Less is More: a Move Toward Sanity in the Budget Process

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LESS IS MORE: A MOVE TOWARD SANITY IN THE BUDGET PROCESS

DONALD B. TOBIN*

The Congressional Budget and Impoundment Control Act of 1974 ("Budget Act")\(^1\) was originally designed as a structural mechanism which would allow Congress to consider the entire federal budget in the aggregate. It was an attempt to gain control over the fragmented way in which the Congress considered the budget, and to counter President Nixon's attempts to increase the President's power over the purse.\(^2\) The Budget Act consisted of structural changes and was policy neutral since it contained no preference or bias for any specific type of fiscal policy.

During the late 1970s and 1980s, the federal budget deficit began to skyrocket.\(^3\) High unemployment, high inflation, and supply-side economics all contributed to the growing deficit. As the budget deficit exploded, politicians attempted to grapple with the ever increasing deficit problem. However, there was no consensus regarding what substantive policies should be enacted to bring the deficit under control. Absent any consensus regarding substantive policy, Congress turned to budget process changes as a panacea for deficit reduction. Thus, the Budget Act was transformed from a policy neutral mecha-

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2. The express purposes of the act were:
   (1) to assure effective congressional control over the budgetary process; (2) to provide for the congressional determination each year of the appropriate level of Federal revenues and expenditures; (3) to provide a system of impoundment control; (4) to establish national budget priorities; and (5) to provide for the furnishing of information by the executive branch in a manner that will assist the Congress in discharging its duties.


The debt held by the public as a percent of Gross Domestic Product rose from 26.1% to 48.8%. Id. at 135.
nism which provided a structural method for considering the budget, to a policy-driven mechanism designed to reduce the deficit.\footnote{For an economic analysis of the deficit problem, see The Federal Budget Process Already Works: Hearings Before the House Comm. on Gov't. Reform & Oversight, Subcomm. on Gov't. Management, Information, & Technology, 104th Cong., 2d Sess. (March 27, 1996) (statement by Richard Kogan), available in Westlaw at 1996 WL 158382 [hereinafter Hearings]; see also ROBERT EISNER, THE MISUNDERSTOOD ECONOMY: WHAT COUNTS AND HOW TO COUNT IT (1994).}

Congress determined that even if there was no policy consensus for deficit reduction, the budget process itself could be used to force Congress to reduce the deficit.\footnote{Hearings, supra note 4.} Congress could then blame the budget process for any unpopular decisions which were required to reduce the deficit. However, since any process can be abused and circumvented, and since budget process legislation is often a substitute for political will regarding substantive policy, Congress has often found ways around the process constraints, or the process constraints themselves have often been insufficient to "force" Congress to reduce the deficit. In addition, because the process was supposed to lead to deficit reduction, whenever the deficit increased, Congress could blame the process. Congress seems to believe that if it could just implement the perfect budget process, the budget would balance itself. However, no budget process can ensure a balanced budget. The solution for reasonable budget policy lies in political will, not a political process.\footnote{In 1997, after over a year of negotiation, the Congress passed and the President signed The Balanced Budget Act of 1997, H.R. 2015, 143 CONG. REC. H6342 (daily ed. July 30, 1997) (passage in the House by a vote of 346-85); 143 CONG. REC. S8410 (daily ed. July 30, 1997) (passage in the Senate by a vote of 85-15). The Balanced Budget Act of 1997 is designed to bring the federal budget into balance by 2002. The Act passed by wide margins in both the House and Senate, and is further indication that bipartisanship and political will, not the budget process, are the essential elements for a balanced budget. The Congress also passed, The Taxpayer Relief Bill, H.R. 2014, 143 CONG. REC. D865 (daily ed. July 31, 1997) (passage in the Senate by a vote of 92-8); 143 CONG. REC. H6664 (daily ed. July 31, 1997) (passage in the House by a vote of 389-43). The President signed both bills on August 5, 1997. Clinton Statement on Taxpayer Relief Act, U.S. NEWSWIRE, Aug. 5, 1997, available in Westlaw at 1997 WL 5714602; Statement by President Clinton on Signing the Balanced Budget Act, U.S. NEWSWIRE, Aug. 5, 1997, available in Westlaw at 1997 WL 5714600 (H.R. 2015). The large margin of victory and the relative ease in passing the measures was due to the bipartisan nature of the agreement. The votes in the Senate were sufficient to withstand any filibuster or any point of order and indicate that the Senate could have passed both plans without the necessity of a fast-track procedure.}

Rudolph Penner, a former director of the Congressional Budget Office (CBO), in discussing budget process reform stated, "The problem is not the process, the problem is the problem."\footnote{The Problem Is the Problem, WASH. POST, July 18, 1984, at A14.} Penner's argument was that the solution to the budget deficit was for Congress to make the politically sensitive deci-
sions and balance the budget. However, Penner's statement that the process is not the problem may no longer be accurate. The Budget Act and the budget process have become so riddled with complicated provisions and loopholes that the Act itself may now be part of the problem. This is not because there is too little process, as argued by others when Penner made his comments, but because there is too much process.

The budget process has become riddled with exceptions, exemptions, waivers and violations. The Budget Act is so complicated that very few members of Congress really understand its implications. Not only is the Budget Act extremely complicated, but the complications make the Act ripe for political abuse since the Budget Act is interpreted by politically appointed individuals and the Budget Committee is given wide discretion over enforcement of the Act. Congress has thus created a massive piece of legislation which is understood by almost no one, and which can be interpreted and manipulated by the majority to its political advantage. The Budget Act is no longer a mechanism for considering the federal budget, but instead is a strong tool in the majority's legislative arsenal.

Part I of this article examines the history of budget process changes since the Budget Act was enacted. Part II discusses the current budget rules under which Congress makes tax and spending decisions. Part III analyzes problems in the current budget process, and Part IV provides potential solutions for simplifying and reforming the budget process.

I. HISTORY OF THE BUDGET PROCESS SINCE THE CONGRESSIONAL BUDGET ACT

A. The Congressional Budget Act of 1974

The Budget Act was originally crafted to provide Congress with a structure
for analyzing the budget and for making fiscal decisions.14 Prior to 1974, there was no mechanism for Congress to consider the entire federal budget. Each appropriations subcommittee independently appropriated money, each authorizing committee independently created mandatory programs,15 and the tax writing committees independently created revenue bills. Each piece of legislation still needed to pass the Congress, but each bill was considered individually and on its own merit. Legislation was not evaluated in the context of the entire federal budget. The Budget Act was a structural change which provided a mechanism for Congress to consider individual spending bills in the context of an omnibus federal budget plan.16

In addition to the haphazard method for considering spending and revenue bills, in 1973 the Congress engaged in a bitter battle with the President regarding the budget and the President's power to impound funds.17 The Budget Act was thus not only a structural change to centralize the budget process, it was also an assertion of congressional power of the purse.18

14. See supra note 2.
15. The General Accounting Office defines mandatory spending: [Mandatory spending] refers to outlays for entitlement programs such as food stamps, Medicare, veterans' pensions, payment of interest on the public debt, and nonentitlements such as payments to states from Forest Service receipts. By defining eligibility and setting the benefit or payment rules, the Congress controls spending for these programs indirectly rather than directly through the appropriations process.


Congress amended the CBA in 1985 to include a definition of entitlement authority, which includes mandatory spending. The CBA, as amended, defines entitlement authority as spending authority described by § 401(c)(2)(C) of the CBA. See CBA § 3(9) (as amended by the Balanced Budget and Emergency Deficit Control Act of 1985 ("Gramm-Rudman-Hollings"), Pub. L. No. 99-177, tit. II, § 201(a)(1), 99 Stat. 1037, 1038 (1985) (amending CBA to add definition of entitlement authority). Section 401(c)(2)(C) describes entitlement authority as:

payments (including loans and grants), the budget authority for which is not provided for in advance by appropriations Acts, to any person or government if, under the provisions of the law containing such authority, the United States is obligated to make such payments to persons or governments who meet the requirements established by such law.

CBA § 401(c)(2)(C), 88 Stat. at 317-18.

The Budget Act created the Senate and House Budget Committees, and the CBO. The CBO was created to provide the Congress with advice and expertise regarding all aspects of the budget. The CBO provides macroeconomic analysis, analyzes the costs of various pieces of legislation, monitors the budget process, provides information regarding revenues and is a general resource to Congress regarding all matters of budget policy.

Due to Congress's mistrust of the executive and its reassertion of the power of the purse, Congress determined that it needed an organization which could provide information to Congress independent of the executive branch's Office of Management and Budget (OMB). Congress intended the CBO to provide Congress with the same information and advice that the President received from OMB. Prior to this point, Congress did not have a central authority to analyze the various components of the federal budget, and it often relied on the OMB's expertise.

The Act also established a macro process for examining the entire federal budget, set a timetable for consideration of the budget, and required the Congress to consider economic conditions in its consideration of the budget. The Budget Act was designed to be policy neutral. The Budget Act's purpose was not to reduce the deficit, but to provide for orderly consideration of the nation's fiscal priorities.

