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PRESIDENTIAL FISCAL ACCOUNTABILITY FOLLOWING THE BUDGET ACT OF 1974

Louis Fisher

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PRESIDENTIAL FISCAL ACCOUNTABILITY FOLLOWING THE BUDGET ACT OF 1974

*Louis Fisher**

In response to the claim by President Nixon that he possessed independent authority to refuse to spend appropriated funds, Congress passed the Budget Act of 1974 to limit impoundment actions and revise the legislative budget process. The objective was to strengthen congressional power over the President, but in practice the new system held a potential for increased executive power. Precisely that took place during the administration of Ronald Reagan. The result: a loss of budget control and a tripling of the national debt during his two terms in office. Overall, the new budget process has substantially reduced the President's accountability in providing needed leadership over budget aggregates, particularly the deficit.

I. INTRODUCTION

Presidents have always exercised some discretion over the spending of appropriated funds. If they can carry out a program for fewer dollars than Congress provided, no one would object. As Attorney General Harmon noted in 1896, an appropriation is not mandatory "to the extent that you are bound to expend the full amount if the work can be done for less"¹ These decisions were routine managerial functions, in no sense representing a threat to legislative prerogatives or constitutional government. Federal courts recognized that "the head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion."²

Matters changed dramatically with the Nixon administration. Beginning in 1971, President Richard Nixon claimed inherent constitutional authority to refuse to spend federal funds, even to the extent of cutting programs in half, or eliminating them entirely. This challenge to the legislative branch prompted Congress to hold hearings to analyze executive authority to impound appropriated funds.³

During those hearings, Senator Sam J. Ervin, Jr. denied that the President had any authority:

under the Constitution to decide which laws will be executed or to what extent they will be enforced. Yet, by using the impoundment technique, the President is able to do just that. He is able to effect policy by determining which of the laws

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1. Appropriation-Contracts, 21 OP. ATT'Y GEN. 414, 415 (1896); similar statements appear at Statutory Construction-Secretary of War, 21 OP. ATT'Y GEN. 391, 392 (1896) and Statutory Construction, 21 OP. ATT'Y GEN. 420, 422 (1896).

2. *Brashear v. Mason*, 47 U.S. 92, 102 (1848).

3. See generally *Executive Impoundment of Appropriated Funds, Hearings Before the Subcomm. on Separation of Powers of the Senate Committee on the Judiciary*, 92d Cong. (1971).

passed by Congress he will enforce and to what extent.⁴

Senator Edmund S. Muskie participated actively on this issue through his service on the Committee on Government Operations, chaired by Senator Ervin, and its Ad Hoc Subcommittee on Impoundment of Funds, chaired by Senator Lawton Chiles. During a hearing in 1973, Muskie referred to a legal analysis prepared by William Rehnquist when he served as Assistant Attorney General in charge of the Office of Legal Counsel. Rehnquist acknowledged that the spending of money “is inherently an executive function, but the execution of any law is, by definition, an executive function.” It seemed to him “an anomalous proposition” that because “the executive branch is bound to execute the laws, it is free to decline to execute them.”⁵ Turning specifically to the administration’s announcement that it cut federal funds for the construction of municipal water treatment facilities from \$11 billion to \$5 billion in the current fiscal year and the next, Muskie objected that this decision “was not an impoundment of appropriations” but instead “a direct and flagrant violation of the authorization powers of Congress.”⁶

Observations in this article are drawn from personal experience with the federal budget process. I joined the Library of Congress in September 1970. Because of a law review article I published the previous year, analyzing constitutional issues over impoundment,⁷ I worked closely with lawmakers and committees to curb presidential power to withhold appropriated funds. During committee hearings I sat behind Senator Ervin to provide professional assistance. I participated in committee markup to evaluate amendments to the impoundment bill, wrote the part of the conference report dealing with impoundment, and received a signing pen and letter from President Richard Nixon.⁸ On other budget matters, including the Gramm-Rudman-Hollings deficit control statute, biennial budgeting, the balanced budget amendment, and the item veto, I testified at hearings and guided legislative efforts. Throughout that period I fully supported the decision to limit impoundment and protect legislative powers.

However, I had grave doubts about the decision of Congress to centralize its operations by passing budget resolutions. I thought it would greatly weaken the President’s duty to take responsibility for budget estimates, particularly the size of the national debt. I also considered the decentralized procedure in Congress to have had benefits by making it more difficult for a President to gain control and impose executive budget priorities. Precisely that happened in the first year of the Reagan administration, leading to a tripling of the national deficit and a series of feckless statutory efforts to control those deficits.

4. *Id.* at 2-3.

5. *Impoundment of Appropriated Funds by the President: Joint Hearings on S. 373 Before the Ad Hoc Subcomm. on Impoundment of funds of the Comm. on Government Operations and the Subcomm. on Separation of Powers of the Comm. on the Judiciary*, 93d Cong. 149 (1973).

6. *Id.* at 150.

7. Louis Fisher, *Funds Impounded by the President: The Constitutional Issue*, 38 GEO. WASH. L. REV. 124 (1969).

8. The impoundment battle in the early 1970s is covered in LOUIS FISHER, *DEFENDING CONGRESS AND THE CONSTITUTION* 205-11 (2011).

II. PRESIDENT NIXON CONFRONTS CONGRESS

From the 1930s through the 1960s, there were periodic disputes about Presidents who refused to spend appropriated funds. President Franklin D. Roosevelt withheld funds from some public works projects, President Harry Truman impounded funds for the Air Force and canceled a supercarrier, and impoundments continued during the Eisenhower, Kennedy, and Johnson administrations.⁹ In those conflicts, Congress raised objections, agencies made adjustments, and the regular political process prevented disputes from ripening into a constitutional crisis. That spirit of accommodation and compromise disappeared in the Nixon years, forcing Congress and the courts to curb presidential abuses.

In 1972, in the midst of his reelection campaign, President Nixon blamed Congress for the level of federal deficits. A series of announcements from the administration attempted to portray Congress as profligate and irresponsible in money matters. Nixon's message of July 26, calling for a spending ceiling, claimed that the budget crisis resulted from the "hoary and traditional procedure of the Congress, which now permits action on the various spending programs as if they were unrelated and independent actions."¹⁰ Because of its decentralized actions, he claimed, Congress "arrives at total Federal spending in an accidental, haphazard manner."¹¹ In a nationwide radio address on October 7, he warned that "excessive spending by the Congress might cause a Congressional tax increase in 1973."¹²

Other members of the administration joined in the attack. John Ehrlichman, the President's domestic adviser, castigated the "credit-card Congress" for adding billions to the budget. He likened lawmakers to a spendthrift brother-in-law "who has gotten hold of the family credit card and is running up big bills" with no thought of paying them.¹³ It was a bold move, calculated to put Congress on the defensive. If senators and representatives agreed to the goal of fiscal restraint and acknowledged the need for legislative reform, Nixon could use that as justification for impounding funds. Many lawmakers even outdid the administration in decrying the irresponsibility of Congress.

Yet the facts did not support a simplistic picture of a virtuous President and degenerate Congress. The decentralized system of Congress did not deprive lawmakers of information about their fiscal decisions; they were regularly informed of the larger picture by their Joint Committee on Reduction of Federal Expenditures. "Scorekeeping reports," printed in the *Congressional Record* from month to month, told members of Congress how congressional actions compared to the President's budget. The results revealed a systematic and responsible pattern, not chaos. Congressional totals generally remained within the President's budget aggregates.

9. LOUIS FISHER, PRESIDENTIAL SPENDING POWER 161-67 (1975).

10. Special Message to the Congress on Federal Government Spending, 238 PUB. PAPERS 742 (July 26, 1972).

11. *Id.*

12. Radio Address on Federal Spending, 341 PUB. PAPERS 964 (Oct. 7, 1972).

13. Wall Street Journal staff, *Nixon Message Warns Congress Democrats Against Voting "Excessive" Money Bills*, WALL ST. J., July 27, 1972, at 3.

During a news conference on January 31, 1973, President Nixon asserted that the “constitutional right for the President of the United States to impound funds—and that is not to spend money, when the spending of money would mean either increasing prices or increasing taxes for all the people—that right is absolutely clear.”¹⁴ He vowed not to spend money “if the Congress overspends.”¹⁵ But Nixon was not using impoundment merely to combat inflation and avoid public debt. In announcing plans to cut research health grants, Model Cities funds, grants for urban renewal, and funds for the clean-water program, he sponsored such costly projects as the supersonic transport, a manned landing on Mars, general revenue sharing, a larger Merchant Marine fleet, and the Safeguard Anti-ballistic (ABM) system.¹⁶ Impoundment was thus a means of shifting spending from congressional priorities to executive priorities.

