

**Statement by Louis Fisher,
The Constitution Project,
Before the
Senate Committee on the Budget,
“Improving the Congressional Budget Process”
October 12, 2011**

Chairman Conrad, Ranking Member Sessions, and members of the committee. Thank you for inviting me to testify on legislation that would change the budget resolution to a joint budget resolution. The current process requires the adoption of a concurrent resolution, passed by both chambers but not submitted to the President. Although binding within Congress, it has no legal standing. To make it binding on both branches, legislation would convert the concurrent resolution to a joint resolution, to be forwarded to the President for signature or veto.

For reasons explained in this statement, I believe that further centralization of the congressional budget process would weaken Congress and do more harm than good. My judgment is formed partly from my experience with the Budget Act of 1974. I worked closely with the Senate Judiciary Committee on legislation to curb the President’s power to withhold appropriated funds. I sat behind Senator Sam Ervin at hearings to provide professional assistance, participated in markup, wrote the part of the conference report dealing with impoundment, and even received a signing pen and letter from President Richard Nixon.¹ I fully supported this decision to limit impoundment and protect legislative powers.

Although I worked on other titles of the Budget Act of 1974, I had serious doubts about the need to centralize the legislative process by adopting a budget resolution. In following the debates over the years on a joint budget resolution, biennial budgeting, a presidential item veto, a balanced budget amendment, and other proposed reforms, I find that institutional and constitutional values are largely overlooked in the search for a more “effective” and “efficient” process. Reform proponents seem to think that if they keep adjusting the budget process, eventually they will get it right. I don’t think so. Piecemeal reforms will not correct what is fundamentally wrong with the legislative assumptions of 1974. I will explain what I mean by that.

¹ The impoundment battle in the early 1970s is covered in Louis Fisher, *Defending Congress and the Constitution* 205-11 (2011), <http://www.kansaspress.ku.edu/fisdef.html>.

I think the record is clear that that when Presidents submit a responsible budget with regard to aggregates (as required by the Budget and Accounting Act of 1921), Congress will live within those aggregates while changing the priorities, which it has every constitutional right to do. That process worked well before and it can work again. If the President submits an irresponsible budget on such aggregates as the deficit, which has been the pattern for many decades, lawmakers cannot correct it, regardless of the process. That is my fundamental point and I will develop it

1. Studying Reforms in a Constitutional Framework

The apparent appeal of a joint budget resolution is to change the legally non-binding concurrent resolution to a joint resolution, thus bringing the two branches together on a mutually agreed upon budget for the nation. No one doubts the failings of the current budget system. When President Ronald Reagan entered office in 1981, the national debt stood at one trillion dollars. It now exceeds 14 trillion with the prospect of much higher levels over the coming decade. The confidence of other nations in the capacity of the United States to manage its finances has declined. The principal issue is not whether the current budget process has serious failings. Demonstrably, it does. The more basic issue is how reform proposals will affect our constitutional system of government. I believe they will further weaken Congress, the system of representative government, separation of powers, checks and balances, and public trust in government.

2. The Missing Player: The President

For more than a century, Congress received from each administration an uncoordinated pile of agency budget requests. That process became intolerable after a string of deficits appeared at the end of the nineteenth century. To gain better control over the national budget, both branches worked on legislation that became the Budget and Accounting Act of 1921. It placed on the President a personal duty to have agency estimates carefully reviewed to produce a responsible national budget. The document that came from the administration was the *President's* budget. He sent it up and was responsible for it.

During debate on this statute, some budget reformers tried to weaken Congress by prohibiting lawmakers from appropriating any money unless it had been requested by the head of a department, or by a two-thirds vote, or to pay a claim against the government. All of those proposals, borrowing greatly from the British parliamentary system, were rejected. The President was empowered to present a budget, but thereafter it became a "legislative budget,"

enabling lawmakers to change it any way they wanted by simple majority vote. Congress refused to be subordinated to the President's budget.²

3. What Went Wrong?

Earlier I said that the total national debt, accumulated from 1789 to 1981, reached a trillion dollars when President Reagan took office. How did it get to 14 trillion and is still climbing? I think a large part of the answer lies with the Budget Act of 1974. The Nixon administration ridiculed lawmakers for their "hoary and traditional procedure" that permitted action on different spending programs "as if they were unrelated and independent actions."³ Under this constant battering, Congress overreacted and failed to protect its institutional interests. This executive rhetoric, unleashed in the middle of the presidential campaign in 1972, had no statistical or evidentiary support.

