

CONTEMPLATING THE CONGRESSIONAL BUDGET PROCESS

*Government is aptly compared to architecture; if the superstructure is too heavy for the foundation the building totters, though assisted by outward props of art.*¹

When the subject of the Congressional budget process arises a common and usually mildly exasperated complaint is often heard: “It is *so* complex.” The adjective “complex” is usually paired with other adjectives, sometimes adverbs, like “overly”², “cumbersome”,³ “tedious,”⁴ “incoherent,”⁵ or “endlessly.”⁶ Even “maddeningly”⁷ has been used, though when this last has been employed, it has been unclear whether the meaning is that it incites anger or causes an impairment of cerebral functioning.

The truth of the characterization is manifest: The current budget process system is, in fact, complex, but that, in itself, is not a flaw, fatal or otherwise. Many things are complex: Microcomputers, theoretical mathematics, Hegelianism and Heideggerian hermeneutic phenomenology all may be characterized as such. Even the primary governing document of the American Nation, the U.S. Constitution, is purposefully complex in its construction. In answering a query as to why

¹ Though this quote is attributed to Benjamin Franklin from an article published in *The Pennsylvania Gazette* in April 1737, John Webbe has also been named as its author. Webbe was an essayist and publisher who was Franklin’s contemporary. The sentiment is valuable no matter who held the pen. See *The Papers of Benjamin Franklin*, New Haven, Yale University Press, 1960, vol. 2, pp. 145–146.

² Brian M. Riedl, “What’s Wrong with the Federal Budget Process”; Background #1816 on Federal Budget, *The Heritage Foundation*, January 25, 2005.

<http://www.heritage.org/research/reports/2005/01/whats-wrong-with-the-federal-budget-process>.

³ Former Senator and Chairman of the Senate Budget Committee, Senator Pietro “Pete” Domenici, “Congressional budget process is broken, drastic makeover needed”; *Brookings Institution*, July 27, 2015.

<http://www.brookings.edu/research/opinions/2015/07/27-congressional-budget-overhaul-rivlin-domenici>

⁴ *National Conference of State Legislatures*, “The Federal Budget Process,” 2016; <http://www.ncsl.org/research/fiscal-policy/federal-budget-process.aspx>.

⁵ Former Director of the Congressional Budget Office Rudolph Penner, “Repairing the Congressional Budget Process”; *Urban Institute*, 2002. <http://www.urban.org/research/publication/repairing-congressional-budget-process>

⁶ Kevin Kosar, “So... this is Nixon’s fault?”; *Politico* (October 21, 2015). <http://www.politico.com/agenda/story/2015/10/richard-nixon-congressional-budget-control-act-history-000282>

⁷ Dylan Matthews, “Why comparing budgets is so maddeningly tough”; *Washington Post*, (April 11, 2013). <https://www.washingtonpost.com/news/wonk/wp/2013/04/11/why-comparing-budgets-is-so-maddeningly-tough/>

such multiple levels are weaved into the Constitution, Alexander Hamilton explained with a contrary simplicity:

The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.⁸

The complexity intrinsic to the budget process, on the other hand, does not have the salutary effect as in these other examples where the densely complicated nature is entirely appropriate to the task at hand. The difficulties of the budget system emanate from the calcified legislative sediment that has accumulated over several decades, and paralleled the evolution of the Federal Government. According to James Madison, “the most productive system of finance will always be the least burdensome.”⁹ In this there is guidance as to achieving a system in which finance, government and budgeting cohere. In this regard, the budget process is that which governs the government. Right now, it is burdensome.

The underlying thesis – the method by which this process became so complicated is deceptively simple and easy to understand: It is borne from the attempt at the restoration of Congressional power, and the corresponding resistance to such a restoration. It reaches the outskirts of irony that in the attempts to rebuild the edifice of Congressional budgetary decision making, Presidents have not been the only ones resistant. Congress itself has participated in undermining the effort in various ways – usually by failing to coalesce around the central idea that a return to Constitutional prerogative is more important than immediate interests or legislative fiefdoms. The beginning of the effort, in earnest, came in 1974.

The budget process can be fairly divided between that which occurred before the *Congressional Budget and Impoundment Control Act of 1974*¹⁰ [CBA]¹¹ and that which came after. The

⁸ James Madison, *The Federalist Papers*, Federalist No. 51; “The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments”, *Independent Journal*; (Wednesday, February 6, 1788).

⁹ James Madison, *The Federalist Papers*, Federalist No. 39; (January 16, 1788).

¹⁰ *Congressional Budget and Impoundment Control Act of 1974*; Pub. L. 93-344, 88 STAT. 297; (2 U.S.C. 621 et seq.) July 12, 1974.

¹¹ Usually the entire law is shortened to the “Budget Act” or “CBA” since its companion in title, the *Impoundment Control Act of 1974* [ICA] is only rarely invoked.

precipitating phenomenon was gradual, but still perceptible. Congress became conscious of an erosion of its power over budget decisions as the 20th Century progressed. This caused some action such as the *Legislative Reorganization Act of 1946*,¹² the *Employment Act of 1946*,¹³ and the establishment of a Joint Committee on the Legislative Budget from the late 1940s. These were significant, but ultimately minor steps.

This changed with the advent of the presidency of Richard Nixon in 1969. This brought alarm, vituperation, anger, and then calls for more significant action. At that time, so many other things were happening in the country (Vietnam, the counterculture, the menace of the Soviet Union, these only scratch the surface), it might be easy to overlook the anger engendered by Presidential impoundment and “backdoor spending.”¹⁴

With the enactment of the Budget Act, the creation of the Budget Committees, the establishment of a process of a budget resolution, and the construction of an entire apparatus of Congressional budget process, Congress asserted itself. Unfortunately for those who had high hopes for this as a continuing realignment, since the early 1980s Congress has seen that structure continue but with certain contractions, expansions, always interruptions, and a sliding away from the original notion of systemic Congressional budget influence. Much of the complexity that has arisen comes from legislative fits and starts, encrusting what began as a largely rational system.

THE ROLE OF CONGRESS IN THE NINETEENTH CENTURY

The budget process, by necessity, is intertwined with the government of the Nation itself. Whenever a policy is found desirable, a natural question is appropriately asked: “Great idea – how are you going to pay for it?” The question on its face is an inquiry as to where the resources are to be derived in order to finance it. From a budget perspective though it is more involved. It is more literal and extensive – “What is the method by which you will measure the idea, consider it in the

¹² *Legislative Reorganization Act of 1946*, Pub. L. 79-601, 60 Stat. 812, 79th Congress, August 2, 1946.

¹³ *Employment Act of 1946*, Pub. L. 79-304, 60 Stat. 23; (15 U.S.C. § 1021) 79th Congress, February 20, 1946.

¹⁴ The term “backdoor spending” has largely fallen in to disuse – it’s a somewhat quaint term for “direct spending” or other spending not subject to annual review. It’s quaintness derives from the fact that there is no longer anything “backdoor” about it – it comes in straight through the front gate.

legislative process, and account for the receipts and spending associated with it?”

This question can be distilled to the essentials: taxes, spending and the mechanism of government. In the days of his senescent, Thomas Jefferson reflected: “We have more machinery of government than is necessary.”¹⁵ A simple thought stated in simple terms. He included the remark in correspondence with an acquaintance, and this at a time when letters were considered minor pieces of literature. It was a concise thought, economical in words but abundant in meaning, and made at a time well preceding the advent of the modern concoction of governmental extravagance. One can only surmise his reaction to the current state, even if he only caught a glimpse of the legislative juggernaut, its prodigious engineering and industrious construct, the pastiche of statism that is our present apparatus of government.

Attendant with the still unquenched growth of government from that specific moment, from Jefferson’s perch in 1824 at age 81, to the second decade of the Twenty-First Century, has been a corresponding necessity to *fund it*. Money does not grow on trees after all. No, it grows on 14th Street Southwest in Washington, D.C. where the Bureau of Engraving and Printing is located.¹⁶ In this age of massive electronic spending and tech friendly taxation, paper money is downright quaint, but the presses run day and night all the same.