The premise of legislative irresponsibility led to the creation of a Joint Study Committee on Budget Control.¹⁷ In its final report on April 18, 1973, the joint committee essentially agreed with Nixon that increases in the size of budget deficits resulted from procedural deficiencies within Congress: “The constant continuation of deficits plus their increasing size illustrates the need for Congress to obtain better control over the budget.”¹⁸ The committee concluded that the decentralized nature of Congress was a significant factor in losing control over deficits: “[T]he failure to arrive at congressional budget decisions on an overall basis has been a contributory factor in this picture.”¹⁹ No committee, it said, was responsible for deciding whether total outlays were appropriate for fiscal policy.²⁰ Each spending bill “tends to be considered by Congress as a separate entity, and any assessment of relative priorities among spending programs for the most part is made solely within the context of the bill before Congress.”²¹

Statistics in the committee report did not support the claim of legislative irresponsibility. In pointing out that the federal budget had been in a deficit position thirty-seven times since 1920, the report acknowledged that in thirty-two of those years Presidents submitted budgets to Congress with a deficit.²² For the Nixon years, table 6 in the report demonstrated that the net effect of congressional action on the deficit was near zero.²³ From fiscal years 1969 through 1973, Congress reduced Nixon’s appropriation requests by \$30.9 billion.²⁴ During that same period, it increased spending authority on legislative bills (backdoor spending and mandatory programs) by \$30.5 billion.²⁵ As for actual outlays, Table 6

14. The Presidents News Conference of January 31, 1973, PUB. PAPERS 62 (Jan. 31, 1973).

15. *Id.*

16. FISHER, *supra* note 9, at 169, 176.

17. H.R. REP. NO. 93-147, at 1 (1973).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 7. Detailed statistics from the committee report appear in Louis Fisher, *Congress, the Executive and the Budget*, 411 ANNALS AM. ACAD. POL. & SOC. SCI. 102, 105 (1974).

23. H.R. REP. NO. 93-147, at 39.

24. *Id.*

25. *Id.*

indicated that Congress added \$6.8 billion to the deficit over the five-year period.²⁶ However, the total deficit over that period exceeded \$100 billion.²⁷ The problem was not solely legislative action. High deficits were regularly incorporated in budgets that Presidents submitted to Congress.²⁸

III. THE BUDGET AND ACCOUNTING ACT

What was missing during the Nixon years was a responsible presidential budget required by the Budget and Accounting Act of 1921, providing guidance on the size of the federal debt.²⁹ At the end of the nineteenth century, federal spending rose sharply because of pension bills, rivers and harbors projects, the Spanish-American War, and construction of the Panama Canal.³⁰ After twenty-eight uninterrupted years of budget surpluses, stretching from 1866 to 1903, the nation encountered deficits for the next six years.³¹ Congress initiated a number of inquiries into the work method of the executive departments. Those investigations included the Cockrell Committee (1887-1889) and the Cockrell-Dockery Commission (1893-1895).³²

A decline in customs revenue in 1904, combined with a sharp rise in federal outlays for a \$50 million right-of-way for the Panama Canal, created a substantial deficit for the Theodore Roosevelt administration.³³ In response, President Roosevelt appointed the Keep Commission in 1905 to determine how the Executive Branch might conduct its operations on the “most economical and effective basis in the light of the best modern business practices.”³⁴ He emphasized the need to eliminate duplication of work, wasteful habits, superfluous letter writing, and inordinate attention to paperwork.³⁵

In 1910, President William Howard Taft obtained \$100,000 from Congress to create a five-member Commission on Economy and Efficiency.³⁶ In June 1912, he submitted proposals for a national budget, making the President responsible for reviewing agency estimates and organizing them into a coherent document.³⁷ The Commission concluded that a national budget was the “only effective means whereby *the Executive* may be made responsible for getting before the country a definite, well-considered, comprehensive program with respect to which *the legislature* must assume responsibility either for action or inaction.”³⁸

The financial shock of World War I precipitated action on budget reform. The War pushed federal expenditures to record heights—from about \$700 million

26. *Id.*

27. *Id.*

28. *Id.*

29. LOUIS FISHER, *THE LAW OF THE EXECUTIVE BRANCH* 234-37 (2014).

30. *Id.* at 233-34.

31. *Id.* at 234.

32. FISHER, *supra* note 9, at 27.

33. *Id.* at 27-28.

34. *Id.* at 28.

35. *Id.*, 275 n.48.

36. *Id.* at 29.

37. *Id.* at 29-30.

38. *THE NEED FOR A NATIONAL BUDGET*, H.R. DOC. NO. 854 at 138 (1912) (emphasis added).

before the War to upwards of \$12.7 billion and \$18.5 billion by 1918 and 1919.³⁹ The total national debt, slightly over one-billion in 1916, soared beyond \$25 billion by 1919.⁴⁰ Debt management problems after the War demanded modernization of the budget process and an increased financial responsibility for the Executive Branch.⁴¹

Several reform proposals would have placed Congress in a subordinate position. John J. Fitzgerald, Chairman of the House Appropriations Committee, met with the New York Constitutional Convention in 1915 to share thoughts on national budgeting.⁴² He supported a process that would make it as difficult as possible for members of Congress to increase estimates submitted by the President.⁴³ It was his position that Congress should be denied the right to appropriate any funds “unless it had been requested by the head of the department, unless by a two-thirds vote, or unless it was to pay a claim against the government or for its own expenses.”⁴⁴

Charles Wallace Collins, in an article published in 1916, endorsed the British parliamentary system.⁴⁵ “Our institutions,” he claimed, “being more nearly akin to those of England, it is to the English budget system that we more naturally look for the purpose of illustration.”⁴⁶ According to his understanding, the British Parliament had long ago looked to the Cabinet to initiate financial legislation and generally ratified what was recommended by executive officials. To Collins, an essential system of budget reform in the United States was “the relinquishing of the initiative in financial legislation to the executive by the Congress.”⁴⁷ The President would “possess the functions of a Prime Minister in relation to public finance” by taking responsibility for preparing the budget.⁴⁸ Congress would surrender its power to amend presidential recommendations “by way of increasing any item in the budget, and also its power to introduce any bill making a charge upon the Treasury, without the consent of the executive.”⁴⁹

Some of those proposals were adopted by members of Congress. In March 1918, Rep. Medill McCormick introduced legislation to unify the review of agency estimates by the Secretary of the Treasury. A House Budget Committee would replace the Committees on Appropriations and Ways and Means, with the same centralization occurring in the Senate. These budget committees, with jurisdiction over both appropriations and revenue, would be empowered to reduce but not add, unless requested by the Secretary of the Treasury acting on the President’s authority, or unless the committees could muster a two-thirds majority. Members

39. FISHER, *supra* note 9, at 32.

40. *Id.*

41. *Id.*

42. FISHER, *supra* note 29, at 235.

43. *Id.*

44. John J. Fitzgerald, *American Financial Methods from the Legislative Point of View*, 62 MUN. RES. 299, 312, 322, 327, 340 (1915).

45. Charles Wallace Collins, *Constitutional Aspects of a National Budget System*, 25 YALE L.J. 376, 376 (1916).

46. *Id.*

47. *Id.* at 380.

48. *Id.*

49. *Id.*

of Congress would not be allowed to add to the budget on the floor except to restore what the President had originally proposed.⁵⁰

William McAdoo, President Woodrow Wilson's first Secretary of the Treasury, supported these restrictions on Congress: "Let us be honest with ourselves and honest with the American people. A budget which does not cover the initiation or increase of appropriations by Congress will be a semblance of the real thing."⁵¹ When Secretary of the Treasury Carter Glass submitted budget estimates in 1919, he announced that the budget "as thus prepared for the President and on his responsibility should not, as such, be increased by the Congress."⁵² David Houston, the next Secretary of the Treasury, urged Congress in 1920 not to add to the President's budget unless recommended by the Secretary of the Treasury or approved by a two-thirds majority.⁵³

Critics of this presidential-centric model regarded it as a diminution of the legislative power of the purse and a threat to republican government. "Uncle Joe" Cannon, Speaker of the House from 1903 to 1911, insisted that if Congress agreed to an executive budget "it will have surrendered the most important part of a representative government."⁵⁴ He advised: "I think we had better stick pretty close to the Constitution with its division of powers well defined and the taxing power close to the people."⁵⁵ Edward Fitzgerald, author of a budget study in 1918, regarded the British budget model as a step toward autocracy and a Prussian-style military state.⁵⁶

In June 1919, the House passed a resolution to create a Select Committee on the Budget. Its report criticized the lack of internal executive checks in reviewing and correcting departmental estimates: "The estimates are a patchwork and not a structure. As a result, a great deal of the time of the committees of Congress is taken up in exploding the visionary schemes of bureau chiefs for which no administration would be willing to stand responsible."⁵⁷ To the Committee, the goals of economy and efficiency could be achieved only by making an officer responsible for receiving and scrutinizing requests for funds by bureau and departmental chiefs: "In the National Government there can be no question but that the officer upon whom should be placed this responsibility is the President of the United States."⁵⁸ A newly created Bureau of the Budget would provide technical assistance to the President.

