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The Shrunken Power of the Purse

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INTRODUCTION

In dividing the federal government into three parts, the Constitution gives each branch tools "to resist encroachments of the others."[1] One of Congress's most potent strengths, particularly with respect to the executive branch, lies in its control over the money of the federal government. Article I, Section 8 begins its enumeration of the powers delegated to Congress with the "Power To lay and collect Taxes, Duties, Imposts and excises";[2] it follows immediately with the power "To borrow money on the credit of the United States."[3] Article I, Section 9 commands that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law."[4] Article I, Section 7 prescribes the exclusive process for making a law, which commences with positive action by both Houses of Congress.[5] Thus, unless Congress passes laws to impose taxes, authorizes borrowing or appropriates funds, the executive branch can neither take money from the citizenry nor spend money on behalf of the government.

Supplementing the constitutional requirements, statutory provisions further undergird Congress's control over the money of the federal government. They require that appropriated funds be used for their stated purposes,[6] that government agents not spend or encumber more funds than appropriated (the Antideficiency Act),[7] and that agents of the government receiving funds from outside sources turn them over to the Treasury's general fund and not retain

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1 THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

2 U.S. CONST. art. I, § 8, cl. 1.

3 *Id.* § 8, cl. 2.

4 *Id.* § 9, cl. 7.

5 *Id.* § 7.

6 31 U.S.C. § 1301(a) (2000).

7 *Id.* § 1341.

them for agency use (the Miscellaneous Receipts Act).[8]

Virtually every federal government action requires an expenditure of funds and a consequent need to obtain revenues. In theory, Congress could exercise discretion over nearly every action of the executive branch by choosing to withhold the necessary funds. The Constitution imposes few limits on this discretion.[9] In practice, however, Congress makes far less use of its fiscal discretion than it might. During the past century, Congress has circumscribed its own discretionary decision-making over spending and taxation in a variety of ways, partly to better achieve a variety of goals and partly because of its own structural nature. As a consequence, Congress's institutional control over government tax and expenditure policy has shrunk.

The difference in structure between the two political branches places Congress at an institutional disadvantage in its confrontations with the President. The President, a single person, makes the ultimate decisions for the executive branch. For Congress to take institutional action, it must obtain majority agreement from the members of each of two separate houses, and for some purposes, a supermajority. Considerations of party interest, individual interest, or ideological difference may prevent a majority from taking action to assert an institutional interest. Inaction by Congress may leave the field clear for the President to do as he or she pleases. The burden of congressional inaction shifts in Congress's favor, however, when a desired outcome requires enactment of new legislation. Congress must act first for the activity to occur; the President's wishes cannot prevail until it does so. Fiscal matters that require periodic legislation, such as annual appropriation, give Congress its financial leverage. Permanent or long-term fiscal legislation removes it.

I. OVERVIEW OF BUDGET HISTORY

In the early years of the Republic, Congress appropriated funds for executive branch departments on a line-item basis.[10] An appropriation bill for

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[8] *Id.* § 3302(b).

[9] For example, Congress cannot increase or decrease the President's compensation during his term. U.S. CONST., art. II, § 1, cl. 7. Similarly, Congress cannot decrease the compensation of federal judges while they serve in office. *Id.* at art. III, § 1. Beyond explicit constitutional limits, some have thought the President's Article II powers may imply a requirement that funds be made available to carry out the President's powers, for example, for recognition of foreign ambassadors. *E.g.*, Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1350-51 (1988) (citing U.S. CONST. art. II, § 3 (presidential power to receive ambassadors); U.S. CONST. art. II, § 2, cl. 2 (presidential power to make treaties)). For a discussion of functions that may continue without an annual appropriation of funds, see generally Alan L. Feld, *Shutting Down the Government*, 69 B.U. L. REV. 971 (1989).