From fiscal years 1969 through 1973, Congress reduced Nixon's appropriation requests by \$30.9 billion. Over that same period, Congress increased spending authority on legislative bills (mandatory programs and backdoor spending) by \$30.5 billion. In short, it was a wash. The decentralized system of Congress worked. The centralized system of the executive branch did not. Over a period of four years, Nixon's budgets added more than \$100 billion to the national deficit.

4. The Lure of Centralization

Instead of rebuking President Nixon for submitting irresponsible budgets and making false statements about Congress and its legislative record, many lawmakers decided to turn against their own institution. They regularly apologized for the shortcomings of congressional procedures and promised to adopt a budget process that looked more like the executive branch. A congressional budget committee in 1973 linked budget deficits to procedural inadequacies within Congress. The fault, it said, was the decentralized nature of Congress and the failure "to arrive at congressional budget decisions on an overall basis."⁴

That critique was greatly overdrawn. The budget system of the early 1970s was not nearly so fragmented, incoherent, and irresponsible. The Joint Committee on Reduction of Federal Expenditures prepared "scorekeeping reports" and circulated them on a regular basis. This document, printed in the *Congressional Record*, informed lawmakers from month to month how congressional actions compared to the President's budget. The results revealed a systematic

² H. Rept. No. 14, 67th Cong., 1st Sess. 6-7 (1921); 42 Stat. 20 (1921). Fisher, *Defending Congress and the Constitution*, at 202-04.

³ Public Papers of the President, 1972, at 742.

⁴ H. Rept. No. 147, 93d Cong., 1st Sess. 1 (1973).

and responsible pattern, not chaos. What was missing from the budget process was a responsible presidential budget, as mandated by the 1921 statute.

5. What Congress Got Right

The Budget Act of 1974 strengthened Congress in several ways. It established a new Congressional Budget Office (CBO) to provide much needed analytical support to lawmakers, making them less dependent on the executive branch. Over the years, CBO has earned a solid reputation by providing nonpartisan, professional assistance. In so doing, it has helped to protect the system of checks and balances and safeguard an independent legislative branch.⁵ Title VII of the statute placed new duties on congressional committees and the General Accounting Office to evaluate federal programs. Title X put an end to presidential abuses through the impoundment process.

Title I established new House and Senate Budget Committees. These committees were authorized to make continuing studies of the national budget, including budget reform proposals. Each chamber of Congress now had a committee responsible for looking at the entire budget, covering appropriations, authorizations, revenues, tax expenditures, and credit policy.

6. Some “Reforms” Come Up Empty

Before discussing budget resolutions and joint budget resolutions, I want to comment on Title V of the 1974 statute, which moved the fiscal year from July 1 to October 1. Congress had been unable to complete action on appropriations bills and other legislation, leading to reliance on short-term funding through continuing resolutions. As explained by the House Committee on Rules, giving Congress three additional months to complete its workload would “put an end to the continuing resolution practice.”⁶ The Senate Committee on Government Operations predicted: “The October 1 date would enable Congress adequately to consider the budget within the existing congressional time frame.”⁷ The Senate Committee on Rules and Administration expressed confidence that Congress could complete its work with the additional three months.⁸

Of course the change in the fiscal year did not solve the problem of late appropriations and dependence on continuing resolutions. This reform is a good reminder that well intentioned changes may not produce the desired and expected results. A second example of a budget reform that did not deliver on its promises is the enactment of item-veto authority for the President in 1996, with the widely accepted belief that it would be a significant way to control spending and reduce deficits. Even before the Supreme Court declared the statute invalid in

⁵ Philip G. Joyce, *The Congressional Budget Office: Honest Numbers, Power, and Policymaking* (2011).

⁶ H. Rept. No. 93-658, 93d Cong., 1st Sess. 31 (1973).

⁷ S. Rept. No. 93-579, 93d Cong., 1st Sess. 62 (1973).

