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William G. Dauster

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BUDGET EMERGENCIES

William G. Dauster*

The law governing the Federal budget process creates limits on spending legislation. It also provides an exception for emergencies. In this Article, Mr. Dauster examines the budget emergency exception, tracing its history in recent budget summits, the legislative history of the current law, and attempts to define the exception. The Article goes on to discuss concerns that the emergency exception creates for relations between the President and the Congress.

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Negotiated agreements between the President and the Congress have dominated the Federal budget process since the late 1980's in the era of divided government.\(^1\) Caps on the amount of money that Congress may annually appropriate have formed the centerpiece of the three budget agreements entered into during this period. As Members of Congress naturally seek to maximize benefits for their constituents, Congress has continually passed appropriation acts that spend money up to the agreed-upon limits.

The scarcity of money under the caps has increased interest in exceptions to the limits. Each of the budget agreements since 1986 has provided an explicit exception for emergencies. The nature of the emergency exception, however, has changed over this period. In its latest incarnation, as a product of the Budget Enforcement Act of 1990,\(^2\) the emergency exception has increased in complexity, variation, and use.

Current law creates a procedure under which both the President and Congress designate spending as “emergency” spending. If both the President and Congress so designate, the spending will not cause automatic cuts under the amended Gramm-Rudman-Hollings law,\(^3\) even if it worsens the deficit or causes spending to exceed the agreed-upon caps.

This article traces the history of the emergency exception, analyzes its meaning, examines its use, and discusses its effects on the relationship between the executive and legislative branches.

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1. The Democratic Party restored divided government by regaining control of the United States Senate in 1986. One can argue that this has been the only period during the history of the Congressional Budget and Impoundment Control Act of 1974 (Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified as amended at 2 U.S.C. §§ 601-688 (1988 & Supp. II 1990)) [hereinafter Congressional Budget Act] that divided Government has existed in any meaningful way. The Democratic party controlled the Congress and the Republican Party controlled the Presidency during the first few months of the Congressional Budget Act, but these were caretaker years for the Republican Party in the wake of the Watergate scandal. During the Carter administration, the Democratic Party controlled both branches. During the first six years of the Reagan administration, the Republican Party controlled the Presidency and the Senate, and achieved working majorities in the House of Representatives. During times of one-party control of the Government, one can expect the President to deal with the members of his or her party in Congress, and President Reagan did so in the early 1980's. See, e.g., THE PRESIDENT, FISCAL YEAR 1985 BUDGET REVISIONS, H.R. DOC. NO. 98-213, 98th Cong. 2d Sess. (1984) (reporting the results of the “Rose Garden summit,” in which President Reagan conferred with Republican leaders only). Thus the summits of the late 1980's and early 1990's took on a more adversarial character than earlier budget summits.


I. THE HISTORY OF THE EMERGENCY EXCEPTION

A. The 1987 Budget Summit

Gramm-Rudman-Hollings, enacted in 1985, set up a series of Federal budget deficit targets. To force Congress and the President to meet these targets, the law created a procedure whereby the Congressional Budget Office, the Office of Management and Budget, and ultimately the General Accounting Office determined how large the deficit appeared in projections made at the beginning of a fiscal year. If the projected deficit exceeded the target, then the law required the President to order across-the-board cuts — called "sequesters" — of government funding. In Bowsher v. Synar, the Supreme Court struck down the law's requirement for automatic sequester orders. The Court held that allowing an arm of Congress — the General Accounting Office — to direct the President when to order the cuts violated the Constitution's doctrine of separation of powers.

After the Democrats took back control of the Senate, fiscally conservative Democrats sought a tool to bring the President to the negotiating table with the Democratic leadership of Congress to work out a deal to reduce the deficit. At the same time, Republican members of Congress sought to control the size of Government and the amount of congressional spending. These fiscally conservative groups joined together to enact legislation restoring the automatic trigger on Gramm-Rudman-Hollings by giving final estimating authority to the President's Office of Management and Budget.

The revitalized Gramm-Rudman-Hollings put pressure on the President and Congress to reduce the deficit by specified amounts. Reacting to this pressure and to the stock market crash of October 1987, the President and the joint leadership of Congress began negotiating to reduce the deficit, reaching an agreement on November 20, 1987, reflected in a memorandum of agreement.

The agreement limited the amounts that Congress could appropriate for fiscal year 1988 (already nearly two months under way) and fiscal year 1989. Negotiators were concerned that the Congress would exceed these caps in supplemental appropriations bills—funding measures passed after enactment of the regular annual spending bills for the thirteen subcommittees of the Appropriations Committees. Even so, negotiators did not want to impede the ability of Congress

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8. Id. at 721-34.
12. Id.
to address exigent situations. As well, negotiators wanted to create an exception that could serve as a safety valve to let off steam from a deficit-reduction machine that might otherwise blow up from pent-up pressure.

One paragraph of the memorandum of agreement addressed procedures to implement the agreement.13 Part of that paragraph sought to limit supplemental appropriations bills:

9. The following procedures will be utilized to implement this agreement for spending:

   c. Neither the Congress nor the President shall initiate supplementals except in the case of dire emergency. When the Executive Branch makes such a request, it shall be accompanied by a presidentially-transmitted budget amendment to Congress.14

Congress and the President thus both agreed to limit their creation of supplemental appropriations bills to dire emergencies. Their contract did not provide an independent means of enforcement. No change in law delegated to the President authority to take make any cuts if either party to the contract breached the agreement. Rather, the agreement relied on the legislative process set forth in the Constitution's Presentment Clauses.15 Congress would present proposals for emergency spending to the President in the form of bills to which the President would then have to agree as a whole or veto. If the Congress wished to spend the money notwithstanding the President's objections, it could do so if it mustered two-thirds of each House.

Observers can debate the budget summit agreement's effect on the amount of spending enacted. Congress did enact supplemental appropriations measures.16 The agreement did, however, result in a change in the titles of supplemental appropriations bills from "supplemental appropriations"17 or "emergency supplemental appropriations"18 to "dire emergency supplemental appropriations."19

B. The 1989 Budget Summit

After President George Bush took office in 1989, hope grew that the congressional leadership and the new administration could negotiate a significant deficit reduction agreement. A group comprised of the House Majority Leader,
the Chairmen and Ranking Republican Members of the Senate and House Budget Committees, the Director of the Office of Management and Budget, and the Secretary of the Treasury conducted a series of negotiations to that end in one of the Majority Leader’s conference rooms on the first floor of the Capitol.20

Negotiators agreed to manifest their agreement in a memorandum like that drafted in 1987. As the negotiators began to discuss the language of a memorandum of agreement, they started with the same language on supplemental appropriations measures as in the 1987 agreement. By April 5, however, negotiators began to discuss language that would have limited supplemental appropriations measures more narrowly, requiring the President to propose spending cuts to offset all increases in discretionary spending that he proposed and requiring Congress to ensure that no discretionary supplemental appropriations spending worsened the deficit in fiscal years 1989 and 1990. Negotiators from the Senate and House Budget Committees objected to the limitation. Had the negotiators agreed on the limitation, it would have eliminated the emergency exception, and the agreement would have called upon Congress and the President to provide for unforeseen spending requirements within the caps.

By April 12, negotiators reintroduced the possibility of an emergency exception, this time for “truly extreme emergencies.” This new term reflected frustration with the ease of using the exception. The Senate and House Budget Committees continued to object to the language requiring spending cuts to offset any new spending. Participants objected to the exception for “truly extreme emergencies.” Unable to agree on new language covering supplemental appropriations measures, the negotiators returned, by default, to the language of the 1987 agreement, and that language stayed in the memorandum of agreement to which the President and the congressional leadership finally acceded.21

Once again, Congress and the President enacted supplemental appropriations measures, and once again Congress named them “dire emergency appropriations.”22

C. The 1990 Budget Summit

In early 1990, participants in the budget process became aware that the revised Gramm-Rudman-Hollings deficit targets once again required painful choices. Beginning in March 1990, a broadened negotiating team began a long series of meetings that would eventually lead to another budget agreement in late September and the Budget Enforcement Act in November.

In June, the Director of the Office of Management and Budget opened the discussion of the budget process in a meeting in a wood-panelled conference rooms.
room off the Senate floor. The Director presented a one-page document that laid out his requests for a series of expanded presidential powers over the budget. He sought two measures to strengthen the discipline of Gramm-Rudman-Hollings: a second annual estimate of the deficit tied to a second sequester possibility, and extension of Gramm-Rudman-Hollings beyond its scheduled expiration date of 1993. Toward the goal of limiting excessive appropriations and "Non-Emergency Supplementals," the Director sought enhanced powers for the President to rescind spending Congress had ordered by law, sequesters to offset supplemental appropriations bills that exceeded the caps, and "emergency reserve accounts." A June 20 Republican proposal incorporated the same proposal.

Democratic negotiators, notably the Chairman of the Senate Appropriations Committee, Senator Robert C. Byrd of West Virginia, quickly rejected the Director's proposal of enhanced rescission. The Democrats prepared to discuss provisions regarding supplemental appropriations bills much like those discussed in prior summits. Negotiations over taxing and spending took center stage after the President issued his June 26 statement indicating that he considered taxes a necessary part of deficit reduction, and negotiations on budget process issues occurred only infrequently for some time.

By early September, Office of Management and Budget staff circulated a draft of statutory language containing sections spelling out enforcement procedures similar to those that the Director proposed in his initial one-page list of requests. One section provided uniform reductions to offset supplemental appropriations exceeding the caps. A second required committees to set aside a two-percent reserve for "dire emergency requirements." A third granted the President enhanced rescission authority whenever Congress appropriated funds for a category of spending at levels either above or below the cap.

From this primary reliance on enhanced rescission powers, Republican negotiators moved toward increased use of sequesters. Under a Republican offer presented on the evening of September 17, 1990, if legislation (presumably signed by the President or enacted over the President’s veto) exceeded an appropriations cap in any of three discretionary categories (domestic, defense, and international), the President would propose rescissions in the offending summit category. If Congress did not enact rescissions sufficient to bring spending below the cap within fifteen days, the law would require the President to order a "categorical" sequester in only the offending summit category. In addition, the offer called for the Office of Management and Budget to estimate changes in the deficit at the end of the fiscal year caused by new entitlement law. The law would then require the President to order a "categorical lookback sequester" equal to the amount by which entitlement law had worsened the deficit. The sequester would cut entitlements and similar programs that result in further spending without annual appropriations law.

At this point, Democratic negotiators advocated replacing Gramm-Rudman-Hollings with a categorical sequester using broader categories. The system would

have required cuts in the broad fiscal category — appropriations, entitlements, or taxes — responsible for any shortfall.

Office of Management and Budget negotiators offered the possibility of emergency exceptions as an inducement for Democratic negotiators to accept limits on discretionary spending enforced by a system of sequesters. Speaking later, the Director of the Office of Management and Budget also cited as another reason for creating the exception the goal of strengthening the agreement by building into it the flexibility to accommodate unforeseen circumstances.24

The Office of Management and Budget first proposed that the President would have to initiate all emergency spending proposals, but negotiators rejected that option, agreeing that Congress — just as the President — should have the ability to initiate emergency spending proposals. Thus negotiators agreed that the President could designate spending as an emergency requirement at any time during the legislative process.

Final agreement on the appropriations caps came late in the negotiation process. On September 26 and again on September 28, negotiators discussed a number of options relating to the caps and the emergency exception. Under one option, violation of the caps would trigger a sequester within the offending category fifteen days after the enactment of the offending bill. The caps would adjust for costs of dire emergencies jointly identified by the President and Congress. Under a second option, the caps would adjust for costs of dire emergencies only upon a presidentially-initiated supplemental request. If Congress added either spending unrelated to the emergency or in excess of the amount to which the President agreed, the President would order across-the-board cuts in the offending category. Under a third option, the caps would also adjust for costs of dire emergencies only upon a presidentially-initiated supplemental request, but if Congress added unrelated spending or exceeded the amount, then the next year’s cap would shrink by the overage. Under a fourth option, congressional points of order would enforce spending limits on supplemental appropriations bills based on whether the President requested the amounts or not.

On September 30, 1990, as a small lead group of negotiators reached agreement on the larger issues, the Office of Management and Budget released a document detailing its view of the agreement.25 With regard to enforcing the caps, this document read:

Automatic across-the-board offset triggered within each of the categories (defense; domestic discretionary; international discretionary) to the extent any appropriation

24. In a hearing before the House Budget Committee, Director Darman had the following exchange with Congressman Beilenson:

REP. BEILENSEN: Circumstances do change and you don’t like to tie the hands of either the administration or the Congress to, you know, to change our attitude as to where spending should be increased or decreased as the years go by.

DARMAN: ...

And that was . . . the basis for the invention of the emergency provision. Because it was recognized that yes, the world changes both suddenly and over time, and these things would — you couldn’t have an agreement so rigid that it couldn’t accommodate them.

Mid-Session Review of the Fiscal Year 1992 Budget: Hearing Before the House Comm. on the Budget, 102d Cong., 1st Sess. 11 (1991) [hereinafter House Mid-Session Hearings].

bill (including supplementals) violates either the budget authority or outlay caps for that category (trigger 15 days after enactment if bill enacted before July 1, lookback if after July 1).

For a Presidentially-declared emergency request in supplementals or regular appropriations bills, this across-the-board offset would not apply to the extent of the funds requested by the President (only if the Congress agreed in the Act that it was for an emergency). If Congress proposes and the President requests new items or additional amounts for the supplemental, the offset would not apply to the items or additions.2

Congressional staff set about drafting the enforcement law. By mid-October, staff had come up with language on supplemental appropriations similar to that in current law, except that the initial drafts included dollar limits on Desert Shield emergency costs.

Budget summit negotiators did not provide for a similar emergency exception for direct spending programs until after staff began drafting the bill. Drafters noted that without such an exception, the Appropriations Committees would find it easier to spend than would authorizing committees. At this point, after debate among the Chairmen and Ranking Members of the Budget Committees, it was agreed to extend the exception to direct spending and receipts legislation.

D. Congressional Debate on the Budget Enforcement Act

The Senate conducted the most extensive and focused debate on what would become the Budget Enforcement Act during consideration of the Omnibus Budget Reconciliation Act of 1990.27 The Senate first saw the draft of the leadership amendment that would become the Budget Enforcement Act late in the evening of October 18, 1990, at the close of Senate debate on the Reconciliation Act. That debate tended to address general propositions. Some of the debate did, however, focus on issues related to the emergency exception.