The procedures in the Budget Act are enforced through "points of order." These points of order lie for specific violations of the Budget Act. If an action violates the Act, any Member of Congress may raise a point of order, and if the point of order is sustained, the offending language may be stricken from the bill or the bill itself may not be considered. However, the body may waive...
a budget act point of order. 29

B. Omnibus Budget Reconciliation Act of 1981 (OBRA) 30

The 1981 OBRA was the first time Congress attempted to use a reconciliation bill in the manner it is used today. Congress made no specific process changes, but used the process under the 1974 Act in a way never envisioned. 31 In 1981, President Reagan sought a mechanism for prompt consideration of his economic agenda. 32 Congress and the President latched onto the reconciliation procedures in the Budget Act. Since reconciliation bills were privileged under Senate rules, and since there was a limited time period for consideration of a reconciliation bill, a budget reconciliation bill could not be filibustered, and the President's package was ensured prompt consideration. 33 Authorizing committees were instructed to make changes to the revenue code and to mandatory programs. 34 These changes were then reported to the full Senate in one omnibus bill. 35 Thus, after 1981, the Senate established a procedure for circumventing the filibuster and for providing a fast-track method for consideration of budget legislation.

What was so striking about the process changes in OBRA of 1981 is that they were one of the most significant budget process changes in the history of the Budget Act, and they were accomplished without any change in the law. The reconciliation process has now become the tool for consideration of the budget, and every major deficit reduction package since 1981 has had a reconciliation bill as its major component.

29. However, some points of order in the Senate may only be waived with sixty votes. See CBA § 904(c), amended by Budget Enforcement Act of 1990, § 13208(a)(1), 104 Stat. 1388-619 (providing that §§ 301(i), 302(c), 302(f), 305(b)(2), 305(c)(4), 306, 310(d)(2), 310(f), 311(a), 313, 601(b), 606(c), 904(c), & 904(d) may only be waived with sixty votes).
31. The Budget Act originally created reconciliation as a mechanism to reconcile spending between the first and second budget resolution. The Congress never indicated any intention that reconciliation be used as a method for enactment of major substantive pieces of legislation.
33. Id. at 897-98.
34. Id. at 887.
35. Id. at 885-86.
C. The Balanced Budget and Emergency Deficit Control Act of 1985 ("Gramm-Rudman-Hollings")

In 1985, the budget process almost completely broke down and the federal deficit and debt began to skyrocket. Huge tax cuts, smaller than expected spending cuts, and a weaker than expected economy all combined to create historically large budget deficits. These huge budget deficits, combined with a budget process in near collapse and the need to raise the ceiling on the national debt to over $2 trillion, led to further budget process changes and the passage of the Balanced Budget and Emergency Deficit Control Act of 1985 ("Gramm-Rudman-Hollings" or GRH).

GRH shifted the focus of the 1974 Budget Act from a structural mechanism for considering budget priorities to a structural mechanism designed to balance the budget. GRH set year-by-year deficit targets which were designed to gradually decrease the deficit to zero. These deficit targets were enforced by sequestration, commonly referred to as across-the-board spending cuts. If the budget deficit in any year exceeded the deficit target, there would be an across-the-board reduction in spending across all non-exempt direct spending accounts. Half the spending reductions would be achieved from the defense function and half from non-defense functions. In addition, Congress could suspend the procedures in times of war or recession.


37. The deficit in 1985 was $221.7 billion. The deficit in 1985 was the largest in the Nation's history up to that point. Debt held by the public as a percent of Gross Domestic Product was at its highest level since the Vietnam War. CONGRESSIONAL BUDGET OFF., THE ECONOMIC AND BUDGET OUTLOOK: FISCAL YEARS 1997-2006 134 (1996).

38. Joyce & Reischauer, supra note 24, at 433.


41. GRH § 251(a)(3)(B), 99 Stat at 1064.

42. GRH § 254, 99 Stat. at 1078-80 (Congress could suspend GRH during recessions); GRH § 251(g), 99 Stat. at 1072 (GRH automatically suspended if there is a declaration of war by the Congress); see also GRH § 258, amended by BEA § 13101, 104 Stat. at 1388-575 (codified as amended at 2 U.S.C. § 907a (Supp. III 1992)). However, Congress has never suspended the Act for either event, even during the 1990-1991 recession. In January 1991, the Senate rejected a joint resolution to suspend the Act by a vote of ninety-seven to two. 137 CONG. REC. S1359 (daily ed. Jan. 31, 1991). The Senate rejected the motion a second time in May 1991 by a vote of...
In the original GRH, the Comptroller General determined whether the budget deficit in any given year exceeded the deficit target.\textsuperscript{43} If the budget deficit exceeded the target, the Comptroller General notified the President that a sequester was required.\textsuperscript{44} After such notification, the President issued a sequestration order which implemented an across-the-board reduction in non-exempt spending programs.\textsuperscript{45} After the issuance of the order, Congress had two months to act before the sequester would automatically take effect.\textsuperscript{46} However, in \textit{Bowsher v. Synar},\textsuperscript{47} the Supreme Court held that the mechanism in GRH for triggering sequestration was unconstitutional in that it violated the separation of powers doctrine. The Court held that Congress could not vest executive power in an officer removable by Congress.\textsuperscript{48} In 1987, Congress amended GRH and gave the Director of OMB the power to determine if the deficit reduction targets were breached.\textsuperscript{49}

\section*{D. Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987\textsuperscript{50}}

In 1987, Congress realized that it would be unable to meet the deficit targets set out in the GRH.\textsuperscript{51} The deficit target for 1988 was $108 billion and the projected deficit was $169 billion.\textsuperscript{52} Congress and the President were unwilling to make substantive legislative changes to meet the targets.\textsuperscript{53} In addition, a sequester of that magnitude would have caused drastic reductions in both defense and non-defense spending. Thus, neither party was interested in passing legislation to meet the targets, nor did they want to implement an across-the-

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\item 43. GRH § 251(b), 99 Stat. at 1068.
\item 44. GRH § 251(b)(2), 99 Stat. at 1069.
\item 45. GRH § 252, 99 Stat. at 1072.
\item 46. GRH § 254(b), 99 Stat. at 1080.
\item 47. 478 U.S. 714 (1986).
\item 48. \textit{Id.} at 721-34.
\item 51. Deficit targets are extremely problematic since economic assumptions and deficit projections are never exact. In addition, since the targets in GRH were not adjusted for inflation, Congress could make significant efforts to reduce the deficit and those efforts could be stymied by changes in economic conditions.
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board sequester. Congress, therefore, amended GRH and extended the deficit targets by two years. In addition, Congress restored the automatic sequester, ruled unconstitutional in its previous form by Bowsher v. Synar, by giving the power to order a sequester to the Director of OMB instead of to the Comptroller General.

The 1987 changes provided two lessons which should guide future budget process reform efforts. First, if targets or goals are unrealistic or unreachable, Congress and the President will find ways to circumvent them. Second, the 1987 changes proved that mere process changes alone would not balance the budget.

E. Omnibus Budget Reconciliation Act of 1990 (OBRA)

In late 1989, it once again became impossible, or at least impractical, to reach the GRH targets, even the amended ones. The President and the Congress were in a stalemate over the budget as they sparred over how to reach or circumvent the GRH targets. President Bush had previously made his "no new taxes" pledge, and Congress was unwilling to make the drastic spending cuts which would be required to meet the targets if revenue increases were not also an option. The Omnibus Budget Reconciliation Act of 1990, and Title XII of that Act, The Budget Enforcement Act of 1990 (BEA) were a compromise between the President and Congress. President Bush modified his "no new taxes" pledge and agreed to a deficit reduction package which included some revenue increases, and Congress agreed to accept further spending cuts and budget process provisions which would encourage restraint on both appropriations and direct spending.

The changes implemented due to the budget agreement fundamentally altered the budget process. The BEA greatly improved the GRH and the

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58. See 26 Weekly Comp. Pres. Doc. 1005 (July 2, 1990) (President Bush's decision to move away from his "no new taxes" pledge); for a discussion regarding the events leading up to the BEA, see AARON WILDAVSKY, THE NEW POLITICS OF THE BUDGET PROCESS 482-526 (1992).
Budget Act, but also caused significant confusion regarding the budget process. The BEA recognized the flaw of deficit targets in GRH and moved away from deficit targets toward spending caps.\(^{60}\) It divided the budget into three parts: 1) overall deficit targets,\(^{61}\) 2) appropriations,\(^{62}\) and 3) direct-spending and receipts legislation.\(^{63}\)

The overall deficit targets were similar to those in GRH, except the BEA deficit targets were adjusted for economic conditions.\(^{64}\) In addition, the deficit targets were set at realistic levels and did not promise to balance the budget.\(^{65}\) Thus, if Congress adhered to the spending caps,\(^{66}\) and the PAYGO requirements,\(^{67}\) spending would never exceed the deficit targets and a sequester would never be necessary.