⁸ S. Rept. No. 93-688, 93d Cong., 1st Sess. 62 (1973).

1998, the record was clear that the item veto had little effect on spending or deficits. In fact, there are good reasons why the availability of an item veto can *increase* spending.⁹

These cautionary tales about changing the fiscal year and enacting an item veto can be applied to other budget reform proposals, including the balanced budget amendment and biennial budgeting. I have testified a number of times on each proposal, pointing out why the promised benefits are not likely to materialize and why these changes could easily make things worse.¹⁰

7. Efforts to Centralize Congress

Supporters of the Budget Act of 1974 believed that if the executive budget of 1921 strengthened presidential control, as it did by creating the Bureau of the Budget (and its successor, the Office of Management and Budget), a legislative budget would strengthen Congress. I don't think the analogy holds. The two branches have different institutional qualities and capabilities. The President heads the executive branch and gains strength from a central budget office. There is no head in Congress and no possibility of a central budget office comparable to OMB. Executive agencies are subordinate to the control of the President and OMB. No such control could be exercised by CBO.

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

The relentless attacks on Congress by President Nixon and his executive officials took its toll. Lawmakers refused to defend their institution or their budget process. The 1974 statute assumed that lawmakers would behave more responsibly by having to vote explicitly on budget aggregates, facing up to totals rather than voting "piecemeal" on separate authorization, appropriation, and revenue bills. In 1974, "fragmentation," "splintering," and "decentralization" within the legislative branch were bad words. Reformers seemed to take the high road by speaking about "coordination" and a "unified budget process," even when those words were impossible for anyone to understand, much less predict their consequences.

⁹ Fisher, *Defending Congress and the Constitution*, at 218-24, 229-31.

¹⁰ *Id.* at 224-28.

8. The Experience with Budget Resolutions

It was not difficult to understand that the 1974 statute carried substantial costs for budget accountability and control. First, it weakened a central purpose of the Budget and Accounting Act of 1921: the personal and nondelegable duty of the President to prepare a responsible budget. The President had a statutory duty to get the budget off to a reasonable start. After 1974, there would be multiple budgets: one submitted by the President, the House budget resolution, the Senate budget resolution, and the final budget resolution agreed to by both houses.

Until 1974, the President's budget provided a fixed and visible benchmark. It was easy for lawmakers and the public to know when congressional action was above or below the President's recommendations. That reference point now disappeared. Instead of keeping within the President's aggregates, members of Congress could vote on generous ceilings in budget resolutions and tell their constituents (and themselves) that they had "stayed within the budget," even if their actions exceeded the President's budget.¹¹ President Reagan was more than willing to step aside and let Congress make the budget. The new statutory process offered Presidents many advantages. In 1985, he announced his acceptance of appropriation bills "even if above my budget, that were within the limits set by Congress's own budget resolution."¹²

Second, the 1974 statute weakened the Appropriations Committees, which had performed the role of fiscal guardian. It was their assigned task to keep appropriations under the President's request. The budget resolution made that institutional purpose far more difficult. If their draft bill fell below the amount allocated to them in a budget resolution, lawmakers would offer amendments to bring the bill "up to" the figure in the budget resolution.¹³

Third, if Presidents ducked their statutory duty under the 1921 law by sending up irresponsible budgets and tossing the problem to Congress and its new process, lawmakers had no capacity to convert an irresponsible budget to a responsible one. Suppose President Reagan submitted a budget with a deficit of several hundred billion. How could Congress remedy that? Lawmakers would have to drastically cut spending and radically increase taxes. Politically they could not do that.

By 1985, the failures of the new budget process were in full view. Even though the procedures were designed to handle such aggregates as total spending, total revenues, and deficits, it was quickly recognized that the process could not manage the deficits of Reagan's

¹¹ 122 Cong. Rec. 17843 (1976), statement by Rep. Tom Steed; 129 Cong. Rec. 25417 (1983), statement by Rep. Jim Wright. See Fisher, *Defending Congress and the Constitution*, at 211-12.

¹² Public Papers of the Presidents, 1985, II, at 1401.