Early in the debate, Senator Bob Graham of Florida took issue with the amendment for taking so many items “off budget,” not counting them toward the caps and the deficit targets.28 Senator Graham argued that it was “in part because so many items were off budget” that the Gramm-Rudman-Hollings law

26. Id. at 36.
27. The Senate debate provides the best legislative history on the emergency exception. The joint statement of managers accompanying the conference report on the Omnibus Budget Reconciliation Act of 1990 briefly notes the existence of the emergency exceptions, but sheds little light on their operation. Under the heading of “I. ENFORCING DISCRETIONARY SPENDING LIMITS,” describing the House measure, the joint statement says: “The House bill provides that the President shall adjust the spending limits in the annual budget submission for . . . Presidentially-determined emergencies . . .” H.R. CONF. REP. No. 964, 101st Cong., 2d Sess. 1152, reprinted in 1990 U.S.C.C.A.N. 2374, 2857. Describing the Senate amendment, it continues: “As does the House bill, the Senate amendment provides that the President may adjust the spending limits in the annual budget submission for . . . Presidentially-determined emergencies, and for limited defined special allowances.” Id. Of the conference agreement, the joint statement notes: “The conference agreement establishes the limits on discretionary spending by category, as proposed by the House and Senate . . .” Id. Under the heading of “II. ENFORCING PAY-AS-YOU-GO,” the joint statement notes with regard to the conference agreement: “The conference agreement includes a provision for emergency direct spending or receipts legislation, which would not be subject to the pay-as-you-go requirement.” Id. at 1154, 1990 U.S.C.C.A.N. at 2859. Other than the conference committee, no other committee reported the language that would become the Budget Enforcement Act.
had not yielded credible deficit reduction.\textsuperscript{29} He thus criticized, among other things, accounting for Operation Desert Shield "outside the spending limits, outside the deficit targets."\textsuperscript{30} He viewed this accounting as giving "completely a blank check for Operation Desert Shield."\textsuperscript{31}

Senator Ernest Hollings of South Carolina, a member and former Chairman of the Budget Committee, criticized, among other things, vesting the estimating power in the Director of the Office of Management and Budget.\textsuperscript{32} Senator Hollings took little comfort in the procedures by which the amendment "quote-unquote 'holds harmless'" Congress for the effects of spending beyond its control, believing instead that the Director of the Office of Management and Budget would "see to it that the Administration's pet projects are held harmless."\textsuperscript{33}

As the Chairman of the Appropriations Committee defended the amendment, Senator David Pryor of Arkansas asked about the intent of the exception for emergency Desert Shield costs. Senator Byrd replied that the negotiators did not know how much the operations in the Middle East would cost and how much the allies would contribute to defray the costs of the operation.\textsuperscript{34} He and Senator

\textsuperscript{29} Id.
\textsuperscript{30} Id., at S15,826.
\textsuperscript{31} Id.
\textsuperscript{32} See id. at S15,827.
\textsuperscript{33} Id.
\textsuperscript{34} The exchange among Senators Pryor, Sasser, and Byrd went as follows:

\textit{Mr. PRYOR.} On page 14, section (E), top of the page, this relates to Operation Desert Shield costs, costs meaning no incremental costs directly associated with increases in operations in the Middle East, and do not consider costs that would be experienced by the Department of Defense as part of its normal operations absent Operation Desert Shield.

Is there an interpretation of this that a layman like myself might understand?

\textit{Mr. BYRD.} Mr. President, the administration at the summit wanted to include Desert Shield in the regular appropriations process. And the question was how do we know how much Desert Shield will cost in fiscal year 1990. The answer was, well, we would predict that it would cost S15 billion.

My position throughout that conference was that whatever Desert Shield costs, it will be outside this appropriation, the regular process. It would not be charged against the defense allocation, and it will not be charged against the domestic discretionary; it would be done in a supplemental appropriation.

\textit{Mr. SASSER.} Will the Senator yield?

\textit{Mr. BYRD.} Yes.

\textit{Mr. SASSER.} The funding for Operation Desert Shield would be treated as an ordinary emergency supplemental appropriations bill.

\textit{Mr. PRYOR.} It would have to be appropriated by the House and Senate.

\textit{Mr. SASSER.} It would have to be appropriated. It would have to be an emergency, subject to hearings, and acted upon by the Appropriations Committee.

The distinguished chairman of the Appropriations Committee was seeking to protect the Senate and the Congress from having the administration come in here and ask for massive sums of additional defense money without proving this was indeed an emergency under the provisions of an emergency supplemental bill. There would be hearings. There would be offsets from other funds collected from Saudi Arabia, et cetera.

\textit{Mr. BYRD.} . . .

The position I took and the result of this agreement the way it is written is that the administration would have to come before the Appropriations Committee and request a supplemental appropriation for any amounts that result from Desert Shield.

I took the position that it ought to come by way of the appropriations process so that the Appropriations Committee can conduct hearings, receive testimony, and find
Jim Sasser of Tennessee, who as Chairman of the Budget Committee had been another key negotiator, explained that the exception did not absolve the administration from having to justify that that funding constituted an emergency requirement, as the Congress would still conduct hearings and take testimony.\textsuperscript{35}

Chairman Byrd explained the emergency provisions, citing natural disasters as examples:

In addition, the agreement will allow a mechanism for both the President and Congress to provide funding for unforeseen emergencies — earthquakes, hurricanes and so forth — without having such costs trigger a sequester. Last year we had two sets of disasters, hurricane Hugo and the California earthquake.

[The Office of Management and Budget] ruled that a portion of the appropriations that were made for these disasters was discretionary. For example, the $1 billion appropriation that was made to repair the bridges and highways that were destroyed in the earthquake was treated as discretionary spending. This $1 billion caused the Appropriations Committee to exceed its allocation, but we escaped a sequester because this was a disaster that occurred after the October 15 sequester date.

Under this agreement, disasters will be treated as mandatory spending and will not cause a sequester, no matter when they occur. And that might occur in my State, it may occur in your State or any State.\textsuperscript{36}

Senator Byrd then explained another motivation for counting the costs of Operation Desert Shield outside the caps: If the negotiators had included the costs in the caps, the negotiators would have had to set the defense cap at a higher amount, and that higher amount would have served as the baseline from which Congress would have to cut. Thus, accounting for Desert Shield outside of the caps would allow Congress to cut the defense budget more easily.\textsuperscript{37}

Senator Bennett Johnston, also a senior member of the Budget Committee, summed up the effect of the budget agreement in a colloquy with Chairman Byrd.\textsuperscript{38} The agreement, the Senators agreed, would “give us . . . first of all, budget peace and, second, budget certainty,” without forcing the Congress annually to adjust the underlying agreed-upon levels for “what is going to happen in the Middle East” or the economy.\textsuperscript{39}

The Senate went on to reject by a vote of 75 to 25 a procedural challenge that Senator Hollings made to the amendment.\textsuperscript{40} Thereafter, the Senate adopted the amendment by a voice vote.\textsuperscript{41}
II. THE BUDGET ENFORCEMENT ACT'S STATUTORY SCHEME

Unlike the 1987 and 1989 summit agreements, the 1990 budget summit agreement manifested itself not in a contract, but in a change of law, the Budget Enforcement Act. The Budget Enforcement Act significantly revised Gramm-Rudman-Hollings and also changed the Congressional Budget Act. As discussed above, prior to 1990, Gramm-Rudman-Hollings forced the President and Congress to reduce the deficit to meet a set of fixed deficit targets. The Budget Enforcement Act revised Gramm-Rudman-Hollings so that, through fiscal year 1993, the law enforces the deficit reduction path on which the President and Congress agreed. Thereafter, for fiscal years 1994 and 1995, Gramm-Rudman-Hollings may either continue as modified or revert to a system not unlike the pre-1990 law, at the option of the President.

Through fiscal year 1993, the Budget Enforcement Act replaced deficit targets on center stage with two new enforcement mechanisms. For that period, the law divides the budget process into two parts: one for appropriations and another for entitlements and taxes. All taxing and spending legislation (other than laws for Social Security and the Postal Service, which Congress has taken off budget) falls into one of the two parts. A series of caps govern appropriations. The new law governs entitlements and taxes through a system it calls “enforcing pay-as-you-go.”

A. Appropriations Caps

The Budget Enforcement Act amended section 601 of the Congressional Budget Act to create a series of caps to enforce the agreement to reduce

41. See id. at S15,840.
43. See supra text accompanying notes 4-6.
45. The conventional wisdom in Washington holds that the President and the Congress will choose to renegotiate the budget agreement in early 1993, after the Presidential elections. For example, on July 17, 1991, the Director of the Office of Management and Budget said before the House Budget Committee:

I think we should, at an early stage in '93, seek to extend the [Budget Enforcement Act]. It may be that we can refine it. I think we have learned some things along the way and I would have some suggestions about how to refine it but the basic structure should be extended because as you know, it lapses for '95. One of its virtues is it allows you to plan for the longer term, with some predictable levels, at least in the discretionary area. House Mid-Session Hearings, supra note 24.
appropriations. Section 601 sets forth caps on both budget authority and outlays. For fiscal years 1991, 1992, and 1993, the law sets forth caps on three categories: defense, international, and domestic. The law sets forth caps on only the total of all appropriations for 1994 and 1995. Whereas in prior years, the congressional budget resolution gave the Appropriations Committee an overall allocation of budget authority and outlays, for fiscal years 1992 and 1993, six additional numbers (budget authority and outlays for each of three caps) constrain appropriations.

If Congress and the President enact appropriations that exceed any of these six caps, section 251 of Gramm-Rudman-Hollings requires the President to order a sequester in only the category that the appropriations breached. The Office of Management and Budget must estimate the cost of any appropriations bill within five days after its enactment. This estimate controls the process. The sequester’s timing depends on when the spending occurs. For regular appropriations bills enacted before Congress adjourns to end a session, the sequester occurs fifteen days after the end of session. For spring supplemental appropriations bills (that is, any enacted after starting a new session but before July 1), the sequester occurs fifteen days after enactment of the bill. Finally, for supplemental appropriations enacted after June 30, the law lowers the target for the next year. Consequently, either appropriations bills for the next fiscal year spend at the lower level, or under the first rule a sequester occurs fifteen days after the end of session.

Points of order also enforce the caps in budget resolutions and appropriations bills in the Senate. These points of order require sixty Senators to waive. The law provides for several adjustments to the caps. Some adjustments simply provide technical consistency, such as those adjusting for changes in concepts and definitions, changes in inflation, and credit re-estimates. Some
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adjustments reflect policy decisions made at the summit, including adjusting for Internal Revenue Service enforcement initiatives,\textsuperscript{65} Egyptian and Polish debt forgiveness,\textsuperscript{66} and International Monetary Fund special drawing rights.\textsuperscript{67} Some adjustments make provision for estimating differences between the Office of Management and Budget and the Congressional Budget Office\textsuperscript{68} or simply allow for more spending than the caps appear to set forth;\textsuperscript{69} the law calls these "allowances." Finally, as discussed at length below,\textsuperscript{70} the caps adjust for what the President and the Congress both agree to designate as "emergencies."\textsuperscript{71}

B. The Pay-as-You-Go Process

The new budget law calls the system governing entitlements "enforcing pay-as-you-go."\textsuperscript{72} The basic rule governing the pay-as-you-go system requires Congress and the President to pay for all entitlement spending increases and tax cuts with offsetting entitlement spending cuts or tax increases for the same fiscal year.

The new law requires the President to order a sequester in certain entitlements at the end of each session of Congress in which changes in law increase entitlement spending or cut taxes without paying for them.\textsuperscript{73} Changes in entitlement spending or tax receipts brought on by causes other than legislation — such as a worsening economy — do not count under the pay-as-you-go system.\textsuperscript{74} The sequester threatens the same entitlement programs that the old Gramm-Rudman-Hollings law put in peril, most significantly Medicare and farm price supports.\textsuperscript{75}

In addition to this constraint that the new law requires the President to enforce, the law also calls on Congress to constrain spending through points of order that the Senate can waive only with the affirmative vote of sixty Senators.\textsuperscript{76} In the pay-as-you-go system, these points of order enforce allocations made by budget resolutions. The budget resolution divides all spending among committees in allocations some call "crosswalks" or "302(a) allocations."\textsuperscript{77} If a bill spends more in a committee's jurisdiction (together with all other laws passed to date) than the budget resolution allocated to that committee, then any Senator may raise a point of order requiring sixty votes to waive.\textsuperscript{78} The point of order enforcing committee allocations applies to the first year covered by a budget.

\textsuperscript{65} See id. § 251(b)(2)(A) (codified as amended at 2 U.S.C. § 901(b)(2)(A) (Supp. II 1990)).
\textsuperscript{67} See id. § 251(b)(2)(C) (codified as amended at 2 U.S.C. § 901(b)(2)(C) (Supp. II 1990)).
\textsuperscript{68} See id. § 251(b)(2)(F) (codified as amended at 2 U.S.C. § 901(b)(2)(F) (Supp. II 1990)).
\textsuperscript{70} See infra notes 84-114 and accompanying text.
\textsuperscript{72} See id. § 252 (codified as amended at 2 U.S.C. § 902 (Supp. II 1990)).
\textsuperscript{73} See id. § 252(a) (codified as amended at 2 U.S.C. § 902(a) (Supp. II 1990)).
\textsuperscript{74} See id. § 252(b) 2 U.S.C. § 902(b) (Supp. II 1990).
\textsuperscript{75} STAFF OF HOUSE COMM. ON WAYS AND MEANS, 102D CONG., 1ST SESS., OVERVIEW OF ENTITLEMENT PROGRAMS: 1991 GREEN BOOK 1592-93 (Comm. Print No. 9, 1991).
\textsuperscript{76} See Congressional Budget Act §§ 302, 602, 904(c) (codified as amended at U.S.C. §§ 633, 665a (Supp. II 1990)).
\textsuperscript{77} See id. §§ 302(a), 602(a) (codified as amended at 2 U.S.C. §§ 633(a), 665a(a) (Supp. II 1990)).
\textsuperscript{78} See id. §§ 302(f), 602(c), 904(c) (codified as amended at 2 U.S.C. §§ 633(f), 665a(c) (Supp. II 1990)).
resolution and to the five-year totals for each committee in the budget resolution. 79

C. Deficit Targets

As originally enacted in 1985, Gramm-Rudman-Hollings set forth a series of fixed deficit targets. 80 The law then created a system of sequesters to reduce the deficit projected at the beginning of a fiscal year to the amount of the fixed targets. As noted above, the Budget Enforcement Act revised these targets, and then, through a series of economic and technical adjustments, 81 makes these revised targets all but irrelevant to the budget process, at least for fiscal years through 1993.