The second division in BEA placed a cap on discretionary spending.\(^{68}\) Under this system, Congress could not spend more than the cap amount.\(^{69}\) If Congress passed an appropriations bills which exceeded the spending caps, and the excess spending caused the deficit to exceed the target, then a sequester would be required.\(^{70}\) Under the BEA, legislation deemed an "emergency" by the President and the Congress is exempt from the budget caps and seques-

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\(^{60}\) For a more thorough discussion of the components of the BEA, see *infra* part II.


\(^{63}\) BEA § 13101, 104 Stat. at 1388-581 (amending GRH § 252 and codified at 2 U.S.C. § 902 (Supp. II 1990)). This section is commonly referred to as Pay-As-You-Go or "PAYGO." As the name implies, PAYGO requires that any increase in the deficit caused by changes in receipts or mandatory programs be paid for with corresponding changes to increase revenues or decrease mandatory spending.

\(^{64}\) BEA § 13101, 104 Stat. at 1388-578 (amending GRH § 251(b)(1) and codified at 2 U.S.C. § 901(b)(1) (Supp. II 1990)).


\(^{70}\) BEA § 13101, 104 Stat. at 1388-578 (amending GRH § 251(a)(2) and codified at 2 U.S.C. § 901(b)(1) (Supp. IV 1992)).
In addition, President Bush was extremely concerned that Congress would meet the spending caps by making drastic cuts in defense spending. Thus, in order to protect defense spending, President Bush insisted upon a "wall" between defense and domestic spending. Therefore, in the first three years of the BEA, there were separate spending categories for domestic, international and defense discretionary programs and funds could not be shifted among these categories without a supermajority vote (three-fifths Senators sworn into office or sixty votes). The BEA thus placed a major impediment on budget prioritization.

The third major component of the BEA restrained the mandatory or direct spending component of the budget. Mandatory spending and revenue provisions are labelled as such because they are on automatic pilot and are not considered by Congress on a yearly basis. Spending decisions regarding mandatory programs are not made through the annual appropriations process, instead, funds are automatically disbursed if beneficiaries meet the statutory requirements.

Unfortunately, direct spending programs can grow dramatically even if Congress makes no programmatic changes. A recession may cause an increase in the number of people seeking public assistance, or the costs of caring for people within a program may increase at higher than expected levels. These increases are almost completely independent of annual congressional spending decisions.

Revenues are similarly independent of annual congressional action. Government revenues increase during economic expansions and decrease during downturns. In addition, the revenue situation is also influenced by tax expenditures.
For example, the government provides taxpayers with a tax deduction for the mortgage interest on their principal residences. This deduction decreases an individual's income tax liability, thus decreasing revenue to the federal government. However, the amount of the tax deduction varies depending on the number of homeowners in any given year and on the current interest rate homeowners must pay. The larger the interest rate the larger the tax deduction.

Since both direct spending and revenues were independent of the annual appropriations process, PAYGO was instituted to ensure that direct spending and revenues did not worsen the projected deficit in any year. Thus, if Congress wanted to increase direct spending, it would either need to cut other direct spending programs or increase revenues. Similarly, if Congress wanted to cut taxes, it would either need to reduce direct spending or increase revenues in other areas. Under the Budget Act, it is impermissible to use funds covered by the PAYGO accounts to supplement programs not included in PAYGO. For example, it is impermissible to cut taxes and pay for those tax cuts with cuts in discretionary spending. PAYGO is enforced through its own independent sequester and through Budget Act points of order.

F. Omnibus Budget Reconciliation Act of 1993 ("Clinton Economic Plan")

The Clinton Economic Plan made no major changes to the BEA. It extended the budget caps and PAYGO requirements through fiscal year 1998 and

77. CBA § 3(3), 88 Stat. at 299 (codified at 2 U.S.C. § 622(3) (1988)) (Tax Expenditure "means those revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability."); see also STAFF OF SENATE COMM. ON THE BUDGET, 102D CONG., 2D SESS., TAX EXPENDITURES: COMPENDIUM OF BACKGROUND MATERIAL ON INDIVIDUAL PROVISIONS (Comm. Print 1992); Edward A. Zelinsky, James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions, 102 YALE L.J. 1165 (1993).

78. As with almost every provision in the Budget Act there are exceptions to this general rule. First, the budget resolution could specifically provide for reserve funds which allow funds to be transferred from mandatory to discretionary programs or vice versa. See H. R. CON. RES 178, 104th Cong., 2d Sess. § 305 (1996). Second, the provision could be waived with 60 votes. Third, through budget scoring conventions, an appropriations bill may get credit, and thus be able to spend more money, if the mandatory spending reduction is added directly to the appropriations bill.

79. See 138 CONG. REC. S10,766-67 (daily ed. July 29, 1992) (statements of Sens. Bentsen and Specter regarding the rule). However, this provision of the Budget Act may be waived with sixty votes. See CBA § 904(c), amended by GRH § 271, 99 Stat. at 1094.


provided for ten year budgeting.\textsuperscript{82} Even though the 1993 plan made no major process changes, it still was important for budget process purposes since it essentially ratified the procedures instituted in 1990.

The budget caps implemented in 1990 significantly constrained discretionary spending starting in 1993.\textsuperscript{83} Therefore, after President Clinton took office, Congress and the President needed to devise a deficit reduction package which met the spending caps in the 1990 agreement.\textsuperscript{84} Congress passed a major deficit reduction package and honored the spending caps from the 1990 agreement.\textsuperscript{85}

\textbf{G. The Balanced Budget Act of 1995\textsuperscript{86}}

After the 1994 elections, the Republicans took over the majority in both the House and Senate. The 1990 process changes were negotiated between a Democratic Congress and a Republican President and it was unclear if the 1990 agreement could withstand the change in Congress.\textsuperscript{87} The Budget Act and GRH were not legislatively amended after the 1994 elections; however, the budget process was significantly impacted by several non-legislative changes.\textsuperscript{88}

First, the Senate altered its rules regarding asset sales. Prior to 1995, when the government sold an asset, the proceeds from the sale were not "scored"\textsuperscript{89} for purposes of deficit reduction even if selling the asset provided some revenue to the treasury.\textsuperscript{90} The rationale for the prohibition was that Congress wanted to discourage short-term solutions to structural budget problems. If asset sales were scored, it would encourage short-term thinking since asset sales

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\textsuperscript{82} H.R. CONF. REP. NO. 213, supra note 81, at 1091.
\textsuperscript{84} Id.
\textsuperscript{85} H.R. CONF. REP. NO. 213, supra note 81, at 1092. The 1993 deficit reduction package has been extremenously successful. Recent estimates indicate that the budget deficit in 1997 will be under $30 billion, or only 0.5% of GDP. Jackie Chalmes, \textit{Budget Deficit of Just $11 Billion So Far Hints at a Bright Picture for Full Year}, WALL STREET J., July 23, 1997, at A2; Beth Belton, \textit{A Booming Economy is Behind the Feat}, USA TODAY, July 18, 1997, at A11.
\textsuperscript{87} Several Republican members have proposed significant budget process changes, but they have yet to become law. See H.R. 4285, 104th Cong., 2d Sess. (1996); H.R. 2599, 104th Cong., 1st Sess. (1995).
\textsuperscript{89} The budgetary savings from legislation is estimated by CBO. This action is referred to as "scoring" legislation. If legislation is not "scored" for purposes of deficit reduction it means that the legislation provides no budgetary savings for purposes of PAYGO or the budget caps.
provide a significant budgetary impact in one year, but often lose money over
the long term.\textsuperscript{91}

The second major change in 1995 was the modification of the reconciliation
process and the institution of the use of multiple reconciliation bills. In
previous years, Congress provided for one, if any, reconciliation bill in the
budget resolution and all mandatory spending and revenue changes were in-
cluded in that one bill.\textsuperscript{92} In 1995, the budget resolution allowed for the cre-
ation of three reconciliation bills. One reconciliation bill for welfare changes,
another for Medicare changes and a third to provide a tax cut.\textsuperscript{93} A multiple bill
reconciliation process allows for the expedited consideration of several contro-
versial policy measures, and it foreshadows the use of the budget reconciliation
process as a fast-track method of considering controversial legislative meas-
ures.\textsuperscript{94}

II. THE CURRENT BUDGET PROCESS

The current budget process is divided into three major components: 1) the
budget resolution, 2) reconciliation, and 3) appropriations bills. The budget
resolution sets the basic framework for current and future spending and reve-
nue decisions. The reconciliation bill provides instructions to authorizing
committees to achieve deficit reduction within their jurisdiction. The appro-
priations process allows Congress to fund programs on an annual basis.