¹³ Allen Schick, *Congress and Money: Budgeting, Spending, and Taxing* 313 (1980). See also Joel Havemann, *Congress and the Budget* 152-53 (1978), and 125 Cong. Rec. 9028 (1979), statement by Rep. Bob Giaimo.

budgets. Consequently, Congress experimented with the hapless Gramm-Rudman Act, which offered a schedule to gradually reduce deficits until they reached zero. The statute was spectacularly ineffective, leading to Gramm-Rudman II, which also failed to control deficits.¹⁴

9. How the Budget Act Backfired

Most budget reformers in 1974 assumed that centralization is better than decentralization, comprehensive plans are superior to fragmentation, and larger legislative vehicles (budget resolutions) naturally excel over smaller ones. The objective: use centralizing forces within Congress to strengthen the legislative branch and weaken the President. The opposite result occurred in 1981 when President Reagan gained control of the budget resolution by attracting Republicans and conservative Democrats. He used the budget resolution as a blueprint to cut taxes, increase defense spending, and reduce some domestic programs. By seizing control of the budget resolution and the reconciliation process, he could largely control appropriations bills and the tax bill. The budget resolution advanced presidential, not congressional, objectives. Instead of the annual deficits of \$25 billion that plagued the Nixon years, deficits exploded to \$200 billion a year.

It is highly unlikely that the costly political and economic miscalculations of 1981 could have occurred without budget resolutions and the reconciliation process. President Reagan would have faced almost insurmountable hurdles had he tried to push his economic program through a decentralized Congress, with committees and subcommittees able to check and reshape White House objectives. Incremental legislative actions present an effective brake on presidential ambitions.¹⁵

David Stockman, who headed OMB from 1981 to 1985, explained how the Reagan administration exploited the centralized congressional process. The constitutional prerogatives of Congress “would have to be, in effect, suspended. Enacting the Reagan administration’s economic program meant rubber stamp approval, nothing less. The world’s greatest deliberative body would have to be reduced to the status of a ministerial arm of the White House.”¹⁶ Members of Congress, far more expert in budget matters than Stockman, regularly deferred to his leadership, assertions, and analysis. After leaving office, Stockman admitted his lack of understanding: “[A] plan for radical and abrupt change required deep comprehension – and we had none of it.”¹⁷

¹⁴ Fisher, *Defending Congress and the Constitution*, at 213-17.

¹⁵ Rudolph G. Penner, “An Appraisal of the Congressional Budget Process,” in *Crisis in the Budget Process* 69 (1986); Allen Schick, “How the Budget Was Won and Lost,” in Norman J. Ornstein, ed., *President and Congress: Assessing Reagan’s First Year* 25 (1982).

¹⁶ David A. Stockman, *The Triumph of Politics: How the Reagan Revolution Failed* 59 (1986).

¹⁷ *Id.* at 91.

10. Joint Budget Resolutions

Congress has considered the merits of a joint budget resolution. The Comprehensive Budget Process Reform Act of 1999 stated these purposes of a joint budget resolution: to “focus initial budgetary deliberations on aggregate levels of Federal spending and taxation; encourage cooperation between Congress and the President in developing overall budgetary priorities; and reach budgetary decisions early in the legislative cycle.”¹⁸ If the two branches failed to agree, a fall-back procedure was available: a concurrent resolution passed under expedited procedures.¹⁹ Members who opposed this reform warned that a joint budget resolution “starts us on a slippery downhill slope.” Once the President and congressional leaders began negotiating over a real statute, not a planning document (as with a concurrent resolution), “they may succumb to the temptation to directly legislate, or statutorily mandate, the fruits of their negotiation.” If that happened, “the power over major budgetary details will slip away from the committees and the individual Members and gravitate toward the President and the Leadership.”²⁰

How would the two branches negotiate on a joint budget resolution? Which members of Congress would be invited to participate? Members recalled one set of negotiations “at Andrews Air Force Base between the Congress and the President scrambling, with sometimes only three people in the room.”²¹ To Rep. David Obey, a joint budget resolution would put the President “right in the middle of Congress’ obligation to define its own budget resolution. So the President gets two kicks at the cat: once when he submits his budget and then another when he puts together a huge budget summit out at Andrews or some other place like they have been in the past, and the President will come to totally dominate that debate. And every rank and file Member of this place will be on the outside looking in, passing notes in, hoping that a handful of people on the inside will give them an occasional listen. We do not want to do that.”²²

