Presidential Budgetary Duties

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As an essential element of republican government, Congress possesses the power of the purse. It uses that authority to control Presidents and executive agencies. From the start, however, there has always been tension between the two elected branches, with Presidents insisting on exercising control over departments and agencies. A major collision occurred during the 1970s, when President Nixon claimed constitutional authority to refuse to spend appropriated funds (the impoundment dispute). He lost that battle in Congress and in the courts. Other issues include covert spending, Gramm-Rudman, Iran-Contra, item vetoes, legislative vetoes, and efforts in recent decades to control the national debt.

When the framers drafted and debated the Constitution, the powers over war and spending were considered essential to legislative prerogatives and republican government. Much of the war power has drifted to the President, especially after World War II. Beginning with Harry Truman's war against North Korea in 1950, Presidents have repeatedly insisted that they may obtain authority to use military force not from Congress but from the UN Security Council and NATO (Fisher 1997). The most recent example of this exercise of presidential power is the military operation by President Barack Obama in Libya in 2011 (Fisher 2012). Unilateral presidential decisions to commit U.S. troops to hostilities result in financial obligations that must be paid by Congress, even if it had no role in the commitment.

Power of the Purse

In Federalist No. 58, James Madison called the power of the purse "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure" (Wright 2002, 391). He understood the essential tie between this power and republican government. In that same essay he explained the evolution of the spending power in the British Constitution: "an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government."

After a centuries-long struggle, the British Parliament used the power of the purse to gradually place limits on the monarch. English kings tried to circumvent Parliament by reaching to outside sources to finance military expeditions and other initiatives. Some of those funds came from private parties and foreign governments. Fueled by those transgressions, England lurched into a bloody civil war and Charles I lost both his office and his head (Einzig 1959, 57-62, 100-06). With Iran-Contra, President Reagan also decided to pursue executive policies by relying on private and foreign money. He managed to escape impeachment.

Madison spoke plainly in Federalist No. 58: "the legislative department alone has access to the pockets of the people" (Wright 2002, 345). Language in Article I, section 9, of the U.S. Constitution reflects that principle: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Other provisions in Article I underscore legislative control over the purse. Congress is empowered to lay and collect taxes, duties, imposts, and excises; borrow money on the credit of the United States; and to coin money and

regulate its value. Madison argued against placing the power of Commander in Chief in the same hands as the power to go to war: "Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought* to be *commenced, continued*, or *concluded*. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws" (Hunt 1906, 6: 148, emphasis in original).

Notwithstanding the clarity of Article I, section 9, Presidents have attempted to wrest the spending power from Congress by entering into financial obligations not authorized by law. An example is President Jefferson and the Louisiana Purchase, but he understood that his initiative required the approval of Congress for additional funds and Senate consent to a treaty (Sofaer 1976, 185-86, 196-98). Other presidential actions pose much graver threats to constitutional government, such as initiating wars, refusing to spend money that Congress appropriates, and seeking funds from foreign governments and private citizens in violation of statutory policy, as with Iran-Contra.

Covert Spending

Underscoring the power of the purse, the framers added this language to Article I, section 9: "A regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." This provision, although essential to republican government, democratic budgeting, and financial accountability, did not appear in the draft constitution until the final few days. On September 14, 1787, George Mason proposed that "an Account of the public expenditures should be annually published." Gouverneur Morris objected that publication

would be “impossible in many cases” (Farrand 1966, 2: 618). A strong supporter of executive authority, Morris might have believed in some level of secrecy and confidentiality.

Rufus King also faulted Mason’s proposal: “the term expenditures went to every minute shilling. This would be impracticable. Congs. might indeed make a monthly publication, but it would be in such general Statements as would afford no satisfactory information” (Farrand 1966, 2: 618). Unlike Morris, King seemed more concerned about impractical detail and frequency of publications than the need for secrecy and confidentiality. James Madison proposed to delete “annually” and insert “from time to time,” giving Congress some discretion over the timing of public disclosure. Other statements during the debate point to the need for secrecy. James Wilson remarked that many operations of finance “cannot be properly published at certain times.” Thomas FitzSimons insisted it was “absolutely impossible to punish expenditures in the full extent of the term.” The convention accepted Madison’s amendment without a dissenting vote. Mason’s proposal, as amended, included an accounting for receipts as well as expenditures and applied the requirement for publication to “all public Money” (Farrand 1966, 2: 619).

An early exception to public access to expenditures appeared in 1790. Congress provided the President with $40,000 to be used for foreign intercourse, leaving to his judgment the extent to which the expenditure would be made public. Legislation three years later authorized the President to make a certificate of the amount of expenditures in foreign intercourse “he may think it advisable not to specify” (1 Stat. 129, 300). A certificate states that funds have been spent without providing any details. This type of spending is referred to as unvouchered funds.

In 1811, Congress passed a secret statute giving President Madison $100,000 to take temporary possession of territory south of Georgia. The law was not published until 1818 (3 Stat. 471-72). Throughout the nineteenth century, the only annual exception to the Statement

and Account Clause was the President's contingency account in foreign intercourse. By 1899 the yearly amount had reached $63,000 (30 Stat. 826). A second exception appeared in 1916, authorizing the Secretary of the Navy to make a certificate of expenses for "obtaining information from abroad and at home" (39 Stat. 557). A third precedent became law in 1935, giving the FBI a confidential fund of $20,000. The level was later raised to an amount specified in an appropriations bill (49 Stat. 78). For the first 146 years, Congress departed from the Statement and Account Clause on only rare occasions and for relatively modest amounts of money.

With World War II, the magnitude of confidential funds increased dramatically. Congress provided billions of dollars to develop and produce the atomic bomb. Only a few lawmakers knew that secret funds had been tucked away in two appropriation accounts: "Engineer Service, Army" and "Expediting Production" (Groves 1962, 360-61; Fisher 1975, 214). Later, a number of agencies received confidential and unvouchered funds, including the White House, the Defense Department, the District of Columbia, the Attorney General, the Bureau of Narcotics and Dangerous Drugs, the Secret Service, the Coast Guard, the Bureau of Customs, and the Immigration and Naturalization Service (Fisher 1979).

Overshadowing those funds in dollar amounts are the agencies that make up the U.S. intelligence community: the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and many others. Appropriations accounts made no mention of those agencies. Instead, their funds were included in other accounts. After the bills became law, OMB transferred the funds to the particular intelligence agencies (Elliot 1975).

William Richardson, an attorney in Pennsylvania, asked the judiciary in the 1960s to declare this method of secret funding a violation of the Statement and Account Clause. A district

court in 1968 ruled that he failed to establish standing to raise a justiciable controversy.[1] The Third Circuit affirmed, deciding that courts lack jurisdiction to hear such cases.[2] The Supreme Court declined to take the case. Justice Douglas thought the case should be heard.[3]

Richardson initiated a new suit in 1970, this time asking that a three-judge court be convened to determine the constitutionality of the CIA budget. Once again a district court said he lacked standing. Moreover, the subject matter raised "political questions in a governmental sense and the subject is not open to a United States District Court for adjudication in any manner."[4] This time, the Third Circuit saw merit to his lawsuit. On July 20, 1972, by a 6 to 3 vote, the appellate court vacated the district court ruling and directed that a three-judge court be designated to adjudicate the issue. Judge Max Rosenn, writing the opinion, underscored the importance and purpose of the Statement and Account Clause: "A responsible and intelligent taxpayer and citizen, of course, wants to know how his tax money is being spent. Without this information he cannot intelligently follow the actions of the Congress or of the Executive. Nor can he properly fulfill his obligation as a member of the electorate. The Framers of the Constitution deemed fiscal information essential if the electorate was to exercise any control over its representatives and meet their new responsibilities as citizens of the Republic."[5]

The Supreme Court agreed to review the procedural aspect of the case: whether Richardson had standing to request a three-judge court. A separate writ of certiorari by Richardson, urging the Court to examine the substance and constitutionality of the issue, was

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[1] Richardson v. Sokol, 285 F.Supp. 866 (W.D. Pa. 1968).
[2] Richardson v. Sokol, 409 F.2d 3 (3d Cir. 1969).
[3] Richardson v. Sokol, 396 U.S. 949 (1969).
[4] Richardson v. United States, C.A. No. 7023 (W.D. Pa. 1970. Not reported, but reprinted at United States v. Richardson, *Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit*, U.S. Supreme Court Docket No. 72-885, at 55a-58a.
[5] Richardson v. United States, 465 F.2d 844, 853 (3d Cir. 1972).

rejected.[6] On June 25, 1974, a divided Court (5 to 4) dismissed the case for lack of standing.[7] The majority regarded the issue as "committed to the surveillance of Congress, and ultimately to the political process."[8] The matter had been in the hands of Congress, which had thus far chose not to comply with the Statement and Account Clause. In a dissent, Justice Douglas said the framers adopted the Clause "to give the public knowledge of the way public funds are expended."[9] He agreed that Congress "has discretion; but to say that it has the power to read the clause out of the Constitution when it comes to one or three agencies is astounding."[10]

In other court actions, in 1976 a district court held that the Freedom of Information Act exempted disclosure of the CIA budget.[11] A year later, the D.C. Circuit decided that Representative Michael Harrington lacked standing to bring suit against the use of public funds for what he claimed to be illegal CIA activities.[12] It also remarked that the Statement and Account Clause "is not self-defining and Congress has plenary power to give meaning to the provision."[13] The court said that Harrington "has suffered no injury in a constitutional sense" and was asking the judiciary "to usurp the legislative function and to grant him the relief which his colleagues have refused him."[14] Disclosure (and compliance with the Constitution) would require action by the elected branches.

House and Senate committees held hearings on whether to publicly disclose the aggregate amount of the intelligence budget. At various times the two chambers moved in that direction,

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[6] United States v. Richardson, 410 U.S. 953 (No. 72-885), certiorari granted; ibid., 955 (No. 72-894), certiorari denied (1973).
[7] United States v. Richardson, 418 U.S. 166, 170 (1974).
[8] Ibid, 179.
[9] Ibid., 200.
[10] Ibid., 200-01.
[11] Halperin v. Colby, Civ. Action No. 75-676 (D.D.C. June 4, 1976).
[12] Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977).
[13] Ibid., 194.
[14] Ibid., 215. For other unsuccessful lawsuits to seek financial documents from the CIA: Halperin v. Central Intelligence Agency, 629 F.2d 144 (D.C. Cir. 1980), Goland v. Central Intelligence Agency, 607 F.2d 339 (D.C. Cir. 1978), Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978), and Baker v. Central Intelligence Agency, 580 F.2d 664 (D.C. Cir. 1978).

but never at the same time (Fisher 2007a, 212-13). Steven Aftergood of the Federation of American Scientists filed a number of FOIA requests and lawsuits to uncover the aggregate budget. His efforts prompted the CIA in 1997 to release the figure of $26.6 billion (with the CIA accounting for about $3 billion) and $26.7 billion the following year. Aftergood and other researchers disclosed CIA budget information for some earlier years (Fisher 2007a, 213-14). In 2005, a top U.S. intelligence official inadvertently revealed at a public meeting what she thought to be the annual intelligence budget: $44 billion (Shane 2005, A24).

