Center for Strategic and Budgetary Assessments

A Defense Buildup in the Near Term?

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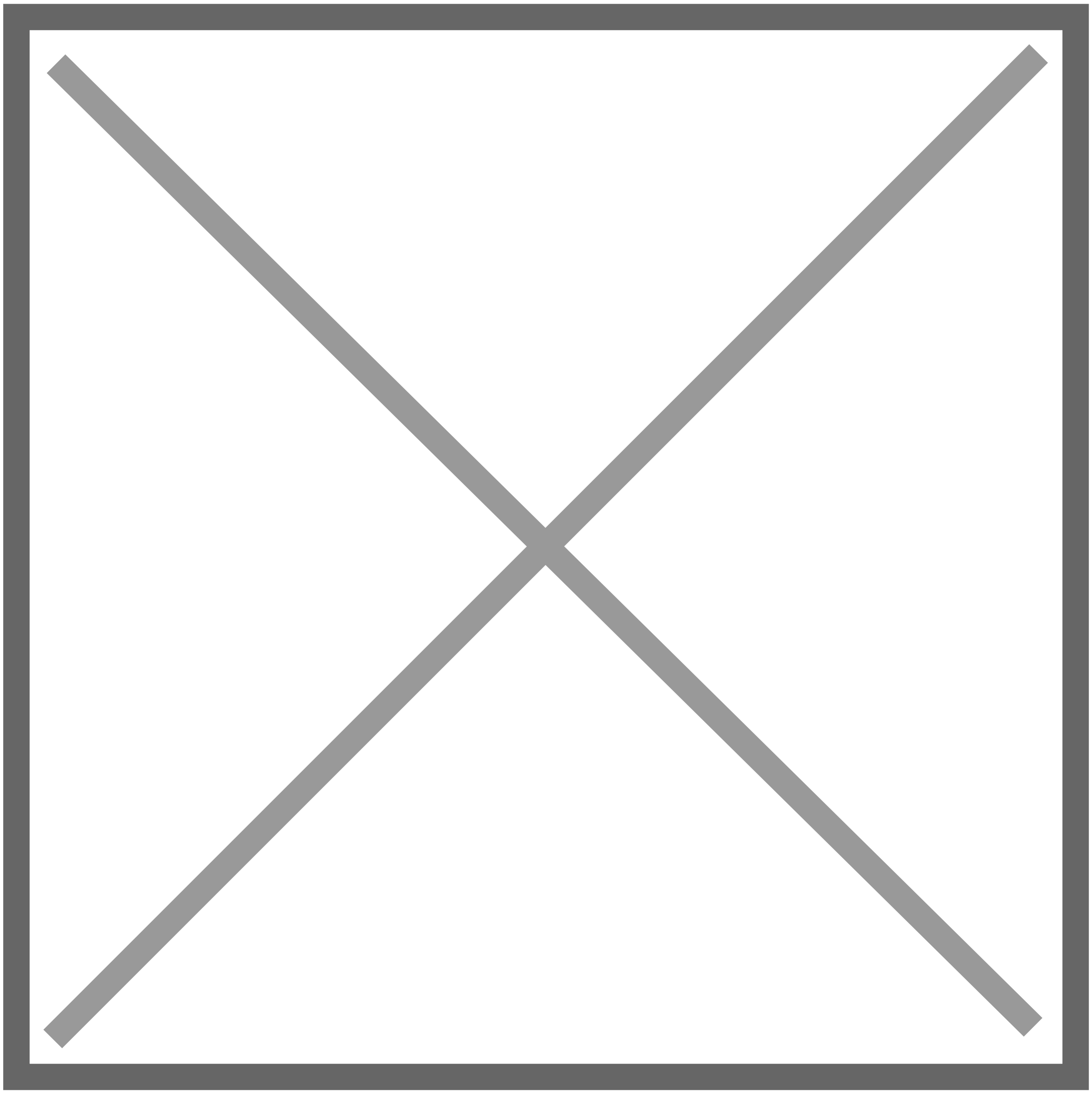
Not content with the Trump administration's decision to defer a defense buildup to FY 2019 and beyond, Congress is taking matters into its own hands. In the FY 2018 authorization and appropriations cycle to date, the House is coalescing at a national defense topline of about $696.5 billion, some $30 billion over the Trump administration's request for $603 billion in base funding and a further $65 billion in OCO for a total of $667 billion. Defense hawks in Congress—like Rep. Mac Thornberry (R-TX) and Sen. John McCain (R-AZ), the chairmen of the House and Senate Armed Services Committees, respectively—advocated for higher defense funding levels in FY 2018, arguing that the military can't wait until after the beginning of the FY 2019 fiscal year on October 1, 2018, to begin restoring capacity and investing in improved capabilities.[1] There appears to be broad consensus about the need for greater defense spending in Congress, including a surprising degree of agreement between the Freedom Caucus and the defense hawks in the House. However, deeper divisions about the right levels of non-defense discretionary spending and cuts to mandatory spending twice postponed the release of a budget resolution in the House Budget Committee, leaving a short legislative timeframe before the beginning of FY 2018.[2] The statutory limitations on national defense spending imposed by the Budget Control Act of 2011 also pose a formidable hurdle.

