Sequestration and the 2011 Budget Control Act

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I. Introduction

The Budget Control Act of 2011 (BCA) was a compromise between President Obama and congressional Republicans to raise the debt ceiling and to reduce future federal spending. In order to achieve the full spending reductions, the act required the formation of a joint congressional committee (commonly known as the “super committee”) to create a plan to meet that objective. However, if the super committee could not reach agreement on deficit reduction by November 23, 2011, the statute authorized automatic spending cuts, otherwise known as sequestration. After several months of negotiation, the super committee was not able to produce a budget deal, and sequestration was slated to occur at the beginning of 2013. However, as sequestration approached, President Obama and congressional Republicans came to a deal to delay the across-the-board cuts, and later in 2013, congressional Democrats and Republicans came to an agreement to mitigate the impact of sequestration for FY 2014 and FY 2015.

The Budget Control Act is not the first time that a sequester has been used to spur congressional action. The Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings) and the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987 (Gramm-Rudman-Hollings II) were attempts to support spending cuts by imposing sequestration if specific deficit targets were not met. Despite these prior measures, the deficit continued to grow and in 1990 the Budget Enforcement Act (BEA) was enacted to stop the steady increase of the federal deficit. However, even this statute, which also used the threat of sequestration to reduce spending, was not enough to decrease the deficit during its budget window, and the BEA was extended through 2002. Finally, the Statutory PAYGO Act of 2010 represented another attempt to lower the deficit.
Given the history of sequestration as a mechanism to force Congress and the President to enact budgets that do not add or lead to growing deficits, this paper examines the BCA within the context of previous attempts at deficit reduction that used the threat of automatic spending cuts to motivate action. As such, this briefing paper will provide an overview of the BCA in Part II. In Part III, the paper will proceed with an examination of the effects of sequestration under the BCA. Part IV will analyze proposals to delay the impact of sequestration as well as legislation that was enacted and agency measures that were taken to do the same. Part V will detail the effects of sequestration on the economy and the armed services. Finally, Part VI will delve into a comparison between the sequestration components of BCA and the sequestration components of previous deficit-control legislation; this will be followed by a conclusion.

II. **Overview of the Budget Control Act of 2011**

The purpose of the BCA was to raise the debt ceiling and to reduce the deficit. Many of the significant provisions in the BCA deal with reducing the deficit in a significant manner. However, like many pieces of legislation, the BCA contains provisions that are germane to the addressing the matter at issue as well as provisions that are only tangentially related to the bill’s goal of deficit reduction. This section of the paper will detail the substantive provisions of the BCA and the effects of the BCA on spending levels and the deficit at the time of its passage.

A. **Increasing the Debt Ceiling**

Under the BCA, the debt ceiling could be raised to at least $2.1 trillion (and as high as $2.4 trillion under certain conditions) in three installments, with the last two installments subject to congressional disapproval.\(^1\) Congress could have prevented the debt ceiling increases for the

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\(^1\) **Bill Heniff, Jr. et al., Cong. Research Serv., Budget Control Act of 2011, 1 (2011).** Raising the debt ceiling to $2.4 trillion was contingent upon either enactment of a super committee proposal that would have reduced the deficit by more than $1.2 trillion or by the passage of balanced budget amendment in Congress. *Id.* at 37. Neither of these events occurred.
last two installments if it had passed joint resolutions disapproving the increase, and if it could have overridden the likely veto. This three-part procedure was created in order to place the responsibility of the debt limit increase on the President.2

Once the BCA was enacted, the first installment was triggered, raising the debt limit by $400 billion when President Obama submitted a certification that stated that the debt ceiling was within $100 billion of being reached.3 A second increase of $500 billion, triggered by the President’s certification from the first increase, occurred on September 22, 2011 without a joint congressional resolution disapproving of the increase.4 In late December 2011, the debt ceiling again came within $100 billion of its limit, which allowed the President to release another certification, triggering the third increase.5 Because a joint resolution of disapproval failed to clear both houses of Congress, the debt ceiling was raised by $1.2 trillion in its third installment.6

B. Essential Spending Reduction Provisions of the BCA

1. Caps on Discretionary Spending

The BCA also established caps on discretionary spending through 2021.7 The caps imposed spending limits on budget authority that started at $1.04 trillion in 2012 and reach $1.23 trillion in 2021.8 For discretionary spending in 2012 and 2013, the BCA created separate caps

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2 See BOB WOODWARD, THE PRICE OF POLITICS 382 (2012) (eBook) (noting that Senate Minority Leader Mitch McConnell (R-KY) proposed the debt limit procedure so that the entire burden of raising the debt ceiling was on the President); see also id. at 530 (“McConnell’s complicated mechanism to increase the debt limit so that Congress would not have take an explicit vote to raise it”).
3 HENIFF ET AL., supra note 1, at 1.
5 Id.
6 Id.
8 Id. at 3.
for defense and nondefense spending, but beginning in 2014, there would be only one spending restriction that applied to all discretionary spending (there is a return to differentiating between defense and nondefense spending when sequestration is triggered). However, not all spending is subject to the discretionary limit; exempt programs include operations supplemental spending in Afghanistan and Iraq, fraud prevention for health care and supplemental income benefits on, emergency spending, and disaster relief.

2. **Creation of the Joint Select Committee on Deficit Reduction**

The BCA created the Joint Select Committee on Deficit Reduction, which was mandated to develop legislation to reduce the deficit by $1.5 trillion over a ten-year period. The select committee was a means to find additional savings that the President and congressional leaders failed to agree upon during the debt limit negotiations. Under the law, the joint committee (super committee) contained twelve members—an equal number of Democrats and

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9 In the BCA, the categories are called “security” and “nonsecurity” because the security category contains discretionary spending that is not strictly defense-related. Included in the security are the Department of Defense, the Department of Homeland Security, the National Nuclear Security Administration, intelligence community management, and all accounts in the international affairs budget function. HENIFF ET AL., supra note 1, at 11. The nonsecurity category contains all other spending. Id. For the purposes of this briefing paper, “nonsecurity” and “security” will be referred to as “nondefense” and “defense,” respectively, in order to be consistent with the terms’ usages in other policy papers and government sources.

10 Id. at 27.

11 Letter from Elmendorf, supra note 7, at 3.

12 For a more detailed discussion of exempted spending, see infra section II.D, TAN 55 – 62.

13 HENIFF ET AL., supra note 1, at 2 – 3.

14 See WOODWARD, supra note 2, at 425 (“Reid thought the [negotiating] group was getting nowhere. His idea was that they push [negotiations] to a new special bicameral, bipartisan group, a kind of supercommittee. It would be . . . given the job of hashing out the details the high-level leaders were failing to agree on.”).

15 HENIFF ET AL., supra note 1, at 18. The members of the super committee from the Senate were Senator Patty Murray (D-WA), co-chair; Senator Max Baucus (D-MT); Senator John Kerry (D-MA); Senator Jon Kyl (R-AZ); Senator Rob Portman (R-OH); and Senator Patrick Toomey (R-PA). Super committee members from the House were Representative Jeb Hensarling (R-TX), co-chair; Representative Xavier Becerra (D-CA); Representative Dave Camp (R-MI); Representative Jim Clyburn (D-SC); Representative Fred Upton (R-MI); and Representative Chris Van Hollen (D-MD). Id. at 18 n.56.
Republicans from both houses\textsuperscript{16} appointed by the Speaker of the House, the House minority leader, and the Senate majority and minority leaders.\textsuperscript{17}

The super committee was given broad discretion under the act to formulate the policy necessary to create the $1.5 trillion in deficit reduction.\textsuperscript{18} Further, the committee “could recommend changes to revenue, spending, or both;”\textsuperscript{19} it also had the power to propose budget enforcement mechanisms that differed from those in the BCA.\textsuperscript{20} The super committee’s recommendations would be subject to special procedures in both houses of Congress that would limit debate and prevent amendment to the legislation if by November 23, 2011, a majority of the committee were to vote in favor of the proposal and accompanying report containing the cost savings and the committee’s findings.\textsuperscript{21} Upon passage, the legislative proposal and accompanying report must have been submitted to the President, Vice President, Speaker of the House, and both chambers’ majority and minority leaders by December 2, 2011.\textsuperscript{22} In order to avoid sequestration, the President must have signed the super committee’s legislation by January 15, 2012.\textsuperscript{23}

As mentioned earlier, the super committee failed to meet its deadline, and as a result, across-the-board spending cuts were triggered. Because there was no legislation for Congress to consider, the following section’s discussion details what would have occurred had a proposal passed out of the super committee.

