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**Analysis & Critique of  
Specialized Rules:**

**Discretionary Caps,  
Spending Targets, and  
Committee Allocations**

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## I. INTRODUCTION

The federal budget in reality combines two distinct budget processes, “each with its own path and players,” in the words of one noted expert.<sup>1</sup> Expenditures by the federal government can be divided into two categories. *Discretionary spending*, which in 2007 accounted for about 37% of total government spending,<sup>2</sup> consists of those expenditures which are appropriated annually. Prominent examples include most defense spending and the operating costs of federal agencies. *Direct spending*, also known as mandatory spending, has grown in recent years and comprised about 54% of the 2007 federal budget.<sup>3</sup> Rather than being handled via an annual appropriation process, direct spending consists of automatic obligations of the federal government that are created by statute. Entitlement programs, most notably social security, are common examples of direct spending.

Given their separate legal and political underpinnings, the processes by which the government accomplishes discretionary and direct spending are marked by differing procedures. This Briefing Paper will consider the most significant procedural rules that affect, or have affected in the past, the budgeting process for *discretionary* spending. In particular, three instances of specialized procedural rules are considered, each of which has played an important role in the federal budget process in recent years: (1) allocations to committees and subcommittees (as outlined in the Congressional Budget and Impoundment Control Act of 1974); (2) spending targets (as established by the Balanced Budget and Emergency Deficit Control Act of 1985, known as the Gramm-Rudman-Hollings (GRH) Act); and (3) discretionary caps (first set forth by the Budget Enforcement Act of 1990). This Paper both outlines the factual background underlying each of these practices and examines existing critiques and related proposals concerning their application in the future. For an overview of the procedural rules affecting *direct* spending, notably the PAYGO and reconciliation policies, please consult *Briefing Papers No. 2 – PAYGO Rules and Sequestration Procedures*, and *No. 17 – Appropriations for Mandatory Expenditures*.<sup>4</sup>

## II. FACTUAL BACKGROUND

### A. Role in Budget Process, Legal Basis, and Participating Entities

#### *1. Background and the Congressional Budget and Impoundment Control Act of 1974 - The Committee Allocation Process*

Over three decades ago, Congress passed the Congressional Budget and Impoundment Control Act of 1974 (Budget Act).<sup>5</sup> While it has been amended over the years, it remains the basis for the federal budget process. Under that Act, the budget process begins each year in

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<sup>1</sup> ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 57 (3d ed. 2007).

<sup>2</sup> See CONGRESSIONAL BUDGET OFFICE, *THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2008 TO 2018*, at 4 (Jan. 2008).

<sup>3</sup> Net interest payments accounted for the remaining outlays. See *id.* at 8.

<sup>4</sup> HARVARD LAW SCHOOL BRIEFING PAPERS, available at <http://www.law.harvard.edu/faculty/hjackson/budget.php>.

<sup>5</sup> MAJORITY STAFF OF HOUSE COMM. ON THE BUDGET, 107<sup>TH</sup> CONG., *BASICS OF THE BUDGET PROCESS 1* (BRIEFING PAPER FEB. 2001) (hereinafter “Majority Staff Briefing Paper”).

February, when the president submits his budget to the Congress. Congress then develops its own budget resolution within each house, culminating with the passage of a concurrent budget resolution and an accompanying conference report later each spring which sets the framework for the spending and tax decisions that Congress hopes to make during the year.<sup>6</sup>

After the budget resolution is passed, under section 302 of the Budget Act the amounts in the resolution are divided into sets of allocations.<sup>7</sup> The first set of allocations, called “302(a)s” after the section that provides for them, is distributed to committees in the House and Senate, including the appropriations committees, with limits both on total new budget authority and total outlays.<sup>8</sup> All discretionary spending, as well as all allocations for entitlements that are funded in the appropriations bills, is placed under the control of the appropriations committees.<sup>9</sup> Other allocations are for direct spending; they go to the various authorizing committees to cover entitlements and mandatory spending.<sup>10</sup>

The funds distributed to the House and Senate Appropriations Committees under section 302(a) are then further divided among the twelve appropriations subcommittees<sup>11</sup> in a section 302(b) report.<sup>12</sup> In this way, there is clear link between the overall budget totals in the budget resolution on the one hand, and the individual appropriations that are passed by the subcommittees on the other.<sup>13</sup> Preparing this report requires committees to make decisions about which subcommittees (and hence which programs within them) will receive more funding than others, resulting in competition among subcommittees, and within programs in subcommittees, for limited funds. The House Appropriations Committee strives to issue its 302(b) report by May of each year, and the analogous committee in the Senate aims for June.<sup>14</sup> Later in the process, programs can obtain additional funds through either revision of the section 302(b) report or via budgetary negotiations between Congress and the president.<sup>15</sup>

The number of appropriations subcommittees has varied over the years since the construction of the first appropriation committee in the 19th Century. In the past, the differing numbers and jurisdictions of appropriations subcommittees in the House and Senate caused delays in successfully executing various appropriations bills. This was most recently seen during the 108th Congress when the House Appropriations Committee reduced its subcommittees to ten.<sup>16</sup> With the goal of streamlining the appropriations process, the 110th Congress realigned the appropriations subcommittee structure, creating twelve corresponding subcommittees in each of

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<sup>6</sup> *Id.* at 1, 2.

<sup>7</sup> *Id.* at 5; Congressional Budget Act of 1974 § 302(a), codified at U.S.C.A. § 633(a) (2005).

<sup>8</sup> Majority Staff Briefing Paper, *supra* note 5, at 5.

<sup>9</sup> ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 206 (2d ed. 2000).

<sup>10</sup> *Id.*

<sup>11</sup> See Press Release, U.S. House of Reps. Cmte. on Appropriations, Senate, House Appropriations Set Subcommittee Plans for New Congress (Jan. 4, 2007), *available at* [http://appropriations.house.gov/News/pr\\_070104.shtml](http://appropriations.house.gov/News/pr_070104.shtml).

<sup>12</sup> SCHICK, *supra* note 9, . at 206; Congressional Budget Act of 1974 § 302(b), codified at U.S.C.A. § 633(b) (2005).

<sup>13</sup> SCHICK, *supra* note 9, at 131.

<sup>14</sup> *Id.* at 206.

<sup>15</sup> *Id.*; Congressional Budget Act of 1974 § 302(d), codified at U.S.C.A. § 633(d) (2005).

<sup>16</sup> See Appropriations Restructuring Chart, *available at* [http://www.ucar.edu/oga/html/legislative/washington\\_updates/appropriations%20restructuring.pdf](http://www.ucar.edu/oga/html/legislative/washington_updates/appropriations%20restructuring.pdf), for a more thorough view of the 108th Congress’ transition of the previous appropriations subcommittee structure.

the House and Senate, including a newly created Financial Services and General Government subcommittee with jurisdiction over federal organizations such as the Treasury as well as the budget for the District of Columbia.

Points of order can be raised to enforce these allocations and sub-allocations.<sup>17</sup> After Congress has completed its work producing a concurrent resolution on the budget for a given fiscal year, it shall not be in order for the House or Senate to enact a bill, resolution, amendment, motion, or conference report that will cause the allocation in 302(a) or 302(b) to be exceeded.<sup>18</sup> Points of order, however, and thus the rules themselves, can be waived in either house. In the House, they can be waived by a special rule that needs only a simple majority to pass; in the Senate, they can only be waived by a three-fifths vote. Given the close partisan divide in the Senate, neither Party on its own can waive affected budget rules, effectively giving each party a veto on revenue and spending legislation and requiring them to come to agreement on the budget that is satisfactory to both sides.<sup>19</sup> For further discussion of the role that points of order play in the budgeting process, see Box — “Budget Points of Order,” below.

### **Budget Points of Order**

#### Points of Order in the House

There are two main budget points of order in the House of Representatives that apply to all appropriations bills passed out of committees and all amendments and conference reports of those bills: 302(f) and 311(a) of the Congressional Budget Act.<sup>20</sup> A 302(f) point of order is in response to floor consideration of an appropriations bill that exceeds either the 302(a) committee allocations or the 302(b) subcommittee allocations.<sup>21</sup> A 311(a) point of order is used in response to floor consideration of a bill that violates the total budgetary authority of outlay ceilings in the budget resolution.<sup>22</sup>

A 302(f) point of order, if passed, functions to prohibit floor consideration of any measure that breaks any committee or subcommittee allocation and in doing so stops any budgetary excess in specific areas and forces the House to stick to the preordained committee allocations in the budget resolution. A 311(a) point of order, if passed, functions to prohibit floor consideration of an appropriations bill that breaks the overall spending limit.

While most bills subject to a 311(a) point of order would also be subject to a 302(f) point of order because such a bill would break through that committee allocation and the overall amount budget ceiling at the same time, it is possible to have a legitimate 311(a) point of order without a possible 302(f) point of order. An only 311(a) point of order occurs when previous allocations exceeded their committee ceilings (the 302(a) or 302(b) limits) and a 302(f) point of order was either

<sup>17</sup> Majority Staff Briefing Paper, *supra* note 5, at 6.

<sup>18</sup> Congressional Budget Act of 1974 § 302(f), codified at U.S.C.A. § 633(f) (2005).

<sup>19</sup> Schick, *supra* note 9, at 131, 134.

<sup>20</sup> Congressional Budget Act of 1974 codified at U.S.C.A. § 633(a) (2005). For further discussion of §302(a), §302(b), §302(f) and §311(a), see Sandy Street, *The Congressional Appropriations Process: An Introduction*, Congressional Research Service (December 6, 2004).

<sup>21</sup> *See id.* at §302.

<sup>22</sup> *See id.* at §311.

not raised or was unsuccessful. Then, later in the budget process when the final appropriations bills are being debated on the floor, an item could be within its 302(a) and 302(b) ceilings but, because of the additional appropriations not factored into the overall budgetary ceiling that have already passed despite exceeding their 302 ceiling, the last appropriations bills could exceed the overall amount and be subject to a 311(a) point of order.

It is very important to note that budget points of order traditionally do not carry the same impact in the House as in the Senate. The ability of the House to adopt a special rule to waive particular points of order prior to floor consideration of a bill by a majority vote gives the rules to very little impact in practice. The House leadership can simply include a waiver of violated budget points of order as a special rule as part of the rule for consideration of the overall bill from the House Rules Committee, and then win the traditional party-line vote on the rule before consideration of the bill commences.

### Points of Order in the Senate

The Senate also has 302(f) and 311(a) points of order and applies them widely to any appropriations measure, motion, amendment or conference report whether or not reported by an Appropriations Committee.<sup>23</sup> This reflects the more free-wheeling and less committee-controlled floor process of the Senate itself and stops these non-committee appropriations from evading budgetary points of order.

The Senate points of order are very similar to the House points of order except that 302(f) consideration enforces only 302(b) subcommittee allocations. The real differences arise in the potency of the points of order on the floor.<sup>24</sup> Because the Senate does not provide for a rule for consideration of each bill as in the House, budgetary points of order are not waived in advanced by a special rule as part of any rules package. Instead these points of order are frequently used in Senate debate to cause votes that require a three-fifths majority of all senators (60 votes) to pass.

This 60 vote requirement functions in two important ways. First, if 60 votes are not achieved the measure is barred from consideration and essentially defeated in its current form. Second, while a 60 vote requirement is often possible by forcing a cloture vote through a filibuster, the budgetary points of order functions to make it clear what the minority is objecting based on and often is a more political popular tool to defeat a spending bill.

It should be noted here that the Senate budget points of order system rests on a majority basis, but, because of centuries of tradition and Senatorial norms, this basis has not been overturned. As with any point of order in the Senate, any budgetary point of order is subject to a ruling by the

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<sup>23</sup> See *supra* note 19.

<sup>24</sup> *Id.*

<sup>25</sup> It is important to note that there would likely be some cost in public legitimacy in directly overruling a Parliamentarian. However, since the Parliamentarian is an appointed Senate employee, it is also possible, although not necessarily likely, that a Parliamentarian could be appointed or pressured to go along with a suspect ruling.

<sup>26</sup> It is also useful to note that such a procedural maneuver could be used to create a precedent for future procedural rulings and in this way change or alter a rule within the Senate.

<sup>27</sup> As seen during the Nuclear Option Crisis and the Gang of 14 Compromise during the first five months of 2005.

<sup>28</sup> For a brief explanation of the majoritarian underpinnings of the Senate in a different context see ROBERT CARO, *MASTER OF THE SENATE*, 856-58, (2002).

chair. The chair is the President Pro Tempore of the Senate, or another majority party senator sitting in his or her place by designation. For almost any point of order the chair simply relays the judgment of the Senate Parliamentarian, who whispers the procedurally correct ruling to the chair. However the chair is under no procedural requirement to obey the Senate Parliamentarian and can rule on the legitimacy of the point of order in whatever way the chair chooses<sup>25</sup>. If a Senator disagrees with a ruling from the chair, as a Senator likely would in this example, they can motion to overrule the chair. However this motion leads to a simple majority vote whether or not to overrule the chair, one the majority party would presumably know it could win before using the chair in such an aggressive fashion.<sup>26</sup> In this way a majority party bent on ignoring a budgetary point of order could do so – although such a maneuver would still be subject to a filibuster, which in turn, would still be subject to possible rulings by the chair<sup>27</sup>. Despite this its procedural availability, the Senate norms and traditions have so far render this maneuver moot in budgetary proceedings<sup>28</sup>.

