

Army Secretary John McHugh (speaking) and Army Chief of Staff General Raymond T. Odierno testify before House Armed Services Committee (U.S. Army/Teddy Wade)



Cut Defense Pork, Revive Presidential Impoundment

By Lawrence Spinetta

We have gone from a sense of urgency to restrict an imperial President to a sense that the President needs to restrict, if not an imperial Congress, at least a spendthrift one.

—SENATOR WILLIAM COHEN
Line Item Veto Debate, 1995

Every year, Congress packs the defense budget with expensive, unnecessary, and unwanted weapons. This year's National Defense Authorization Act is no exception. Not only does it spend \$2 billion more than the military requested, but it also

diverts \$74 billion in proposed savings to, in the words of former Secretary of Defense Leon Panetta, "other areas that, frankly, we don't need."¹

As a case in point, Congress mandated the purchase of 280 M1A2 Abrams tanks despite Army Chief of Staff General

Raymond Odierno repeatedly telling the House Appropriations Subcommittee on Defense: "these are additional tanks that we don't need."² The Army wants to continue shedding its Cold War-era heavy armor and will likely send the 280 additional tanks to join 2,000 others sitting idle at depots in the California desert.³ The Army made the same argument to Congress last year but was similarly rebuffed.

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Defense as a Jobs Program

Lawmakers habitually spend more on defense than the Pentagon requests because they treat the defense budget as a jobs program. In the case of the M1 tank, Congress was unwilling to close the production line because it provides 16,000 jobs at 882 suppliers spread widely among congressional districts. In short, parochial interests triumphed over national security requirements.

The Services share some of the blame. They recognize that many in Congress prioritize jobs within their districts, which is why most major weapons systems have parts built in nearly every state. For example, the F-35 Joint Strike Fighter, a new fighter jet designed for the Air Force and Navy, has 1,300 suppliers in 47 states and Puerto Rico. While this legislative strategy helps gain approval for new weapon systems, it is a Faustian bargain because it entrenches the political power of the defense industry and saddles the Services with inventories of strategically obsolete weapons that Congress loathes to cut.

Money used to maintain these expensive, unnecessary, and unwanted weapons could be better spent elsewhere. In March 2012, Lieutenant General Robert Lennox, the deputy chief of staff for Army programs (G8), emphasized that the Army does not have the budget to support legacy systems to prop up the defense industry. He used a historical analogy to deride Congress's decision to buy more M1 tanks notwithstanding a lack of need: "We don't want to be in the position of 1939 when we say we have to go out and protect the saber and saddle industry because our cavalry is going to need it for the future. We have to make sure we got the right industrial challenges for the future and those are the ones we have to focus on."⁴

Not only does innovation suffer, but readiness suffers as well. "There is pressure on the department to retain excess force structure and infrastructure instead of investing in the training and equipment that makes our force agile and flexible and ready," observed Secretary Panetta in December 2012 remarks at the National Press Club. "Aircraft, ships,

tanks, bases, even those that have outlived their usefulness have a natural political constituency. Readiness does not."⁵

Past statements by then-Senator Chuck Hagel suggest the new Secretary will be keen to prevent Congress from throwing money at wasteful defense projects. In June 2011, he lectured fellow lawmakers: "You guys have it upside down. Our Defense Department budget . . . is not a jobs program. It's not an economic development program for my state or any district."⁶ One way Secretary Hagel can counter Congress's penchant for pork is to advocate for the revival of Presidential impoundment, an executive branch tool used to enforce fiscal prudence. Impoundment occurs when the President delays or refuses to spend money appropriated by Congress.

Thomas Jefferson set precedent for impoundment in 1803 when he suspended the purchase of 15 gunboats.⁷ In his Third Annual Message to Congress, President Jefferson stated, "The favorable and peaceable turn of affairs on the Mississippi rendered an immediate execution of that law unnecessary." Furthermore, he explained, "Time was desirable in order that the institution of that branch of our force might begin on models the most approved by experience."⁸ In short, Jefferson exercised his discretion as Commander in Chief and chief executive. He impounded congressionally appropriated funds based on his assessment of the strategic situation and his desire to purchase new and better models at a later date.

The U.S. Constitution established a system of checks and balances that entrusts the "power of the purse" to Congress under Article I. However, Article II assigns the executive branch the authority to expend appropriated funds. A 1995 Senate budget committee report noted, "This tug-of-war goes to the most basic tenet of the American democratic system of government—the balance of powers between the executive and the legislative branches of government—the power of the purse versus the impoundment power."⁹

For 170 years after Jefferson claimed the power of impoundment, Presidents at

various times and for various reasons exercised that authority. They mostly used it for narrow defense-related purposes, trimming expenditures for weapons they deemed unnecessary.¹⁰ For example, Harry Truman refused to spend \$735 million to increase the Air Force from 48 to 58 groups. Dwight Eisenhower set aside \$137 million for the Nike-Zeus missile system. And John Kennedy, on the advice of Secretary of Defense Robert McNamara, withheld \$180 million to end the XB-70 Valkyrie bomber program.¹¹

