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Thoughts On The 2011 State Of The Union

Law360, New York (February 1, 2011) -- Despite being a registered lobbyist and heading a government strategies group at a major law firm, I am also part of the Get It Done political party, a group that includes most of the American public. The reason Congress has been rocked in the 2006, 2008 and 2010 elections is that the Get It Done party members out there are not interested in political labels but moving the country forward.

I loved how people behaved at this year's State of the Union. The dignity of the Congress was preserved, which is no small achievement, by the gesture of members crossing the aisle. The past few years of atrocious behavior ("You lie!") and juvenile behavior (clapping at the wrong time to embarrass either President George W. Bush or President Barack Obama) were thankfully missing. The desire to make the State of the Union seem more like a town hall meeting with shout outs or act outs is one best resisted if Congress is to have the dignity granted the president by his singular State of the Union rule.

The high cost we paid as a society to achieve this moment of dignity — the tragic attack on Rep. Gabrielle Gifford and other innocent victims simply gathering to talk to their congresswoman — will hopefully continue to influence events in the future, and some vestige of the dignity of this meeting will continue in the future.

Now let's examine the battle between the branches.

The first chapter of our novella is the 2011 Supreme Court v. the President of the United States. In last year's State of the Union, we had the first version of this "case," President of the United States v. 2010 Supreme Court, when a truly electric moment was the president slamming the court's decision in Citizens United.

This year's "case" was the deliberate absentee vote with their feet by three of the consistently right-wing Supreme Court justices (Antonin Scalia, Samuel Alito and Clarence Thomas). They stayed away in a clear intent to rebuke the president for his conduct last year. A roundhouse boo for Justice Scalia ("Get over it"), who found the time to controversially participate in a partisan meeting with far-right-leaning members of Congress during the same week. But let's give a shout out of approval for Chief Justice John Roberts, for choosing correctly to be there at the State of the Union. Another smart move by a good pol shows the chief is not in any way tone deaf to what the Get It Done party members think.

The next chapters are all Executive Branch v. Congress.

Being Catholic, the need to confess has been forcibly inserted into my DNA by nuns. So let me confess my leanings. Having served in both the U.S. Department of Justice and as general counsel of a U.S. Senate committee, I still tend to worry more about Congress retaining a robust ability to deal with the more singular information-gathering and focus capabilities of the executive.

The president continued his persistent, consistent and popular State of the Union battle against lobbyists, by challenging Congress to list online all meetings with lobbyists. This suggestion received an appropriate backhand from the newest star of the Republican House, who quickly and appropriately gave the raspberry to this suggestion.

Darrell Issa was right. Congress is different. It has to be able to deal with its constituents, not giving the lobbyist a Miranda warning before listening or devoting limited information technology resources to the task of listing lobbyist contacts. Just as members of the administration have skirted the White House rule by meeting at the Caribou Coffee or Starbucks, in a minor fit of civil disobedience, so too should Congress not bind itself to receive its information in any way that limits the traffic.

The second chapter of this State of the Union-driven struggle was the president's claim he will veto any legislation that contains "earmarks." Earmarks have become a pejorative term as a result of a decade or more of improper growth and abuse, best epitomized by Jack Abramoff and the members who were his all-too-willing accomplices.

But let me evidence my deep skepticism for the practicality, propriety and wisdom of this State of the Union suggestion on several levels. Entire bills are nothing but compilations of earmarks — the best examples being the Transportation Committee's four-year transportation bill. The defense authorization and appropriation bills, as we know them, do now and always will have items that definitionally will contain earmarks, and it is now a label applied to a matter another member opposes. Congress was constitutionally given the right to earmark. If Congress gives up that right, it will lose some measure of its power to govern and influence policy.

Furthermore, the whole debate on earmarks is a clever smokescreen to obscure the fact that neither Congress nor the administration can afford to be totally serious about claims of fiscal responsibility. Moreover, earmarks are a tug of war between the congressional and executive branches. Would you rather have your member of Congress direct funding for projects in his/her congressional district, or a dedicated but unelected official at a federal agency? Congress should not capitulate on its ability to legislate, including earmarks. But it likely will.

Lobbyists have a truly peculiar take on the State of the Union, different from normal citizens. Secretly, we all listen to the State of the Union in rapt attention for the Truly Great Moment: Did they get their obscure issue into the president's speech?

Or alternatively, despite the fact the lobbyist couldn't routinely find the Rayburn or OMB, did events conspire to favorably place the lobbyist's issue in the State of the Union, such that he or she can claim success to their client? If lobbyists were bird hunters, each bird would have been shot dead by many, not one, individual.

The State of the Union high point in the lobbyist's life of wretched tradecraft is only transcended by the disappointment of having your subject matter ignored, yet again, along with the tactical suicide of having told your client in advance you were confident your issue is in the State of the Union, and then failing. Like the old RCA ad: the lobbyist, looking not unlike the dog listening with ear cocked to the speech for moments that make you (or a competitor) eligible for the lobbying hall of fame.

Finally, members of Congress, like lobbyists, also listen to the State of the Union for recognition of their past success. In this State of the Union, the president recognized the passage of the credit card bill of rights, which remains one of the most popular pieces of legislation passed by the prior Congress, which was otherwise rebuked by the voters for its other bills and actions.

The bill was the brainchild of U.S. Rep. Carolyn Maloney, D-N.Y., who paid for that bill's passage by having an apologist for the banks "primary" her, claiming she had been insufficiently supine to the industry. The taxpayer-voters of her district, many of whom do have a financial services background, crushed that attempt by a very wide margin. Since I have repeatedly disagreed with the president here, let me give him the final salute for recognizing Maloney's popular bill.

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