Now that this all-encompassing governmental spending machine has been constructed through the prodigious enactment of laws (courtesy of the U.S. Congress¹⁷) and the collecting of taxes (through the Executive Branch, sometimes not so courteously), this mechanism must be managed, coordinated, and organized. It must be budgeted for.

The current statutory *budget* structures, haltingly enacted, indicate an unfortunate parallel to the statutory *government* structures. They are similar in their authors’ caprice, evident lack of foresight, and the intermittent planning that produced

¹⁵ Thomas Jefferson, Letter to William Ludlow, (September 6, 1824); *Letters of Thomas Jefferson*, University of Virginia.

¹⁶ While the U.S. Mint, ironically the first building constructed pursuant to the Constitution, makes coins, the Bureau of Engraving and Printing is where the printing presses run out trillions in paper currency.

¹⁷ The Constitution makes multiple references to Congress making law, the President is relegated in the text to “take care that the laws be faithfully executed”; U.S. Const. art. 2. sec. 3. cl. 1.

them. Their development has the hallmarks of a fusion of political expedience and frantically reactive lawmaking. A brief review of budget moments in American history is revealing.

In 1789, the House appointed a ten-member Committee on Ways and Means to report on supplies and revenues. Though it lasted only 8 weeks that year, it was made a standing committee in 1802. The Senate used select committees for general appropriation bills until 1816, when it established the Committee on Finance as a standing committee. Because legislative items kept finding their way onto appropriation bills and causing delays, the House adopted the rule prohibiting appropriations not already authorized by a previously enacted law in 1837. The Senate followed suit in 1850. This was a typical ebb and flow that has occurred in Congress. As Congressional Research Service analyst, later consultant, Alan Schick noted: “As has often happened during 200 years of congressional history, the concentration of power was followed by the dispersion of power.”¹⁸

With the large increases in spending and debt requisite to the Civil War and the corresponding increase in the power of the Ways and Means Committee, the House in 1865 reduced that committee’s jurisdiction to just revenue bills. Its former responsibilities were transferred to two new committees: the Appropriations Committee and a Committee on Banking and Currency. Two years later, the jurisdiction of the Senate Finance Committee was similarly reduced in scope. The Senate’s decision to create its own Appropriations Committee was justified as a means of dividing the responsibility of the Finance Committee with the new Senate Appropriations Committee.

This reorganization, though, caused a great concentration of power in the Appropriations Committees. They, in turn, were stripped of legislative responsibilities over issues such as rivers and harbors, agriculture, consular and diplomatic affairs, the Army, the Military Academy, the Navy, the Post Office, and Indian affairs. Significantly, with these transfers of power, the authority to provide appropriations was also allowed to the receiving committee.

¹⁸ Allen Schick, CRS Consultant, “Legislation, Appropriation, and Budgets: The Development of Spending Decision-Making in Congress”; *Congressional Research Service*, (May 1984), p. 22. The specific reference was made related to the “Holman Rule” in the Appropriations process from the late 19th Century, but the principle is generally applicable.

RISE OF THE PRESIDENT

The Budget and Accounting Act of 1921

Just as the Civil War caused a spike in spending, deficits, and debt, so World War I, and the concomitant rise in progressive domestic policies, caused much higher spending. This again led to a concentration of budget decisions and then the enactment of the *Budget and Accounting Act of 1921*¹⁹ [BAA] ensued. For the first time, the United States had a unified budget. This law established the Federal budget system and provided for a method to account for total Federal spending and revenue. It required the President, for the first time, to submit to Congress an annual budget for the entire Federal Government. This was something of a boon to the President, not surprisingly at the expense of Congressional prerogative. An old adage provides that “something is better than nothing” – a corollary can be added: Power flows to the one with a budget and away from the one who has nothing.

In terms of centralizing budgetary decisionmaking, the BAA was perhaps the most important budget-related legislation enacted after the U.S. Constitution replaced the Articles of Confederation and Perpetual Union. It set the stage for the unified Federal budget process. President Warren G. Harding signed BAA to establish a Federal budget system and to provide for a method by which Federal spending and revenue was to be accounted. The BAA required the President, for the first time, to submit to Congress a single annual budget for the Federal Government.

Section 207 of the BAA formed the Office of Management and Budget²⁰ [OMB] to review budget funding requests from, and formulating the budgets for, Federal agencies. The OMB mandates all government estimates, receipts, and expenditures be cleared by its Director. From the Director, the estimates go to the President and then to Congress. While it evaluated the requests from various agencies, it was precluded from doing so for the other two branches of Government: The Congress and the Supreme Court. Section 201 of the Act states the budgets of the “Legislative Branch of the Government and the Supreme Court of the United States shall be transmitted to the

¹⁹ *Budget and Accounting Act of 1921*, Pub. L. 67–13; 42 Stat. 20; 67th Congress, June 10, 1921.

²⁰ When first established, it was named the “Bureau of the Budget”.

President on or before October 15th of each year, and shall be included by him in the Budget without revision.”

The Act also established the Government Accountability Office.²¹ As a Congressional support agency staffed with accountants and lawyers, it conducts audits, investigates any issue Congress may find of interest, and will advise on accounting and legal matters related to Federal spending. This is a Congressional support agency that conducts audits, investigates any issue Congress may find of interest, and will advise on accounting, certain legal matters, and provide budgetary advisories when asked, primarily by the Budget Committees, but also other committees and Members of Congress.

Congress reacted to this centralization of budget making in the Executive Branch by again concentrating appropriation bills in the House and Senate Appropriations Committees. As CRS analyst, later consultant, Alan Schick noted: “As has often happened during 200 years of congressional history, the concentration of power was followed by the dispersion of power.”²²

Substantive jurisdiction, though, did not travel back to those committees, as had been the case when they were first established in the 19th Century. While the “authorizing” committees were stripped of their appropriating powers, they maintained their ability to spend by engaging in “backdoor spending”. The term has been replaced formally by “direct spending”, though it is also now known as “mandatory”, “entitlement”, or “automatic” spending.

The Federal Government and Decades of Expansion

By the onset of the twentieth century, the United States had finished expanding in terms of geographic size. With the annexation of the American Southwest, the Gadsden Purchase, the acquisition of Alaska, and the Spanish-American War, the borders of the U.S. had basically reached its limit.²³

²¹ This office was originally named the “General Accounting Office”.

²² Allen Schick, CRS Consultant, “Legislation, Appropriation, and Budgets: The Development of Spending Decision-Making in Congress”; *Congressional Research Service*, (May 1984) p. 22.

²³ The U.S. shed possessions like Cuba, the Philippines, the Panama Canal Zone, and relinquished control over the Pacific Trust Territory, so geographically speaking, it has undergone minor contractions.

This was hardly the case with the expansion of the Federal Government. Through the adoption of new domestic policies and the international engagement that followed, the beginnings of an enormous bureaucracy could be seen. Indicated during the Civil War, expanded during Theodore Roosevelt's Square Deal, and then the progressivism of Woodrow Wilson, there was some retrenchment during the decade following World War I. The small government policies of the 1920s, though, did not last.