Their relevance could be restored, however, if the President chooses to discontinue the regime of economic and technical adjustments. If the President makes that choice (which the law allows the President who holds office on the day after the inauguration of the President elected in 1992), then the law will impose a third layer of sequesters on top of the sequesters for appropriations and pay-as-you-go legislation. 82 If the President chooses to restore this layer, then section 253 of the amended Gramm-Rudman-Hollings will, in all likelihood, require further deficit reduction after Congress and the President have complied with the appropriations caps and the requirement that direct spending and receipts legislation not worsen the deficit. As discussed below, 83 the emergency exception continues to apply to the deficit targets. Consequently, emergency spending may take on even greater significance if the President chooses to revert to the regime of fixed deficit targets.

D. Emergencies Under the New Law

1. The General Rule

Sections 251(b)(2)(D) and 252(e) of the amended Gramm-Rudman-Hollings provide for designation of emergencies. Section 251 provides the rule for appropriations acts, while section 252 provides the rule for pay-as-you-go legislation. Both sections provide essentially the same rule. The law provides that if the President designates a provision as an emergency requirement, and the Congress also so designates in law, then the spending will not count under the Gramm-Rudman-Hollings system of sequesters.

For appropriations acts, section 251(b)(2) creates the exception for emergencies by requiring the Director of the Office of Management and Budget to calculate adjustments to the caps in the Director’s sequestration reports. The President must then include these adjustments in the revised caps in the budgets

79. See id. §§ 602(c), 606(a) (codified as amended 2 U.S.C. §§ 665a(c), 665e(a) (Supp. II 1990)).
81. See Gramm-Rudman-Hollings § 253(g) (codified as amended at 2 U.S.C. § 903(g) (Supp. II 1990)).
82. See id. §§ 253(g)(1)(B), (C) & (D), 254(a) (codified as amended at 2 U.S.C. §§ 903(g)(1)(B), (C) & (D), 904(a) (Supp. II 1990)).
83. See infra notes 86-87 and accompanying text.
that the President submits to Congress.\footnote{84} For direct spending law, section 252(b) instructs the Director of the Office of Management and Budget to calculate the amount of any net deficit increase caused by all direct spending and receipts legislation, which the law then defines to exclude emergency spending.\footnote{85}

Even if the President chooses to restore the system of fixed deficit targets for fiscal years 1994 and 1995, emergencies will still not contribute to sequestration. Section 253(b)(2) defines the excess deficit, that is, the amount that the President must sequester, to exclude "the amounts for that year designated as emergency direct spending or receipts legislation under section 252(e)."\footnote{86} Section 253(g)(1)(C) requires that, in the event that the President chooses to restore the system of fixed deficit targets, the deficit targets for each year nonetheless adjust by the amount of the adjustments to discretionary spending limits under section 251(b), which includes the adjustment for emergencies.\footnote{87}

Section 251(b)(2)(D)(i) sets forth the general rule for designating emergencies in appropriations law:

\footnote{84} Section 251(b)(2) provides in part:

\begin{quote}
(b) ADJUSTMENTS TO DISCRETIONARY SPENDING LIMITS. — . . . .
\end{quote}

\footnote{85} Section 252(b) provides in part:

\begin{quote}
(b) SEQUESTRATION; LOOK-BACK. — Within 15 calendar days after Congress adjourns to end a session . . . ., there shall be a sequestration to offset the amount of any net deficit increase in that fiscal year and the prior fiscal year caused by all direct spending and receipts legislation enacted after the date of enactment of this section (after adjusting for any prior sequestration as provided by paragraph (2)). OMB shall calculate the amount of deficit increase, if any, in those fiscal years by adding —

(1) all applicable estimates of direct spending and receipts legislation transmitted under subsection (d) applicable to those fiscal years, other than any amounts included in such estimates resulting from —

(B) emergency provisions as designated under subsection (e) . . . .
\end{quote}

\footnote{86} Section 253(b) defines "excess deficit" as follows:

\begin{quote}
(b) EXCESS DEFICIT; MARGIN. — The excess deficit is, if greater than zero, the estimated deficit for the budget year, minus —

(1) the maximum deficit amount for that year;

(2) the amounts for that year designated as emergency direct spending or receipts legislation under section 252(e) . . . .
\end{quote}

\footnote{87} Section 253(g)(1)(C) provides:

\begin{quote}
(C) When the budget for fiscal year 1994 or 1995 is submitted and the sequestration reports for those years under section 254 are made (as applicable), if the President does not choose to make the adjustments set forth in subparagraph (B), the maximum deficit amount for that fiscal year shall be adjusted by the amount of the adjustment to discretionary spending limits first applicable for that year (if any) under section 251(b).
\end{quote}

\footnote{2 U.S.C. § 903(g)(1)(C) (Supp. II 1990).}
(D) EMERGENCY APPROPRIATIONS. — (i) If, for fiscal year 1991, 1992, 1993, 1994, or 1995, appropriations for discretionary accounts are enacted that the President designates as emergency requirements and that the Congress so designates in statute, the adjustment shall be the total of such appropriations in discretionary accounts designated as emergency requirements and the outlays flowing in all years from such appropriations.  

Section 252(e) sets forth parallel language for designating emergencies in direct spending and receipts legislation:

(e) EMERGENCY LEGISLATION. — If, for fiscal year 1991, 1992, 1993, 1994, or 1995, a provision of direct spending or receipts legislation is enacted that the President designates as an emergency requirement and that the Congress so designates in statute, the amounts of new budget authority, outlays, and receipts in all fiscal years through 1995 resulting from that provision shall be designated as an emergency requirement in the reports required under subsection (d).  

Note that in each case, the President and Congress designate as emergencies provisions of law, rather than all of a law. For appropriations acts, the President and Congress designate “appropriations,” that is, specific provisions of law making appropriations. For direct spending and receipts legislation, the President and Congress designate “provisions.” The President and Congress may thus designate some or all of the provisions in a bill that contains several provisions.  

Note that while the 1987 and 1989 summit agreements reserved to Congress the option to enact supplemental appropriations acts for “dire emergencies,” the new law allows such emergency legislation only if the President and the Congress agree outside of the normal legislative and constitutional process. Thus where the prior summit agreements reserved powers to Congress notwithstanding the contract into which Congress entered, the new law grants power to the President to limit the cases in which Congress uses its power.  

The language of sections 251(b)(2)(D)(i) and 252(e) link the President and the Congress by a simple conjunction. The law thus sets forth a requirement that both act before a provision becomes an emergency requirement. The law says nothing about the order of the action. The President need not designate the emergency first, but may follow Congress’s action.

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91. See id. § 252(e); 2 U.S.C. § 902(e) (Supp. II 1990).
93. On occasion, Members of Congress have requested that the President designate items as emergency requirements. An early example, made by the Majority Leader, the Chairman of the Budget Committee and the Chairman of the Joint Economic Committee in a letter to the President, called for designating unemployment insurance expenses as emergency requirements. Letter from Majority Leader George J. Mitchell, Chairman Jim Sasser, and Chairman Paul S. Sarbanes to President George Bush (Feb. 25, 1991). For text from the letter, see infra note 185.
The law requires Congress to designate "in statute." The law does not, however, require the designation to appear in the same statute as the spending or receipts provision itself. Congress could set forth its designation in a law enacted prior to the spending provision, for example in an authorization bill.

The law does not set forth any further procedure for how the President may designate an emergency. The President may thus designate provisions as emergency requirements in any manner the President chooses. The President may send a written letter or simply announce the decision orally before signing the bill into law.94

The President should choose whether or not to designate on or before the date of enactment. If the President has not made the choice clear by that point, the President creates unnecessary ambiguity in enforcement of and accounting for the law. In any case, the President must decide by the fifth day after enactment, when the President's Office of Management and Budget must issue a cost estimate for the newly enacted law in which the Director of the Office of Management and Budget will either have to count the provision in question or not.95

2. The Effect of the President's Signature

In the procedure envisioned by the law, the President may choose to sign the legislation without designating provisions as emergency requirements. The provisions would then count fully under the Gramm-Rudman-Hollings scheme against the caps or the pay-as-you-go requirement of deficit neutrality or the deficit targets.

Note, however, that changes in drafting can result in differing effects from the President's signature. One can distinguish three cases.

First, Congress may write legislation stating: "Pursuant to section 251(b)(2)(D) of the Balanced Budget and Emergency Deficit Control Act of 1985, Congress designates the spending provided in section 1 as emergency requirements." This language makes Congress's intent plain. Congress would be playing its part in the process envisioned by section 251(b)(2)(D), inviting the President to designate spending as an emergency. The President could sign such legislation and simultaneously announce the choice not to designate such spending as an emergency requirement.

Second, Congress could write legislation stating: "Notwithstanding section 251(b)(2)(D) of the Balanced Budget and Emergency Deficit Control Act of 1985, the spending provided in section 1 shall be considered emergency requirements within the meaning of that Act." Once again, this legislation makes Congress's intent plain. Congress would be legislating later-enacted law to supersede the provisions in the Budget Enforcement Act granting the President authority to designate spending as an emergency requirement. In this case, the President's act of signing the legislation would end the discussion, and the later-enacted provision

94. Note that the law requires the Congress to designate "in statute," but requires the President merely to designate. See id. §§ 251(b)(2)(D)(i) & 252(c); 2 U.S.C. §§ 901(b)(2)(D)(i) & 902(e) (Supp. II 1990). The Congress thus demonstrated its ability to constrain the manner of designating if it so desired.

95. See id. §§ 251(a)(7) & 252(d); 2 U.S.C. §§ 901(a)(7) & 902(d) (Supp. II 1990).
directing the President to consider the section an emergency requirement would control. It would not matter what the President said in the signing statement. The President would have no legal basis to disregard the later-enacted statute in favor of the Budget Enforcement Act provisions as originally drafted.

Congressman Gradison, the Ranking Minority Member of the House Budget Committee, asked the Director of the Office of Management and Budget about a subset of this second case, where the language of would deem the President’s signature of a bill to constitute his agreement that certain items within that bill constituted emergencies.96 One can imagine a variety of wordings, for example: “Upon signature of this bill, the President will be deemed to have designated sections X, Y, and Z as emergency requirements within the meaning of section 251(b)(2)(D) of the Balanced Budget and Emergency Deficit Control Act of 1985.” The Director expressed his belief that this language allowed the President some flexibility:

[T]he Congress cannot deem for the President, and . . . if the President took such a law as you describe hypothetically, signed it, and in signing it, said that he was not deeming it to be an emergency or any subpiece of it to be an emergency, then with respect to that subpiece, it would not at that point be jointly declared to be an emergency.97

The Director’s position is curious. It seems to rely on a grant of power from Congress to the President made in the prior-enacted Budget Enforcement Act to

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96. Congressman Gradison and Director Darman had the following exchange:

REP. GRADISON: Mr. Darman, one of the ideas that’s cropped up in some of the appropriations bills has been a provision — I don’t have a copy of it in front of me, but the essence of it is that the signature of a given bill by the president would be deemed to be his agreement that certain items within that bill are emergencies. I don’t believe any of these has reached his desk yet. Frankly, I hope none does. But I wonder if you could examine that principle or have any legal opinions on whether such action would override the provisions of the Budget Enforcement Act.

DARMAN: I do have opinions and I will state them. I believe that, and I think we almost all agree that it’s clear, including most of the appropriators, that the Budget Enforcement Act requires that both the President and the Congress agree that something is an emergency in order for it to be subject to the emergency exemption.

So now the question that you put arises: what happens if a law passes in which the Congress says that they deem this to be an emergency and by the act of signing, the president is deeming it to be an emergency? You’re correct, I believe, that we have not had any such law. We’ve had some try to work their way forward. Unfortunately, they’ve been stopped along the way.

We would take the position that the Congress cannot deem for the President, and that if the President took such a law as you describe hypothetically, signed it, and in signing it, said that he was not deeming it to be an emergency or any subpiece of it to be an emergency, then with respect to that subpiece, it would not at that point be jointly declared to be an emergency.

I think that would then come for legal challenge. I think it creates an undesirable mess, conflict that we should well avoid, and that we ought not to — I mean, it’s being too cute. We’re going to end up — somebody’s going to outsmart themselves and the system in the process with that.

So I think we’re much better advised to try to call them straight. If the Congress says it’s an emergency, we should say, and we’re prepared to say, in advance, do we agree or not agree. And if we disagree, we disagree. If we agree, it’s an emergency subject to the exemption. That’s I think the way the system was intended to work and that’s what we should make it do.

House Mid-Session Hearings, supra note 24.

97. Id.
overrule the later-enacted law deeming an item an emergency. After all, in the
hypothetical later bill, Congress does not call for the President to exercise
judgment. Rather, the hypothetical bill directs in law that the President must
treat certain provisions as if the President had exercised judgment under another
statute.

Consider the similar case where Congress grants the President authority to
issue a rule governing a certain subject. The President then exercises judgment
under that law and issues the rule. The Congress then passes a law stating that
the President shall be deemed not to have promulgated the rule. The Director's
position would lead to the absurd conclusion that the President could sign the
second law and then choose not to enforce it because an earlier law had once
given him power to issue the rule.

Third. The third type of emergency language would ambiguously state
congressional intent: Congress could write legislation stating: "Any spending
provided in section 1 is an emergency requirement." Here, Congress has not
made clear its intent. Is Congress merely exercising its option under section
251(b)(2)(D) of Gramm-Rudman-Hollings to designate, awaiting the President’s
designation? Alternatively, is Congress thereby legislating later-enacted law that
intends to wrest the designation of emergency away from the President? The
President should seek to give effect to Congress’s intent, but the law gives the
President room to find that intent where the President wants.\(^9\) The prudent
drafter should avoid the ambiguity of this third option and opt for one of the
two others.

Drafting may add yet another wrinkle to the effect of the President’s
signature. The legislation may make funding for the provision in question
contingent on the President’s designation of the provision as an emergency
requirement.\(^9\) In other words, the legislation may state that the provision will
take effect only if the President designates it as an emergency requirement. If
Congress uses such language, the Budget Committees and the Office of Manage-

\(^{98}\) Indeed, the Director of the Office of Management and Budget appears willing to disregard
congressional intent and act as though Congress intended the result granting the President the widest
discretion.

\(^{99}\) For example:

SEC. 10. EMERGENCY DESIGNATION.
   (a) EMERGENCY DESIGNATION. — Pursuant to sections 251(b)(2)(D)(i) and 252(e)
of the Balanced Budget and Emergency Deficit Control Act of 1985, the Congress
hereby designates all direct spending amounts provided by this Act (for all fiscal years)
and all appropriations authorized by this Act (for all fiscal years) as emergency
requirements within the meaning of part C of the Balanced Budget and Emergency
   (b) EFFECTIVENESS. — Notwithstanding any other provision of law or any other
provision of this Act, none of the preceding sections of this Act shall take effect unless,
not later than the date of the enactment of this Act, the President submits to the
Congress a written designation of all direct spending amounts provided by this Act (for
tax fiscal years) and all appropriations authorized by this Act (for all fiscal years) as
emergency requirements within the meaning of part C of the Balanced Budget and

S. 1554, 102d Cong., 1st Sess., 137 CONG. REC. S10,781, S10,784 (daily ed. July 24, 1991); Emergency
infra note 216.
ment and Budget cannot score the provision as costing anything, for either the President will designate it as an emergency (and it will thus not count by virtue of the law regarding emergency provisions), or the President will not designate it as an emergency (and it will not take effect at all by virtue of the contingency language).

