

or new entitlement authority¹⁵⁶ for such fiscal year shall not be enrolled until the Congress has completed action on any reconciliation bill or reconciliation resolution¹⁵⁷ or both required by such concurrent resolution to be reported in accordance with section 310(b);¹⁵⁸

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(4) set forth such other matters, and require such other procedures, relating to the budget, as may be appropriate to carry out the purposes of this Act;¹⁵⁹

¹⁵⁶ Section 3(9) (*see supra* p. 18) defines "entitlement authority" to mean that authority described in section 401(c)(2)(C) (*see infra* p. 252). For a discussion of language that ensures that authority will not constitute entitlement authority, *see infra* note 652.

¹⁵⁷ Section 310(b) defines "reconciliation resolution." *See infra* pp. 163-166.

¹⁵⁸ *See infra* pp. 163-166. Sections 310(b) and 301(b)(3) empower reconciliation provisions in a budget resolution to direct the development of a reconciliation resolution. Such a reconciliation resolution could direct the Clerk of the House or the Secretary of the Senate to revise certain bills on which enrollment has been delayed pursuant to section 301(b)(3). Congress has not included this reconciliation resolution procedure in any budget resolution.

¹⁵⁹ Some refer to this paragraph as the "elastic clause." Section 2 sets forth the purposes of this Act as:

- (1) to assure effective congressional control over the budgetary process;
- (2) to provide for 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.

See supra p. 10.

Process Changes in Budget Resolutions

The Constitution preserves to each House of Congress the power to change the rules governing its procedure. Article I, which sets forth the powers of the legislative branch,
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¹⁵⁹(...continued)

provides that "[e]ach House may determine the Rules of its Proceedings" U.S. CONST. art.-I, § 5, cl. 2. Pursuant to this power, Congress may by concurrent resolution supersede rule-making statutes, such as the Congressional Budget Act of 1974, insofar as they establish congressional procedures. Section 904(a), *see infra* pp. 357-358, restates this constitutional power of Congress (and each of its Houses) to change the Budget Act's provisions. Section 301(b)(4) provides an affirmative statement of the same reservation of powers.

The legislative history of section 301(b)(4) makes clear that the drafters of the Budget Act intended that the section would grant later Congresses broad authority to revise the budget rules in budget resolutions. As passed by the House of Representatives, the Act provided a general grant of authority to include miscellaneous budgetary matters:

(b) MATTERS REQUIRED TO BE SET FORTH IN CONCURRENT RESOLUTION. The concurrent resolution referred to in subsection (c) shall set forth, for the fiscal year concerned

...

(5) such other matters relating to the budget as may be appropriate to carry out the purposes of this Act.

H.R. 7130, 93d Cong., 2d Sess. § 121(b) (1974) (as passed by the House). As passed by the House, the Act had no explicit statement of its purposes.

As amended in the Senate, the Act provided two general provisions:

SEC. 301. (a) ACTION TO BE COMPLETED BY JUNE 1. — On or before June 1 of each year, the Congress shall complete action on the first concurrent resolution on the budget The concurrent resolution shall set forth —

...

(7) OTHER MATTERS. — Such other matters relating to the budget as may be appropriate to carry out the purposes of this Act.

(b) ADDITIONAL MATTER IN CONCURRENT RESOLUTION. — The first concurrent resolution on the budget may also include provisions relating to one of the following procedures:

...

(4) any other procedure which is considered appropriate to carry out the purposes of this Act.

H.R. 7130, 93d Cong., 2d Sess. § 301 (1974) (as amended by the Senate). The other
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¹⁵⁰(...continued)

procedures explicitly listed included a procedure to make all spending contingent on the passage of a wrap-up funding bill, a procedure providing for delayed enrollment of spending bills until after Congress completed reconciliation, and a procedure for including all appropriations measures in one omnibus bill. *See id.*

The most authoritative legislative history for the Act, the joint statement of managers in the conference report accompanying the Act, includes a detailed discussion of section 301(b)(4), plainly indicating the drafters's intent that future Congresses have broad authority to make temporary changes in the process governing spending legislation during the period covered by the budget resolution:

SECTION 301 (a) and (b). ADOPTION AND CONTENT OF FIRST
CONCURRENT RESOLUTION

The House bill provided for adoption of the first concurrent resolution The budget resolution also could contain other matters relating to the budget. The Senate amendment provided for adoption of the first resolution The Senate amendment also provided that the budget resolution would contain . . . and other matters deemed appropriate for the congressional budget. The Senate amendment further provided that the budget resolution could mandate additional procedures relating to the consideration of spending measures.

The conference substitute provides for adoption of the first concurrent resolution This resolution shall set forth: . . . and other matters deemed appropriate to the congressional budget. . . .

. . . .