A. The Budget Resolution

The budget resolution is the first step in the congressional budget process.
A budget resolution is passed by Congress and does not require the President's
signature.\textsuperscript{95} Therefore, it does not have the force of law, but only acts to guide
Congress's actions. The budget resolution contains the aggregate spending
levels for discretionary spending, entitlement spending\textsuperscript{96} and revenues. The

\textsuperscript{92} See TIEFER, supra note 32, at 885.
\textsuperscript{93} H.CO.N. REs. 178, 104th Cong., 2d Sess § 203(a) (welfare), § 203(b) (Medicare), §
203(c) (tax cut) (1996). Only one reconciliation bill, the welfare provisions, was considered by
the Senate. H.R. 3734, 104th Cong., 2d Sess. (1996). H.R. 3734 was signed by the President on
193, 110 Stat. 2105.
\textsuperscript{94} Bill Dauster, The Day the Senate Died: Budget Measure Weakens Minority, ROLL
\textsuperscript{95} See 2 U.S.C. § 632(a) (1994) (giving Congress a deadline for completing a budget reso-
lution by April 15th for the fiscal year beginning in October of the same year).
\textsuperscript{96} The Congressional Budget Act refers to § 401(c)(2)(C) for the definition of "entitlement
authority." Section 401(c)(2)(C) states:
(C) to make payments (including loans and grants), the budget authority for which is not
provided for in advance by appropriations Acts, to any person or government if, under the
provisions of the law containing such authority, the United States is obligated to make
resolution also contains suggested levels of spending for each budget category; however, these levels are solely advisory.\textsuperscript{97}

The budget process is further complicated by the fact that the suggested levels of spending by category are established in the resolution by functional categories. These are the categories used by the Executive Branch and OMB to categorize spending programs within a topical area. However, when Congress actually spends money, it does so through the appropriations process. Budget function categories do not directly coincide with the 13 appropriations subcommittees' jurisdictions. For example, when Congress votes upon a budget resolution which designates a certain amount of funds for function 300, Natural Resources and Environment, that funding may be divided between several appropriations bills. Thus, when the budget resolution increases funding for the Natural Resources and Environment function, all of the increases may go to energy programs when Congress actually intended them to go to environmental programs.\textsuperscript{98} Since the budget resolution functional totals do not correspond with the appropriations subcommittees, it is very difficult for Congress clearly to prioritize spending among appropriations bills.

**B. The Appropriations Process**

Once Congress passes a budget resolution, the Senate and House Appropriations Committees divide up the total discretionary spending figure in the budget resolution among the various Subcommittees on Appropriations.\textsuperscript{99} The Appropriations Committees may divide the aggregate total in any manner they choose,\textsuperscript{100} and the functional totals in the budget resolution are only advisory as to them.

Once the Appropriations Committees set the subcommittee allocations, the allocations are binding on each subcommittee.\textsuperscript{101} Thus, each subcommittee

\begin{footnotes}
\footnote{such payments to persons or governments who meet the requirements established by such law. 88 Stat. at 318 (codified at 2 U.S.C. § 651 (1994)).}
\footnote{97. 137 CONG. REC. S6324-26 (daily ed. May 22, 1991) (statement by Sen. Sasser, Chairman of the Senate Budget Committee).}
\footnote{98. The Appropriations Committee attempts to translate the functional totals into appropriated accounts, but such a translation is almost impossible because the assumptions behind the functional totals are not disclosed as part of the budget process. 99. See CBA § 602(a), amended by BEA § 13111, 104 Stat. at 1388-603 (aggregate amount of discretionary spending); CBA § 602(b)(1), amended by BEA § 13111, 104 Stat. at 1388-604 ("Suballocation By Appropriations Committees—As soon as practicable after a budget resolution is agreed to, The Committee on Appropriations of each House... shall suballocate each amount allocated to it... among its subcommittees.")}
\footnote{100. However, when the Budget Act contained separate caps for domestic and defense spending, the Appropriations Committee could not allocate funds above the spending caps in each area.}
\footnote{101. 2 U.S.C. § 633(b) (1994).}
\end{footnotes}
cannot exceed its allocation without being subject to a budget act point of order. After the subcommittee allocations are set, each appropriations subcommittee considers how to distribute the allocated funds among the various programs within its jurisdiction. These bills are then considered by the Appropriations Committee and then by the full House. Therefore, Congress's decisions regarding discretionary spending are implemented through its passage of thirteen appropriations bills which are considered in the course of the regular legislative process.

C. The Reconciliation Process

The third major component of the current budget process, reconciliation, has fundamentally changed both the budget process and the legislative process as a whole. The reconciliation bill was originally a method to reconcile deficiencies between the first and second budget resolution in a given year. However, the second budget resolution was eliminated and reconciliation remains.

Since the reconciliation bill was intended to force legislative changes in order to meet the second budget resolution, a reconciliation bill is enacted into law. However, a reconciliation bill is a privileged bill. It is one of a few measures which is considered by the Senate with limited debate and is signed by the President into law. Thus, reconciliation bills can be used as a fast-track method for considering substantive legislative changes without any fear of a filibuster in the Senate.

The reconciliation process works in two phases. First, the budget resolution may include an order to various authorizing committees, including the Senate Finance Committee and the House Committee on Ways and Means, to produce changes in budget authority, entitlement authority, or revenues within the jurisdiction of the relevant committee. The Budget Committees may not

104. The fundamental legislative process change instituted as part of the reconciliation process mainly impacts the Senate. Reconciliation fundamentally changed the way the Senate considers legislation since the reconciliation bill cannot be filibustered. Such a change was insignificant in the House since House rules often provide for limited debate.
105. TIEFER, supra note 32, at 884 n.95.
106. See supra note 25.
107. Budget resolutions are not enacted into law and do not have the force of law. They are only considered by the Congress, and only bind the Congress.
108. By Senate precedent, reconciliation instructions and a reconciliation bill may either increase or decrease the deficit. The Budget Act gives the Budget Committees the authority to order "changes." 2 U.S.C. § 641(b)(2) (1994). The Act does not specify that these "changes" must reduce the deficit. In 1995, the budget resolution in the Senate created a reconciliation bill, the
order the authorizing committees to make specific authorizing changes, but
they may order the authorizing committees to provide a certain level of sav-
ings.\footnote{109} The reconciliation instructions provide a mechanism for forcing
authorizing committees to make changes in mandatory programs, and the re-
conciliation process is the central method used by Congress for reducing enti-
tlement spending.

Once the committees make the various changes consistent with the Budget
Committee's instructions, the various changes are compiled by the Budget
Committee in each house into one major budget reconciliation bill.\footnote{110} The
reconciliation bill is then considered in a privileged manner in each house un-
der strict time constraints.\footnote{111} A total of twenty hours is allocated to consider
reconciliation bills. Such a time constraint is appropriate if the reconciliation
bill was only intended to reconcile budget accounts between a first and second
budget resolution, as originally intended. However, in the current process,
such a time constraint limits the full Senate to only twenty hours of debate on
subjects which significantly change major pieces of legislation.\footnote{112}

In addition to limited debate, reconciliation bills are also privileged re-
garding amendments. In the Senate, a Senator may normally offer an amend-
ment on any subject to almost any piece of legislation. However amendments
to budget reconciliation bills must be germane.\footnote{113} Moreover, in general, all

\footnote{109. 2 U.S.C. § 641(e) (1994).}
\footnote{110. Under the new precedent in 1995, the budget resolution may require more than one rec-
 onciliation bill. Thus, the Budget Committee may be required to compile the language reported
 by various committees into different reconciliation bills. See infra part III.A.}
\footnote{111. CBA § 310(e)(2), 88 Stat. at 316 (codified at 2 U.S.C. § 641(e)(2) (1994)) provides
 twenty hours for the consideration of a reconciliation bill. These time constraints are most sig-
nificant in the Senate where unlimited debate and a filibuster would have been possible absent
 section 310. If entitlement changes were considered outside of the reconciliation process, any
 Senator would be entitled to filibuster the bill and proponents would need sixty votes to invoke
 cloture and override the filibuster. Thus, avoidance of the filibuster and the supermajority re-
 quirement is one of the major reasons that the reconciliation process has become the major legis-
lative vehicle for controversial pieces of legislation which lack broad bipartisan support. See
 also supra part II.B.}
\footnote{112. The OBRA of 1995 made massive changes to federal welfare programs. Such changes
 would normally be entitled to weeks of debate and consideration. However, since these changes
 were considered in the context of a reconciliation bill, they were entitled to only twenty hours of
 debate. See infra part III.B.}
\footnote{113. CBA § 305(b)(2), 88 Stat. at 311 (codified at 2 U.S.C. § 636(b)(2) (1994)) ("No amend-
 ment that is not germane shall be received."). In general, an amendment is germane if it: 1) stri-
 kes a provision in the bill or resolution; 2) changes a number or a date; 3) states purely preca-
tory language; 4) otherwise does not add or expand existing subject matter. See generally
 WILLIAM G. DAUSTER, BUDGET PROCESS LAW ANNOTATED 125-37 (also cited as STAFF OF
 SENATE COMM. ON THE BUDGET, 103D CONG., 1ST SESS., BUDGET PROCESS LAW ANNOTATED
 (Comm. Print 1993)). For a discussion about the possible manipulation of germaneness, see infra
 part III.E.2.}
amendments to budget resolutions must be deficit neutral.\textsuperscript{114} There is an exception, however, in that a motion to strike a provision is always in order.\textsuperscript{115} Since a motion to strike usually eliminates a provision included in the reconciliation bill which reduces the deficit, a successful motion to strike will often have the effect of increasing the deficit. Under this rule it would not be germane to make changes which would decrease the magnitude of a spending cut, but it would be germane to completely eliminate the cut. For example, under the current procedure, it would not be in order to reduce a Medicare cut included in the reconciliation bill, but it would be in order to strike the entire Medicare reduction.