## 2. *Gramm-Rudman-Hollings (GRH) and Targets*

In spite of the process established in the Budget Act, including the limits on committee allocations and sub-allocations, deficits rose significantly during the 1980s. In response to this, Congress passed the Balanced Budget and Emergency Deficit Control Act of 1985, known as the Gramm-Rudman-Hollings (GRH) Act after the bill's main sponsors.<sup>29</sup> GRH set deficit targets and called for the sequestration of funds if those targets were not met, aiming to impose legal and institutional constraints to prevent deficit growth.<sup>30</sup>

Specifically, GRH sought to achieve deficit reduction through two steps. First, it created stringent spending controls throughout the budget process. Included in this was the requirement that both the president's proposed budget and the congressional budget resolution project a deficit at or below the statutory maximum or achieve a prescribed amount of deficit reduction.<sup>31</sup> The deficit targets were different each year, with the goal of gradually reducing them.

The second step was the imposition of sequestration.<sup>32</sup> If at the first stage, the budget process did not result in sufficient deficit reduction to meet the target outlined in the statute, the necessary amount of funding was to be automatically sequestered to meet that target.<sup>33</sup> Given

<sup>29</sup> *Id.* at 22; Pub. L. 99-177, 99 Stat 1037, codified at 2 U.S.C.A. §§ 900-907, 922 and related sections. Amended by the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987 (Pub. L. 100-119, 101 Stat.754, codified at 2 USCA § 908, since repealed, and related sections); amended by Budget Enforcement Act of 1990, Pub. L. 101-508, 104 Stat 1388, codified at 2 U.S.C.A. §§ 900, 907a-d, 2 U.S.C.A. §§ 665, 665a-e, 661, 661a-f, and related sections; amended by Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat 312, codified at various U.S.C.A. sections; amended by Budget Enforcement Act of 1997, Pub. L. 105-33, 111 Stat 677, codified at 2 U.S.C.A. §§ 645, 645a, and related sections. As passed in 1985, GRH gave the Comptroller General of the General Accounting Office the ultimate responsibility of enforcing its deficit targets. In 1986, the Supreme Court ruled in *Bowsher v. Synar* that this provision was unconstitutional, as it violated the separation of powers principle. In the fall of 1987, Congress and the President amended GRH to bring back the automatic sequestration process so central to the first Act, eliminating the constitutional defect by giving the final responsibility for implementing the sequestration to the Office of Management and Budget (OMB). See Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 593, 597-598 (1988).

<sup>30</sup> Stith, *supra* note 28 at 623-624.

<sup>31</sup> *Id.* at 625-626; Pub. L. 99-177, § 201(a)(1)(7).

<sup>32</sup> *Id.* at 625-626.

<sup>33</sup> *Id.* at 627-628; Pub. L. 99-177, § 251 (a)(1)(A)(3).

that agencies need to apportion their budgets during the year to avoid shortfalls towards the end of the year, GRH calculated and apportioned sequestration amounts largely before each fiscal year began. To sequester the funds, the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) calculated the projected excess to the deficit target both approximately a month before and then shortly after the start of the fiscal year, resulting in an initial and ultimately a final presidential sequestration order. The sequestration found half of the spending cuts in the domestic budget and half in the defense budget, exempting most annually appropriated and all permanently appropriated entitlement programs (including social security), as well as prior legal obligations.<sup>34</sup> For federal budget accounts that were not exempt, GRH required that annual outlays (and ultimately budget authority) be cut on a “uniform percentage basis,” lowering spending without affecting the relative spending priorities of Congress.<sup>35</sup>

Due to a variety of reasons discussed below, GRH simply did not work, and while it called for decreasing deficits until there was a balanced budget, this did not take place over the long run. For example, in 1993, the year in which GRH, as amended (GRH II), called for a balanced budget, the actual deficit ran \$255 billion.<sup>36</sup> The results of GRH and GRH II can be seen in the table below.

### **3. Background and the Budget Enforcement Act - Discretionary Caps & Beyond**

With mounting deficits as a backdrop, Congress passed the Budget Enforcement Act (BEA) of 1990 to revise the budget process; the BEA not only changed the procedures and timetables of GRH, but it also changed the focus. Now, deficit reduction was no longer the primary goal; limiting spending and guaranteeing that the baseline level of revenues was indeed collected were now the main purposes of the process.<sup>37</sup> The BEA was passed in a budget summit between Congress and the president after the GRH scheme broke down in 1990, as Title XIII of the Omnibus Budget Reconciliation Act of 1990, which formally amended GRH.<sup>38</sup> It originally applied to fiscal years 1991 through 1995.<sup>39</sup> The key provisions of the BEA were then extended through fiscal year 1998 by the Omnibus Budget Reconciliation Act of 1993.<sup>40</sup> The Balanced Budget Act of 1997 revised these limits and extended them through 2002.<sup>41</sup>

The BEA brought into being a different process than had existed under GRH, setting forth a new framework. As mentioned, the deficit targets were no longer the focus, and Congress and the president ultimately decided not to extend the deficit maximums, removing

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<sup>34</sup> *Id.* at 628-629, 631; Pub. L. 99-177, § 251 (a)(1)(A)(3)(B).

<sup>35</sup> *Id.* at 631-632; Pub. L. 99-177, § 251 (a)(1)(A)(3)(C)(II).

<sup>36</sup> U.S. Gen. Accounting Office, *Budget Process: Evolution and Challenges, Testimony before the Committee on the Budget, House of Representatives, Susan J. Irving, Associate Director, Budget Issues*, GAO/T-AIMD-96-129, at 4-5 (July 11, 1996) (hereinafter referred to as *Evolution and Challenges*).

<sup>37</sup> STANLEY E. COLLENDER, *THE GUIDE TO THE FEDERAL BUDGET: FISCAL 2000 23* (1999) (hereinafter referred to as COLLENDER 2000).

<sup>38</sup> SCHICK *supra* note 9, at 22. *See also* S. Rep. No. 105-67 at 10 (1998). Budget Enforcement Act of 1990, Pub. L. 101-508, 104 Stat 1388, codified at 2 U.S.C.A. §§ 900, 907(a-d), 2 U.S.C.A. §§ 665, 665(a-e), 661, 661 (a-f) and related sections.

<sup>39</sup> SCHICK *supra* note 9, at 23.

<sup>40</sup> STANLEY E. COLLENDER, *THE GUIDE TO THE FEDERAL BUDGET: FISCAL 1996 19* (1995) (hereinafter referred to as COLLENDER 1996). Pub. L. 103-66, 107 Stat 312, codified at various U.S.C.A. provisions.

<sup>41</sup> COLLENDER 2000 *supra* note 36 at 77-78. Pub. L. No. 105-33, 111 Stat 677, codified at 2 U.S.C.A. §§ 645, 645a, and related sections.

them from the budget process altogether.<sup>42</sup> Instead, the BEA enacted two new important enforcement mechanisms to keep spending and the deficit under control: (1) caps on discretionary spending, and sequestration to enforce those caps, and (2) pay-as-you-go (PAYGO) rules for revenues and mandatory spending.<sup>43</sup> In addition, the BEA took the sequestration procedure - a key innovation in GRH - and expanded its application, including calling for potential sequestration to take place throughout the year, rather than just once annually.<sup>44</sup>

The discretionary caps, generally speaking, covered the federal spending that is appropriated on an annual basis (approximately one third of all federal spending during the years the caps were in place).<sup>45</sup> This applied to essentially all defense expenditures, the majority of federal agencies' operating costs, and dozens of grant programs. There were caps both for budget authority (authority to take on obligations that normally result in outlays of funds) and for outlays (payments made to liquidate or fulfill obligations).<sup>46</sup>

While the caps remained throughout the time the BEA was in force, the structure of the caps was altered as they were extended. All discretionary spending was divided into three categories for FY1991-1993: defense, international, and domestic.<sup>47</sup> The separate limits, while they were enforced, were called "firewalls," since spending could not be shifted among them if it went beyond the limits.<sup>48</sup> For FY1994 and 1995 they were consolidated into a single discretionary category,<sup>49</sup> with the exception of the Violent Crime Reduction Trust Fund, which was established by the Violent Crime Control and Law Enforcement Act of 1994 as a second category (in addition to general purpose appropriations); these two categories ultimately remained in place through FY1996.<sup>50</sup> The Balanced Budget Act of 1997 then changed the categories once again, establishing three categories for FY1998 and 1999: defense, non-defense excluding violent crime reduction, and violent crime reduction spending. For FY2000, defense and non-defense were combined, resulting again in two categories - violent crime reduction spending and all other discretionary spending. The Transportation Equity Act for the 21<sup>st</sup> Century, enacted in 1998, altered the cap structure one final time, adding two additional categories and caps that apply to (1) highway and (2) mass transit programs; they were created for FY1999 through FY2003.<sup>51</sup>

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<sup>42</sup> *Id.* at 24-25, 27.

<sup>43</sup> *Id.* at 27-29.

<sup>44</sup> *Id.* at 76.

<sup>45</sup> SCHICK *supra* note 9, at 49; Budget Enforcement Act § 250(c)(7).

<sup>46</sup> SCHICK *supra* note 9, at 49, 289, 294; COLLENDER 1996, *supra* note 39, at 75.

<sup>47</sup> U.S. Gen. Accounting Office (GAO): *Report to the President and the Congress: Budget Issues: Compliance Report Required by the Budget Enforcement Act of 1990*, GAO/AIMD-95-66, at 6 (Jan. 1995) (hereinafter referred to as *BEA Compliance Report, 1995*).

<sup>48</sup> Edward Davis, *The Evolution of Federal Spending Controls: A Brief Overview*, PUBLIC BUDGETING & FINANCE, Fall 1997 at 19.

<sup>49</sup> *BEA Compliance Report, 1995*, *supra* note 32, at 6.

<sup>50</sup> U.S. Gen. Accounting Office (GAO): *Report to the President and the Congress: Budget Issues: Compliance Report Required by the Budget Enforcement Act of 1990*, GAO/AIMD-96-41, at 7 (Feb. 1996) (hereinafter referred to as *BEA Compliance Report, 1996*).

<sup>51</sup> U.S. Gen. Accounting Office (GAO): *Report to the Chairman, Committee on the Budget, House of Representatives: Budget Issues: Budget Enforcement Compliance Report*, GAO-02-794, at 8 (June 2002) (hereinafter referred to as *Budget Enforcement Compliance Report, 2002*). The Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21) is Pub. L. 105-178.

Regarding the sequestration process based on these spending caps, since the caps cover both budget authority and outlays, a discretionary spending sequester can occur if either the budget authority or outlay of any category is exceeded due to enacted legislation. Congress and the president can pass laws revising the caps any time they so desire (and as discussed below, they have); however there are political constraints against voting to increase spending. There are two general types of ways caps can be revised without legislation: *automatic* revisions, in which the caps are revised automatically when the president sends his budget to Congress, in order to incorporate any changes in “concepts and definitions;” and *as used* revisions, which allow the caps to be increased to cover any “emergency” funding passed by Congress and the president.<sup>52</sup>

There are three different kinds of discretionary sequesters. First, there is an “end-of-session” sequester, which takes place 15 days after Congress adjourns if OMB determines the caps will be breached, taking into account appropriations enacted during that just-completed session, as well as advance appropriations that had been enacted earlier and outlays from the budget authority of prior years.<sup>53</sup> This will result in all the programs in the relevant category being cut by the percentage necessary to bring overall spending within the cap.<sup>54</sup> Second, there are “within-session” sequesters, which occur after Congress convenes and before July 1 if, during that time, Congress enacts legislation that breaches a cap for the current fiscal year.<sup>55</sup> A sequester will take place 15 days following the president’s signing of the bill that causes the breach, and the sequester will take place in the same manner as an end-of-session sequester.<sup>56</sup> Finally, the third type of sequester is the “look-back” sequester.<sup>57</sup> It occurs if a spending bill applying to the current fiscal year is enacted after June 30 but before September 30 (the end of the fiscal year), causing a cap to be breached. For this type, current-year spending is not affected, however the cap in the budget year that will start on October 1 will be lowered by the amount of the breach.<sup>58</sup>

In 2002, the BEA expired, and the caps terminated. According to some experts, the termination of the caps was a key factor that allowed President George W. Bush, along with a friendly Congress, to cut taxes while spending aggressively over the past half-decade. These actions, combined with an uncooperative economy, have led to dramatic increases in the federal deficit.<sup>59</sup> While several proposals to reinstate discretionary spending caps have been proposed, both by the Executive and by Congress, as of yet the caps have not been reinstated. See below, section II.B.3, for a discussion of what has taken place in Congress in the interim; and see below, section III.B, for description and analysis of some of the recent proposals for instituting new caps moving forward.

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<sup>52</sup> COLLENDER 2000, *supra* note 36, at 76, 79: Regarding changes in “concepts and definitions:” “There is no definition in the BEA of what constitutes a change in a concept or definition. The presumption when the law was written was that it would cover technical changes, such as the definition of budget authority...OMB makes the final decision as to what the change is and how it should be scored in the budget.”*Id.* at 79 n.18.

<sup>53</sup> *Id.* at 79; Budget Enforcement Act §251(a)(1).

<sup>54</sup> COLLENDER 2000, *supra* note 36, at 79.

<sup>55</sup> *Id.* at 81; Budget Enforcement Act §251(a)(6).

<sup>56</sup> COLLENDER 2000, *supra* note 36, at 81.

<sup>57</sup> *Id.* at 81; Budget Enforcement Act §251(a)(5).