In 2004, the 9/11 Commission recommended disclosure of the aggregate budget of the intelligence community. Three years later Congress passed legislation to implement that proposal. The statute required the Director of National Intelligence (DNI) to disclose the aggregate budget, but it authorized the President by fiscal 2009 to waive the disclosure requirement if he deemed it necessary (121 Stat. 335). On October 30, 2007, DNI Mike McConnell released the aggregate amount of $43.5 billion for fiscal 2007 (Office of the Director of National Intelligence 2007). That figure was only part of the picture. His aggregate did not include funds for military intelligence (Defense Department) operations. Including those amounts pushed the total well beyond $50 billion (Mazzetti 2007, A16; Pincus 2007, A4). An estimate in July 2010 put the total at approximately $75 billion (Secrecy News 2010). In October 2010, the government announced it had spent $80.1 billion for intelligence activities (Pincus 2010, A2).

Controlling the Treasury

When members of Congress created executive departments in 1789, they regarded the Departments of Foreign Affairs and War as executive in nature and assigned them directly to the President (1 Stat. 28, 49). Those departmental heads had no regular obligation to come to Congress and present reports. Both departments retained their identity as administrative agencies during the transition from the Articles of Confederation to the Constitution. The continuity is remarkable. Robert Livingston and John Jay held the post of Secretary for Foreign Affairs from 1781 to 1790. Henry Knox served as Secretary of War from 1785 to 1794 (Michaelsen 1987; Sanders 1971; Ward 1962; Ferguson 1961).

A different attitude applied to the Treasury Department. Robert Morris had been Superintendent of Finance from 1781 to 1784, at which point the management of finances fell back to the previous Board of Treasury. Lawmakers viewed the Treasury Department as close to Congress because of the spending power. In 1789, members in the House debated whether the Secretary of the Treasury should not only *digest* plans for the improvement and management of the revenue but also *report* them. John Page of Virginia objected that this authority was a "dangerous innovation upon the Constitutional privilege of this House" and would "create an undue influence within these walls." Members might defer to executive official "even against their own judgment." He feared it would create a precedent "which might be extended, until we admitted all the ministers of the Government on the floor, to explain and support the plans they have digested and reported: thus laying a foundation for an aristocracy or a detestable monarchy" (1 Annals of Cong. 592-93).

Benjamin Goodhue rejected this suspicion and jealousy toward the new Treasury Department: “We certainly carry our dignity to the extreme, when we refuse to receive information from any but ourselves.” It was his expectation that the Treasury Secretary “will, from the nature of his office, be better acquainted with the subject of improving the revenue or curtailing expense, than any other person; if he is thus capable of affording useful information, shall we reckon it hazardous to receive it?” (1 Annals of Cong. 594). Thomas Fitzsimons recommended that the bill be amended by striking the word “report” and inserting “prepare.” The bill that became law reflected that change: “it shall be the duty of the Secretary of the Treasury to digest and prepare plans for the improvement and management of the revenue, and for the support of the public credit; to prepare and report estimates of the public revenue, and the public expenditures; . . .” The statute also required him to “make report, and give information to either branch of the legislature, in person or in writing (as he may be required), respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office” (1 Stat. 65, sec. 2). Leonard White, a specialist in public administration, concluded that Hamilton played a significant role in drafting the bill (White 1948, 118n).

Relationships between Hamilton and Congress grew tense over the years. When he asked to come before Congress in 1792 to answer questions concerning the public debt, some lawmakers objected to the practice of mixing the two branches. They did not want the heads of departments to originate legislation or even voice an opinion that might influence Congress (Annals of Cong., 2d Cong., 1-2 Sess. 703-08). Attacks on Hamilton continued. A House resolution in 1793 claimed he had violated appropriation laws, ignored presidential instructions, failed to discharge essential duties, and committed an indecorum against the House. On each count he was exonerated. A new charge in 1794, regarding a pension claim, was later dismissed

by Congress as "wholly illiberal and groundless." Legislative investigations persisted until December 1794, when Hamilton announced his intention to resign.[15]

President Andrew Jackson's opposition to the Second U.S. Bank opened a new chapter in the struggle over the spending power. Congress often treated the Secretary of the Treasury as its agent, delegating to him — rather than the President — the responsibility for placing public funds either in the national bank or in state banks. Jackson wanted the funds deposited in state banks and had to remove two Secretaries of the Treasury before finding a third willing to carry out his orders. On March 28, 1834, the Senate passed a resolution censuring Jackson for assuming "upon himself authority and power not conferred by the Constitution and laws, but in derogation of both" (1 Cong. Globe 271). Senator Henry Clay led the attack on Jackson, arguing that "although the heads of the State, War, and Navy Department were emphatically the mouth-pieces of the President, yet the Treasury was one over which the control of Congress was complete, and therefore the President had no right to interpose his authority over the head of that department" (1 Cong. Globe 269).

Outraged that the Senate would censure him on the basis of unspecified charges and without an opportunity to defend himself, Jackson accused the Senate of violating the Constitution by charging him with an impeachable act without first waiting for the House to act: "Without notice, unheard and untried, I thus find myself charged on the records of the Senate, and in a form hitherto unknown in our history, with the high crime of violating the laws and Constitution of my country" (Richardson, 3: 1289). Jackson regarded the Secretary as "wholly an executive officer" subject to removal whenever the President was no longer willing to be

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[15] Annals of Cong., 2d Cong., 1-2 Sess. 899-963 (February 28 to March 1, 1793); Annals of Cong., 3d Cong., 1-2 Sess. 458 (February 19, 1794); Annals of Cong., 3d Cong., 1-2 Sess. 463-66 (February 24, 1794) and 954 (December 2, 1794).

responsible for his actions (Richardson, 3: 1301). He regarded the safekeeping of public funds as an executive, not a legislative, responsibility.

In the 1836 elections, Jacksonians gained a majority in the Senate and began a lengthy debate to expunge the censure resolution. They argued that the resolution was "irregularly and illegally adopted . . . in violation of the rights of defence which belongs to every citizen, and in subversion of the fundamental principles of law and justice." Jackson had been "adjudged and pronounced to be guilty of an impeachable offence, and a stigma placed upon him as a violator of his oath of office . . . without going through the forms of an impeachment, and without allowing to him the benefits of a trial, or the means of defence" (13 Reg. of Debates, 24th Cong., 2d Sess. 390-81). The vote to expunge, taken on January 16, 1837, was 24 to 19 (13 Reg. of Debates, 24th Cong., 2d Sess. 504).

In 1840, the Whigs won the White House. President William Henry Harrison in his inaugural address of March 4, 1841, warned of the "unhallowed union of the Treasury with the executive department." The essential difference between monarchy and the American presidency, he said, was the former's control over public finances. He believed it was "a great error" on the part of the framers "not to have made the officer at the head of the Treasury Department entirely independent of the Executive" (Richardson, 3: 1867-69). Those Whiggish sentiments did not last long. .

Submitting a Budget

The year 1921 is sometimes identified as a point of origin for presidential budgetary duties. In that year Congress passed the Budget and Accounting Act, directing the President to formulate and present a national budget. Congress created a Bureau of the Budget — later the

Office of Management and Budget — to provide technical assistance. Given this development, it might seem that Presidents and Treasury Secretaries had been largely bystanders from 1789 to 1921, passively forwarding budget estimates to Congress without revision or comment (Fisher 1975, 268-70). Yet Presidents and Treasury Secretaries had taken an active hand in revising agency budget estimates before they were sent to Congress.

Jefferson's Secretary of the Treasury, Albert Gallatin, demanded close scrutiny of budget estimates. His principal goals included reduction of the national debt and elimination of excise taxes (Walters 1957, 145-54). Recommendations by Gallatin, who had previously served on the House Ways and Means Committee, were routinely accepted by the Cabinet and by Congress. President Monroe complained on several occasions that Treasury reports were being sent to Congress without first being shared with him. Relationships with his Secretary of the Treasury, William Crawford, were severely strained. President John Quincy Adams stayed well informed of budget estimates. When his Secretary of the Treasury pressed for reductions in departmental budget estimates to the lowest possible level, Adams recommended a little padding. Congressional committees felt an obligation to "retrench something from the estimates presented to them; and if some superfluity be not given them to lop off, they will cut into the very flesh of the public necessities" (Adams 1874-77, 7: 359).

The financial panic of 1837 called for presidential leadership of the budget. President Van Buren's first annual message stated that the condition of the country made it necessary to keep budget estimates as low as possible. His last annual message, on December 5, 1840, referred to the need to reduce expenditures because of the recession (Richardson, 4: 1554). President John Tyler insisted on "a complete separation . . . between the sword and the purse" (Richardson, 4: 1890-91). However, he quickly discovered that the nation's business slump

required executive leadership. His second annual message on December 6, 1842, stated that department heads had paid “every proper attention” to the interest of the nation and that the “reduction in the annual expenditures of the Government already accomplished furnishes a sure evidence that economy in the application of the public moneys is regarded as a paramount duty” (Richardson, 5: 2056).

Executive budget leadership increased in 1844 with the election of James K. Polk as President. Drawing upon his legislative experience as chairman of the House Ways and Means Committee, he participated actively in exercising control over agency estimates and the level of federal expenditures. He directed his Cabinet to pay close attention to the estimates submitted by bureau chiefs, who were “favourable to large expenditures, and in some instances included objects which were unconstitutional, especially in regard to internal improvements” (Quaife 1910, 1:48). If budget cuts by his Cabinet seemed insufficient, he intervened to reduce items or eliminate them altogether (Quaife 1910, 3: 213-21; 4: 165-81).

In the years following the Civil War, some Presidents developed a reputation as guardians of the purse. In vetoing a rivers and harbors bill in 1882, President Arthur explained the peculiar deficiency of this kind of legislation. Citizens from one state, learning that public revenues were being spent for projects elsewhere, insisted on projects for themselves. “Thus,” Arthur noted, “as the bill becomes more objectionable it secures more support” (Richardson, 10: 4708). After Congress overrode his veto, a cartoon by Thomas Nast showed the President armed with a rifle, watching an oversized vulture perched upon the Capitol, consuming his veto message. The bottom of the cartoon supplied words of encouragement: “President Arthur, hit him again! Don’t let the vulture become our national bird” (Nast 1882).

Another drain on the Treasury came from the military pension system. Fraudulent claims followed the Revolutionary War and the War of 1812, but the full measure of chicanery by pension claimants and their agents emerged after the Civil War. Federal outlays for military pensions rose from $29 million in 1870 to $139 million at the turn of the century (Glasson 1918, 123). Veterans met slight resistance from Congress. During the first term of President Cleveland, from 1885 to 1889, he vetoed 414 bills (304 regular vetoes and 110 pocket vetoes) — more than twice the number of all vetoes before him. A full 345 of the vetoes were leveled at private and general pension bills (U.S. Senate Library 1992, 65-137). On a single day on May 8, 1886, Cleveland received nearly 240 private bills granting new pensions, increasing their benefits, or restoring old names to the list. Some disabilities existed before the claimant's enlistment to military service; others were not incurred in the line of duty; still others had their origin after discharge (Richardson, 10: 5001-02).