Quite the reverse occurred with the arrival of the First and Second New Deals of the 1930s and its blizzard of acronyms led by the National Recovery Administration [NRA]. In finding the NRA unconstitutional, the Supreme Court admonished the President for an overreach attempt to regulate more than the limited area of interstate commerce and it charged that Congress unacceptably delegated its legislative power to the executive branch. This barely slowed the growth of government programs and the NRA continued, with even more letters strung together, usually in sets of three (FHA, WPA, PWA etc.). A corresponding increase in budgetary procedures was largely absent, though. Congress adopted the Legislative Reorganization Act of 1946.²⁴

The Employment Act of 1946

During and just after the concluding days of the Second World War, Congress turned its attention toward the possibility of a recession or a return of the depression. This had been the case when wars had come to an end and economic production needed to return to domestic rather than military priorities. This led to the enactment of the Employment Act of 1946.²⁵ The Act attempted to assert a greater Congressional role by putting a new requirement on the President to provide an "Economic Report" to Congress.²⁶

The Act also created what is now known as the "Joint Economic Committee" [JEC] in Congress, which analyzes various factors of the economy. The Act, motivated at least in part by the dominant role President Franklin Roosevelt played during the

²⁴ *Legislative Reorganization Act of 1946*, Pub. L. 601, ch. 753, 60 Stat. 812, enacted August 2, 1946.

²⁵ U.S. Congress, Joint Economic Committee, *Twentieth Anniversary of the Employment Act of 1946*, (Washington, D.C.: 1966).

²⁶ The report is titled the *Economic Report of the President* and is annual transmitted to Congress by the Chairman of the Council of Economic Advisers.

Depression and World War II, was of limited success in reasserting Congressional power. Though Congress gained the JEC, the President's power was also augmented by the creation of the new "Council of Economic Advisors" in the White House, at his personal disposal, and which had ready access to vast amounts of economic information collected by the Executive Branch.

The *Employment Act of 1946* has a major role at least in the text of the Budget Act as it sets forth the terms of the annual Congressional Budget. Though this appears in section 301 and other places in the Budget Act, the law is largely forgotten as it interrelates with the annual budget resolution. The JEC, while serving an important function, was not given as prominent a role as in economic affairs as would optimally balance the new Presidential influence in shaping economic analysis. For example, the JEC has no legislative jurisdiction and while it may shape opinions and provide analysis, it does not write law.²⁷

Legislative Reorganization Act of 1946

The perception of a loss of Congressional stature in the face of growing executive power also sparked the idea reforming Congress itself, to modernize it, enhance its effectiveness boost its efficiency. These reforms encompassed reducing the numbers of committees, clarifying their jurisdiction, and enhancing oversight capabilities.

One provision included in this legislation was the creation of a Joint Committee on the Legislative Budget. It was composed of all the members of the Appropriations Committees of the House and Senate, the Senate Finance Committee, and the House Ways and Means Committee. The Joint Committee was assigned the task of reporting on "the estimated overall Federal receipts and expenditures" for a year, and to issue that report by February.²⁸ Though the law accomplished a great deal in modernizing Congress, the budgetary element was halfhearted and fell victim to entrenched concerns about power seeping away from other Committees toward this new institution. Senator Styles Bridges, a Republican from New Hampshire who served as Chairman of the Committee, observed the "an unwieldy group of this size passing on these

²⁷ U.S. Congress, Senate, Report of the Joint Economic Committee on The Federal Budget as an Economic Document, S. Rpt. 88-396; 88th Cong., 1st sess., 1963

²⁸ See section 138 of the Legislative Reorganization Act of 1946.

matters, we should have [a group] which can be studying the matter of the budget all year.”²⁹ Though it was well intentioned, this attempt at asserting Congressional budget prerogative was ultimately unsuccessful. The Senate Budget Committee, in its history of the budget process noted on the Joint Committee: “In 1947, conferees were unable to reach a final agreement. In 1948, a joint resolution was adopted by both Houses, but a strongly worded minority report noted basic defects in the procedure. No further attempts were made to comply with the Act after 1949.”³⁰

Later in that decade, Senator John L. McClellan from Arkansas, proposed replacing in effect this Legislative budget function found in section 138 of the LRA. This new proposed “Joint Committee on the Budget” would have had fourteen members, seven members from the appropriation committee of each House. It would have analyzed the President’s budget submission, provided information to the appropriation subcommittees, and prepared estimates of appropriations and authorizing legislation. More akin to the Congressional Budget Office or the Joint Committee on Taxation, it would certainly have given Congress resources in budget decisions and matters. Though it passed the Senate a number of times, the House refused to consider it.

THE CONGRESS AND THE BUDGET PROCESS LAW SINCE 1974

Since 1974, governing the government has been subject to two competing trends: (1) Agreements within the Congressional budget structure; and (2) agreement on spending and tax levels, and policy implementation, outside of this structure. The more prevalent latter has had a concomitant excrescence of additional enforcement structures and regimen leading to the previously, and repeatedly, mentioned complexity of budget laws and rules. These extra-budgetary compacts have had a deleterious effect on Congressional budgeting and process since they are often the result of a concentration of power rather than an expression of the institutional and representative legislative will.

²⁹ U.S. Congress, Chairman Styles Bridges (R-NH), *Proceedings of the Joint Committee on the Legislative Budget*, January 22, 1948 and February 6, 1948, 80th Congress, Second Session, GPO, Washington, D.C. 1948, p. 3.

³⁰ “The Congressional Budget Process: An Explanation”; *Committee on the Budget of the U.S. Senate*, S. Prt. 105-67, 105th Congress, Second Session, GPO, Washington, D.C. 1998, p. 7.

Congressional Budget and Impoundment Control Act of 1974

The *Congressional Budget and Impoundment Control Act of 1974*³¹ [CBA or “the Budget Act”] is the law that sets the foundation for the congressional budget process. It established the Committees on the Budget in the House of Representatives and the Senate and the Congressional Budget Office. It outlines their functions and duties, and established the requirements for adopting the concurrent resolution on the budget for each fiscal year. The achievement of this Act should not be dismissed or discounted – what most take for granted right now, Congress fashioned from whole cloth. For example, the parameters of what is now the Congressional Budget Office was not immediately clear. The Comptroller General, head of GAO, was not convinced the idea of a CBO and two new Budget Committees was at all the good idea, believing his Office could serve in that role:

We believe that the capabilities of the General Accounting Office, the Congressional Research Service, and executive agencies can effectively support the proposed legislative budget committees ...

I fear that if an independent Congressional Office of the Budget is created, the individual budget committees will still need to create their own staffs as well and we will end up with three new budgetary support organizations which will further confuse and complicate the congressional budget control process.³²

The Budget Act has ten titles: The first nine comprise the “Congressional Budget Act of 1974” and the tenth is formally referred to as the “Impoundment Act of 1974” [ICA]. At the time, and since, much has been made of this tenth title as the impetus for the enactment of the law, but it has been overshadowed by its companion Budget Act. History records the entire Act, and in particular the ICA, as a furious Congressional reaction against President Richard Nixon’s propensity to impound funds – his refusal to spend money insisted on by Congress over his objects, and sometimes his veto. Though impoundment had been a longstanding practice, one with early antecedents, beginning with the \$50,000 Thomas Jefferson refused to spend for 15 gunboats to patrol the Mississippi River.³³ Yet even though Presidents preceding

³¹ *Congressional Budget and Impoundment Control Act of 1974* (Pub. L. 93–344, 88 STAT. 297; (2 U.S.C. 621 et seq.) July 12, 1974.

³² “Statement by Honorable Elmer B. Staats, Comptroller General of the United States”; *Budget Control Act of 1973*, Hearings Before the Committee on Rules, House of Representatives, 93rd Congress, First Session, September 13, 1973; p. 217.

³³ “The sum of fifty thousand dollars appropriated by Congress for

Nixon had exercised the power, the extent with which it was used, and because there was a distinct lack of affection in Congress for President Nixon, Congressional was spurred into action to circumscribe the practice of impoundment. It remains of little relevance that the Supreme Court was in the process of ruling the activity largely unconstitutional in *Train v. New York*.³⁴ In addition, this particular title which provides for the “deferral” of funds – an alternative constricted method by which the spending of funds may be postponed – has been little used.

The main effect of the law has certainly been the application of the first nine titles, the *Congressional Budget Act of 1974*.

