Analysis & Critique of Specialized Rules: Discretionary Caps, Spending Targets, and Committee Allocations

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INTRODUCTION

Allocations to committees and subcommittees (as outlined in the Congressional Budget and Impoundment Control Act of 1974), spending targets (as established by the Balanced Budget and Emergency Deficit Control Act of 1985, known as the Gramm-Rudman-Hollings (GRH) Act), and discretionary caps (first set forth by the Budget Enforcement Act of 1990), each has played a significant role in the federal budget process in recent years. This paper outlines both the factual background underlying each of these practices and examines existing critiques and related proposals concerning them moving forward.

I. FACTUAL BACKGROUND

Role in Budget Process, Legal Basis, and Participating Entities

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). 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 February, with the president’s submitting 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 spending and tax decisions the Congress hopes to make during the year.

After the budget resolution is passed, based on Section 302 of the Budget Act, the amounts in the resolution are then divided into sets of allocations. 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. 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. Other allocations are for direct spending; they go to the various authorizing committees to cover entitlements and mandatory spending.

The funds distributed to the House and Senate Appropriations Committees under section 302(a) are then further divided among the 13 appropriations subcommittees in a section 302(b) report. 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

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2 Id. at 1, 2.
3 Id. at 5; Congressional Budget Act of 1974 § 302(a), codified at U.S.C.A. § 633(a) (2005).
4 Majority Staff Briefing Paper, supra note 1 at 5.
6 Id.
7 Id. at 206; Congressional Budget Act of 1974 § 302(b), codified at U.S.C.A. § 633(b) (2005).
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. Later in the process, however, programs can obtain more money through either revision of the section 302(b) report or through budgetary negotiations between Congress and the president.

Points of order can be raised to enforce these allocations and sub-allocations. 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. 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.

**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, in the 1980s, deficits began to rise significantly. 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. 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.

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

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8 SCHICK, supra note 5 at 131.
9 Id. at 206.
11 Majority Staff Briefing Paper, supra note 1 at 6.
13 Schick, supra note 5, at 131, 134.
15 Stith, supra note 14 at 623-624.
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.\textsuperscript{16} The deficit targets were different each year, with the goal of gradually reducing them.

The second step was the imposition of sequestration.\textsuperscript{17} 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.\textsuperscript{18} Given 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.\textsuperscript{19} 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.\textsuperscript{20}

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 zero deficit, the deficit was $255 billion.\textsuperscript{21} The results of GRH and GRH II can be seen in the table below.

\textit{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; it 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 the baseline level of revenues was indeed collected were now the main purposes of the process.\textsuperscript{22} It 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.\textsuperscript{23} It originally applied to fiscal years 1991 through 1995. The key provisions of the BEA were then extended through fiscal year

\textsuperscript{16} \textit{Id.} at 625-626; Pub. L. 99-177, § 201(a)(1)(7).
\textsuperscript{17} \textit{Id.} at 625-626.
\textsuperscript{18} \textit{Id.} at 627-628; Pub. L. 99-177, § 251 (a)(1)(A)(3).
\textsuperscript{24} SCHICK supra note 5, at 23.

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 them from the budget process. 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. 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 at one point each year.

The discretionary caps, generally speaking, covered the federal spending that is appropriated on an annual basis (one third of all federal spending). 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).

While the caps remained throughout the time the BEA was in force, the structure of the caps has been altered as they have been extended. All discretionary spending was divided into three categories for FY1991-1993: defense, international, and domestic. The separate limits, while they were enforced, were called ‘firewalls,’ since spending could not be shifted among them if it went beyond the limits. For FY1994-1995, they were consolidated into a single discretionary category, with the exception of the Violent Crime Reduction Trust Fund, that 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. 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 21st 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.

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.

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. This will result in all the programs in the relevant category being cut by the percentage necessary to bring overall spending within the cap. 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. 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. Finally, the third type of sequester is the “look-back” sequester. It occurs if a spending bill applying to the current fiscal year is enacted after June 30 but before the 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.