\textsuperscript{16} Id. at 2.
\textsuperscript{17} Id. at 18.
\textsuperscript{18} Id. at 3.
\textsuperscript{19} Id. at 19.
\textsuperscript{20} See id.
\textsuperscript{21} Id. at 20.
\textsuperscript{22} Id.
\textsuperscript{23} Id. at 27. If the President were to have vetoed the bill, the BCA would have limited debate on the veto message in the Senate to one hour, equally divided between majority and minority leaders and their designees. Id.
3. *Expedited Procedures for Considering Deficit-Reduction Proposals*

Upon receiving the committee’s report and proposal, the majority leaders in the House and the Senate were to present the legislation without change.\(^{24}\) In the Senate, the legislation was to be referred to all the committees that had jurisdiction over the content of the proposal.\(^{25}\) The committees must have reported the legislation by December 9, 2011; if a committee did not meet the deadline, the proposal automatically would have been placed before the full chamber.\(^{26}\)

After the bill were put on the Senate calendar, under the rules modified by the BCA, any senator could have offered a motion to proceed that would not have been debatable and that only would have needed a simple majority to take up the bill.\(^{27}\) Further, the BCA would have prevented motions to postpone or reconsider the vote and would have precluded senators from raising points of order against consideration of the super committee bill.\(^{28}\) Additionally, the BCA would have prevented senators from amending the super committee’s legislation and would have limited debate to thirty hours.\(^{29}\)

As in the Senate, every House committee with jurisdiction over the issues in the super-committee proposal would have received the bill.\(^{30}\) Each House committee would have needed to report the bill by December 9, 2011 without amendment.\(^{31}\) Following this reporting, any member could have made a non-debatable motion for the House to consider the bill.\(^{32}\) Under the BCA, any House member could have made a privileged motion, subject to twenty minutes of

\(^{24}\) *Id.* at 21.
\(^{25}\) *Id.* Under normal procedure, legislation is referred to one committee (with few exceptions) with jurisdiction over the subject matter in the bill. *Id.*
\(^{26}\) *Id.*
\(^{27}\) *Id.* at 22.
\(^{28}\) *Id.* at 23.
\(^{29}\) *Id.*
\(^{30}\) *Id.* at 22. Unlike the Senate, this procedure is not a significant departure from House rules since the proposal is submitted to the relevant committees under regular rules. *Id.*
\(^{31}\) *Id.*
\(^{32}\) *Id.* at 25.
debate, to discharge the legislation from a committee if it missed the December 9 deadline.\textsuperscript{33}

Once the super committee’s bill reached the floor, the BCA would have allowed the House to consider the bill for two hours without ability to amend the legislation.\textsuperscript{34}

4. \textit{Sequestration Mechanism}

If the super committee’s bill were not enacted by January 15, 2012, or if it were enacted but did not meet the deficit reduction targets, sequestration would have been triggered automatically.\textsuperscript{35} Implementing the sequester required the following four steps: (1) a revision of the statutory spending limits for FY 2013 – 2021, which redefined defense and nondefense categories and extended the categories through FY 2021; (2) the equal division of spending reductions between defense and nondefense spending; (3) the proportional division of discretionary and mandatory spending within the two categories (with some exceptions); and (4) a combination of sequestration and the downward adjustment of discretionary spending limits.\textsuperscript{36}

Once triggered, the automatic spending reductions were accomplished in three steps. First, the discretionary budget resources for FY 2013 were sequestered;\textsuperscript{37} each nonexempt account was be reduced by a uniform percentage to achieve the necessary reductions.\textsuperscript{38} Second, there was a downward adjustment of the revised discretionary spending limits for FY 2014 – FY 2021.\textsuperscript{39} As such, during this timeframe, discretionary spending is limited through caps rather than the across-the-board cuts that took place in FY 2013. However, if the Office of Management and Budget (OMB) were to indicate in a final sequestration report that discretionary appropriations within a category exceeded the revised spending limit for that

\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id. at 27.
\textsuperscript{36} Id. at 27 – 28.
\textsuperscript{37} Id. at 31
\textsuperscript{38} See id. at 32.
\textsuperscript{39} Id. at 31.
category, sequestration would be triggered. The President would be required to issue a
sequestration order that cancelled resources in the amount necessary to eliminate the breach in
category where it occurred. Finally, for mandatory spending all reductions from FY 2013 to
FY 2021 would be achieved through across-the-board cuts that OBM calculates annually.

C. Other Provisions in the BCA

1. Restructuring of Some Federal Student Aid Programs

The BCA also makes changes to the William D. Ford Federal Direct Loan Program
(Direct Loan Program) and Pell Grants. The Direct Loan Program is “the primary federal
student loan program administered by the . . . Department of Education.” The program makes
Subsidized and Unsubsidized Stafford Loans, among others, available to undergraduate,
graduate, and professional students. Under the BCA, graduate and professional students were
no longer eligible for Subsidized Stafford Loans on July 1, 2012. Further, the BCA eliminated
the Secretary of Education’s authority to offer a loan repayment incentive where the borrower of
Stafford Loan received a 0.5 percent up-front interest rebate would offset a one percent
origination fee. Also under the BCA, borrowers of PLUS Loans are no longer eligible to
receive an up-front rebate of 1.5 percent to offset a four percent origination fee. At the passage
of the BCA, the Congressional Budget Office (CBO) estimated that the elimination of this

40 See id. at 32; id. at 13 – 14.
41 Id. at 14. If there were a breach in the nondefense category, for example, then sequestration would be ordered to
eliminate the breach in nonexempt accounts in only that category.
42 Id. at 31 – 32.
43 Id. at 34.
44 Id. at 35.
45 Id.
46 Id.
47 Id.
48 Id.
authority would reduce mandatory spending by $21.6 billion over ten years, with nearly $17 billion going toward Pell Grants and $4.6 billion going toward deficit reduction.\textsuperscript{49}

Pell Grants are the single largest source of federal grant aid for postsecondary education students.\textsuperscript{50} The BCA provided an additional $10 billion in mandatory funding for Pell Grants in FY 2012 and an additional $7 billion in mandatory funding in FY 2013.\textsuperscript{51}

2. \textit{Vote on a Constitutional Amendment to Balance the Budget}

The BCA mandated that Congress vote on a balanced budget amendment between September 30 and December 31, 2011.\textsuperscript{52} If both houses of Congress were to have passed the amendment then the debt ceiling could have been raised by $1.5 trillion; absent the passage of an amendment, it could only be raised $1.2 trillion.\textsuperscript{53} Votes on a balanced budget amendment failed in both the House and the Senate.\textsuperscript{54}

D. \textit{Spending Subject to Adjustment Under the Discretionary Spending Limit}

As mentioned previously, six circumstances are subject to statutory cap adjustments. Those programs are (1) changes in concepts and definitions; (2) emergency appropriations; (3) appropriations for Overseas Contingency Operations/Global War on Terror; (4) spending for continuing disability reviews and redeterminations; (5) spending on containing health care fraud and abuse; and (6) disaster relief.\textsuperscript{55} The first three adjustments—changes in concepts and definitions, emergency appropriations, and spending for Overseas Contingency

\textsuperscript{49} Id.
\textsuperscript{50} Id. at 36.
\textsuperscript{51} Id.
\textsuperscript{52} Id. at 33.
\textsuperscript{53} Id. The BCA also provides special procedures for consideration of a constitutional amendment if one chamber were to approve it. See generally id. at 33 – 34.
\textsuperscript{55} HENIFF ET AL., \textit{supra} note 1, at 11 – 12.
Operations/Global War on Terror—are not capped.56 OMB can make the adjustment for changes in concepts and definitions, in consultation with the Appropriations and Budget Committees of both houses while the adjustment to emergency appropriations and the Overseas Contingency Operations/Global War on Terror appropriations are made on a case-by-case basis.57

The last three spending adjustments—spending for continuing disability reviews and redeterminations, spending on containing health care fraud and abuse, and disaster relief—are capped.58 For disability review and redetermination spending, the maximum adjustment ranges from $623 million in FY 2012 to $1.3 billion for each of the fiscal years from 2017 through 2021, which allows for a total adjustment of $11.13 billion over the entire period of FY 2012–FY 2021.59 Further, the maximum adjustment for controlling health care fraud ranges from $270 million in FY 2012 to $496 million for FY 2021 for a total of $3.93 billion over the entire period.60 The BCA allowed for adjustments of the preceding two programs since they are program integrity initiatives aimed at reducing net spending for income security and health care programs.61 Lastly, under the sequester, the adjustment for disaster relief is not to exceed, in any year, “the average funding provided for disaster relief over the previous [ten] years, excluding the highest and lowest years” plus the amount that the preceding year’s appropriation was less than the applicable average spending level.62

56 Id. at 12.
57 Id. at 12–13.
58 Id. at 13.
59 Id.
60 Id.
61 Letter from Elmendorf, supra note 7, at 3.
62 HENIFF ET AL., supra note 1, at 13.
E. Process to Enforce Sequestration

The BCA requires OMB to calculate the amount of deficit reduction necessary to meet the statutory sequestration requirements.\(^{63}\) The calculations provide four different amounts in spending reductions: defense discretionary appropriations, defense mandatory appropriations, nondefense discretionary appropriations, and nondefense mandatory appropriations.\(^{64}\) There are five steps to determine these calculations: (1) start with the reduction goal of $1.2 trillion; (2) subtract the amount of spending reduction in the super-committee legislation, if enacted; (3) subtract eighteen percent of the difference, which is attributable to servicing the debt; (4) divide by nine to allocate the spending reductions equally across FY 2013 through FY 2021; and (5) divide by two to allocate the spending reduction needed from the defense and nondefense categories from FY 2013 – 2021.\(^{65}\) The calculations are then divided proportionally between discretionary and nonexempt mandatory spending within the defense and nondefense categories, yielding the four results mentioned previously. Further, the BCA requires OMB to increase the spending reductions in discretionary appropriations and nonexempt non-Medicare mandatory spending uniformly to offset the reductions not achieved in Medicare due to the two percent limit on spending reductions placed on it.\(^{66}\) After OMB determines the proper allocation of the sequestration cuts, the President must order any necessary cuts to mandatory programs and activities or reduce discretionary limits to achieve the required reductions.\(^{67}\)

The BCA requires OMB and CBO to issue reports throughout the year to help Congress comply with the act’s spending limit and to trigger sequestration if necessary.\(^{68}\) OMB is required

\(^{63}\) Id. at 29.