The bill that passed the House on October 21, 1919, did not provide for an executive budget patterned after the British model. It was executive only in the sense that the President was made responsible for forwarding agency estimates. It was legislative thereafter, giving Congress full authority to increase or decrease the

50. MEDDILL MCCORMICK, PLAN FOR A NATIONAL BUDGET SYSTEM, H.R. DOC. NO. 1006 (1918).

51. *Annual Report of the Secretary of the Treasury*, 1918-19, at 121 (Oct. 4, 1919) (testimony of Secretary Glass).

52. *Id.* at 117.

53. DAVID F. HOUSTON, EIGHT YEARS WITH WILSON'S CABINET 88 (1926).

54. THE NATIONAL BUDGET, H.R. DOC. NO. 264 at 28 (1919).

55. *Id.* at 28-29.

56. EDWARD FITZPATRICK, BUDGET MAKING IN A DEMOCRACY viii-ix, (1918); *see also* FITZPATRICK, *supra*, at 117.

57. NATIONAL BUDGET SYSTEM, H.R. REP. NO. 362 at 4 (1919).

58. *Id.* at 5.

estimates. Changes could be made in committee or on the floor by simple majority vote, not the two-thirds margin that many reformers had proposed, and certainly not by requiring Congress to seek permission from the President and the Secretary of the Treasury. The report from the House Select Committee on the Budget set forth the constitutional principles in clear terms: "The budget under this plan will be an Executive budget only to the extent that the Executive initiates the budget. It is a congressional budget after it has been considered and acted upon by Congress. The responsibility of the Executive and Congress will be clearly defined, and each branch will be held to a strict accountability for the part it has played."⁵⁹ This legislation was eventually signed by President Warren Harding in 1921.⁶⁰ This budget system worked relatively well until the confrontation between President Nixon and Congress over impoundment.

IV. STATUTORY LIMITS ON IMPOUNDMENT

The severity of Nixon's impoundments prompted about eighty lawsuits, with the administration losing most of them.⁶¹ The administration justified impoundment under the legal theory that Congress had merely *authorized* programs without *mandating* them. Federal courts regularly found the administration's position unpersuasive, declaring the actions of executive officials to be in excess of their authority, in violation of agency regulations, and conducted in a manner that was arbitrary and capricious.⁶² One case found that the Secretary of Agriculture lacked statutory authority to terminate a direct loan program while using those funds for a different program favored by the administration.⁶³ In another case, a district court ruled the Secretary of the Housing and Urban Development Department was obliged by law to administer a water and sewer grant program and lacked authority to entirely suspend it, which was an "abuse of discretion."⁶⁴

The impoundment case that reached the Supreme Court involved funds for the clean-water program.⁶⁵ Congress had provided \$18 billion in contract authority over a three-year period to provide for waste treatment.⁶⁶ The statute provided for some administrative flexibility. For each year, the dollar amounts were described as "not to exceed."⁶⁷ They were thus ceilings rather than mandatory levels for obligation and expenditure.⁶⁸ Instead of using this flexibility to implement the

59. *Id.* at 7.

60. Budget and Accounting Act, Pub. L. No. 67-13 Ch. 18, 42 Stat. 20 (1921).

61. FISHER, *supra* note 9, at 175-201.

62. *Berends v. Butz*, 357 F. Supp. 143, 157 (D. Minn. 1973).

63. *Sioux Valley Empire Elec. Assoc. v. Butz*, 367 F. Supp. 686 (D. S.D. 1973).

64. *Rooney v. Lynn*, Civil Action No. 201-73 (D.D.C. 1974) [Editor's note: *Rooney v. Lynn* does not appear to have been reported, and no copy of the decision has been located. The author, however, discusses this case in some detail in FISHER, *supra* note 9, at 193]; see also Nile Stanton, *History and Practice of Executive Impoundment of Appropriated Funds*, 53 NEB. L. REV. 1 (1974); Louis Fisher, *Impoundment of Funds: Uses and Abuses*, 23 BUFF. L. REV. 141 (1973); Nile Stanton, *The Presidency and the Purse: Impoundment 1803-1973*, 45 U. COLO. L. REV. 25 (1973).

65. FISHER, *supra* note 9, at 184-89.

66. *Id.*

67. *Id.*

68. *Id.*

program within a scheduled period of time, Nixon cut it in half.⁶⁹

At hearings in 1973, Senator Muskie confronted William D. Ruckelshaus, Administrator of the Environmental Protection Agency.⁷⁰ Muskie argued that the purpose of Congress in providing the agency discretion and flexibility was to see that the statutory commitment be carried out in full, not to undermine the legislative purpose:

The clear language and debate was what we were giving you, is what we understood to be legitimate administrative discretion to spend the money, not defeat the purposes. Then to have you twist it as you have, is a temptation of this Senator to really handcuff you the next time.⁷¹

On February 18, 1975, the Supreme Court ruled that the Clean Water Act required full allotment.⁷² A unanimous Court decided that the addition of phrases such as "not to exceed" did not alter the basic thrust of the statute, which was intended to provide a firm commitment of substantial sums within a fixed period of time.⁷³

Executive officials told Congress that President Nixon was simply following precedents that dated back to President Thomas Jefferson, who withheld \$50,000 that Congress provided in 1803 for gunboats.⁷⁴ OMB Director, Caspar Weinberger, told a Senate committee: "[W]e are doing not only nothing different than any other President since Thomas Jefferson has done; we are doing it to no greater degree."⁷⁵ In response to this testimony by the Nixon administration, I published an article for the *Washington Star* on February 25, 1973, entitled "Impoundment Relies on Weak Arguments."⁷⁶ In that article, I examined the legal and political claims offered by the administration and found none of them persuasive or credible. Jefferson's actions had zero application to Nixon's impoundments. The military emergency that Congress had anticipated in 1803 disappeared because of the Louisiana Purchase. Jefferson took time to study the most recent models of gunboats and a year later spent the money. His action was temporary and had the support and understanding of Congress. He did not unilaterally terminate programs, impose a spending ceiling, berate Congress for fiscal irresponsibility, or attempt to dictate budget priorities over those chosen by Congress.

69. *Id.*

70. *Impoundment of Appropriated Funds by the President*, *supra* note 5, at 411.

71. *Id.*

72. *Train v. City of N.Y.*, 420 U.S. 35, 41 (1975).

73. *Id.*

74. FISHER, *supra* note 9, at 150-51.

75. *Caspar W. Weinberger to Be Secretary of Health, Education, and Welfare: Hearings Before the Senate Comm. on Labor and Public Welfare (Part 1)*, 93d Cong. 29 (1973). HUD Secretary George Romney also cited the Jefferson precedent to defend Nixon's impoundments. *Dep't of Housing and Urban Development; Space, Science, Veterans, and Certain Other Independent Agencies Appropriations, Fiscal Year 1973: Hearings Before the Senate Comm. on Appropriations*, 92d Cong. 565 (1972).

76. Louis Fisher, *Impoundment Relies on Weak Arguments*, WASH. SUN. STAR AND DAILY NEWS, Feb. 25, 1973, at C2, reprinted in 119 CONG. REC. 5801-03, 7087-88 (1973). For further details on Jefferson's temporary withholding of funds for gunboats, see the analysis by Joseph Cooper at 119 CONG. REC. 7065 (1973).

Each chamber of Congress drafted legislation to control presidential impoundment. The general idea was to divide impoundments into two categories: “rescissions” (actions to terminate funds) and “deferrals” (proposals to delay spending).⁷⁷ Lawmakers agreed to prohibit Presidents from canceling a program unless Congress specifically approved by statute.⁷⁸ The President would have to submit a rescission proposal to Congress and have it approved within a designated period of days.⁷⁹ Congress could ignore the request if it so chose.⁸⁰ Legislative inaction meant that the funds would have to be spent.⁸¹

For deferrals, lawmakers agreed that Congress could disapprove by something short of a public law and they chose a one-house veto.⁸² The Supreme Court’s 1983 decision in *INS v. Chadha*, striking down the legislative veto, invalidated the one-house veto over deferrals.⁸³ Several years later, the D.C. Circuit determined that the one-house veto was tied inextricably to the deferral authority.⁸⁴ If one fell, so did the other. The President’s authority to make policy deferrals thus disappeared. Only routine, non-policy deferrals are permitted. Congress promptly converted the judicial ruling into statutory policy.⁸⁵

Toward the end of the effort to pass a bill checking presidential impoundments, Senator Ervin asked me if I thought the legislation protected congressional interests. I told him it did. We did not talk about the other titles of the bill that changed the budget process within Congress. Supporters of this reform believed that if the executive budget of 1921 strengthened presidential control, a legislative budget would strengthen Congress.⁸⁶ But why assume that centralizing the budget process within the legislative branch would yield comparable benefits?