<sup>58</sup> COLLENDER 2000, *supra* note 36, at 81, 82.

<sup>59</sup> Tim Westmoreland, *Standard Errors: How Budget Rules Distort Lawmaking*, 95 GEO. L.J. 1555, 1564 (2007).

## **B. Committee Allocations, Spending Targets, and Discretionary Caps in Practice**

While an overview of the federal budget process itself is important to laying the groundwork for further analysis, any examination is not complete without a discussion of how this process has worked in reality.

### ***1. Committee Allocations in Practice***

Over the years, experience has been that, generally, committees have kept to their allocations, and the breach of such allocations is rare. Appropriations committees and subcommittees are able to do this in part by designating spending as emergency, as well as by employing a variety of other tactics, discussed below, that enable additional spending without breaching the allocations.<sup>60</sup>

The committee allocation system, for much of the last 15 years, has operated within the larger budget process that involved discretionary spending caps from the BEA. Within this system, the act of staying or not staying within the allocations has not been what has determined whether the overall caps were breached. In other words, this has not been where the train has run off the tracks, if and when it has. For example, the budget resolution for FY2001 was well above the statutory caps imposed by BEA, indicating that even if the appropriations committees stayed within their allocations, they likely would have collectively exceeded the caps. Congress then passed legislation that ultimately raised the caps to considerably higher than was called for in the budget resolution; here, regardless of whether the committees stayed within their allocations, it seems likely they would not break the new, higher discretionary caps.<sup>61</sup> Therefore, we must look to the overall actions of Congress in light of the discretionary caps to find where and when the process breaks down, and additional spending is allowed, subverting the caps (in spirit, if not in name).

### ***2. Gramm-Rudman-Hollings in Practice***

As noted above, GRH was a failure in many ways, ultimately leading to its revision by the BEA. It was not successful in restraining spending and bringing deficits under control for several reasons. First, since only deficit targets (rather than actual deficits) were used by GRH to determine cuts, there was a strong incentive for Congress to employ overly optimistic economic assumptions to meet the deficit targets, even if these targets were never actually met.<sup>62</sup> Congress did exactly this, adopting budget resolutions that met the projected deficit targets, but never achieved those targets, in either the original or the revised version of the Act passed in 1987. Focusing on one year at a time also drove policymakers to take steps that would make the deficit appear smaller in the upcoming year even if it made the longer-term deficit targets harder to reach. These included tricks such as one-time payments shifts and other changes in timing that would result in no reduction in the deficit in the long run.

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<sup>60</sup> Telephone Interview with Miriam Rollin, Federal Policy Director, Fight Crime: Invest in Kids (March 4, 2005).

<sup>61</sup> Robert Keith, CRS Report, *Techniques for Preventing a Budget Sequester*, Congressional Research Service Report for Congress, RL31155, at CRS-5, 6 (updated Mar. 8, 2002).

<sup>62</sup> Davis, *supra* note 47, at 18.

Furthermore, GRH targets were inflexible, not allowing for revisions due to changing conditions, and thus making targets even harder to reach.<sup>63</sup> Finally, GRH aimed at holding Congress responsible for deficits, regardless of whether Members of Congress were actually responsible in any way. Regardless of the cause of the deficit - be it changes in the economy, in demographics, or Congressional action or inaction - the response would be the same sequestration process. In addition, if a sequester were necessary, it would not distinguish between programs where Congress had already made cuts and programs where there had been no cuts or even additional spending. This provided Members of Congress little incentive to keep spending down, and basically placed them in a prisoner's dilemma.<sup>64</sup>

See the below table for the GRH (and GRH II) target deficits and the actual deficits for those years:

**Table 1: Gramm-Rudman-Hollings (GRH) Deficit Targets and Actual Deficits**

	GRH 1985	GRH 1987	Actual Deficit
FY 1986	171.9		221
FY 1987	144		150
FY 1988	108	144	155
FY 1989	72	136	152
FY 1990	36	100	221
FY 1991	0	64	269
FY 1992		28	290
FY 1993		0	255

*Source: Evolution and Challenges, Testimony before the Committee on the Budget, House of Representatives, p. 5.*

### **3. Discretionary Spending Caps in Practice**

Given the central role of the BEA and its discretionary caps over most of the last 15 years, describing the experiences Congress has had with them is very important. Based on the description of the process laid out in the BEA for discretionary caps and the institution of sequestration should those caps be breached, an important question to now ask is to what extent those caps were followed, and how often sequestration was actually employed. Over the years FY1991-2002, the caps were generally followed, and sequestration was rarely employed;<sup>65</sup> in the early years, this was a fair indication of effective constraint of spending, however as the years went by, compliance with the caps and a lack of sequestration were achieved in name but not substance, as Congress found ways to spend more while technically staying within the caps.

Regarding sequestration, two sequesters were triggered in FY1991 under the discretionary spending limits, but they were both very minor. One was based on a drafting error in the Foreign Appropriations Act, which caused a sequester expected to yield \$191 million in savings from outlays; but the error was later corrected, and the savings were then cancelled. The other minor sequestration occurred when a supplemental appropriations act for FY1991

<sup>63</sup> *Id.*

<sup>64</sup> *Evolution and Challenges, supra* note 35, at 4.

<sup>65</sup> Robert Keith, *Budget Sequesters: A Brief Review*, Congressional Research Service Report for Congress, RS20398, at CRS-3 (updated Mar. 8, 2004).

accidentally caused a small breach, leading to an across-the-board cut of domestic spending, per the sequestration procedure, of 0.0013%, or \$1.4 million, an exceedingly marginal amount. From FY1992 until FY2002, no further sequesters took place under the discretionary spending limits, although Congress and the President enacted special legislation to meet the caps in FY2000, FY2001, and FY2002.<sup>66</sup>

Given that Congress therefore essentially stayed within the caps and never faced a substantial sequester under BEA, it is important to explore how useful the caps were, and why they were useful, as well as how Congress managed to meet the caps in name while they evaded them in spirit.

There is widespread agreement among budget analysts and observers that the BEA, for much of the 1990s, helped restrain spending effectively, but also that towards the last few years, as the controls within the BEA were exercised to their limits, they no longer were effective in this regard.<sup>67</sup> From 1990 to 1993, Congress restrained domestic discretionary spending, and for 1990 through 1998, expenditures on discretionary spending only grew an average of 0.7 percent per year (after adjusting for inflation and population growth), a slow rate of growth. In fact, from 1990 to 1998 expenditures on domestic discretionary programs actually fell compared to the size of the economy (as a percentage of Gross Domestic Product (GDP)), from 3.16 percent of GDP in 1990 to 3.04 percent of GDP in 1998. On the other hand, the caps set in 1997 were not adhered to, and discretionary spending did not fall, a result the caps aimed to bring about.<sup>68</sup>

There are several reasons that explain why the caps from FY1991 through roughly FY1998 were adhered to, restraining spending, while the caps from roughly FY1999 through FY2002 were followed in name but evaded in spirit, not resulting in spending restraint. First is the fact that with the arrival of budget surpluses around 1998, it was harder for Members of Congress to accept spending caps. The table below shows the original budget authority caps, as they were established in 1990 and extended in 1993 and then 1997, adjustments made to the caps, and the level of appropriations that were actually enacted from FY1991 through FY2002. As can be seen, the caps were adhered to far better until around 1998 when surpluses came about.<sup>69</sup>

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<sup>66</sup> *Id.*

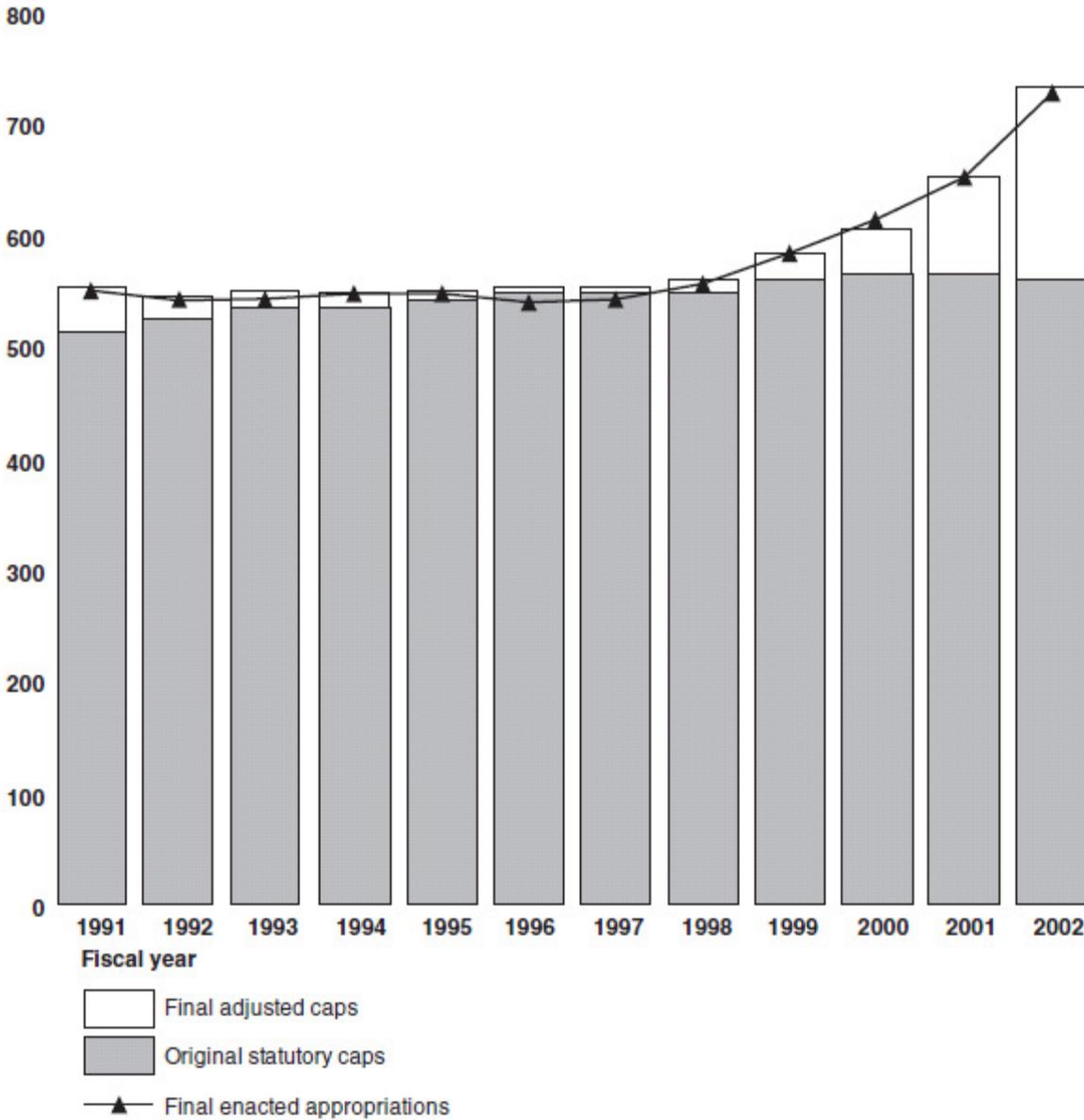
<sup>67</sup> U.S. General Accounting Office, *Budget Process: Extending Budget Controls, Testimony of Susan J. Irving before the Committee on the Budget, House of Representatives*, GAO-02-682T, at 4-5 (April 25, 2002) (hereinafter referred to as *Extending Budget Controls, Irving, 2002*).

<sup>68</sup> Richard Kogan, *Capping Appropriations: Administration's Proposal Regarding Discretionary Caps Likely to Prove Inequitable and Ineffective*, Center on Budget and Policy Priorities 2 (Mar. 1 2004).

<sup>69</sup> *Extending Budget Controls, Irving, 2002, supra* note 66, at 5.

**Figure 1: Discretionary Outlay Caps and Enacted Appropriations**

Billions of dollars



Note: Data for fiscal year 2002 are current as of February 4, 2002; the final amount after the end of the fiscal year may be higher depending on the enactment of any supplemental spending.

Source: Office of Management and Budget.

Source: *Extending Budget Controls*, Testimony of Susan J. Irving before the Committee on the Budget, House of Representatives, p. 6.

Another factor affecting their success was how strict, or tight, the budget caps were. If the experience from 1990 through 1998 shows that reasonable discretionary caps can be effective in restraining spending, experience further shows that the caps would not be followed, and spending restraint would not be achieved, when the caps were too strict. The new set of caps established in 1997 were far tighter than the earlier caps, calling for a decrease of 0.5 percent of GDP over the period ending in FY2002, which was five times greater than spending fell from 1990 through 1998. These caps were simply too strict, and were not followed.<sup>70</sup> This argument is logically compelling as well, for often, if goals seem unattainable, no effort to achieve them is put forth, while if they are perceived to be within reach, ample effort is made.

Yet another explanation for the differing effectiveness of the caps relates to what was taking place with the rest of the budget towards the later years that BEA was in force. The negotiations that took place in 1990 and 1997 preceding the introduction and extension of the caps, respectively, resulted in bipartisan agreement and were part of a multi-year package of balanced policies aimed at reducing the deficit. These included not only restraining discretionary spending, but also raising taxes and minor trimming of entitlements, such as Medicare. On the contrary, in its FY2000, FY2001, and FY2002 budgets, Congress called for and ultimately adopted large tax cuts, with none of them being offset, in spite of the budget rules the 1997 Balanced Budget Act extended that required tax cuts to be paid for.<sup>71</sup> It seems likely that with some Members of Congress ignoring some of the budget rules, other Members would begin to ignore other rules. Congress at that point began to employ various gimmicks to breach the discretionary caps in spirit, but not in name, and for FY2001 and FY2002, Congress simply ignored the caps, enacting discretionary funding at the levels they so desired, and raising the discretionary caps after the fact to those levels.<sup>72</sup> This is reflected in the table above.