Congress Fights Back

Congress sometimes acquiesced to Presidents' actions while at other times the parties negotiated a political settlement. However, the balance of power changed as a result of President Richard Nixon, who expanded the scope and magnitude of Presidential impoundments, holding back between 17 and 20 percent of controllable expenditures between 1969 and 1972. In 1973, under the guise of controlling inflation caused by high levels of government spending to support the Vietnam War, he suspended nearly \$15 billion, almost 20 percent of controllable spending, which affected over a hundred Federal programs.¹² Congress fought back and passed the Congressional Budget and Impoundment Control Act (CBICA) of 1974, which had the objective of curtailing the President's budgetary powers. The act outlawed impoundment, requiring the executive branch to spend every last penny of congressional appropriations.

Nixon denied that Congress had the constitutional authority to impose such a restriction. However, weakened by the Watergate scandal, he elected not to fight it. Nixon resigned a month after the CBICA became law. The new Ford administration, not wanting to further antagonize a hostile Congress, chose to comply with the law rather than appeal to the Supreme Court.¹³ That decision, according to Senator John McCain, contributed to "exploding" deficits. "It is not coincidence that up until 1974 revenues and expenditures . . . were in sync," opined McCain during a 1995 Senate



M1 Abrams battle tanks (DAC/Don Teft)

debate. “There are times . . . in war when we ran up huge deficits. But after those emergencies subsided, we again brought the budget into balance. It was in 1974 when the two began to diverge to an incredible degree.”¹⁴

The CBICA fundamentally shifted the budgetary balance of power between Congress and the President. The law allowed the President to request rescissions, but that was only permitted if both houses of Congress consented. Not surprisingly, subsequent to the enactment of CBICA, Congress has simply ignored Presidential rescission requests, killing them through inaction.

The CBICA granted more leeway with deferrals. The President was authorized to defer spending unless either the House or Senate passed legislation disapproving the request. (Note that appropriated funds still had to be spent before the end of the fiscal year.) In 1986 the Supreme Court reviewed the CBICA deferral provision and ruled one-house

veto of Presidential actions unconstitutional.¹⁵ Acting quickly to regain the upper hand, Congress enacted the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987 (otherwise known as Gramm-Rudman-Hollings II). The bill took away most of the President’s deferral power, although it did provide for limited exceptions.

In 1988 the Air Force probed congressional appetite for enforcement of the law when it refused to spend \$160,000 authorized by Congress to keep seven SR-71 Blackbird spy planes in flyable storage. The Service insisted the aging Cold War aircraft were too expensive to operate and were no longer needed because of the capabilities of spy satellites. The move went unchallenged, perhaps because the sum at stake was relatively inconsequential. Five years later, Congress ordered the Blackbird out of retirement. The Air Force, which had not budgeted for the aircraft, moved to ground the plane for a second time in

1996. The move coincided with a shift in the tug-of-war between Congress and the President back in favor of the executive. Congress enacted the Line Item Veto Act of 1996, which gave the President sweeping powers to veto individual items in appropriations bills unless Congress overrode the veto with a two-thirds vote in both houses.

The legislation was immediately challenged by multiple lawsuits. One appeal reached the Supreme Court in 1997, but justices withheld ruling on the constitutionality of the act, choosing instead to dismiss the challenge on technical grounds.¹⁶ During the legal wrangling, President Bill Clinton used his new power 82 times, including taking action to rescind \$39 million allocated for the SR-71.¹⁷ Finally in June 1998, the Supreme Court took up a second appeal (*Clinton v. City of New York*) and struck down the law in a 6 to 3 decision.¹⁸ In dissent, Justice Antonin Scalia wrote, “There is not a dime’s worth of difference between

Congress authorizing the president to cancel a spending item, and Congress' authorizing money to be spent on a particular item at the president's discretion. And the latter has been done since the founding of the nation."¹⁹

The Supreme Court decision shifted the balance of power back in Congress's favor, something that is not conducive to curing, to quote then-Senator and later Secretary of Defense William Cohen, "the presence and prevalence of trichinosis in the halls of Congress."²⁰ Congress's refusal to cut public spending has led to sequestration, which mandates across-the-board defense spending cuts that no one believes make strategic sense.

While dysfunction and a failure of political will to cut spending do not justify unconstitutional remedies such as the Line Item Veto Act, returning to a pre-1974 equilibrium where the President routinely exercises his judgment to trim defense pork would be advantageous for the Nation.²¹ "To be able to surgically remove wasteful spending would be a service to the taxpayers," remarked Cohen. "Every report about a \$700 toilet seat . . . sends the message that Congress is either intoxicated with power or powerless to overcome its spending addiction."²²

The President's Next Move

Accordingly, the President should initiate the next round in the tug-of-war between the powers of the purse versus that of impoundment. Specifically, he should seek to revive his impoundment authority for narrow, defense-related weapon procurement issues. "There [is] a fragile but real distinction between impoundment of appropriations for weapons systems and the impoundment of other funds," notes one constitutional scholar.²³ The President should first explore a legislative compromise with Congress to grant him that power. One solution may be for the President to lean on Congress to include the phrase "sum(s) not exceeding" in the defense bill rather than mandating specific funding levels for programs. That phrase has been used in a series of statutes to give the executive branch discre-

tion over appropriated funds. Indeed, the Supreme Court in its *Clinton v. City of New York* decision suggested that practice was within the bounds of the U.S. Constitution.