[10] *See, e.g.*, Act of July 10, 1797, ch. 17, 1 Stat. 534 (making additional appropriations for the support of government for the year 1797). For an introduction to congressional budgeting activities from the founding of the Nation through the Johnson Administration, see generally Louis Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 LAW & CONTEMP. PROBS. 135 (1972). For a comprehensive overview of current budget

a department might have one line for salaries, another for office supplies, and another for rent. In some years, Congress gave a department or agency limited authority to transfer funding from one line to another. When it did not the funds had to be spent as appropriated. Congress made appropriations one year at a time, in bills separate from substantive legislation. Year to year increases tended to be modest. Until the Civil War era, each house of Congress acted on revenue and spending bills through a single committee: Ways and Means in the House and Finance in the Senate.[11] This facilitated coordination of federal revenue and spending, which approached a balanced budget norm except during wartime.[12]

The Civil War added greatly to the size of the federal budget. The government's outlays in 1860 totaled $63 million.[13] In 1867 they had grown to $358 million, more than five and a half times larger.[14] To ease the burden on the fiscal committees, first the House and then the Senate divided authority over revenue from expenditure, retaining jurisdiction over taxes in the Ways and Means and Finance Committees and transferring appropriations jurisdiction to new committees. A balanced budget remained the norm. Revenues covered peacetime expenditures and allowed for gradual pay down of debt accumulated during wartime.[15] Some legislative committees, dissatisfied with tight spending controls, sought their own spending jurisdiction.[16] Fragmentation of budget requests from the executive branch increased as well. Some agencies submitted budget requests directly to the congressional committees without presidential review.[17] The Treasury Department published an annual *Book of Estimates* that generally did not coordinate spending requests.[18]

World War I similarly accounted for enormous growth in the size of the federal budget, from outlays of $713 million in 1916 to $6.36 billion in 1920, an almost ninefold increase.[19] This growth called for greater coordination of funding requests and appropriations. Internally, the House and Senate amended their rules to give their respective appropriations committees

practices, see generally ALLEN SCHICK, THE FEDERAL BUDGET (3d ed. 2007).

[11] SCHICK, *supra* note 10, at 10-14.

[12] *Id.*

[13] *Id.* at 13.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 13-14.

[17] *Id.*

[18] *Id.*

[19] OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, HISTORICAL TABLES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2009, at 21, tbl. 1.1 (2008) [hereinafter HISTORICAL TABLES], *available at* http://www.gpoaccess.gov/usbudget/fy09/pdf/hist.pdf.

exclusive jurisdiction over spending legislation.[20] More importantly, Congress passed the Budget and Accounting Act of 1921, which mandated that the President submit an annual budget to Congress, and created the Bureau of the Budget (now the Office of Management and Budget or "OMB") to help gather information necessary for the budgeting process.[21] Although the President's recommendations did not have the force of law, the Act shifted the initiative for specification of spending priorities to the President.

This change may not have had much effect on the dynamic between Congress and the President during the 1920s, when both institutions continued to pursue a balanced budget and reduction of the federal debt accumulated during the war years. In the subsequent decades, however, both the Congress and the President pursued more expansive federal government objectives in connection with the Great Depression, World War II, and the Korean War, and continued an expanded governmental role into the 1950s and 1960s. The presidential role shifted from limiting spending to proposing new spending programs. When the Vietnam War created sharp divisions in the country and raised concerns as to controls over the executive branch, Congress sought to reassert its role in connection with the federal government's money. Members of Congress objected particularly to President Nixon's impoundment of funds Congress had appropriated for particular projects, to Congress's reliance on executive branch projections of spending needs and economic development, and to the persistence of budget deficits even as the Vietnam War phased down.[22] Congress enacted the Congressional Budget and Impoundment Control Act of 1974 to redress the balance between the branches on money matters in Congress's favor.[23]

The 1974 Act required Congress to adopt an annual budget resolution to set revenue, spending, and debt totals, and to allocate spending among twenty functional categories.[24] In so doing, Congress sought to coordinate better its spending and revenue raising functions. It established new Budget Committees to set appropriate legislative targets. The Act created the Congressional Budget Office to provide financial estimates independent of the executive branch's numbers. It laid down budget procedures, under which no spending or tax legislation was in order until passage of a concurrent budget resolution. It limited Presidential impoundment of appropriated funds. These changes helped to equalize Congress's institutional position on fiscal matters with the President.

In subsequent decades, Congress experimented with additional budget

[20] SCHICK, *supra* note 10, at 13-14.

[21] Budget and Accounting Act of 1921, ch. 21, 42 Stat. 20 (codified as amended in scattered sections of 31 U.S.C.).

[22] SCHICK, *supra* note 10, at 17-18.

[23] Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 31 U.S.C.).