1. The Byrd Rule\textsuperscript{116}

Some Senators recognized the potential for abuse of the reconciliation process and were concerned that individuals would attempt to use the reconciliation process as a way to circumvent the filibuster requirement in the Senate. The general view in the Senate was that deficit reduction was so important that it warranted fast-track consideration. However, Senators wanted to make sure that this privileged procedure was applied only to measures which would decrease the deficit.\textsuperscript{117}

In order to stop the abuse of the reconciliation process, the Senate passed the "Byrd Rule,"\textsuperscript{118} which was designed to stop the Senate from considering extraneous matters on the reconciliation bill.\textsuperscript{119} However, the Byrd Rule is incredibly complicated and it has become more so as members attempt to push

\textsuperscript{114} CBA § 310(d)(2) (codified at 2 U.S.C. § 641 (1994)).
\textsuperscript{115} Id.
\textsuperscript{116} CBA § 313, \textit{amended by} Consolidated Omnibus Budget Act of 1985 § 20001, 100 Stat. at 390, \textit{and further amended by} BEA § 13214, 104 Stat. at 1388-621 (codified at 2 U.S.C. § 644 (1994)). This section is referred to as the "Byrd Rule" after its sponsor, Senator Robert C. Byrd of West Virginia.
\textsuperscript{117} Senator Byrd, the principal sponsor of section 313 stated: "'extraneous,' in [this] context, is determined by whether or not the language contributes to reducing the deficit and balancing the budget; otherwise it is extraneous . . . ." 131 CONG. REC. S28,971 (daily ed. Oct. 24, 1985).
\textsuperscript{118} Since the Byrd Rule was intended to stop the abuse of circumvention of the filibuster, the Byrd Rule does not facially apply in the House. However, the Byrd Rule does apply to a reconciliation bill which comes to the Senate from the House. Since no Senate reconciliation bill may include extraneous matter, the Senate restriction, in fact, results in placing the same restriction on the House. \textit{See} 135 Cong. Rec. S12,589 (daily ed. Oct. 4, 1989) (statement of Budget Committee Chairman Sasser).
\textsuperscript{119} The codification of the Byrd Rule sets out the definition of extraneous. In general, a measure will be extraneous if 1) the provisions has no direct budgetary effect; 2) the provision increases the deficit and the net effect of provisions reported by the Committee reporting the title containing the provision fails to meet its reconciliation instruction; 3) the provision is not in the jurisdiction of the Committee which reported the provision; 4) the provision produces budgetary changes which are merely incidental to the non-budgetary components of the provision. 2 U.S.C. § 644(b)(1)(A) (1994).
the envelope regarding the rule. The Byrd Rule is now one of the most com-
plicated and manipulated parts of the budget process.120

The rule requires that an extraneous matter may not be included in a rec-
conciliation bill without the consent of at least sixty senators.121 The Byrd Rule,
therefore, ensures that an extraneous provision will only be included in a rec-
conciliation bill if it has the same support that would be required if that matter
was considered outside the budget context. The confusion and manipulation
regarding the Byrd Rule usually revolves around section 313(b)(1)(D) which
states that a provision will be considered extraneous if the effect on the deficit
is merely incidental to the non-budgetary components of the provision.122 This
test is tremendously ambiguous and requires a subjective determination by the
Chair.123 However, in practice, the Chair usually follows the advice of the
Parliamentarian.124 The Parliamentarian has not provided a bright-line test and
considers each provision on a case-by-case basis.125 Moreover, although the
Parliamentarian will discuss and debate matters with all staff and members
who seek his advice, the Parliamentarian is not required to seek out opposing
points of view. Thus, the Parliamentarian may consider the validity of a provi-

120. See generally ROBERT KEITH & EDWARD DAVIS, CONGRESSIONAL RESEARCH SERVICE,
103RD CONG., 2D SESS., THE SENATE'S "BYRD RULE" AGAINST EXTRANEOUS MATTER IN
RECONCILIATION MEASURES (1993).
121. CBA § 313 may be waived with sixty votes. See CBA § 904(c), amended by BEA
§13208, 104 Stat. 1388-619.
123. CBA § 313(a), 88 Stat. at 297 (codified at 2 U.S.C. § 644 (Supp. IV 1992) (it is the duty
of the Chair to rule on the point of order). The Constitution provides that the Vice President is
the presiding officer of the Senate. U.S. CONST. art. 1, § 3, cl. 4. However, the Vice President
rarely presides in the Senate and usually only does so when his vote is needed to break a tie or on
ceremonial occasions. TIEFER, supra note 32, at 491. The Constitution also provides that the
Senate may choose a President pro tempore to act when the Vice President is absent. U.S.
CONST. art. 1, § 3, cl. 5. Senate Rules allow the President pro tempore to appoint an Acting
President pro tempore to preside over the Senate in the Vice President's and the President pro
tempore's absence. TIEFER, supra note 32, at 493. Traditionally, the President pro tempore has
been the senior most member of the majority party, and since the 1970s the President pro tempore
has appointed only members of his party to the post of Acting President pro tempore. Id. Thus,
except when the Vice President is in the Chair, the presiding officer in the Senate will be a mem-
ber of the majority party.

124. TIEFER, supra note 32, at 509. Historically, the Parliamentarian is nonpartisan in his
rulings. The first Parliamentarian was appointed in 1935 and served until 1965. The second
served from 1965 to 1975. However, in recent times, the Parliamentarian has changed when the
majority party in the Senate changes. Thus, when a new party takes control of the Senate, there
is usually a new Parliamentarian. When the Republicans took control of the Senate in 1981, the
Parliamentarian left and the Assistant Parliamentarian, Bob Dove, assumed the post. When the
Democrats regained the Senate in 1987, Dove left the office and Alan Frumin assumed the post.
When the Republicans regained the Senate in 1994, Dove once again assumed the office of Par-
liamentarian. Id.

125. See DAUSTER, supra note 113, n.580.
sion without hearing the opposing point of view. Furthermore, since the Parliamentarian does not in fact rule on a point of order and only provides advice to the Chair, and since he does not provide that advice prior to the issue being raised on the Senate floor, the Parliamentarian reserves the right to change his mind until he provides advice to the Chair at the moment an issue is considered on the Senate floor. Thus a member may believe that a specific provision is valid under the Budget Act, but find out later that the Parliamentarian changed his mind and advised the Chair that the provision violated the Act.

A member seeking to determine if a proposed provision violated the Byrd Rule is therefore constrained by decisions which 1) allow the Parliamentarian to give advice to a party regarding a specific provision in secret, 2) does not require the Parliamentarian to follow the advice of past Parliamentarians, and 3) allows the Parliamentarian to change his mind.

The purpose of section 313 was to prohibit policy changes masked as deficit reduction measures from being included in reconciliation. Almost all legislative changes impact the deficit; however, if the budget impact is only incidental to the policy change, then a small impact on the deficit should not be considered sufficient to justify the provision. For example, a federal ban on providing public education to children of illegal immigrants by a state may have a small impact on the deficit, but its major purpose is to create a policy change.

2. Protection of Social Security

In addition to deficit reduction, another major substantive policy included in the Budget Act is the protection of the Social Security Trust Fund. Section 301(i) of the Budget Act prohibits the consideration of any budget resolu-

126. In practice, the Parliamentarian rarely changes his mind and usually follows precedent in his advice to the Chair. Moreover, parliamentary inquiries, a method of asking advice on the Senate floor regarding procedural matters, provide a Member with the opportunity to put the Parliamentarian on record. These inquiries do not form precedents for the Senate. TIEFER, supra note 32, at 512. However, while rulings of the Chair do form precedents upon which the Senate should rely, Id., rulings of the Chair are not explained and often provide little guidance for future decisions. In addition, since only rulings of the Chair are precedental, the Parliamentarian is not obligated to follow the advice of past Parliamentarians. Moreover, a Parliamentarian may decide that past decisions of the Chair are in fact wrong and advise the Chair accordingly. The recourse in the Senate if the Chair rules contrary to precedent and a Senator disagrees with the new interpretation would be to appeal the ruling of the Chair. The full Senate would then vote on the validity of the Chair's ruling. Senate Rule XX(1) (reprinted in SENATE MANUAL, S. Doc. No. 103-1, 103d Cong., 1st Sess. 20 (1993)).