The managers conceive of the first budget resolution as a major annual opportunity for considering budget policies and priorities. The budget process must combine an optimum amount of information in committee reports and other sources with attention to the key aggregates and priorities in the budget resolution. . . .

The managers recognize that as it acquires experience with its new budget process, Congress may desire to establish additional procedures to facilitate the coordination of its separate budget and appropriation decisions. Section 301(b) authorizes Congress to require in the first budget resolution that appropriation and entitlement legislation not be enrolled until the reconciliation stage of the budget process is completed. Congress may devise any other procedure relating to the budget process and prescribe its implementation for the ensuing fiscal year. It is intended that the authority to prescribe "any other procedure which is considered appropriate to carry out the purposes of this Act" applies only to the specific procedures for the enactment of budget authority and spending authority legislation for the

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¹³⁹(...continued)

coming fiscal year and not to the jurisdiction of committees, the authorization of budget authority, or to permanent changes in congressional procedure. The Budget Committees are directed to report to Congress on the implementation of such procedures no later than the end of the 95th Congress.

S. CONF. REP. NO. 924, 93d Cong., 2d Sess. 57-58 (1974), *reprinted in* 1974 U.S.C.C.A.N. 3591, 3599-600.

Budget resolutions have included numerous provisions making changes in the budget process. Those provisions have included:

Maximum Deficit Amount: One budget resolution included an explicit exception for appropriations measures to the maximum deficit amount point of order under sections 311(a) and 605 of the Congressional Budget Act. *See* Concurrent Resolution on the Budget — Fiscal Year 1993, H. Con. Res. 287, 102d Cong., 2d Sess. § 10 (1992) (adopted).

Social Security "Fire Wall": One budget resolution included a provision extending the reach of a 60-vote point of order against budget resolutions that would worsen the Social Security Trust Fund balances. This section implicitly amended section 301(i) of the Congressional Budget Act. *See* Concurrent Resolution on the Budget — Fiscal Year 1993, H. Con. Res. 287, 102d Cong., 2d Sess. § 12(b) (1992) (adopted). *See also* the related provisions of *id.* § 12(a); Concurrent Resolution on the Budget — Fiscal Year 1992, H. Con. Res. 121, 102d Cong., 1st Sess. § 8, 105 Stat. 2414 (1991) (adopted) (requiring use of baseline levels for Social Security for purposes of sections 302 and 311 of the Congressional Budget Act).

Reserve Funds. Several budget resolutions have included what are called "reserve funds" that allow deficit-neutral legislation on specified subjects to proceed in excess of aggregates and committee allocations. These provisions implicitly waive sections 302(f), 311(a), and 602(c) of the Congressional Budget Act for the purposes of considering specific initiative areas. While section 301(b)(7) of the Budget Act codified this practice in 1990, earlier budget resolutions since 1983 had included this type of language. *See* Concurrent Resolution on the Budget — Fiscal Year 1993, H. Con. Res. 287, 102d Cong., 2d Sess. § 9 (1992) (adopted) (initiatives to improve the health and nutrition of children and to provide for services to protect children and strengthen families; economic growth initiatives (including for unemployment compensation or other, related programs); continuing improvements in ongoing health care programs and phasing-in of health insurance coverage for all Americans; initiatives to improve educational opportunities for individuals at the early childhood, elementary, secondary, or higher education levels, or to invest in America's children); Concurrent Resolution on the Budget — Fiscal Year 1992, H. Con. Res. 121, 102d Cong., 1st Sess. § 9, 105 Stat. 2414 (daily ed. May 21, 1991) (adopted) (initiatives to improve the health and nutrition of children and to provide for services to protect children and strengthen families, economic recovery initiatives, continuing improvements in ongoing health care programs and phasing-in of health insurance coverage for all Americans, to expand access to early childhood development services for low-income pre-schoolers, and to fund surface transportation); Concurrent Resolution on the Budget — Fiscal Year 1991, (continued...)