Defense Committee Actions

The appropriate level of national defense and non-defense discretionary funding has been the subject of intense debate and negotiation between the Armed Services Committees, the Defense Subcommittees of the Appropriations Committees, and the Budget Committees as the annual National Defense Authorization Act (NDAA) and appropriations process for the FY 2018 fiscal year begins and the House and Senate attempt to pass an FY 2018 budget resolution with spending targets for the Appropriations Committees.[3] There is wide agreement within the Republican caucus that increases in defense spending are necessary. Although the exact figures vary, the HASC, SASC, and HAC-D have all marked to a total national defense topline that is about $30 billion more than the Trump administration's PB 2018 request, demonstrating strong will to increase defense spending in the Congress.

The House Armed Services Committee marked to an NDAA that authorizes a total of $621.5 billion in discretionary base spending for national defense and an additional $75 billion in OCO in a compromise negotiated with the House Budget Committee. This negotiated funding level for national defense also reportedly includes a guarantee that the House will seek a 5 percent increase in defense funding over this level in FY 2019, FY 2020, and FY 2021.[4] The House Budget Committee negotiations over the rest of the federal budget have broken down over the amount of mandatory spending cuts to include in the FY 2018 budget resolution. [5] The House Budget Committee advanced an FY 2018 budget resolution on July 19.[6] However, the Freedom Caucus, whose votes will be necessary to win the passage of the resolution in the House, is reportedly unwilling to vote for the draft resolution, objecting to the higher levels of spending than in the administration's FY 2018 budget proposal.[7] The House Appropriations Committee Defense Subcommittee, whose portfolio excludes nuclear weapons activities and military construction, appropriated $584.2 billion in base DOD funding and an additional $73.9 billion in OCO, a dollar amount consistent with the HASC's overall national defense topline of $696.5 billion. Much of this increase in the HAC bill to a $696.5 topline comes in the form of a new National Defense Restoration Fund. This new fund would provide $28.6 billion in FY 2018, in order to allow the Pentagon to fund necessary investments identified in the National Defense Strategy review immediately in FY 2018, rather than waiting until FY 2019 or beyond.[8] This fund as proposed would appropriate $18.6 billion for procurement, $7 billion for O&M, $2 billion for RDT&E, and $1 billion for MILPERS (see Figure 3-1). These funds would be available at the Secretary of Defense's discretion, with a 15-day notice period to Congress.

Figure 3-1: Proposed National Defense Restoration Fund Appropriations by Appropriation Title



Meanwhile, the Senate Armed Services Committee has marked to a $640 topline and $60 billion in OCO for a total of $700 billion in national defense spending.[9] This total is $3.5 billion more than the House national defense total but reflects a greater shift of national defense funding into the base budget instead of OCO. There is no indication that either the Senate Appropriations Committee or the Senate Budget Committee has settled on a national defense topline (see Table 3-1).

Table 3-1: Congressional Defense FY18 Funding Levels

BCA Caps Bar a Base Buildup

The most pressing question of the debate about the FY 2018 defense budget is whether Congress will be able to raise or remove the statutory caps that limit national defense spending. The Budget Control Act of 2011, as amended, forms a formidable barrier to a defense buildup. The original Budget Control Act of 2011 was passed as part of negotiations over raising the national debt ceiling limit and concern about high spending deficits and lower federal revenues following the financial crisis of 2008. It capped discretionary spending for both national defense and non-defense spending over ten years. It also empowered a Joint Select Committee on Deficit Reducation, popularly known as the supercommittee, which was charged with reaching a deal to reduce the federal deficit by at least $1.5 trillion between FY 2012–FY 2021. Because the committee was unable to reach a deal, the BCA mandated that the discretionary spending caps be further reduced by $1.2 trillion across FY 2013–FY 2021, split evenly between national defense and non-defense discretionary funding.[10] In FY 2013, these further automatic reductions in the discretionary spending caps were realized as a sequester, which proportionally cut the funding allocated to nearly every discretionary program, project, and activity of the federal government. The discretionary spending caps, popularly known as the “sequester” caps, have been amended three times, increasing the spending caps in FY 2013–FY 2017 and delaying their imposition in FY 2013.[11] This “sequester relief,” has averaged $19 billion dollars in each fiscal year, though the actual amount has varied between $9.2 billion and $26.7 billion.