Absent a legislative compromise, the President should pick an egregious example of defense pork, perhaps the 280 M1 tanks slated for storage, and reassert his historic right. While the Supreme Court was not amenable to allowing Congress to vote to give the President broad line-item veto power, it may be less willing to infringe upon the President's independent constitutional authorities as Commander in Chief and chief executive to block defense spending that is wasteful or strategically unsound.

Even if a limited Presidential authority emerges from this next round of tug-of-war, it would serve to lower the defense baseline every year. And as every saver knows, even small cuts over a long period can add up to considerable savings. More important, it may also instill behavioral changes that stave off bankruptcy and lead to a more stable financial future. JFQ

Notes

¹ Leon E. Panetta, remarks at the National Press Club, Washington, DC, December 18, 2012.

² Raymond T. Odierno, testimony before the U.S. House Appropriations Subcommittee on Defense, Washington, DC, March 7, 2012.

³ "Congress buying tanks no one needs," *The Modesto Bee*, February 10, 2013, available at <www.modbee.com/2013/02/10/2572079/congressbuying-tanks-no-one-needs.html>. See also Drew Griffin and Kathleen Johnston, "Army to Congress: Thanks, But No Tanks," *CNN.com*, October 9, 2012, available at <http://security.blogs.cnn.com/2012/10/09/army-to-congress-thanks-but-no-tanks/>.

⁴ Michael Hoffman, "Army to saber and saddle industry: Sorry," *DoDBuzz.com*, March 22, 2012, available at <www.dodbuzz.com/2012/03/22/army-to-saber-and-saddle-industry-sorry/>.

⁵ Panetta.

⁶ Chuck Hagel, interview by Jacob Weisberg, New York, June 14, 2011, available at <www.cfr.org/world/hbo-history-makers-chuck-hagel/p25305>.

⁷ In February 1803, Congress appropriated \$50,000 to buy the warships after learning France had acquired the Louisiana Territory

from Spain and closed the port of New Orleans to American commerce. Two months later, France agreed to sell the Louisiana Territory to the United States, thereby negating the immediate need to acquire the gunboats, at least in Jefferson's opinion.

⁸ Thomas Jefferson, Third Annual Message to the Senate and House of Representatives of the United States, Washington, DC, October 17, 1803.

⁹ U.S. Senate, *Legislative Line Item Veto of 1995: Report of the Committee on the Budget*, Report 104-9, 104th Cong., 1st sess., February 27, 1995, 1.

¹⁰ Notable exceptions of Presidents who impounded funds for other than defense-related purchases include Ulysses S. Grant and Franklin D. Roosevelt. In 1876 Grant declined to spend money appropriated for harbor and river improvement projects. Similarly, relying on emergency authorities during World War II, Roosevelt laid aside funds appropriated for public works not directly related to war efforts. See Arthur M. Schlesinger, *The Imperial Presidency* (New York: Mariner Books, 2004), 236.

¹¹ Ibid.

¹² Ibid., 238.

¹³ See Paul M. Johnson, *A Glossary of Political Economy Terms*, available at <www.auburn.edu/~johnspm/gloss/impoundment>.

¹⁴ John S. McCain, *Congressional Record—Senate* 141, no. 52 (March 21, 1995), S4212–S4222.

¹⁵ *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987).

¹⁶ *Byrd v. Raines*, 956 F.Supp. 25, 37–38 (D.D.C. 1997).

¹⁷ Helen Dewar and Joan Biskupic, "Court Strikes Down Line-Item Veto," *The Washington Post*, June 6, 1998, A1.

¹⁸ *Clinton v. City of New York*, 524 U.S. 417 (1998). The court's decision did not consider whether the act disrupts the balance of powers specified in the U.S. Constitution. Rather, its ruling "rests on the narrow ground that the Act's procedures are not authorized by the Constitution." Note: the Court's decision did not save the SR-71. The Air Force redistributed the funds and expunged the aircraft from its inventory in 1998.

¹⁹ Ibid.

²⁰ William S. Cohen, *Congressional Record—Senate* 141 (March 22, 1995), S4301–S4312, available at <www.gpo.gov/fdsys/pkg/CREC-1995-03-22/pdf/CREC-1995-03-22-pt1-PgS4301.pdf>.

²¹ Dewar and Biskupic, A1.

²² Cohen.

²³ Clinton L. Rossiter, *The Supreme Court and the Commander in Chief* (New York: Cornell University Press, 1976), 163.