3. Congressional Enforcement

The amended Congressional Budget Act enforces budget resolution allocations, the appropriations caps, and deficit targets by allowing Members of Congress to raise points of order against legislation that violates the limits. In the Senate, waiving these points of order often requires a supermajority. For the purposes of congressional enforcement, each House of Congress relies on estimates made by its Budget Committee. When should the Budget Committee count legislation that purports to fall within the emergency exception to the caps or the pay-as-you-go requirement?

The Congressional Budget Act provides that the Budget Committees shall not count these emergency provisions in its determinations under Congressional Budget Act points of order. During floor consideration, how can the Budget Committee identify these provisions? Budget Committee staff should review legislation on a case-by-case basis and assess the probability that the President and Congress will designate provisions as emergencies.

In the language of the law, section 251(b)(2)(D) of Gramm-Rudman-Hollings excepts from the appropriations caps "appropriations for discretionary accounts . . . enacted that the President designates as emergency requirements and that the Congress so designates in statute." Similarly, section 252(e) of Gramm-Rudman-Hollings excepts from the pay-as-you-go scheme "a provision of direct spending or receipts legislation . . . enacted that the President designates as an emergency requirement and that the Congress so designates in statute." Section 606(d)(2) of the Congressional Budget Act provides that "[f]or purposes of congressional consideration of provisions described in [these sections on emergencies], determinations under sections [of the Congressional Budget Act providing points of order] shall not take into account any new budget authority, new entitlement authority, outlays, receipts, or deficit effects in any fiscal year of those provisions." Several options (most unsatisfactory) exist for rules to guide the Budget Committees:

101. See id. § 904(c).
102. See id. §§ 201(g), 302(g), 310(d)(4), 311(c), 313(c); Gramm-Rudman-Hollings § 258B(h)(4); 2 U.S.C. §§ 602(g), 633(g), 641(d)(4), 642(c), 644(e), 907c(h)(4) (1988 & Supp. II 1990).
1. Wait for designation both by the Congress by statute and by the President. This option would require both branches of government to take action before the Budget Committee applied the exception. For example, the Congress could enact an authorization that designates the emergency status of appropriations. This would severely limit the number of emergencies, and would create the ungainly requirement that authorizing committees enact two pieces of legislation to enact a pay-as-you-go emergency. This option would merit no attention if it were not the treatment resulting from a literal reading of the new law. It does not, however, reflect the intent of the drafters.

2. Wait for the President to designate formally. This option would require the President to send Congress a letter or otherwise formally announce designation. The Budget Committees would then presume that the Congress would agree that the provision constituted an emergency (a presumption well grounded in experience). This option would give the President the whip hand and would severely limit emergencies.

3. Presume to be emergencies any provisions so designated in the language of the bill, unless the President has not explicitly rejected the designation. This option would change what happens when the President's position is unclear. If the language of the statute purported to create an emergency, the Budget Committees would not score the provision unless the President had made clear that he or she would not designate the provision as an emergency.

4. Presume to be emergencies any provisions so designated in the language of the bill. This option has the virtue of simplicity. The Budget Committees used this approach in applying the prohibition on transfers of spending from one year to another in section 202 of the 1987 revision of Gramm-Rudman-Hollings. As Members interested in spending would soon learn the magic words that exempted their bill or amendment from the budget process, however, this option would soon render the Budget Committees bystanders to the process.

5. Exercise the Committee's best judgment as to the probability that the President will designate the provision to be an emergency. This option reserves to the Budget Committees the most discretion. It also represents the procedure most closely tailored to the intent of the new law. One cannot easily articulate it as a neutral principle, however, and it may leave the Budget Committees open to accusations of practicing situational ethics.

4. Desert Shield Costs

The previous section discusses the general rule. In addition, the statute sets forth a particular case of emergency treatment that requires special attention. Section 251(b)(2)(D)(ii) defines the “costs for operation Desert Shield” as emergency requirements. Thus, for these costs, the President and the Congress need not formally designate the provisions as emergency requirements, as the Gramm-Rudman-Hollings law has already done so.

The statute provides:

(ii) The costs for operation Desert Shield are to be treated as emergency funding requirements not subject to the defense spending limits. Funding for Desert Shield will be provided through the normal legislative process. Desert Shield costs should be accommodated through Allied burden-sharing, subsequent appropriation Acts, and if the President so chooses, through offsets within other defense accounts. Emergency Desert Shield costs mean those incremental costs associated with the increase in operations in the Middle East and do not include costs that would be experienced by the Department of Defense as part of its normal operations absent Operation Desert Shield.\(^{108}\)

The last sentence of this subparagraph defines "Desert Shield costs." The second sentence makes clear that Desert Shield costs come out of defense accounts, as the President may choose to offset them with cuts in "other defense accounts."\(^{109}\) One could read the last sentence to imply that Desert Shield costs are a subset of costs "experienced by the Department of Defense," although that has not been the practice.\(^{110}\) The statutory language thus does not appear to anticipate that expenditures for veterans' benefits or foreign aid related to Operation Desert Shield would fall within the definition of Desert Shield costs.\(^{111}\)

109. Id. (emphasis added).
110. See, e.g., infra note 156 and accompanying text.
111. On February 5, 1991, the Director of the Office of Management and Budget sent the following letter touching on this point to the Majority Leader, the Republican Leader, and the Chairmen and Ranking Republican Members of the Appropriations, Armed Services, and Budget Committees:

Last week, the Senate Armed Services committee marked up several spending bills related to military personnel. Review of that mark-up suggests that some may not correctly understand the "emergency" and "Desert Shield" exemptions enacted last year in the Budget Enforcement Act of 1990 (BEA). I thought it would be useful to clarify the terms and implications of these exemptions, as we understand them.

**Exemption for Desert Shield**

The BEA contains a provision exempting the costs of Operation Desert Shield from the defense discretionary spending cap. That provision (section 251(b)(2)(D)(ii)) states, in relevant part:

"..."

Only the "incremental costs" of Desert Shield qualify under this exemption. Thus, for example, S. 232, which increases life insurance coverage for everyone in the service — regardless of any connection with or needs of Desert Shield — would not qualify as incremental costs of Operation Desert Shield.


Similarly, on March 5, 1991, the Director of the Office of Management and Budget wrote to the Chairman of the House Appropriations Committee regarding the supplemental appropriations measures associated with Operation Desert Shield (H.R. 1281 and H.R. 1282):

Although we are, of course, deeply appreciative of the Israeli role and responsibility in the conduct of the War, such an amendment could present two serious problems:

First, we could not justify the expenditure if it were at or above the level estimated by the Israeli government in its recent presentation to us — $910 million. Applying the same definition of "incremental costs" as used in the development of the U.S. defense request, we could justify only a substantially smaller amount, and have so indicated to the Israeli government. Even so, this category of cost would not seem to qualify for the "Desert Shield exemption," which applies only to accounts appropriated for U.S. defense (function 050).

Second, for whatever amount might be justified, we would have to fit it appropriately within the framework either fitting it within the existing budgetary caps, or offsetting it, or determining that it were subject to the "emergency" exemption — and doing so in a way that neither set an adverse precedent, nor
As the statute places the Desert Shield provision as part of the emergency exception to the appropriations caps, it does not apply to direct spending or receipts legislation.112 How can one tell if a provision creates Desert Shield costs? One could argue that simply designating them as such in statute would bind the President upon signature of the bill into law.113 Once again, drafting should make a difference. Statutory language stating that "Notwithstanding the definition of section 251(b)(2)(D)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985, the spending provided in section 1 shall be considered Desert Shield costs within the meaning of that Act," should have the same effect as if the statute directed the President not to count the spending. If, however, the statute merely states that "Any spending provided in section 1 is a cost of Desert Shield," the language leaves the President room to interpret the intent of Congress as merely rationalizing the expenditure, rather than directing the President not to count the expenditure. A charitable reading of the statute would yield the result of not counting the provision, but the Director of the Office of Management and Budget has made clear his position to the contrary.114 Once again, the prudent drafter should avoid the ambiguity of this option if in doubt as to whether the President will view an item as a Desert Shield cost.

Section 251(b)(2)(D)(ii) provides a special application of the emergency rule in section 251(b)(2)(D)(i). Because section 251(b)(2)(D)(ii) states that "[t]he costs for operation Desert Shield are . . . not subject to the defense spending limits," one could read the statute to direct that Desert Shield costs result in no adjustment to the caps at all. The better reading, however, would be to place them in the statutory scheme of which they are a part. Section 251(b)(2)(D)(ii) also states that "[t]he costs for operation Desert Shield are to be treated as emergency funding requirements." The drafters of the Budget Enforcement Act incorporated the Desert Shield provisions into the emergency paragraph after first considering.

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112. The Director's February 5 letter also addressed this point:

Another limitation of the Desert Shield exemption from the caps is that it only applies to discretionary spending, not to direct or "mandatory" spending. Because of this limitation, S. 160, for example, would not qualify for the Desert Shield exemption. S. 160 would extend the period of unemployment compensation for separated military personnel. Expansion of unemployment benefits increases mandatory spending, not discretionary spending. (And, consistent with the previous point, even if mandatory programs were exempt — which they are not — a general increase in unemployment insurance would not qualify for the Desert Shield exemption because its focus would be far broader than that necessary to qualify as incrementally related to Desert Shield.)


113. The drafters of S. 160, referred to by the Director of the Office of Management and Budget, supra notes 111 & 112, had this view.

114. See supra note 112.
a separate paragraph. They thus meant to include its treatment under the umbrella of treatment for all emergencies. Thus, the Office of Management and Budget should treat them as adjustments. The Office of Management and Budget has appeared to take both positions at different times, but appears to have settled on the correct position.

III. DEFINING EMERGENCIES

One might translate the statutory definition of a budget emergency as whatever Congress and the President agree is an emergency. This definition, however, gives participants in the budget process no guidance. The President should give the statute and its intent full meaning when executing the law. Until the parties dissolve the relationship they entered into in the budget summit, both the President and the Congress should abide by the spirit of their contract with each other. Both should attempt to give the law meaning rather than merely test the limits of their power under it. To give effect to the spirit and intent of the statute, the President and the Congress should seek to define “emergency” consistent with its plain meaning, the statutory scheme, the legislative history, and precedent under the Budget Enforcement Act.

A. Dictionary Definitions

Dictionary definitions can furnish a starting point for understanding the intent of Congress in enacting the emergency provisions of the Budget Enforcement Act. Black's Law Dictionary defines “emergency” in six alternatives involving the pressure of time or surprise: “A sudden unexpected happening; an unforeseen occurrence or condition; perplexing contingency or complication of circumstances; a sudden or unexpected occasion for action; exigency; pressing necessity. Emergency is an unforeseen combination of circumstances that calls for immediate action without time for full deliberation.”

Black's cites a case117 that quotes the unabridged Webster's Third New International Dictionary. That dictionary, in relevant part, defines “emergency” as:

1: an unforeseen combination of circumstances or the resulting state that calls for immediate action <they were far from help when the [emergency] overtook them>: as a: a pressing need: EXIGENCE <a state of [emergency] existed during which any help was acceptable>: . . . c: a usu[ally] distressing event or condition that can often be anticipated or prepared for but seldom exactly foreseen <wait until the [emergency] is over, prices will go down then>: <an [emergency] water supply>: <[emergency] docking facilities>: <[emergency] crews working to clear the roads>118

118. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 741 (1986).
These and other definitions focus on either the sudden, unforeseen nature of the contingency or the urgent nature of the need in terms of time.  

B. The Statutory Scheme

Although the statute does not provide a definition of “emergency” as such, it does supply two means of uncovering meaning. First, it provides an example of an emergency in Desert Shield costs, which it does define. Second, it provides context that helps the reader to understand the motivation for including the emergency exception.

1. Emergency Desert Shield Costs

The statute itself defines the costs of Desert Shield as emergency requirements. The choice of this one emergency can shed some light on what constitutes an emergency. Plainly, a state of war would constitute an emergency. Furthermore, as the drafters of the Budget Enforcement Act designated Operation Desert Shield as an emergency before hostilities actually broke out, the drafters also indicated that national defense imperatives short of all-out war also rise to the level of an emergency.  

As noted above, the law defines “Emergency Desert Shield costs” as “those incremental costs associated with the increase in operations in the Middle East and . . . not . . . costs that would be experienced by the Department of Defense as part of its normal operations absent Operation Desert Shield.” This definition instructs that all emergency requirements must be increments to normal operations absent the emergency.

2. Statutory Context

The statutory context also guides discovery of the definition of “emergency.” The emergency exception provides only one of many exceptions designed to hold the Government harmless for events beyond its control. Notably, the law requires the President to adjust the deficit targets for up-to-date reestimates of economic


120. On January 16, 1991, the Defense Department transformed Operation Desert Shield into Operation Desert Storm when the forces representing the coalition of nations opposed to the Iraqi invasion of Kuwait began hostilities with Iraq. No serious question exists among participants in the budget process as to whether the exception for Desert Shield costs also applies to Desert Storm costs. The renaming of the operation has spawned an awkward progeny of terms involving parentheses and slashes, such as “[O]peration Desert Shield (including Operation Desert Storm)” (see, e.g., Pub. L. No. 102-28, 105 Stat. 161, 161 (1991)), “Operation Desert Shield/Desert Storm” (see, e.g., id.), and “Operation Desert Shield/Storm” (see, e.g., S. Rep. No. 23, 102d Cong., 1st Sess. 1 (1991)). (What this last appellation gains in brevity, it loses in awkwardness, evoking images of a rain of armor among the dunes.) In this article, references to Operation Desert Shield also refer to its successor Operation.

and technical assumptions\textsuperscript{122} and to adjust the discretionary spending caps for changes in the rate of inflation from that foreseen at the drafting of the Budget Enforcement Act.\textsuperscript{123} Along the same lines, the law provides an opportunity to suspend much of the enforcement of the system in the event of war or low economic growth.\textsuperscript{124}

Each of these provisions involves a logic similar to that for the emergency exception: The law holds participants in the budget process responsible for the changes to the system that they create, but holds them harmless for larger forces such as war and recession beyond their control. Indeed, had the Congress chosen to declare war on Iraq upon the initiation of hostilities under Operation Desert Storm, it would have triggered both the emergency Desert Shield costs exception for the costs of the war as well as the suspension of the enforcement procedures during the pendency of the war.\textsuperscript{125}

Thus the statutory context can provide a means of limiting applications of the emergency exception to cases beyond the Government’s control. For example, the Senate Majority Leader, the Chairman of the Senate Budget Committee, and the Chairman of the Joint Economic Committee have argued along these lines when urging that the President designate spending on unemployment insurance administrative costs as emergency requirements.\textsuperscript{126} In their letter, they stated the interpretation that “[t]he Budget Enforcement Act of 1990 reformulated the Gramm-Rudman-Hollings law to prohibit expansion of the structural deficit” and that “the new law unlinked the requirement for deficit reduction from the changes in the deficit caused by the economic cycle.”\textsuperscript{127} Thus, they argued, the misfortune caused by exigent economic circumstances falls within the understanding of emergency requirements created by the statutory scheme.\textsuperscript{128} Note, as discussed below, that the President did designate increased funding for unemployment insurance administrative expenses as emergency requirements.\textsuperscript{129}

C. Legislative History

Participants in the budget process should seek to interpret the intent of Congress consistent with the legislative history discussed above.\textsuperscript{130} As noted above, during debate on the Budget Enforcement Act, Chairman Byrd cited the examples of “earthquakes, hurricanes and so forth,” pointing to natural “disasters” as the paradigm of emergency requirements.\textsuperscript{131}

D. Congressional and Administrative Interpretations

1. The Office of Management and Budget’s Definition

The Director of the Office of Management and Budget has attempted to develop neutral principles to narrow the application of the emergency exception.