Rep. Obey also discussed how a joint budget resolution would affect the relationship between the House and the Senate. He concluded it would “enhance the power of the Senate vis-à-vis the House.” Because the Senate operates on unanimous consent and a system of holds, the Senate leadership would be vulnerable to having a Senate chairman insist: “I’m not going to vote for your budget resolution unless you add my authorization bill in the budget resolution.” Other Senators would be motivated to add legislative language to a joint budget resolution. Obey pointed to another difference between the House and the Senate: “we have a germaneness rule, but in the Senate there is no germaneness rule. And so they can add virtually anything they want.”²³

¹⁸ H. Rept. No. 198 (Part 2), 106th Cong., 1st Sess. 3 (1999).

¹⁹ Id. at 5-6, 29, 36.

²⁰ Id. at 202.

²¹ 146 Cong. Rec. H3086 (daily ed. May 16, 2000), statement by Rep. Jim Nussle.

²² Id. at H3088.

²³ Id.

In 1999, some members of the House Committee on Rules pointed to other problems of a joint budget resolution. It would make “it more difficult to agree on a budget.” It is “hard enough to adopt a congressional budget resolution on time Asking the President to sign it will only make it more difficult to come to a quick agreement.”²⁴ Speaking during floor debate the next year, Rep. Joe Moakley warned that a joint budget resolution “will stall the appropriations process even further, while Congress and the White House struggle and struggle to agree.”²⁵

Rep. Obey pointed out that if Congress were to pass a joint budget resolution and discovered it did not work as intended and wanted to repeal or revise it, “we will not be able to change it without the permission of the President of the United States. That is not a position which any independent legislative body should be in.”²⁶

11. Rediscovering What Worked

Ever since the Budget Act of 1974 there has been a move toward greater centralization of Congress, leading to the passage of a budget resolution and now the possible shift to a joint budget resolution. On paper the budget process appeared to look more comprehensive and formal, implying greater coherence and responsibility. But what have been the results? Less budget control and higher deficits. In hearings in 1990, former CBO Director Rudolph Penner called attention to this interesting pattern. Prior to 1974, budget issues were handled reasonably well under the regular, “fragmented” political process, disorderly as it might have appeared. Budget resolutions were widely praised because they represented a vehicle for centralized, systematic, and comprehensive legislative action.

Penner, however, made this observation: “I have always been struck by the fact in looking at the history of the [budget] process that it appeared chaotic in the late 19th century and early 20th century, but the results were very good in terms of budget discipline, yielding balanced budgets or surpluses most of the time, unless there was really a good reason to run a deficit.” The budget process created in 1974 “looks very elegant on paper, but it is leading to very dishonest and disorderly results.” He admitted that he was “one of those public policy analysts who thought the 1974 process was a good idea when it was first invented. I have to confess to a lot of disappointment and frustration as to how it actually worked out. I think the criticism of that process, that it was too complex and too time consuming, are right on the mark.”²⁷

²⁴ H. Rept. No. 198 (Part 3), 106th Cong., 1st Sess. 163 (1999).

²⁵ 146 Cong. Rec. H3085 (daily ed. May 16, 2000).

²⁶ Id. at H3105.

²⁷ “Budget Process Reform,” hearing before the House Committee on the Budget, 101st Cong., 2d Sess. 20-21 (1990).

If we agree that the budget process established in 1974 created dramatically less control over spending and deficits, what can be done to recreate what worked better in the past? First: restore the essential importance of a responsible presidential budget. There must be pressure on the President – from Congress, scholars, interest groups, the public, and the media – to assure that the process begins with accountability for getting aggregates in order, particularly deficits. *Executive leadership is needed when submitting a responsible budget, not at some later point.* Congress can then live basically within those aggregates and change priorities as it likes.

We need a visible, credible, and accountable presidential budget. The political focus must be on the President, where it was before 1974 and where it needs to be now. With one budget, the nation can fix a spotlight on the President and restore needed accountability and personal responsibility.