\(^{64}\) Id. at 30 – 31.

\(^{65}\) Id. at 29 – 30.

\(^{66}\) Id. at 32.

\(^{67}\) CONG. BUDGET OFFICE, ESTIMATED IMPACT OF AUTOMATIC BUDGET ENFORCEMENT PROCEDURES SPECIFIED IN THE BUDGET CONTROL ACT 5 (2011) [hereinafter CBO ESTIMATED IMPACT].

\(^{68}\) HENIFF ET AL., supra note 1, at 15.
to issue a sequestration preview report with the President’s budget, a sequestration update report by August 20th, and a final sequestration report at the end of each congressional session. CBO is required to issue its own sequestration update and final sequestration reports five days before OMB. Pursuant to the law, OMB and CBO released sequestration reports in FYs 2011, 2012, 2013, and 2014.

F. Programs Exempt from or Subject to Special Rules Under Sequestration

Under sequestration, sections 255 and 256 of Gramm-Rudman-Hollings (GRH), as amended, provide exemptions and special rules that apply to certain programs. Section 255 provides a list of programs that are exempt from sequestration and section 256 contains special rules for the sequestration of certain programs and spending. Each of these exemptions and special rules will be discussed in the following section.

I. Section 225 Exemptions

On the discretionary side, few programs are included in the section 225 exemptions. Pell Grants as well as most transportation trust funds for highways, mass transit, and airports are

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69 Id.
70 Id.
71 In FY 2013, the first year of sequestration, the CBO’s estimate for the security category cap was $1 million higher than OMB’s estimate due to a rounding difference. OFFICE OF BUDGET & MGMT., OMB FINAL SEQUESTRATION REPORT TO THE PRESIDENT AND CONGRESS FOR FISCAL YEAR 2013, 10 (2013) [hereinafter OMB FISCAL YEAR 2013]. Additionally, for FY 2014 – 2021, CBO begins with the same levels as OMB for the defense and nondefense spending limits, but CBO includes estimated adjustments to those caps. Id. In FY 2014, OMB’s final sequestration report noted that CBO’s defense spending limit was $181 million lower than OMB’s because of a statutorily required adjustment for technical estimating differences and a rounding difference. OFFICE OF BUDGET & MGMT., OMB FINAL SEQUESTRATION REPORT TO THE PRESIDENT AND CONGRESS FOR FISCAL YEAR 2014, 8 – 9 (2014). For the nondefense cap, there is a $2 million difference due to rounding differences. Finally, for FY 2016 – 2021, CBO includes estimated adjustments to the defense and nondefense caps that OMB does not, which results in differences between the two reports. Id. at 9 – 10.
72 KAREN SPAR, BUDGET “SEQUESTRATION” AND SELECTED PROGRAM EXEMPTIONS AND SPECIAL RULES 6 (2013).
73 Id. at 7, 10. In addition, five of the six adjustments that the BCA allows effectively exempt certain discretionary spending from the caps. HENIFF ET AL., supra note 1, at 11. For the reasons stated in section II.D, the following circumstances are effectively exempt certain discretionary programs from the spending limits: (1) changes in concepts and definitions; (2) emergency appropriations; (3) appropriations for Overseas Contingency Operations/Global War on Terror; (4) spending for continuing disability reviews and redeterminations; and (5) spending on containing health care fraud and abuse.
exempt.\textsuperscript{74} Further all of the programs that the Department of Veterans Affairs administers are exempt from sequestration.\textsuperscript{75} Conversely, much of the mandatory spending is exempt from sequestration. These exemptions include Social Security, net interest payments on the national debt, Medicare Part D low-income premium and cost-sharing subsidies, Medicare Part D catastrophic subsidy payments, Medicare Qualified Individual Premiums, Medicaid, and the Children’s Health Insurance Program (CHIP).\textsuperscript{76} Other mandatory programs that are exempt include the Supplemental Nutrition Assistance Program (SNAP), Supplemental Security Income, Temporary Assistance for Needy Families as well as federal retirement and disability accounts and refundable tax credits.\textsuperscript{77}

2. \textit{Section 256 Special Rules}

The majority of the special rules in section 256 are applied to mandatory programs. For example, under sequestration, the William D. Ford Direct Loan Program has to increase loan origination fees by a uniform percentage specified in the sequestration order.\textsuperscript{78} In addition, under section 256 special rules, funding for community and migrant health centers and the Indian Health Service can only be reduced by two percent.\textsuperscript{79} Under section 256, sequestration of the Commodity Credit Corporation, which is the funding mechanism for the Department of Agriculture’s mandatory spending on farm commodity support and certain conservation programs, is not permitted to interfere with the corporation’s primary duties.\textsuperscript{80} Further, commodity contract loans that were made before the initial sequestration order were not reduced

\textsuperscript{74} U.S. HOUSE OF REPRESENTATIVES COMM. ON THE BUDGET, FREQUENTLY ASKED QUESTIONS ABOUT SEQUESTRATION UNDER THE BUDGET CONTROL ACT OF 2011, 3 (2011) [hereinafter HOUSE COMM. ON THE BUDGET].
\textsuperscript{75} Id. at 8 – 9.
\textsuperscript{76} Id. at 8 – 9.
\textsuperscript{77} Id. at 8 – 9.
\textsuperscript{78} Id. at 15 – 16.
\textsuperscript{79} Id. at 15 – 16.
\textsuperscript{80} Id. at 19 – 20.
while those after the order were. The following sections will discuss other programs that are subject to special rules under sequestration.

a) Medicare

Under the BCA, a reduction in Medicare spending is limited to two percent. If a sequestration order called for a uniform spending reduction that was less than two percent, the reduction would be applied to Medicare just as it would be applied to nonexempt programs. However, if the sequestration order required a spending reduction that was greater than two percent, then only a two percent cut would be made to Medicare while the uniform spending reduction for nonexempt programs would be recalculated and increased to achieve the total level of cuts necessary. Moreover, the spending reductions are not made to the Medicare coverage that beneficiaries receive. For Medicare Parts A and B, the cuts are made to individual payments to service providers, such as hospitals. For Medicare Parts C and D, reductions are made to the payments to the private plans that administer these parts of the program.

b) Federal Pay

A sequestration order cannot reduce the rate of pay to which a federal employee is entitled under a statutory pay system—the General Schedule, the Foreign Service pay schedule, and the Department of Medicine and Surgery at the Department of Veterans Affairs pay schedule. Further, a sequestration order may not reduce the rate of military pay for those in the uniformed services. However, this provision does not mean that federal pay is completely

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81 Id. at 20.
82 Id. at 12. As mentioned in section II.F.1, certain Medicare Part D benefits are exempt from sequestration.
83 Id.
84 Id.
85 Id. at 12 – 13.
86 Id. at 13.
87 See id. at 17.
88 See id. at 17 – 18.
shielded from the effects of sequestration. An employee may receive a pay cut during sequestration if he or she is placed on furlough.\textsuperscript{89}

c)  \textbf{Federal Administrative Expenses}

Federal administrative expenses are subject to sequestration regardless of whether they were incurred in connection with a program, project, activity, or account that is exempt from sequestration or subject to a special rule.\textsuperscript{90} However, for the sequestration that took place on March 13, 2013, OMB determined that the special rule described above would only apply to mandatory funds.\textsuperscript{91} As such, only mandatory expenses for an otherwise exempt program could be sequestered.

d)  \textbf{Unemployment Insurance}

Section 256 states that federal loans to states for the payment of unemployment benefits and regular unemployment benefits are exempt from sequestration.\textsuperscript{92} The exemption also extends to unemployment insurance for former federal workers and former service members.\textsuperscript{93} However, there is no exemption for administrative grants to states and the federal share of the extended benefit program (unemployment insurance that is provided beyond twenty-six weeks), even though states are still obligated to pay their share of extended benefits.\textsuperscript{94} Further, the authorization of temporary emergency unemployment insurance is subject to sequestration as well.\textsuperscript{95}

\textsuperscript{89} See id. at 18.
\textsuperscript{90} Id. at 18.
\textsuperscript{91} Id.
\textsuperscript{92} Id. at 19.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
G. Effects of the BCA on the Deficit and Spending Levels at the Time of Passage

