most taxpayers. A team of KPMG experts has written an analysis of the 2009 legislation (p. 467). The group discusses the operation of the new carryback rules and considers the planning opportunities and potential problems taxpayers should be aware of before making a carryback decision.

For most of 2008, the price of energy (specifically oil) was a major issue. The spike in gasoline prices gave green advocates their most powerful ammunition to date for climate change legislation and a switch to alternative energy sources. The steady decline in the price of oil, attributed to a fall in demand related to the economic downturn, forced energy issues to the back burner, but Richard Westin believes that the incoherent energy policy of the United States will eventually have expensive consequences. In his special report on p. 481, Westin argues in favor of a crude oil price stabilization tax. The purpose of the tax is to prevent wild swings in oil prices. The long-term goal of Westin's proposal is to reduce the risk of eventually running out of crude oil before alternative energy sources can be developed and exploited. Westin writes that stabilizing the price of crude oil will have other positive benefits, including enabling automobile manufacturers to more easily react to changes in demand.

Sullivan might think that Brown's victory in Massachusetts doesn't necessarily spell the end of Obama's proposed bank tax, but Diana Furchtgott-Roth wouldn't be disappointed if Senate Republicans blocked the proposal. In her analysis piece this week, she finds that the tax would discourage wholesale bank transactions vital to the economic recovery (p. 535). She also is critical of the fact that the tax treats institutions that have repaid their TARP funds the same as those that have not done so, and that it exempts some TARP recipients altogether. She concludes that the measure isn't designed so much to recover TARP monies, as to take advantage of popular furor over bank bonuses.

The temporary death of the estate tax is a sad state of affairs and reflects poorly on Congress and policymakers, say William VanDenburgh and Nancy Nichols (p. 495). The two review the recent history that led to the repeal of the tax, including the legislative gridlock that blocked reform efforts in 2009. They argue that a compromise is a necessity, given the government's need for revenue, and propose using increased enforcement in the area of charitable foundations as a way to pay for a lower estate tax rate that could pass Senate muster.

For the last two years, the Shelf Project has presented proposals to raise revenue and protect the tax base. Prof. Calvin Johnson celebrates the two-year anniversary of the project by providing an inventory of all the proposals that have appeared in *Tax Notes* and by showing how the Shelf Project can help with the impending tax and revenue crisis facing the federal government. The tax base is in terrible shape, and Johnson hopes that Congress and the White House might look to Shelf Project proposals as a start on major tax reform. For the two-year anniversary article, see p. 513.

In a practice article, David Woolridge, Ronald Levitt, and Gregory Rhodes analyze the substantial compliance doctrine and how it relates to the Tax Court's decision in *Simmons* (p. 474). The authors focus on the application of the doctrine to conservation easement contributions. Jonathan Trexler's empirical study of intervention in innocent spouse cases shows that courts' distrust of culpable spouses makes intervention counterproductive. The author attempts to provide some explanations for why the voices of intervening spouses fall on deaf ears (p. 499). Alex Brill's On the Margin column discusses partnership loss transfers, *Southgate Master Fund*, and how the American Jobs Creation Act of 2004 affected those deductions (p. 505). Home workers and statutory employees are the least discussed aspect of the employee classification debate, according to Robert Wood and Christopher Karachale. In Woodcraft, they argue that home worker classification needs attention in this era of changing technologies (p. 531). ■