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978-0-521-87731-2 - Fiscal Challenges: An Interdisciplinary Approach to Budget Policy

Edited by Elizabeth Garrett, Elizabeth A. Graddy and Howell E. Jackson

Excerpt

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PART ONE

THE LAW AND POLITICS OF FISCAL POLICY

The United States Constitution places the power of the purse in the legislature's domain: Article I, §9, cl. 7 specifies that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Thus, the founders entrusted the federal government's most important power to the most politically accountable branch, the U.S. Congress. Congress not only sets the amount of money appropriated to executive branch agencies and other government activities, but it also directs how that total is to be spent by enacting directives in appropriations laws.¹ Congress has not always handled its budgetary authority responsibly, which can result in an abdication of its power to the executive branch. In some cases, legislators fail to meet constitutional obligations because they wish to avoid blame for potentially unpopular decisions; in other cases, congressional inaction may be due to collective action problems inherent in entities made up of many individuals often pursuing different objectives.

In Chapter 1, William Dauster describes the evolution of the congressional budget process with a particular emphasis on the modern era, beginning with the adoption of the Congressional Budget and Impoundment Control Act of 1974. He describes what has been called the "fiscal Constitution"² because of its importance in the American political process. Over the past 30 years, Congress has adopted a series of institutional reforms, including enactment of framework laws that structure the deliberative process in committees and on the floor and creation of the Congressional Budget Office to provide lawmakers more professional expertise. Framework legislation "creates rules that structure congressional lawmaking; these laws establish internal procedures that will shape legislative deliberation and voting with respect to certain laws or decisions

¹ See Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1345 (1988), terming the two powers "a Principle of the Public Fisc" and a "Principle of Appropriations Control."

² Kenneth W. Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271 (1977).

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in the future.”³ The congressional budget process is the archetypical framework law, and it affects a substantial portion of Congress’ legislative business.

The evolving framework shaping the congressional budget process is designed to achieve several objectives. First, it serves as a *coordination device* to govern the actions of the dozens of committees in both chambers that are involved in spending or raising money. Second, the framework may serve *symbolic purposes*, particularly when the public is concerned about growing deficits, to saliently demonstrate to voters that lawmakers are fiscally responsible. Third, at least some parts of the budget framework are intended to serve as a *precommitment device* to make it harder for lawmakers to engage in deficit spending. Fourth, the budget process also has shifted the *balance of political power* in important ways, as Dauster discusses in his chapter. Not only did Congress hope to regain power that it had ceded to the executive branch, but the framework also works to shift power internally from long-serving committee leaders to party leaders. Some of these changes in power were intended by those adopting budget rules, but some may have been unforeseen at the time of enactment.

Cheryl D. Block builds on Dauster’s comprehensive description of the congressional budget framework to describe how strategic political actors manipulate these rules to achieve their goals. In Chapter 2, she describes a bagful of tricks that lawmakers and interest groups use to ensure that programs important to them continue to receive federal support even during times that Congress claims to be pursuing spending restraint. Not only do these games undermine fiscal discipline, but they can also threaten rational decision making because the information that lawmakers rely on is not accurate or complete. Moreover, policymakers may choose to construct federal programs in particular ways merely to comply with budget rules, and these structures may not be the most efficient or equitable way to deliver benefits. Examples of the effect of budget gimmicks are legion, and Block illustrates her analysis with provisions enacted by both Republican and Democratic Congresses. When it comes to budget games, the players come from both sides of the aisle and seem able to discover ways around even the most complicated of rules.⁴

Lawmakers resort to budget gimmicks because they want to enact new policies even when the legislative environment is shaped to constrain them. Their reelection is dependent in part on their record of achievement on issues that matter to voters, and many voters prefer policies that cost the federal government money to policies designed to cut the deficit. Even voters who favor smaller government and spending restraint would often prefer that programs

³ Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISS. 717, 718 (2005).

⁴ Not surprisingly, games occur at the state level as well. See Richard Briffault, *Balancing Acts: The Reality Behind State Balanced Budget Amendments* (1996).

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The Law and Politics of Fiscal Policy

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benefiting them and their families stay off the cutting block and perhaps even receive more resources. In addition, lawmakers know that their reelection is crucially related to their ability to raise money for campaigns. A large part of that financial support comes from organized interest groups that expect lawmakers to help them pursue their top priorities. In some cases, the objectives of interest groups may not align with the general welfare.