At the time of passage, the discretionary spending caps that the BCA imposed were estimated to reduce the budget deficit by $917 billion between 2012 and 2021.\textsuperscript{96} Relative to the adjusted March 2011 baseline, which the CBO used for its estimates, proposed budget authority and outlays were going to be $840 billion and $756 billion lower, respectively, from 2012 to 2021 under the BCA.\textsuperscript{97} Including the savings from the super committee’s proposal or the triggering of sequestration, the BCA was estimated to reduce the deficit by at least $2.1 trillion between 2012 and 2021.\textsuperscript{98} Further, apart from the action of the super committee, the spending caps in the BCA were calculated at the time of passage to provide savings in discretionary spending of $741 billion and in mandatory spending of $20 billion.\textsuperscript{99} Additionally, savings in interest on the public debt due to the lower deficit were estimated to be $156 billion.\textsuperscript{100}

III. Sequestration Under the BCA

A. Failure of the Super Committee

The super committee failed to create a proposal by the November 23, 2011 statutory deadline, triggering sequestration. There are a number of reasons that the six Democrats and six Republicans on committee could not come to an agreement to report a bill to the floor. The two parties disagreed on the amount of total deficit reduction. Democrats supported a plan that reduced the deficit by as much as $3 trillion through a mix of entitlement cuts and tax increases.\textsuperscript{101} Meanwhile, Republicans supported a $2 trillion proposal that raised less through

\textsuperscript{96} Letter from Elmendorf, supra note 7, at 1.
\textsuperscript{97} Id. at 3.
\textsuperscript{98} Id. at 1. These deficit reduction numbers are based on CBO’s March 2011 baseline adjusted for subsequent appropriate action. Id. at 7.
\textsuperscript{99} Id.
\textsuperscript{100} Id.
Democrats wanted to raise $1.3 trillion in tax revenue while the Republican plan allowed for $640 billion in revenue, little of which would come from tax increases. Further, Republicans wanted to cut an additional $150 billion in mandatory spending from benefit programs such as SNAP and federal nutrition programs over what Democrats proposed. Republicans also called for $500 billion in Medicare cuts and $185 billion in Medicaid cuts while Democrats wanted $400 billion in Medicare savings. Republicans were also opposed to the Democrat’s proposal to include stimulus spending in the legislative package.

A. Projected Effect of the Sequester on Spending and Deficit Levels

Under the BCA’s spending caps and sequestration, the CBO projected that defense discretionary outlays would decrease by $15 billion in FY 2012 and $812 billion over the ten-year period from FY 2012 – FY 2021 relative to a baseline using FY 2011 appropriated levels adjusted for inflation. The CBO also projected that nondefense discretionary outlays would be reduced by $12 billion in FY 2012 and $714 billion over ten years. Under the sequestration alone, it was estimated that mandatory spending would be cut by $12 billion in FY 2013, the start of sequestration, and $165 billion over the FY 2013 to FY 2021 period. After full implementation of the sequester, the BCA was projected to reduce the deficit by one percent of

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102 Id.
103 David Rogers, Competing Supercommittee Plans Reveal Chasm, POLITICO (Oct. 26, 2011, 8:46 PM), http://dyn.politico.com/printstory.cfm?uuid=EB026751-C88A-4487-9388-9B15EE13CC36. Of the $640 billion, about $440 billion was to come from increased fees and about $200 billion was attributed to future tax reform stimulating economic growth. Id.
104 Hudson, supra note 101.
105 Id.
106 Id.
107 MINDY R. LEVIT & MARC LABONTE, CONG. RESEARCH SERV., THE BUDGET CONTROL ACT OF 2011: THE EFFECTS ON SPENDING AND THE BUDGET DEFICIT WHEN THE AUTOMATIC SPENDING CUTS ARE IMPLEMENTED 3 (2012). This estimate assumed that there would be no emergency spending for ten years. Id.
108 Id.
109 Id. at 5.
gross domestic product (GDP) per year.\textsuperscript{110} These spending reductions reflected the intent of the negotiators and the drafters of the BCA to make sequestration seem so unappealing that the super committee would have to complete its task of finding further deficit reduction.\textsuperscript{111} However, the threat of sequestration did not spur the super committee to produce legislation to avert the across-the-board cuts.

B. Effects of Sequestration on Selected Areas of Spending

The super committee’s failure to produce a legislative proposal to reduce the deficit by $1.5 trillion triggered sequestration that was to start in January 2013. However, the President signed legislation (which will be discussed in detail later in the paper) that delayed the sequester until March. The following section will discuss the effect of sequestration on discretionary spending, the Affordable Care Act, military spending, disaster relief, and unemployment insurance.

1. Discretionary spending

As mentioned earlier, most mandatory spending is exempt from sequestration. As a result, discretionary spending bore the brunt of the sequester’s impact. On March 1, 2013, President Obama signed a sequestration order that cancelled $85 billion in spending, which was divided equally between defense and nondefense spending.\textsuperscript{112} Of the $85 billion, $25.8 billion of those cuts were to nondefense discretionary programs, which represented a funding reduction of five percent.\textsuperscript{113} On the defense side, nonexempt defense discretionary spending was reduced by $42.6 billion or 7.8 percent.\textsuperscript{114} No sequestration order was signed for FY 2014.\textsuperscript{115}

\textsuperscript{110} Id. at 11.
\textsuperscript{111} See Woodward, supra note 2, at 585.
\textsuperscript{112} D. Andrew Austin, Cong. Research Serv., Trends in Discretionary Spending 11 (2014) [hereinafter Austin Trends]. The spending cuts for FY 2013 were supposed to be $109 billion but were reduced due to the delay of the sequester by the American Taxpayer Relief Act. Id. at 7.
\textsuperscript{113} Id. at 11.
\textsuperscript{114} Id.
2. **Effects of the Sequester on the Affordable Care Act**

Most of the Affordable Care Act’s (ACA) spending to expand insurance coverage is exempt from sequestration.\(^{116}\) Medicaid and CHIP are exempt from automatic cuts as are the refundable tax credits available to individuals and families between 100 percent and 400 percent of the federal poverty line for purchasing insurance through the health exchanges.\(^{117}\) However, the small business tax credit that is available for employers to help offset the cost of insurance for their employees and ACA’s annual appropriations can be sequestered at the rate for nonexempt nondefense mandatory spending.\(^{118}\) In addition, under OMB guidance, the mandatory expenses necessary to administer programs exempt from sequestration are subject to automatic cuts.\(^{119}\) Further, ACA discretionary spending is subject to sequestration at the same rate applied to nonexempt nondefense discretionary spending.\(^{120}\)

The administration has worked to minimize the impact of sequestration on ACA by exempting certain elements of the program from sequestration. The cost-sharing subsidies that OMB had indicated last year were subject to sequestration are no longer available to be cut.\(^{121}\) This exemption amounts to approximately $10 billion in restored cost-sharing subsidies over ten years.\(^{122}\) Further, the Department of Health and Human Services has issued a proposed rule to exempt risk adjustment and reinsurance payments from sequestration.\(^{123}\) The proposed rule

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\(^{115}\) See id. at 14.

\(^{116}\) C. STEPHEN REDHEAD, CONG. RESEARCH SERV., BUDGET CONTROL ACT: POTENTIAL IMPACT OF SEQUESTRATION ON HEALTH REFORM SPENDING, 14 (2013.)

\(^{117}\) Id. at 15. Although the Affordable Care Act’s refundable tax credit is not specifically exempt from the sequester, the BCA contains a general exemption for refundable tax credits. Id.

\(^{118}\) Id. at 15, 17. However, sequestration of ACA’s annual Community Health Center Fund appropriation is capped at two percent.

\(^{119}\) Id. at 19.

\(^{120}\) Id. at 18.


\(^{122}\) Id.

would remove the savings from the cuts without replacing them with reductions in other areas. As a result, the sequester’s savings will be reduced by approximately $6 billion over ten years.\(^{124}\)

### 3. Military Spending

Because the sequester was delayed for FY 2013 and defense spending was increased in the March 2013 funding bill, the impact of the automatic spending cuts on defense was blunted. As a result, only $37 billion was cut from the Department of Defense’s budget rather than the projected $54 billion.\(^{125}\) Despite these cuts, a significant portion of military spending is exempt from sequestration. Indeed, less than $1 billion in defense mandatory spending was subject to sequestration in FY 2013.\(^{126}\) Further, President Obama decided to exempt military personnel accounts from sequestration, which required larger reductions in other defense accounts.\(^{127}\) As a result, those exemptions meant that the sequester impacted certain areas more significantly; these areas include operations and maintenance, procurement, and research and development.\(^{128}\)

As such, to many in the military establishment, sequestration was a threat to national security. It was argued that the FY 2013 sequester was “severely damaging military readiness”\(^{129}\) and that units not currently deployed or about to be deployed had gone from combat-ready to not combat-ready due to sequestration.\(^{130}\) Under sequestration, the Department of Defense instituted a hiring freeze, significantly reduced facilities maintenance, and furloughed civilian personnel.\(^{131}\) On the research and development side, sequestration cut $6 billion from