Cleveland's veto messages earned a reputation for their sarcastic quality. One claimant, who enrolled in the Army on March 25, 1865, entered a post hospital a week later with the measles. He returned to duty on May 8 before being mustered out of the service three days later. Cleveland observed that 15 years after this "brilliant service and this terrific encounter with the measles," the claimant discovered that the measles somehow affected his eyes and spinal column. Cleveland found no merit to the claim. He bristled at another pension request from a widow whose husband had joined the service but deserted several days later. "Those who prosecute claims for pension," he said, "have grown very bold when cases of this description are presented for consideration" (Richardson, 10: 5028, 5033-34). A Thomas Nast cartoon captures Cleveland in his role as protector of the purse. He is shown manfully blocking the door to the Treasury while thwarted pension agents slink from his presence (Nast 1886, 421).

Budget and Accounting Act

Federal expenditures increased sharply at the end of the nineteenth century. On top of pension bills and rivers and harbors projects, outlays rose because of the Spanish-American War and construction of the Panama Canal. After 28 uninterrupted years of budget surpluses, from 1866 to 1903, the nation encountered deficits for the next six years. Congress initiated a number of inquiries into work methods of the executive departments, including the Cockrell Committee (1887-89) and the Cockrell-Dockery Commission (1893-95) (Kraines 1951). In 1905, President Roosevelt appointed the Keep Commission to determine how the executive branch might more efficiently conduct its business. President Taft in 1910 secured $100,000 from Congress to set up a five-member Commission on Economy and Efficiency.

In June 1912, Taft submitted to Congress the Commission's proposals for a national budget. The President would be made responsible for reviewing departmental estimates and organizing them into a coherent document. The Commission concluded that the budget was the "only effective means whereby *the Executive* may be made responsible for getting before the country a definite, well-considered, comprehensive program with respect to which *the legislature* must also assume responsibility either for action or inaction" (Commission on Economy and Efficiency 1912, 138 (emphasis in original)). Several factors blocked action on Taft's proposals. Passage of the Sixteenth Amendment, proposed in 1909 and ratified in 1913, promised larger revenues from an income tax. It took the financial shock of expenditures for World War I to precipitate action on budget reform. The war pushed federal expenditures to record levels — from about $700 million before the war to upwards of $12.7 billion and $18.5 billion by 1918 and 1919. Deficits reached unprecedented magnitudes. The total national debt, slightly over one

billion in 1916, soared beyond $25 billion by 1919. Debt management problems after the war called for modernization of the budget process and an increased financial responsibility for the executive branch.

Some reform proposals placed the President in a superior position. John J. Fitzgerald, chairman of the House Appropriations Committee met with the New York constitutional convention in 1915 to discuss changes in national budgeting. He supported a process that made it as difficult as possible for lawmakers to increase estimates submitted by the President. He believed it was necessary to prohibit Congress from appropriating any funds "unless it had been requested by the head of the department, unless by a two-thirds vote, or unless it was to pay a claim against the government or for its own expenses" (Fitzgerald 1915). An article by Charles Wallace Collins, published in 1916, advocated adoption of the British parliamentary system. "Our institutions," he argued, "being more nearly akin to those of England, it is to English budget system that we more naturally look for the purpose of illustration." He noted that the British Parliament had long ago yielded the initiative in financial legislation to the Cabinet. The budget in England was generally ratified as introduced by executive officials. To Collins, an essential feature of a national budget system in America was "the relinquishing of the initiative in financial legislation to the executive by the Congress." The President would "possess the functions of a Prime Minister in relation to public finance" by taking responsibility for preparation of the budget. Congress would surrender its power to amend the presidential budget "by way of increasing any item in the budget, and also its power to introduce any bill making a charge upon the Treasury, without the consent of the executive" (Collins 1916).

In March 1918, Representative Medill McCormick introduced a number of bills and resolutions calling for unification of agency estimates by the Secretary of the Treasury, creation

of a House budget committee to replace the Committees on Appropriations and Ways and Means, establishment of an independent audit of departmental accounts, and reorganization of the Treasury Department. The budget committee would have jurisdiction over both appropriations and revenue, with power to reduce but not add, unless requested by the Secretary of the Treasury upon the President's authority, or unless the committee could muster a two-thirds majority. Members of the House would not be permitted to add to the budget on the floor, except to restore what the President had originally submitted. This budget system, heavily dependent on the British model of parliamentary government, largely subordinated Congress to the President and the Secretary of the Treasury (McCormick 1918).

William McAdoo, President Wilson's first Secretary of the Treasury, recommended a budget system to prohibit Congress from increasing the President's requests: "Let us be honest with ourselves and honest with the American people. A budget which does not cover the initiation or increase of appropriations by Congress will be a semblance of the real thing" (McAdoo, 1919, 121). When Secretary of the Treasury Carter Glass submitted budget estimates in 1919, he said that the budget "as thus prepared for the President and on his responsibility should not, as such, be increased by the Congress" (Glass 1919, 117). David Houston, the next Secretary of the Treasury, urged Congress in 1920 not to add to the President's budget unless recommended by the Secretary of the Treasury or approved by a two-thirds majority (Houston 1926, 88).

Critics of this executive-centered model considered it a diminution of the congressional power of the purse and a threat to republican government. "Uncle Joe" Cannon, Speaker of the House from 1903 to 1911, warned that if Congress consented to an executive budget "it will have surrendered the most important part of a representative government." His advice: "I think

we had better stick pretty close to the Constitution with its division of powers well defined and the taxing power close to the people" (Cannon 1919, 28-29). Edward Fitzpatrick, author of a budget study in 1918, described the British budget model as a step toward autocracy and a Prussian-style military state (Fitzpatrick 1918, viii-ix, 117).

In June 1919, the House passed a resolution to create a Select Committee on the Budget. Its report criticized the lack of internal executive checks on departmental estimates: "The estimates are a patchwork and not a structure. As a result, a great deal of the time of the committees of Congress is taken up in exploding the visionary schemes of bureau chiefs for which no administration would be willing to stand responsible" (U.S. House 1919, 4). Economy and efficiency, said the committee, could be secured only by making an officer responsible for receiving and scrutinizing requests for funds by bureau and departmental chiefs: "In the National Government there can be no question but that the officer upon whom should be placed this responsibility is the President of the United States" (U.S. House 1919, 5). A newly created Bureau of the Budget would provide technical assistance to the President.

The bill that passed the House on October 21, 1919, did not provide for an "executive budget" patterned after the British model. It was executive only in the sense that the President became responsible for the estimates. It was legislative thereafter, giving Congress full power to increase or reduce the estimates. Increases could be made in committee or on the floor by simple majority vote, not the two-thirds margin earlier proposed by some reformers and certainly not by requiring Congress to seek permission from the President and the Secretary of the Treasury (U.S. House 1919, 7).

President Wilson vetoed the bill because it provided for removal of the Comptroller General and Assistant Comptroller General by concurrent resolution, a measure that requires

approval by both houses but is not submitted to the President for his signature or veto. He regarded the removal power as an "essential incident" to the appointing power of the President (Wilson 1920, 2). The House vote to override the veto was 178 to 103, short of the necessary two-thirds (59 Cong. Rec. 8609-14). Congress passed a new bill early in 1921, signed into law by President Harding. The bill created a Bureau of the Budget to be located in the Treasury Department. Removal of the Comptroller General and Assistant Comptroller would be by joint resolution, requiring action by both houses and submission of the resolution to the President. To protect the independence of the legislative and judicial branches, estimates for Congress and the Supreme Court were to be included in the President's budget "without revision" (42 Stat. 20, sec. 201(a)).

Impounding funds

From the days of George Washington forward, Presidents were not required to spend every dollar that Congress appropriated. Some appropriation accounts were purely discretionary, such as contingency funds. Presidents had no obligation to spend all the money. A highly publicized account, cited by the Nixon administration to justify its impoundment policy, was the decision by President Jefferson in 1803 to withhold $50,000 for gunboats. However, there was no dispute with Congress. He explained to lawmakers that the Louisiana Purchase made it unnecessary to immediately spend the money. He took time to study the most recent models of gunboats and informed Congress when he was proceeding with the program (Richardson, 1: 348, 360).

As Attorney General Harmon noted in 1896, an appropriation was not mandatory "to the extent that you bound to expend the full amount if the work can be done for less" (21 Op. Att'y Gen. 414, 415). Those managerial decisions were not a threat to legislative prerogatives. Some

impoundments, however, encroach on the ability of Congress to set national policy and decide budget priorities. House Appropriations chairman George Mahon observed in 1949 that members of Congress did not object to any reasonable economies in government: "But economy is one thing, and the abandonment of a policy and program of the Congress another thing" (95 Cong. Rec. 14922).

From 1940 through the 1960s, Presidents collided with Congress by refusing to spend appropriated funds. On January 3, 1941, President Roosevelt in his budget message announced the postponement of construction projects that would interfere with the defense program (Williams 1955, 5, 8-20). President Truman impounded Air Force funds and canceled a supercarrier (Fisher 1970, 366-68). Many of these impoundments and subsequent withholdings of funds affected military programs (Brownell 2001). Impoundments continued during the Eisenhower, Kennedy, and Johnson administrations (Fisher 1970, 368-69, 370-72). In each case the political system made the necessary political accommodations. A constitutional crisis did not emerge. There was no need for litigation.

Matters changed dramatically with the Nixon administration. During a news conference on January 31, 1973, President Nixon asserted that the "constitutional right for the President of the United States to impound funds — and that is not to spend money, when the spending of money would mean either increasing prices or increasing taxes for all the people — that right is absolutely clear." He vowed not to spend money "if the Congress overspends" (Nixon 1973, 62). OMB Director Roy Ash claimed that impoundment was consistent with the President's "constitutional authority in the area of foreign affairs, his role as Commander in Chief, and his constitutional duty to 'take care that the laws be faithfully executed.'" (U.S. Congress 1973a, 271).

Deputy Attorney General Joseph Sneed doubted whether Congress could legislate against impoundment even in the domestic area: "To admit the existence of such power deprives the President of a substantial portion of the 'executive power' vested in him by the Constitution . . . ." With regard to national defense and foreign relations, he argued that the President's constitutional powers to impound funds find their source not only in the Take Care Clause and his "express status as Commander-in-Chief" but as the "sole organ of the Nation in the conduct of its foreign affairs" (U.S. Congress 1973a, 369). The sole-organ doctrine rests on a complete misconception by Justice Sutherland in the 1936 case of *United States* v. *Curtiss-Wright* (Fisher 2007b, 139).