127. See DAUSTER, supra note 113, n.580 (Provisions in OBRA 1993 regarding the earned income tax credit, empowerment zones and food stamps, each of which increase the deficit, did not violate § 313(o)(2)(D)).

tion or amendment that would decrease the excess of social security revenues over outlays. However, Congress removed the Social Security Trust Fund from the budget and when it did so the budget process no longer protected social security. Therefore, Congress amended the Budget Act to create provisions, often referred to as "fire walls," to protect social security. In the Senate, waiver of the social security "fire walls" requires the vote of sixty Senators.

III. CURRENT PROBLEMS CONCERNING THE BUDGET PROCESS

The Budget Act has been transformed from a mechanism to consider the aggregate federal budget to a mechanism for promoting certain policy goals. As the budget process becomes more a mechanism for promoting policy and less a mechanism for orderly process, it risks becoming a partisan tool instead of a bipartisan one. In addition, as policy is written into the process, the process may become a substitute for policy. The more the process becomes the policy, the more likely the process will be relied upon for deficit reduction in lieu of political will. If there is no will for deficit reduction, then it is inherent in the creation of budget process that creative politicians will circumvent the process, or at least maximize the process to their advantage.

Since the budget process has become a method for achieving substantive policy changes, the Budget Act must change as priorities change. With each passing change, the Budget Act becomes more cumbersome and complicated. Process has become the problem—we simply have too much.

A. Reconciliation

The fast-track component of reconciliation bills has made them a very attractive vehicle for legislative initiatives. The Byrd Rule and germaneness requirements were instituted to ensure that the fast-track mechanism was used on only rare occasions and primarily for deficit reduction. However, the reconciliation process has now been expanded under a new legislative precedent and as a consequence, Congress will need to deal with an ever increasing number of reconciliation bills.

Under the new precedent set by the Parliamentarian, a budget resolution

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131. See CBA § 904(c), amended by BEA § 13208, 104 Stat. 1388-619.

132. See supra part I.B.
may create multiple reconciliation bills.\textsuperscript{133} In addition, the budget resolution may create a budget reconciliation bill which solely increases the deficit.\textsuperscript{134} The possible consequence of this action is that partisan substantive matters which normally would have been considered in the legislative process will now be considered in the reconciliation process.\textsuperscript{135}

This is not the first time reconciliation was considered as a mechanism for subverting the normal legislative process. In 1993, the Clinton Administration encouraged Congress to use the budget reconciliation process as a means of considering the President's health care reform package.\textsuperscript{136} Senator Byrd opposed doing so since he believed it would be an abuse of the reconciliation process.\textsuperscript{137} However, although reconciliation was clearly not intended as a means to consider major pieces of substantive legislation such as the President's health care package, consideration of the package in reconciliation may have been possible in light of the new interpretations surrounding reconciliation since the President's health care reform measure surely would have impacted the deficit. In addition, since the Byrd Rule and the germaneness requirement have been weakened in recent years, the health care package may have been able to clear hurdles as well.\textsuperscript{138} In fact, if the President's health care package was considered in the reconciliation package it might be law today. The fact that the minority had the opportunity to filibuster the measure slowed down its momentum and helped defeat the health care bill.

In addition, since the establishment of reconciliation bills is done by the majority in the budget resolution,\textsuperscript{139} only the majority party will be able to use the process to circumvent a filibuster. The Senate will then be in the uncomfortable situation of having two sets of rules, one for the majority and one for the minority. The majority could pass a major piece of legislation with a majority vote while the minority would still be required to overcome a filibuster by any Senator.

The second consequence of multiple reconciliation bills is that it will be even more difficult for Congress to make aggregate decisions regarding budget

\textsuperscript{133} 142 CONG. REC. S5418 (daily ed. May 21, 1996) (Sen. Daschle questioning the Chair regarding multiple reconciliation bills).
\textsuperscript{134} Id. at S5417.
\textsuperscript{135} Id. at S5415 (Sen. Daschle criticizing the process); Id. at S5415 (Sen. Domenici defending the practice).
\textsuperscript{137} Id.
\textsuperscript{138} Id. Senator Domenici argues that multiple reconciliation bills will not lead to further abuse regarding the filibuster and that the Byrd Rule and the germaneness requirement will still prevent the abuse of the reconciliation process. However, the more partisan politics become a part of the budget process the greater chance that the Byrd Rule and the germaneness requirement will fail to protect the Minority.
\textsuperscript{139} See supra part II.C.
priorities. When the majority increases the number of reconciliation bills, it also decreases their scope. Since reconciliation requires amendments to be germane and not extraneous, the more limited the scope of the bill, the less amendments which will be considered germane. For example, if a reconciliation bill contained a tax cut and paid for that tax cut with reductions in Medicare and Medicaid, an amendment would be in order to reduce the tax cut and provide increased funding for Medicare and Medicaid. In addition, the amendment would be in order if it were to cut taxes even further and pay for the additional tax cuts with additional cuts in Medicare and Medicaid.

However, if the reconciliation bill contained only a Medicare reduction, then it would not be in order to offer an amendment to offset the Medicare cuts with revenue increases. Such an amendment would not be in order because the original reconciliation bill contained no language regarding revenues. Thus, any amendment regarding revenues would not be germane to the reconciliation bill. The same would be true if the reconciliation bill only involved a tax cut. If a reconciliation bill involved only a tax cut, it would not be in order to reduce the tax cut and use those savings to increase funding for Medicare and Medicaid. Once again, the reasoning is that the reconciliation bill only included instructions regarding taxes, it contained no instructions regarding Medicare or Medicaid. Thus, language to reduce the tax cut and provide increased funding for Medicare and Medicaid would not be germane. So if the majority wanted to avoid a debate regarding whether there should be a tax cut, or Medicare and Medicaid cuts, it could avoid any amendment to transfer from one area to the other simply by creating two reconciliation bills.

The result is a budget process which is completely backwards. The Budget Act was originally created so that the budget could be considered in the aggregate, and Congress could prioritize spending among various budget accounts. However, the proliferation of reconciliation bills will ensure the opposite result.

B. Time

Although most Members of Congress probably want to expedite the budget process even further, in actuality, the reconciliation process is dangerously short. A budget reconciliation bill has a maximum time limit of twenty hours. Such a limited debate made sense when Congress was simply trying to reconcile funding from the first budget resolution to the second. However, now that the reconciliation process has become a major process for substantive legislative change, the twenty hour limit is far too short.

The twenty hours is divided between the majority and minority leaders.

140. CBA § 2, 88 Stat. at 298.
Thus each side has only ten hours. A number of those hours are spent talking generally about the reconciliation bill. As a result, each side has approximately five hours to consider what might amount to almost one hundred amendments to the reconciliation bill. Thus, the minority, which took almost no part in the reconciliation process, has almost no opportunity to debate the measure and offer amendments. Once time is expired on the resolution, Senators may continue to offer amendments; however, those amendments are considered without debate. As a result, Senators vote on amendments with almost no regard for what is contained within them. Reconciliation bills often include major changes to the tax code, Medicare and Medicaid programs, environmental programs, banking law, and housing programs. Each change would normally warrant several days of consideration in the Senate. However, under the reconciliation process each change is barely considered.

C. Lack of Prioritization

The budget process has become so full of points of order, sequesters and "walls" that it has become almost impossible to prioritize and reprioritize spending. With regard to discretionary spending, the "walls" prohibit Congress from transferring spending from domestic to defense and vice versa without the vote of sixty Senators. In addition, it is a violation of the Budget Act to transfer spending from discretionary to mandatory spending or vice versa without the vote of sixty Senators. Therefore, a majority in the Senate could not reprioritize spending from defense to Medicare or from Medicaid to public safety. The PAYGO process was designed to ensure that mandatory changes did not increase the deficit; however, if any changes to mandatory programs are offset by equivalent changes on the discretionary side, the deficit would not increase. Congress should be able to prioritize spending without a supermajority vote.

The Budget Act also prohibits using revenue increases or decreases to increase or decrease discretionary spending without the vote of sixty Senators.

142. See 141 CONG. REC. S16,034 (daily ed. Oct. 27, 1995) (statement by Sen. Byrd) (comparing how the Senate debated the Civil Rights Act for over 103 days while the Senate is limited to only twenty hours on a reconciliation bill which makes major changes to welfare programs.).

143. In practice, thirty seconds is usually given to each side to summarize its position. The amendment is then immediately considered for a vote. Senators then have approximately ten minutes to read the amendment and decide how to vote. The result is a multitude of amendments are considered without careful consideration.