Finally, while these reasons help to explain how useful the caps were, and why they became less effective later on, it is still important to review how - if the caps were never broken, and sequestration never employed, from FY1992 through FY2002, Congress managed to evade the caps in spirit while meeting them in name. The answer is that Congress employed a variety of tactics, particularly in the later years in which the BEA was enforced, which allowed it to spend more yet not encounter sequestration.

Emergency spending was one major tool Members of Congress used to do this. Before 1999, emergency spending was generally confined to relatively small supplementary appropriations that were passed in response to natural disasters or international crises. In the 1999 omnibus regular appropriations act, however, over \$21 billion of spending was designated as emergency. In 2000, the amount designated as such increased to \$30 billion.<sup>73</sup> This spending, by law, does not count against the discretionary caps, making such spending seem free even though it still adds to the surplus or deficit number. Many believe that the ability to designate funding as such led to under-funding disaster relief programs in the regular appropriations process, making more room for other appropriations under the caps and allowing funding for

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<sup>70</sup> Kogan, *supra* note 67, at 2-3.

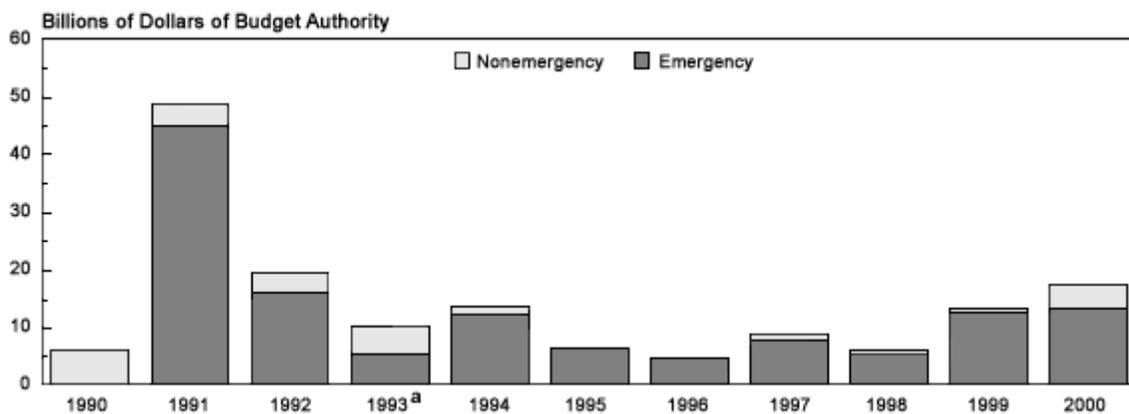
<sup>71</sup> *Id.* The first two of these tax cuts were vetoed by President Clinton, but the third was signed by President Bush.

<sup>72</sup> *Id.*

<sup>73</sup> Congressional Budget Office, *Supplemental Appropriations in the 1990s*; available online at <http://www.cbo.gov/showdoc.cfm?index=2768&sequence=0> (updated, March 2001) (hereinafter referred to as *Supplemental Appropriations*).

such programs to be made in the form of supplemental appropriations. While the term “emergency,” is not defined in budget law, in 1991, an OMB report required by Congress attempted to develop a definition, and it laid out five criteria: (1) a necessary expenditure, (2) sudden, (3) urgent, (4) unforeseen, and (5) not permanent.<sup>74</sup> Critics have pointed out a variety of examples, however, of funding designated as emergency that do not meet any of these criteria.<sup>75</sup> Indeed, during the past several years, many have thought that the use of the emergency designation procedure and other gimmicks has been abusive.<sup>76</sup> Particularly regarding FY2000, this gimmick was used to pay for popular programs that were not true emergencies.<sup>77</sup>

The below chart shows the amount of budget authority that was designated as “emergency” funding (as a subset of all supplemental appropriations), and thus escaped the discretionary spending limits imposed by the BEA during the 1990s. An upwards trend is visible toward the ends of the decade.



Source: Congressional Budget Office, *Supplemental Appropriations in the 1990s* (March 2001), available at <http://www.cbo.gov/doc.cfm?index=2768&type=0>.

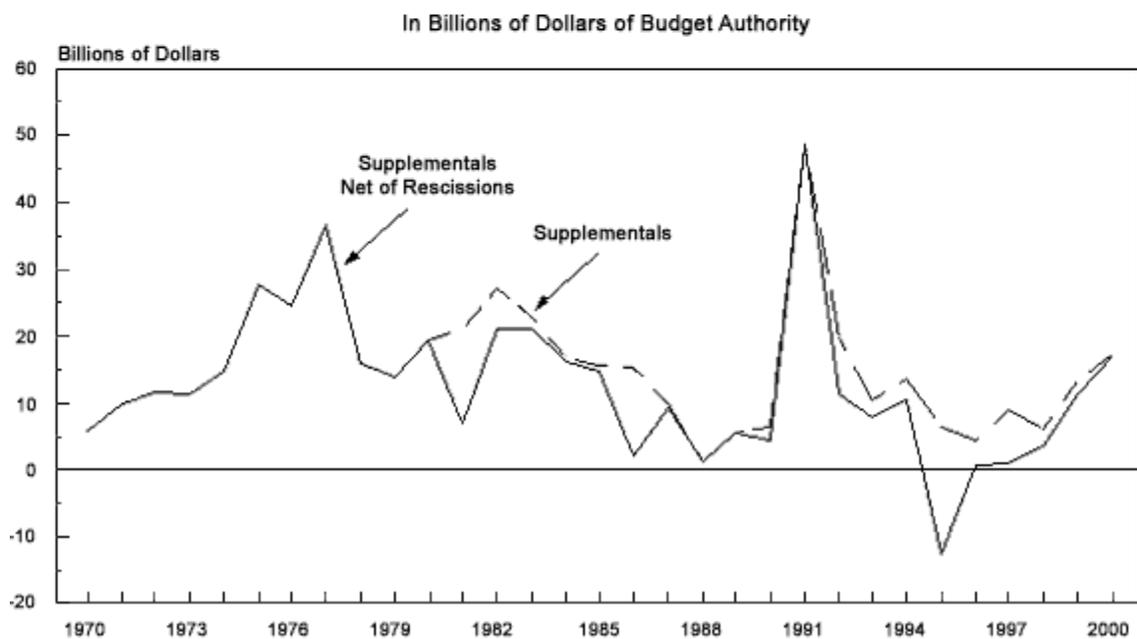
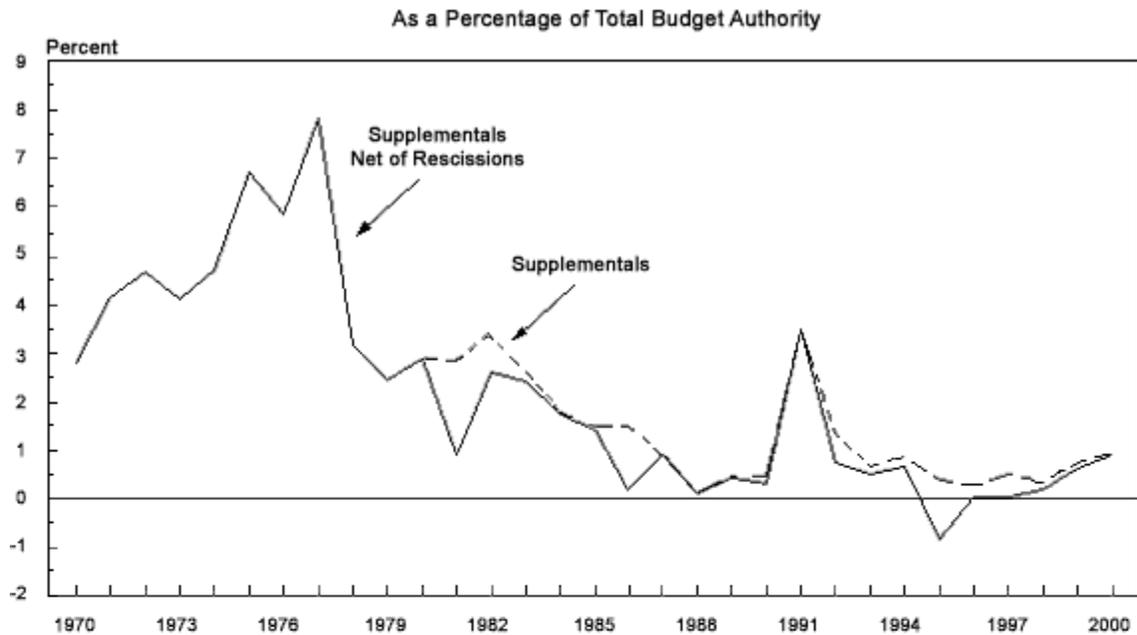
These amounts were, to some extent, offset by rescissions from unspent funds in other areas of the budget. However, while politically popular, many questioned the actual savings garnered by this practice, given that at least some of the “rescinded” funds would likely never have been spent regardless. The amount of rescission ranged in total from \$770 million for FY1999 to almost \$19 billion for FY1995. The below charts show total supplementary spending, gross and net of rescissions, both as absolute values and as percentages of total annual budget authority.

<sup>74</sup> *Id.* The criteria include additional language to clarify their meaning: a necessary expenditure (*an essential or vital expenditure, not one that is merely useful or beneficial*); sudden (*coming into being quickly, not building up over time*); urgent (*a pressing and compelling need requiring immediate action*); unforeseen (*not predictable or seen beforehand as a coming need, although an emergency that is part of an overall level of anticipated emergencies, particularly when estimated in advance, would not be “unforeseen”*); and not permanent (*the need is temporary in nature*).

<sup>75</sup> *Id.*

<sup>76</sup> *Techniques for Preventing a Budget Sequester*, *supra* note 60 at CRS-3.

<sup>77</sup> SCHICK *supra* note 9, at 62.



Source: Congressional Budget Office, *Supplemental Appropriations in the 1990s* (March 2001), available at <http://www.cbo.gov/doc.cfm?index=2768&type=0>.

These figures increased significantly for FY2001-2002, the last years of the BEA, as Congress responded to the events of September 11, 2001 by appropriating increased emergency funds for the military.

In addition to emergency spending, Congress has often offset spending by rescinding previous appropriations or by increasing offsetting collections from fees and additional sources; while under the BEA, the offsets are only supposed to come from discretionary accounts, in

practice, Congress and the president have sometimes raided PAYGO (mandatory) accounts for this purpose, doing so frequently in the 1990s. Furthermore, especially in 1999 and even more the following year, Congress used advance appropriations (deferring the appearance of appropriations) to make appropriations in the present year but have the money scored against the discretionary caps for the later year in which the funds become available, effectively allowing Congress to evade the initial year's caps.<sup>78</sup>

Finally, during the 12 year period during which the BEA was in force, Congress and the President have gone even further to ensure they did not technically break the BEA caps, enacting statutory provisions three times to intervene in the enforcement of the caps. In 2000, Congress and the President enacted a provision that prevented a 'within-session' sequester. OMB had estimated that non-emergency supplemental appropriations in an omnibus bill would breach both the budget authority and outlay limits, by several billion dollars each. To avoid sequestration, Congress inserted a provision into the bill, prohibiting sequesters this year (if the spending bill had become law in June) or reductions in the limits for FY2001 (that would have occurred if the bill became law after the July 1 triggering date). The bill became law in July, and the spending limits in FY2001 were not affected.<sup>79</sup> The following year, in planning for FY2001, the budget resolution adopted by the House and Senate was well above the discretionary caps, and it was assumed that they would raise the limits to accommodate their spending. That year, Congress ultimately legislated an even larger increase in the limits than those outlined in the budget resolution, and made a similar move in FY2002 to increase the caps significantly.<sup>80</sup> Indeed, to allow for additional discretionary spending, Congress and the President simply raised the caps on budget authority and outlays by \$99 billion and \$59 billion, respectively, in FY2001, and for FY2002, total discretionary budget authority and outlays under CBO's baseline went beyond their respective caps by \$113 billion and \$106 billion.<sup>81</sup>

In 2002, the BEA expired and no regime of statutory caps took its place to constrain spending.<sup>82</sup> However, informal discretionary spending caps have continued to play a role in the federal budget process. Each year, the President's Budget has included a suggested discretionary spending cap. In the years that Congress adopted a concurrent budget resolution,<sup>83</sup> it has included its own spending cap for both new budget authority and outlays, which has generally been slightly greater than the President's suggested cap. For instance, in FY2006, Congress's cap was set at \$842.7 billion, only slightly greater than the President's suggestion of \$840.3 billion. For FY2008 the difference was a bit more pronounced, as the spending cap of \$954 billion set by Congress was more than \$20 billion greater than the President's suggested cap of \$933 billion. President Bush responded by threatening to veto any spending bills that would have violated his suggested cap, and he did in fact veto a submitted Labor and Health and Human Services bill for

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<sup>78</sup> *Id.* at 62-63.

<sup>79</sup> *Techniques for Preventing a Budget Sequester*, *supra* note 60, at CRS 4-5.