Officials in the Nixon administration cited Jefferson's withholding of funds for gunboats as a guiding precedent. Questioned by a Senate committee on impoundment actions, HUD Secretary George Romney replied: "I guess Thomas Jefferson started this" (U.S. Congress 1972, 565). OMB Director Casper Weinberger testified that it all started "in the days of Thomas Jefferson. Every President since Thomas Jefferson has done precisely the same thing . . . ." After sharing some statistics with the committee, Weinberger claimed that "we are doing not only nothing different than any other President since Thomas Jefferson has done; we are doing it in no greater degree" (U.S. Congress 1973b, 29). As explained earlier, the differences between the actions of Jefferson and Nixon were worlds apart. Jefferson, after explaining to Congress how circumstances had changed, delayed spending money but eventually purchased gunboats to carry out statutory policy. Nixon claimed the constitutional right to cut programs in half and eliminate them altogether. The severity of those reductions prompted about 80 lawsuits, with the administration losing almost all of them (Fisher 1975, 175-201).

During December 1972, the Nixon administration ordered wholesale reductions in many programs and outright termination in others. The legal justification for curtailing and eliminating those programs: they had been *authorized* by Congress but not *mandated*. Under that legal theory, unless Congress stripped the executive branch of all discretion and flexibility, statutory programs could be axed. The response by Congress was predictable. It began rewriting laws to make them mandatory.

A district court, after reviewing the actions of Secretary of Agriculture Earl Butz, declared that he had acted in excess of his authority, violated several regulations promulgated by his agency, and conducted himself in a manner that was arbitrary and capricious.[16] In another case, a district court held that Butz lacked statutory authority to terminate a direct loan program and use those funds for a different loan program favored by the administration.[17] In 1974, a district court ruled that the Secretary of HUD had an "affirmative obligation" to administer a water and sewer grant program. While discretion existed there was no statutory authority to entirely suspend the program. The Secretary's failure to carry out the program constituted an "abuse of discretion."[18]

Impoundment of funds for the clean-water program reached the Supreme Court. Congress provided $18 billion in contract authority over a three-year period to provide for waste treatment. The statute provided for administrative flexibility. For each year, the dollar amounts were described as "not to exceed." They were thus ceilings rather than mandatory levels for obligation and expenditure. Instead of using this flexibility to implement the program within a scheduled period of time, Nixon cut it in half.

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[16] Berends v. Butz, 357 F.Supp. 143, 148 (D. Minn. 1973).
[17] Sioux Valley Empire Electric Association v. Butz. 367 F.Supp. 686 (D. S.D. 1973).
[18] Rooney v. Lynn, Civil Action No. 201-73 (D.D.C. 1974).

A number of federal courts concluded that although some discretion existed as to final expenditures for the clean-water program, the statute required the administration to make full allotments to the states to assure them of federal funding. On February 18, 1975, the Supreme Court ruled that the Clean Water Act required *full* allotment. A unanimous Court decided that the addition of phrases such as "not to exceed" did not alter the "entire complexion and thrust of the Act." The statute was intended to provide a firm commitment of substantial sums within a fixed period of time.[19]

These decisions, combined with congressional hearings, committee studies, and floor debate, discredited the legal and constitutional arguments offered by the Nixon administration. Both houses worked on impoundment control bills. Instead of passing legislation to deal specifically with this issue, lawmakers decided to add impoundment as one title of a much larger package. Congress would change its budgetary procedures to confront such aggregates as total spending, anticipated revenues, and the level of deficits and surpluses. The result: the Budget Act of 1974. The impoundment title has been effective in curbing executive abuses. The rest of the statute, by weakening presidential responsibility under the 1921 act, produced even less capacity to control deficits.

Budget Act of 1974

In 1972, President Nixon blamed Congress for the level of federal deficits. He said they resulted from the "hoary and traditional procedure of the Congress, which now permits action on the various spending programs as if they were unrelated and independent actions." Because of its decentralized process, he explained, Congress "arrives at total Federal spending in an accidental,

[19] Train v. City of New York, 420 U.S. 35 (1975).

haphazard manner" (Nixon 1972, 742). Yet lawmakers were regularly informed of the larger picture by its Joint Committee on Reduction of Federal Expenditures. "Scorekeeping reports," printed in the *Congressional Record* from month to month, told members of Congress how congressional actions compared to the President's budget. The results revealed a systematic and responsible pattern, not chaos. Congressional totals generally remained within the President's budget aggregates.

The premise of legislative irresponsibility led to the creation of a Joint Study Committee on Budget Control. In its final report of April 18, 1973, the joint committee basically agreed with Nixon that the increasing size of budget deficits resulted from congressional deficiencies: "The constant continuation of deficits plus their increasing size illustrates the need for Congress to obtain better control over the budget. The Joint Study Committee has concluded that the failure to arrive at congressional budget decisions on an overall basis has been a contributory factor in this picture" (Joint Study Committee on Budget Control 1973, 1).

As to the source of those deficits, statistics in the committee report did not support its emphasis on legislative irresponsibility. In pointing out that the federal budget had been in a deficit position 37 times since 1920, the Joint Study Committee noted that in 32 of those years the budgets were submitted to Congress with a deficit. For the Nixon years, table 6 in the report showed the net effect of congressional action on the deficit was near zero. From fiscal years 1969 through 1973, Congress reduced Nixon's appropriation requests by $30.9 billion. During that same period, it increased spending authority on legislative bills (backdoor spending and mandatory programs) by $30.5 billion. As for actual outlays, table 6 indicated that Congress had added $6.8 billion to the deficit over the five-year period. However, the total deficit over that period exceeded $100 billion. The problem was not solely legislative; high deficits were

regularly incorporated in budgets submitted to Congress. What was missing was a responsible presidential budget promised by the 1921 statute.

Each house drafted legislation to control presidential impoundment. The general idea was to divide impoundments into two categories: "rescissions" (actions to terminate funds) and "deferrals" (proposals to delay spending). Lawmakers agreed to prohibit Presidents from canceling a program unless Congress specifically approved by statute. The President would have to submit a rescission proposal to Congress and have it approved within a designated period of days. Congress could ignore the request if it so chose. Legislative inaction required the funds to be spent. For deferrals, lawmakers agreed that Congress could disapprove by something short of a public law. The choice was a one-house veto.[20] Members of Congress worried that action on a separate impoundment bill would be interpreted as pro-spending because its purpose was to release impounded funds to be spent. In 1974, an election year, lawmakers wanted impoundment control combined with legislation that promised control over spending and deficits. As a result, impoundment control became Title X of the Budget Act of 1974.

The nine other titles radically revamped congressional procedures. Congress created budget committees in each house and directed them to draft budget resolutions that set totals for aggregates: total spending, total revenues, and the resulting deficit or surplus. The budget resolution divided spending into broad functional categories such as national defense, agriculture, transportation, and other sectors. The objective was to facilitate debate on budget priorities. The statute established a new Congressional Budget Office (CBO) to provide analytical support to lawmakers (88 Stat. 297).

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[20] The Supreme Court's decision in *INS* v. *Chadha* (1983), striking down the legislative veto, invalidated the one-house veto for deferrals. A federal court determined that the one-house was tied inextricably to the deferral authority. If one fell, so did the other. The President's authority to make policy deferrals thus disappeared. Only routine, non-policy deferrals are permitted. Congress promptly converted the judicial ruling into statutory policy. City of New Haven, Conn. v. United States, 809 F.2d 900 (D.C. Cir. 1987); 101 Stat. 785, sec. 206 (1987).

The 1974 statute assumed that members of Congress would behave more responsibly if they voted on budget aggregates, facing up to totals rather than voting in "piecemeal" fashion on separate authorization, appropriation, and revenue bills. One result of this statute was to weaken the central purpose of the 1921 statute, which was to place a personal and nondelegable duty on the President to prepare a responsible budget, particularly with regard to aggregates. The 1974 statute generated multiple budgets: one submitted by the President, the House budget resolution, the Senate budget resolution, and the final resolution agreed to by both chambers. The President's budget had provided a fixed and visible benchmark, making it easy for the public to know if congressional action was above or below the President's estimates. That reference point disappeared. Instead of keeping within the President's aggregates, lawmakers could vote on generous ceilings in budget resolutions and tell their constituents they had "stayed within the budget," even if their actions exceeded the President's budget.

When Representative Tom Steed managed an appropriation bill for fiscal 1977, he explained: "Although we are over the President's budget, we are under the legislative budget. . . . [T]his particular bill will be well within the limits set by the Committee on the Budget" (122 Cong. Rec. 17843). In 1983, after lawmakers asked whether a pending bill was below or above budget, House Majority Leader Jim Wright assured them: "This bill is not over the budget; the amounts proposed in this amendment are well within budgeted figures. The amounts that we have agreed to and have discussed are not in excess of the congressional budget resolution. That, of course, is the budget." He admitted, however, that the amounts might exceed the President's budget, but "that, of course, is not the budget. Congress makes the budget; the President does not" (129 Cong. Rec. 25417).

President Reagan was quite willing to step aside and let Congress make the budget. He found many political benefits to the new procedure. In 1985, he announced his acceptance of appropriations bills "even if above my budget, that were within the limits set by Congress's own budget resolution" (Reagan 1985, II: 1401). If Presidents ducked their duty under the 1921 to present a responsible budget and submitted one with high deficits, Congress was institutionally incapable of converting an irresponsible presidential budget to a responsible one. To do so would require drastic cuts in spending and sharp increases in taxes. Politically that was extremely unlikely.

The 1974 statute also weakened the Appropriations Committees, which had previously functioned as guardian of the purse. It had been their custom to keep appropriations under the President's requests. Under the new procedure, they found it difficult to resist amendments for greater spending. If their draft bill fell below the amount allocated to them in a budget resolution, lawmakers would pressure the Appropriations Committees to spend "up to" the figure in the budget resolution. A chief clerk in an appropriations committee complained that spending limits in a budget resolution had been set at far too generous a level, forcing the committee to "spend up to the full budget allocation" (Schick 1980, 313). In 1979, Rep. Bob Giaimo as chairman of the House Budget Committee admitted that budget resolutions up to that time had given "a sizeable incremental funding increase, almost regardless of its effectiveness" (125 Cong. Rec. 9028).

Most budget reformers in 1974, including lawmakers and outside experts, believed that centralization of Congress was better than decentralization, comprehensive action superior to fragmentation, and large legislative vehicles (budget resolutions) more productive of responsible action than smaller vehicles. After seeing the damage done by the 1974 process, especially in

the Reagan years, former CBO Director Rudolph Penner offered insightful analysis during a House hearing in 1990. He concluded that Congress operating under its former decentralized and informal system had been more coherent and responsible. Both elected branches performed reasonably well under the older and now discredited legislative process. He now observed: "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 and surpluses most of the time, unless there was really a good reason to run a deficit." Although the 1974 statute created a process that "looks very elegant on paper," it had led to "very dishonest and disorderly results." He noted that those who criticized the Budget Act as "too complex and too time consuming, are right on the mark" (Penner 1990, 20-21).