Congressional Budgeting and the Era of Budget Summitry

The *Congressional Budget Act of 1974* did not get off to a roaring start with the first budget resolution adopted for fiscal year 1976. These years can be characterized as Congress becoming acclimated to the process, while the various institutions like authorizing and appropriating committees adapted to the new system. The main approach was accommodation made easier by the Executive and Congressional majority being of the same political party. As much change as the CBA brought, the economy continued to struggle with deficit spending, high unemployment, nagging inflation.

The “Reagan Landslide” of 1980³⁵ changed the political landscape with a Republicans gaining a net of 12 Senate seats (and the majority) and 33 House seats, where Democrats were still nominally in control. While the House Leadership was hostile to the Reagan platform, both chambers had majorities that were not – what became known as Gramm-Latta I and Gramm Latta II, an alternative budget resolution and reconciliation legislation implementing the resolution, the budget process envisioned by the *Congressional Budget Act of 1974* essentially worked with the system followed, albeit without the approval of the House Leadership.

providing gun-boats, remains unexpended.” Thomas Jefferson, Third Annual Message to Congress, October 17, 1803. *Bureau of National Literature*, 1897.

³⁴ *Train v. City of New York*, 420 U.S. 35 (1975).

³⁵ This was a common description at the time. See for example: “Reagan In A Landslide,” *Pittsburgh Post-Gazette*, Vol. 54-No. 93, (November 4, 1980), p. 1.

The enactment of *Omnibus Budget Reconciliation Act of 1981*³⁶ was not an exercise that has been oft repeated. Ironically, at the time there were those who believe Congress abdicated its responsibility by enacting a Presidentially proposed plan. This ignores the plain fact that the Congressional system was observed and worked despite entrenched opposition from traditional battlements.

Still, after the enactment of this law, and companion measures, different forms of agreements bean to be reached. These deals were consequent to summits negotiated outside of, sometimes in contradiction to, and periodically without the participation of, the Congressional budget institutions – in particular the Budget Committees.

For fiscal year 1983, negotiations began in April of 1982, representatives of President Reagan and Speaker Thomas “Tip” O’Neil, these talks pointedly excluded House Budget Chairman James Jones and Senate Budget Chairman Peter Domenici.

With the political retrenchment in the elections of 1982, when Republicans lost 26 House seats, the influence of party affiliation became more pronounced. For fiscal year 1984, no summit and no budget concurrence was reached, though a budget resolution was adopted by both House and Senate. It provided for a reconciliation bill, but adjournment came without a bill ever being adopted or enacted.

Fiscal year 1985 saw the adoption of a budget resolution, and the enactment of reconciliation legislation implementing a bicameral and Congressional-Presidential accord were all accomplished. The system did quite, though, work the way it was supposed to. The system in this year worked backward. The Senate only adopted its budget resolution the day after the passage of the deficit reduction (reconciliation bill). In the end, Congress only adopted the final budget resolution on October 1, the same day the fiscal year to which it applied began after all the details had already been worked out and placed in law.

Balanced Budget and Emergency Deficit Control Act of 1985

When Congress enacted the *Balanced Budget and Emergency Deficit Control Act of 1985* [BBEDCA]³⁷ in December of 1985, it

³⁶ *Omnibus Budget Reconciliation Act of 1981*, Pub. L. 97-35, 95 Stat. 357, August 13, 1981.

³⁷ *Balanced Budget and Emergency Deficit Control Act of 1985*; Pub. L. 99–

certainly substantially added to the layers of the budget process. Though systemically, it was not the equal of the Budget Act, whether for ill or good, it fundamentally changed the nature of budgeting in its application. Conceptually, it can be viewed as bookending the budget: The Congressional Budget Act of 1974 applies to decisions before they are set in law, applying at the stage of Congressional consideration of legislation. BBEDCA sets up a system that is designed to be beyond the reach of Congress, or at least attempts at making it inconvenient to change the automatic spending cuts it uses as its enforcement mechanism, known as sequestration.³⁸ The term “sequestration” is defined as the cancellation of previously enacted spending authority and is set in motion if certain circumstances are met – independent of Congressional action. In order to stop it, Congress must act, which it has done often.

BBEDCA established deficit targets for fiscal years 1985 through 1990 and sequestration procedures to enforce those targets. The enforcement provisions were revised pursuant to the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987 (BBEDCRA 1987) following a ruling by the Supreme Court in *Bowsher v. Synar*³⁹ that found aspects of the enforcement provisions unconstitutional. In particular, BBEDCRA 1987 charged the Government Accountability Office with enforcement responsibilities – a Congressional agency. When struck down, these were transferred by BBEDCRA 1987 to the Office of Management and Budget.

While there are many facets to BBEDCA and BBEDCRA 1987, the most pertinent here is that they served again as budget summits. At the heart of BBEDCA, in its very first sentence, was an increase in the debt limit. An accord needed to be reached to do it with as little political repercussion as possible, and hence it was adorned with copious budget processes. BBEDCRA 1987 was a legislative sequel necessitated by the Supreme Court’s *Bowsher v. Synar* finding the enforcement mechanism of BBEDCA unconstitutional. A serendipitous convenience in passing the new law was the fact that the deficit targets were going to be missed, and hence trigger the automatic spending cuts of sequestration. BBEDCRA 1987

177, 99 Stat. 1037, (2 U.S.C. 900 et seq.) December 12, 1985. GPO Link: <http://www.gpo.gov/fdsys/pkg/STATUTE-99/pdf/STATUTE-99-Pg1037.pdf>

³⁸ Congress, since 1985, has shown itself quite adept at overcoming the obstacles – it has routinely circumventing the automatic spending reductions by timing shifts, asset sales, reclassification of budget resources, and ultimately, just by turning them off.

³⁹ *Bowsher v. Synar* (478 U.S. 714) (1986).

allowed the deficit limits to be reset while another summit was held.

In both the laws the Congressional system as it was in place before the agreements was largely ignored. This is accurate as far as it goes, but it also must be explained that the system was also amended by the two laws to accommodate a new approach. For example, the requirement that the President submit a current services budget in November of the year before the year a budget resolution was to be considered was pushed back to January (it now is ignored as a separate requirement, though this law remains⁴⁰). The initial system of two budget resolutions for each year was eliminated, being moved to the current system of annual budget resolutions. Perhaps the most important title of the Budget Act, Title III was entirely rewritten, though the basic system of Congress setting the terms for an annual budget was retained. It simply did not apply in 1985 and 1987 in any real way.

Budget Enforcement Act of 1990

In 1990, Congress effectively replaced deficit-target enforcement by adopting discretionary spending limits and Pay-As-You-Go Rules⁴¹ though it retained enforcement mechanism of sequestration. *The Budget Enforcement Act of 1990* (BEA 1990) was enacted as title XIII of the *Omnibus Budget Reconciliation Act of 1990*.⁴² BEA 1990 added new points of order and procedures to the budget process, such as freestanding provisions on the off-budget status of Social Security. It also incorporated a modified version of the Senate's reconciliation Rule on extraneous matter (known as "the Byrd Rule") into the CBA. The BEA 1990 also established Pay-As-You-Go (PAYGO) procedures, which required that direct spending increases and revenue decreases be offset with either direct spending decreases or revenue increases.

In addition, BEA 1990 established discretionary spending limits, which placed limits on annual appropriations levels. These provisions replaced the deficit-target procedures of BBEDCA. BEA 1990 enforcement was extended twice—first

⁴⁰ 31 U.S.C. 1109.

⁴¹ These "Paygo" rules should not be confused with the recent equivalent, enacted in the *Statutory Pay-As-You-Go Act of 2010*, after these expired after 2002.