\textsuperscript{122} See Gramm-Rudman-Hollings § 253(g), 2 U.S.C. § 903(g) (Supp. II 1990).
\textsuperscript{125} See id. § 258(b); 2 U.S.C. § 907a(b) (Supp. II. 1990).
\textsuperscript{126} See Letter from Majority Leader George J. Mitchell, Chairman Jim Sasser, and Chairman Paul S. Sarbanes to President George Bush (Feb. 25, 1991); infra note 185.
\textsuperscript{127} Id.
\textsuperscript{128} See id.
\textsuperscript{129} See infra notes 185-188 and accompanying text.
\textsuperscript{130} See supra notes 27-41 and accompanying text.
\textsuperscript{131} See supra note 36 and accompanying text.
In his February 5, 1991, letter regarding S. 160, the Director began this definition process by excluding general and permanent changes in law:

A second requirement of these exemptions is that there must be an “emergency requirement.” Bills that provide spending that is not required to meet a true emergency do not qualify. For example, S. 160 generally and permanently extends the period of unemployment compensation for all former service members. This is not a requirement to meet a true emergency. An emergency is usually a sudden, urgent and unforeseen situation, and not a permanent condition.\(^{132}\)

Congress directed the Director to report to the appropriate committees of Congress on the unfunded costs of dire emergencies caused by floods, droughts, tornadoes, unemployment, and other disasters in the United States and abroad.\(^{133}\) The Director responded with a report transmitted June 27, 1991, in which he built on his earlier paragraph to develop a rigorous definition of “emergency requirement”:

For purposes of determining spending provisions that qualify for exemption, the President uses a definition of an “emergency requirement” that includes the following elements: the requirement is a necessary expenditure that is sudden, urgent, and unforeseen, and is not permanent. These elements are defined as follows:

- **necessary expenditure** — an essential or vital expenditure, not one that is merely useful or beneficial;
- **sudden** — quickly coming into being, not building up over time;
- **urgent** — pressing and compelling need requiring immediate action;
- **unforeseen** — not predictable or seen beforehand as a coming need (an emergency that is part of an aggregate level of anticipated emergencies, particularly when normally estimated in advance, would not be “unforeseen”); and
- **not permanent** — the need is temporary in nature.

In addition, the classification of certain spending as an “emergency” depends on common sense judgment, made on a case-by-case basis, about whether the totality of facts and circumstances indicate a true emergency, and about whether the needs can be absorbed within the existing level of resources available.\(^{134}\)

Note that Director Darman’s definition strings together almost all the possible characteristics of emergency and then requires that an emergency must meet all of them to qualify under the law. As a matter of meaning and congressional intent, this definition restricts too much.

In testimony before the House Budget Committee on July 17, 1991, the Director has indicated an interest in further refining the definition of “emergency” in a joint paper produced among the Office of Management and Budget and the

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Senate and House Budget Committees. Later in the same hearing, the Director listed tightening of the emergency definition among things that he would like to see done to the budget process in its next revision. The Director thus continues to seek to use the definition of “emergency” as a means to constrict use of the exception and constrain participants in the budget process within the limits set out by the Budget Enforcement Act.

2. Deep Personal Need

In contrast to the Director’s attempts to limit the definition of “emergency” using neutral principles, many members of Congress have followed the second branch of the dictionary definition — an urgent need — and sought to define emergencies in terms of the depth of the personal need involved in given situations. For example, at a July 17, 1991, hearing of the Senate Budget Committee to hear the testimony of the Director of the Office of Management and Budget, Senator Donald Riegle, a senior member of the Committee and an organizer of Senate efforts to respond to the recession, pressed Director Darman with examples of workers whose lives had been devastated by unemployment. Similarly, during

135. *House Mid-Session Hearings, supra* note 24, at 8-9 (statements of Rep. Gradison and Director Darman).

136. The Director made his statement in response to a question by Congressman Alex McMillan asking, “Would you care to outline your thoughts on what you think we should do with respect to extending this basic agreement.” Part of the Director’s response was:

I think with respect to the definition of emergency, we ought to try to tighten the definition of emergency the next time we extend this. That there ought still to be an emergency exemption from caps for the obvious reason that there will be legitimate emergencies.

But we need to cut down on the occasion for conflict between us and among us by being a little tighter in the definition of emergency as we go, that that will help.

*House Mid-Session Hearings, supra* note 24, at 13.

137. See *supra* note 119 and accompanying text.

138. Senator Riegle stated:

Senator Riegle... I want to go back to the part about when we designate something an emergency and the problem with unemployment in the country today.

As I am sure you know, the unemployment rate just went up again in the country and we are now at 7 percent nationally. But let me tell you what is happening out across the country, and let me just start with my own home State of Michigan.

....

Now you had a discussion earlier with some other members as to whether or not the unemployment compensation problem, this part of it and perhaps other parts of it, do or do not constitute an emergency. It is an emergency, and if you were in this situation or other people in the administration were in this situation, I think you would understand it for the emergency that it is.

I am going to give you just two human examples of people that I saw in Michigan recently that I spoke to. One was an unemployed [United Auto Workers] member, worked in an auto plant for many years, had an excellent record[, lost his job, exhausted his unemployment benefits, was qualifying for extended benefits. Those were pulled out from under him, ... and he was half-way through a retraining program to become a medical records specialist. He had no extra money, was living out of his car, and he had to drop out of that [program].

I do not know what has happened to him since, but presumably he is living, if he has not found something, and most people in Michigan cannot now, because there are no extra jobs out there, I assume he is making it the best he can. Maybe he is in a homeless shelter. I am not sure at the moment where he is.

I saw another fellow out there the other day, with an excellent work record. He had a group of certificates of accomplishment as a machine tool operator. He was explaining
a congressional debate on legislation to expand unemployment compensation benefits, several members of Congress cited pressing personal need to define the term "emergency."139

E. Precedent

As noted above, in one sense, the statute defines an emergency as whatever Congress and the President agree is an emergency.140 Consequently, review of what the President and the Congress have agreed constituted an emergency provides the only certain way to define the term.

One can argue that the precedents of what the President and Congress have designated as an emergency in the past should guide participants in the budget process in their designations in the future. Even though precedent does not bind the President and the Congress in the same fashion that legal precedent binds courts, the same considerations of justice and fairness among different petitioners apply here in favor of honoring precedent. In a political environment, practice may shame one party or another into following along to avoid being accused of favoring one petitioner or class of petitioners over another similarly situated.141 At least one statute has cited similarity with past emergency designations as a basis for at least one designation.142

In the first year after enactment of the emergency process, Congress enacted four bills appropriating funding for emergency requirements. In the wake of the statutory designation of Operation Desert Shield as an emergency, Congress enacted two bills, as its first supplemental appropriations measures: the Desert Shield/Desert Storm Supplemental143 and the Dire Emergency Supplemental.144

139. See infra notes 207-208 and accompanying text.
140. See supra note 115 and accompanying text.
141. Precedent played an important part in debate of efforts to expand unemployment insurance benefits. See infra notes 202-203 and accompanying text.
The third, the Humanitarian Assistance Supplemental, funded (among other things) refugees from the conflict. The fourth, the Disaster Relief Supplemental included a significant component of Desert Shield funding.

Altogether, during the first session of the 102d Congress, Congress and the President designated $57.9 billion in budget authority and $49.6 billion in outlays as emergency requirements for fiscal years 1991 and 1992 (using Congressional Budget Office estimates). Defense spending accounted for all but a small share of these totals: 94.4% of the budget authority and 94.3% of the outlays. Of the remainder, 2.0% of the total budget authority and 2.2% of the total outlays fell within the international category. Domestic discretionary spending accounted for 3.6% of the budget authority and 3.5% of the outlays designated as emergency requirements.

I. Desert Shield/Desert Storm Supplemental

The Desert Shield/Desert Storm Supplemental appropriated $42.6 billion in budget authority and $31.6 billion in outlays for fiscal year 1991. All of these amounts fell within the defense category.

The opening language of the Act seeks to bring the bill within the exception for emergency Desert Shield costs: "For incremental costs of the Department of Defense and the Department of Transportation associated with operations in and around the Persian Gulf as part of operations currently known as operation Desert Shield (including Operation Desert Storm) ...." Other than allusions such as this to Operation Desert Shield, the Act does not otherwise mention the emergency designation. Legislative history makes clear the intent of the drafters...
to treat all funding in the bill as Desert Shield emergency requirements.\footnote{154}  
The Act provided budget authority to the Department of Transportation for Coast Guard expenditures.\footnote{155} The Congress and the President treated these items as emergency Desert Shield costs even though one might argue that the statutory definition limits emergency Desert Shield costs to Department of Defense accounts.\footnote{156}  
The Senate Appropriations Committee differed with the House on whether two items constituted emergency Desert Shield costs.\footnote{157} The Senate Committee specifically and correctly disapproved of counting as emergency Desert Shield costs the increase in costs of fuel for Department of Defense activities outside of forces in the Persian Gulf.\footnote{158}  

**154.** The House Appropriations Committee’s report on the bill noted: “All funds provided in this bill are necessary to meet the emergency funding requirements of Operation Desert Shield/Desert Storm.” H.R. Rep. No. 10, 102d Cong., 1st Sess. 17 (1991). The report went on to state: “These funds are exempt from the Committee’s Section 302(a) allocation.” Id. In other words, as directed by section 606(d)(2) of the Congressional Budget Act (2 U.S.C. § 665e(d)(2) (Supp. II 1990)), as a consequence of these costs being Desert Shield cost, the Budget Committees would not count these funds against the Appropriations Committees’ allocations under the latest budget resolution. The Senate Appropriations Committee’s report on the bill reviewed the history of the bill in the context of the emergency provisions.:

**OPERATION DESERT SHIELD/DESERT STORM BACKGROUND**

On February 22, the President submitted a supplemental request to provide for the costs of Operation Desert Shield/Storm. Under the conditions established in the Omnibus Budget Reconciliation Act of 1990, Congress and the executive branch provided that the incremental costs of Desert Shield/Storm would be considered an emergency. As defined in that act, emergency requirements are not subject to the ceilings for discretionary spending under the budget summit agreement. Costs for such emergencies may be submitted as supplemental appropriations requests.


**156.** See, e.g., supra note 110 and accompanying text. In response, one could argue that the President and the Congress implicitly agreed to designate these items as emergency requirements under the general provisions on emergency requirements.

**157.** Id. at 7-8.

**158.** Id. at 7. The report stated:

**FUEL PRICE INCREASE**

The Department of Defense has requested funding to cover increased prices of the Department’s planned (baseline) fiscal year 1991 purchases of fuel, other than fuel purchased for use by our forces in the Persian Gulf. Thus, our forces in the United States (and elsewhere) would receive funds from this supplemental appropriation to pay fuel costs even though they are not actively participating in Desert Shield/Storm activities. These costs cannot be considered incremental costs directly related to Operation Desert Shield/Storm. In its bill, the House directed that the amount for fuel price increases be allocated only to the fuel consumed in direct support of Operation Desert Shield/Storm, but made no reductions to the Department’s request. Accordingly, the Committee recommends reducing the request by $1,247,000,000. Also, a general pro-
counting Virginia telephone improvements as emergency Desert Shield costs. The conference committee nonetheless chose to treat the telephone improvements as emergency Desert Shield costs, albeit at a reduced level of funding.

2. Dire Emergency Supplemental

The Dire Emergency Supplemental moved through the legislative process at the same time as the Desert Shield/Desert Storm Supplemental. The Dire Emergency Supplemental appropriated emergency requirements of $1.6 billion in budget authority and $1.8 billion in outlays for fiscal year 1991 (using Congressional Budget Office Estimates). The emergency spending fell into each of the three appropriations categories: the international category received $909 million in budget authority and $899 million in outlays, the defense category received $374 million in budget authority and $344 million in outlays, and the domestic discretionary category received $364 million in budget authority and $511 million in outlays.

Some provisions of the act explicitly designate appropriations as emergency requirements. More ambiguous language opens title V, regarding military

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vision has been added that restricts the Department from obligating any funds appropriated in this supplemental for fuel costs other than those incremental costs directly associated with Desert Shield/Storm operations.


159. S. Rep. No. 23, supra note 154, at 7-8. The report states:

TIDWATER, NORFOLK, VA

The House included an appropriation of $500,000 in operation and maintenance, Navy, to implement and staff an enhanced telephone system for the Tidewater Family Services Center. It also included $11,000,000 in operation and maintenance, Defense Agencies, for improvements in dependent medical care in the Tidewater area, including an automated health care provider appointment system. While these projects appear to be worthy of funding in an annual appropriation bill, neither of them is directly concerned with Operation Desert Shield/Storm and, in the Committee's view, ought not to be included in this supplemental.

Id.