[24] *Id.*

constraints aimed at reduction of deficit spending. The Gramm-Rudman-Hollings Act threatened to sequester funding across the board when Congress failed to meet spending targets intended to help balance the budget.[25] Congress, however, found ways to avoid the sequester. Later, Congress enacted pay-as-you-go requirements ("PAYGO"), matching increased spending or tax benefits with reductions in other outlays or increases in revenue.[26] PAYGO expired in 2002.[27] In 2006, the House enacted PAYGO requirements as part of its own rules.[28] Neither the Senate nor the President, however, operates under a similar constraint.

At present, discretion over expenditure of federal money combines congressional action with input from the President. Formal inclusion of the President's budget at the beginning of the process allows the executive branch, with the coordination provided by OMB, to frame budget issues. Congress, however, must initiate action to appropriate funds. When Congress makes a large, lump-sum appropriation or a permanent appropriation, the recipient can spend the money with no further action by Congress. It has to that extent given up its discretionary role over the outlay.[29]

II. THE SCOPE OF CONGRESSIONAL FISCAL DISCRETION

Congress's control over the federal government's funds concerns four related areas: expenditures, impoundments, debt, and taxes.

A. *Expenditures*

When Congress enacts appropriations or levies taxes for short periods, it can review quickly the effects of the legislation, including the executive branch's actions in making the expenditure. For much of the current fiscal landscape, however, Congress has enacted relatively permanent law. Appropriations for entitlements, for example, provide the authority to spend such amounts as needed to meet the claims for social security or Medicare payments.[30] Such

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[25] Balanced Budget and Emergency Deficit Control Act (Gramm-Rudman-Hollings Act) of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (codified as amended in scattered sections of 31 U.S.C.).

[26] Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (codified as amended in scattered sections of 31 U.S.C.).

[27] 2 U.S.C. § 902(a) (2006).

[28] H.R. Res. 6, 110th Cong. § 405 (2007) (enacted) (amending clause 10, Rule XXI of the Rules of the House of Representatives).

[29] Budget rules may create their own incentives and distortions; that is beyond the scope of this Essay. *See generally* Tim Westmoreland, *Standard Errors: How Budget Rules Distort Lawmaking*, 96 GEO. L.J. 1555 (2007); George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. (forthcoming 2009), *available at* http://ssrn.com/abstract=1172102.

[30] 42 U.S.C. § 301 (2000) (authorizing appropriations sufficient to cover each state's social security commitments); *id.* § 1396 (authorizing appropriations sufficient to allow each

permanent fiscal legislation limits Congress's ability to review and change priorities through the appropriation process. New legislation can alter any law currently on the books. In practice, however, change must pass through the many steps for enactment of legislation, obtaining the separate approval of each house and the President, rendering change difficult to achieve. The difficulty increases when the change reduces benefits or increases burdens, encouraging the affected parties to mobilize their opposition.

The federal government in 2007 had fiscal outlays of about $2.7 trillion, representing almost twenty percent of gross domestic product.[31] As a practical matter, the 110th Congress controlled only a small part of it. The Budget Enforcement Act of 1990 categorizes almost sixty-two percent of the outlays as mandatory – money over which Congress exercised no discretion.[32] The largest component of the mandatory category consists of entitlement programs, such as social security, Medicaid and veterans pensions.[33] The remainder of the budget divides between defense spending and all other discretionary spending.[34]

Within these latter two categories Congress specifies the uses to which the funds will apply. The amount of detail varies widely. Some categories contain such breadth that the President or the executive agency makes the real choices of how to spend the funds. Other mechanisms also transfer the discretion over use of the funds from Congress to the President or the agency. Some appropriations grant an administrator express authority to shift funds from one category to another.[35] Congress may create exceptions to the Miscellaneous Receipts Act and allow an agency to retain funds from outside sources.[36] Thus, Congress allows military medical facilities to retain health care recoveries from third-party payers for medical treatment to military personnel.[37] Congress has established several revolving funds in which, after an initial appropriation, the agency may replenish the fund with related receipts.[38] In the case of the CIA, sums made available to the Agency contain

state to provide medical assistance for qualifying families and individuals).

[31] HISTORICAL TABLES, *supra* note 19, at 27, tbl 1.3.

[32] OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2009, at 25-26 (2008), *available at* http://www.gpoaccess.gov/usbudget/fy09/pdf/budget/outlook.pdf (observing that fifty-three percent of funding is "mandatory" and nine percent is interest payments under the standards set forth by the 1990 Act).