Elizabeth Garrett and Adrian Vermeule tackle this tension between accountability to voters and accountability to organized interest groups in their chapter on transparency in budgeting decision making. They reach the counterintuitive conclusion in Chapter 3 that broad and immediate disclosure of deliberation on budget matters may not be desirable because it disproportionately advantages organized interests rather than the unorganized and dispersed public. They also compare the kind of deliberation that occurs in public with that possible in more private venues. They recommend a different sort of framework for budget transparency, not only to apply to congressional entities but also to executive branch advisory committees and interbranch budget summits.

In the final chapter of this section, we turn to a comparative analysis of budget institutions. Jürgen von Hagen describes the experience in the European Union, which confronts the challenge of controlling deficit spending in a context different from that of the United States. Not only is Europe characterized by parliamentary systems, but the EU is seeking to impose a framework on countries that have long histories of autonomy in fiscal policy. The federated European system is vastly different from the federal system in the United States, and thus it poses different challenges for the designers of budget institutions. Comparative studies like von Hagen's provide insight into the larger issues of institutional design; for example, the EU had the advantage in the 1990s that it could severely punish nations that did not adhere to fiscal objectives because it could deny them entry to the European Monetary Union. The effect of such a penalty on the behavior of EU countries during this time illuminates the challenges for the U.S. system and now for the EU, where the punishment for defection from budget objectives is largely political. This chapter is only the first kind of comparative analysis we will provide; Part III's comprehensive analysis of state budgetary structures allows a different sort of comparison to the federal process.

1 The Congressional Budget Process

William G. Dauster

I. HOW IT EVOLVED

“Money is power,” wrote President Andrew Jackson in an 1833 veto message.¹ More than anything else, that equation explains how budgets work. America’s congressional budget process evolved from efforts to grasp and disperse that power. This chapter recounts the evolution of the process and then discusses how it works – focusing particularly on the president’s budget, Congress’ budget resolution, authorizations and appropriations, and the budget reconciliation process.

A. The Founders

America’s founders gave Congress the power over money to provide a check on the president. Article I, Section 9 of the Constitution states the following: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” The founders learned from their study of English history that it was important to separate the power to control the government’s money from the power to run the government. They felt that enhancing the legislature’s money powers would help to preserve the rights of the people. James Madison summarized the English experience when he wrote in the *Federalist Papers*, concerning the House of Representatives:

They, in a word, hold the purse – that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in

¹ Andrew Jackson, pocket veto message (Dec. 4, 1833), in SEN. J. 20, 30 (Dec. 5, 1833).
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fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.²

B. The Ways and Means and Finance Committees

The English Parliament's struggle for power with the king culminated in the English Civil War in the 1640s. The forces aligned with Parliament prevailed, and Parliament wrested the power of the purse exclusively to itself. As part of that process, in 1641, the Parliament formed its Committee on Ways and Means, giving it the power to determine tax policy.

America's House of Representatives formed a Ways and Means Committee early on and patterned it on its parliamentary forbearer.³ After a period of legislating through ad hoc committees, the Senate followed suit in 1816 with its Committee on Finance.⁴ In these early days, the Ways and Means and Finance Committees held nearly plenary jurisdiction over fiscal policy. They handled both taxes and spending. That may have been the last time that America had a simple congressional budget process. Of course, America was simpler then, too. Our first appropriation act fit on a single page.⁵ Today, funding the government each year can take a dozen separate laws, each often spanning hundreds of pages.

C. The Appropriations Committees

The increased fiscal demands of the American Civil War demonstrated the power of the two money committees. For the first time, the government spent more than \$1 billion in one year. In the wake of the war, Congress sought to disperse that power, separating the power to spend from the power to tax. To oversee spending, the House created the Appropriations Committee in 1865, and the Senate followed suit in 1867.⁶ The House Ways and Means and Senate Finance Committees retained their jurisdiction over taxes.

² James Madison, *THE FEDERALIST* No. 58, at 359 (Clinton Rossiter ed., 1961).

³ See Donald R. Kennon and Rebecca M. Rogers, *THE COMMITTEE ON WAYS AND MEANS: A BICENTENNIAL HISTORY: 1789–1989*, at 6 (1989) (H. Doc. 244, 100th Cong., 2d Sess.).

⁴ See Staff of S. Comm. on Finance, 97th Cong., *HISTORY OF THE COMMITTEE ON FINANCE* 14–18 (1981).

⁵ See H.R. 32, 1st Cong., 1st Sess. (1789) (An Act Making Appropriations for the Service of the Present Year), *reprinted in* 4 *DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA* 49 (Charlene Bangs Bickford and Helen E. Veit eds., 1986).