V. CENTRALIZING THE LEGISLATIVE BUDGET PROCESS

The Impoundment Control Act appeared in Title X of the Budget Act of 1974.⁸⁷ Although I worked on other titles of the statute, I had serious doubts about the need to radically revamp congressional procedures. Congress created budget committees in each house and directed them to draft budget resolutions to set totals for aggregates: total spending, total revenues, and the resulting deficit or surplus.⁸⁸ The budget resolution divided spending into broad functional categories such as national defense, agriculture, transportation, and other sectors.⁸⁹ The objective was

77. FISHER, *supra* note 29, at 241.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1013, 88 Stat. 297, 334-35 (1974).

83. *INS v. Chadha*, 462 U.S. 919, 959 (1983).

84. *New Haven v. United States*, 809 F.2d 900, 902 (D.C. Cir. 1987).

85. Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, § 206, 101 Stat. 754, 785, (1987).

86. FISHER, *supra* note 29, at 242.

87. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 1013, 88 Stat. 297, 332 (1974).

88. *Id.* at 299-302.

89. *Id.* at 306-16.

to facilitate debate on budget priorities. The statute established a new Congressional Budget Office (CBO) to provide analytical support to lawmakers, making them less dependent on the Executive Branch.⁹⁰ This agency has served Congress well in estimating program costs and providing budgetary projections.⁹¹ Over the years, CBO has earned a solid reputation by providing nonpartisan, professional assistance.⁹² In so doing, it has helped to protect the system of checks and balances and safeguard an independent Legislative Branch.⁹³

The 1974 statute assumed that lawmakers would behave more responsibly if they voted on budget aggregates, facing up to totals rather than voting in “piecemeal” fashion on separate authorization, appropriation, and revenue bills. However, one result of the statute was to weaken the central purpose of the Budget and Accounting Act of 1921: to place a personal and non-delegable duty on the President to prepare a responsible budget, particular with regard to such aggregate as the budget deficit.⁹⁴ What the 1974 statute did was to generate multiple budgets: one submitted by the President, the House budget resolution, the Senate budget resolution, and the final resolution agreed to by both chambers.⁹⁵ From 1921 to 1974, the President’s budget provided a fixed and visible benchmark, making it easy for the public to know if legislative action was below or above the President’s estimates.⁹⁶ That reference point disappeared in 1974. Instead of keeping within the President’s aggregates, lawmakers could vote on general ceilings in budget resolutions and tell their constituents they had “stayed within the budget,” even if their actions exceeded the President’s budget.⁹⁷

Accountability of elected officials, instead of being strengthened, declined. President Reagan, finding many political benefits to the Budget Act of 1974, was quite willing to step aside and let Congress “make the budget.”⁹⁸ In 1985, he announced his acceptance of appropriations bills “even if above my budget, that were within the limits set by Congress’s own budget resolution.”⁹⁹ If Presidents ducked their duty under the 1921 statute to present a responsible budget and submitted one with high deficits, it was evident to me that Congress found itself institutionally incapable of converting an irresponsible presidential budget to a responsible one. To do so would require drastic cuts in spending and sharp increases in taxes, a political step I found that was highly unlikely and unrealistic.

The 1974 statute also weakened the Appropriations Committees. In my judgment, previously they had functioned as guardian of the purse, regularly keeping appropriations under the President’s requests. Under the new budget

90. *Id.* at 302-05.

91. *See generally* PHILIP G. JOYCE, *THE CONGRESSIONAL BUDGET OFFICE: HONEST NUMBERS, POWER, AND POLICYMAKING* (2011).

92. *Id.*

93. *Id.*

94. FISHER, *supra* note 29, at 242.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. Message to the House of Representatives Returning Without Approval the Treasury Department, Postal Service, and Certain Independent Agencies Appropriations Bill, 2 PUB. PAPERS 1401 (Nov. 15, 1985).

procedure, they found it difficult to resist amendments for greater spending. If their draft bill fell short of the amount allocated to them in a budget resolution, the Appropriations Committees were under pressure to spend “up to” the figure in the budget resolution.¹⁰⁰ A chief clerk in an appropriations committee objected that spending limits in a budget resolution had been set at far too generous a level, forcing the committee to “spend up to the full budget allocation.”¹⁰¹

From my personal involvement in the legislative process, I noticed that budget reformers in the 1971-1974 period believed that centralization of Congress was better than decentralization, comprehensive action superior to fragmentation, and large legislative vehicles (budget resolutions) more likely to result in responsible action than smaller vehicles. After seeing the damage done by the 1974 procedure, former CBO Director, Rudolph Penner, offered insightful analysis during a House hearing in 1990.¹⁰² He concluded that Congress operating under its former decentralized and informal system had been more coherent and responsible, and that both elected branches performed reasonably well under the older and now discredited legislative process.¹⁰³ He now remarked:

I have always been struck by the fact in looking at the history of the [budget] process that it appeared chaotic in the late 19th century and early 20th century, but the results were very good in terms of budget discipline, yielding balanced budgets and surpluses most of the time, unless there was really a good reason to run a deficit.¹⁰⁴

Although the 1974 statute created a process that “looks very elegant on paper” it had led to very dishonest and disorderly results.¹⁰⁵ He noted that those who criticized the Budget Act as “too complex and too time consuming, are right on the mark.”¹⁰⁶

In following the budgetary process, the record was clear to me that that when Presidents submit a responsible budget with regard to aggregates (as required by the Budget and Accounting Act of 1921), Congress will live within those aggregates while changing the priorities, which it has every constitutional right to do. That process worked well before and can work again. If a President submits an irresponsible budget on such aggregates as the deficit, which has been the pattern from Nixon to the present time, lawmakers cannot correct it, regardless of what process they follow. To do so would require them to rely on a combination of raising taxes and cutting programs deeply, a prospect that is highly unlikely for political reasons. That point was evident during the Reagan presidency and has been underscored ever since.

100. FISHER, *supra* note 29, at 243.

101. 125 CONG. REC. 9028 (1979).

102. *Budget Process Reform: Hearing Before the H. Comm. on the Budget*, 101st Cong. 20 (1990) (statement of Rudolph Penner, Former Director, Cong. Budget Office).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 21.

VI. REAGAN AND THE GRAMM-RUDMAN ACTS

When President Ronald Reagan entered office, the national debt stood at one trillion dollars, reflecting from 1789 to 1981 a succession of economic crises, wars, and the Great Depression.¹⁰⁷ During the eight years of his administration the national debt tripled.¹⁰⁸ It now exceeds \$18 trillion with the prospect of much higher levels over the coming decade.¹⁰⁹ The confidence of other nations in the capacity of the United States to manage its finances has declined. The principal issue is not whether the current budget process has serious failings. Demonstrably, it does. The more basic issue is how reform proposals can affect our constitutional system of government by weakening Congress, the system of representative government, separation of powers, checks and balances, and public trust in government.

Supporters of the Budget Act of 1974 believed that if the executive budget of 1921 strengthened presidential control, a legislative budget would strengthen Congress.¹¹⁰ The analogy need not hold. The two branches have different institutional qualities and capabilities. The President heads the executive branch and gains strength from a central budget office. There is no head in Congress and no possibility of a central budget office comparable to OMB. Executive agencies are subordinate to the control of the President and OMB. No such control could be exercised by CBO.

Compared to the Executive Branch, Congress is by nature decentralized. It is split between two chambers with rival political parties vying for control. The Executive Branch has two elected officials: the President and Vice President. Congress has 535, each with an independent political base. The Legislative Branch is driven by committees and subcommittees that operate with a certain level of autonomy. The Executive Branch is largely hierarchical. Congress is essentially collegial in its operations.

Most budget reformers in 1974, assuming that centralization is better than decentralization, believed that centralizing forces within Congress would strengthen the legislative branch and weaken the President. The opposite result occurred in 1981 when President Reagan gained control of the budget resolution by attracting votes from Republicans and conservative Democrats.¹¹¹ He used the budget resolution as a blueprint to cut taxes, increase defense spending, and reduce some domestic programs.¹¹² By seizing control of the budget resolution and the reconciliation process, he was able to largely control appropriations bills and the tax bill.¹¹³ The budget resolution advanced presidential, not congressional, objectives.¹¹⁴ Instead of the annual deficits of \$25 billion that plagued the Nixon

107. FISHER, *supra* note 29, at 244.

108. *Id.*

109. Jonathan Weisman, *Budget Forecast Sees End to Sharp Deficit Declines*, N.Y. TIMES, Jan. 27, 2015, at A13.

110. FISHER, *supra* note 29, at 243.

111. *Id.* at 244.