BIOSKETCH FOR LOUIS FISHER

Louis Fisher is Scholar in Residence at the Constitution Project. Previously he worked for four decades at the Library of Congress as Senior Specialist in Separation of Powers (Congressional Research Service, from 1970 to 1996) and Specialist in Constitutional Law (the Law Library, from 2006 to 2010). During his service with CRS he was research director of the House Iran-Contra Committee in 1987, writing major sections of the final report.

His books include *President and Congress* (1972), *Presidential Spending Power* (1975), *The Constitution Between Friends* (1978), *The Politics of Shared Power* (4th ed. 1998), *Constitutional Conflicts Between Congress and the President* (5th ed. 2007), *Constitutional Dialogues* (1988), *American Constitutional Law* (with Katy J. Harriger, 9th ed. 2011), *Presidential War Power* (2d ed. 2004), *Political Dynamics of Constitutional Law* (with Neal Devins, 4th ed. 2006), *Congressional Abdication on War and Spending* (2000), *Religious Liberty in America: Political Safeguards* (2002), *Nazi Saboteurs on Trial: A Military Tribunal & American Law* (2003; 2d ed. 2005), *The Politics of Executive Privilege* (2004), *The Democratic Constitution* (with Neal Devins, 2004), *Military Tribunals and Presidential Power: American Revolution to the War on Terrorism* (2005), *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case* (2006), *The Constitution and 9/11: Recurring Threats to America's Freedoms* (2008), *The Supreme Court and Congress: Rival Interpretations* (2009), *On Appreciating Congress: The People's Branch* (2010), and *Defending Congress and the Constitution* (2011). His textbook in constitutional law is available in two paperbacks: *Constitutional Structures: Separation of Powers and Federalism* and *Constitutional Rights: Civil Rights and Civil Liberties*. With Leonard W. Levy he edited the four-volume *Encyclopedia of the American Presidency* (1994). He has twice won the Louis Brownlow Book Award (for *Presidential Spending Power* and *Constitutional Dialogues*). The encyclopedia he co-edited was awarded the Dartmouth Medal. In 1995 he received the Aaron B. Wildavsky Award "For Lifetime Scholarly Achievement in Public Budgeting" from the Association for Budgeting and Financial Management. In 2006 he received the Neustadt Book Award for *Military Tribunals and Presidential Power*. In 2011 he received the Walter Beach Pi Sigma Alpha Award from the National Capital Area Political Science Association for strengthening the relationship between political science and public service.

He received his doctorate in political science from the New School for Social Research (1967) and has taught at Queens College, Georgetown University, American University, Catholic University, Indiana University, Johns Hopkins University, the College of William and Mary law school, and the Catholic University law school.

Dr. Fisher has been invited to testify before Congress more than 50 times on such issues as war powers, state secrets privilege, NSA surveillance, executive spending discretion, presidential reorganization authority, Congress and the Constitution, the legislative veto, the item veto, the Gramm-Rudman deficit control act, executive privilege, committee subpoenas, executive lobbying, CIA whistleblowing, covert spending, the pocket veto, recess appointments, the budget process, the balanced budget amendment, biennial budgeting, and presidential impoundment powers.

He has been active with CEELI (Central and East European Law Initiative) of the American Bar Association, traveling to Bulgaria, Albania, and Hungary to assist constitution-writers, participating in CEELI conferences in Washington, D.C. with delegations from Bosnia-Herzegovina, Lithuania, Romania, and Russia, serving on CEELI “working groups” on Armenia and Belarus, and assisting in constitutional amendments for the Kyrgyz Republic. As part of CRS delegations he traveled to Russia and Ukraine to assist on constitutional questions. For the International Bar Association he helped analyze the draft constitutions for Swaziland and Zimbabwe.

Dr. Fisher’s specialties include constitutional law, war powers, budget policy, executive-legislative relations, and judicial-congressional relations. He is the author of more than 400 articles in law reviews, political science journals, encyclopedias, books, magazines, and newspapers. He has been invited to speak in Albania, Australia, Belgium, Bulgaria, Canada, China, the Czech Republic, Denmark, England, France, Germany, Greece, Israel, Japan, Macedonia, Malaysia, Mexico, the Netherlands, Oman, the Philippines, Poland, Romania, Russia, Slovenia, South Korea, Sweden, Taiwan, Ukraine, and the United Arab Emirates.