The Trump administration’s proposed FY 2018 budget of $603 billion in discretionary national defense spending is $54 billion over the current statutory caps—at the level that defense spending would have been capped at had the supercommittee succeeded. The administration’s budget proposes offsetting the increases in national defense spending over the BCA caps by imposing $54 billion of cuts to non-defense discretionary spending. For FY 2019–FY 2027, the administration proposes raising the defense BCA caps by 2 percent annually, while cutting the non-defense BCA caps by 2 percent annually. However, the BCA caps for defense and non-defense spending are independently binding. Additionally, although the PB 2018 budget claims that it “fully repeals the defense sequestration,” the proposed budget merely raises the national defense caps for FY 2018–FY 2021 and extends them for six more years after their expiration in FY 2021.

Unless the caps are amended in statute, any increases to national defense base funding over the $549 billion allowed in FY 2018 would trigger a sequester, per the enforcement provision in the BCA, even if offset by equivalent cuts in non-defense discretionary spending.[12] The requested increase in FY 2018 national defense spending of $54 billion is nearly three times the average amount of negotiated sequester relief and twice the single largest amount by which Congress has previously raised the caps (see Table 3-2).

Table 3-2: National Defense Budget Control Act Caps in Current-Year Dollars

Note: Bold denotes amended caps. * denotes proposed cap relief.

Either bipartisan agreement—in extremely short supply in the Congress—or further shredding of legislative precedent in the Senate would be needed to raise the budget caps.

As it did in the three previous deals to amend the BCA caps, Congress could reach a bipartisan deal. However, any regular bill to raise the BCA caps would require the votes of eight Democratic senators to vote for cloture. Others have floated raising or eliminating the BCA caps in practice by including a provision directing that they be waived for FY 2018, and potentially other fiscal years, in other legislation. Any non-reconciliation legislation would still require the votes of at least eight Democratic senators in the Senate to invoke cloture on a bill.

Many senior Democrats, including the ranking members of the HASC and SASC, and the ranking members of the Defense Subcommittees of the House and Senate Appropriations Committees, have argued that the BCA caps on national defense spending and non-defense spending must be increased or eliminated. SASC ranking member Sen. Jack Reed (D-RI) has argued against the caps in the BCA, stating: “Setting arbitrary spending thresholds on defense and non-defense spending has not made our country safer, and it has not fixed our broader fiscal problems.”[13] HASC ranking member Adam Smith re-introduced the Relief from Sequester Act (H.R. 1745) on March 23, 2017, which would eliminate the sequester provisions of the BCA, leaving the spending caps at their original levels, as described in Table 3-2.[14] Rep. Pete Visclosky (D-IL), the ranking member of the House Appropriations Committee Defense Subcommittee, has characterized the caps as an “albatross” around the neck of Congress and said they impose “unacceptable risk” on the military.[15]