112. *Id.*

113. *Id.*

114. *Id.*

years, deficits exploded to \$200-250 billion a year under Reagan.¹¹⁵

It is highly unlikely that the costly political and economic miscalculations of 1981 could have occurred without budget resolutions and the reconciliation process.¹¹⁶ President Reagan would have faced almost insurmountable hurdles had he tried to push his economic program through a decentralized Congress, with committees and subcommittees able to check and reshape White House objectives.¹¹⁷ Incremental legislative actions (or inactions) by a series of legislative actors would have presented an effective brake on presidential ambitions.¹¹⁸

The whole purpose of the 1974 statute was to force Congress to vote on an overall budget plan. If the White House gained control of that plan, the process would serve presidential ends.

David Stockman, who headed OMB from 1981 to 1985, explained how the Reagan Administration exploited the centralized congressional process.¹¹⁹ The constitutional prerogatives of Congress “would have to be, in effect, suspended.”¹²⁰ Enacting the Reagan Administration’s economic program meant rubber stamp approval, nothing less.¹²¹ The world’s so-called greatest deliberative body would have to be reduced to the status of a ministerial arm of the White House.”¹²² Members of Congress, far more expert in budget matters than Stockman, regularly deferred to his leadership, assertions, and analysis. After leaving office, Stockman admitted his lack of understanding: “[A] plan for radical and abrupt change required deep comprehension—and we had none of it.”¹²³

In this climate of uncontrolled deficits, the two branches decided to make things worse by passing the misnamed Balanced Budget and Emergency Deficit Control Act of 1985, commonly called the Gramm-Rudman-Hollings (GRH) statute.¹²⁴ Designed to control deficits, it failed utterly in that regard. What GRH did was to announce, very plainly, that the 1974 budget process could not be counted on to handle budget aggregates and deficits—precisely the capacity that budget reformers had touted. Gramm-Rudman established a statutory schedule to eliminate deficits by fiscal 1991.¹²⁵ Beginning with a deficit of \$171.9 billion for fiscal 1986, the deficit was scheduled to decline by \$36 billion a year over five years until it reached zero.¹²⁶ The President with his budget and Congress with its budget resolutions were obligated to follow these statutory mandates. If in any fiscal year the projected deficit exceeded the statutory allowance by more than \$10

115. *Id.*

116. Rudolph G. Penner, *An Appraisal of the Congressional Budget Process*, in *CRISIS IN THE BUDGET PROCESS* 69 (1986); Allen Schick, *How the Budget Was Won and Lost*, in *PRESIDENT AND CONGRESS: ASSESSING REAGAN’S FIRST YEAR* 25 (Norman J. Ornstein ed., 1982).

117. *Id.*

118. *Id.*

119. DAVID A. STOCKMAN, *THE TRIUMPH OF POLITICS: HOW THE REAGAN REVOLUTION FAILED* 159 (1986).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 91.

124. FISHER, *supra* note 29, at 244-45.

125. *Id.* at 245.

126. *Id.*

billion, another mechanical solution kicked in.¹²⁷ A “sequestration” process required across-the-board cuts to protect the statutory targets. Half of the reductions would come from national defense.¹²⁸ Designated social programs were exempt from these automatic cuts.¹²⁹

Draft legislation relied on two congressional offices (CBO and GAO) to carry out what seemed clearly executive duties. One bill required the CBO and OMB Directors to estimate the levels of total revenues and budget outlays to determine whether the deficit for a particular year would exceed the statutory limit.¹³⁰ The two agencies would then specify the degree to which agency budgets had to be cut to eliminate the excess deficit.¹³¹ Upon receiving the CBO-OMB report, the bill required the President to issue an order to eliminate the excess deficit.¹³² Over that decision the President could exercise no independent judgment or discretion. It was his duty to sign his name to the sequestration order prepared by CBO and OMB.¹³³

The Senate held no hearings to consider the constitutionality of this legislation. The House Committee on Government held a hearing on October 17, 1985. Invited to testify were Comptroller General Charles Bowsher, OMB Director Jim Miller, and CBO Director, Rudolph Penner. In their testimony they did not analyze or comment on constitutional issues. I was the fourth to testify, and proceeded to give my opinion that the bill was unconstitutional because it gave CBO and GAO “substantive enforcement responsibilities.”¹³⁴ My testimony relied in part on the Supreme Court’s decision in *Buckley v. Valeo*,¹³⁵ which prohibited Congress from vesting substantive and enforcement responsibilities in legislative officers.

The bill that emerged from conference committee authorized the Comptroller General to certify the results reached by CBO and OMB. In the opinion of Senator Bob Packwood, the addition of GAO, “which indeed is an executive agency . . . cures the allegation of unconstitutionality.”¹³⁶ However, GAO is not an executive agency. It functions as a research and investigative arm of Congress. Instead of resolving the constitutional issue, Congress chose to push it to the judiciary. It authorized any member of Congress to take the issue to court, following an expedited process that would begin with a three-judge court and go from there directly to the Supreme Court.¹³⁷

The three-judge court held that the transfer of executive powers to the Comptroller General was unconstitutional, and its finding was affirmed by the

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *The Balanced Budget and Emergency Deficit Control Act of 1985: Hearing on H.J. Res. 372 Before the H. Comm. on Government Operations*, 99th Cong. 25-26 (1985).

132. *Id.*

133. *Id.*

134. *Id.* at 200, 198-200, 207-12.

135. 424 U.S. 1 (1976).

136. 131 CONG. REC. 30273, 30274 (1985).

137. *Balanced Budget and Emergency Deficit Control Act of 1985*, Pub. L. No. 99-177, § 274, 99 Stat. 1098 (1985).

Supreme Court.¹³⁸ Recognizing that the legislation was at constitutional risk, Congress provided for a “fallback” procedure in case the courts struck down the statute.¹³⁹ Under the substitute process, the OMB and CBO reports would go to a specially created Temporary Joint Committee on Deficit Reduction consisting of the full membership of both Budget Committees.¹⁴⁰ This joint committee would then report the sequestration bill for floor action. If passed by both chambers, it would go to the President to be signed or vetoed.¹⁴¹

Gramm-Rudman was ineffective in controlling exploding budget deficits during the Reagan years. Both branches relied on dishonest budget projections and new heights of accounting ingenuity to project compliance with the scheduled annual deficit reductions.¹⁴² Costs were shifted to the next year or even to the previous one.¹⁴³ Some items were moved off budget. Improbable estimates of revenues were devised to satisfy the deficit targets, even if no one expected the revenues to materialize.¹⁴⁴ Rep. Marty Russo, member of the House Budget Committee, explained how the two branches practiced deceit:

The President submits a budget that relies on very optimistic economic and technical assumptions and questionable savings proposals to meet the Gramm-Rudman deficit target. Congress attacks the assumptions and proposals as phony, but uses them in the budget resolution anyway.¹⁴⁵

Congress adopted the President’s numbers because honest figures (which were available) would have increased the projected deficit and made Congress look like the “big spender.”¹⁴⁶ Once the President chose to submit a deceptive budget, lawmakers were compelled by politics to embrace the same mistaken and misleading figures. Budget analyst Allen Schick summarized the result: “GRH started out as a process for reducing the deficit and has become a means of hiding the deficit and running away from responsibility.”¹⁴⁷

Gramm-Rudman never came close to meeting any of its prescribed deficit targets. When it became obvious that the experiment had failed, and why, Congress nevertheless enacted a revision in 1986 known as GRH II.¹⁴⁸ It projected a deficit of zero by fiscal 1993. The actual deficit for that year: \$255 billion.¹⁴⁹ From Reagan forward, Presidents and Congresses continued to sidestep accountability for federal deficits. The national debt climbed from \$1 trillion to \$3

138. *Synar v. United States*, 626 F. Supp. 1374, 1391-93 (D.D.C. 1986), *aff’d* 478 U.S. 714 (1986).

139. FISHER, *supra* note 29, at 245-46.

140. *Id.* at 246.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Budget Reform Proposals: Joint Hearings Before the S. Comm. on Governmental Affairs and the Comm. On the Budget*, 101st Cong. 3 (1989).

145. *Budget Process Reform: Hearing Before the Task Force on Budget Process, Reconciliation and Enforcement of the H. Comm. on the Budget*, 101st Cong. 1 (1990).