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\(^{124}\) Id.
\(^{125}\) Id.; STEVE BELL ET AL., BIPARTISAN POLICY CTR., FROM MERELY STUPID TO DANGEROUS: THE SEQUESTER’S EFFECTS ON NATIONAL AND ECONOMIC SECURITY 12 (2013).
\(^{126}\) AUSTIN TRENDS, supra note 112, at 11.
\(^{127}\) Id.
\(^{128}\) Id. at 17.
\(^{129}\) Letter from Chuck Hagel, Sec’y of Def., to Senator Carl Levin, Chairman of the Comm. on Armed Servs., & Senator James M. Inhofe, Ranking Member of the Comm. on Armed Servs. (July 10, 2013) (on file with the author) [hereinafter Letter from Sec’y Hagel].
\(^{130}\) BELL ET AL., supra note 125, at 22.
\(^{131}\) See Letter from Sec’y Hagel, supra note 129.
738 of 764 programs in FY 2013. Further, procurement funding for nine of the ten top programs defense analysts have deemed critical for future missions was cut during sequestration.\footnote{Bell \textit{et al.}, supra note 125, at 25.}

\section*{4. Hurricane Sandy Disaster Relief}

Pursuant to section 251’s allowance for adjustments to discretionary limits, the President designated $41.67 billion of Hurricane Sandy response and recovery efforts as emergency requirements. \footnote{See id. at 20, 23.} Further, under sequestration, the adjustment for disaster relief was set at $11.78 billion, of which $5.38 billion was for Hurricane Sandy response and recovery. \footnote{OMB \textsc{Fiscal Year} 2013, supra note 71, at 4 – 5.} Despite these adjustments, the nearly $51 billion supplemental appropriation for Hurricane Sandy was trimmed to $48 billion due to sequestration.\footnote{Id. at 7.}

\section*{5. Unemployment Insurance}

While regular unemployment benefits are spared from sequestration, the benefits of the long-term unemployed are subject to the automatic cuts. Consequently, sequestration cut as much as $139 from the weekly benefits of the long-term unemployed in some states. \footnote{Daniel Hoople, \textit{The Budgetary Impact of the Federal Government’s Response to Disasters}, \textsc{Cong. Budget Office} (Sept. 23, 2013), http://www.cbo.gov/publication/44601. $1.9 billion that was to be used for transportation repairs, U.S. Army Corp of Engineer flood mitigation projects, and Community Development Blocks was cut due to sequestration. Malia Rulon Herman, \textit{FEMA: Sequestration Won’t Affect Payouts to Sandy Victims}, USA TODAY (Mar. 13, 2013, 7:15 PM), http://www.usatoday.com/story/news/nation/2013/03/13/fema-sandy-budget-sequestration-fugate/1985913/.} The automatic cuts reduced the maximum benefit under the Emergency Unemployment Compensation program, which covers workers who have been unemployed for six months or
longer, by an average of $62. Since the average maximum weekly benefit is $414, this reduction represents about a fifteen percent cut to the program.\textsuperscript{138}

IV. Legislation to Delay Sequestration

A. Legislation to Replace the Sequester That Did Not Pass

Recognizing the potentially negative effect that sequestration could have on the economy, Congress and President crafted proposals in order to blunt the impact of the automatic cuts or to replace them all together. The following section details scored proposals, which were not enacted, to mitigate or completely turn off the sequester.

1. President Obama’s FY 2013 Budget

President Obama FY 2013 budget proposed replacing the sequester with narrowly tailored spending cuts and tax increases.\textsuperscript{139} The most significant proposal would have allowed the tax cuts for single filers making over $200,000 and married joint filers making over $250,000 to expire.\textsuperscript{140} Other savings were to be derived from changes to Medicare, Medicaid, other mandatory programs, and the placement of caps on spending for overseas contingency operations.\textsuperscript{141} In total, this plan would have produced $2.2 trillion in deficit reduction between FY 2012 and FY 2022.\textsuperscript{142}

2. Sequester Replacement Reconciliation Act

The Sequester Replacement Reconciliation Act, which was contained in the House’s FY 2013 Budget, proposed replacing portions of the sequester with spending cuts elsewhere while

\textsuperscript{138} \textit{id.}


\textsuperscript{140} \textit{id.}

\textsuperscript{141} \textit{id.}

\textsuperscript{142} \textit{id.} The President’s budget failed to pass either the House or the Senate. Stephen Dinan, \textit{Obama Budget Defeated 99-0 in Senate}, WASH. TIMES (May 16, 2012, 4:27 PM), http://www.washingtontimes.com/blog/inside-politics/2012/may/16/obama-budget-defeated-99-0-senate/.
retaining the FY 2014 – FY 2021 automatic cuts. The bill would have cancelled about $98 billion in discretionary and mandatory defense spending scheduled for FY 2013 while the sequestration of $12 billion in nondefense mandatory spending would remain. The changes to mandatory spending would have included alterations to SNAP eligibility criteria and benefits, changes to certain housing and financial authorities, changes to the health care exchanges, adjustments to the retirement contributions of federal employees and congressman, and alterations to Medicaid and CHIP. As a result, the bill would have lowered FY 2013 cap from $1.05 trillion to $1.03 trillion and cut other mandatory nondefense programs. Further, the measure would have reduced the deficit by $262 billion more than the BCA’s FY 2013 spending cuts over the FY 2012 – FY 2022 period.

3. **Representative Van Hollen’s Amendment to the Sequester Replacement Reconciliation Act**

Representative Chris Van Hollen’s amendment to the Sequester Replacement Reconciliation Act sought to replace the entire FY 2013 sequester with a combination of revenue increases and spending cuts. The spending reductions were to come primarily from ending the direct payment program for agriculture producers while revenue increases were obtained through a new minimum tax for individuals and families with an adjusted gross income of more than $1 million. Other revenue enhancers included increased retirement contributions from members.

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143. LEVIT BUDGET CONTROL ACT, supra note 139, at 7.
144. Id.
145. Id. at 8.
146. Id. at 7 – 8.
148. LEVIT BUDGET CONTROL ACT, supra note 139, at 8.
149. Id.
of Congress and limits on certain tax deductions for oil and gas companies.\textsuperscript{150} This measure would have reduced the deficit $30 billion more than the FY 2013 sequester over the FY 2012 – FY 2022 period.\textsuperscript{151}

4. National Security and Job Protection Act

The National Security and Job Protection Act would have cancelled the FY 2013 sequester on the discretionary defense, discretionary nondefense, and mandatory defense categories if other legislation were passed to achieve spending reductions equal to those that sequestration would have achieved in those areas.\textsuperscript{152} The proposal lowered the FY 2013 cap from $1.05 trillion to $1.03 trillion and created one spending cap that covered both defense and nondefense spending.\textsuperscript{153} Without the passage of accompanying legislation, this proposal would not have had any budgetary impact.\textsuperscript{154}

B. Legislation Enacted to Mitigate the Effect of the Sequester

This section highlights statutes that were passed to mitigate the effects of the sequester or to cancel it for FY 2013 and legislation that was enacted to raise the revised discretionary spending caps for FY 2014 and FY 2015. Some of the legislation contained provisions that did not directly relate to reducing the effects of the BCA. Only those provisions that are relevant to sequestration and the discretionary spending limits will be discussed below.

\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
1. **Reducing Flight Delays Act of 2013**

The sequester resulted in the furlough of air-traffic controllers, which led to airport delays throughout the country. Further, the automatic cuts would have forced the Federal Aviation Administration (FAA) to close 149 contract air-traffic control towers in rural areas. The resulting public backlash against those consequences resulted in the enactment of the Reducing Flight Delays Act of 2013. The act allowed the FAA to use money from a grant program for airport improvement to stop personnel furloughs.

2. **American Taxpayer Relief Act of 2012**

President Obama signed the American Taxpayer Relief Act of 2012 (ATRA) on January 2, 2013. The act delayed the start of the sequester from January 2 to March 1, 2013 by reducing the automatic spending reductions to $85 billion. To make up for the costs associated with the delay and reduction of the sequester, the ATRA reduced the discretionary spending caps for FY 2013 and FY 2014, which offset approximately half the cost. On the revenue side, the ATRA contained a provision that allowed certain retirement accounts to be

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158 Laing, *supra* note 155. The statute allowed the FAA to move $235 million from the grant program. Mascaro, *supra* note 155.


160 *Id.*

161 *Id.*
transferred to designated Roth accounts since contributions to such accounts are subject to taxation.\textsuperscript{162}


On December 26, 2013, the Bipartisan Budget Act of 2013 (BBA) was signed into law and set a two-year budget for FY 2014 and FY 2015.\textsuperscript{163} Sequestration relief under the BBA is divided equally between defense and nondefense spending. The BBA raised the caps on discretionary spending by $44 billion for FY 2014 ($22 billion each in defense and nondefense spending) and by $18 billion for FY 2015 (about $9 billion in defense and nondefense spending each).\textsuperscript{164} As a result, the BBA permitted discretionary spending to rise from $986 billion to $1.012 trillion for FY 2014 and $1.014 trillion in FY 2015.\textsuperscript{165} Over the FY 2014 to FY 2023 budget window, outlays are approximately $62 billion higher under the BBA. To offset this cost, the BBA includes $85 billion in spending cuts and non-tax receipts, such as user fees.\textsuperscript{166} Further, the legislation extended sequestration by two years to apply through FY 2023.\textsuperscript{167} The extension applies to nonexempt mandatory accounts and is set to decrease spending by $28 billion over the 2022 – 2023 period.\textsuperscript{168}

As structured, the BBA allows the FY 2014 and FY 2015 spending cuts to ease into the revised discretionary spending cap for FY 2016, which is set at $1.016 billion—$91 billion lower than it would be in the absence of sequestration.\textsuperscript{169} As such, the BBA does not provide sequester

\textsuperscript{162} See id. While the revenue change increases inflows to the government within the ten-year budget window, it decreases revenue outside of the ten-year window. Id. at 9.