⁶ See Staff of S. Comm. on Appropriations, 109th Cong., *UNITED STATES SENATE COMMITTEE ON APPROPRIATIONS; 138TH ANNIVERSARY; 1867–2005*, at 4–5 (2005); Allen Schick, *LEGISLATION, APPROPRIATIONS, AND BUDGETS: THE DEVELOPMENT OF SPENDING DECISION-MAKING IN CONGRESS* (May 1984) (CRS rep. no. 84-106).

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Appropriations bills provided the authority for the Treasury to disburse money to run the government. These must-pass bills provided vehicles on which some sought to enact unrelated changes in law. Beginning in the 1830s in the House and in 1850 in the Senate, Congress adopted rules that further divided the spending power.⁷ Under those rules, appropriations bills merely funded existing programs and “carr[ied] out the provisions of some existing law.”⁸ The rules prohibited these bills from creating new programs. Other committees – called “authorizing” or “legislative” committees – worked on legislation creating (“authorizing”) new programs, revising (“reauthorizing”) old ones, and terminating programs that ceased to serve their purposes. The authorizing committees reported legislation to authorize levels of spending subject to later appropriations. Authorizing legislation did not in itself allow money to leave the Treasury.

In the wake of the increased fiscal demands of World War I, Congress sought to rationalize the executive branch’s budget process by enacting the Budget and Accounting Act of 1921.⁹ That law created the Bureau of the Budget (the forerunner of today’s Office of Management and Budget, or OMB), created the General Accounting Office (GAO, forerunner of today’s Government Accountability Office) independent of the executive, and required the president to submit budgets to Congress every year.

D. The Congressional Budget Act

Beginning particularly with the New Deal programs of the 1930s – notably Social Security – and continuing with the Great Society programs of the 1960s – notably Medicare and Medicaid – authorizing committees came to report legislation that obligated the government to make payments, *not* subject to annual appropriations, to beneficiaries who met specified requirements. This spending – called an “entitlement,” “mandatory spending,” or “direct spending” – grew to increasingly large portions of the federal budget by the 1970s. Entitlement spending surpassed appropriated spending in 1975.¹⁰ The appropriations process thus ceased to oversee the broad sweep of federal spending. Since the formation of the Appropriations Committees, Congress had dispersed the powers of taxing and spending among several committees, without any single committee to oversee the bottom-line effect of Congress’ actions on the deficit, and the growth of entitlement spending only increased this fragmentation of responsibility.

⁷ The process was not a linear one. The late 19th century and early 20th century saw several revisions of these processes, as powers shifted between authorizers and appropriators.

⁸ Senate Rule XXX (Dec. 19, 1850).

⁹ Pub. L. No. 67-13, 42 Stat. 20 (codified as amended in scattered sections of 31 U.S.C.).

¹⁰ See Congressional Budget Office, *THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2007 TO 2016*, at 144 (2006).

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The early 1970s also saw a constitutional confrontation between the Congress and the Nixon administration over the president's power to refuse to spend money that Congress had by law directed the president to spend. President Nixon claimed the power not to spend – to “impound” – these funds. Congress asserted its traditional power of the purse. When courts addressed lawsuits raising these issues, they tended to deny that the president has either constitutional or statutory authority to decline to spend the funds.¹¹

Congress addressed this impoundment crisis, and also the problem of not having one entity or a coordinated process to examine the fiscal bottom line, in the Congressional Budget and Impoundment Control Act of 1974.¹² Title X of the act solved the impoundment confrontation through a legislative compromise. Congress granted the president the power to defer spending money for a limited time, unless one house of Congress passed a resolution – a “legislative veto” – disapproving the deferral. On the other hand, Congress deprived the president of the power to cancel or “rescind” funds, unless Congress also passed a rescission bill canceling the funds. In 1983, the Supreme Court ruled legislative vetoes of the sort used by the Impoundment Control Act unconstitutional because such a veto was a legislative act that needed to meet the constitutional requirements of bicameralism and presentment.¹³ After that case, stopping a presidential deferral took the vote of both houses of Congress, most probably by a two-thirds vote to overcome a veto, instead of merely a majority vote of one house of Congress through a legislative veto. Consequently, Congress has rarely acted on deferrals.