146. FISHER, *supra* note 29, at 246.

147. ALLEN SCHICK, *THE CAPACITY TO BUDGET* 205 (1990).

148. FISHER, *supra* note 29, at 246.

149. For analysis of the enactment and implementation of GRH, see JASMINE FARRIER, *PASSING THE BUCK: CONGRESS, THE BUDGET, AND DEFICITS* 82-128, 132-36 (2004).

trillion during the Reagan's presidency.¹⁵⁰ President George H. W. Bush, after initially pledging no new taxes, abandoned that principle during the summer of 1990.¹⁵¹ Several budget initiatives, including the Budget Enforcement Act of 1990, seemed to indicate better control mechanisms than GRH.¹⁵² Still, the national debt climbed to \$4 trillion after four years of the Bush administration.¹⁵³

As Allen Schick has explained, when President Bill Clinton took office he "put deficit reduction at the top of his agenda, giving it priority over health care reform."¹⁵⁴ In August 1993, he signed a package of tax increases and spending cuts, helping to reduce the size of the deficit from 1993 to 1995.¹⁵⁵ In what Schick calls a political triumph, the budget was balanced in 1998.¹⁵⁶ Because of a favorable economy, annual surpluses emerged and appeared ready to persist after Clinton left office.¹⁵⁷ The political settlement during the Clinton years—with spending constraints and tax increases—gave promise to controlling deficits and even projected large surpluses.¹⁵⁸

VII. A PRESIDENTIAL ITEM VETO

After both chambers of Congress agreed to pass legislation to curb the impoundment actions of President Nixon, mounting national debts during the Reagan and Bush I years, coupled with the failure of the Gramm-Rudman statutes, prompted lawmakers to reconsider presidential power.¹⁵⁹ Proposals were now made to do precisely what the Impoundment Control Act prohibited: permit the President to single out particular programs for termination.¹⁶⁰ Beginning in 1987, private citizens and some members of Congress argued that the President had an "inherent item veto" and could refuse to spend money on particular programs.¹⁶¹ According to their belief, the power originated in 1789 and no one happened to discover it until 1987.¹⁶² Close analysis by the Office of Legal Counsel in 1988 found not the slightest support for an inherent item veto.¹⁶³ In 1992, President George H. W. Bush announced that he did not possess such authority,¹⁶⁴ but advocates of this idea continued to promote it.¹⁶⁵ A Senate hearing on June 15,

150. FISHER, *supra* note 29, at 246.

151. FARRIER, *supra* note 149, at 133.

152. *Id.* at 129-164.

153. FISHER, *supra* note 29, at 246.

154. ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 26 (3d ed. 2007).

155. *Id.*

156. *Id.* at 27.

157. *Id.* at xi, 27-28, 32-33.

158. Jasmine Farrier, *Barack Obama and Budget Deficits: Signs of a Neo-Whig Presidency?*, 41 PRES. STUD. Q. 618, 624 (2011).

159. SCHICK, *supra* note 154, at 112-13.

160. FISHER, *supra* note 29, at 189.

161. FISHER, *supra* note 8, at 219.

162. Stephen Glazier, *Reagan Already Has Line-Item Veto*, WALL. ST. J., Dec. 4, 1987, at 14, reprinted in 133 CONG. REC. 34208 (1987).

163. The President's Veto Power, 12 Op. O.L.C. 128, 128 (1988).

164. Remarks to Republican Members of Congress and Presidential Appointees, 1 PUB. PAPERS 477, 479 (Mar. 20, 1992).

165. See FISHER, *supra* note 8, at 219-21.

1994, evaluated a Senate resolution to express the sense of the Senate that the President currently has constitutional authority to veto individual items of appropriations and the President should exercise that power without waiting for any statutory authority.¹⁶⁶ The Senate took no action on the resolution.¹⁶⁷

Advocates of an inherent item veto argued that it was permissible because Congress had resorted to “omnibus” legislation (measures much larger than the standard appropriations bills) and thus undercut the President’s original veto power.¹⁶⁸ Acting in self-defense, the President could “unbunch” those bills by vetoing line items and riders.¹⁶⁹ However, omnibus legislation is not a modern invention. In 1789, Congress passed an appropriations bill that consisted of four lump-sum amounts for the entire government.¹⁷⁰ The bill covered twenty-three lines in the U.S. statutes.¹⁷¹ A similar omnibus appropriations bill appeared the next year.¹⁷² President George Washington never objected to receiving omnibus bills. Writing in 1793, he offered this view of the veto power: “From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto.”¹⁷³ There was nothing new about appropriation riders. At the Philadelphia Convention, the delegates debated the procedure for passing tax bills in the House and allowing amendment in the Senate. George Mason expressed concern that Senators might follow “the practice of tacking foreign matters to money bills.”¹⁷⁴

Lawmakers during the 1990s explored ways to grant the President some form of expanded impoundment power, allowing a rescission (termination) power greater than that provided in the Impoundment Control Act.¹⁷⁵ Most of the focus was on two ways a President could rescind funds. “Expedited rescission” required at least one chamber of Congress to support a President’s recommendation to cancel funds and rescind items.¹⁷⁶ “Enhanced rescission” would grant the President much greater power.¹⁷⁷ Under this procedure, the President’s recommendations would automatically become law unless Congress passed a resolution of disapproval.¹⁷⁸ If it did, and the President vetoed the resolution, Congress would need a two-thirds majority in each chamber to override the veto.¹⁷⁹ Throughout this period, I was active in testifying against the item veto and preparing budget analyses to demonstrate that estimates of savings expected by a presidential item veto were greatly exaggerated.¹⁸⁰

166. *Line Item Veto: The President’s Constitutional Authority: Hearing Before the Subcomm. of the Constitution of the Senate Comm. on the Judiciary*, 103d Cong. (1994).

167. See FISHER, *supra* note 8, at 220-21.

168. Glazier, *supra* note 162, at 14.

169. *Id.*

170. Act of Sept. 29, 1789, ch. 23, 1 Stat. 95.

171. *Id.*

172. See Act of Mar. 6, 1790, ch. 4, 1 Stat. 104.

173. 33 WRITINGS OF GEORGE WASHINGTON 96 (John C. Fitzpatrick ed., 1940).

174. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 273 (Max Farrand, ed., 1911).

175. FISHER, *supra* note 8, at 222.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 220-23.

Also considered was a version of item-veto authority called "separate enrollment."¹⁸¹ That procedure would convert 13 appropriation bills into about 10,000 bills.¹⁸² After an appropriation bill passed both chambers, a clerk would break it into separate paragraphs, sections, and numbers, with each piece made into a bill and submitted to the President.¹⁸³ The Senate passed that version.¹⁸⁴ Republicans delayed taking an item veto bill to conference because they did not want to give President Clinton access to that authority in the middle of 1996, an election year.¹⁸⁵ The Item Veto Act of 1996, signed by Clinton, adopted the model of enhanced rescission.¹⁸⁶ Although it was enacted on April 9, the bill did not take effect until January 1; a delay intended to deny Clinton use of an item veto with whatever political benefit that would give him.

To the surprise of many Republicans, Clinton was reelected and made some use of the item veto.¹⁸⁷ As a remedy for budget deficits, the item veto fell far short of expectations. Over a five-year period, total savings came to less than \$600 million.¹⁸⁸ The anticipated use of the item veto to cut spending to balance the budget had been greatly oversold.¹⁸⁹

In 1997, a district court held that the statute was unconstitutional because it violated the legislative procedures set forth in Article I.¹⁹⁰ On appeal, the Supreme Court ruled that the plaintiffs (members of Congress) lacked standing to bring the case.¹⁹¹ The following year, a district court in a separate lawsuit found standing for private plaintiffs and held the statute unconstitutional for failure to follow the procedures of Article I.¹⁹² The Supreme Court affirmed.¹⁹³ It took another branch of government to provide the constitutional analysis that Congress should have performed by itself.

VIII. FROM GEORGE W. BUSH TO BARACK OBAMA

There were efforts after 1998 to enact some other type of item-veto authority. After the Supreme Court invalidated enhanced rescission, the likely alternative focused on expedited rescission.¹⁹⁴ In 2006, Congress debated legislation to give the President that authority (S. 2381 and H.R. 4890).¹⁹⁵ The Budget Committees in

181. *Id.* at 223.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. Line Item Veto Act, Pub. L. No 104-130, 110 Stat. 1200 (1996).

187. FISHER, *supra* note 8, at 224.

188. *The Line Item Veto: Hearing Before the H. Comm. on Rules*, 105th Cong. 13 (1998).

189. For analysis of the fiscal effects of Clinton's actions, see Robert J. Spitzer, *The Item Veto Dispute and the Secular Crisis of the Presidency*, 28 PRES. STUD. Q. 799, 800-02 (1998).

190. See *Byrd v. Raines*, 956 F. Supp. 25 (D.D.C. 1997). The Court concluded that presidential cancellations were equivalent to repeal and that repeal may be accomplished only through the regular legislative process: passages by both houses and presentment of a bill to the President. *Id.* at 35-37.

191. *Raines v. Byrd*, 521 U.S. 811, 832 (1997).

192. *City of New York v. Clinton*, 985 F. Supp. 168 (D.D.C. 1998).

193. *Clinton v. City of New York*, 524 U.S. 417 (1998).