Reagan and Gramm-Rudman

Those who drafted the Budget Act of 1974 believed that centralizing the legislative process would strengthen Congress and weaken the President. The first year of the Reagan presidency proved them wrong. By attracting votes from conservative Democrats and loyal Republicans, President Reagan gained control of the budget resolution and used it to pursue White House objectives, including tax cuts, increased military spending, and reduction of some domestic programs. He used the reconciliation process, created by the 1974 statute, to ensure that spending and tax bills remained consistent with his budget resolution. The House Appropriations Committee explained how reconciliation played into the hands of the President: "It is much easier for the Executive Branch to gain support for its program when it is packaged in one bill rather than pursuing each and every authorization and appropriation measure to insure

compliance with the Executive's program. The device tends to aid the Executive Branch in gaining additional control over budget matters and to circumvent the will of Congress."[21]

The results of 1981 exposed serious weaknesses within Congress and the Budget Act. Instead of following CBO's projections or substituting an economic forecast of its own, Congress accepted the administration's flawed assumptions. The 1974 statute had been praised for giving Congress an independent analytical capacity. In 1981, however, it chose to adopt the President's false premises and calculations. When Reagan's theory of supply-side economics failed to generate anticipated revenues, the nation did not experience annual deficits of $25 billion, as during the Nixon years. They now exploded to more than $200 billion a year. The 1974 procedures, supposedly far better at dealing with budget aggregates, proved wholly ineffective.

Could the political and economic errors of 1981 have occurred without budget resolutions and the reconciliation process? Not likely. Reagan, as with any President, would have faced almost insurmountable hurdles had he presented his economic plan to a decentralized Congress. White House proposals would have undergone independent scrutiny by a series of committees and subcommittees, each one capable of substantially altering the President's budget. Incremental actions (or inactions) by a series of legislative actors would have fundamentally altered presidential objectives.

The whole purpose of the 1974 statute was to force Congress to vote on an overall budget plan. If the White House gained control of that plan, the process would serve presidential ends. David Stockman, OMB Director from 1981 to 1985, explained how the centralized process created in 1974 furthered executive goals. The constitutional prerogatives of Congress "would

[21] "Views and Estimates on the Budget Proposed for Fiscal Year 1983," House Committee on Appropriations, 97th Cong., 2d Sess. 12 (committee print, 1982).

have to be, in effect, suspended. Enacting the Reagan administration's economic program meant rubber stamp approval, nothing less. The world's so-called greatest deliberative body would have to be reduced to the status of a ministerial arm of the White House" (Stockman 1986, 59). For Reagan's budget plan to succeed, Congress had to "forfeit its independence" (Stockman 1986, 200). The effect of the Budget Act of 1974 was to replace the constitutional system of separation of powers and checks and balances with a British-style parliamentary government, with the executive branch very much in control.

The damage done by President Reagan and the 1974 budget process is evident in the deficits accumulated over his eight years. The total national debt from 1789 to 1981 stood at one trillion dollars when he entered office. It reflected various wars and economic downturns over a period of almost two centuries. By the end of Reagan's first term the national debt had *doubled* to $2 trillion. Four years later, at the end of his second term, it climbed to $3 trillion. The architects of the 1974 statute thought they had build a process to control aggregates, especially deficits. What developed were a remarkable series of miscalculations: political, economic, institutional, and constitutional.

In this climate of uncontrolled deficits, the two branches decided in 1985 to make things much worse by passing the Gramm-Rudman-Hollings (GRH) statute. It was designed to control deficits. It failed utterly in that regard. What Gramm-Rudman did was to announce, very plainly, that the 1974 process could not be counted on to handle budget aggregates and deficits. Gramm-Rudman established a statutory schedule to eliminate deficits by fiscal 1991. Beginning with a deficit of $171.9 billion for fiscal 1986, the deficit was supposed to decline by $36 billion a year over five years until it reached zero. The President with his budget and Congress with its budget resolutions were obliged to honor these statutory mandates. If in any fiscal year the

projected deficit exceeded the statutory allowance by more than $10 billion, another mechanical solution kicked in. A "sequestration" process required across-the-board cuts to protect the statutory targets. Half of the reductions would come from national defense. Designated social programs were exempt from these automatic cuts.

Draft legislation relied on two congressional offices (CBO and GAO) to carry out what seemed clearly to be executive duties. One bill required the CBO and OMB Directors to estimate the levels of total revenues and budget outlays to determine whether the deficit for a particular year would exceed the statutory limit. These two agencies had to specify the degree to which agency spending had to be cut to eliminate the excess deficit.[22] Upon receiving the joint CBO-OMB report, it was the duty of the President to issue an order to eliminate the excess deficit. The President could exercise no discretion. It was his duty to sign his name to the sequestration order prepared by CBO and OBM.

The Senate held no hearings on the constitutionality of this process. The House Committee on Government Operations held a hearing on October 17, 1985. Comptroller General Charles Bowsher, OMB Director Jim Miller, and CBO Director Rudolph Penner testified but not did comment on constitutional issues. I was the fourth to testify and proceeded to state that the bill was unconstitutional because it gave CBO and GAO "substantive enforcement responsibilities" (Fisher 1985, 200). My testimony relied in part on the Supreme Court's decision in *Buckley* v. *Valeo* (1976), which prohibited Congress from vesting substantive and enforcement responsibilities in legislative officers.[23]

The bill that emerged from conference committee authorized the Comptroller General to certify the results submitted by CBO and OMB. Senator Bob Packwood concluded that the

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[22] "The Balanced Budget and Emergency Deficit Control Act of 1985," hearing before the House Committee on Government Operations, 99th Cong., 1st Sess. 26-27 (1985).
[23] Buckley v. Valeo, 424 U.S. 1 (1976).

addition of GAO, "which indeed is an executive agency . . . cures the allegation of unconstitutionality" (131 Cong. Rec. 30274). GAO is not an executive agency. It functions as a research and investigative arm of Congress. Instead of resolving the constitutional issue, Congress chose to punt to the judiciary. It authorized any member of Congress to adjudicate the question, following an expedited process that would begin with a three-judge court and go from there directly to the Supreme Court (99 Stat. 1098, sec. 274).

The three-judge court held the delegation of executive powers to the Comptroller General to be unconstitutional and the Supreme Court affirmed.[24] Recognizing that the process was constitutionally vulnerable, Congress provided for a "fallback" procedure in the event the courts invalidated the statute. Under the substitute process, the OMB and CBO reports would go to a specially created Temporary Joint Committee on Deficit Reduction consisting of the full membership of both budget committees. The joint committee would report the sequestration bill for floor action, and, if passed by both houses, would go to the President to be signed or vetoed.

If Congress failed to pass the appropriations bills, the national government had to rely on stopgap continuing resolutions, creating further uncertainty in executive agencies. With the regular legislative process at a standstill, both branches decided to hold "budget summits" at the White House and other locations. The result: a further weakening of representative and democratic government. Many senior lawmakers from substantive committees were excluded from those summits and had no way to participate in "the normal give and take of congressional deliberations" (Thelwell 1990, 197). Those who did attend were likely to be congressional party leaders without the expertise and experience of committee members.

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[24] Synar v. United States, 626 F.Supp. 1374, 1391-93 (D.D.C. 1986) (three-judge court), aff'd, Bowsher v. Synar, 478 U.S. 714 (1986).

Gramm-Rudman allowed deficits to climb while the elected branches sought refuge in dishonest projections, budget manipulation, escapism, and new forms of accounting ingenuity (Farrier 2004, 82-128). By focusing on a particular fiscal year to project a deficit result, the two branches could indulge in different types of budgetary games. Costs were shifted to the next year or even the previous one. Items could be moved off budget. Improbable estimates of higher revenue were devised to satisfy the projected deficit number even if they never materialized.

Representative Marty Russo, member of the House Budget Committee, explained in 1990 how the two branches practiced deceit with budget deficits: "The President submits a budget that relies on very optimistic economic and technical assumptions and questionable savings proposals to meet the Gramm-Rudman deficit target. Congress attacks the assumptions and proposals as phony, but uses them in the budget resolution anyway" (Russo 1990, 1). Congress accepted the President's phony figures because honest figures (which were available) would have increased the projected deficit and made Congress look like the "big spender." Once the President ducked responsibility by submitting a deceptive budget, politics led Congress to embrace the same mistaken and misleading numbers.

Budget analyst Allen Schick summarized the result: "GRH started out as a process for reducing the deficit and has become a means of hiding the deficit and running away from responsibility" (Schick 1980, 205). Gramm-Rudman never met any of its deficit targets. When it became obvious that the targets could not be met, Congress enacted a revision in 1986 known as GRH II. It projected a deficit of zero by fiscal 1993. The actual deficit for that year: $255 billion.

Presidents and Congresses continue to sidestep responsibility for federal deficits. The national debt, having jumped from $1 trillion to $3 trillion by the end of Reagan's presidency, climbed to $4 trillion after four years of President George H.W. Bush. A political settlement during the Clinton years gave hope controlling deficits, even promising surpluses. The decision by President George W. Bush to fight two wars without paying for them, and the economic collapse in 2008 and recession under President Barack Obama, pushed the national debt beyond $16 trillion. That story is pursued in the last section, but here it is necessary to turn to another budgetary issue that emerged under President Reagan: Iran-Contra.

Seeking outside funds: Iran-Contra

Beginning in 1982, Congress adopted statutory provisions to restrict the Reagan administration's effort to support the Contra resistance in Nicaragua. Executive officials hoped the rebel force would overthrow the Sandinista government. Despite statutory restrictions, Congress learned that the administration continued to supply different forms of assistance. Some executive officials believed it was impermissible for Congress to use funding restrictions to limit the President's constitutional powers over foreign policy. That attitude led the administration to consciously violate statutory limitations and destroy documents.

There was nothing novel about Congress using its power of the purse to control foreign policy. Even in recent years, officials in the Reagan administration could recall that Congress adopted the Cooper-Church Amendment in 1971 to prohibit the use of any funds to introduce U.S. ground combat troops into Cambodia (84 Stat. 1942, sec. 7(a)). In 1973 Congress cut off all funds for military operations in Southeast Asia (87 Stat. 129, sec. 307; 87 Stat. 134, sec. 108).

Three years later, with the Clark Amendment, Congress prohibited all U.S. assistance for conducting military or paramilitary operations in Angola (90 Stat. 757, sec. 404).

In response to Reagan administration policy in Nicaragua, Congress added language to a continuing resolution in 1982 to prohibit the CIA and the Defense Department from furnishing military equipment, military training or advice, or other support for military activities "to any group or individual, not part of a country's armed forces, for the purpose of overthrowing the Government of Nicaragua or provoking a military exchange between Nicaragua and Honduras" (96 Stat. 1865, sec. 793). A House report issued on May 13, 1983, described the statutory curb as ineffective. The insurgents in Nicaragua "openly acknowledged" their goal of overthrowing the Sandinistas and provoking a "military confrontation" (H. Rept. No. 122 (Part 1), 98th Cong., 1st Sess., 11). Congress discovered early in 1984 that the administration, operating through the CIA, had mined the harbors of Nicaragua. It passed statutory language specifically prohibiting that activity (98 Stat. 1210, sec. 2908).