<sup>80</sup> *Id.*

<sup>81</sup> Congressional Budget Office, *Economic Outlook: Fiscal Years 2002-2011*, at 75 (January 2001).

<sup>82</sup> Kogan, *supra* note 67, at 3.

<sup>83</sup> Congress failed to adopt a budget resolution for FY2003, FY2005, and FY2007. See SCHICK, *supra* note 1, at 118. For the years in which Congress failed to adopt a concurrent budget resolution, the Senate has nonetheless generally adopted a discretionary spending cap on its own. See, e.g., Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, P.L. 109-234, § 7035 (2006).

that reason.<sup>84</sup> Congress then put together an Omnibus Spending Bill, signed by the President that limited discretionary spending to \$933 billion, but which made liberal use of creative tactics such as emergency spending and advance appropriations in order to meet that level.<sup>85</sup> Recently, President Bush again threatened to veto any spending bill that exceeds his FY2009 spending limit,<sup>86</sup> though it is unclear of yet whether he will follow through on this warning.

The spending limits set by Congress are enforceable in the Senate, but not the House, by a point of order,<sup>87</sup> though they do not carry with them the enforcement strength of sequestration. Since the expiration of the BEA, the informal spending limits set by Congress have been nominally adhered to. However, as in the period during the BEA, Congress has effectively evaded the discretionary spending limits via the strategic use of appropriating funds designated as “emergency” spending, which is mostly exempt from budget controls and spending limits.<sup>88</sup> Despite the specific criteria included in Budget Resolutions for classifying funds as “emergency spending,” see *infra*, the Government Accountability Office has found that many provisions ultimately adopted as emergency spending “were not clearly consistent with these criteria.”<sup>89</sup> (Amusingly, the 2000 Census, despite being required by U.S. Constitution, was funded with emergency spending.) Moreover, while between FY1981 and FY2006 on average 34% of supplemental appropriations were offset by corresponding rescissions, in the period from FY2002 to FY2006 that figure fell to 8%.<sup>90</sup>

The below table indicates the dramatic increase in emergency budget authority over the previous half-decade:

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<sup>84</sup> See Jennifer Loven, *Bush Vetoes Health and Education Bill*, ASSOCIATED PRESS (Nov. 13, 2007).

<sup>85</sup> Discussion with Office of Management and Budget official, April 1, 2007.

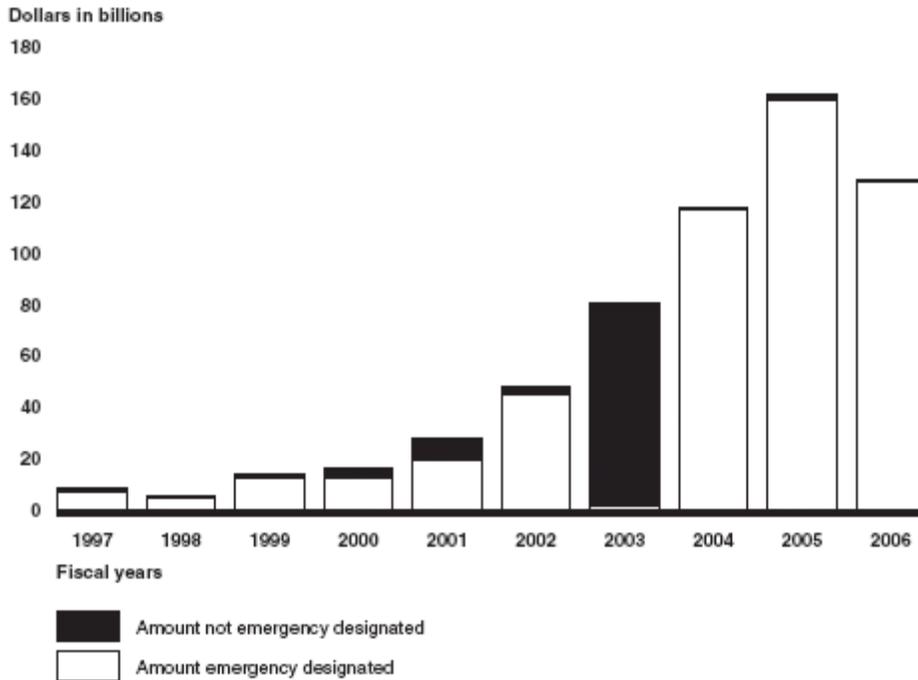
<sup>86</sup> Peter Cohn, *Bush Threatens to Veto Fiscal 2009 Appropriations Above Set Limit*, CONGRESS DAILY (Feb. 8, 2008).

<sup>87</sup> See SCHICK, *supra* note 1, at 61.

<sup>88</sup> See, e.g., H. Con. Res. 95, §402(b) (109th Congress) (FY2006 budget resolution).

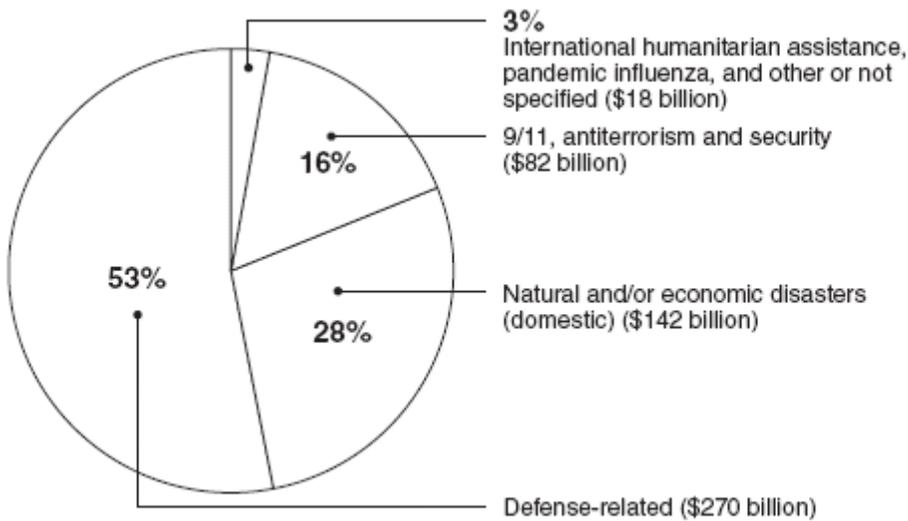
<sup>89</sup> U.S. Gen. Accounting Office (GAO), *Supplement Appropriations: Opportunities Exist to Increase Transparency and Provide Additional Controls*, GAO-08-314, at 13 (Jan. 2008).

<sup>90</sup> Thomas L. Hungerford, CRS Report, *Supplemental Appropriations: Trends and Budgetary Impacts Since 1981*, Congressional Research Service Report for Congress, RL33134 (updated Nov. 8, 2006).



Source: U.S. Gen. Accounting Office (GAO), *Supplement Appropriations: Opportunities Exist to Increase Transparency and Provide Additional Controls*, GAO-08-314, at 13 (Jan. 2008).

An analysis by the Government Accountability Office of the uses to which this funding was put in the period from 1997 to 2006 concluded that the majority has gone to defense-related matters, with natural disasters (e.g. Hurricane Katrina) constituting the bulk of the remainder:



Source: U.S. Gen. Accounting Office (GAO), *Supplement Appropriations: Opportunities Exist to Increase Transparency and Provide Additional Controls*, GAO-08-314, at 14 (Jan. 2008).

In particular, since FY2002 funding related to the Global War on Terror has generally been designated as emergency funding.<sup>91</sup> Some have argued that it is problematic to provide funding for an ongoing event as an emergency, which is defined as being sudden and unforeseen,

<sup>91</sup> *Id.* at 15.

while others maintain that including War on Terror-related funding in the normal budget process would result in inflated baselines for defense spending.<sup>92</sup> While the Senate has adopted a point of order to challenge consideration of legislation containing an emergency designation,<sup>93</sup> the point of order does not apply to discretionary spending for defense accounts.<sup>94</sup> Recent proposals have suggested closing this loophole by extending the point of order to apply to all emergency spending, whether defense-related or not.<sup>95</sup>

In 2007, the newly Democratic Congress reenacted the PAYGO provisions of the BEA, in amended form, after campaigning strongly on the issue, but did not see fit to also reinstitute the discretionary spending caps.<sup>96</sup> There are many different views on why the Democrats would revive PAYGO but not discretionary caps. Some argue that it is because PAYGO provisions are easy to suspend and bypass giving the appearance of budgetary responsibility, but still containing an easily usable escape hatch when necessary<sup>97</sup>. Others argue that Congressional Democrats were campaigned on the issue of budgetary responsibility generally and PAYGO specifically, and were fulfilling a concrete campaign promise<sup>98</sup>. A middle ground between both arguments is likely: Democrats had promised PAYGO so they delivered PAYGO even though it would limit their options in the majority without at least the politically unappealing task of consistently suspending PAYGO rules - they had not promised discretionary caps so they felt no need to limit their actions in the majority but a restraint they had never promised voters. See below, section III.B, for more on proposals to potentially institute new caps moving forward.

### III. EXISTING CRITIQUES & PROPOSALS FOR REFORM

As described above, committee allocations, targets, and discretionary spending caps have at one time played, or continue to play, important roles in the federal budget process. Below is a sampling of reactions from academics, government agencies and other commentators from the last 15 years. Such critiques range from assessments of the BEA and the current allocation system to various reform proposals of the past few years in light of the expiration of the BEA in 2002.

#### A. Assessments

##### 1. *Gramm-Rudman-Hollings & Targets*

As set out above, the two-step deficit reduction process inherent in the GRH ultimately proved unsuccessful, a fact not overlooked by the large majority of commentators who have written on the subject. Most critics echo the sentiments of the historical analyses of the GRH as

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<sup>92</sup> *Id.*

<sup>93</sup> H. Con. Res. 290, § 205(b) (106th Cong.)

<sup>94</sup> James V. Saturno, CRS Report, *Emergency Spending: Statutory and Congressional Rules*, Congressional Research Service Report for Congress, RS21035, at CRS-5 (updated July 24, 2007).

<sup>95</sup> See Press Release, *Sen. Voinovich Offers Budget Amendment to Curb Abuse of "Emergency" Spending* (Mar. 12, 2008).

<sup>96</sup> See Lori Montgomery, *House Adopts Pay-as-You-Go Rules*, WASH. POST, Jan. 6, 2007, at A4.

<sup>97</sup> See Wall Street Journal Editorial Board, *Tax As You Go*, WALL ST. JOURNAL, Jan. 5, 2007, available at [http://online.wsj.com/article/SB116796509525567834.html?mod=opinion\\_main\\_review\\_and\\_outlooks](http://online.wsj.com/article/SB116796509525567834.html?mod=opinion_main_review_and_outlooks)

<sup>98</sup> See Richard E. Cohen, *Rangel's reach*, NATIONAL JOURNAL, Nov. 3, 2007

described above, which themselves contain explicit critiques of the failed system. One author, James Thurber, went so far as to say that GRH failed to achieve any of its objectives, writing that “deficit targets, within which discretionary spending decisions were to operate, became a function of unknown, unrelated and uncontrollable economic conditions.”<sup>99</sup> Specifically, he argues that appropriators simply delayed passage of bills until after sequestration occurred in order to evade GRH.<sup>100</sup>

## **2. *The Effect of the BEA on Appropriations Committees and Committee Allocations***

It has been noted that the Budget Enforcement Act’s discretionary cap and PAYGO enforcement mechanisms instituted a relatively new process in the wake of the GRH’s failures, which in turn greatly influenced the amount and methods of achieving budget authorities and outlays. Directly related is the effect these mechanisms had on the system of committee allocations designed to fuel the process along.

One critique in 1994 noted that the replacement of a system centered on a “committee government” with one dominated by subcommittees brought unintended consequences to the BEA-regulated process.<sup>101</sup> Specifically, the authors discussed what they saw as a fragmentation of policy-making in which billions of dollars of discretionary appropriations went unauthorized, using FY1994 – when 11.5% of discretionary appropriations went unauthorized – as a prime example.<sup>102</sup> In this regard, they assert that while subcommittees were designed to foster ideas and represent diverse interests, they were actually unrepresentative and unable to forge policy solutions binding on the larger institution.<sup>103</sup> In the larger picture, these same commentators felt that “the Budget Act of 1974, and its successor amendments (the Gramm-Rudman-Hollings Act of 1985, 1987, and the 1990 BEA) had also focused inordinate attention on the fiscal impact of proposed policies, often at the expense of deliberations over the wisdom, necessity, or likelihood of success of new policies, or the need to weed out ineffective existing programs through more systematic oversight.”<sup>104</sup>

Other academics frame the debate in terms of identifying the winners and losers of the new system, with the Appropriations Committees frequent players on these scorecards. Stanley Collender, cited often above for his documentation of the federal budget process, builds upon his observation that despite the BEA’s focus on limiting spending and guaranteed baseline revenues, deficit reduction was nevertheless supposed to occur due to a growing economy and falling interest rates/inflation. In particular, he frames his analysis by looking at who he believes gained and lost in the shifted process, finding the White House and the Office of Management and Budget the biggest winners. The President is permitted to spend under the “emergency” exception, while the OMB is given even greater formal and informal discretion; after all, it is the

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<sup>99</sup> James A. Thurber, “*Congressional Budget Reform: Impact on Appropriations Committees*,” *Public Budgeting & Finance*, 62, 65 (Fall 1997).