⁴² *Omnibus Budget Reconciliation Act of 1990*, Pub. L. 101-508, 104 Stat. 1388, November 5, 1990; Link: <http://legislink.org/us/pl-101-508>.

under title XIV of the *Omnibus Budget Reconciliation Act of 1993* (Public Law 103–66) and then under the *Budget Enforcement Act of 1997* [BEA 1997]—before expiring in 2002. The discretionary spending limits were reestablished by the *Budget Control Act of 2011* [BCA], setting these limits through fiscal year 2021. These were subsequently, almost immediately, modified by the *American Taxpayer Relief Act of 2012*⁴³ and the *Bipartisan Budget Act of 2013* [BBA 2013]⁴⁴.

Budget Enforcement Act of 1997

The *Budget Enforcement Act of 1997* [BEA 1997] was included as title X of the *Balanced Budget Act of 1997* [BBA 1997]. This Act, the result of budget negotiations between the President and Congress, extended the discretionary spending limits and PAYGO process of the Budget Enforcement Act of 1990 through fiscal year 2002. It repealed title VI of the Budget Act and made significant revisions to title IV of that law. It created a new process for adjusting committee allocations and required the establishment of appropriate budgetary levels for both the current fiscal year and at least the four ensuing fiscal years. BEA 1997 removed the special five-day requirement and applied the normal House rule (former Rule XI clause 2(l)(6)) regarding layover periods (three days for bills) to budget resolutions as well.

The important aspect of the BEA 1997 was that it was a set of reforms that were achieved as part of an overall reform effort, including the use of the annual budget resolution and the reconciliation legislation that it initiated. Though the reforms in the BEA 1997 were not significant in terms of creating new procedures and new systems of budget enforcement, it served to modernize the existing system. It cleaned out a great deal of legislative detritus from the Congressional Budget Act of 1974, helped harmonize the statutory elements of BBEDCA with the CBA, and extended the discretionary spending limits and the pay-as-you-go regimen through fiscal year 2002. It included the innovation for Paygo by extending the scorecard⁴⁵ so that direct spending and revenue budgetary effects were captured over the full five-year period no matter which year they were enacted,

⁴³ *American Taxpayer Relief Act of 2012*, Pub. L. 112–240, 126 Stat. 2370, January 2, 2013.

⁴⁴ *Bipartisan Budget Act of 2013*, Pub. L. 113–67, 127 Stat. 1166, December 26, 2013.

⁴⁵ The original pay-as-you-go scorecards, established in the BEA 1990 only had one five-year scorecard compared to the two scorecards under S-Paygo system that was enacted in 2010.

rather than the original system whereby the scorecard shrank by one year annually in terms of enforcement. Under this original system, the scorecard, for all intents and purposes, became a one-year enforcement device in the final year of its application. Thus, while the Paygo expired in 2002, the budget effects were recorded, and could cause a sequestration to enforce them, through fiscal year 2006.

This reform, though well intentioned, was less than successful, since after 2002, large balances remained on the scorecard that would have caused annual sequestration through 2006. Congress, not unexpectedly, erased these balances.⁴⁶

Statutory Pay-As-You-Go Act of 2010

Congress enacted the *Statutory Pay-As-You-Go Act of 2010*⁴⁷ [S-Paygo] in which both established new methods of budget control, as well as resuscitating expired methods. Together, the provisions of the act brought back certain sections of BBEDCA. It amended parts of that law such as the list of direct spending programs exempt from sequestration. Instead of bringing back the previous sections of law it was named after, it instead established pay-as-you-go requirements distinct from the prior pay-as-you-go law found in section 252 of BBEDCA. Though it operates in similar form, S-Paygo is a freestanding budget enforcement statute without an expiration date.

Conceptually it helps to divide budget enforcement mechanisms between statutory and rulemaking, the first being based in law and administered by the President and the latter controlling the internal legislative operations of Congress. S-Paygo is a good example as to how that line is blurry at best since it is primarily statutory but reaches into the Congressional rule making authority. S-Paygo is the basis for the current Senate Pay-As-You-Go rule, and associated point of order, governing the consideration of measures brought before the Senate. It also served as the model for clause 10 of rule XXI in the Rules of the House of Representatives. It was known in the 110th and 111th Congresses as the “House Paygo Rule”⁴⁸

⁴⁶ *To reduce preexisting PAYGO balances*, Pub. L. 107-312, 116 STAT. 2456, December 2, 2002.

GPO Link: <https://www.gpo.gov/fdsys/pkg/PLAW-107publ312/html/PLAW-107publ312.htm>.

⁴⁷ *Statutory Pay-As-You-Go Act of 2010*, Pub. L. 111-139, 124 STAT. 8, , February 12, 2010.

GPO Link: <https://www.gpo.gov/fdsys/pkg/PLAW-111publ139/html/PLAW-111publ139.htm>

⁴⁸ Clause 10 of Rule XXI; Jefferson’s Manual, *House Rules and Manual*

until it was rewritten at the beginning of the 112th Congress and is now known as the “House Cutgo Rule.”⁴⁹ Both the Paygo Rule and the Cutgo Rule specifically make cross references to BBEDCA. In addition, the budget enforcement mechanism of these Congressional rules is distinct from the main legislative process found in the Budget Act.

Budget Control Act of 2011

While S-Paygo brought back parts of the expired statutory controls that held sway in the 1990s, those applying to direct spending, it was the *Budget Control Act of 2011*⁵⁰ [BCA] that followed a year later to bring back those parts of BBEDCA controlling discretionary spending. The primary purpose of the bill was to authorize an increase in the public debt limit, as was the case with BBEDCA and S-Paygo; it attached budget process controls to make the debt increase more politically palatable.

The debt provisions of the BCA had a number of contingencies, but it increased the debt limit by least \$2.1 trillion (and up to \$2.4 trillion under certain conditions). The increase was subject to a disapproval process requiring the support of two-thirds of each chamber to prevent a debt limit increase.

In addition to increasing the debt limit, the BCA set statutory limits on discretionary spending through fiscal year 2021. These spending limits were divided, after the operation of certain statutory constructs,⁵¹ between defense and nondefense spending categories. If either category limit is exceeded, an across-the-board spending reduction is automatically triggered to bring spending in the form of budget authority within the statutorily set category amount.

The BCA also established a Joint Select Committee on Deficit Reduction. This new bicameral committee was composed of twelve Members, six from the House and six from the Senate, evenly divided between Republicans and Democrats. This Select Committee was set to the task of

§1068f, 111th Congress.

⁴⁹ Clause 10 of Rule XXI, Jefferson’s Manual, *House Rules and Manual* §1068f, 114th Congress.

⁵⁰ *Budget Control Act of 2011*, Pub. L. 112-25, 215 Stat. 240, August 2, 2012.

⁵¹ For example, the separate “security” and “nonsecurity” category definitions were changed under the law when deficit reduction designed to occur failed to be enacted.

reporting a bill, ultimately unsuccessful, to reduce the federal deficit by \$1.2 trillion over a 10-year period ending in fiscal year 2021. The legislation from the joint committee would be considered under expedited procedures in order limit amendment and debate. The BCA-set ten-year “budget goal” of \$1.2 trillion in reduced deficits, could be accomplished through spending reductions, tax increases, or a combination of both.

The BCA structured a system whereby the budget goal would be reached through calculating various factors – a beginning amount was set at \$1.2 trillion over ten years, reducing that amount by the Joint Committee bill amount, reduced by 18 percent for debt services and dividing it by nine to result in an annual amount of sequestration.

The Joint Select Committee was unable to come to an agreement among its Members so no legislation was reported and the full sequestration was set into motion, to reduce discretionary and direct spending in both defense and non-defense categories. This made the above calculation for the budget goal somewhat less complex.

Like the S-Paygo law, the BCA did not follow normal legislative procedures. It was not introduced as a bill, considered for amendment by committees with jurisdiction over the subject matter, nor did it have an explanatory report detailing its methodology. Instead, it used an unrelated measure making technical amendments to education science programs as a vehicle. The text was largely written by the Office of Management and Budget by those with little experience in Congressional budget matters. The broad parameters were negotiated between representatives of the President and those in the Congressional Leadership. The muddle of indeterminate bipartisan and bicameral participation produced a predictably disorganized miasma of budget concepts.