After this pattern of executive officials skirting statutory limitations, Congress decided on October 12, 1984, to adopt strict language to prohibit any kind of U.S. military assistance to the Contras. The statutory language (at times referred to as Boland II) was meant to put a halt to further evasion and circumvention by the executive branch: "During fiscal year 1985, no funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual" (98 Stat. 1935, sec. 8066(a)).

Congress drafted this elaborate language to prevent the administration from continuing to evade statutory policy. With this provision, Congress intended to close all further executive efforts to ignore legislative policy. Senator Christopher Dodd suspected in early 1985 that the administration might still be finding ways to assist the Contras. During Senate hearings, he spoke about rumors and newspaper stories that the administration might try the fund the Contras "through private groups or through funneling funds through friendly third nations, or possibly through a new category of assistance and asking the Congress to fund the program openly" (U.S. Congress 1985a, 908). Ambassador Langhorne Motley, appearing as the administration's spokesman, assured Dodd that the executive branch understood the meaning of Boland II and had no intention of trying to evade it with tricks: "Nobody is trying to play games with you or any other Member of Congress. That resolution stands, and it will continue to stand; and it says no direct or indirect. And that is pretty plain English; it does not have to be written by any bright, young lawyers. And we are going to continue to comply with that."

Motley provided similar assurances to the House Appropriations Committee during testimony on April 18, 1985. He said the administration would not attempt to solicit funds from outside sources to assist the Contras (U.S. Congress 1985b, 1092). When President Reagan signed the bill containing the strict language of Boland II, he did not claim that Congress had overstepped its constitutional authority or imply he would continue to assist the Contras. The constitutionality of Boland II was not challenged by the Attorney General or the Office of Legal Counsel. Yet while Motley testified and offered assurances that the administration would comply with Boland II, executive officials were actively soliciting funds from private parties and foreign governments to assist the Contras.

Following enactment of Boland II, Congress continued to pass legislation for the funding of the Contras. Legislation in 1985 retained the prohibition on military aid to rebel groups in Nicaragua but authorized $27 million in humanitarian aid for the "Nicaraguan democratic resistance" (99 Stat. 249, sec. 722). The assistance "shall be provided to such department or agency of the United States as the President shall designate, except the Central Intelligence Agency or the Department of Defense." The Nicaraguan Humanitarian Assistance Office (NHAO) was created in the State Department to administer this financial aid.

Legislation in 1986 provided $100 million for the Nicaraguan opposition, of which $70 million could be used for non-humanitarian assistance (100 Stat. 1783-300). The Secretary of State (or his designee) was made responsible for policy guidance, coordination, and supervision of U.S. government activities under this title of the statute. Nothing in the title was to be construed as permitting the President to furnish additional assistance to the Nicaraguan democratic resistance from funds other than the funds specified in this statute or otherwise specifically authorized by Congress.

On October 5, 1986, one of the aircraft used by the administration to provide covert assistance to the Contras was shot down in Nicaragua. On board was Eugene Hasenfus, who survived the crash. The Sandinista government found in the wreckage an identification card issued to Hasenfus by the Air Force and an identification card issued to the pilot, William Cooper, by a CIA front company. Those documents were shared with reporters. Although senior officials in the administration, including President Reagan, denied any connection with the flight, it had been assisted by National Security Adviser Robert McFarlane, Col. Oliver North in the White House, the U.S. ambassador in Costa Rica, and the CIA station chief for Central America (Iran-Contra Report 1987, 144-45). Elliott Abrams, Assistant Secretary of State for

Inter-American Affairs, assured congressional committees there was no connection between the administration and the plane carrying Hasenfus (Iran-Contra Report 1987, 245-46). Claire George, CIA Deputy Director for Operations, also testified at congressional hearings that his agency was not involved, directly or indirectly, in assisting resupply missions conducted by private individuals in support of the Contras (Iran-Contra Report 1987, 147).

On November 3, 1986, a Lebanese weekly (*Al-Shiraa*) reported that the Reagan administration had sold arms to Iran. Initial reports claimed that the purpose was to win the release of American hostages held in Lebanon (Iran-Contra Report 1987, xv). Such a policy would have violated U.S. policy and public announcements by President Reagan. The Secretary of State had designated Iran as a country supporting terrorism. On July 1, 1985, Reagan declared his opposition to any type of bargaining with terrorists: "We make no concessions. We make no deals" (Iran-Contra Report 1987, 157). It was later learned that some of the funds from those transactions were diverted to support the Contra rebels in Nicaragua. Selling arms to Iran violated the administration's policy called "Operation Staunch," which advocated no arms sales to either side in the war between Iran and Iraq (Shultz 1993, 239-41, 785n). The Iran-Contra Committee concluded that the sale of weapons to Iran violated the Arm Export Control Act on several grounds: arms could not be transferred to a terrorist nation, no presidential finding authorized the sale, and no notice had been given to Congress (Iran-Contra Report 1987, 418-19).

Three weeks after the *Al-Shiraa* report, President Reagan created a Special Review Board (called the Tower Commission) to investigate the administration's involvement in Iran-Contra. Serving on the board were former Senator John Tower, former Senator Edmund Muskie, and former National Security Adviser Brent Scowcroft. With regard to arms sales to Iran, the board

concluded: “The President appeared to be unaware of key elements of the operation” (Tower 1987, 2). However, Reagan admitted to the board that he had approved “a convoluted plan whereby Israel would free 20 Hezballah prisoners, Israel would sell TOW [tube-launched, optically tracked, wire-guided] missiles to Iran, the five U.S. citizens Beirut would be freed, and the kidnappings would stop” (Tower 1987, 37). A draft finding for the covert operation had been signed by Reagan, although he told the board he did not recall signing it (Tower 1987, 37). He advised the board on January 26, 1987 that “he did not know that the NSC staff was engaged in helping the Contras” (Tower 1987, 61).

In a book published in 1991, Senator Tower said he doubted Reagan’s statements when he met with the board. Tower sat opposite Reagan, listening to his “rather convoluted statement,” and was “shocked” at what he heard. At one point Reagan recanted a previous statement, although that testimony was “fully consistent” with documentary evidence the board possessed. Responding to a question from Tower, Reagan stood up and walked to his desk, picked up a sheet of paper and, as Tower recalled, said to the board: “This is what I am supposed to say.” He read an answer prepared for him by White House Counsel Peter Wallison. To Tower, it “was obvious that the president had been prepped by Wallison and words were being put into his mouth” (Tower 1991, 283).

To Attorney General Edwin Meese, the combination of funding the Contras and sending arms to Iran could cause the “possible toppling” of Reagan through impeachment proceedings. He believed it was essential for the administration to release information and get it “out the door first” (Draper 1991, 521). The administration called NATO Ambassador David Abshire back to Washington, D.C., to ensure that executive documents — many of them highly classified — were made available to Congress in an expeditious manner. He described the problems he faced:

"there had been so much lying within the White House that no one could know the real truth. There had been too much shredding of documents and too much falsification of records" (Abshire 2005, 27). Presidential aides worried about Reagan's vulnerability to impeachment (Walsh 1997, 9, 189, 355, 358-59, 360, 397).

Recalling Nixon's experience with Watergate, the Reagan administration decided to get facts out quickly to prevent opponents from charging a cover-up and obstruction of justice. Reagan permitted two former National Security Advisers, Robert McFarlane and John Poindexter, to testify before Congress. Other administration officials who testified included Secretary of State George Shultz and Secretary of Defense Caspar Weinberger. They were at liberty to publicly discuss their conversations with the President. Because Reagan authorized the release of documents, ordered executive officials to testify before Congress, and waived executive privilege, members of Congress never seriously considered a move to impeach him (Cohen and Mitchell 1988, 45-50).

Reagan directed Attorney General Meese to go to a special judicial panel and request an independent counsel. The judges appointed Lawrence Walsh. His efforts to uncover the full scope of illegalities, however, were limited by the decision of the Reagan and Bush I administrations to withhold key documents (Walsh 1997, 210-11, 218-19). In the course of Walsh's investigation, McFarlane pled guilty to withholding information from Congress, Abrams pled guilty to giving false statements to Congress, George was charged with making false statements to Congress, and other administration officials were either charged or found guilty.

On December 24, 1992, President Bush pardoned six executive officials involved in Iran-Contra: Weinberger, McFarlane, Abrams, and three CIA officials (Duane Clarridge, Alan Fiers, and Clair George). The pardons eliminated the opportunity to learn the full extent of CIA

involvement. Had Weinberger gone to trial, he would likely have sought Bush's testimony. Bush therefore had personal reasons to pardon Weinberger (Crouch 2009, 106-07). On October 30, 1992, four days before the presidential election between Bush and Bill Clinton, Walsh indicted Weinberger a second time. Walsh released information that indicated Bush had not been truthful when he claimed to be "out of the loop" and unaware of key decisions to send arms to Iran. In the closing days of the campaign, Clinton publicly challenged Bush's credibility in Iran-Contra, one of several factors that led to Bush's defeat (Crouch 2009, 102-03).

Denied appropriated funds to assist the Contras, the Reagan administration solicited money from foreign governments and private citizens. The countries were variously referred to as Countries 1 through 6 in the congressional investigation. The one country actually identified in the congressional report is Brunei, which agreed to provide $10 million to the Contras but a typographical error in the bank account number by either Colonel North or his secretary blocked this form of assistance (Iran-Contra Report 1987, 71, 352-53). The administration also sought funds from a number of private individuals. When prosecuted by Walsh, some pled guilty to various counts of conspiracy to defraud the United States (Iran-Contra Report 1987, 85-103; Walsh 1997, 95).

In congressional testimony, Colonel North claimed that the President could authorize and conduct covert operations by using nonappropriated funds (U.S. Congress 1987, Vol. 100-7 (Part 2), 37). He was asked: "And it is also clear, isn't it, that if Congress told the President he could not ask foreign countries or private individuals for financial or other official assistance for the Contras, there would be serious doubt about whether Congress had exceeded its constitutional power, correct?" North replied: "If the Congress had passed such a measure, it would clearly, in my opinion, be unconstitutional." The purpose of those questions was to challenge the

constitutionality of Boland II. If Congress closed the door to the Treasury, could a President go elsewhere for funds to implement White House objectives?

Former National Security Adviser John Poindexter testified that the administration was justified in withholding information from Congress because the Contras were being assisted with nonappropriated funds: "we weren't using appropriated funds. They were private, third-country funds" (U.S. Congress 1987, Vol. 100-8, 158). He argued that the President possesses inherent power over foreign policy and Congress may not interfere with his decisions: "The point was, and still is, that the President has the constitutional right and, in fact, the constitutional mandate to conduct foreign policy. His policy was to support the Contras. Congress had put some restrictions on the use of appropriated funds. Those restrictions didn't apply to private funds. They didn't apply to third-country funds. And the restrictions in the Boland Amendment, as I have said, did not apply to the NSC staff" (U.S. Congress 1987, Vol. 100-8, 159).