194. FISHER, *supra* note 29, at 189.

195. *Id.*

each house held hearings. Support for the President's recommendations needed the approval of both houses in a bill returned to the President for his signature. H.R. 4890 passed the House on June 22, 2006. The Senate did not act on that bill or its own version.¹⁹⁶

In 2009 and 2010, with deficits climbing because of tax cuts by President George W. Bush, the deep recession, two wars in Afghanistan and Iraq, entitlement programs for individuals (including social security and Medicare), and the financial bailout, Congress held hearings on expedited rescission.¹⁹⁷ President Obama asked for expedited rescission authority.¹⁹⁸ The bills did not pass. On February 8, 2012, the House passed legislation to provide expedited rescission for the President.¹⁹⁹ The Senate took no action on the bill.

Budget surpluses from the Clinton years did not last very long. President George W. Bush decided to cut taxes and fight two wars in Afghanistan and Iraq without paying for either of them. Those actions, combined with the economic collapse in 2008, added trillions to the national debt. Given economic conditions in 2009, no one expected President Barack Obama to present a balanced budget, but it was within his capacity to propose tax and spending changes that would bring deficits under control ten years out. For various reasons that was not done, in part because both branches chose to rely on a variety of mechanical procedures—including a fiscal commission and a “supercommittee” in Congress—that would automatically do what Presidents and lawmakers refused to do. Much like Gramm-Rudman, these failed experiments promised budget control without doing anything tangible to reduce deficits.

In 2009, members of Congress debated the idea of creating a fiscal commission to confront massive federal deficits. Bills were introduced to empower a commission to draft legislation to “reform tax policy and entitlement benefit programs and ensure a sound fiscal future for the United States”—code words to raise revenue, cut entitlements, and bring deficits under control.²⁰⁰ Legislative sponsors believed this initiative would ensure broad bipartisan support and fiscal success. Senator Kent Conrad, chairman of the Senate Budget Committee, concluded, “the regular legislative process is simply not going to get it done.”²⁰¹ In taking that position, he conceded that the procedures of the Budget Act of 1974, adopted for the express purpose of exercising effective control over budget aggregates, were not reliable. Democrats and Republicans, acting alone or in concert, would not agree to cut popular entitlement programs (Medicare, social security, etc.) or raise taxes. As a means of guaranteeing that a proposal would have strong bipartisan support, the fiscal commission would need a supermajority

196. *Id.* at 190.

197. *Id.*

198. See Jackie Calmes, *Obama Asks for Authority to Cut Items for Spending*, N.Y. TIMES, May 24, 2010, at A18; Walter Alarkon, *President Asks Congress for More Power to Cut Spending*, THE HILL, May 25, 2010, at 3.

199. Rachael Bade, *Bill Would Restore Line-Item Veto for Appropriations*, CONG. Q. WKLY REP., Dec. 22, 2011, at 2674; 158 CONG. REC. H575, 593-615 (2012).

200. H.R. 1557, 111th Cong. (2009); S. 1056, 111th Cong. (2009); S. 2853, 111th Cong. (2009).

201. *Bipartisan Process Proposals for Long-Term Fiscal Stability*, before S. Budget Comm. 1 (2009), at 1 (statement by Chairman Kent Conrad).

(for example, twelve out of sixteen members) before making its recommendations.

Hearings on this legislation in 2009 generally ignored a role for the President. Instead, lawmakers and budget experts blamed Congress for the fiscal crisis: a national debt of \$12 trillion at the time and an annual deficit that exceeded \$1.4 trillion. Projections estimated an addition \$9 trillion added to the debt. Senator George Voinovich, at a November 10 hearing, offered this perspective: “Congress is simply not willing or not capable of enduring short term pain for long term gain.”²⁰² A fair observation, but why not say the same about Presidents George W. Bush and Barack Obama? At one point in the hearing, Senator Lamar Alexander did raise that point: “What about the President? The President has to be involved He is the agenda setter No one else can come close to that.”²⁰³

In December 2009, the cover of *Newsweek* highlighted the budget crisis by featuring this headline: “How Great Powers Fall: Steep Debt, Slow Growth, and High Spending Kills Empires—And America Could be Next.” Which political branch deserved blame? In the background was the Capitol, upside down.²⁰⁴ Where was the White House? It should have been upside down also. At a hearing in December 2009, Senator Joe Lieberman explained that tackling the budget deficit problem required “facing the hard choices Congress has shown in the past it hasn’t the stomach for.”²⁰⁵ His evaluation of the legislative branch was justified, but recent Presidents have demonstrated no stomach for the fight either. At that same hearing, Senator Voinovich said that President Obama and his OMB Director “realize we have a crisis that needs to be addressed.”²⁰⁶ If the crisis was that clear, why did the President not address it squarely with recommendations? Why leave it to Congress and a fiscal commission?

The basic idea of a Senate bill (S. 2853) was to create a fiscal commission consisting of eighteen members to study methods of reducing the budget deficit. Sixteen would be members of Congress; two would come from the executive branch. The commission would be empowered to recommend changes in entitlement programs, taxes, and appropriations. A majority of fourteen was required to report the bill for floor action. No floor amendments would be allowed. Lawmakers only choice was voting up or down, without making any changes. To pass each chamber, a majority of sixty percent was needed. The bill failed in the Senate, mustering a vote of only fifty-three to forty-six.²⁰⁷

At that point President Obama, instead of providing specific guidance to control budget deficits over the next decade, issued an executive order on February 18, 2010, establishing an eighteen-member National Commission on Fiscal

202. *Id.* at 1-2 (statement by Senator Voinovich).

203. *Id.*

204. Niall Ferguson, *How Great Powers Fall: Steep Debt, Slow Growth, and High Spending Kills Empires—And America Could be Next*, NEWSWEEK, Dec. 7, 2009.

205. *Safeguarding the American Dream: Prospects for Our Economic Future and Proposals to Secure It*, before the Homeland Security and Governmental Affairs Committee, 3 (2009) (Statement of Chairman Joseph Lieberman).

206. *Id.* at 2 (statement by Senator Voinovich).

207. Lori Montgomery, *Senate Rejects Plan to Create Commission on the Deficit*, WASH. POST, Jan. 27, 2010, at A8.

Responsibility and Reform.²⁰⁸ He had been in office for one year without addressing the deficit issue, even for the out-years. Another year would be consumed while waiting for the commission to present a plan no later than December 1, 2010. To issue the report, the commission needed a supermajority of fourteen of eighteen members.

Obama's first budget message in February 2009 underscored the seriousness of the budget deficit: "[W]e cannot lose sight of the long-run challenges that our country faces and that threaten our economic health—specifically, the trillions of dollars of debt that we inherited."²⁰⁹ He explained that his initial budgets carried high deficits because of the deep recession that began in 2008 and continued. Yet he pledged: "we must begin the process of making the tough choices necessary to restore fiscal discipline, cut the deficit in half by the end of my first term in office, and put our Nation on sound fiscal footing."²¹⁰ Because his administration took few concrete actions to achieve that goal, annual deficits continued to mount, to be addressed in subsequent budgets.

In his budget message of February 2010, Obama told the nation: "we cannot continue to borrow against our children's future."²¹¹ He spoke of the urgency of "getting our fiscal house in order" and declared that "our fiscal situation remains unacceptable."²¹² Insufficient steps were taken by the administration to bring future deficits under control, other than to wait for the fiscal commission to complete its work. On July 13, 2010, Obama announced the appointment of his new OMB Director, Jacob Lew, who would be responsible for reducing the deficit "to 3 percent of the size of the economy by 2015."²¹³

Meanwhile, in December 2010, the fiscal commission completed its work but could not attract the necessary fourteen votes to produce a deficit control plan. President Obama said it was inaccurate to say the fiscal commission's report would be "shelved," because it would "still provide a framework for a conversation."²¹⁴ Another year had elapsed without progress toward a balanced budget or even projected surpluses. The *New York Times* pointed out in an editorial: "What Mr. Obama's budget is most definitely not is a blueprint for dealing with the real long-term problems that feed the budget deficit."²¹⁵ A *Washington Post* article carried this title: *Punter-in-chief: President Obama's budget kicks the hard choices further*

208. Remarks on Signing an Executive Order Establishing the National Commission on Fiscal Responsibility and Reform and an Exchange With Reporters, DAILY COMP. PRES. DOC., Feb. 18, 2010; OFFICE OF THE PRESS SECRETARY, Executive order 13531 – National Commission on Fiscal Responsibility and Reform, (Feb. 18, 2010), <http://www.whitehouse.gov/the-press-office/executive-order-national-commission-fiscal-responsibility-and-reform>.

209. OFFICE OF MGMT. & BUDGET, A NEW ERA OF RESPONSIBILITY, RENEWING AMERICA'S PROMISE 3 (2009), available at http://www.whitehouse.gov/sites/default/files/omb/assets/fy2010_new_era/A_New_Era_of_Responsibility2.pdf.