Bipartisan Budget Act of 2013

The President signed the *Bipartisan Budget Act of 2013* [BBA 2013] into law on December 26, 2013. Among the amendments made to various budget-related laws and processes, perhaps its most important effect was to amend the *Balanced Budget and Emergency Deficit Control Act of 1985* [BBEDCA]⁵². It revised

⁵² *Balanced Budget and Emergency Deficit Control Act of 1985*, Pub. L. No. 99-177, 99 Stat. 1037, (2 USC §§ 900, et seq.), December 12, 1985.

the limits on discretionary spending established in section 251(c) of BBEDCA. The limits remained subdivided in each fiscal year through 2021 into two categories: the revised security category and the revised nonsecurity category.

The revised security category is defined as the National Defense budget function (Function 050) that includes funding for the Department of Defense, the nuclear weapons-related work of the Department of Energy, intelligence-related activities, and the national security elements of the Departments of Commerce, Justice, Homeland Security, and several independent agencies. The Department of Defense (including the intelligence programs) usually receives over 95 percent of the budget authority in this function. The revised nonsecurity category comprises discretionary spending not contained in the revised security category.

BBA 2013 amended section 251(c) of BBEDCA to increase the limits on discretionary spending for fiscal years 2014 and 2015. In addition to the limits on discretionary spending, section 251A of BBEDCA also required the sequestration of direct spending, the size of which interacts with the discretionary spending levels. The law maintained the direct spending reductions as if the changes in the discretionary spending had not been made, preserving those reductions. This was necessary because of the way the direct spending reductions interact with the level of the discretionary spending limits.

It also further reduced direct spending by \$28 billion by requiring the President to sequester the same percentage of direct spending in 2022 and 2023 as will be sequestered in 2021.

Bipartisan Budget Act of 2015

Just shy of two years after the enactment of the BBA of 2013, the *Bipartisan Budget Act of 2015* of the 114th Congress became law on November 2, 2015. This Act has important similarities with its namesake Act from 2013, but important differences from a legislative standpoint.

Like the BBA 2013, the bill increased the spending limits in the early years, fiscal years 2016 and 2017, by \$50 billion and \$30 billion respectively. It also extended the current law automatic spending reductions (“sequestration”) by a year, through fiscal year 2025. Not only were these changes similar

to the BBA 2013, the same legislative language was used, almost verbatim with only changes to dates.

The Act also included a deeming resolution which established a budget for fiscal year 2017 for the Senate, though it did not include a parallel provision for the House.

The overall structure of the bill was very similar as well, with the budget changes set forth in Title I, and a variety of spending reductions included in the remaining titles.

The differences are important to note, not from a substantive standpoint, but related to the subject at hand, the process by which the changes were made. Unlike the BBA 2013, the Committees of jurisdiction were largely excluded from the decisions as to the content of the BBA 2015. Also, the normal procedure used to bring bills to the Floor in the House and the Senate was circumvented. In contrast, the Bipartisan Budget Act of 2013 stemmed originally from a concurrent resolution on the budget and through discussions between the Chairs of the Budget Committees of the House and Senate. In addition, a committee print was set forth by the Committee on the Budget of the House, which included explanatory material as to the provisions of the Act.⁵³

The BBA 2015 was the product of the Leadership offices of the House and the Senate. Ultimately Rep. John Boehner, Speaker of the House, and Senator Mitch McConnell, Majority Leader of the Senate, reached an agreement with President Barack Obama and Democratic Members of the House and Senate. It was then cobbled together, apparently, by Leadership Offices and the White House and brought to the House and Senate for a vote, and then signed into law as Public Law 114-74.

The *Bipartisan Budget Act of 2015* is the latest, though surely not the last, of budget agreements (or summits). It included, much like the BBA 2013 from which it cribbed liberally, budget process elements. Its design and purpose is consistent with much of what has happened in budget law over the past decades. Its failure to utilize Congressional expertise and experience in its formulation and execution, its preparation in

⁵³ *Bipartisan Budget Act of 2013*, Committee Print of the Committee on the Budget; U.S. House of Representatives; February 2014, Serial No. CP-2 (86-374).

GPO Link: <http://www.gpo.gov/fdsys/pkg/CPRT-113HPRT86374/pdf/CPRT-113HPRT86374.pdf>

the murkiest of corridors, and its negotiation in strict secrecy, all reflect elements seen before.

The laws described, from the CBA through the BBA 2015, a handful have been manifestations of the Members of Congress and the Executive Branch working through policies to produce an outcome. The first Reagan Budget, the BBA 1997 (and its budgetary component the BEA 19997), the Deficit Reduction Act of 2005,⁵⁴ and the BBA 2013, each employed the existing budgetary system of a negotiated budget resolution, legislation enacted pursuant to that agreement, and the participation of Members and Committees relevant to the process. The BBA 2013 and the BBA 2015 bear striking similarities, right down to the language used to alter the discretionary spending limits and extend the annual sequester of direct spending programs. The main dissimilarity is more than just year: The first was enacted by working within the system, and the second was enacted by ignoring it.

Having reviewed past laws, this leads to the next question: What now?

CRAFTING A CONGRESSIONAL BUDGET PROCESS

Having evaluated the way the process has developed, and how it is applied today, the outlines of what a reform might look like begin to take form. The details are yet to be finalized, though perhaps still somewhat shackled like those in Plato's in the Allegory of the Cave,⁵⁵ perhaps some levels understanding of the reality, and what it will entail, of budget process reform is.

This is not an entirely new conundrum. The modern incarnation of the Congressional budget process began with the *President's Commission on Budget Concepts*, issuing on October 10, 1967 a relatively brief (114 pages) report that began in what is an appropriate assessment of the situation today:

The President's Commission on Budget in this Report presents its recommendations designed to make the budget of the United States Government a more understandable and useful instrument of public policy and financial planning. This has not been a simple task. Given

⁵⁴ *Deficit Reduction Act of 2005*, Pub. L. 109-171, 120 STAT. 4, February 8, 2006.

⁵⁵ Plato's *The Republic*; Library of Congress, Washington D.C. 20540.

the scope and variety of Federal Government activities, the Federal budget is *inevitably complex*.⁵⁶ (Emphasis added)

Much the same can be said of today's situation, nearly fifty years after those words were written. With those decades from which to learn, at least there is more information of what has worked and what has not. Unfortunately the latter tends to have greater mass, density, and staying power than the former. Even mustering the power and strength to disassemble and haul away the deleterious components of the process presents difficulties. Running themes through the budget process have been the expedience and myopia, the complexity and the one-dimensionality, and the careering between frenetic legislating and an enervated lassitude when contemplating the skill needed to fully fathom the system.

As in most endeavors, the beginning is simple, with much hope not deceptively so. The two basic elements of the current budget process are straightforward:

- 1) *Congressional consideration of legislation*. This most often taking the form of rules providing for the consideration of bills and joint resolutions; and
- 2) *Statutory controls*. These are procedures set in law and overseen generally by the Executive Branch, specifically under the powers of the President.

Congressional Consideration of Legislation.

The first of these controls happen before resources are committed pursuant to law since they provide for the consideration of bills before they spend money. The second, statutory controls, largely happen after laws have been enacted and the money spent. If violations of enforcement procedures happen in this area, enforcement largely takes the form of across the board s pending cuts, often so painful they were generally circumvented until the sequestration of fiscal year 2013.

For Congressional Budget procedures, two additional elements can be seen. The timetable is currently set out in the Congressional Budget Act of 1974⁵⁷ and begins each year when

⁵⁶ *Report of the President's Commission on Budget Concepts*, U.S. Government Printing Office, Washington D.C. 20402, October 1967; p. 1.