164. See, e.g., Dire Emergency Supplemental tit. I, 105 Stat. at 130 ("All funds provided under this title are hereby designated to be 'emergency requirements' for all purposes of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended.").
personnel and veterans' benefits.\textsuperscript{165} The titles, enacting clause, and headings of title I also attest to the emergency designation of portions of the Act.\textsuperscript{166} Despite the ambiguity of the statutory language,\textsuperscript{167} report language makes clear the intent of Congress to designate these appropriations pursuant to the provisions of Gramm-Rudman-Hollings, rather than despite them.\textsuperscript{168}

The President's request for supplemental appropriations designated some of the funding as emergencies.\textsuperscript{169} The presidentially-designated emergency items

\begin{itemize}
  \item \textsuperscript{165} The language states:
  \begin{quote}
    For emergency expenses necessary for the benefits provided in the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991, not to exceed $655,000,000 appropriated, to be derived by transfer only by the Secretary of Defense, with the approval of the Director of the Office of Management and Budget, from current and future balances in the Defense Cooperation Account...
  \end{quote}
  \item \textsuperscript{166} The Act's full title is "An Act Making dire emergency supplemental appropriations for the consequences of Operation Desert Shield/Desert Storm, food stamps, unemployment compensation administration, veterans compensation and pensions, and other urgent needs for the fiscal year ending September 30, 1991, and for other purposes." Id. The short title of the Act is nearly identical: "Dire Emergency Supplemental Appropriations for Consequences of Operation Desert Shield/Desert Storm, Food Stamps, Unemployment Compensation Administration, Veterans Compensation and Pensions, and Other Urgent Needs Act of 1991." Id. at 160. The enacting clause states: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the following sums are appropriated... to provide dire emergency supplemental appropriations for the fiscal year ending September 30, 1991, and for other purposes..." Id. at 130. The heading of title I states: "TITLE I — EMERGENCY SUPPLEMENTAL APPROPRIATIONS." Id.
  \item \textsuperscript{167} See supra text accompanying note 98.
  \item \textsuperscript{168} The House Appropriations Committee report states:
  \begin{quote}
    EMERGENCY APPROPRIATIONS
    The bill includes language designating all funds provided in Title I of this bill as "emergency requirements" for all purposes of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended. Under Section 251(b)(2)(D) of that Act, amounts appropriated for discretionary accounts that are designated as emergency requirements by the President and by the Congress shall constitute automatic adjustments to the appropriate Budget Enforcement Act discretionary spending limits.
  \end{quote}
  \item \textsuperscript{169} The President's request stated in part:
  \begin{quote}
    I ask Congress to consider requests for supplemental non-defense appropriations for [fiscal year] 1991 in the amount of $89,750,000 and amendments to the request for appropriations for [fiscal year] 1991 in the amount of $4,252,000. Pursuant to section 251(b)(2)(D)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended, I am hereby designating these specific supplemental requests in particular amounts for [fiscal year] 1991, and these specific amendments to [fiscal year] 1992 requests in particular amounts as emergency requirements.
  \end{quote}
\end{itemize}
included funding for the following non-defense activities related to Operation Desert Shield: the State Department and related agencies for the Voice of America, evacuation of employees, security, travel and communications; various law enforcement and related agencies to counter terrorism; and the Panama Canal Commission for increased traffic through the canal.170

Statutory language makes clear that the motivation for most of the emergency designations in the Act was "to provide for additional costs resulting from Operation Desert Shield"171 Report language supports this link.172

agencies. These are in addition to the requests transmitted with your Budget on February 4th, although we hope they may be linked with them in the legislative process. (They are separate and distinct from the defense supplemental, which we hope to have treated separately in the legislative process.) In addition, the Legislative Branch requests emergency appropriations of $12,115,000 in [fiscal year] 1991 and $4,252,000 in [fiscal year] 1992.

The transmittal letter to Congress for these non-defense proposals formally designates them as emergencies. If they are enacted, the budget agreement discretionary spending limits will be adjusted by the associated amounts. A brief description of each of these designated emergency proposals follows:

Supplemental appropriations totaling $59,400,000 are requested for the Department of State, the Agency for International Development, and the United States Information Agency. This increase funding would cover emergency expenses for the evacuation and reassignment of U.S. civilian employees (including contractor employees), additional broadcasting costs of the Voice of America, increased security for personnel and facilities, and increased travel and communications costs.

Supplemental appropriations totaling $7,736,000 are requested for the Department of Justice to enable the Federal Bureau of Investigation and the Immigration and Naturalization Service to counter the increased threat of terrorism.

Supplemental appropriations totaling $6,934,000 are requested for the Secret Service and the Bureau of Alcohol, Tobacco and Firearms (ATF) in the Department of the Treasury. These increases would cover the costs of additional protection provided by the Secret Service and explosive training, bomb threat management and security planning provided by ATF.

A supplemental appropriation of $3,565,000 is requested for the District of Columbia to cover the costs of additional police protection and security support in the District.

An increase in obligatory authority is requested for the Panama Canal Commission to pay the costs associated with increased traffic through the canal. These additional costs would be fully offset by tolls paid by ships using the canal.

Additional appropriations totaling $12,115,000 for [fiscal year] 1991 and $4,252,000 for [fiscal year] 1992 are requested by the Legislative Branch. These increases would cover the costs incurred in providing increased security to the U.S. Capitol complex.

Id. at 3-4 (reprinting Letter from Director Richard Darman to President George Bush (Feb. 21, 1991)).


171. Almost all of the items in title I follow a form similar to: "For an additional amount for [a particular purpose] to provide for additional costs resulting from Operation Desert Shield/Operation Desert Storm, [a particular amount]." Id. at 130-33.

172. The House Appropriations Committee report states:

Overall, the bill as recommended by the Committee provides total new budget authority of $4,136,377,100. This includes dire emergency appropriations of $151,113,000 which are primarily to offset the consequences of "Operation Desert Shield/Desert Storm" and $650,000,000 which will assist Israel with costs it has incurred in the Persian Gulf conflict.

H.R. REP. No. 9, 102d Cong., 1st Sess. 1 (1991); see also id. at 5-16 (explaining appropriations in detail); S. REP. No. 43, 102d Cong., 1st Sess. 3-16 (1991).
The Senate Appropriations Committee recommended emergency designation for evacuation of International Trade Administration personnel, criticizing the administration for designating as emergency requirements the costs of evacuations that fell within the international category but not similar activities in the domestic discretionary category. Similarly, the Committee recommended emergency designation to reimburse the National Oceanic and Atmospheric Administration for meteorological and oil spill assistance provided in connection with Operations Desert Shield and Desert Storm. The administration did not bend, however, and Congress retreated from the Committee's request for emergency funding.

The Senate Appropriations Committee also recommended emergency designation for veterans' medical care and administration costs resulting from Operations Desert Shield and Desert Storm. The conference committee agreed with the Senate position on designation.

Similarly, the Senate Appropriations Committee recommended emergency funding for student financial assistance for military personnel and veterans.

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173. The Senate Appropriations Committee report states:

The Committee recommends an emergency supplemental appropriation of $310,000 for evacuation and property damage costs of the U.S. Foreign and Commercial Service related to Operation Desert Shield/Storm. These funds would be used for exactly the same purposes, at the same overseas locations, as those requested by the administration for the U.S. Department of State. The Committee fails to understand why the administration considers such costs to be an emergency when they occur to an agency funded under the [international] spending cap, but not when they are borne by a domestic discretionary funded agency like the International Trade Administration.

S. REP. No. 43, supra note 33.

174. See id.

175. See H.R. CONF. REP. No. 29, 102d Cong., 1st Sess. 6 (1991). The joint statement of managers noted:

The conferees have reluctantly agreed not to include any funding to reimburse Department of Commerce agencies for Operation Desert Shield/Desert Storm emergency expenses. The conferees have not been able to appropriate funds because of the Administration's inconsistent treatment of the Department of Commerce vis-a-vis other Executive Branch agencies such as the Department of State, Agency for International Development, Department of Treasury and the Department of Justice. For example, the Administration refuses to agree to emergency designation for appropriations for the International Trade Administration that are for the same purposes and at the same overseas locations as those requested for the Department of State.

Id.

176. The Committee report states:

The Committee has provided $25,000,000 for veterans medical care. This includes $3,600,000 for costs incurred for planning and preparation for Operation Desert Storm; $16,000,000 for costs incurred due to the call up of reservists employed by the [Veterans' Affairs] medical system; $1,400,000 for posttraumatic stress disorder treatment. The Committee notes that these additional costs are a direct result of Operation Desert Shield/Desert Storm.

The Committee has provided $12,000,000 for general operating expenses. Funds are needed to hire 132 staff in the Veterans Benefits Administration to process new claims submitted by veterans of Operation Desert Storm.

S. REP. No. 43, supra note 133 at 15-16.

177. See H.R. CONF. REP. No. 29, supra note 175, at 10. The joint statement of managers states:

"The conferees agree that the amount provided is necessary to cover costs that have been and will be incurred by the [Department of Veterans' Affairs] because of events in the Persian Gulf." Id.

178. The Senate Committee reports states:

The Committee recommends the transfer of $500,000,000 from the Defense Cooperation Account for emergency expenses necessary for military personnel and veterans
The conference committee added the language in title V of the bill on this subject.\textsuperscript{179}

The President requested repeal of a cap on the Export Enhancement Program.\textsuperscript{180} The House Appropriations Committee disagreed with the request.\textsuperscript{181} The Senate Appropriations Committee revived the request, placing it among items designated as emergencies, but without explanation of that emergency designation in its report.\textsuperscript{182} As the administration did not project any cost from this action, it might have considered the emergency designation as a matter of less importance.\textsuperscript{183} The conferees agreed to repeal the cap, expressing concerns for producers of particular agricultural products.\textsuperscript{184}

The unemployment insurance designation resulted from a negotiation between members of Congress and the administration. On February 25, the Senate Majority Leader, the Chairman of the Senate Budget Committee and the Chairman of the Joint Economic Committee wrote the President calling on him to designate $200 million in additional unemployment insurance administrative expenses as emergency requirements.\textsuperscript{185} Despite the President's recommendation of benefits as authorized in S. 578, the defense supplemental authorization bill, for costs occurring between fiscal year 1991 and fiscal year 1995. In addition, the Committee recommends emergency appropriations of $30,000,000 for family education and support services . . . .

The Committee is well aware of the sacrifices participation in Operation Desert Shield/Desert Storm demanded, and will continue to demand for some time to come, not only of military personnel in both the Active and Reserve component[s], but also of their families. The Committee hopes that these emergency appropriations, intended to provide additional support during the transition from a wartime footing to peacetime will enable members of our military to resume their normal lives as quickly as possible.

S. REP. NO. 43, supra note 133 at 66.

180. See id. at 16.
182. See S. REP. NO. 43, supra note 133, at 16.
183. For a discussion of scoring of this program, see supra note 147.
185. The letter states, in part:

We write you today to request that you join with us in recognizing the amount of the shortfall in funding for the administrative expenses of the Unemployment Insurance Trust Fund and the emergency nature of the need for [unemployment insurance] administrative expense funding. Moreover, we urge you to make such an emergency designation under section 251(b)(2)(D)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

We were disappointed and somewhat surprised to find that you requested only $100 million for Unemployment Insurance administrative expenses in your budget submission to Congress on February 4, in spite of the Department of Labor's projection that the need for such funds was significantly higher. We were equally disappointed to find that your request for administrative expenses did not receive an emergency designation.

We would like to request that you increase your supplemental appropriation request for [unemployment insurance] administrative funds to $200 million to fulfill the Federal Government's commitment to states. Furthermore, we request that you designate your request as an "emergency requirement" under the provisions of the recently passed Budget Enforcement Act to prevent the amount from being counted against the discretionary caps established for the Appropriations Committee in last year's budget summit.

Plainly, an emergency exists. Both the Congressional Budget Office and your own Office of Management and Budget have certified that the Nation is in a recession. Unemployment has risen from 5.6 percent in September of last year to the current 6.2 percent. Waits of 4 to 6 weeks for benefit checks are not uncommon in virtually all
$100 million in funding, the House Appropriations Committee recommended increasing funding by $200 million, although it did not designate these funds as emergency requirements. The Senate Appropriations Committee recommended a compromise figure of $150 million, plus language designating the amount as an emergency. The conference committee adopted the Senate compromise funding level and emergency designation.

3. Humanitarian Assistance Supplemental

The third supplemental appropriations act incorporating emergency funding also had links to Operation Desert Shield. The Humanitarian Assistance

regions of the United States. In Indiana 17 local offices were closed and 100 staff were laid off as a result of last year's administrative fund shortfall while the number of claims increased from 29,670 per week in October to 57,330 in December of last year. In many states, increased workload and decreased staff result in waiting lines of up to 6 hours. On several occasions in the District of Columbia, staff have been forced to turn people away, asking them to return another day. In one local office in Maine, the backlog caused such delays that the fire marshal forced some of those waiting to leave. In New York last year, an estimated $4.5 million in tax revenues was lost due to redeployment of tax staff to handle the backlog in [unemployment insurance] claims activities. The list goes on and on.

Section 251(b)(2)(D)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings) as amended by section 13101 of the Budget Enforcement Act of 1990 sets forth a procedure to address emergency funding requirements such as this. That section provides that if the President and the Congress each designate appropriations as emergency requirements, then the discretionary spending limits shall be adjusted to allow for legislation to respond to the emergency. We stand ready to move legislation that would so designate the administrative expenses of the Unemployment Insurance Trust Fund as emergency requirements. We invite you to write the Congress to join us in making this designation.

Designating funding for the administrative expenses of the Unemployment Insurance Trust Fund as an exception to the spending caps of the new law is consistent with the intent of that law. The Budget Enforcement Act of 1990 reformulated the Gramm-Rudman-Hollings law to prohibit expansion of the structural deficit. The new law recognized that the economic cycle will expand and contract the deficit, and the new law unlinked the requirement for deficit reduction from the changes in the deficit caused by the economic cycle. The same logic applies to the administrative expenses of the Unemployment Insurance Trust Fund. They rise and fall with the economic cycle, and the spirit of the new law calls for the Government to fund them fully without cutting other needed Government services as an offset.

The new law focuses on controlling actions that the Congress and the President take to worsen the deficit. The new law generally holds Congress and the President harmless for the effects on the deficit of events outside their control. As much as leaders would like to be able to engineer the economy, factors beyond the control of the Government determine the amount of money needed to fund the administrative expenses of the Unemployment Insurance Trust Fund.

Americans overwhelmingly agree that support for our armed forces in the Persian Gulf rises to the level of an emergency requirement. By the same token, however, the recession dominating the home front has created an emergency right here in our own country. Please join with us, Mr. President, in combatting this emergency.


187. The Senate Committee report sheds little light on how it made the decision with regard to the emergency designation. "The Committee has added bill language indicating that funding for this program shall be designated 'emergency requirements' for the purposes of budget scoring pursuant to the Balanced Budget and Emergency Deficit Control Act of 1985, as amended." S. REP. No. 43, supra note 133, at 38.
188. See H.R. CONF. REP. No. 29, supra note 175, at 25. The joint statement of managers offers little explanation. See supra note 187.
Supplemental funded emergency requirements of $572 million in budget authority and $415 million in outlays for fiscal year 1991. The emergency spending fell into the international and defense categories: The defense category received $337 million in budget authority and $269 million in outlays and the international category received $236 million in budget authority and $148 million in outlays.