[33] *Id.*

[34] *Id.*

[35] *See, e.g.*, 15 U.S.C. § 1538 (2006) (National Oceanic and Atmospheric Administration); 50 U.S.C. § 403-4(d) (2000) (Director of National Intelligence).

[36] 31 U.S.C. § 3302(b) (2000).

[37] 10 U.S.C. § 1095(g) (2006).

[38] 42 U.S.C. § 10601 (2000) (Crime Victims Fund); 15 U.S.C. § 2514(b) (2006) (appropriating funds for federal agencies to use electric and hybrid vehicles).

virtually no limitations.[39]

Congressional committees can review how an agency has used appropriated funds, but Congress cannot retrieve funds the agency has spent or committed. Frequently, the agency and the relevant committees are continuing players, and the threat of reduced funding in subsequent years may constrain agency action that strays too far from congressional intent. Thus, in some cases formal discretion over spending devolves from Congress to the executive agency with continuing informal oversight from one or more congressional committees. The threat the committees hold concerns the power to appropriate funds for the future.

Within Congress, the House traditionally originates the appropriations bills.[40] In a classic study, Richard Fenno analyzed the power of the House Appropriations Committee ("HAC").[41] In the years he studied, the HAC formulated the annual appropriations legislation after detailed study, discussion, and compromise within its subcommittees.[42] The bills passed the House with little change. The Senate accepted the House bills as its starting point and offered amendments, and the President signed the bills. Generally, the final legislation closely resembled the version crafted by HAC.

Fenno attributed acceptance of the HAC appropriations bills to a number of factors. The committee members worked hard in reviewing requests from federal agencies and acquired considerable expertise in the process, thus gaining the respect of nonmembers. Members maintained a common general objective, limiting claims on the federal fisc. Although one party remained in control of Congress and established its spending priorities for most of the years Fenno studied, the HAC acted in a bipartisan fashion and incorporated amendments and proposals from members of the other party. Minority party members of the Committee did not feel shut out of the process, and the Committee members presented a common front to the House in support of the legislation reported from the Committee. A common esprit, coupled with an understanding that cooperation enhanced their authority, limited dissent outside the HAC: non-members rarely challenged HAC's determinations. Further, Committee membership was very stable.[43] As a result of all these factors, Fenno concluded that the HAC product received only limited revisions

[39] 50 U.S.C. § 403-1(c) (2000). A taxpayer has no standing to require reporting of Agency receipts and expenditures. United States v. Richardson, 418 U.S. 166, 170 (1974).

[40] The Constitution requires that bills for the raising of revenue originate in the House, U.S. CONST. art. I, § 7, cl. 1, but the Constitution contains no origination requirements for other money bills.

[41] RICHARD F. FENNO, JR., THE POWER OF THE PURSE: APPROPRIATIONS POLITICS IN CONGRESS (1966); *see also* Richard F. Fenno, Jr., *The House Appropriations Committee as a Political System: The Problem of Integration*, 56 AM. POL. SCI. REV. 310, 310-24 (1962).

[42] FENNO, *supra* note 41, at 127-90.

[43] *Id.* at 82-95. Committee membership was usually awarded to senior members from safe districts. As such, Committee members may remain on the Committee for many terms. *Id.*

in the balance of the legislative process.[44]

By the end of the twentieth century, the institutional fabric of the HAC had unraveled.[45] Republican control of the House after 1994 emphasized increased partisanship and excluded minority party members from decision-making. Changes in rules for membership on the HAC and greater insistence by the House leadership on setting the Committee's agenda further eroded the cohesive relationships that had helped the Committee function.[46] As a consequence, the Committee lost its capacity to set the expenditure agenda for the House.[47] The executive branch and the Senate filled parts of the resulting vacuum. Conflict between Congress and the President led to increasing use of continuing resolutions to keep government functions running at their previous level, an abdication of the exercise of choice in making expenditures.[48]

In sum, congressional control over federal expenditures has been weakened in several ways. Permanent appropriations constrain Congress's ability to review and change priorities through the appropriation process. Explicit grants of discretion to alter or suspend congressional directives for the use of funds transfer the ability to make choices to executive agencies. Within Congress, the HAC no longer sets the expenditure agenda as it formerly did – allowing the executive branch to fill part of the resulting vacuum. Conflict between Congress and the President increasingly result in the use of continuing resolutions rather than new appropriations. In short, Congress has given up some of its power to make expenditure choices.