\textsuperscript{164}See CHRISTINA HAWLY ET AL., CONG. BUDGET OFFICE, BIPARTISAN BUDGET ACT OF 2013, 3 (2013).

\textsuperscript{165} Id. The BBA raises $85 billion to account for the nearly $18 billion in interest on the $62 billion increase in discretionary spending. Id.

\textsuperscript{166} Id. at 3.

\textsuperscript{167} Id.

\textsuperscript{168} Id.

\textsuperscript{169} AVI LERNER, CONG. BUDGET OFFICE, FINAL SEQUESTRATION REPORT FOR FISCAL YEAR 2014, 3 – 4 (2014).
relief after FY 2015. Despite the resumption of the sequester caps, the Department of Defense (DOD) budget request for FY 2016 – FY 2019 requested funding that exceeds the current limits by a total of approximately $115 billion.\textsuperscript{170} Currently, however, DOD’s request does not seem viable given that there has been no public effort, as of yet, to raise the sequester caps for FY 2016 and beyond.

C. \textbf{Agency Action to Blunt the Sequester}

Despite dire warnings of the impact of the sequester, the many harms to government functions that it was supposed to cause did not occur. The less-disruptive nature of the sequester on government services can be attributed to agency and congressional maneuvering to reduce spending in areas that would not be greatly impact general operations.\textsuperscript{171} Such measures included reprogramming funds between projects, programs, and activities (PPAs) and transfers to shift resources between accounts.\textsuperscript{172} For example, the Department of Justice (DOJ) was able to avoid furloughs for FY 2013 by using its funding flexibility to transfer and reprogram funds.\textsuperscript{173} First, on March 15, 2013, the DOJ notified the House and Senate Appropriations Committees of its intent to transfer funds to the Federal Bureau of Prisons (BOP) to avoid furloughing 3,570 staff.\textsuperscript{174} DOJ then transferred $150 million to BOP from the following

\begin{footnotesize}
\begin{enumerate}
\item Although the sequester was not as disruptive to government functions as expected, the cuts still resulted in reduced public benefits, delayed services, and furlough of more than 770,000 federal employees. GOV’T ACCOUNTABILITY OFFICE, 2013 SEQUESTRATION: AGENCIES REDUCED SOME SERVICES AND INVESTMENTS, WHILE TAKING CERTAIN ACTIONS TO MITIGATE EFFECTS 55 (2014), available at http://www.gao.gov/assets/670/661444.pdf.
\item Id. at 37. Some agencies were limited in their flexibility because their PPAs were narrowly defined. See id. at 65. For example, PPAs in the Department of Agriculture’s (USDA) Agricultural Research Service, Farm Service Agency, and Natural Resources Conservation Service were defined at specific research locations, county offices, or flood prevention or watershed projects, respectively. Id. As a result, the USDA reported that its flexibility to decide how to implement sequestration was limited because each location, office, or project was subject to sequestration without regard to size or demand for service. Id.
\item Id. at 128.
\item Id. BOP also received $87 million in additional funding to its salaries and expenses account from the Consolidated and Further Continuing Appropriations Act of 2013, which helped it to avoid furloughs. Id. at 129.
\end{enumerate}
\end{footnotesize}
accounts: Drug Enforcement Administration’s salaries and expense account; the FBI’s construction, salaries, and expenses accounts; DOJ’s fees and expenses of witnesses account, and the U.S. Marshals Services construction account.\textsuperscript{175} On April 17, 2013, DOJ informed the Appropriations Committees in the House and Senate of its intent to reprogram, transfer, and use unobligated funds to prevent furloughing almost 60,000 employees.\textsuperscript{176} This maneuvering freed $313 million, which was comprised of the following components:

$239 million in de-obligated and expired FBI salary and expenses funding, $12 million in [de-obligated] and expired [Bureau of Alcohol, Tobacco, Firearms, and Explosives] salary and expenses funding, $2.6 million in election monitoring program balances, $13.9 million in legal education balances within the U.S. Attorney’s Office, and the transfer of $45 million within the U.S. Marshals Service.\textsuperscript{177}

In another example, within its science account, NASA reprogrammed $48.7 million from the planetary science and astrophysics programs to the heliophysics program ($4.9 million) in order to maintain missions in development and to the James Webb Space Telescope program ($43.8 million) in order to ensure the telescope remains on schedule to launch in 2018.\textsuperscript{178} Additionally, the U.S. Geological Survey initially warned that they would have to turn off 350 gauges that were necessary to predict floods. However, the agency only turned off less than ninety in part because it was able to cut $2.7 million in conference expenses since February 2013.\textsuperscript{179} Even the cut to the FAA’s airport improvement grant program mentioned in Section IV.B.1 that was used to avoid furloughs of airport personnel did not have a significant impact.

\textsuperscript{175} Id. DOJ transferred $116 million in unobligated funds from its Working Capital Fund to the FBI to replace the $131.5 million it transferred from the FBI to BOP. \textit{Id.}

\textsuperscript{176} Id. In order to minimize furloughs, DOJ also continued a hiring freeze started in 2011, delayed or cancelled contracts, restricted non-essential travel, cancelled or postponed nonmandatory training, postponed or reduced the scope of conferences, limited employee overtime, and eliminated the use of discretionary monetary awards. \textit{Id.}


\textsuperscript{178} \textsc{Gov’t Accountability Office, supra note 171, at 43.}

\textsuperscript{179} David A. Fahrenthold & Lisa Rein, \textit{They Said the Sequester Would Be Scary. Mostly, They Were Wrong}, WASH. POST (June 30, 2013), http://www.washingtonpost.com/politics/they-said-the-sequester-would-be-scary-mostly-they-were-wrong/2013/06/30/73bdab6c-da7a-11e2-8ed8-7ad8eb6e9a_story.html.
The grantees that were entitled to the money had already told officials that they did not need it for FY 2013.\textsuperscript{180}

However, many of the strategies used to mitigate the effects of the sequester were one-time actions rather than long-term efforts to reduce agency expenses.\textsuperscript{181} Tables 1 and 2 in the Appendix provide further information on the efforts that agencies took to reduce the sequester’s impact on their functions.

V. Critiques of the BCA and Sequestration

A. Criticism and Projected Effects of the Sequester Prior to Implementation

Prior to the start of the delayed sequester, the Obama administration released a report detailing the impact of sequestration—which it viewed as harmful to vital government functions—on numerous areas including education, small businesses, health and safety, and national security. For example, the administration indicated that the sequester could remove 70,000 children from Head Start and put the jobs of 10,000 teachers at risk.\textsuperscript{182} Further, the administration stated that the Food and Drug Administration could conduct 2,100 fewer inspections at food product manufacturers while more than 600,000 women and children were to lose food aid from the Special Supplemental Nutrition Program for Women, Infants, and Children from March through September of 2013.\textsuperscript{183}

While they saw the need to attempt to replace sequestration with other forms of spending reductions, Republicans were a more muted in their criticism of the sequester. When praising his House colleagues for the work they had done in the first three months of 2013, Speaker of the

\begin{footnotes}
\item[180] Id.
\item[181] For example, 90 percent of the money DOJ used to avoid furloughs in FY 2013 is not available for future years. GOV’T ACCOUNTABILITY OFFICE, supra note 171, at 129.
\item[183] Id. Please see the source for more examples from the administration of how the sequester was projected to impact the middle class, the economy, jobs, health and safety, and national security.
\end{footnotes}
House John Boehner (R-OH) gave passing mention to the need to replace the automatic cuts with better spending reductions that advanced the Republican goal of a balanced budget by the end of the decade.\footnote{Memorandum from Representative John A. Boehner, Speaker of the U.S. House of Representatives, to House Republicans (Mar. 28, 2013) (http://blogs.rollcall.com/218/boehner-memo-we-forged-a-new-tactical-plan/).} While some Republicans were concerned with the lack of urgency over the sequester,\footnote{Jeremy Herb, GOP Hawks Sound Alarm on Sequester, THE HILL (Jan. 30, 2013, 10:00 AM), http://thehill.com/policy/defense/280007-gop-hawks-sound-alarm-on-sequester (stating that Senators John McCain (R-AZ) and Lindsey Graham (R-SC) both expressed concern over the lack of action to avert the sequester).} others viewed the impending reductions as an imperfect way in which to extract other spending cuts from Democrats.\footnote{Brett Logiurato, It Looks Like We’re Headed for Sequestration Doom, but No One Is Freaking out About It, BUS. INSIDER (Jan. 31, 2013, 6:27 PM), http://www.businessinsider.com/sequestration-what-it-is-cuts-debt-ceiling-fiscal-cliff-2013-1 (noting that Republican aides in the House and Senate did not want the cuts to happen but were content to see them implemented if it meant that they could extract spending cuts from President Obama and congressional Democrats).} However, even conservative think tanks viewed the sequester as an imperfect mechanism that substituted a “blunt instrument” for the deliberate identification of unnecessary federal spending.\footnote{See, e.g., ROMINA BOCCIA, CUTTING THE U.S. BUDGET WOULD HELP THE ECONOMY GROW 3 (2013), available at http://thf_media.s3.amazonaws.com/2013/pdf/BG2864.pdf.}