37 COLLENDER 2000, supra note 22 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.” (footnote 18, p. 79, COLLENDER 2000).
38 Id. at 79. Budget Enforcement Act §251(a)(1).
39 Id. at 79.
40 Id. at 79; Budget Enforcement Act §251(a)(6).
41 Id. at 81.
42 COLLENDER 2000, supra note 22, at 81; Budget Enforcement Act §251(a)(5).
43 Id. at 81, 82.
In 2002, the BEA expired, and the caps have not been continued. See below in this section for what has taken place in Congress in the interim, and see below in Part II for more on some of the proposals for instituting new caps moving forward.

**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.

**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.44

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.45 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).

**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.46 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

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46 Davis *supra* note 33, at 18.
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.

Furthermore, GRH targets were inflexible, not allowing for revisions due to changing conditions, and thus making targets even harder to reach. 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 was 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.

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

<table>
<thead>
<tr>
<th>Year</th>
<th>GRH 1985</th>
<th>GRH 1987</th>
<th>Actual Deficit</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY 1986</td>
<td>171.9</td>
<td>221</td>
<td></td>
</tr>
<tr>
<td>FY 1987</td>
<td>144</td>
<td>150</td>
<td></td>
</tr>
<tr>
<td>FY 1988</td>
<td>106</td>
<td>144</td>
<td>155</td>
</tr>
<tr>
<td>FY 1989</td>
<td>72</td>
<td>136</td>
<td>152</td>
</tr>
<tr>
<td>FY 1990</td>
<td>38</td>
<td>100</td>
<td>221</td>
</tr>
<tr>
<td>FY 1991</td>
<td>0</td>
<td>64</td>
<td>259</td>
</tr>
<tr>
<td>FY 1992</td>
<td>26</td>
<td>290</td>
<td></td>
</tr>
<tr>
<td>FY 1993</td>
<td>0</td>
<td>265</td>
<td></td>
</tr>
</tbody>
</table>

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

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 - FY2002, the caps were generally followed, and sequestration was rarely employed. 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.

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47 Id.
48 Evolution and Challenges, supra note 21, at 4.
in the Foreign Appropriations Act, that 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 accidentally caused a small breach, leading to an across-the-board cut of domestic spending, per the sequestration procedure, of .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.\textsuperscript{50}

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 when 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\textsuperscript{51}. 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.\textsuperscript{52}

There are several reasons that explain why the caps from FY1991 through roughly FY1997-1998 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.\textsuperscript{53}

\begin{itemize}
  \item \textsuperscript{50} Id.
  \item \textsuperscript{52} Richard Kogan, \textit{Capping Appropriations: Administration’s Proposal Regarding Discretionary Caps Likely to Prove Inequitable and Ineffective}, Center on Budget and Policy Priorities 2 (Mar. 1 2004).
  \item \textsuperscript{53} \textit{Extending Budget Controls, Irving, 2002, supra} note 51, at 5.
\end{itemize}
Figure 1: Discretionary Outlay Caps and Enacted Appropriations

Billions of dollars

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 are too strict. The new set of caps established in 1997 were far tighter than the earlier caps, calling for a decrease of .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.\textsuperscript{54} 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.\textsuperscript{55} 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.\textsuperscript{56} 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 were generally relatively small supplementary appropriations that were passed to respond 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.\textsuperscript{57} 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

\textsuperscript{54} Kogan, supra note 52, at 2-3.
\textsuperscript{55} Id. The first two of these tax cuts were vetoed by President Clinton, but the third was signed by President Bush.
\textsuperscript{56} Id.
\textsuperscript{57} 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. Critics have pointed out a variety of examples, however, of funding designated as emergency that do not meet any of these criteria. Indeed, during the past several years, many have thought that the use of the emergency designation procedure and other gimmicks has been abusive. Particularly regarding FY2000, this gimmick was used to pay for popular programs that were not true emergencies.

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.

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. 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. 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

58 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).
59 Id.
60 Techniques for Preventing a Budget Sequester, supra note 45 at CRS-3.
61 SCHICK supra note 5, at 62.
62 Id. at 62-63.
63 Techniques for Preventing a Budget Sequester, supra note 45, at CRS 4-5.
64 Id.
FY2002, total discretionary budget authority and outlays under CBO’s baseline went beyond their respective caps by $113 billion and $106 billion.65

In 2002, the BEA expired, and there was no regime of statutory caps to take its place in constraining spending in 2003 or 2004.66 In light of this, in 2003 and 2004, Congress simply set politically acceptable discretionary spending limits in its budget resolutions (based on the President’s requested levels of spending), and complied with them in the appropriations process.67 See below in Part II for more on proposals to potentially institute new caps moving forward.