210. *Id.*

211. OFFICE OF MGMT. & BUDGET, BUDGET OF THE U.S. GOV'T 3-4 (2010).

212. *Id.*

213. Anne E. Kornblut & Ed O'Keefe, *Obama nominates Lew to head Office of Management and Budget*, WASH. POST, July 14, 2010, at A3.

214. Jackie Calmes, *Budget Wanting, Obama Concedes*, N.Y. TIMES, Feb. 16, 2011, at A1, A16.

215. Editorial, *The Obama Budget*, N.Y. TIMES, Feb. 15, 2011, at A26.

*down the road.*²¹⁶

Although the experiment with the fiscal commission had failed, Obama could have adopted some of its proposals, such as making reductions in Social Security, reductions in defense spending, and increased taxes.²¹⁷ He made no such recommendations.²¹⁸ Nothing in his budget of February 2011 dealt substantively with long-term deficits.²¹⁹ OMB Director Lew spoke the language of budget restraint, claiming that Obama's budget is one "that lives within our means."²²⁰ However, the February 2011 budget projected deficits of \$7 trillion over the next decade.²²¹ The Congressional Budget Office projected deficits of \$9.5 trillion over the next decade.²²²

With President Obama unwilling to bring deficits—near-term or long-term—under control, Congress passed the Budget Control Act on August 2, 2011, to create a new process to reduce the deficit by up to \$2.4 trillion over ten years. Part of that reduction came from statutory caps for fiscal years 2012 through 2021, amounting to an estimated \$917 billion in savings. To enforce the caps, the statute relied on the "sequesters" from Gramm-Rudman. If Congress were to exceed the caps, automatic across-the-board spending cuts would occur within discretionary accounts.²²³

The second step in deficit control depended on the work of a new twelve-member "supercommittee."²²⁴ The statute directed the Joint Select Committee on Deficit Reduction to recommend an additional \$1.5 trillion in deficit reduction over ten years.²²⁵ Interestingly, Congress once again decided it could not rely on its regular legislative process or the procedures of the Budget Act of 1974 that had promised control over aggregates, including deficits. Recommendations from this new committee would be voted on by the end of 2011.²²⁶ If a majority of the committee reached agreement on proposed legislative language, lawmakers had to vote by December 23, 2011.²²⁷ No amendments were allowed.²²⁸ The bill needed to be enacted by January 15, 2012, to avoid automatic spending cuts

216. Editorial, WASH. POST, Feb. 15, 2011, at A20.

217. Jackie Calmes, *Panel Seeks Cuts in Social Security and Higher Taxes*, N.Y. TIMES, Nov. 11, 2010, at A1.

218. OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2012 BUDGET OF THE U.S. GOV'T 1-7 (2011).

219. *Id.*

220. Dana Milbank, *Keep Passing the Buck on Budget Reform? Yes, We Can*, WASH. POST, Feb. 15, 2011, at A2.

221. Lori Montgomery, *Bipartisan analysis: Obama deficit plan 'falls short' of others*, WASH. POST, April 22, 2011, at A15.

222. Lori Montgomery, *Senators urge Obama to join budget initiative*, WASH. POST, March 19, 2011, at A4.

223. For details on this statute, see Bill Heniff, Jr., Elizabeth Rybicki, & Shannon M. Mahan, CONG. RESEARCH SERV., R41965, THE BUDGET CONTROL ACT OF 2011(2011), *reprinted in* THE FEDERAL BUDGET PROCESS: A DESCRIPTION OF THE FEDERAL AND CONGRESSIONAL BUDGET PROCESSES, INCLUDING TIMELINES 16-1 to 16-47 (2012).

224. Budget Control Act of 2011, Pub. L. 112-25, Title IV, 125 Stat. 240, 259.

225. *Id.* § 401(b)(2).

226. *Id.* § 401(b)(3)(B)(i).

227. *Id.* § 402(b)(4).

228. *Id.* § 402(b)(1), (c)(4).

(“sequestration”).²²⁹ This threat was intended to force committee agreement. If it did not achieve at least \$1.2 trillion in deficit reduction, automatic sequesters would be triggered to achieve the savings.²³⁰ As with Gramm-Rudman, various programs were exempted from these cuts.²³¹ Notwithstanding expectations about the supercommittee, it failed to reach agreement.²³²

In February 2012, Obama’s budget included the \$1 trillion in discretionary spending required by the Budget Control Act of 2011.²³³ His budget proposed an estimated \$4 trillion in additional cuts by 2018.²³⁴ Even with those projections, the estimated annual deficit for 2022 was \$704 billion.²³⁵ If Congress declined to accept some of his proposals for spending cuts and tax increases, projected deficits would be higher.²³⁶ In mid-2013, CBO estimated deficits in 2023 to be a half-trillion dollars.²³⁷ A few months later, in a September 2013 report, CBO warned that federal deficits might fall in the short term but long-term deficits will begin to climb because of growing claims on entitlement programs such as Medicare, Medicaid, and Social Security.²³⁸

A CBO study in June 2014 warned that the national debt would jump to 106 percent of gross domestic product (GDP) in 2039, driven largely by the rising costs of entitlement programs.²³⁹ Federal debt in 2014 represented seventy-four percent of GDP.²⁴⁰ The upward path of the debt relative to the size of the economy marked a trend “that could not be sustained indefinitely.”²⁴¹ Although the annual federal deficit declined to \$468 billion for 2015 and was estimated to be \$467 billion for 2016, the CBO projected that the deficit will begin to rise in 2017 and continue to expand with an aging population receiving such benefits as Social Security and health care.²⁴²

IX. CONCLUSION

If the budget process established in 1974 created dramatically less control over spending and deficits, what can be done to recreate what worked better in the past? A necessary first step: restore the essential importance of a responsible presidential

229. *Id.* § 251(a)(1).

230. *Highlights of Budget Control Act*, CONG. Q. WEEKLY REPT., Aug. 8, 2011, at 1762 (“Enforcement trigger”).

231. Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240; *Highlights of Budget Control Act*, CONG. Q. WEEKLY REPT., Aug. 8, 2011, at 1761-62.

232. FISHER, *supra* note 29, at 259-60.

233. OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2013 BUDGET OF THE U.S. GOV’T 2-3 (2012).

234. *Id.*

235. *Id.*

236. Jackie Calmes, *Military Cuts and Tax Plan Are Central To a Budget*, N.Y. TIMES, Feb. 14, 2012, at A12.

237. Erik Wasson, *CBO Says Deficit Shrinking at Faster Rate*, THE HILL, May 15, 2013, at 13.

238. Jackie Calmes, *Budget Office Warns That Deficits Will Rise Again Because Cuts Are Misdirected*, N.Y. TIMES, Sept. 18, 2013, at A16.

239. Bernie Becker, *CBO says entitlement spending unsustainable*, THE HILL, June 16, 2014, at 1.

240. *Id.*

241. *Id.*

242. Jonathan Weisman, *Budget Forecast Sees End to Sharp Deficit Declines*, N.Y. TIMES, Jan. 27, 2015, at A13.

budget. There must be pressure on the President—from Congress, scholars, interest groups, the public, and the media—to assure that the process begins with accountability by getting aggregates in order, particularly deficits. Executive leadership is needed when submitting a responsible budget, not at some later point. The record is clear that Congress can then live within those aggregates while changing budget priorities as it likes. Both branches then draw on their institutional strengths.

The constitutional process requires the President to play a central role in submitting a responsible budget on aggregates. That is especially important in controlling the deficit. That leadership function, eventually enacted into law with the Budget and Accounting Act of 1921 to cope with extraordinary deficits, was gravely undermined by the 1974 statute. It unrealistically expected Congress to make the budget, both in aggregate and in detail. We need a visible, credible, and accountable presidential budget. The political focus must be initially on the President, where it was before 1974 and where it needs to be now. With one budget, the nation can fix a spotlight on the President and restore needed accountability and personal responsibility. The budget system can work when the President provides leadership by talking frankly to the nation and to Congress to explain what steps are needed. The willingness of Bush I to support tax increases, followed by Clinton's decision to promote tax increases and spending constraints, produced not only a balanced budget, but surpluses. We have not seen that level of presidential involvement in the Bush II and Obama years.

Instead of presidential accountability and leadership, both branches have resorted to a variety of ineffective substitutes, including budget resolutions, the Gramm-Rudman Acts, item vetoes, fiscal commissions, and supercommittees. Repeatedly, those alternatives to political action have failed. Presidents and members of Congress are public servants, elected to handle problems that threaten the nation's fiscal health and stability. The picture that emerges from 1974 to the present is a lack of the leadership skills in both elected branches needed to protect republican and constitutional government.