**B. Projected Effect of the BCA’s Sequestration on Jobs and the Economy**

After sequestration was ordered in FY 2013, the CBO estimated the impact of eliminating the sequester on the economy in 2014. According to the CBO, real GDP would be 0.7 percent higher in the third quarter of 2014 in the absence of the sequester.\footnote{Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Representative Chris Van Hollen, Ranking Member of the Comm. on the Budget 2 (July 25, 2013) (http://www.cbo.gov/sites/default/files/cbofiles/attachments/44445-SpendReductions_1.pdf).} Further, there would be 900,000 more jobs during the same quarter of 2014 as a result of cancelling sequestration.\footnote{Id. The CBO’s economic figures represent the central estimates of GDP and employment growth for the third quarter of 2014. The CBO estimated that turning off the sequester could raise real GDP between 0.2 percent and 1.2 percent, and could raise employment between 300,000 and 1.6 million jobs. Id.} For the fourth quarter of 2014, turning off the automatic cuts would increase real GDP by 0.6 percent and full-time employment by 800,000 jobs.\footnote{Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Representative Chris Van Hollen, Ranking Member of the Comm. on the Budget 1 (Sept. 26, 2013) (http://www.cbo.gov/sites/default/files/cbofiles/attachments/44630-Van-Hollen.pdf).}
A. Critiques of Sequestration After Implementation

As mentioned in Section IV.B.1, the effects of the sequester on government functions were not as severe as predicted. Indeed, commentators showed that, instead of having a disruptive impact, the sequester was accomplishing its intended purpose. They noted that, under the BCA, federal outlays declined from 24.1 percent of GDP in FY 2011 to 20.8 percent in FY 2013.\textsuperscript{191} They also used the decline of discretionary spending from 9.4 percent of GDP in FY 2010 to 7.6 percent in FY 2013 as further evidence of the effectiveness of the BCA.\textsuperscript{192} Additionally, supporters of the cuts, such as the Heritage Foundation, point to Moody’s assertion that “the growth of the U.S. economy . . . , while moderate, is currently progressing at a faster rate compared with several Aaa peers and has demonstrated a degree of resilience to major reductions in the growth of government spending”\textsuperscript{193} as further evidence that sequestration was not harmful to economic growth.\textsuperscript{194}

Other organizations had a more tepid view of the sequester’s impact. Some think tanks pointed to the effects that the sequester was having on individuals to show that it was a harmful policy. The liberal outlets noted that the sequester prevented social programs such Head Start, unemployment insurance, and housing agencies from being able to fully service public need.\textsuperscript{195}

From a nonpartisan perspective, the CBO noted that under current law even though the deficit is estimated to result in a real GDP that was between 0.2 percent and 1.0 percent higher and would result in between 300,000 and 1.2 million more full-time jobs. \textit{Id.}


\textsuperscript{192} \textit{Id.}


\textsuperscript{194} See BOCIA, supra note 187, at 5.

projected to fall 2.6 percent of GDP, it will rise to about four percent by 2024.\textsuperscript{196} Thus, assuming the BCA and the BBA remain unchanged, in spite of sequestration, deficits will reach levels during the period that the statutes cover that are greater than the forty-year average.\textsuperscript{197}

VI. Comparison of the BCA and Previous Budget Control Legislation

The BCA was not the first legislative effort to force deficit reduction through sequestration. Since the 1980s, there have been five major attempts to reduce the deficit through the threat of automatic spending cuts: GRH, Gramm-Rudman-Hollings II (GRH II), the Budget Enforcement Act of 1990 (BEA), the Budget Enforcement Act of 1997 (BEA II), and the Statutory PAYGO Act of 2010 (Statutory PAYGO). Despite their common goal, the BCA differs from each prior deficit-reduction legislation. The most common difference between the BCA and all other deficit reduction measures is the BCA’s use the super committee’s failure as a mechanism to trigger automatic spending cuts. This section will examine other differences between the BCA and the other deficit reduction measures in sequestration triggers and procedures to enforce the automatic spending cuts.

A. Gramm-Rudman-Hollings & Gramm-Rudman-Hollings II\textsuperscript{198}

The BCA amended a number of sections of GRH including sections that dealt with the statutory limits on discretionary spending and GRH’s expiration date.\textsuperscript{199} As such, due to section 104 of the BCA, which repeals GRH’s expiration date, many of the features of the previous

\textsuperscript{196} \textsc{Jared Brewster} & \textsc{Amber Marcellino}, \textsc{Cong. Budget Office, Updated Budget Projections: 2014 to 2024}, 1 (2014).

\textsuperscript{197} \textit{Id.} Over the past forty years, the deficit averaged 3.1 percent of GDP, and averaged 2.3 percent in the 40 years prior to the recession in FY 2008. \textit{Id.}

\textsuperscript{198} After \textsc{Bowsher v. Synar} invalidated the sequestration process in GRH, GRH II was passed with many of the same provisions. However, the new statute fixed the problem of the invalidated sequestration process by having a report from the OMB director trigger the President’s sequestration order for FY 1988 through FY 1993. \textsc{Megan Suzanne Lynch}, \textsc{Cong. Research Serv.}, \textsc{Statutory Budget Controls in Effect Between 1985 and 2002}, 6 (2011).

\textsuperscript{199} \textsc{Heniff et al.}, \textit{supra} note 1, at 11
discretionary limits, including the sequestration process, were restored.200 This restoration made section 256 of GRH, which mandated a uniform percentage reduction to all programs, projects, and activities within a budget account during sequestration, applicable to the BCA.201 Other provisions that remained the same between statutes were the lists of programs that were subject to exemptions and special rules. Further, like the BCA, GRH equally divided sequestration between defense and nondefense spending.202

The most significant difference between GRH and the BCA is the trigger mechanism to which the sequestration process is tied. Under GRH, sequestration would be triggered if maximum annual deficit limits were exceeded while under the BCA maximum spending limits or the failure of the super committee are used as mechanisms to activate sequestration. Further, unlike the BCA, which uses a ten-year timeline for annual deficit reduction, GRH used a shorter six-year timeline—later extended by two years in GRH II—for specifying the annual deficit limits.203

Under the sequestration regime of GRH II—which was passed to amend the sequester mechanism invalidated in Bowsher v. Synar—the OMB director would issue a report that the President would use as the basis for his sequestration order.204 The amount withheld under the President’s order would begin on October 1st, pending his final sequestration order to be issued

200 Id.
201 See OMB REPORT PURSUANT TO THE SEQUESTRATION TRANSPARENCY ACT OF 2012 (P.L. 112-155) 9 – 10 (2012).
202 LYNCH, supra note 198, at 2.
203 Id.
204 Id. at 6. The OMB’s report, which was to give due regard to the deficit and sequestration report submitted to the OMB director by the CBO, was to include (1) an estimate of the revenues and outlays for the upcoming fiscal year; (2) a determination of whether the deficit was expected to exceed specified levels (but allowing for an excess of $10 billion); (3) an estimate of real economic growth; (4) the amount, if any, by which the deficit would be breached; and (5) if there was a breach in the deficit, the base from which reductions were to be made in each nondefense and defense account, and the dollar amount and percentage of reduction that was necessary in each account to eliminate the excess deficit. See id. at 4, 6.
on October 15th. After the issuance of the President’s final sequestration order, the funding reductions necessary to meet the specified reductions would be split equally between defense and nondefense spending, with programs in each category (except those that were exempt) being reduced by a uniform percentage in order to achieve the total overall deficit reduction.

GRH had means to turn off its sequester other than by keeping spending under the statutory limits. The statute mandated that OMB and CBO issue a joint deficit and sequestration report for the upcoming fiscal year. If in OMB’s and CBO’s joint report negative real economic growth was projected to occur in two consecutive quarters then the deficit limit could be suspended. Additionally, the deficit level could be suspended if the Department of Commerce were to project that actual real growth was below one percent for two consecutive quarters. In either of the two events, Congress was authorized to consider a joint resolution under an expedited process that would suspend deficit reduction procedures for the current or all fiscal years. However, it could not suspend a sequestration order that was already in effect.