<sup>100</sup> *Id.*

<sup>101</sup> Congressman Gerald B.H. Solomon & Donald R. Wolfensberger, “*The Decline of Deliberative Democracy in the House and Proposals for Reform*,” 31 *HVJL* 321 (Summer 1994).

<sup>102</sup> *Id.* at 344-345.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at footnote 118.

OMB that drafts the presidential budget and, as a result, updates deficit maximums and discretionary spending caps and determines the necessity of a sequester.<sup>105</sup>

However, he finds the House & Senate Appropriations Committees clear winners as well, since it is to their advantage to know how much they will have to spend before the process begins. Similarly, he says the failure to approve a budget resolution by April 15 results in the committees receiving allocations in line with the caps set out in the President's budget. Finally, the absence of deficit maximums reduces the chance of sequester in those rare times when the appropriations committees themselves include additional cap-breaching spending, an occurrence so unlikely that the committees can generally operate without concern over later cuts.<sup>106</sup>

On the other hand, Collender views the Budget Committees as the big losers, since it is the above institutions that determine priority and generally hold the power. He notes that the budget committees have a potentially larger role if the budget resolution is used to develop a deficit reduction plan, but that process is not required by the BEA.<sup>107</sup>

In contrast, James Thurber believes the power of the Appropriations Committees declined significantly in the wake of the BEA adoption. First, the “zero-sum” choices inherent in the BEA significantly reduced the power of appropriators over program funding and shifts among categories.<sup>108</sup> In particular, the establishment of spending ceilings for the categories of defense, domestic and international – with sequestration reserved for those categories exceeding limits due to changes in legislation (but not economic conditions) – left the Appropriations Committees with only the primary duty of preventing funds from one category from being used to offset spending that breaks caps in another.<sup>109</sup> Second, the aforementioned possibility of “look back” legislation prevented Appropriations Committees from increasing the deficit post-snapshot and further served to reduce flexibility in case of emergency or changing situations.<sup>110</sup> Next, the process itself made decisions by Appropriations Committees more open, accessible and accountable to a more learned public, as well as to interest groups and to the administration, giving them less ability to execute the budget tricks described earlier.<sup>111</sup> This, in turn, led to even more budgetary conflict and complexity over what was to be cut or how spending totals of functional categories in the budget resolution would be allocated among subcommittees. Other negative consequences he outlines include: discouraging individual members from initiating their own budget proposals because cuts and revenue enhancements would need to be found elsewhere; the creation of a more centralized spending allocation process that necessarily involved party leadership; and an overall reduction of autonomy in light of any resultant control over policy preferences being limited by the required subcommittee allocations.<sup>112</sup>

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<sup>105</sup> COLLENDER 2000, *supra* note 36, at 30.

<sup>106</sup> *Id.* at 30-31.

<sup>107</sup> *Id.* at 31.

<sup>108</sup> Thurber, *supra* note 86 at 66.

<sup>109</sup> *Id.* at 69.

<sup>110</sup> *Id.* at 67.

<sup>111</sup> *Id.* at 69.

<sup>112</sup> *Id.* at 67-71

In “*The Congressional Budget Process: Strengthening the Party-In-Government*,” *Symposium: Law and Political Parties*,<sup>113</sup> Elizabeth Garrett also discusses the winners and losers who emerged from the adoption of the new procedural framework, saying it decreased the power of lawmakers as a group to enact new spending proposals but benefited individual members by strengthening parties-in-government.<sup>114</sup> She adds that the move from a policy-neutral budget law in 1974 to a series of budget acts designed to achieve particular outcomes (e.g. deficit reduction through spending limitation) set the stage for policy stalemates that necessitated political summits among top-level party officials rather than committee chairs or individual members.<sup>115</sup> Further, there was always the danger that votes inconsistent with spending targets or seeking to change caps would potentially have unfavorable electoral consequences, leading to more frequent use of complex budget gimmicks that produce bills appearing consistent with spending targets.<sup>116</sup>

### **3. The Discretionary Caps**

#### **(a) Academic/Independent Critiques**

Despite the existing commentary on these and other topics, in reality, most critiques in this area are devoted to an analysis of the discretionary caps themselves, and how effective this Budget Enforcement Act mechanism was in achieving its ambitious objectives during the period the BEA was in force. These assessments began almost immediately after the BEA’s passage, providing analysis that is especially relevant in light of the current potentiality of “renewing” many of the foundations of the BEA, including (and relevant for this discussion) the discretionary spending caps.

Philip Joyce’s “*The Budget Enforcement Act and Its Survival: Congress Hears from Experts*,” *Public Budgeting & Finance*, 16-22 (Spring 1992), is a collection of pieces of testimony given by budget experts. Alice Rivlin (former CBO Director) testifying before the House Budget Committee’s Task Force on Budget Process, Reconciliation and Enforcement on October 10, 1991, cautioned that any future changes in discretionary caps should be able to simultaneously shift priorities and accelerate budget deficit reduction (e.g., by merging categories into one over-arching cap) and maintain budget discipline – warnings based on her belief that the system as it stood failed to achieve balance.<sup>117</sup> Before the same body on the same day, Allen Schick, a frequent source for the framework set out in Part I, held firm that the BEA was seriously flawed, even if it represented the best solution at the time. He maintained that spending caps were not sufficiently responsive to new developments and changing priorities, and that it halted domestic discretionary initiatives by barring tradeoffs between discretionary spending and mandatory spending. Schick went on to testify that there was a double standard in capping discretionary spending while allowing direct spending to rise without limit, and that such rules led to “no-fault” budgeting. He ended by recommending that discretionary caps be seen as limits that are not required to be reached (not floors), that modifications to the BEA continually be discussed whenever deficit projections rise, that budget savings be based on

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<sup>113</sup> 100 Colum. L. Rev. 702 (2000).

<sup>114</sup> *Id.* at 729-730.

<sup>115</sup> *Id.* at 707.

<sup>116</sup> *Id.* at 716-717.

<sup>117</sup> Joyce at 18-19.

structural changes, not temporary provisions, to avoid bookkeeping trickery, and that a process for terminating low-priority programs be established.<sup>118</sup>

On November 6, 1991, Isabel Sawhill of the Urban Institute went before the Subcommittee on Legislation and National Security of the House Committee on Government Operations and claimed there was no need for multiple discretionary categories, but that it would be beneficial to allow discretionary spending increases to be financed through higher taxes and lower entitlement spending.<sup>119</sup> Robert Reischauer (then CBO Director) testified both before the House Budget Committee's Task Force on Budget Process, Reconciliation and Enforcement on October 10, 1991 and before the Subcommittee on Legislation and National Security of the House Committee on Government Operations on November 6, 1991, predicting that discretionary spending caps would prove increasingly restrictive, but arguing that the extension of the caps was necessary to avoid temptation. He suggested consideration should be given to setting targets for deficit reduction rather than deficit targets, with some greater threat than sequestration (e.g., an automatic surcharge on tax payments).<sup>120</sup>

Stanley Collender also contributed to the discussion by contending that only a few people in the administration and Congress understood the impact of the BEA at the time of its passage and that due to limited discussion of ideas and last minute negotiations, the BEA was not really well-conceived or planned.<sup>121</sup>

As time progressed and the BEA was either extended or on the verge of expiration, commentators continued to weigh the effectiveness of the BEA. One of the more notable sets of remarks was by Rudolph G. Penner of The Urban Institute on "*Repairing the Budget Process*," in May 2002. He believed there was a missed opportunity in 1974 to improve coordination and lessen complexity by recombining the revenue and spending sides of the budget (i.e., by folding the respective Appropriations Committees into the House Ways and Means Committee and Senate Finance Committee), instead of adding Budget Committees.<sup>122</sup> He saw the BEA as forcing policymaking to be more mechanical than wise in some respects, and that the caps were basically ignored and circumvented through emergency spending.<sup>123</sup> At the same time, Penner thought the caps contributed to surplus creation in 1998-2001 and that "it was, in fact, remarkable how well the caps and PAYGO rule had operated [prior to the discipline erosion caused by the surpluses]. While there were loopholes in the rules, making them vulnerable to evasion through accounting gimmicks and other devices, Congress generally resisted the temptation to exploit these weaknesses."<sup>124</sup> Noting that spending rose only 1.4% between 1990 and 1997, he wrote that "although Congress may be faulted for adopting unrealistic long-run caps for cosmetic reasons because it wished to promise declining deficits, when the caps were adjusted, total discretionary spending still declined in real terms."<sup>125</sup>

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<sup>118</sup> *Id.* at 20-22.

<sup>119</sup> *Id.* at 19-20.

<sup>120</sup> *Id.* at 17-18.

<sup>121</sup> COLLENDER 2000, *supra* note 36, at 23-24.

<sup>122</sup> Penner, "*Repairing the Budget Process*" at 5.

<sup>123</sup> *Id.* at 8-9.

<sup>124</sup> *Id.* at 9.

<sup>125</sup> *Id.* at 11.

(b) Government critiques

In addition to analyzing critiques from academics and independent think-tanks, it is important to look at reports by some of the many government agencies that play a direct role in the development of the federal budget as well.

For example, the General Accounting Office, now named the Government Accountability Office (GAO), submitted annual BEA compliance reports starting in 1990 (and prior had submitted annual reports regarding compliance with GRH), some of which have been cited above. In general, these reports discussed the scoring differences between OMB and CBO and commented on whether sequestration was necessary on either the discretionary or the mandatory fronts. However, for the purposes of this section, the last BEA compliance report in 2002 also discussed the future of budget enforcement in light of the impending expiration of the BEA, and took a close look at extension of discretionary caps.<sup>126</sup>

The report first sets out what it believes to be general criteria for any good budget process, including providing information about the long-term impact of decisions while recognizing short-term, medium-term and longer-term distinctions, focusing on important macro trade-offs, and maintaining enforceability, control, accountability and transparency.<sup>127</sup> As to extending caps on discretionary spending, as discussed in Part I, the report notes the widespread agreement that the BEA was successful in restraining fiscal action, but that recent spending caps were unrealistically tight and undermined by the emergence of budget surpluses.<sup>128</sup> It recognized that emergency spending, upward cap adjustments, advance appropriations, obligation and payment delays and specific legislative direction for scorekeeping were all used to raise discretionary spending while maintaining technical compliance with the limits.

As a result, the report asserts that any system must address these potential cap adjustments, balancing the need to respond to emergencies and the desire to avoid making the “emergency” label an easy way to raise caps. Brainstorming possible systems that might achieve this objective, the GAO offered two possibilities. The first was patterned after a House Budget Resolution for FY2002 (H. Con. Res. 83), which (i) established a reserve fund of \$5.6 billion for emergencies and (ii) defined an emergency as an unanticipated and urgent situation requiring new budget authority to prevent or respond to imminent loss of life or property. Alternatively, a system could provide for more emergency spending under any spending caps, either in the form of a reserve or a greater appropriation for the Federal Emergency Management Agency (FEMA), with the amount reserved or appropriated taken from a rolling 5- or 10-year average of emergency spending.<sup>129</sup> Additionally, whatever the system structure, the compliance report declared it must also address the length of the caps, alternative methods of categorization, and the notion of caps as either ceilings or guaranteed levels of funding (e.g., floors).

With this background, the GAO laid out a number of reform options, none of which were mutually exclusive. One included extension of BEA-type caps, but limiting them to caps on

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<sup>126</sup> *Budget Enforcement Compliance Report, 2002*, supra note 50. See also U.S. General Accounting Office, *Budget Process: Extending Budget Controls*, Irving, supra note 66, among other GAO reports.

<sup>127</sup> *Budget Enforcement Compliance Report, 2002*, at 50.

<sup>128</sup> *Id.* at 9, 36.

<sup>129</sup> *Id.* at 44-45.

budget authority rather than on both budget authority and outlays. The rationale given was that the existence of two caps potentially skewed authority from rapid spending to slower spending programs, thus pushing more outlays to the future and creating problems in complying with outlay caps in future years. In contrast, the GAO felt that having only one cap would allow Congress to focus on budget authority, which itself controls outlays, and not waste time trying to control outlay timing. The report also contemplated the creation of an “investment component” within discretionary caps, covering funding for physical infrastructure, research and development, and education and training.<sup>130</sup>

The same report also discusses how to address the uncertainty of projections and the risk that such projections, whether they be for 5- or 10-year periods, are materially wrong. In particular, it notes that while GRH triggers were tied to deficit results, BEA triggers were tied to congressional action, leading to the rare, small sequester. While there wasn’t the same consensus as on the BEA’s role in limiting deficits, the GAO felt that triggers could be discussed as a potential mechanism if a given target was exceeded, whether that target was linked to actual surplus results, actual revenue results, actual debt results, or spending as a share of GDP – going so far as to mention a proposal by former CBO director Robert Reischauer to make a declining percentage of any projected surplus available for spending increases or tax cuts (see the reform proposals below for more information).<sup>131</sup>

Another critical government actor, the CBO, also submits frequent reports on the topic. One report, *Extending the Budget Enforcement Act, Testimony of Dan L. Crippen before the Committee on the Budget, House of Representatives* (June 27, 2001), contains much of the same information as in the GAO reports regarding the effectiveness and general significance of BEA-type provisions. However, it puts further emphasis on the argument that the root of the problem regarding BEA’s discretionary caps was not the gimmickry surrounding circumvention, but that base levels of discretionary appropriations allowed under the caps were not supported by a consensus, supporting the arguments made in Part I of this paper by Richard Kogan of the Center on Budget and Policy Priorities.<sup>132</sup> Further, it remarked that carving out separate sub-limits for certain categories of spending would sacrifice the flexibility to shift priorities and open the door to future gimmickry, especially if the sub-limits also acted as floors.<sup>133</sup> Looking at the big picture, the CBO declared that “budgeting is a process for setting priorities and allocating resources,” even during a time of surpluses, such that “the BEA framework...can continue to be an important component of budgetary policymaking and help lawmakers to confront future budgetary pressures.”<sup>134</sup>

In the “Discretionary Spending” subsection of another recent CBO publication, *The Budget and Economic Outlook: Fiscal years 2006 to 2015* (January 2005), the CBO discusses a number of demonstrative figures for 2005. For instance, the report maintained that total discretionary outlays as a share of GDP would drop from 7.7% in 2004 to 7.6% in 2005, but additional estimated outlays of \$30 billion for Iraq and Afghanistan would bring total

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<sup>130</sup> *Id.* at 42-45.