II. 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 over 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.

Assessments

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, for the most part, echo the sentiments of the historical analyses of the GRH such as those 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.”68 Specifically, he says appropriators simply delayed passage of bills until after sequestration occurred in order to evade GRH.69

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.

66 Kogan, supra note 52, at 3.
67 Id. at 3.
69 Id.
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. Specifically, the authors discussed what they saw as a fragmentation of policy-making in which billions of dollars of discretionary appropriations went unauthorized, using Fiscal Year 1994 – where 11.5% of discretionary appropriations went unauthorized -- as a prime example. 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. 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.”

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 being 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 OMB that drafts the Presidential budget and, as a result, updates deficit maximums and discretionary spending caps and determines the necessity of a sequester.

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.

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.

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71 Id at 344-345.
72 Id.
73 Id at footnote 118.
75 Id. at 30-31.
76 Id. at 31.
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. 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. 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. 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. 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.

In “The Congressional Budget Process: Strengthening the Party-In-Government,” Symposium: Law and Political Parties, 100 Colum. L. Rev. 702 (April 2000), 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. 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. 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.

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

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77 Thurber, supra note 68 at 66.
78 Id at 69.
79 Id at 67.
80 Id at 69.
81 Id at 67-71
82 Garrett at 729-730.
83 Id at 707.
84 Id at 716-717.
the BEA was in force. These assessments began almost immediately after the BEA’s passage, 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.85 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 structural changes, not temporary provisions, to avoid bookkeeping trickery, and that a process for terminating low-priority programs be established.86

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.87 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).88

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

85 Joyce at 18-19.
86 Id. at 20-22.
87 Id. at 19-20.
88 Id. at 17-18.
and that due to limited discussion of ideas and last minute negotiations, the BEA was not really well-conceived or planned.\(^{89}\)

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.\(^{90}\) 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.\(^{91}\) 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.”\(^{92}\) 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.”\(^{93}\)

(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.\(^{94}\)

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.\(^{95}\) As to

\(^{89}\) COLLENDER 2000, supra note 22, at 23-24.
\(^{90}\) Penner, “Repairing the Budget Process” at 5.
\(^{91}\) Id at 8-9.
\(^{92}\) Id at 9.
\(^{93}\) Id at 11.
\(^{95}\) Budget Enforcement Compliance Report, 2002, at 40.
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 emergence of budget surpluses. 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. 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 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.

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).

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90 Id. at 9, 36.
91 Id at 44-45.
92 Id. at 42-45.
93 Id at 48-49.
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. 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. 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.”

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 discretionary outlays to 7.9% of GDP (the highest level since 1993). 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. 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. 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.

**Proposals for Reform**

In addition to any proposals outlined in connection with the above assessments, various experts and participating entities have also undertaken to submit proposals for potential enforcement mechanisms that either build off of or replace the main elements or tenets of the BEA.

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100 CBO 2001 at 7-8. See footnote 55 and accompanying text.
101 *Id* at 7.
102 *Id* at 9.
103 CBO 2005 at 14.
104 *Id* at 15.
105 *Id*.
106 *Id* at 12.
President Bush’s Fiscal Year 2006 Budget

The latest presidential budget proposal, submitted by President Bush for FY2006, outlines a number of potential reforms that the administration hopes to undertake via a re-proposal of the previously unpassed Spending Control Act of 2004. The following budget enforcement provisions are part of such proposals:

(a) Discretionary Caps
The budget proposal sets 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 addresses 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.107

(b) Program Integrity Cap Adjustments
The administration’s proposal also attempts 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 is accomplished by recommending cap adjustments for spending above a base level of funding within discretionary levels for certain program integrity initiatives.108

(c) Advance Appropriations
The FY2006 outline also asserts 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 sets 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.109

(d) Federal Pell Grants
The proposal attempts 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 seeks to keep the Pell Grant program discretionary, with

108 FY 2006 at 236-237.
109 FY 2006 at 237.
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.110

(e) Project BioShield Category

Finally, the budget proposal includes 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.111

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 relates 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.112