⁵⁷ Section 300, title III, *Congressional Budget and Impoundment Control Act of 1974*, Pub. L. 93-344, 88 STAT. 297, 2 U.S.C. §§ 601-688), July 12, 1974.

the President submits his budget not later than the first Monday in February.⁵⁸

The other element is the relative importance of the budget resolution in the legislative process. The only annual legislative review of the budget occurs through the adoption of the concurrent resolution on the budget for a fiscal year. This document, while valuable, has significant limitations: It is not a law but rather an internal set of rules for Congressional consideration of legislation that *does* become law. A budget resolution cannot by itself alter statute, or fundamentally reform the process. Even this limited vehicle has faced difficulties. First occurring for fiscal year 1999, Congress has failed to adopt such resolutions for both House and Senate more often than not over the past decade. Even when a conference report is adopted, its breadth and quality has been decidedly uneven.

A budget resolution, though its terms are set in law in the *Congressional Budget Act of 1974*, is tantamount, in application, to the Rules of both the House of Representatives and the Senate. Moreover, where provisions in the concurrent resolution on the budget conflict with or are inconsistent with the House Rules, they take precedence.

Though simple resolutions expire at the end of each Congress, those beginning with the term “House Resolution” before the number; “House Concurrent Resolutions”, such as concurrent resolutions on the budget, do not necessarily expire in the same fashion. In each new Congress an “organizing resolution” must be adopted, usually, though not always, this is numbered as “H. Res. 5”. As a matter of its introduction, it deems all laws and concurrent resolutions in force on the date of the end of that Congress shall continue to have force and effect in the new Congress.

A fundamental purpose of a budget resolution is to set a limit on the amount of discretionary spending⁵⁹ that is spending subject to yearly appropriation is as a matter of recent common

⁵⁸ 31 U.S.C. 1105(a). See *Compendium of Laws and Rules of the Congressional Budget Process*; Committee on the Budget of the House of Representatives, August 2015; Serial No. CP-1 (96-107); General Publishing Office, page 366.

⁵⁹ Spending provided by annual appropriation acts reported by the Appropriation Committees of the House of Representatives and the Senate. See section 302(a) and (b) of the Congressional Budget Act of 1974.

practice, bears little practical significance to the amount ultimately provided for this form of spending. During times when discretionary spending limits are set in law does not always mean this is the amount that will be set in a budget resolution. When on the heels of a budget agreement though, such as occurred and reflected in the BBA 2013 and the BBA 2015, the amount has already been, as a matter of practical reality, set. That fundamental element has, in this particular, already been built into the rules of the House and the Senate.

Effective use of the budget resolution for controlling spending and revenue, deficits and debt, growth and contraction of is hampered by at least two respects excrescences of the process: Neither of them within the system, they just tend to happen. The first is the waiving of the budget rules and second is the *ad hoc* replacement of them through piecemeal agreements.

A well-known Latin proverb and legal principle is that there can be “no penalty without law.”⁶⁰ The less happy fellow traveller proverb is that without penalty, there is no law.⁶¹ The penalties for violating the budget resolution have, over time, become only intermittently enforced. In the Senate, any time sixty votes can be mustered to support a measure, normally those same votes can be counted on to waive budget rules. In the House, it is even easier: The Committee on Rules may always be relied upon to waive “all points of order” against any budget rules that might be violated. A budget resolution will only be as effective as the will to enforce it.

The parallel development having the effect of marginalizing the budget resolution is the periodic summitry of President’s and Congress. Though these summit agreements have agreed consistently since the early 1980s, they have also been inconsistent as to form, breadth, and coherent with the existing budget rules.

Though these perils are always looming, and manifest without warning, the budget resolution still remains relevant. Congress estimates the spending, revenue, deficit and debt levels of the budget of the United States for a fiscal year. Still, when a system fails or is ignored, waivers and eruptions of patchworks are not surprising results. Though only one among many facets, it shows how the confluence of statutory and

⁶⁰ In Latin: *Nulla poena sine lege*. The concept is also found in Romans 4:15: “for where no law is, there is no transgression.” (King James Bible).

⁶¹ In Latin: *Sine poena nulla lex*.

rulemaking aspects of the budget system consistently effect one another.

An example of how this interaction is tangled into the most basic of budget concepts lies in the definition of the year for which a budget is to be applied. In a budget resolution, the budget year is naturally really the fiscal year for which budget resolution has been adopted. This fiscal year is updated each year as a new budget resolution is agreed to. This is the case for the consideration of laws and the application of points of order under the Budget Act.

This is not true, though, as the term “budget year” is defined in law.⁶² Though it is closely associated with the budget resolution year, it is defined in law as the fiscal year beginning in the calendar year in which a session of Congress first meets.⁶³ If it doesn’t convene at this time, Congress generally meets several days thereafter.

While the term is useful, between the beginning of a session of Congress and the day on which a budget resolution is adopted, it indicates a different fiscal year. The budget resolution year does not change depending on the date on which a Congress first meets, but rather moves forward a year when a new budget resolution is adopted, or deemed in force, for a particular fiscal year. This most notably makes a difference in the House where the “Cutgo” point of order is based on the statutory definition of “budget year” whereas the Budget Act points of order are based on a budget resolution year.

Statutory Controls

The second main element of budgetary enforcement are those enacted procedures applying limits to spending, revenue, the deficit, and debt levels after legislation has been considered by Congress and signed into law. If this newly enacted legislation causes those existing statutory levels to be exceeded, certain changes automatically take effect. The “automatic” procedures are across-the-board spending cuts and formally known as sequestration.⁶⁴ Currently, automatic direct spending

⁶² The term “budget year” is defined in section 250(c) of the *Balanced Budget and Emergency Deficit Control Act of 1985* specifically for purposes of that statute, but has gained wider applicability.

⁶³ The U.S. Constitution, in Article I, Section 4, Part 2 and Amendment XX, stipulates that Congress must meet beginning at noon of on January 3 of each year or at a time otherwise set in law.

⁶⁴ Sequestration is defined as “the cancellation of budgetary resources

sequestration cuts are in law, but otherwise such reductions are only caused by the enactment of newly enacted legislation.

Sequestration has been the target of much invective, being criticized as a “blunt instrument,”⁶⁵ “harsh,”⁶⁶ and even that it was “*designed* to be terrible policy.”⁶⁷ It is also the primary tool by which statutory enforcement is applied. Many observers, analysts, and followers of budget issues have remarked, accurately, that the fiscal tribulations facing the nation are centered on the growth of direct spending, also known as mandatory or entitlement spending. Since its inception in 1985, a list has been maintained of spending exempt from the “terrible policy” of sequestration. The list is extensive and includes items ranging from Social Security benefits to the “Geothermal resources development fund.”⁶⁸ The program list started as long, and has only become lengthier with time, with any advocate of a particular program pressing for its inclusion. Even during the negotiations over the minimal, minor, and even the irrelevant budget provisions of the BBA 2015, there were those that advocated using it as a vehicle to further expand the list of program exemptions.

Each time a program is added to the sequestration exemption list, it is colloquially known as “narrowing the base” subject to across the board spending reductions. If sequestration is to be included in a budget reform process effort, the wisdom of maintaining a lengthy exemption list in the direct spending category must be examined. In 1993, in the wake of the budget deal that resulted in the BEA 1990, the then CBO Director Robert Reischauer stated:

The best way to build consensus on actions to reduce the deficit is to ensure that the effects of such actions are spread broadly. A broader base would exist for example if all mandatory programs were subject to sequestration.⁶⁹

provided by discretionary appropriations or direct spending laws.” *A Glossary of Terms Used in the Federal Budget Process*; Government Accountability Office (GAO-05-734SP), Fifth Edition, Washington, D.C. 2005, p. 90.

⁶⁵ Keith Laing, “DOT chief: Sequestration a ‘blunt instrument’ that should be replaced”; *The Hill*, August 1, 2013.

⁶⁶ Harry Stein and Hilary Gelfond, “How Shortsighted Spending Cuts Increase Waste, Fraud, and Abuse”, *Center for American Progress*, October 1, 2014.