<sup>131</sup> *Id.* at 48-49.

<sup>132</sup> CBO 2001 at 7-8. See *supra* note 80 and accompanying text.

<sup>133</sup> *Id.* at 7.

<sup>134</sup> *Id.* at 9.

discretionary outlays to 7.9% of GDP (the highest level since 1993).<sup>135</sup> With this additional funding for Iraq and Afghanistan, the CBO predicted that defense outlays could grow to 4.0% of GDP, compared to 3.9% in 2004, with total non-supplemental budget authority for defense growing from \$394 billion in 2004 to \$420 billion in 2005.<sup>136</sup> In addition, it predicted that, excluding supplemental funding, appropriations for non-defense discretionary programs would grow by 3.5% in 2005 as compared to 2004, mostly due to spending on homeland security.<sup>137</sup> The report also addresses presumed figures for the 10-year period of 2006-2015. Most significantly, the CBO projects that discretionary outlays would drop from \$930 billion in 2005 to \$914 billion in 2006, before rising steadily for the remainder of 10-year projection period, to \$1.1 trillion in 2015.<sup>138</sup>

## **B. Proposals for Reform**

Since the expiration of the BEA in 2002, a number of proposals have been made for potential budget enforcement mechanisms that either build off of or replace the main elements or tenets of the BEA. Commentators have explained this renewed interest as follows:

For the last several years, there has been considerable interest in restoring and possibly making significant modifications to the BEA procedures [that expired in 2002]. Many members of Congress and some outside observers agree that the budget enforcement mechanisms associated with the BEA promoted fiscal discipline throughout the 1990s, and contributed to the federal government achieved a unified budget surplus in FY 1998 – the first in almost 30 years. With the return of deficits, some have argued for restoring such fiscal discipline mechanisms.<sup>139</sup>

Proposals for reform have emanated from the President and from Congress, as well as from the private sector. While Congress did respond to calls for improvement in the budget process by re-enacting elements of the PAYO rules that apply to direct spending,<sup>140</sup> as of yet no action has been taken to reign in discretionary spending. In addition to any proposals outlined in connection with the above assessments, the following sections discuss the most significant proposals to reform discretionary spending, most significantly by reinstating the spending caps that were in place under the BEA.

### ***1. President Bush's Fiscal Year 2006 Budget***

President Bush's budget proposal for FY2006 notably outlined a number of potential reforms that the administration hoped to undertake via a re-proposal of the unpassed Spending Control Act of 2004,<sup>141</sup> a measure, proposed by the House Budget Committee but voted down by

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<sup>135</sup> CBO 2005 at 14.

<sup>136</sup> *Id* at 15.

<sup>137</sup> *Id*.

<sup>138</sup> *Id* at 12.

<sup>139</sup> Bill Heniff Jr. and Robert Keith, CRS Report, *Federal Budget Process Reform: A Brief Overview*, RS21752, at CRS-3 (May 11, 2005).

<sup>140</sup> *See supra* text accompanying note 89.

<sup>141</sup> H.R. 3937 (H.Rept. 108-442)

the full House, that would have restored discretionary spending limits for FY2005-FY2009.<sup>142</sup> While certain minor elements of President Bush's proposal were eventually adopted, the set of reforms as a whole failed to gain traction and remains largely ignored. Despite this lack of success, the President's budget has continued to propose long-term discretionary spending caps enforced by sequestration procedures.<sup>143</sup>

The following budget enforcement provisions were part of the President's proposals:

(a) Discretionary Caps

The budget proposal set limits on net discretionary budget authority and outlays for 2005 through 2010, and confirms that legislation exceeding discretionary caps would trigger the sequester of non-exempt discretionary programs. In addition, it addressed the much-debated issue of categorization by setting a framework such that in 2005-2007, there would be separate caps for defense and non-defense categories, while in 2008-2010, only a single cap for all discretionary spending would exist. Furthermore, the notion of separate caps for transportation categories (specifically Federal Highway and Mass Transit) would continue into 2005-2009, while separate caps for conservation programs previously established in the BEA.<sup>144</sup>

(b) Program Integrity Cap Adjustments

The administration's proposal also attempted to curb the inefficiencies that occur when funds go to the wrong recipient program, the recipient program receives incorrect funding, or the recipient program uses funds in an improper manner. This was to be accomplished by recommending cap adjustments for spending above a base level of funding within discretionary levels for certain program integrity initiatives.<sup>145</sup>

(c) Advance Appropriations

The FY2006 outline also asserted an intention to curb the abuse of advance appropriations that results when budget authority is shifted from the current year to the subsequent year, with other programs then being appropriated that "freed-up" amount under the budget year discretionary cap. The proposal set out to (i) cap advance appropriations to allow increases to be reflected in the year of enactment, (ii) score the second-year effect of appropriations acts that delay obligations of mandatory budget authority as advance appropriations that count against the discretionary caps (i.e., the second-year impact will be treated as an advance appropriation and scored against the discretionary caps), and (iii) mandate that total funding for advance appropriations (including obligation delays) provided in an appropriations act for 2006 through 2010 that is in excess of a specific advance appropriations cap (\$22.6 billion) will count against the discretionary cap in the year enacted, not against the year the funds first become available.<sup>146</sup>

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<sup>142</sup> The Act also included PAYGO requirements applicable only to direct spending. See Heniff Jr. and Keith, *supra* note 117, at CRS-4.

<sup>143</sup> See OMB, *Fiscal Year 2009 Budget of the U.S. Government* at 26.

<sup>144</sup> *Analytical Perspectives, The Budget of the United States Government, Fiscal Year 2006* at 235. The "Conservation Spending" category was established by the Department of the Interior and Related Agencies Appropriations Act for FY 2001, setting new spending limits for FY 2002-2006 despite expiration of BEA caps in 2002. *Budget Enforcement Compliance Report, 2002*.

<sup>145</sup> FY 2006 at 236-237.

<sup>146</sup> FY 2006 at 237.

(d) Federal Pell Grants

The proposal attempted to avoid shortfalls in funding of the Pell Grant program due to insufficient Pell Grant appropriations by suggesting an increase of the \$4,050 maximum award by \$100 in FY2006 and by \$500 over following five years, as well as by retiring the current \$4.3 billion shortfall. The administration sought to keep the Pell Grant program discretionary, with additional discretionary appropriations needed to support any future cost increases. Appropriations would be scored at an amount needed to fully fund the award level set out in appropriations acts.<sup>147</sup>

(e) Project BioShield Category

Finally, the budget proposal included the creation of a separate BEA category for budget authority for Project BioShield, which develops vaccines and medications for biodefense, in order to ensure that funding is not used as offsets for other discretionary spending.<sup>148</sup>

## ***2. Responses and Critiques to the President's Budget Proposal***

With this foundation in mind, the following is a series of responses and critiques of the administration's budget proposal as it related to discretionary spending. Included are two articles: James Horney & Richard Kogan, "*Administration's Five-Year Caps on Appropriations Would Lead to Substantial Reductions in Important Domestic Programs*," Center on Budget and Policy Priorities (March 1, 2005) and Sharon Parrot, Isaac Shapiro, David Kamin and Ruth Carlitz, "*Unpublished Administration Budget Documents Show Domestic Cuts Would Significantly Reduce Funding for Most Public Services*," Center on Budget and Policy Priorities (February 14, 2005).

The first critique is that the budget proposal's discretionary caps are in practice different from the discretionary caps of the BEA. Unlike those of the BEA, these caps would not be enacted as part of an overall deficit-reduction package involving entitlement program reductions and revenue increases (as in 1990 & 1993), making it more difficult to reach bipartisan agreement unless even further discretionary cuts are made to appease those who resist raising revenue. In fact, it is suggested that due to proposed tax cuts and greater defense and security spending, deficits for 2006-2010 would be \$29 billion higher under the proposed budget than if there were no change. It is further argued that since there is no limit on the size of tax cuts under the new budget rules, domestic appropriation cuts will actually be paying for tax cuts, not reducing the deficit.<sup>149</sup>

Another concern centers on the deeper reductions in domestic discretionary programs (those not related to the Department of Defense, international affairs or homeland security) if, as proposed, the caps are established at levels equal to the amount requested (\$214 billion over five years). It is argued that reductions would actually be six times greater than the cuts achieved under discretionary caps established between 1990 and 1998, and that in 2010, cuts would reduce expenditures for domestic discretionary programs to their lowest level since before 1962.<sup>150</sup>

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<sup>147</sup> FY 2006 at 237-238.

<sup>148</sup> FY 2006 at 238.

<sup>149</sup> Horney at 2, 3.

<sup>150</sup> *Id.* at 2-4.

It is also emphasized that, for the first time in decades, the current budget proposal does not outline reductions in individual appropriated programs for the years 2007-2010 after the coming year (2006). That is, while the budget outlines the first \$18 billion in cuts, it leaves \$196 billion in further cuts unidentified.<sup>151</sup> Failing to provide these details hampers the potential debate on policy trade-offs and the ability to assess the impact of caps in subsequent years, since such caps are unknown. The following table<sup>152</sup> outlines assumed reductions:

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<sup>151</sup> Parrott at 1.

<sup>152</sup> Parrott at 4

**Table 1**  
**President's 2006 Budget Proposes \$214 Billion in Cuts**  
**In Domestic Discretionary Programs**

(President's Proposal Relative to the Current Services Baseline, By Budget Category)

Budget Function	Change in 2010		Five Year Change: 2006-2010
	In Billions of Dollars	Percent Change	In Billions of Dollars
General Science, Space, and Technology	-\$1.1	-3.9%	-\$2.7
Energy	-\$1.9	-33.7%	-\$6.5
Natural Resources and Environment	-\$8.0	-22.5%	-\$27.2
Agriculture	-\$1.2	-17.0%	-\$4.0
Commerce*	\$3.1	151.4%	-\$1.5
Transportation	-\$3.0	-11.1%	-\$14.8
Community and Regional Development	-\$3.5	-20.8%	-\$14.9
Education, Training, Employment, and Social Services	-\$13.5	-15.3%	-\$43.2
Health (NIH, CDC, and other, not Medicare or Medicaid)	-\$8.1	-13.9%	-\$25.9
Income Security (Housing, WIC, child care, and other)	-\$5.9	-11.4%	-\$14.3
Veterans Benefits Services (primarily medical care)	-\$5.8	-16.4%	-\$14.9
Administration of Justice	-\$4.8	-10.1%	-\$12.7
General Government (White House, Congress, IRS)	-\$2.8	-14.9%	-\$6.5
<b>Total Domestic Discretionary (All Discretionary Except Pentagon, International, and Homeland Security)**</b>	<b>-\$66</b>	<b>-15.7%</b>	<b>-\$214.1</b>

Notes:

\* The 2010 funding level for the commerce category reflects increased funding for the decennial census in that year. The current services baseline does not include this additional funding.

\*\* The functional figures do not add to the total. Not all functions are shown. In addition, the functional figures (but not the total reductions shown for domestic discretionary programs) include homeland security. Given the information that is available, we are unable to exclude homeland security funding from the budget function figures. The commerce, transportation, community and regional development, and justice functions receive significant homeland security funding. If increases in funding for homeland security were excluded from these functions, the cuts in these functions generally would be larger than shown here.

In light of the above criticisms, an alternative reform proposal is put forward whereby rather than having a statute impose multi-year discretionary caps, a budget resolution could require all budget resolutions and appropriations bills passed for the following four years to remain within the discretionary caps that the initial budget resolution set. In addition, the budget

resolution could specify that 60 votes were needed to pass any future resolution or legislation that breached the caps.<sup>153</sup>

### 3. *Congressional Proposals*

In addition to the President's proposals, over the last few years several pieces of legislation have been introduced in Congress with the aim of capping discretionary spending more forcefully than current procedures allow for.<sup>154</sup> Most notable among these proposals was the Stop Over Spending Act (SOS) of 2006,<sup>155</sup> introduced by Senator Judd Gregg. SOS sought both to cap discretionary spending, as under the BEA, as well as to established fixed deficit targets, as under GRH.