B. *Impoundment*

Most disagreements over expenditures involve spending priorities of the executive branch that Congress does not fully endorse. Occasionally, however, Congress appropriates funds the President does not wish to spend, whether as part of a general budget-tightening policy, or for reasons related to the particular purpose for the funds. Presidential impoundment of funds became a major source of friction in the post-Vietnam War era. Congress passed the 1974 budget legislation partly in response to President Nixon withholding funds Congress had appropriated.[49] The 1974 Act created procedures that

[44] *Id.* at 676-78.

[45] *See generally* Joshua Gordon, The (Dis)Integration of the House Appropriations Committee: Revisiting The Power of the Purse in a Partisan Era 3-7 (Aug. 28, 2003) (unpublished manuscript presented at the Annual Meeting of the American Political Science Association) (arguing that the HAC can no longer fulfill its historic role because of changes in the partisan atmosphere), *available at* http://www.allacademic.com/meta/p_mla_apa_research_citation/0/6/4/6/7/p64673_index.html.

[46] *Id.* at 12-22.

[47] *Id.* at 23-27.

[48] SCHICK, *supra* note 10, at 6-7, 260-63.

[49] *See supra* notes 22-24, and accompanying text.

govern an agency's failure to spend money Congress appropriated.[50] It divides this category into deferrals and rescissions.[51] The President may defer an expenditure for the limited reasons listed in the statute – such as to provide for savings made possible by external changes – by reporting the deferral to Congress. Other decisions not to spend funds constitute rescissions. The President may propose a rescission of an appropriation, which starts a forty-five-day clock for Congress to take action on the proposal. Congressional failure to act requires that the President release the funds for expenditure. Congress may also initiate rescissions. This process keeps Congress directly involved in the contemplated expenditure and does not leave discretion with the executive branch.

After a small number of initial disagreements between Congress and the President, this process has operated relatively smoothly.[52]

C. *Debt*

Congress does not exercise effective control over the federal debt outside the direct appropriation and taxation processes. It has provided a general authorization to the Secretary of the Treasury to borrow on the credit of the United States as necessary for expenditures authorized by law.[53]

In addition, Congress has established a limit on the total amount of debt the federal government can incur.[54] But whenever the debt grows to near that amount, Congress simply increases the limit.[55] In 1979, after several contentious votes on raising the debt limit, the House amended its standing rules to increase the debt limit automatically whenever the concurrent budget resolution sets a new limit.[56] Deeming the House to have approved the new ceiling when it approved the budget resolution, the Rule provides for enrollment of a bill automatically setting the debt limit at the new level and sending it to the Senate without a separate vote.[57] In effect, this approach treats the debt limit as a dependent variable, determined by receipts and disbursements, rather than as a separate control on federal government spending.

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[50] Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297, Title X (codified as amended in scattered sections of 31 U.S.C.).

[51] *Id.*

[52] SCHICK, *supra* note 10, at 120, 284-86.

[53] 31 U.S.C. §§ 3102-03 (2000).

[54] *Id.* § 3101(b).

[55] *Id.* Congress most recently increased the debt limit to $9.815 trillion. 31 U.S.C.A. § 3101(b) (West 2003 & Supp. 2008). For a discussion of proposals to make the debt limit statute more effective, see generally Anita S. Krishnakumar, *In Defense of the Debt Limit Statute*, 42 HARV. J. ON LEGIS. 135 (2005).

[56] This rule continues in effect. Rules of the House of Representative, R. XXVIII, 110th Cong. (2008).

[57] *Id.*

D. *Taxes*

The individual income tax constitutes the largest single source of federal government revenues. For 2007 it amounted to slightly more than $1.1 trillion, representing about 45.3% of all federal revenues and 8.5% of the U.S. gross domestic product.[58] The relative role of the corporate income tax has declined in recent years, but for 2007 it accounted for nearly $370 billion in revenue, 14.4% of all federal revenues and 2.7% of GDP.[59]

In the first two-and-a-half decades of the individual income tax, from 1913 through 1938, Congress enacted a complete revenue act about once every two years. In 1939, Congress codified federal taxes, in effect rendering them a permanent part of the law that required no periodic reenactment.[60] While Congress occasionally has made major changes in these levies, most notably in the World War II era, it generally has left the basic structure in place and has dealt with details of the income taxes. The bulk of this tax revenue consistently has come from wage and personal service income. In effect, the individual and corporate income taxes have continued from year to year as a permanent fixture of the federal government without further congressional action.