Like the BCA, sequestration was triggered under GRH. $11.7 billion in sequestration cuts were ordered for the FY 1986 budget, which lowered the projected FY 1986 deficit to the $171.9 billion deficit target. The sequestration cuts that were necessary for FY 1987 were

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205 Id. at 4 – 5.
206 Id. at 2.
207 Id. at 4.
208 Id.
209 Id. However, both GRH and the BCA could be suspended upon a declaration of war. HENIFF ET AL., supra note 1, at 13 n.36.
210 LYNCH, supra note 198, at 4.
211 Sung Deuk Hahm et al, The Influence of the Gramm-Rudman-Hollings Act on Federal Budgetary Outcomes, 1986 – 1989, 11 J. POL’Y ANALYSIS & MGMT. 207, 210 (1992); LYNCH, supra note 198, at 7. However, the $171.9 billion deficit target was an optimistic projection; the $11.7 billion reduction represented only about five percent of the actual deficit, which was $221 billion. See Hahm et al., supra, at 211. The $11.7 billion reduction was the result of a compromise between lawmakers, which also gave President Reagan some discretion in distributing the defense cuts. Jeffrey L. Sheler et al., The Curtain Rises on Gramm-Rudman; Budget Law Takes First Bite, U.S. NEWS & WORLD REP., Jan. 27, 1986, reprinted in Seth Cline, What Happened Last Time We Had a Budget Sequester, U.S. NEWS & WORLD REP. (Mar. 1, 2013), http://www.usnews.com/news/blogs/press-past/2013/03/01/what-happened-last-time-we-had-a-budget-sequester.
avoided through the result of a number of legislative actions and budget gimmicks. The combined effects of earlier cuts in defense spending and a one-time revenue increase from the Tax Reform Act of 1986 reduced the projected deficit for FY 1987 to $163 billion—$19 billion in excess of the deficit target for FY 1987. Asset sales, optimistic forecasts, and gimmicks such as shifting a military payday from the last day of FY 1987 to the beginning of FY 1988 were used to close the funding gap and to remove the threat of cuts. GRH II was enacted in 1987 and raised the FY 1988 deficit target to $144 billion and to $136 billion for FY 1989 in order to avoid the more than $60 billion in cuts necessary to meet the $108 billion FY 1988 deficit target. In FY 1990, the last sequester under the GRH regime required the sequestration of $16.1 billion; however, that amount was reduced to $5.75 billion by the Omnibus Budget Reconciliation Act of 1989, which resulted in the issuance of a new sequestration order consistent with the lower amount.

A. Budget Enforcement Act of 1990

The BEA moved away from GRH’s focus on deficit targets and implemented an approach that used discretionary spending limits and PAYGO procedures that controlled new mandatory spending and revenue bills; these procedures were enforced separately. While the BEA and the BCA both use the breaching of maximum spending limits as a means to trigger sequestration of discretionary spending, BEA PAYGO’s and the BCA’s sequestration of

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212 Hahm et al., supra note 211, at 211.
213 LYNCH, supra note 198, at 7.
214 Hahm et al., supra note 211, at 211.
216 Hahm et al., supra note 211, at 211. The deficit targets for FYs 1990 – 1993 were $100 billion, $64 billion, $28 billion, and $0 respectively. LYNCH, supra note 198, at 7.
218 LYNCH, supra note 198, at 8.
mandatory spending contrast. Under the BEA PAYGO procedures, the aggregate impact of all new mandatory spending and revenue legislation, which was recording on a rolling PAYGO scorecard, was not to increase the deficit.\textsuperscript{219} A PAYGO violation would occur if the net effect of mandatory spending or revenue legislation during a legislative session, when combined with any PAYGO balance carried over from the previous session, would produce a net increase in the deficit.\textsuperscript{220} A violation would result in cuts that were to be made to nonexempt mandatory spending programs.\textsuperscript{221} Under the BCA, the failure of the super committee requires the President to order spending reductions in nonexempt mandatory programs for each year from FY 2013 through FY 2021—this extends through FY 2023 under the BBA—based on OMB’s calculations. In another contrast, under the BEA, cuts to Medicare could be as high as four percent\textsuperscript{222} while the limit under the BCA for Medicare cuts is two percent.

Further, unlike the BCA, which only has defense and nondefense spending categories for the first two fiscal years (in the absence of sequestration) covered under the statute, the BEA established spending limits for different categories in different fiscal years. For FY 1991 – FY 1993, the BEA placed limits on three categories: defense, international, and domestic spending.\textsuperscript{223} However, like the BCA in the absence of sequestration from FY 2014 to FY 2021, the BEA authorized a single limit on the total amount of discretionary spending in FY 1994 and FY 1995.\textsuperscript{224} If the spending limits were breached, in both the BEA and the BCA, the President could issue a sequestration order for the category in which the breach occurred.\textsuperscript{225}

\textsuperscript{219} Id. at 10.
\textsuperscript{220} Id.
\textsuperscript{221} Id.
\textsuperscript{222} Id.
\textsuperscript{223} See id. at 9.
\textsuperscript{224} Id.
\textsuperscript{225} Id.
Both the BEA and the BCA allowed for adjustments to the discretionary spending limits, and both used the same mechanisms to make those adjustments: the sequestration preview report in the President’s budget, the August sequestration update report, and the final sequestration report issued in fifteen days after Congress adjourns.\textsuperscript{226} Finally, sequestration was triggered under the BEA just it has been under the BCA; however, the BEA’s two sequestrations were comparatively minor and limited to discretionary spending. The first sequestration, which occurred in FY 1991 and was expected to save $191 million, was due to a drafting error in the Foreign Operations Appropriations and cancelled after it was corrected.\textsuperscript{227} Also in FY 1991, a small breach resulted in the sequestration of $2.4 million in the domestic category.\textsuperscript{228}

B. Budget Enforcement Act of 1997

In 1997, President Clinton signed a deficit reduction measure that extended the discretionary spending limits from the BEA to FY 2002.\textsuperscript{229} BEA II and the BCA differed in the number of spending categories they contained. The spending limits for FY 1998 and FY 1999 were divided into three categories: defense, nondefense, and crime reduction.\textsuperscript{230} There were two discretionary spending limit categories for FY 2000: crime reduction and all other discretionary spending.\textsuperscript{231} Finally, there was only one overall discretionary limit for FY 2001 and FY 2002.\textsuperscript{232} Unlike the BCA, there was no sequestration triggered under BEA II.\textsuperscript{233}

\textsuperscript{226} \textit{id.} at 9; \textit{HENIFF et al., supra} note 1, at 15.
\textsuperscript{227} \textit{KEITH, supra} note 217, at 3.
\textsuperscript{228} \textit{id.} at 5.
\textsuperscript{230} \textit{id.} at 12
\textsuperscript{231} \textit{id.}
\textsuperscript{232} \textit{id.}
\textsuperscript{233} See \textit{KEITH, supra} note 217, at 3.
C. **Statutory Pay-As-You-Go Act of 2010**

Enacted in February 2010, Statutory PAYGO required that all new legislation that changed taxes, fees, or mandatory expenditures not increase the projected deficit. The same difference between BEA’s PAYGO and the BCA also exists between Statutory PAYGO and the BCA: Statutory PAYGO focuses on reducing the deficit by controlling mandatory spending while the BCA prioritizes limits on discretionary spending. Further, Statutory PAYGO specifies the manner in which the deficit is to be controlled. Under Statutory PAYGO, revenue increases or cuts in mandatory programs must completely offset any increase in mandatory spending. Other than prescribing spending limits, the BCA does not dictate how to remain under those limits. Additionally, the BCA and Statutory PAYGO operate under different timeframes. While the BCA operated under a ten-year period, Statutory PAYGO is permanent.

Statutory PAYGO governs part of the sequestration process under the BCA. Indeed, sequestration under the BCA follows the procedures and rules specified in section 6 of Statutory PAYGO. However, while sequestration under the BCA affects both discretionary and mandatory spending, Statutory PAYGO’s sequestration only impacts mandatory programs. Furthermore, even though many of the same mandatory programs that are exempt from sequestration in the BCA are also exempt in Statutory PAYGO, nonexempt programs receive a larger cut under Statutory PAYGO. Specifically, Medicare can be reduced by as much as four percent under Statutory PAYGO while two percent is the limit under the BCA.

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235 *Id.*
236 *Id.*
238 See CBO ESTIMATED IMPACT, * supra* note 67, at 6 n.9.
239 Statutory PAYGO, * supra* note 234.
240 *Id.*
VII. Conclusion

Although sequestration has been cancelled for FY 2014 and FY 2015, it will be interesting to see whether Congress and the President are able to work together to extend sequestration relief or if they will allow automatic cuts to again govern the budgetary process. This question becomes more compelling when the political context is taken into account given that there is a real possibility that Republicans will gain control of Congress after the 2014 midterm elections. However, if history is any indication, an impending sequester may be enough for Congress and the President to work together to find a way to remove across-the-board cuts, with or without replacing them with more deliberate spending reductions.
# Appendix

Table 1. Funding Actions Taken During the FY 2013 Sequester[^1]

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[^1]: GOV'T ACCOUNTABILITY OFFICE, supra note 171, at 42. The information was gathered from the twenty-three of the twenty-four chief financial offers in agencies that the Chief Financial Officers Act of 1990 covers. *Id.* at 196. The Department of Veteran Affairs is not included because its functions were exempt from sequestration. *Id.*
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242 Gov’t Accountability Office, supra note 171, at 42.
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