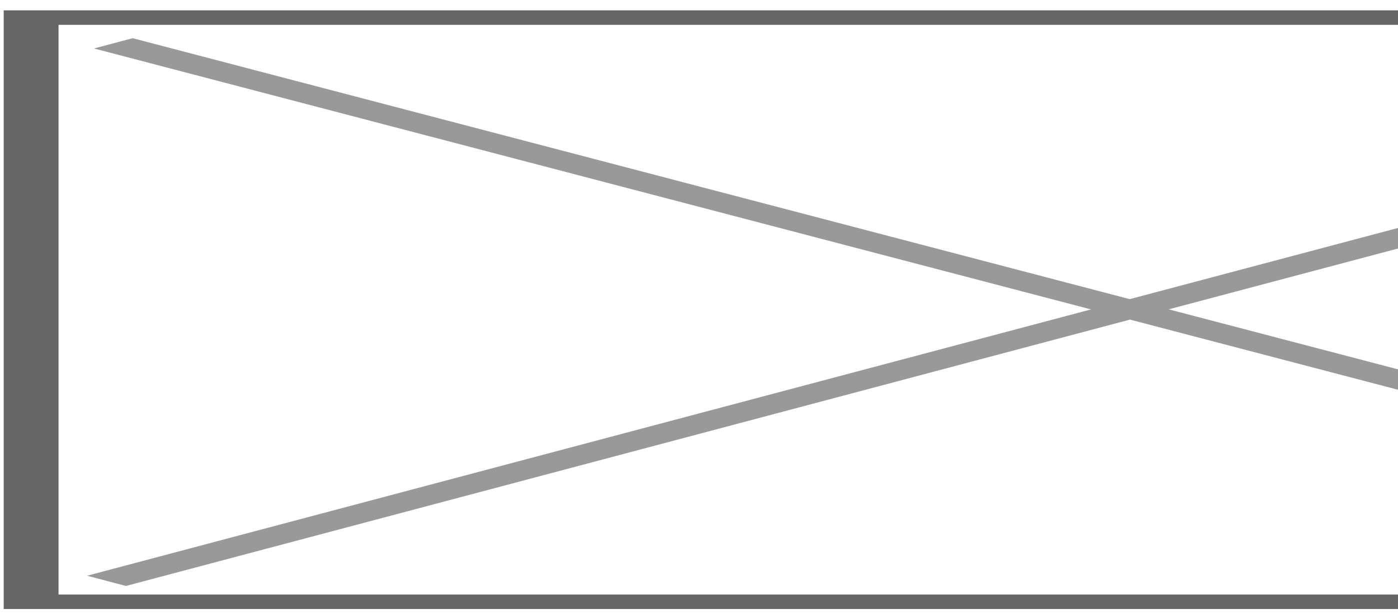
However, Senate Democrats have been consistent in demanding parity between increases in the caps on defense and non-defense discretionary spending. This parity principle was adhered to in each of the three prior deals to raise the BCA caps. The budget debates have grown more contentious as Senate Democrats have used filibusters to insist on parity between BCA cap increases for defense and non-defense spending, filibustering the FY 2016 and FY 2017 defense appropriations—backed up by veto threats by President Obama.[16] For FY 2018, the Senate Democratic leadership and senior Democrats on the Budget and Appropriations committees sent a letter to Senate Majority Leader Mitch McConnell (R-KY) and the Senate Appropriations Committee Chairman Thad Cochran (R-MS), insisting that the caps for national defense and non-defense spending be lifted equivalently in exchange for Democratic support for amending the caps.[17] However, conservative Republicans are unlikely to accept higher non-defense domestic spending as the price for higher national defense spending, particularly when the break point between the Freedom Caucus and other House Republicans negotiating the House budget resolution for FY 2018 has been whether $200 billion in mandatory spending cuts is deep enough.[18] These deep and immutable policy differences are likely to lead negotiators to the same impasse that has made prior BCA cap deals difficult to broker and exceedingly modest in scope.

Senate Majority Leader Sen. Mitch McConnell could amend the Senate rules to eliminate the legislative filibuster as the last remaining "nuclear option" allowed by Senate precedent—something he stated in April that he would never do.[19] In an effort to avoid the need for Democratic support to amend the caps, some have discussed eliminating the BCA caps in a reconciliation bill under an FY 2018 budget resolution and accompanying reconciliation instructions. Although reconciliation bills may affect both discretionary and mandatory funding, the BCA caps cannot properly be amended via reconciliation. Because the spending caps do not themselves appropriate any funding, any Senate-originating provision or conference amendment between the two chambers amending the BCA caps would be vulnerable to a point of order in the Senate. Any attempt to amend the BCA caps could be challenged as extraneous to budget reconciliation under the first prong of the Byrd Rule, because it does not itself produce a change in outlays or revenues.[20] Any senator on the Senate floor may raise the point of order against a provision or provisions in the bill. The presiding officer then rules upon the point of order, with the advice of the Senate parliamentarian. It requires a three-fifths majority to overrule the presiding officer's decisions on budget process points of order on appeal.[21] Because the Byrd Rule is enacted in statute, the Senate does not have the same discretion to amend it as it would for points of order raised under the Senate's rules.[22]

However, because the presiding officer of the Senate makes the final determination about violations of the Byrd Rule, some Republicans, including Sen. Ted Cruz (R-TX), have argued that the presiding officer should ignore the parliamentarian and decades of Senate precedent. As Sen. Cruz argued in May, regarding the Republican efforts to functionally eliminate Obamacare via the Better Care Reconciliation Act of 2017, "The parliamentarian merely advises, the vice president decides."[23] Other Republican senators appear less sanguine about undoing the protection against extraneous provisions in reconciliation bills provided by the Byrd Rule. As Sen. Mike Enzi (R-WY), Chairman of the Senate Budget Committee noted, "It would set a new precedent for the Senate that would allow anybody to bring up any bill on any other bill at any other time, even under reconciliation."[24] Breaking the precedent of deferring to the parliamentarian's judgment in order to get around a Byrd Rule violation would effectively allow any type of provision to be attached to a reconciliation bill, rather than limiting it to budget matters. Because reconciliation bills require simple majority votes to pass, this would be analogous to eliminating the legislative filibuster and the 60-vote threshold in the Senate.