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H. Con. Res. 310, 101st Cong., 2d Sess. § 6, 104 Stat. 5163 (1990) (children, including funding through tax credits); Concurrent Resolution on the Budget — Fiscal Year 1990, H. Con. Res. 106, 101st Cong., 1st Sess. §§ 7 & 8, 103 Stat. 2540 (1989) (children, including funding through tax credits; and medicaid); Concurrent Resolution on the Budget — Fiscal Year 1989, H. Con. Res. 268, 100th Cong., 2d Sess. §§ 5 & 6, 102 Stat. 4875 (1988) (the welfare reform initiative, the medicare catastrophic health insurance initiative, and the anti-drug initiative); Concurrent Resolution on the Budget — Fiscal Year 1988, H. Con. Res. 93, 100th Cong., 1st Sess. § 9, 101 Stat. 1986 (1987) (the welfare reform initiative and the medicare catastrophic health insurance initiative); Concurrent Resolution on the Budget — Fiscal Year 1987, S. Con. Res. 120, 99th Cong., 2d Sess. §§ 3 & 4, 100 Stat. 4354 (1986) (unmet critical needs requested by the President and a general revenue sharing extension); First Concurrent Resolution on the Budget — Fiscal Year 1984, H. Con. Res. 91, 98th Cong., 1st Sess. § 2, 97 Stat. 1501 (1983) (loan foreclosure relief to farmers; direct loans for farm ownership, operating, or economic emergency programs; and for other purposes); *see also* the related provisions of Concurrent Resolution on the Budget — Fiscal Year 1988, H. Con. Res. 93, 100th Cong., 1st Sess. § 5, 101 Stat. 1986 (1987) (funding for defense).

Asset Sales: Budget resolutions have prohibited the counting of the proceeds from asset sales and loan prepayments. These provisions altered the functioning of points of order under sections 302, 310, 311, 601(b), 602, 604, and 605 of the Congressional Budget Act. *See* Concurrent Resolution on the Budget — Fiscal Year 1993, H. Con. Res. 287, 102d Cong., 2d Sess. § 8 (1992) (adopted); Concurrent Resolution on the Budget — Fiscal Year 1992, H. Con. Res. 121, 102d Cong., 1st Sess. § 7, 105 Stat. 2414 (1991) (adopted); Concurrent Resolution on the Budget — Fiscal Year 1991, H. Con. Res. 310, 101st Cong., 2d Sess. § 5, 104 Stat. 5163 (1990); Concurrent Resolution on the Budget — Fiscal Year 1990, H. Con. Res. 106, 101st Cong., 1st Sess. § 6, 103 Stat. 2540 (1989); Concurrent Resolution on the Budget — Fiscal Year 1989, H. Con. Res. 268, 100th Cong., 2d Sess. § 4, 102 Stat. 4875 (1988); Concurrent Resolution on the Budget — Fiscal Year 1988, H. Con. Res. 93, 100th Cong., 1st Sess. §§ 7 & 8, 101 Stat. 1986 (1987).

House Exception to Aggregate Point of Order: One recent budget resolution also clarified the application of the exception that applies in the House to the point of order under section 311 of the Congressional Budget Act (2 U.S.C. § 642(b) (1988)) implicitly amending that section. *See* Concurrent Resolution on the Budget — Fiscal Year 1993, H. Con. Res. 287, 102d Cong., 2d Sess. § 11 (1992) (adopted).

Automatic Second Budget Resolution: When the Congressional Budget Act still provided for first and second resolutions on the budget, budget resolutions have provided that the first resolution be considered to be the second resolution if the Congress had not adopted the second one by a date certain. Those provisions also provided an exception in the House to the aggregate point of order under section 311 of the Congressional Budget Act. *See* First Concurrent Resolution on the Budget — Fiscal Year 1986, S. Con. Res. 32, 99th Cong., 1st Sess. § 3, 99 Stat. 1941 (1985); First Concurrent Resolution on the Budget — Fiscal Year 1985, H. Con. Res. 280, 98th Cong., 2d Sess. § 4, 98 Stat. 3484 (1984); First Concurrent Resolution on the Budget — Fiscal Year 1984, H. Con. Res. 91, 98th Cong., 1st Sess. § 5, 97 Stat. 1501 (1983).

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Point of Order Where Committees Fail To Suballocate: One resolution created a new point of order in the House against the consideration of legislation before the committee of jurisdiction had completed its suballocation of spending. See First Concurrent Resolution on the Budget — Fiscal Year 1985, H. Con. Res. 280, 98th Cong., 2d Sess. § 5, 98 Stat. 3484 (1984).

Revised Aggregates and Allocations in the House: One budget resolution has empowered the Chairman of the House Budget Committee to revise aggregates and allocations under the budget resolution, affecting the enforcement of sections 302, 311, and 602 of the Congressional Budget Act. See Concurrent Resolution on the Budget — Fiscal Year 1992, H. Con. Res. 121, 102d Cong., 1st Sess. § 12, 105 Stat. 2414 (1991) (adopted). See also Concurrent Resolution on the Budget — Fiscal Year 1988, H. Con. Res. 93, 100th Cong., 1st Sess. § 13, 101 Stat. 1986 (1987) (empowering the House Budget Committee Chairman to file original allocations at a later date); Concurrent Resolution on the Budget — Fiscal Year 1987, S. Con. Res. 120, 99th Cong., 2d Sess. § 13, 100 Stat. 4354 (1986) (same).