At these hearings, Secretary of State Shultz rejected the theory that an administration, denied funds by Congress, could seek financial support from private parties and foreign governments: "it is totally outside of the system of government that we live by and must live by. You cannot spend funds that the Congress doesn't either authorize you to obtain or appropriate. That is what the Constitution says, and we have to stick by it" (U.S. Congress 1987, Vol. 100-9, 74-75). He said that when he was asked in 1984 about third-country solicitations for the Contras, he advised: "in the end if this is going to work, we have to persuade the Congress to support it." The idea of circumventing Congress and relying on funds from private parties and foreign governments "is a piece of junk and it ought to be treated that way."

Some members of the Iran-Contra Committee agreed with Poindexter. Senator Orrin Hatch asked him: "But regarding Boland, would you say that you were trying to comply with the

law while still attempting to pursue the President's policies; is that right?" Poindexter agreed. Hatch continued: "OK. Boland didn't really apply to the President, did it?" Poindexter concurred. Hatch: "I don't know of one person who has any semblance of constitutional authority or law or background who will say that it did. . . . There was nothing in Boland, though, or in any of these Boland Amendments that prohibited private donations to the Contras . . . . Private donations could be made to the Contras. . . . There was nothing in Boland that prohibited foreign governments from donating to the Contras . . . ." (U.S. Congress 1987, Vol. 110-8, 290).

Hatch's position raises several political and constitutional issues. If Congress were to authorize military operations against another country, the President would be permitted to seek financial assistance from other countries and have those funds deposited in the Treasury to be appropriated by Congress. That process was followed in deciding to go to war against Iraq in 1990-1991 (Fisher 2004, 169). But if Congress denies funds for a program, could the President go, hat in hand, to private groups and foreign governments for financial assistance to carry out White House policy? Such conduct would invite a major confrontation with Congress by acting in defiance of statutory policy. The President would fail in his constitutional duty to see that the laws are faithfully executed and would likely face impeachment proceedings. Also, soliciting funds from foreign governments to promote U.S. foreign policy would open the door to widespread compromise and corruption through various quid pro quos. Having received funds from another country, an administration would likely reciprocate by giving donor countries special consideration in terms of foreign assistance, military assistance, arms sales, and trade concessions (Whiting 1990).

At the time of Iran-Contra, constitutional and statutory restrictions already existed on receiving gifts or funds from foreign governments. Article I, section 9, requires an appropriation to draw money from the Treasury and contains the Statement and Account Clause. Immediately following is this language: "No title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign state." At the Virginia ratifying convention, Edmund Randolph defended this limitation as a means of excluding "corruption and foreign influence" (Farrand, 3:327). Justice Story in his *Commentaries* explained that this provision originated "in a just jealousy of foreign influence" (Story 1833, 215-16).

It is possible to conduct federal operations with private and foreign funds, but only when specifically authorized by Congress. Statutes create trust funds to receive gifts from the private sector and from foreign government (31 U.S.C. § 1321; 5 U.S.C. § 7342). Gift funds must be placed in the Treasury and spent only for objects defined by Congress (31 U.S.C. § 3302). The purpose is to "ensure that the executive branch remains dependent upon the congressional appropriations process."[25] Failure to comply with statutory policy on contributions from private parties and foreign nationals is subject to criminal laws that provide for fines and prison sentences.

Quid pro quos were covered by the Pell Amendment of 1985, which placed prohibitions on military and paramilitary operations in Nicaragua. No funds could be used to provide "assistance of any kind, directly or indirectly, to any person or group engaging in an insurgency or other act of rebellion against the Government of Nicaragua." The intent: prevent the United States from entering into any arrangement that conditioned, "expressly or impliedly," the

[25] General Accounting Office, "Principles of Federal Appropriations Laws," 5-65 (1982); see also 5-82 to 5-89.

provision of defense articles and services to recipients of U.S. funds with the understanding that they will assist others engaged "in an insurgency or other act of rebellion against the Government of Nicaragua" (99 Stat. 254, sec. 722(d)).

Congress drafted legislation to place new limits on quid pro quos. In November 1989, President Bush vetoed two bills that attempted to do that. The first prohibited the solicitation of funds from any foreign government or U.S. person for the purpose of furthering a military or foreign policy objective that is contrary to statutory law. Bush believed the bill was designed to prohibit consultation between the United States and another country, even though the bill stated there was no such intent (Bush 1989, 1545-46). Two days later he vetoed another bill that contained criminal penalties for the use of third-party funds by executive branch officials. His objections to both bills centered not on concerns that he recognized as legitimate, but on language he found to be too "vague and sweeping" (Bush 1989, 1567-68).

He did sign a bill, on November 21, 1989, that covered quid pro quos. The legislation prohibited the use of appropriated funds to provide assistance to a foreign government in exchange for that government undertaking "any action which is, if carried out by the United States Government, a United States official or employee, expressly prohibited by a provision of United States law" (103 Stat. 1251, sec. 582). In his signing statement, Bush accepted the legislative purpose of prohibiting "quid pro quo" transactions. As he put it: "transactions in which U.S. funds are provided to a foreign nation on the express condition that the foreign nation provide specific assistance to a third country, which assistance U.S. officials are expressly prohibited from providing by U.S. law" (Bush 1989, II: 1573).

Congress enacted a more comprehensive statute in 1991. The 1980 Intelligence Oversight Act required Presidents to make a confidential "finding" that a covert operation was

necessary. With regard to Iran-Contra, President Reagan issued an "oral" finding and attempted to retroactively authorize what the CIA had done. Congress rewrote the Intelligence Oversight Act in 1991 to specify that presidential findings "shall be in writing," may not have retroactive effect, and "may not authorize any action that would violate the Constitution or any statute of the United States." If the President determines that "it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States," the finding may be reported to what is called the "Gang of Eight": the chairmen and ranking minority members of the intelligence committees, the House Speaker and minority leader, and the Senate majority and minority leaders (105 Stat. 442-43, sec. 503).

In signing the bill, President Bush raised this objection: "I remain concerned about legislatively directed policy determinations in the Act and provisions that are without effect because they are unconstitutional under the Supreme Court decision in *INS* v. *Chadha*, 462 U.S. 919 (1983). I reiterate that the inclusion of such provisions is inappropriate" (Bush 1991, II: 1043-44). He did not identify the particular provisions or explain why they were invalid under *Chadha*. He might have had in mind the requirement that the CIA Director and the heads of all departments, agencies and entities involved in a covert action furnish to the intelligence committees any information or material concerning covert actions "which is requested by either of the intelligence committees in order to carry out its authorized activities" (105 Stat. 443, sec. 503(b)(2)). This type of reporting requirement is not barred by *Chadha*. The Court noted that the Constitution provides Congress "with abundant means to oversee and control its administrative creatures. Beyond the obvious fact that Congress ultimately controls administrative agencies in the legislation that creates them, other means of control, such as

durational limits on authorizations and formal reporting requirements, lie well within Congress' constitutional power."[26]

Item Vetoes and Legislative Vetoes

The spending power remains with Congress if it chooses to exercise it. At times it has been willing to surrender it, such as giving the President an item veto in 1996. The Supreme Court held the statute unconstitutional for failing to follow the legislative procedures of Article I.[27] Budgetary savings from the Line Item Veto Act were extremely modest. Over a five-year period, savings came to less than $600 million (U.S. Congress 1998, 13). The anticipated use of the item veto to cut spending to balance the budget had been greatly oversold (Spitzer 1998, 800-02).

Legislative vetoes give Congress some control over agency spending decisions. Legislation in 1867 placed the following restriction on appropriations for public buildings and grounds: "To pay for completing the repairs and furnishing the executive mansion, thirty-five thousand dollars: *Provided*, That no further payment shall be made on any accounts for repairs and furnishing the executive mansion until such accounts shall have been submitted to a joint committee of Congress, and approved by such committee" (14 Stat. 469). Why would a President allow such a bill to become law? Why not veto it as a legislative encroachment? The answer: Presidents and their advisers recognized an important advantage. If the administration reached the statutory limits of $35,000 and wanted to exceed it, it was not necessary to seek

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[26] INS v. Chadha, 462 U.S. 919, 955 n.19 (1983). Budgetary and constitutional issues of Iran-Contra are carefully examined by Banks and Raven-Hansen (1994).
[27] Clinton v. City of New York, 524 U.S. 417 (1998).

additional funds by passing another law and obtaining the approval of both houses. Securing approval from the joint committee would suffice.

Committee vetoes flourished in the 1940s in response to emergency conditions during World War II. Because of the volume of wartime construction, it was impractical to continue the regular practice of having Congress authorize each defense installation or public works project. Beginning with an informal system in 1942, proposals for the acquisition of land and leases were submitted in advance to the Naval Affairs Committees in each house for their approval (89 Cong. Rec. 1217-29). By 1944, Congress had written that understanding into law (58 Stat. 7-8, 189-90). Additional "coming into agreement" provisions were added in 1949 and 1951, requiring the approval of the Armed Services Committees for the acquisition of land and real estate transactions (63 Stat. 66; 65 Stat. 365).

Presidents Truman and Eisenhower objected to some of these committee vetoes, regarding them as an intrusion into the President's constitutional duty under Article II to see that the laws are effectively executed. During the Eisenhower administration, Attorney General Herbert Brownell issued an opinion in 1955 that the committee veto represented an unconstitutional infringement of executive duties (41 Op. Att'y Gen. 230). So advised, Congress adopted another procedure that yielded precisely the same result. It drafted a bill to prohibit appropriations for certain real estate transactions unless the Public Works Committees first approved the contracts. If committees could not directly control the administration, they could do it indirectly. Eisenhower signed the bill after being assured by Brownell that this procedure, based on the separate legislative stages of authorization and appropriation, was fully within Congress's power to adopt its own rules (Harris 1964, 230-31).

In *INS* v. *Chadha* (1983), the Supreme Court ruled that the legislative veto was unconstitutional because it violated the requirements of bicameralism and presentment. The Court held that whenever congressional action has the "purpose and effect of altering the legal rights, duties, and relations of persons" outside the legislative branch, Congress must act through both houses in a bill submitted to the President.[28] That principle is far too broad. As the Office of Legal Counsel acknowledged in 1996, each house of Congress may alter the legal rights and duties of individuals outside the legislative without resorting to bicameral action and presentation. The issue of committee subpoenas is one method (20 Op. O.L.C. 124, 138). The Supreme Court itself has recognized the power of either house to issue subpoenas and hold uncooperative executive officials and private citizens in contempt.[29]

After the Supreme Court in *Chadha* struck down the legislative veto, Congress retained its committee veto over agency spending adjustments during a fiscal year. President consistently object to these committee vetoes in signing statements, but agency officials nevertheless comply with language in their budget manuals that explicitly require committee approval for certain shifts of funds (the "reprogramming process"). Agencies have both a moral and legal duty to comply with their written regulations. Eliminating this type of committee veto would deprive executive agencies of the flexibility needed to carry out complex and time-sensitive duties throughout the year. Total reliance on the full legislative process is impracticable for both branches (Fisher 2005).

[28] 462 U.S. 919, 952 (1983).
[29] Subpoena power: Eastland v. United States Servicemen's Fund, 421 U.S. 491, 505 (1975); contempt power: Anderson v. Dunn, 6 Wheat. 204 (1821).