The first nine titles of the 1974 Budget Act proved more significant than its impoundment provisions; they created new congressional institutions and added new congressional procedures. The Budget Act created Budget Committees to join the other committees in each house of Congress. The Budget Act also created the Congressional Budget Office (CBO) to provide Congress with its own, neutral source of information independent of the president's Office of Management and Budget.

In addition, the Budget Act created fast-track legislative vehicles to consider fiscal policy. First came the concurrent resolution on the budget, or budget resolution. The budget resolution provided rules for Congress that constituted an overall blueprint for the nation's fiscal policy. As a concurrent resolution, the budget resolution was not presented to the president for signature or veto. The

¹¹ See, e.g., *Train v. Campaign Clean Water, Inc.*, 420 U.S. 136 (1975); *Train v. City of New York*, 420 U.S. 35 (1975); *Commonwealth of Pennsylvania v. Lynn*, 501 F.2d 848 (D.C. Cir. 1974); *State Highway Comm'n of Missouri v. Volpe*, 479 F.2d 1099 (8th Cir. 1973).

¹² See Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified as amended at 2 U.S.C. §§ 601–688).

¹³ The Supreme Court held legislative vetoes unconstitutional in *I.N.S. v. Chadha*, 462 U.S. 919 (1983). Applying *Chadha*, the Court of Appeals in *City of New Haven, Conn. v. United States*, 809 F.2d 900 (D.C. Cir. 1987), struck down Section 1013 of the Impoundment Control Act regarding deferrals.

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House of Representatives considered the budget resolution as it did almost all legislation, under rules specific to the particular legislation under consideration that restricted debate and amendment. In contrast, the Senate found the fast-track procedures governing the budget resolution most unusual. Normally, the Senate's rules ensured senators the right to speak as long as they wanted. Thus ordinarily senators could engage in extended debate – or a “filibuster” – unless 60 senators voted to bring debate to a close.¹⁴ Because the Budget Act created special procedures to limit debate on the budget resolution, however, senators could not wage a filibuster against it. A simple majority of senators voting could determine what amendments the Senate would adopt, and a simple majority could pass the resolution. Thus, the Budget Act's processes increased the power of the majority party, especially in the Senate, which could use the act's fast-track process to advance its agenda with fewer delays.

Participants in the federal budget process initially underestimated the potential power of the budget resolution. They failed completely, however, to foresee the power of a second fast-track procedure created by the Budget Act called “reconciliation.” The Budget Act originally provided for two budget resolutions: The first would advise, and the second, passed closer to the start of the fiscal year, would bind. The Budget Act provided that the second budget resolution could instruct committees of Congress to reconcile laws passed within their jurisdiction to the new budget priorities of the second budget resolution. The idea was that the reconciliation bill would merely clean up changes that occurred over the summer between the two budget resolutions.

The reconciliation process did not turn out to be quite as modest as the drafters of the Budget Act had intended. Rather, it became a fast-track, coordinated vehicle of great power to change permanent law affecting spending and taxes. In years when the budget resolution contained reconciliation instructions, the authorizing committees instructed were required to report changes in law within their jurisdictions to modify spending or taxes by the overall amount that the resolution instructed. As with the budget resolution, the Senate considered the reconciliation bill under fast-track procedures unusual for that body.

The experience under the Congressional Budget Act divides into four eras. Between enactment of the Congressional Budget Act and the beginning of the use of the reconciliation process, 1974 to 1980, the congressional budget process was neutral as to the fiscal result. Congress could enforce the fiscal policy that it created. But that process did not point toward balancing the budget or expanding the deficit. And the tools that Congress used to enforce its fiscal policy were relatively weak, lacking supermajority requirements or use of the fast-track reconciliation process to change permanent law.

¹⁴ See Standing Rules of the Senate, Rule XXII(2) (the cloture rule).

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Beginning with the first use of reconciliation in 1980 and extending through 1996, the congressional budget process experienced a second period in which the process was biased toward deficit reduction. The Senate parliamentarian advised during this period that the Senate could not use reconciliation for legislation that worsened the deficit. And in 1985, Congress changed the law to require 60 votes in the Senate to get around many budget rules.

The third period began with the parliamentarian's reinterpretation of the reconciliation process in 1996 and extended through 2007. As a result of that reinterpretation, reconciliation became generally available for budget-related policy change, regardless of whether it improved or worsened the nation's fiscal balance. And the congressional budget process returned to one that was neutral as to the fiscal result. This time, however, Congress had relatively strong tools to enforce its fiscal policy – supermajority hurdles and fast-track reconciliation legislation.