144. See supra note 74.

145. See supra note 29.

146. See supra note 63.

147. For a discussion regarding PAYGO, see supra part I.E.
Therefore, absent a Budget Act waiver,\textsuperscript{148} Congress could not raise taxes and use the increase in revenues to pay for added funding for public safety or education. In addition, Congress could not cut discretionary spending and use those savings to cut taxes. There should be no bias in the process in favor of a specific program or a specific type of spending. The Act was designed to help Congress make choices, and it is no longer fulfilling that function. Moreover, as discussed in the previous section, prioritization can also be negatively impacted through the reconciliation process. If multiple reconciliation bills become the norm of the reconciliation process, then it will be even more difficult for Congress to prioritize spending.

D. Partisanship

Consideration of the budget, partially due to its subject matter and partially due to the budget process, has become one of the most partisan activities in the Congress. Budget packages often include major substantive policy changes.\textsuperscript{149} Since these changes can be made without fear of the filibuster,\textsuperscript{150} thus with only a simple majority vote, the majority party can ensure passage of a budget reconciliation bill or a budget resolution by simply maintaining the votes of its own party. Therefore, the party seeking to pass the reconciliation bill does not need bipartisan support for the measure.

However, in the Senate, due to the possibility of the filibuster, Republicans and Democrats often work together to ensure that legislation has bipartisan support, and thus sufficient support to invoke cloture and break a filibuster. However, since there is no filibuster threat on either a budget resolution or on a reconciliation bill, the Budget Committee majority does not attempt to work with the minority prior to passage of the bill. The majority works with its own members to ensure that there is sufficient support for the bill on its side of the aisle, and the deals and compromises regarding the budget package are made only within the majority party.\textsuperscript{151} As a result, the measure comes before the Senate with almost no minority support or involvement. This ensures a partisan environment for the consideration of the measure. It also ensures a significant number of amendments from the minority since they have had no other opportunity to influence consideration of the budget package.\textsuperscript{152}

\textsuperscript{148} Congress could also avoid a budget act point of order by creating a reserve fund. See \textit{supra} note 78.
\textsuperscript{149} See \textit{supra} note 32.
\textsuperscript{150} See \textit{supra} note 33.
\textsuperscript{151} See, e.g., Eric Pianin & John E. Young, \textit{Senate Approves 7-year Budget Plan}, \textit{WASH. POST}, Oct. 28, 1995, at A1 (detailing how a reconciliation bill was passed with only votes from the majority party).
\textsuperscript{152} \textit{Id.}
E. Abuse of Process

Due to the Budget Act’s unique provisions and its complicated nature, the budget process is ripe for abuse. The reconciliation process allows substantive legislative proposals to escape a filibuster threat. Therefore, the fate of legislation may hinge on whether or not the legislation is properly considered within a reconciliation bill. If the provision violates the Budget Act and is improperly within the budget reconciliation package, the provision will most likely need sixty votes. Due to the partisan nature regarding consideration of the budget, it is unlikely that most measures will receive a supermajority vote. Thus, the interpretation of the Budget Act and Budget Act points of order play an essential role in determining what provisions violate the Act, and thus require a supermajority vote, and what provisions are in compliance, and therefore may be considered as part of the reconciliation package without a super-majority vote. In recent years, the minority has complained in several instances about what it claims is partisan manipulation of the budget process.

1. Use of Social Security Funds in Violation of Section 310(d)

Under section 310(d) of the Budget Act, social security outlay reductions may not be used to offset non-social security spending increases. In 1995, as part of the consideration of the Balanced Budget Act of 1995, the chairman of the Senate Committee on Finance offered an amendment to increase funding for Medicaid grants in certain states. The chairman paid for those increases by legislating a technical correction which decreased the social security cost-of-living adjustment (COLA).

Since social security is a mandatory program, social security spending is estimated by CBO based on the number of participants and based on economic projections. Social security recipients receive an increase in their benefits based on increases in inflation as measured by the Consumer Price Index ("CPI"). In 1995, CBO originally projected the CPI to be 3.1%. Later in 1995, updated figures indicated that the actual CPI would be 2.6%. The lower CPI figure meant that COLAs would be reduced and that there would be a significant savings to the government. However, CBO does not credit as savings the technical change in estimates from 3.1% to 2.6% because those

153. See supra notes 130-31.
155. 141 CONG. REC. S16,039 (statement of Sen. Roth); see generally, 141 CONG. REC S16,111-56 (daily ed. Oct. 27, 1995) (debating whether the money that is being used to increase Medicaid comes from cuts in social security, and therefore is out of order under the Budget Act).
159. 141 CONG. REC. S16,039 (statement of Sen. Roth).
changes would occur automatically under existing law. It is a technical economic change, not a legislative one.

The chairman's amendment, however, legislated the already occurring change. The chairman thus legislated that the COLA for social security would be reduced from 3.1% to 2.6% and claimed the savings from that reduction. He claimed the savings even though current law already required that the COLA would be 2.6%.

Senator Graham raised a Budget Act point of order that the chairman's amendment violated section 310(d) of the Budget Act because it caused an outlay reduction to social security. Graham's logic was that if you are reducing the social security COLA from 3.1% to 2.6%, then social security spending is being reduced and there is an outlay reduction. However, the chairman of the Budget Committee claimed otherwise, he claimed that there was no point of order and that "dollar numbers being referred to are actual." He would not comment as to why they were "actual" or why they should not be considered an outlay reduction from social security. The Parliamentarian held, "The scoring of this bill under the Budget Act is under the control of the chairman of the Budget Committee, and the precedents of the Senate do not go beyond that. The point of order is not well taken." Under this precedent, a point of order under section 310(d) of the Budget Act can be avoided on a partisan basis simply based on the scoring determination of the chairman of the Budget Committee. Thus, the chairman can score a measure one way for the majority in order to facilitate amendments and an entirely different way for the minority in order to prevent amendments. There is nothing to constrain the chairman in his scoring decisions based on this precedent.

The Assistant Director for Budget of the Congressional Budget Office claimed that CBO and OMB:

[D]o not score savings for legislating a COLA that would happen anyway under current law. This rule was applied to veterans compensation 1991 and to food stamps in 1992...

... At the request of the Budget Committees, the CBO has from time to time updated the baseline to reflect recent economic and technical developments. In such circumstances, however, we insist on incorporating all relevant new information, not just selected items, such as COLAs. In this instance... if we were to include all of the information in our August baseline, plus the actual 1996 COLA, our estimate of the 2002 deficit... would be higher.


160. The Assistant Director for Budget of the Congressional Budget Office claimed that CBO and OMB:

[D]o not score savings for legislating a COLA that would happen anyway under current law. This rule was applied to veterans compensation 1991 and to food stamps in 1992...

... At the request of the Budget Committees, the CBO has from time to time updated the baseline to reflect recent economic and technical developments. In such circumstances, however, we insist on incorporating all relevant new information, not just selected items, such as COLAs. In this instance... if we were to include all of the information in our August baseline, plus the actual 1996 COLA, our estimate of the 2002 deficit... would be higher.


163. Id.

164. Id. at S16,048 (statement by Sen. Domenici).

165. Id.

166. Id. at S16,048 (statement by parliamentarian).
The Budget Act also prohibits any reconciliation bill, as amended or reported, from amending the Social Security Act. Senator Harkin raised a point of order arguing that since the Roth amendment changed the social security COLA, it was amending the Social Security Act in violation of section 310(g). The amendment, however, did not specifically amend the Act. The amendment stated: "Notwithstanding any other provision of law . . . any such adjustment [to the CPI] which takes effect during fiscal year 1996 shall be equal to 2.6 percent." Even though the amendment impacted the Social Security Act and changed the social security COLA, the Chair ruled that the point of order was not well taken.

Senator Harkin then argued that section 310(g) can now be circumvented by using the words "notwithstanding any other provision of law." The Chair again asserted that the chairman of the Budget Committee has the authority to make the determination with regard to section 310(g). Once again, the Budget Act allows the chairman of the Budget Committee to manipulate the process and score a provision one way for the majority and an entirely different way for the minority. Without consistent interpretation, it is impossible for members of Congress to know whether an amendment will or will not violate the Act.

2. Application of the Byrd Rule and the Germaneness Standard

Both the Byrd Rule and the germaneness standard require subjective interpretation of their provisions. Section 305(b)(2) of the Budget Act states that "[n]o amendment that is not germane" shall be received. However, germaneness has a very fungible definition. The lack of clarity regarding germaneness allows for significant manipulation of the process. If the Parliamentarian determines that an amendment is not germane, the amendment cannot be considered without sixty votes. Thus, a decision regarding germaneness may decide the fate of a proposed provision.

For example, in 1995, the Parliamentarian determined that since the Senate reconciliation bill did not contain any specific revenue provisions, any amendment to increase taxes would be considered not germane. However,
the reconciliation bill contained a complicated procedure which would allow for a tax cut if the Senate passed a balanced budget.\textsuperscript{176} Since the resolution contained a provision which would require a tax cut if a budget reconciliation bill was passed, it would have been equally plausible for the Parliamentarian to rule that the revenue amendments were germane.