Permanent legislation, as manifested in codification of the tax law, places the burden of changing or repealing the law on the proponents of change or repeal, rather than on those who want to continue the tax. Imposition of a tax without periodic congressional action allows members of Congress to disclaim responsibility for the levy. Rhetoric in recent Republican-controlled Congresses, for example, attacked the "IRS Code," effectively disclaiming responsibility for it – as if the Agency, not Congress, had created the tax.[61] Codification hands the executive branch an assured source of revenue until new legislation by Congress – either with the President's approval or by supermajorities – makes a change. The Founding Fathers understood that the power to impose taxes was an important curb on executive power.[62] A permanent tax guarantees the executive branch vast resources without further congressional revenue-raising action. It thereby reduces congressional power and with it various checks against the executive branch.

A permanent tax also facilitates the creation of tax expenditures – special tax-sparing provisions targeted to particular transactions or entities.[63] Once such provisions become embedded in the income tax, they fall outside the

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58 HISTORICAL TABLES, *supra* note 19, at 31-35, tbls. 2.1, 2.2 & 2.3.

59 *Id*.

60 Internal Revenue Code of 1939, Public L. No. 76-1, 53 Stat. 1 (codified as amended in scattered sections of 26 U.S.C.).

61 *E.g.*, 148 CONG. REC. 15487 (2002) (statement of Sen. Gramm).

62 THE FEDERALIST NO. 58 (James Madison), *supra* note 1, at 394.

63 For a list of current tax expenditures, see JOINT COMM. ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2008-2012, at 48-76 (2008), *available at* http://www.house.gov/jct/s-2-08.pdf.

usual expenditure review and can avoid all congressional review for long periods of time.

Congress occasionally enacts tax provisions with an expiration date or "sunset." These provisions require new legislative votes to remain in existence. Scholars disagree as to the desirability of sunsetting tax provisions. On the one hand, a public choice critique holds that the periodic reenactment of a tax benefit merely creates multiple opportunities for legislators to extract "rents" from the affected industries.[64] On the other hand, periodic reenactment arguably allows for tighter fiscal control over tax expenditures.[65] Periodic review and reenactment of the entire income tax has not been debated or studied. It would, however, require legislators to take responsibility for the tax and perhaps invite closer scrutiny of federal use of tax revenues.

CONCLUSION

Three decades ago, Charles Black examined Congress's difficulty in advancing its institutional concerns by posing the following collective action problem: Congress could trump the President's veto power if it were prepared to override every exercise of the veto without regard to the merits of each issue.[66] If it did so, if everyone expected that Congress would always override a veto, Congress would more often have its own way when it disagrees with the President. Strengthening Congress in this way would enhance its role over the long term. Each member would gain some additional measure of power. Yet Congress does not behave in this way and the presidential veto has become a formidable weapon in his arsenal.

Similarly, in connection with spending decisions, the interests of individual members often vary in the short term from any institutional objective. Party divisions enlarge this divergence. Members of the President's party may find themselves sharing more of their current spending priorities with the President, rather than with other members of Congress. If we add the claims of interests outside the legislative four walls, the institutional claims on each member's behavior have ample competition.

Compared with the more hierarchical executive branch, the task within Congress of coordinating action to achieve institutional objectives involves far greater difficulty. Congress's power to direct spending priorities on a continuing basis reaches its peak if it must act to authorize the expenditure. Permanent appropriations or tax measures leave the decision-making field largely to the executive branch.

Fenno's analysis of the HAC offers some steps for Congress to assert

[64] Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L. REV. 335, 339 (2006).

[65] Yin, *supra* note 29 (manuscript at 14-15).

[66] CHARLES L. BLACK & BOB ECKHARDT, TIDES OF POWER: CONVERSATIONS ON THE AMERICAN CONSTITUTION 23 (1976).

enhanced exercise of discretion as compared with the executive branch.[67] First, a significant majority must present a unified front in support of any spending plan. Only through bipartisan deliberation and the give and take of compromise can Congress achieve such unity on a regular basis. Second, Congress must be prepared to act periodically on measures that matter in the fiscal world, leaving as little as practicable to permanent legislation. By doing so, perhaps Congress can reestablish its role in checking executive spending – and enhance the power of the purse.

[67] *See supra* notes 41-43 and accompanying text.