Finally, Congress began the fourth era in 2007, returning to fiscal discipline by adopting a budget resolution that tightened pay-as-you-go rules and restricted reconciliation to deficit reduction once again.

E. Budgeting to Reduce the Deficit

The Congress first enacted a reconciliation bill reported by the Budget Committee in 1980. In 1981, in an effort to enact President Reagan's first budget, the budget resolution included reconciliation instructions for years beyond the first fiscal year covered by the resolution, extending the reach of the reconciliation vehicle to more-permanent changes in law. Congress thus converted the reconciliation process from a short-term measure to recalibrate actions that Congress took in the most recent summer to a long-term measure to change permanent law. This expansion of reconciliation further enhanced the power of the congressional budget process and the Budget Committees, at the expense of other committees in Congress.

After 1981, reconciliation became a regular feature of most budget resolutions, and Congress has accomplished most significant deficit reduction through the reconciliation process. Congress also enacted many other legislative items as part of reconciliation legislation, taking advantage of reconciliation's limits on debate and amendment. For example, the 1981 reconciliation act included substantial legislative matter regarding federal housing programs. Reconciliation bills have included provisions ranging from lawn mower standards to the maximum speed limit (for cars, not lawn mowers). The power of reconciliation thus attracted much matter not strictly related to the budget. In response to this "extraneous" matter, in 1985 the Senate adopted the Byrd Rule,¹⁵ named after its sponsor, Democratic Leader Robert C. Byrd (W. Va.). At

¹⁵ Congressional Budget Act § 313, 2 U.S.C. § 644.

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the pain of requiring a 60-vote waiver in the Senate, the Byrd Rule prohibited including items without budgetary effect.

Meanwhile, in the mid-1980s, the nation was running deficits in excess of 5 percent of the gross domestic product, rates not seen since the World War II era. President Reagan's 1981 tax cuts lowered the share of the gross domestic product that the federal government collected in taxes from 20.2 percent in 1981 (a record high shared with 1969) to 18.0 percent in 1984. The government did not, however, reduce spending during the same period. Total federal outlays accounted for 22.9 percent of the economy in 1981 and rose marginally to 23.0 percent by 1984. In 1983, OMB Director David Stockman warned that failing to act on the budget would produce \$200 billion deficits "as far as the eye can see."¹⁶ In reaction to these deficits, Congress turned in 1985 to a new procedure, called Gramm-Rudman-Hollings, designed to ensure that the budget process worked toward a balanced budget.¹⁷ Named after its three principal sponsors, Senators Phil Gramm, Warren Rudman, and Ernest Hollings, Gramm-Rudman-Hollings directed the budget process toward a particular policy goal. With Gramm-Rudman-Hollings, the nation explicitly adopted the fiscal policy of a balanced budget.

Gramm-Rudman-Hollings established a series of deficit targets leading gradually to a balanced budget in the fifth year. If the government failed to cause the projected deficit to fall within \$10 billion of the required target, then the law required the president to order across-the-board cuts – called "sequesters" – to bring the deficit down to the target amount. This sequestration was not as draconian as it could have been because Gramm-Rudman-Hollings exempted the vast majority of entitlement programs from these cuts.

As originally enacted, Gramm-Rudman-Hollings called for the CBO to make one estimate of the deficit and the president's OMB to make another. To the extent that the two estimates differed, the law directed the GAO to average the two estimates and issue a final report that would bind the president. This provision set the stage for a constitutional challenge of the new process. In 1986, the Supreme Court ruled that Gramm-Rudman-Hollings violated the Constitution's doctrine of separation of powers.¹⁸ The court reasoned that the law allowed a congressional actor – the GAO – to direct the president how to execute the laws, whereas the Constitution provides that "[t]he executive Power shall be vested in [the] President of the United States of America."¹⁹

¹⁶ Helen Dewar, *Stockman Issues Blunt Warning; Budget Agreement Called Vital*, WASH. POST, Apr. 19, 1983, at A1.

¹⁷ The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, tit. II, 99 Stat. 1037, 1038 (1985), *amended by* the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, tit. I-II, 101 Stat. 754 (1987), *and largely repealed by* Budget Enforcement Act of 1990, Pub. L. No. 101-508, tit. XIII, 104 Stat. 1388, 1388-573–1388-630 (1990) (codified as amended at 2 U.S.C. §§ 900–922).

¹⁸ *Bowsher v. Synar*, 478 U.S. 714, 721–734 (1986).

¹⁹ U.S. Const. art. II, § 1, cl. 1.