The Byrd Rule provisions are similarly susceptible to manipulation. The Byrd Rule prohibits extraneous matter from being considered on a reconciliation.\textsuperscript{177} However, the definition of extraneous, like germaneness, requires subjective interpretation, and is interpreted by the Parliamentarian without a bright line test or even set guidelines. As Senator Domenici, the Chairman of the Senate Budget Committee acknowledged, "The budget has become an extremely controversial issue and efforts to include extraneous matter in reconciliation has led to abuse in the past by both Republicans and Democrats."\textsuperscript{178}

Disputes regarding germaneness and the Byrd Rule usually involve honest differences regarding the interpretation of the Budget Act. However, the Senate places sole authority regarding the interpretation of the Act with the Chair\textsuperscript{179} and authority regarding "scoring" under the Act with the Senate Budget Committee.\textsuperscript{180} The Parliamentarian has not outlined a specific or consistent test for germaneness or for the Byrd Rule. In addition, the Parliamentarian is not bound by past Senate precedent.\textsuperscript{181} Thus absent clear rules and binding precedent, it is extremely unclear what will be considered germane or extraneous. If there is no clear standard, the test is ripe for political manipulation.

\textsuperscript{176} The majority argued that there would be a significant increase in economic growth (an "economic dividend") due to the passage of a balanced budget. Which would cause a dividend of approximately $170 billion. The budget reconciliation bill contained a provision that allowed the Senate to consider a $170 billion tax cut bill after the passage of the original reconciliation bill. The Parliamentarian, however, ruled that any amendment to limit the amount of the tax cut would be not germane since the actual tax cut was not included in the reconciliation bill. The tax cut would be included in a subsequent bill, if the original bill was passed. For a general discussion of this matter, see 141 CONG. REC. S17,247-79 (daily ed. Nov. 17, 1995).

\textsuperscript{177} See supra part II.C.1.

\textsuperscript{178} 142 CONG. REC. S8521 (July 23, 1996) (statement by Sen. Domenici) (Sen. Domenici also claims that the Democrats manipulated the Byrd Rule in 1993 by placing provisions regarding bovine growth hormones and a national vaccination program in reconciliation. Sen. Domenici paraphrased statements by other Republicans and argued that Chair's ruling in 1993 made a complete joke of the Byrd Rule. He further implied that the Byrd Rule was being applied on a "whimsical basis" and that "anything goes" under the Byrd Rule's enforcement in 1993.).

\textsuperscript{179} As discussed infra, the Chair usually acts on the advice of the Parliamentarian. See TIEFER, supra note 32, at 512.

\textsuperscript{180} See supra part II.C.

\textsuperscript{181} See supra note 126.
IV. PROPOSED SOLUTIONS

The Budget Act has become a morass of technical provisions which confuse and complicate consideration of the federal budget. Congress should return to the roots of the Budget Act. It should simplify the budget process, eliminate policy biases in the Act, and use the Act as a mechanism for considering the federal budget. The Budget Act should be policy neutral and promote, not inhibit, policy prioritization.

A. Repeal the Reconciliation Process

As discussed throughout this article, the budget reconciliation process has been abused and manipulated beyond anything imagined when it was first enacted in 1974. The original premise of budget reconciliation was to reconcile funding shortfalls between the first and second budget resolution. No one imagined that it would become a method for circumventing the filibuster and for making major substantive policy changes with extremely limited debate.

The absence of a reconciliation process will not prevent Congress from considering reductions in entitlement spending. Major changes to Medicare, Medicaid, and social security are still possible without a reconciliation process. Changes to entitlement programs are no more or less important than changes to other major laws. If Congress wanted to change the Civil Rights Act, the current health care system, or the banking system, it would be required to do so through the normal legislative process. The rules of the Senate allow for unlimited debate absent a vote of cloture. Entitlement programs, including Medicare, Medicaid, food stamps and child nutrition, should not be exempted from the cloture requirement simply because reducing funding for those programs will provide deficit reduction.

Furthermore, deficit reduction alone is not an acceptable rationale for fast-track consideration. Appropriations bills, which allocate funding for discretionary programs, are still considered through the regular legislative process. These bills only require a majority vote for passage, but a filibuster threat exists against each appropriations bill. In fact, appropriations bills still pass the Senate and very few are ultimately filibustered.

Repeal of the reconciliation process will ensure that important measures which drastically change current law are given ample consideration. It will


183. In fact, the opportunity to filibuster appropriations bills ensures that these bills are considered on a bipartisan basis. Partisanship in the appropriations process exists, but to a much lesser extent than in the budget process. The repeal of reconciliation may decrease the partisanship in the budget process and ensure that budget packages are considered with bipartisan support.
also ensure that all legislative changes, those to repeal existing entitlement programs and those to create new ones, follow the same basic rules of the Senate. In addition, repeal of reconciliation will return the Budget Act to its roots and ensure a policy neutral mechanism for considering our nation's budget priorities.

However, even if Congress continues to use the reconciliation process, there are several steps it can take to reform and simplify the process. First, the Parliamentarian should be required to set out guidelines and rules regarding the definitions of extraneousness and germaneness, or Congress should legislate further guidelines and rules. The Parliamentarian should also be required to articulate for the record the reasons for his decisions and the assumptions he used in reaching those conclusions. Finally, the Parliamentarian should be required to rely on his past decisions absent a directive from the full Senate to the contrary.

Second, the time for consideration of reconciliation bills should be extended. The melee that occurs at the end of each reconciliation where the Senate considers amendment after amendment with no debate is irresponsible. Significant policy changes are being enacted during reconciliation and these provisions deserve ample opportunity for debate.

Third, the Senate should make two clarifications to the Act regarding the scope and number of reconciliation bills. The Senate should either close the loophole which allows for multiple reconciliation bills or should make clear that reprioritization should be allowed among reconciliation bills. In addition, the Senate should close the loophole created in 1995 when an unknown future economic dividend was used to allow for future tax cuts. If the Senate creates contingency instructions, amendments which relate to those contingencies should be in order.

184. During the consideration of the 1997 Budget Reconciliation Bill, Senator Byrd offered an amendment to increase the time for consideration of reconciliation to thirty hours and to eliminate the ability to offer amendments after thirty hours expired. The amendment was intended to eliminate that practice of offering numerous amendments after time on reconciliation expired. The amendment was passed by a vote of 92-8. See 143 Cong. Rec. S6681 (daily ed. June 27, 1997). The conference agreement did not incorporate the provision but instead created a bipartisan task force to study the issue. See 143 Cong. Rec. H6280 (daily ed. July 29, 1997).

185. Sen. Byrd stated:

I was here when we adopted the Budget Act of 1974. I never comprehended, never could I have imagined that the reconciliation process would have been used as it is being used here, a reconciliation process in which we bring several bills into one massive bill, on which the time for debate is severely restricted. Cloture in nothing as compared with the time limitation on the reconciliation bill. Cloture is but a speck on the distant horizon as compared with this bear trap.

B. Eliminate most Budget Act Point of Orders

Several Budget Act points of order hamper Congress's ability to prioritize funds. Since setting out Congress's priorities is a major part of the budget process, the process should encourage, not discourage, such prioritization. Thus, points of order which inhibit prioritization should be removed.

First, Congress should remove any "wall" between domestic and defense discretionary spending. Neither category should be artificially protected. If a majority believes that funds should be transferred from defense to domestic, or vice versa, such a transfer should not be artificially prohibited.

Second, Congress should remove the wall between discretionary spending and revenues and mandatory programs. Congress should be able to increase revenues to fund discretionary programs, or entitlement programs, or to cut discretionary spending and provide a tax cut. These may not be wise policy changes, but the Budget Act itself should not favor one particular type of spending over another.

In addition, Congress should examine the possibility of eliminating almost all Budget Act points of order and spending targets and replacing them with one aggregate flexible target. Such a target would include the baseline expenditures for mandatory spending, adjusted for technical and economic changes, and the discretionary spending targets. A point of order and sequester would only exist if Congress exceeded the one aggregate spending cap.

C. Long Term Planning

Congress should examine the budget scoring rules and attempt to return to the basic principles of the Budget Act by encouraging long-term planning. In the original act, Congress contemplated serious discussion about the economy and long-term budget planning in its consideration of the budget. However, meeting spending caps and PAYGO requirements have often encouraged Congress to think short term. Budget scoring rules and accounting procedures should be modified to enhance long term planning. In addition, Congress should return to pre-1996 rules regarding asset sales.

CONCLUSION

The Budget Act has evolved into a complicated, dysfunctional method for considering the federal budget. It is no longer simply a mechanism for consideration of the aggregate budget, but has become a process with both policy and partisan bias. The Act clearly favors certain policies over others and is full of provisions which are designed to achieve certain policy goals. These have no place in a purely structural piece of legislation and thus have no place in the Budget Act.

Congress should return the Budget Act to its roots. It should greatly simplify the budget process and create a purely structural system, with no policy
bias, for consideration of the federal budget.