Although the Act includes language referring to emergencies and Desert Shield Costs, the operative language designating the emergency simply directs how to estimate the costs of the Act, notwithstanding the requirements of the Budget Enforcement Act. The Act provides: "Funds made available in this Act, being incremental costs of 'Operation Desert Storm' or offset, similar to items in the Dire Emergency Supplemental Appropriations Act, Public Law 102-27, and the Operation Desert Shield/Desert Storm Supplemental Appropriations Act, Public Law 102-28, are off-budget." To the extent that the Act’s funding amounts to international assistance rather than incremental costs of the United States defense effort in the Middle East, the Act stretches the boundaries of the emergency Desert Shield costs exception.

4. Extended Unemployment Insurance Benefits

In addition to the appropriations measures, Congress passed another bill that includes an emergency designation, although the President chose not to join in the designation. Action on this measure, a bill to provide extended unemployment insurance benefits, highlights the differing views of what constitutes an emergency. On July 24, 1991, Senator Lloyd Bentsen, Chairman of the Finance Committee, introduced S. 1554, the first unemployment insurance bill on which Congress would act in the 102d Congress. The Finance Committee reported out the bill by a vote of sixteen to four, beating down a series of amendments. When the Majority Leader sought to proceed to the bill, the Republican leadership exercised its rights under the Senate rules to delay consideration and threatened

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194. Id.


a lengthy tax debate. The Senate considered the bill on August 1, just before its summer recess, approving it on a voice vote. The next day, the House of Representatives considered and passed a bill, H.R. 3201, that was substantially identical to the Senate bill, by a vote of 375 to 45. The Senate passed the House bill by unanimous consent later that day.

Many Members of Congress argued that the precedents for emergency designation supported designating this case as an emergency requirement. In

unanimous consent to proceed to S. 1554, that a cloture motion on the motion to proceed be deemed to have been filed, and that the cloture vote occur not earlier than July 29, 1991; id. at S11,191-92 (daily ed. July 29 1991) (Senate votes 96 to 1 to invoke cloture on the motion to proceed to S. 1554); id. at S11,193 (daily ed. July 29, 1991) (Majority Leader Mitchell asks unanimous consent that the 30 hours of debate allowed on the motion to proceed to the bill under the cloture rule be deemed to have elapsed upon the convening of the Senate on July 31, 1991, and that the motion to proceed then be deemed agreed to, and that a cloture motion on the bill then be deemed to have been filed); id. at S11,397, S11,408 (daily ed. July 31, 1991) (statements of Majority Leader Mitchell & Republican Leader Dole).

198. Republican Senators filed 35 amendments to qualify them under the cloture rules. 137 Cong. Rec. S11,234 (daily ed. July 29, 1991) (Kasten amendment, no. 887); id. at S11,239-47 (Kasten amendment, no. 911); id. at S11,381-82 (daily ed. July 30, 1991) (Kasten amendment, no. 945); id. at S11,590-91 (daily ed. Aug.1, 1991) (Gorton amendment, no. 951); id. at S11,591-92 (Mack amendment, no. 953); id. at S11,855-56 id. at S11,856 (Dole amendment, no. 982); id. at S11,856 (Dole amendment, no. 983); id. at S11,856 (Dole amendment, no. 984); id. at S11,856 (Dole amendment, no. 985); id. at S11,856 (Dole amendment, no. 986); id. at S11,856 (Dole amendment, no. 987); id. at S11,856-57 (Dole amendment, no. 988); id. at S11,857-58 (Dole amendment, no. 989); id. at S11,858-59 (Dole amendment, no. 990); id. at S11,859 (Domenici amendment, no. 991); id. at S11,859-60 (Domenici amendment, no. 992); id. at S11,860 (Kasten amendment, no. 993); id. at S11,860-74 (Hatch amendment, no. 995); id. at S11,874 (Hatch amendment, no. 996); id. at S11,874 (Hatch amendment, no. 997); id. at S11,874 (Hatch amendment, no. 998); id. at S11,874 (Hatch amendment, no. 999); id. at S11,875 (Gramm amendment, no. 1003); id. at S11,875-76 (Gramm amendment, no. 1004); id. at S11,876 (Gramm amendment, no. 1005); id. at S11,876-77 (Gramm amendment, no. 1006); id. at S11,877 (Gramm amendment, no. 1007); id. at S11,877-78 (Gramm amendment, no. 1008); id. at S11,878 (Gramm amendment, no. 1009); id. at S11,878-82 (Gramm amendment, no. 1010); id. at S11,882-86 (Gramm amendment, no. 1011); id. at S11,886-97 (Gramm amendment, no. 1012); id. at S11,897-905 (Kasten amendment, no. 1013); id. at S11,906-12 (Dole amendment, no. 1018). Democrats also filed six amendments. Id. at S11,874-75 (Kohl amendment, no. 1000); id. at S11,875 (Kohl amendment, no. 1001); id. at S11,875 (Kohl amendment, no. 1002); id. at S11,905-06 (Metzenbaum amendment, no. 1014); id. at S11,906 (Kennedy amendment, no. 1015); id. at S11,906 (Fowler amendment, no. 1016).


201. See id. at S12,032-36.

202. See, e.g., Senate Mid-Session Hearings, supra note 138, at 249-55 (statements of Sen. Riegle, including: "Let me tell you some of the emergencies we have funded already this year. There is an emergency situation for the Kurdish people. We made an emergency designation there and we are sending them money. An emergency designation for Egypt, we are sending them money. Turkey, we are sending them money. The Sudan, we are sending them money. . . . You are helping every country in the world, in my view, except our own, and you are using the procedures, the emergency procedures to get money out there to those other countries and you are not willing to help our own unemployed. . . . I think it is outrageous."); 137 Cong. Rec. S11,192 (daily ed. July 29, 1991) (statement of Senate Finance Comm. Chairman Bentsen: "I understand the administration does not consider this an emergency. But they did consider it an emergency when they wanted help for the Kurds; when they wanted help for the Turks; when they wanted help for the Israelis, and the Congress went along. We thought that was justified. What we are asking now is for this administration to go along with us in looking after the unemployed in this country."); id. at S11,732 (statement of Sen. Benten: "Earlier this year, the President asked Congress to pass emergency legislation providing assistance to the Kurds, the Israelis, the Turks and others whose circumstances he felt merited our concern and compassion. We agreed with the President and joined him in declaring an emergency. Now, we're asking the President to join us in recognizing that American workers also need our help in time of trouble."); id. at S11,733 (daily ed. Aug. 1991) (statement of Sen. Dodd); id. at S11,748 (statement
response, some Senators and Congressmen engaged their colleagues on this playing field, seeking to distinguish prior precedents, either because the need had been greater or because they had been paid for. The Senate Republican Leader also

of Sen. Byrd); id. at S11,749 (statement of Chairman Bentsen); id. at S11,752 (statement of Budget Comm. Chairman Sasser); id. at S11,754 (statement of Sen. Baucus: "... I hope that President Bush will recognize that the plight of the unemployed in this Nation is as important as the plight of the Kurdish refugees. The President should join us in helping those still feeling the impact of an economic recession. Of course, there is a cost to this, just as there was a cost to our aid to the Kurds. But both are emergencies and the budget should treat them as such. We shouldn't have one threshold for foreign emergencies — which says you don't have to offset the cost — and another standard[ ] for the unemployed in this country — which says you don't get benefits unless some other program is cut.'"); id. at H6201 (daily ed. Aug. 1, 1991) (statement of Rep. Kennedy); id. at H6320 (daily ed. Aug. 2 1991) (statement of Rep. Traficant); id. at H6326 (statement of Rep. Wise); id. at H6327 (statement of Rep. Pelosi); id. at H6328 (statement of Rep. Schroeder comparing the emergency designation more broadly to emergency items and other items excluded from the deficit calculations under the Budget Enforcement Act); id. at H6329 (statement of Rep. Bonoir); id. at H6333 (statement of Rep. Wise, citing how both prior and the instant emergencies could lead to similar human hardships); id. at H6334 (statement of Rep. Hayes of Illinois, same); id. at H6336 (statement of Rep. Wolpe); id. at H6339 (statement of Rep. Hoyer: "For a man with such purported vision, it is clear he is farsighted. Emergencies in Bangladesh and Kurdistan are clear as day to him, but emergencies close at home are blurred and indiscernible.'"); id. at H6340 (statement of Rep. Kapur, criticizing the President's foreign priorities more generally, but making clear that she thought of cases, among others, in which the President had previously designated emergencies); id. at H6342 (statement of Rep. Stokes: "If the President can find an emergency in Kuwait, or in Kurdistan, what about Cleveland?'"); id. at H6342 (statement of Rep. Smith of Florida); id. at H6343 (statement of Rep. Foglietta: "Dramatic changes in our economy — like defense cutbacks — and the recession have prompted an emergency here at home, just like there were emergencies with the Kurds and in Bangladesh.'"); id. at H6346 (statement of Rep. DeLauro: "How can the President fly around the world offering economic assistance to foreign lands while refusing to acknowledge the desperate need for such assistance in his own back yard?'"); id. at H6346 (statement of Rep. Kildee: "Mr. Chairman, recently our Nation has generously provided assistance to the Kuwaiti people, the Kurdish people, the Bangladeshi people, Filipino people — now it is time to help the American people.'"); id. at H6348 (statement of Rep. Fazio: "We are past the halfway mark of George Bush's term and his accomplishments read more like a Secretary of State's than a President's. It's time to come home, Mr. President. It's time to help our own.'"); id. at H6348 (statement of Rep. Olver: "If President Bush can declare an emergency to provide aid to Kurdish refugees, why can't we declare an emergency to help the unemployed men and women in my district and in our country?'"); id. at H6348 (statement of Rep. Ford of Michigan); id. at H6350 (statement of Rep. Coyne); id. at H6353 (statement of Majority Leader Gephardt: "The President can see suffering overseas but not when it is happening right before his eyes.'"); id. at E2925 (statement of Rep. Wise, entering into the Congressional Record a statement citing past emergencies); id. at S12,032-33 (statement of Majority Leader Mitchell: "The President says this is not an emergency. But when people in Iraq needed help, the President said it was an emergency. When people in Turkey needed help, the President said it was an emergency. When people in Israel needed help, the President said it was an emergency. When Americans need help, the President says it is not an emergency. We disagree.'"); id. at S12,035 (statement of Majority Leader Mitchell: "There is no disagreement that Members of Congress wanted to and supported helping people in Iraq, people in Turkey, people in Israel, and people in Bangladesh. The point is that no one then said this is a problem with the deficit. No one then said this is not an emergency. The problem is that only when we want to help Americans does this question come up about the deficit and the breaking the budget agreement.... The budget agreement... specifically established a procedure for the declaration of emergencies and, pursuant to that procedure, emergencies were declared with the President's full support and support of Congress for help to the people in Iraq, for help to the people in Turkey, for help to the people in Israel. All we are saying is that Americans ought to get the same treatment that the American Government gave to people in other countries.'").

203. See 137 Cong. Rec. S11, 750 (daily ed. Aug. 1, 1991) (statement of Republican Leader Dole: "With regards to the chairman's comments about the emergency declaration for the Kurds — the $336 million for the Kurds did not come out of the U.S. Treasury. It was financed out of interest on Desert Storm funds. I also don't think I need to remind the chairman of those pictures of literally thousands of people huddled together dying from disease, exposure, and starvation. In connection with the funds for Turkey and Israel, let's not forget the economic havoc wreaked on their economies...")
noted that the Congress — not just the President — had sought to designate emergencies in the precedents. Opening House debate on the bill, the Chairman of the Committee on Ways and Means expressed his understanding of how Members might base an emergency designation on precedent, but noted how he considered this action taken in reliance on precedent to be an exceptional case.

Members also argued (using the second of the two dictionary definitions of "emergency") that the urgent human need of the unemployed amounted to an emergency. Chairman Bentsen, for example, came close to setting forth an

as a result of the Persian Gulf war and the support they gave us during that extremely important effort.

By my count, we have on four occasions this year declared an emergency and bypassed the pay-go requirements of the Budget Enforcement Act. In each of these instances, we did it at the President’s request. Given this pattern of Presidentially initiated emergencies, I can understand why a majority of my colleagues believe this bill should also qualify for an emergency designation. Many Members are frustrated with the apparent willingness to declare emergencies to help citizens of foreign countries, while ignoring equally compelling emergencies at home. However, I want to emphasize to my colleagues that I view this bill as an exception. I will continue to insist on pay-as-you-go financing for future legislation which increases spending or which reduces revenue.

Id. at H6337.

See supra note 119 and accompanying text.

See 137 Cong. Rec. S12,033 (daily ed. Aug. 2, 1991) (statement of Sen. Dole, “... I have to believe that there were a lot of Members of Congress asking for aid to Israel, asking for aid for Turkey, asking for aid to help the stricken people in Bangladesh, where 125,000 people lost their lives in a very cataclysmic tragedy there, and in Ethiopia where people were starving to death. We were asking — Congress was asking — not just the President. It was not just the President who declared that an emergency.”).
alternative set of criteria by arguing that the need of the unemployed was "real," "serious," and "urgent."\textsuperscript{208} The Chairman of the Senate Budget Committee compared the urgent human needs of the unemployed to the Office of Management and Budget's definition of "emergency."\textsuperscript{209}

An unusual coalition of Members criticized the bill from both the left and the right for failing to pay for itself, either implicitly or explicitly questioning the appropriateness of the emergency designation or the emergency procedure altogether.\textsuperscript{210} As a consequence, some of these Senators (chief among them the
Republican Leader) argued that the bill violated the summit agreement. Some of these Members apparently argue that Congress can only utilize the emergency exception without breaking the budget agreement in cases where it would not increase the deficit. Although the statutory exception for emergency Desert Shield costs would fit into that category, neither the statute nor its legislative history support so narrow an application of the emergency exception.

The Chairman of the Budget Committee countered the accusation that the bill broke the summit agreement, arguing that the summit agreement contemplated exactly this kind of use of the emergency exception, stating that recession was one of the three contingencies — along with war and natural disasters — that negotiators had explicitly considered during negotiations on the budget summit.

...
Similarly, the Chairman of the House Budget Committee, Congressman Panetta of California, and Congressman Smith of Florida both asserted that the bill did not breach the budget agreement. Congressman Downey responded to the point generally by noting that Republicans opposed both the spending without taxes to pay for it and the spending with the taxes to pay for it.