In summary, under the Constitution, each House of Congress has the power to alter its procedure, including rule-making statutes such as the Congressional Budget Act. Section 904(a) of that Act explicitly restates this power, while section 301(b)(4) of the Act makes an affirmative statement of the principle, providing for inclusion in budget resolutions of "such other matters, and . . . such other procedures, relating to the budget, as may be appropriate to carry out the purposes of this Act." The legislative history of the law makes clear that the drafters of the Act intended that the section would grant later Congresses broad authority to revise the budget process. In practice, Congress has included a variety of budget process provisions in budget resolutions, and many of these have (explicitly and implicitly) altered the application of points of order under the Congressional Budget Act.

Sense of the Congress Provisions

In addition, the concurrent resolution on the budget, like any concurrent resolution, may include "sense of the Congress" and "sense of the Senate" provisions. These provisions state the opinion of the Congress or the Senate and have no binding effect. They must be within the jurisdiction of the Budget Committee in order for the Committee to report the language. Thus, the budget resolution may include any "sense of the Congress" or "sense of the Senate" provision dealing with budgetary policy. —

Many "sense of the Congress" and "sense of the Senate" provisions have been included in budget resolutions, including provisions on:

- tax reform;
- tax law enforcement;

(continued...)

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(5)¹⁶⁰ include a heading entitled "Debt Increase as Measure of Deficit"¹⁶¹ in which the concurrent resolution shall set forth the amounts by which the debt subject to limit (in section 3101 of title 31 of the United States Code¹⁶²) has increased or would increase in each of the

¹⁵⁹(...continued)

- monetary policy;
- Federal employment policy;
- Congressional Budget Office scorekeeping;
- farm loss deductions;
- limitations on benefits to aliens;
- military retirement programs;
- limiting the level of credit activities through the appropriations process;
- coverage of off-budget and credit activities in budget resolutions;
- Federal Financing Bank activities;
- international monetary conference;
- the Grace Commission;
- the National Commission on Social Security Reform;
- early action by Senate committees to meet reconciliation instructions; and
- inflationary effects of Federal regulations.

¹⁶⁰ Section 13203 of the Budget Enforcement Act added this paragraph. *See infra* p. 717. The statement of managers accompanying the conference report on the Budget Enforcement Act explains the change briefly: "Following the Senate bill, the conference agreement allows for display of the increase in the debt as a measure of the deficit . . ." H.R. CONF. REP. No. 101-964, 101st Cong., 2d Sess. 1170 (1990), *reprinted in* 1990 U.S.C.A.N. 2374, 2875.

¹⁶¹ Section 3(6) defines "deficit." *See supra* p. 16.

¹⁶² The public debt limit is set at 31 U.S.C. § 3101 (Supp. III 1991), *amended by* the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13411, 107 Stat. 312 (1993).

relevant fiscal years;

§ 301(b)(6) (6)¹⁶³ include a heading entitled "Display of Federal Retirement Trust Fund Balances" in which the concurrent resolution shall set forth the balances of the Federal retirement trust funds;

§ 301(b)(7) (7)¹⁶⁴ set forth pay-as-you-go procedures for the Senate whereby —

§ 301(b)(7)(A) (A) budget authority¹⁶⁵ and outlays¹⁶⁶ may be allocated to a committee for legislation that increases funding for entitlement and mandatory spending programs within its jurisdiction if that committee or the committee of conference on such legislation reports such legislation, if, to the extent that the costs of such legislation are not included in the concurrent resolution on the budget, the enactment of such legislation will not increase the deficit¹⁶⁷ (by virtue of either deficit reduction in the bill or previously passed deficit reduction) in the resolution for the first fiscal year covered by the concur-

¹⁶³ Section 13203 of the Budget Enforcement Act added this paragraph. *See infra* p. 717. The statement of managers accompanying the conference report on the Budget Enforcement Act explains the change briefly: "Following the Senate bill, the conference agreement allows for . . . display of Federal retirement trust fund balances . . ." H.R. CONF. REP. No. 101-964, 101st Cong., 2d Sess. 1170 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2374, 2875.

¹⁶⁴ Section 13204 of the Budget Enforcement Act added this paragraph. *See infra* p. 718. The statement of managers accompanying the conference report on the Budget Enforcement Act explains the change briefly: "Following the Senate bill, the conference agreement allows for . . . the creation in budget resolutions of pay-as-you-go provisions similar to reserve funds established in budget resolutions since 1987." H.R. CONF. REP. No. 101-964, 101st Cong., 2d Sess. 1170 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2374, 2875.

¹⁶⁵ Section 3(2) defines "budget authority." *See supra* pp. 11-13.

¹⁶⁶ Section 3(1) defines "budget outlays." *See supra* p. 11.

¹⁶⁷ Section 3(6) defines "deficit." *See supra* p. 16.