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 1962.113

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.114 Failing to provide these details hampers the potential

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110 FY 2006 at 237-238.
111 FY 2006 at 238.
112 Horney at 2, 3.
113 Id. at 2-4.
114 Parrott at 1.
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 outlines assumed reductions:

### 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*

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

**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.

115 Parrott at 4
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.[16]

**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,[17] he spoke of the following general characteristics as what an effective budget process should do (although each of them 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 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).[18]

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.[19]

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.”[20]

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[18] *Id.*
(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.121

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 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.122

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.123

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.124

121 Reischauer, supra note 117.
122 Penner & Steuerle at 549-552.
123 Penner, supra note 90, at 24.
124 Id at 19.
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. 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. 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).

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 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.

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.

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

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125 Id at 19-20.
127 Id.
128 Id.
129 Budget Process: Considerations for Updating the Budget Enforcement Act, supra note 126 at 13-16.
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.130

III. CONCLUSION

While the committee allocation process and some of the other broad outlines of the Congressional Budget Act of 1974 has 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 others write extensively about these topics, this pattern seems likely to continue.

130 Id at 15.
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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
MAJORITY STAFF OF HOUSE COMM. ON THE BUDGET, 107TH CONG., BASICS OF THE BUDGET PROCESS (BRIEFING PAPER FEB. 2001)

- Provides a basic yet comprehensive overview of the federal budget process.


Books


- Provides a comprehensive overview of the federal budget process, and while it is relatively current, it is somewhat dated given the expiration of BEA’s discretionary caps and other requirements in 2002.


- Provides a comprehensive overview of the federal budget process, though it is rather dated by this point, particularly given the extension in budget procedures with the Budget Enforcement Act of 1997 and the expiration of the discretionary caps in 2002.


- Sets forth a comprehensive and straightforward overview of the federal budget process, but again, in light of the expiration of the BEA, is becoming more dated.

CBO Reports


- Is a report issued annually by the Congressional Budget Office on the state of the economy. It is particularly useful for finding figures regarding by how much Congress had surpassed the discretionary caps in its last years in existence.

Congressional Budget Office, Extending the Budget Enforcement Act, Testimony of Dan L. Crippen before the Committee on the Budget, House of Representatives (June 27, 2001)
GAO Reports

- As required by the Budget Enforcement Act of 1990, this is the GAO’s annual report, for 1995, reviewing the OMB and CBO annual reports to ensure they both complied with the BEA.

- As required by the Budget Enforcement Act of 1990, this is the GAO’s annual report, for 1996, reviewing the OMB and CBO annual reports to ensure they both complied with the BEA.

- A broad statement describing how the budget process came to exist in its current form, as well as challenges faced in the short-run.

- As required by the Budget Enforcement Act of 1990, this is the GAO’s final annual report, for 2002, reviewing the OMB and CBO annual reports to ensure they both complied with the BEA.

Legislation

Congressional Budget Act of 1974 § 302(a, b, d, f), codified at U.S.C.A. § 633(a, b, d, f) (2005).
- Provides the legal basis for both sets of committee allocations, allows programs to secure additional funding after the 302(b) reports have been made through either a revision of that report or through negotiations between Congress and the President, and prohibits the consideration of legislation that exceeds a committee’s allocation of new budget authority.

- Created a sequestration mechanism within the federal budget process aimed at reducing what had been mounting deficits.
- Reinstituted the sequestration process of GRH after a provision in that law was held unconstitutional.

- Created a new system of discretionary caps and pay-as-you-go (PAYGO) requirements within the federal budget process.

- Extended the Budget Enforcement Act discretionary caps through FY1998.

- Again extended the Budget Enforcement Act discretionary caps until FY2002.

Congressional Budget Office, Supplemental Appropriations in the 1990s (as updated, March 2001); available online at http://www.cbo.gov/showdoc.cfm?index=2768&sequence=0
- Is a great study that covers the size and contents of supplemental appropriations from FY1990 through FY1999.

Testimony and Interviews


Telephone Interview with Miriam Rollin, FEDERAL POLICY DIRECTOR, FIGHT CRIME: INVEST IN KIDS (March 4, 2005).
- Discussed the federal budget process with this practitioner, who shared her insights regarding how committees generally do not exceed their allocations (although they may be raised to enable that to occur).