SOS would have established discretionary spending caps for FY2007 (\$872.5 billion), FY2008 (\$895.4 billion), and FY2009 (919.5 billion).<sup>156</sup> For purposes of comparison, discretionary spending amounted to \$1068 billion for FY2007 and is projected to be \$1045 billion for FY2008.<sup>157</sup> Even excluding funding for Iraq and Afghanistan and other activities related to the War on Terrorism, those figures would be \$898 billion and \$957 billion respectively, well above the caps set by SOS.<sup>158</sup> The bill's spending limits would be adjusted in the case of an "emergency requirement," but emergency spending would be limited to \$90 billion, \$50 billion, and \$30 billion for FY2007-2009 respectively. The caps would be enforced by an across-the-board uniform percentage sequestration as under the BEA, based upon a report issued by OMB within 15 days after the end of a congressional session.<sup>159</sup>

SOS also would have established annual maximum deficit amounts, expressed as a percentage of GDP. The allowable deficit would start at 2.75% of GDP for FY2007 and then gradually decrease until it reached 0.5% of GDP for FY2012 and each fiscal year thereafter. Like the discretionary spending caps, the annual deficit amounts would be enforced by sequestration procedures, but defense spending would be largely protected from this process. Sequestration could be avoided if both houses agreed on an omnibus reconciliation act that would eliminate the projected excess deficit by either cutting spending or increasing revenues.<sup>160</sup>

In addition, SOS contained some far-reaching reforms of the overall budget process. Under Title III of the act, the annual budgeting and appropriations process would be converted into a biennial process. In the first session, Congress would develop a budget resolution setting forth a six-year budget plan. In the second session, Congress would conduct oversight and enact authorization measures. The biennial budget would be due on May 15 of each odd-numbered

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<sup>153</sup> Horney at 7.

<sup>154</sup> See, e.g., Family Budget Protection Act of 2005 (H.R. 2290).

<sup>155</sup> S. 3521.

<sup>156</sup> See Bill Heniff, CRS Report, *S. 3521, the Stop Over Spending Act of 2006: a Brief Summary*, RL33547, at CRS-3 (July 14, 2006).

<sup>157</sup> CBO, *The Budget and Economic Outlook: Fiscal Years 2008 to 2018*, at 73.

<sup>158</sup> *Id.*

<sup>159</sup> The Act also provided for within-session sequestration to occur whenever an appropriation caused a spending limit to be breached during the fiscal year. See Heniff, *supra* note 134, at CRS-3 n.8.

<sup>160</sup> *Id.* at CRS-4.

year, as compared to April 15 of each year as under existing law.<sup>161</sup> The amount of debate over the budget resolution would also be restricted as compared to the current process.<sup>162</sup>

Senator Gregg's bill drew a mixed response. Some organizations praised the proposal as a fiscally responsible way to deal with escalating spending and deficits.<sup>163</sup> Others had a less positive view, and the discretionary caps quickly came under fire for their purported harshness, and for effectively shielding the recent tax cuts from review. The Center on Budget Policy and Priorities released a report comparing the SOS caps with those instituted under the BEA; the report concluded that the caps were much more stringent than those earlier imposed, and further noted that in the later years of the BEA, when the caps were especially tight, they were ineffective at promoting fiscal discipline. "The lesson is that reasonable caps negotiated as part of a balanced deficit-reduction package that contains shared sacrifice can be effective, but caps that are too severe are not sustained, especially when they are not part of a larger, balanced set of deficit reduction policies."<sup>164</sup>

SOS's fixed deficit targets were also criticized on grounds similar to those used in opposition to GRH. Analysts observed that by tying deficit targets to GDP, SOS would most limit government spending during times of a weak economy when GDP was low – precisely the time when government spending may be necessary to stimulate the economy.<sup>165</sup> Perhaps in part as a result of such criticisms, after emerging from committee SOS died on the House floor without ever coming to the vote.

#### **4. Other Commentary**

##### **(a) General System Criteria**

Ten years after testifying before numerous House committees, former CBO director Robert Reischauer again gave testimony in July 2001, this time before the U.S. House of Representatives Committee on the Budget. As published by the Urban Institute on July 19, 2001,<sup>166</sup> he spoke of the following general characteristics as what an effective budget process should do (although noting that the goals may be in conflict with one another): (i) command widespread support, or else one party can easily "circumvent, paralyze or game the process;" (ii) align with the nation's fiscal policy goals to avoid a disconnect between the goals that the process is designed to pursue and fiscal reality; (iii) encourage transparency and honesty to discourage reality distortion; (iv) create a conversion system from dollars that strives for fiscal equivalency, but which maintains some connection to numbers; (v) reveal the long-run fiscal impacts of current decisions; (vi) maintain flexibility to changes in economic conditions and shifts in national priorities; (vii) undergo critical review at least once per decade; (viii) remain

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<sup>161</sup> See *id.* at CRS-4 – 5.

<sup>162</sup> See *id.* at CRS-7.

<sup>163</sup> See Brian M. Riedl, *The Stop Over-Spending Act: A Real Opportunity to Limit Spending*, THE HERITAGE FOUNDATION, June 19, 2006, available at <http://www.heritage.org/Research/Budget/wm1132.cfm>; Statement of Chris Edwards, Director of Tax Policy Studies, Cato Institute, *The State of the Economy and the Budget*, before the United States Sen., Cmte. on the Budget (Sept. 28, 2006).

<sup>164</sup> See James Horney et al., *Discretionary Caps in Gregg Bill would Lead to Overly Deep Cuts*, CENTER ON BUDGET POLICY AND PRIORITIES, July 7, 2006; see also Arloc Sherman et al., *Proposed Discretionary Caps Would Hit States Hard*, CENTER ON BUDGET POLICY AND PRIORITIES, July 5, 2006.

<sup>165</sup> See Robert Greenstein et al., *Gregg Bill Would Made Far-Reaching Changes in Budget Rules*, CENTER ON BUDGET AND POLICY PRIORITIES, Aug. 9, 2006.

<sup>166</sup> Available online at <http://www.urban.org/urlprint.cfm?ID=7324>.

compatible with political pressures and constraints faced by lawmakers looking to maintain elected positions; (ix) avoid holding lawmakers strictly accountable for budget outcomes (as Gramm-Rudman-Hollings did).<sup>167</sup>

In a 2002 article excerpted above entitled “*Repairing the Congressional Budget Process*,” written as the BEA was expiring, Rudolph Penner says that any reform should be guided by certain overarching principles. First, it must encourage simplicity and expeditiousness, and cannot be so complicated that the rules are not understood or are easily evaded without being conspicuous. Second, it must be ideologically neutral and designed to make rational allocations of resources, not solely be directed at either deficits or surpluses. Along the same lines, the rules must be technically and practically possible to implement rather than setting rigid quantitative targets ruled by economic conditions (as GRH did), and they cannot be so politically harsh as to invite circumvention. Finally, there must be a safety net in the form of emergency clauses, even if such an escape tactic has the potential for abuse.<sup>168</sup>

Another think tank-based observation by Alan J. Auerbach, William G. Gale, Peter R. Orszag & Samara R. Potter in “*Budget Blues: The Fiscal Outlook and Options for Reform*,” The Urban Institute, May 2003, asserts that the failure to make PAYGO rules and spending caps a permanent part of budget procedure would be a “serious mistake.”<sup>169</sup>

#### (b) Specific Proposals

In the same 2001 testimony described above, Reischauer recommends turning to a new approach rather than extending the existing budget process. One possibility he discusses is to return to a pre-1985 process which, unlike the regime ushered in by GRH and BEA, was neutral with respect to fiscal outcomes or balanced budgets, though he recognizes such a system would not command much support. Noting the need to avoid the state of affairs that occurred when surpluses emerged in a BEA-governed regime, he suggests that any new or revised procedure must establish rules of action for when the fiscal objective has been exceeded or is projected to be exceeded. This potentially could be accomplished by establishing procedures that limit lawmakers’ abilities to dissipate projected excess amounts, perhaps by allowing each new Congress to encumber only a declining fraction of the resources that exceed the fiscal goal under the CBO’s baseline projection. Such a system would be enforced through variants of the discretionary cap and PAYGO mechanisms.<sup>170</sup>

Rudolph G. Penner & C. Eugene Steuerle, in “*Budget Rules*,” 57 *National Tax Journal* 547 (September 2004), posit that a new BEA would not provide an answer to today’s budget problems. They note that the BEA was originally passed to protect tax increases and spending constraints in a 1990 agreement between the President and Congress, and was successful prior to 1998 because it was backed by a broad political consensus looking to control the deficit. Today, however, they see no similar bipartisan budget deal needing enforcement and no consensus behind the goal of a balanced budget. Thus, a simple set of BEA-like rules will not be sufficient; instead, there must be agreed-upon goals (preferably aimed at reforming tax programs rather than

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<sup>167</sup> *Id.*

<sup>168</sup> Penner, *supra* note 109, at 22-23.

<sup>169</sup> Auerbach at 28.

<sup>170</sup> Reischauer, *supra* note 117.

at an artificial deficit number) and an emphasis on the notion that our budget problems will not be solved by constraining discretionary spending or raising taxes, but instead by focusing on entitlements.<sup>171</sup>

In *Repairing the Budget Process*, discussed above, Penner addresses discretionary caps specifically, saying they can impose some measure of constraint and discipline, cause deliberation on priorities, be separated into categories if necessary, be changed from year to year as budget and economic conditions change, and be enforced by a sequester mechanism that is relatively simple. At the same time, he feels it is necessary to avoid implementing overly-stringent caps, or else subsequent individual spending increases will render the caps purposeless. Also, he suggests it is not worth the effort to try to design caps impervious to trickery or gimmicking, since it will only lead to more complexity.<sup>172</sup>

Penner also discusses various reform proposals being discussed at the time, and how they might affect the appropriations process. He notes that the first – abandoning the 1974 Act and the BEA and starting over – has the advantage of avoiding wasting energy when budget resolutions are ignored or circumvented, but says it is hard to imagine returning to a system that failed to coordinate revenue and spending.<sup>173</sup>

An alternative would be a joint resolution that is signed or vetoed, instead of a concurrent budget resolution not requiring presidential approval, which would allow for earlier agreement but would also lead to time-consuming bargaining only involving party leaders.<sup>174</sup> The GAO has also commented on such an idea, reporting that while some have suggested that requiring the president's signature on budget resolutions would engender constructive debate, it would then fail to be a statement of congressional priorities, as was the case before 1974.<sup>175</sup> In addition, a joint resolution could avert the year-end disruption caused by the inability to reach agreement on funding the government, but it must be asked whether this would shift power from Congress to the president, or whether it is really needed to reach politically binding agreements. The GAO also broached the subject of automatic continuing resolutions instead, especially in light of experiences with government shutdowns (partial or otherwise), but cautioned that such an approach might lessen the incentive for policymakers to negotiate seriously and reach agreement (e.g., if the default position specified in the automatic continuing resolution is preferable to the apparent likely outcome).<sup>176</sup>

A final popular debate surrounds converting the process to biennial budgeting, which Penner sees as advantageous in light of the time saved by completing budgets half as often. He also recognizes, however, that adjustments are more effective if made every year, frequent

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<sup>171</sup> Penner & Steuerle at 549-552.

<sup>172</sup> Penner, *supra* note 109, at 24.

<sup>173</sup> *Id* at 19.

<sup>174</sup> *Id* at 19-20.

<sup>175</sup> U.S. General Accounting Office, *Budget Process: Considerations for Updating the Budget Enforcement Act*, Statement of Susan J. Irving before the Committee on the Budget, House of Representatives, GAO-01-991T at 13 (July 19, 2001) (hereinafter referred to as *Budget Process: Considerations for Updating the Budget Enforcement Act*).

<sup>176</sup> *Id.*

corrections are beneficial, and that it is hard to imagine scrutiny of discretionary spending any more intense with two-year cycles than with one-year.<sup>177</sup>

The GAO has also weighed in on this topic, summarizing the arguments supporting biennial budgeting as providing more focused time for congressional oversight of programs, shifting the allocation of agency officials' time from the preparation of budgets to improved financial management and analysis of program effectiveness, and enhancing agencies' abilities to manage their operations by providing more certainty in funding over two years. If the BEA were to be extended in conjunction with biennial budgeting, the GAO notes that many technical issues would need to be considered, including the timing of the BEA-required sequestration report, the application and timing of the sequestration process, and the updating of forecasts and baselines. Regardless, it is the GAO's belief that the success of biennial budgeting would depend on the ability of Congress and the president to reach agreement on how to respond to uncertainties inherent in a longer forecasting period, specifically how to update the CBO forecast and baseline against which legislative action is scored and how to deal with unexpected events.<sup>178</sup>

Faced with these concerns, it does not appear the GAO is in favor of implementing biennial budgeting. Believing that economic changes during a biennium would most likely prompt the Congress to revisit its decisions and reopen budget agreements anyway, and that it is not currently necessary to change the frequency of decisions in order to change the length of time funds are available, they declare "we have long advocated regular and rigorous congressional oversight of federal programs. Annual[ly] enacted appropriations have long been a basic means of exerting and enforcing congressional policy . . . . A 2-year appropriation cycle would change—and could lessen—congressional influence over program and spending matters since the process would afford fewer scheduled opportunities to affect agency programs and budget."<sup>179</sup>

#### IV. CONCLUSION

While the committee allocation process and some of the other broad outlines of the Congressional Budget Act of 1974 have not been significantly changed since that legislation passed, spending targets and discretionary caps, promulgated through legislation such as Gramm-Rudman-Hollings and the Budget Enforcement Act, have been ongoing subjects of debate and have altered the process in important ways over the years. Moving forward, as Congress and the president grapple over the federal budget, and as others write extensively about these topics, this pattern seems likely to continue.

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<sup>177</sup> Penner, *supra* note 109 at 20-21.

<sup>178</sup> *Budget Process: Considerations for Updating the Budget Enforcement Act*, *supra* note 160 at 13-16.

<sup>179</sup> *Id.* at 15.

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