Controlling the National Debt

A House committee in 1919 concluded that economy and efficiency at the federal level could be secured only by making an officer responsible for receiving and scrutinizing agency budget requests: “In the National Government there can be no question but that the officer upon whom should be placed this responsibility is the President of the United States” (H. Rept. No. 362, 66th Cong., 1st Sess., 5). That political and constitutional principle led to the Budget and Accounting Act of 1921 and the expectation that the President would be personally responsible for submitting a national budget, especially with regard to aggregates and the projection of budget surpluses and deficits. If the President presents a budget with realistic aggregates, Congress is able to operate within those numbers and change the priorities. Each branch has the institutional capacity to perform those tasks.

As explained earlier, presidential and congressional duties changed radically with the Budget Act of 1974. The nation no longer had a single budget: the President’s. It had several, including the President’s, the House budget resolution, the Senate budget resolution, and the budget resolution agreed to by the two chambers. The single measuring rod disappeared. Lawmakers could claim they were “under” the budget without the public knowing which budget they meant. The Appropriations Committees lost their traditional purpose of producing bills under the President’s budget. They were now pressured to come “up to” the numbers in the budget resolution. Presidents were more than happy to let Congress make the budget and step away from their statutory duty to submit a responsible budget, especially with regard to aggregates and deficits.

When President Reagan entered office, the national debt — accumulated from 1789 to 1981 — had reached one trillion dollars. Instead of the budget resolution serving as a mechanism to strengthen congressional authority, Reagan managed to gain control of the now centralized legislative process to cut taxes and increase military spending. The deficit tripled during his eight years. Both branches avoided accountability by creating the "automatic" control of the Gramm-Rudman Act, which egregiously failed to control deficits. The national debt rose to four trillion under President George H. W. Bush, but seemed to be brought under control by the two branches during the Clinton years. A combination of spending constraints and tax increases projected sizable budget surpluses.

Under the presidencies of George W. Bush and Barack Obama, the national debt climbed beyond $16 trillion. Part of that increase came from Bush's decision to cut taxes and fight two wars in Iraq and Afghanistan without paying for them. If conditions after the terrorist attacks of 9/11 were indeed a national crisis, it was appropriate to ask the public to pay for military expenditures or cut other programs. That was not done. The economic collapse in 2008 reduced revenues and increased the debt still further. No one expected President Obama to immediately produce a balanced budget, given joblessness and economic conditions, but it was within his capacity to present a budget that brought deficits under control ten years out. That was not done either.

The failure of the elected branches to address the problem of budget deficits raises several issues. One is the growing expense to pay interest on the debt, consuming each year a greater portion of the national budget. Second, the United States is increasingly dependent on foreign countries (China, Japan, and others) to purchase U.S. bonds. Concerns about budget irresponsibility in the United States creates the likelihood that they may refrain from buying the

bonds, or would agree to do so only if the rates are substantially increased. That would add still further to the cost of paying for the annual debt. Third, what accounts for the unwillingness of contemporary Presidents and members of Congress to provide leadership for controlling deficit spending? The magnitude of the national debt and its increase over the coming decade makes it a legitimate topic of national security. Instead of addressing the problem head-on, both branches searched for new mechanisms, including a fiscal commission and a "supercommittee" in Congress that would supposedly do what Presidents and lawmakers refused to do.

In 2009, members of Congress debated the idea of creating a fiscal commission to confront massive federal deficits. Bills were introduced to empower a commission to develop legislation to "reform tax policy and entitlement benefit programs and ensure a sound fiscal future for the United States" — code words for raising revenue, cutting entitlements, and bringing budget deficits under control.[30] Sponsors of this legislation regarded it as crucial to create a process that would ensure bipartisan support. Senator Kent Conrad, chairman of the Senate Budget Committee, concluded that "the regular legislative process is simply not going to get it done" (Conrad 2009, 1). Democrats and Republicans, acting alone, would not agree to cut popular entitlement programs (Medicare, social security, etc.) or raise taxes. To guarantee that a proposal would have bipartisan support, the fiscal commission would need a supermajority (for example, 12 of 16 members) before making its recommendations.

Hearings on these proposals generally ignored a role for the President. Lawmakers and budget experts in 2009 blamed Congress for the fiscal crisis: a national debt of $12 billion at that time and an annual deficit that exceeded $1.4 trillion. The next decade was projected to add another $9 trillion of debt. At a hearing on November 10, 2009, Senator George Voinovich

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[30] H.R. 1557, 111th Cong., 1st Sess. (2009); S. 1056, 111th Cong., 1st Sess. (2009); S. 2853, 111th Cong., 1st Sess. (2009).

offered this view: "Congress is simply not willing or not capable of enduring short term pain for long term gain" (Voinovich 2009, 1-2). Certainly that is a fair point, but the same could be said of Presidents George Bush and Barack Obama. During the hearing, Senator Lamar Alexander asked: "What about the President? The President has to be involved. . . . He is the agenda setter. . . . No one else can come close to that" (Alexander 2009).

On December 7, 2009, the cover of *Newsweek* captured the budget crisis dramatically with this headline: "How Great Powers Fall: Steep Debt, Slow Growth, and High Spending Kills Empires — And America Could Be Next." In the background was the Capitol, upside down. Where was the White House? It should have been upside down also. At a hearing in December 2009, Senator Joe Lieberman remarked that confronting the deficit problem required "facing the hard choices Congress has shown in the past it hasn't got the stomach for" (Lieberman 2009, 3). The record supports his judgment about the legislative branch, but recent Presidents demonstrated no stomach for the fight either.

The basic idea of a Senate bill (S. 2853) was to create a fiscal commission consisting of 18 members to study methods of reducing the federal deficit. Sixteen would be members of Congress; two would come from the executive branch. The bill empowered the commission to draft a bill to include changes in entitlement programs, taxes, and appropriations. A majority of 14 would be needed to report the bill for floor action. No floor amendments were allowed. The choice for lawmakers: vote it up or down, without any changes. A majority of 60 percent in each house was required to pass the bill. If it cleared both chambers, the bill would go to the President for his signature or veto. Needing a supermajority of 60 percent, the bill fell short on a vote of 53 to 46 (Montgomery 2010, A8).

At that point, President Obama issued an executive order on February 18, 2010, establishing an 18-member National Commission on Fiscal Responsibility and Reform. He had been in office for one year without addressing the deficit issue. Another year would be lost waiting for the commission to complete its work and present a plan no later than December 1, 2010, after the November elections. Issuing the report required the approval of "not less than 14 of the 18 members of the Commission" (Obama 2010).

Obama's first budget message on February 26, 2009, spoke frankly about the seriousness of the debt: "[W]e cannot lose sight of the long-run challenges that our country faces and that threaten our economic health — specifically, the trillions of dollars of debt that we inherited." He noted that his initial budgets carried high deficits because of the deep recession and the need to stimulate economic recovery, but pledged: "we must begin the process of making the tough choices necessary to restore fiscal discipline, cut the deficit in half by the end of my first term in office, and put our Nation on sound fiscal footing." Those words were never followed by actions needed to achieve that goal.

A year later, with his budget message of February 1, 2010, Obama told the nation: "we cannot continue to borrow against our children's future." He spoke of the urgency of "getting our fiscal house in order" and admitted that "our fiscal situation remains unacceptable." Instead of making concrete proposals to cut the deficit, he issued his executive order to create a fiscal commission. On July 13, 2010, when he announced the appointment of his new OMB Director, Jacob Lew, it was reported that Lew would be responsible for reducing the deficit "to 3 percent of the size of the economy by 2015" (Kornblut and O'Keefe 2010, A3). Based on the gross domestic product (GDP) of $19.190 trillion projected for fiscal 2015, the annual deficit at that

time would be $575.7 billion. Projections of that order did not reflect a policy of fiscal discipline to control deficits.

In December 2010, the fiscal commission failed to attract the necessary 14 votes to produce a deficit control plan. Another year had slipped by without moving toward a balanced budget or to surpluses. Obama could have adopted some of the proposals of his fiscal commission, which urged reductions in social security, cuts in defense spending, and increased taxes (Calmes 2010, A1). But nothing in his third budget, released on February 14, 2011, dealt substantively with long-term deficits. OMB Director Lew spoke the language of budget restraint, claiming that Obama's budget is one "that lives within our means" (Milbank 2011, A2). However, this budget projected deficits of $8 trillion over the next decade.

With President Obama unwilling to bring deficits — near-term and long-term — under control, Congress passed the Budget Control Act of 2011, signed into law on August 2. The legislation created a new process to reduce the deficit by up to $2.4 trillion over ten years. Part of that reduction came from statutory caps for fiscal years 2012 through 2021, amounting to an estimated $917 billion in savings. To enforce the caps, the legislation borrowed from the "sequesters" of Gramm-Rudman. If Congress were to exceed the caps, automatic across-the-board spending cuts would occur within discretionary accounts.

The second step in potential savings depended on the work of a new 12-member "supercommittee." The statute directed this Joint Select Committee on Deficit Reduction to recommend an additional $1.5 trillion in deficit reduction over ten years. Once again Congress decided it could not rely on its regular legislative process or the procedures of the Budget Act of 1974. Recommendations from this new committee would be voted on by the end of the year. If a majority of the committee agreed on proposed legislative language, lawmakers had to vote by

December 23, with no amendments allowed. Enactment had to occur by January 15, 2012 to avoid automatic spending cuts. If the committee failed to achieve at least $1.2 trillion in deficit reduction, automatic sequesters would be triggered to achieve the savings. As with Gramm-Rudman, a number of programs were exempted from these cuts (CQ 2011, 1761-62). The supercommittee failed to reach agreement.

On February 13, 2012, Obama submitted his fourth budget. Including the $1 trillion in discretionary spending required by the Budget Control Act, his budget proposed an estimated $4 trillion in additional cuts by 2018. Even with those projections, the estimated annual deficit for 2022 was $704 billion. These estimates come from a section on "Key Budget Facts" in his budget. If some of his proposals for spending cuts and tax increases are not accepted by Congress, the deficits will be higher (Calmes 2012, A12).

Conclusions

The growth of the national debt over the last three decades has been too extraordinary to ignore. Nevertheless, elected officials from both branches have allowed an urgent matter to persist. They have resorted to new mechanisms — budget resolutions, the Gramm-Rudman Act, item vetoes, fiscal commissions, and supercommittees — to replace the regular legislative process. Repeatedly those substitutes failed. Presidents and members of Congress are public servants, elected to handle problems that threaten the nation's fiscal health and stability. The picture that emerges after 1981 is the lack of leadership skills in both elected branches needed to protect republican and constitutional government.

The political process requires the President to play a central role in submitting a responsible budget on aggregates, especially the deficit. There is no substitute for that personal involvement, but the Budget Act of 1974 helped erode presidential accountability. Other factors contribute to the crisis, such as a public that wants more services than it is willing to pay for, and increased polarization that drives moderates out of both parties. The budget system can work when the President provides leadership, including frank talks with the nation to help voters understand what steps are needed. That has not been done for many years.

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