Since the adoption of the Byrd Rule, senators have raised points of order because a provision failed the first prong of the test (i.e., it did not impact revenues or outlays) 38 times. In 30 cases, the presiding officer ruled that the provision was not permissible, and there either was no motion to waive or the motion was unsuccessful. In seven cases, the motion to waive was successful, resulting in the offending provision being permitted in the bill. Only once did the presiding officer rule that the provision was not in conflict with the Byrd Rule. In a parallel to any attempts to amend the BCA caps through reconciliation, four amendments that would have amended Congressional budget procedures without directly impacting outlays or revenues were challenged under the Byrd Rule—all were ruled out of order by the chair and fell after failing to receive the 60 votes necessary on motions to waive the points of order (see Table 3-3).[25] In other words, in each of the previous four cases where a Byrd Rule point of order was raised for a provision in a reconciliation bill that would set deficit targets or spending limitations on the basis that it did not directly impact outlays or revenues, the point of order was sustained.

Table 3-3: Previous Byrd Rule First Prong Points of Order for Provisions Touching on Budgetary and Budget Enforcement Matters



OCO as a Defense Spending Safety Valve

As in past years, the Overseas Contingency Operations accounts could serve as a safety valve, allowing higher levels of defense spending while not technically violating the BCA caps. Under the BCA, funds designated as “emergency” funding by Congress and the president are not subject to the caps, though they are subject to any sequester. Accordingly, if a satisfactory deal to amend the BCA cannot be reached, it would be possible for Congress to substantially increase defense spending by appropriating base national defense spending at the $549 billion allowed by the caps for FY 2018, then increasing OCO funding to $118.6 billion to reach the Trump administration’s proposed topline or to $147.5 billion to reach the topline agreed to by the House. This would require increasing OCO by about $54 to $83 billion over the administration’s request for $65 billion—an eye-popping increase in OCO funding. If Congress takes that route, OCO funding would rise to about the levels of FY 2012 or FY 2006, respectively, after adjusting for inflation. Such a large increase in OCO funding may be difficult for many in Congress to swallow, particularly fiscal conservatives. While this maneuver could be implemented within a regular FY 2018 appropriations bill, it would require the approbation of at least eight Democratic senators in order to avoid a filibuster, the same threshold as actually amending the BCA caps. However, this would amount to de-facto increase in defense spending without any commensurate increases for non-defense spending, which the Democrats have pledged to oppose.

Blatantly avoiding the BCA caps by designating increased funding as “emergency” OCO funding could also be accomplished within an FY 2018 reconciliation bill, as the caps would remain intact in letter if not in spirit. This may be more palatable than compromising with the Democrats to raise defense spending at the price of some increases to non-defense discretionary spending. However, reconciliation requires an FY 2018 budget resolution to start the reconciliation process. The Republican caucus remains riven over the scale of mandatory spending cuts and dedicated to using the FY 2017 budget resolution as a vehicle to eliminate Obamacare. The House may not pass an FY 2018 budget resolution before the month-long August recess, and the Senate Budget Committee has yet to reveal an FY 2018 budget resolution.[26] There are just 12 legislative days that both the House and Senate are in session between the August recess and the end of the fiscal year on September 30. Additionally, any FY 2018 budget resolution is earmarked as the vehicle for comprehensive tax reform, a process that is just as likely to experience legislative divisions and gridlock as health care. Meanwhile, Congress’ window for funding defense—and the rest of the government—before the end of the 2017 fiscal year is short and closing fast.

Bottom Line—Whence a Defense Buildup?

These procedural and political hurdles make it difficult to see how a substantial defense buildup on the order of the $54 billion proposed by the Trump administration, the $621.5 billion agreed to by the House Armed Services Committee and the Appropriations Committee Defense Subcommittee, or the $640 billion proposed by the Senate Armed Services Committee can be realized. The wide gulfs between the political parties, and between the defense hawks and the fiscal hawks, will not be closed soon. Additionally, the full legislative calendar of the Congress before September 30, 2017, including Obamacare repeal, FY 2018 appropriations, and an impending debt ceiling debate, increase the likelihood that FY 2018 will begin with a several-month-long continuing resolution, rather than a substantial increase in defense spending.

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