⁶⁷ Alex Altman, “A Guide to Sequestration, the Bad Budget Policy We May Not Be Able to Avoid”; *Time Magazine*, February 6, 2013, Emphasis in the original.

⁶⁸ Section 255(g)(2) of the *Balanced Budget and Emergency Deficit Control Act of 1985*, Pub. L. 99-177, 99 STAT. 1085, December 12, 1985; (2 U.S.C. 905(g)(2)).

⁶⁹ Robert D. Reischauer, Director, Congressional Budget Office; “CBO

In addition to enforcement procedures, the Executive has a corresponding role to play in the Federal budget. First taking shape in the Budget and Accounting Act of 1921, as previously described, its more recent incarnation does not vary significantly from the BAA.

Some differences have arisen though – the Congressional Budget Act of 1974 now requires the President to submit a budget by the first Monday in February of each calendar year. Chapter 11 of Title 31 of the United States Code sets out the specific items that the President must include in the budget submission. In particular, section 1105(a) of Title 31 sets out 39 separate paragraphs for items that must be included in the President's budget, and this does not count other items that must be sent along at the same time required in other statutes.

The Congressional Role in the Budget Process

This bifurcation in responsibility for budgeting, porous by necessity, interleaved through Constitutional requirement, entwined by practicality, still requires serious reexamination. The very establishment of the bedrock of the budget process, the Budget Act, stemmed from the perceived encroachment by the President into Congressional prerogative. It succeeded to a degree. Though attempting to amend not more than ten years after its enactment the House Rules Committee observed: "The establishment of the Budget Committees and the Congressional Budget Office, and the institution of an annual congressional debate over the budget plan are clearly responsible for greater congressional control of fiscal policy and budget priorities."⁷⁰ Perhaps ironically, the budgetary process reforms included in the law were instigated by the fracas between the branches. *Congressional Quarterly* described the negotiations:

Republicans insisted on coupling impoundment control with budget reform. They argued that it was unreasonable to put restraints on the President's power to hold down spending if Congress did not simultaneously discipline its own procedures to eliminate the excesses that made presidential impoundments necessary.⁷¹

Testimony"; Subcommittee on Legislation and National Security Committee on Government Operations, U.S. House of Representatives May 13, 1993, p. 13.

⁷⁰ *Congressional Budget Act Amendments of 1984*, Report of the Committee on Rules, U.S. House of Representatives, H. Rpt. 98-1152 (Part I), 98th Congress, Second Session, October 5, 1984, pp. 10-11.

⁷¹ "Budget Reform Sidetracked Anti-Impoundment Bill." *CQ Almanac 1973*,

Still, today the entire budget process, as set out in the timetable of the Budget Act, begins with the President's submission of his budget. The submission comes usually in sequential proximity, and hence policy conjunction, with the State of the Union. The specific policies are very often of limited duration and importance, they have historically been significant in importance instances: President Bill Clinton's health care initiative and stimulus bill, President George W. Bush's tax reductions, and President Barack Obama's health care initiative and stimulus bill (redux).

This is far removed from the timetable of the Congressional Budget Act of 1974 as originally enacted. Then, the beginning of the entire budget process did not begin in February, it began in the prior November. The original schedule required the President to submit his "current services budget" on November 10 of each year, followed by the Presidential budget submission on the "15th day after Congress meets" which then fell sometime in January.⁷² The current services budget is still required earlier than the formal budget. By law, the President must submit it "on or before the first Monday after January 3 of each year."⁷³ This law is not observed. It has been completely ignored since the enactment of the current date of the full budget submission that happened in 1990 with the passage of the BEA 1990.

Any budget process reform in its journey to enactment must face the obstacles of partisanship, bicameral rivalry, internecine conflict between branches of government, legislative rivalry among committees and support agencies. Adding these elements to the multiplicity of budget processes, concepts, definitions, laws and rules, makes the whole endeavor inexorably complicated. It might even be characterized as maddeningly so.

CONCLUSION

If the diagnosis appears grim, the reason is quite simple: It is, in fact, grim. Those who tread easily through the twisting corridors and intricate alleyways of what has become known, mundanely misleading in simplicity, the "budget process", are

29th ed., 252-62. Washington, DC: Congressional Quarterly, 1974.

⁷² Congressional Budget Act of 1974, section 300 (as enacted).

⁷³ 31 U.S.C. 1109.

few. Though many have toiled, and continue to put great effort into the endeavor of amending the process, cohesion of purpose and system has not been achieved. Much work has been applied to bring clarity to the murk. In truth, a bill has not yet been written to bring a comprehensive order to the budget process. This is not surprising since it will require much time, much effort, and the pen of those possessing the experience to fathom the recondite morass of concepts and definitions.

So while much legislation has been churned out in the past decades, very often the result is meager. Occasionally a venture to bring about “comprehensive reform” of the budget is attempted, but these have constituted thick bills which have simply strung together individual reforms with no real overall purpose or cohesive structure. Furthermore, these bills, if enacted, would result in an equally arcane and difficult to understand situation, and likely achieve nothing more than additional layers of procedures with which to contend.

The two most significant budget reform laws recently enacted were the *Statutory Pay-As-You-Go Act of 2010* and the *Budget Control Act of 2011*. Both were necessitated by a looming breach in the public debt limit, both were the result of a twisted legislative pathway to signature, and both added complexity to complexity: the first for spending not subject to annual Congressional review and the second for exactly that kind of spending. Their commonality constituted an eased journey for increases in the statutory limit on the Public Debt at the price of another missed opportunity for real restructuring.

Some alternate form of budget process reform has become a necessity – a government as large as ours; one responsible for “the general welfare” is prone to the abuse of the Federal tax receipt if the method by which those dollars are spent is unclear. The responses to this, not inaccurately, are that a government this large and complex will by equal necessity require complexity and intricacy in detail. One does not build a skyscraper with just hammer and nails. Yet skyscrapers are built all the time, sometimes even on time and within expected costs, even though large skilled crews and impressively noisy machinery are pressed into service.

What is now required is a broad ranging law with clear purpose, comprehensive in an etymologically accurate sense of the word, and competent execution without having to suffer the

twin maladies of the modern legislative process: expedience and shortsightedness. The very idea is, in its own way, revolutionary. History is replete however with examples of advocates of “revolutions” having sought to tear down an *ancien régime* and start again, only to find themselves standing amidst rubble after having done incalculable damage to that which they cherished. It is perhaps by some Act of divinity that the American Revolution was in essence a conservative one. It forwarded the radical idea of replacing Monarchy with a Republic, but conserving freedoms and mores, preserving institutions and rights, and establishing the nation by which the promulgation of laws is by representatives of the citizenry.

Invoking the Founding Fathers is common practice in political discourse in 21st Century America, as it was in the 20th and the century before that, but in this particular regard, it bears more than its share of meaning: The “budget” evokes green eyeshades, calculators, computerized spreadsheets, even Bob Cratchit sitting on his high seat with ink stained fingers numbing his mind with bookkeeping numbers. Here it is more than balancing a checkbook or keeping track of double entry accounting, it is the resources of the Nation and their character, the power to take from Americans their property and wealth, and distribute it for what is by Constitution, the common good. Such a subject, perhaps, merits a quote or two from Madison, Franklin, or Hamilton.

While it is easy to declare an intent to scrap the system entirely and to begin anew, the reality of doing so is far harder to accomplish. To avoid those previously mentioned piles of rubble, to avert breaking the things that work while failing to fix the things that do not, great care, much effort, and a not inconsequential modicum of skill is required. It is not enough to simply tear down the structure and build from the ground. The very foundation of the edifice must be carefully removed and rebuilt, keeping certain structures, renovating others, and consigning still others to dusty history books. Rebuilding the foundation is the essential first principle. It is through this effort that the restoration of Congressional responsibility and prerogative may be accomplished.