The Ranking Republican Members of the Senate Budget Committee and the House Ways and Means Committee questioned the emergency designation as an uncontrollable loophole.

intentionally wrote into the new law. It is exactly the kind of exception to the system's rigid constraints that we made room for.

At the summit, we deliberately constructed a limited safety valve — a pressure release — that grants budget flexibility in time of crisis.

We went even further. We explicitly considered recession as one of the three circumstances — along with war and natural disasters — that would warrant invoking the emergency option.

_Id._ at S11,753.


214. See CONG. REC. H6343.

215. See CONG. REC. H6339 (daily ed. Aug. 2, 1991) (“And you have the temerity to stand up here and tell us that the bill is weak because we do not pay for it, and you oppose the tax. And then when we decide not to have the tax, you say there is no emergency.”).

216. Senator Domenici stated:

> At the summit, we said if the President and Congress agree that there is an emergency, then you do not have to pay as you go. You can break the budget and spend, and it does not count.

> Well, I submit tonight, what is being attempted, is to say we are not interested in getting the President's concurrence. We are sending him a bill, and the bill is going to say in it, we are not paying for this. And if you declare it an emergency, Mr. President, then it goes into effect under the emergency clause.

> I submit that there really is no budget agreement left, because Congress can decide every time they want something new; that they will send it to the President and say, we think it is an emergency, if you agree, there is no budget limitation.

> ... [I]f you want to start using the emergency clause this way, I believe you have every opportunity to ignore the budget resolution, the appropriation caps, and send him [the President] freestanding spending bills, and put the emergency in his lap and say, if you do declare it, we spend it; if you do not, it is not an emergency. And that becomes the end of the budget resolution and the 5-year agreement.


Congressman Archer stated:

> Mr. Chairman, there is widespread agreement in the Nation that the most important issues before Congress has been and continues to be the Federal budget deficit. The most recent in a long line of attempts to reduce the deficit is last year's Budget Enforcement Act, enacted after one of the most bitter and divisive legislative struggles in recent history.

> The fundamental problem addressed by the Budget Act, as well as by the earlier Gramm-Rudman-Hollings law, is how to control Federal spending. After four decades of unrelenting growth in Federal spending and taxes, most Members of Congress came to realize that the desire to spend would always exceed the political ability to tax. From this realization, it was a short step to concluding that Congress, lacking discipline and will, had to figure out some device by which it could automatically control its urge to spend.

> Under Gramm-Rudman-Hollings that device was sequestration. Though the Budget Act retained sequestration as one of its control devices, the major new devices for controlling the deficit were spending caps for military, domestic discretionary, and foreign discretionary programs and the so-called pay-go requirement that any expansion of entitlement programs must be completely paid for by tax increases or cuts in other
The Senate Republican Leader proposed an alternative amendment that provided fewer benefits and did not designate an emergency but provided an offset — primarily through auction of the electromagnetic spectrum and loan collection reforms — to at least partly compensate for the expenditure. Both the Republican Leader and the administration argued that the recovery was underway. The Senate rejected the Dole amendment and passed the bill by a voice votes.

President Bush announced his intention to sign the measure but not designate the emergency at a news conference for Maine reporters on Friday, August 16. President Bush cited two, somewhat contradictory reasons: first, that the bill's spending would "bust the budget," and second, that the bill's spending was not needed because, with regard to unemployment, "things are getting better."

As it now turns out, the Budget Act's attempt to put Congress on automatic pilot contained a potential seed of self-destruction. Reasoning that war, pestilence, depression, and similar calamities might require spending above the forecasted amounts, Congress inserted a provision that if the President and Congress agreed that an emergency was at hand, new money could be spent without counting it against the caps or the pay-go requirement.

In my view, Congress and the administration must be extremely responsible and use the emergency escape valve to violate spending caps only in the most dire emergencies. Our current unemployment situation, though serious, has no risen to a level which justifies the complete restructuring of the extended benefits program contained in this bill.

This bill violates last year's Budget Enforcement Act in one important respect. It proposes mandatory entitlement expansions totaling approximately $5.5 billion over the next 6 years, none of which is offset by increased revenues or reductions in other outlays. This is a straightforward and substantial breach of last year's budget agreement — unless there is an emergency. As I have argued at length above, I do not think an emergency exists — and it is instructive to note that a majority of committee members apparently did not see the problem to be sufficiently severe to justify raising taxes to pay for the new spending called for in this legislation.

Perhaps the most important principle agreed upon in last year's budget deal was that future program expansions should only be made if Congress is willing to pay for them. The will to raise the necessary taxes for these benefits does not exist in Congress at this time — hence the attempt to force the President to declare an emergency. If we are true to the letter and spirit of the Budget Act, we will not enact this legislation.


217. See id. at S11,738-44.
218. See id. at S11,744-45. The Republican Leader submitted for the Congressional Record a copy of a statement of administration policy released that day opposing the emergency designation. See id. at S11,746 ("The Administration and most private forecasters believe that the recession is ending and the recovery is underway. . . . In this context, the Administration does not believe it is appropriate to declare an 'emergency' . . . .").
219. See id.
220. Id. at S11,755.
221. Here are relevant excerpts from the news conference:
Q: Mr. President, what are your plans on the extension of unemployment benefits?

PRESIDENT BUSH: My plans are that I will not sign the Democratic bill. I'm sorry that they did not adopt — I will probably sign the legislation but I will not declare it an emergency. I won’t bust the budget, bust the caps on the budget that was agreed to by Democrats and Republicans alike. Senator Dole had a good alternative that would have done this in a responsible manner. It was beaten back. So I will do what has been expected, probably sign it and not go for declaring it an emergency.

Q: Don't you agree these benefits are necessary, especially in a place like Maine
Strictly speaking, a bill that invites use of an exception explicitly provided by the statute cannot violate the statute. In a less technical response, it should be noted that this bill was a measured response and not a wholesale suspension of the deal.222 Furthermore, the opponents of the unemployment legislation did not serve their own strategic interests by arguing that a bill inviting Presidential designation of an emergency breaks the deal. Their saying that this legislation would break the deal freed up the advocates of the program to substitute a method that actually would break the deal: one that would not call on the President for assent. After all, what worse could the President say than he already had?

Upon return from the August recess, Democratic congressional leaders began to try again. On September 17, 1991, Chairman Bentsen introduced S. 1722, the Emergency Unemployment Compensation Act of 1991,223 and the Majority Leader facilitated its being placed on the Senate calendar.224 As placed on the calendar, S. 1722 contained the same contingent emergency language as S. 1554 had: it made Congress's designation of the emergency, invited the President to do the same, and stated that the law would not take effect unless the President designated where unemployment is so high?

PRESIDENT BUSH: Yes, I do and that's why I wish they'd gone with the Dole approach.

Q: The tourist industry is — how do you restore consumer confidence now? Is there anything you can do? I mean, in Maine the tourist business is the same, the people are here but they're not spending money. So how do you restore (inaudible)?

PRESIDENT BUSH: You restore it by having sound fiscal policies nationwide, in the states and in the federal government, and that's the best thing you can do.

Well, as I say, it looks like the national economy is recovering. That's pretty hard to tell somebody that's out of work. It's pretty hard to say to someone that's out of work hey, things are getting better — not necessarily getting better for their families. And when you have difficult economic times, you're faced with difficult economic choices.

One way to guarantee a less bright future is to have the federal government keep doing what often in the past it's done, recklessly spend money.

Q: Why don't you veto the unemployment benefits bill? Why take the approach you're taking? Are you afraid of an override?

PRESIDENT BUSH: That's a possibility but more because we've had a better idea.

It at least demonstrates that I am concerned in terms of economic benefits.


222. As part of a general discussion attesting to compliance with the Budget Enforcement Act, the Congressional Budget Office contrasted the unemployment proposal with wholesale suspension of the deal:

Just before recessing in early August, the House and Senate agreed on legislation temporarily extending unemployment insurance benefits for some recipients in hard-hit areas. Unlike the wholesale suspension of the act’s requirements in the face of slow economic growth, this legislation was narrowly targeted to address a specific problem that had arisen in the recession and incipient recovery.


224. See 137 cong. rec. S13,198 (daily ed. Sept. 17, 1991) (Majority Leader Mitchell asked unanimous consent that, through the procedures of Senate Standing Rule XIV, the bill go directly to the calendar); id. at S13,202 (daily ed. Sept. 18, 1991) (bill placed on the calendar).
the emergency.\textsuperscript{225} The Republican Leadership agreed to timely consideration,\textsuperscript{226} and the Senate began consideration of the bill on September 20, 1991.\textsuperscript{227}

Republican Senators tried to convert the debate into one on tax policy, but the Senate rejected the Republican amendments.\textsuperscript{228} The Senate went on to adopt a Committee substitute by voice vote\textsuperscript{229} and pass the bill as amended by a 69 to 30 vote\textsuperscript{230} — giving its advocates hope that they had enough votes to override the President's expected veto. That same day, the House passed its version of the bill by a 294 to 127 vote — once again more than enough votes to override a veto.\textsuperscript{231}

A conference committee met and quickly reported an agreement\textsuperscript{232} that included language requiring the President to treat the legislation as an emergency

\textsuperscript{225} As placed on the calendar, section 10 of S. 1722 read:

\texttt{SEC. 10. EMERGENCY DESIGNATION.}

(a) \textit{EMERGENCY DESIGNATION.} — Pursuant to sections 251(b)(2)(D)(i) and 252(e) of the Balanced Budget and Emergency Deficit Control Act of 1985, the Congress hereby designates all direct spending amounts provided by this Act (for all fiscal years) and all appropriations authorized by this Act (for all fiscal years) as emergency requirements within the meaning of part C of the Balanced Budget and Emergency Deficit Control Act of 1985.

(b) \textit{Effectiveness.} — Notwithstanding any other provision of law or any other provision of this Act, none of the preceding sections of this Act shall take effect unless, not later than the date of the enactment of this Act, the President submits to the Congress a written designation of all direct spending amounts provided by this Act (for all fiscal years) and all appropriations authorized by this Act (for all fiscal years) as emergency requirements within the meaning of part C of the Balanced Budget and Emergency Deficit Control Act of 1985.

See id. at S13,325 (daily ed. Sept. 19, 1991) (Majority Leader Mitchell asked unanimous consent that the Senate turn to the bill on Sept. 20).

226. \textit{See id.} at S13,325 (daily ed. Sept. 19, 1991) (Majority Leader Mitchell asked unanimous consent that the Senate turn to the bill on Sept. 20).


230. \textit{See id.} at S13,571 (Senate Vote 205).

231. \textit{See id.} at H6869-70 (House Vote 280).

232. The House was considered to have adopted a motion to insist on the House amendment and to request a conference with the Senate pursuant to the rule. \textit{See id.} at H6870 (daily ed. Sept. 25, 1991). The House named Representatives Rostenkowski, Downey, Ford of Tennessee, Kennelly, Andrews of Texas, Archer, Vander Jagt, and Shaw as conferees. \textit{See id.} The next day, the Senate disagreed to the House amendments and agreed to a conference by unanimous consent, and named
upon signature.\textsuperscript{233} To remove any room for doubt, the language then directed the President not to count the costs of the legislation.\textsuperscript{234}

In the Senate, the Ranking Republican Member of the Budget Committee attacked the new language as a rewriting of the budget law,\textsuperscript{235} and thus violative of the Congressional Budget Act's limitations on budget process law.\textsuperscript{236} Budget Committee Chairman Sasser moved to waive the limitation, arguing that the unemployment legislation merely applied the emergency exception as the participants in the summit had foreseen it would be applied.\textsuperscript{237} The difference in language proved enough to change the votes of enough moderate Republican Senators.\textsuperscript{238} The Senate voted 65 to 34 to waive the Budget Act restriction,\textsuperscript{239} and then went on to approve the conference report by a vote of 65 to 35.\textsuperscript{240} The House expeditiously approved the conference report the same day.\textsuperscript{241}


233. The conference report accompanying S. 1722 included the following budgetary provisions:

**TITLE IV — BUDGET PROVISIONS**

**SEC. 401. TREATMENT UNDER PAY-AS-YOU-GO PROCEDURES.**

(a) DESIGNATION AS EMERGENCY. — The provisions of (and amendments made by) this Act shall be treated as provisions designated as emergency requirements by the President and the Congress under section 252(e) of the Balanced Budget and Emergency Deficit Control Act of 1985.

(b) NEW BUDGET AUTHORITY, ETC., NOT CONSIDERED. — Any amount of new budget authority or outlays resulting from the provisions of (and amendments made by) this Act shall not be considered for any purpose under the Balanced Budget and Emergency Deficit Control Act of 1985.

**SEC. 402. EXEMPTION OF EMERGENCY UNEMPLOYMENT COMPENSATION FROM SEQUESTRATION.**

Payments under title I of this Act (relating to emergency unemployment compensation) shall be exempt from any order issued under part C of the Balanced Budget and Emergency Deficit Control Act of 1985.


234. See id.


239. See id. at S14,009 (Senate vote 212).

240. See id. at S14,010 (Senate vote 213).

241. The House Committee on Rules held a hearing before the conference committee submitted its report and reported out a rule (H. Res. 230) that (among other things) waived all points of order against the conference report. See id. at H6999, D1164 (Sept. 26, 1991). On October 1, the date of Senate action, the conference committee filed its report with the House (see id. at H7111-18 (daily ed. Oct. 1 1991)), the House adopted the rule on the conference report by a 270 to 147 vote (see id. at H7127-37 (House vote 284)), and the House passed the conference report by a 300 to 118 vote. See id. at H7137-44 (House vote 285).

The President vetoed the bill, once again charging a "breach[ of] the budget agreement."\(^{242}\) The Senate received his message on October 15.\(^{243}\) After two hours of debate the next day, the Senate fell two votes short of overriding the President's veto.\(^{244}\)

On November 1, 1991, Ways and Means Committee Chairman Rostenkowski and Congressman Downey introduced a bill, H.R. 3697, that sought to pay for the increased spending with increased taxes.\(^{245}\) It did not include emergency designation, but explicitly exempted both the bill's spending and its receipts from the budget calculations.\(^{246}\)

On November 7, the Senate Democratic Leadership introduced another version that would have given the President the choice whether (1) to declare the spending an emergency, (2) to pay for the spending with cuts in international aid, or (3) to pay for the spending with new taxes.\(^{247}\) This choice would have presented the President with another hybrid of the contingent emergency.\(^{248}\)

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\(^{244}\) See id. at S14,736-57 (daily ed. Oct. 16, 1991) (Senate vote 221).

\(^{245}\) See id. at E3666 (daily ed. Nov. 1, 1991). The bill was referred to the Committee on Energy and Commerce and the Committee on Ways and Means. See id. at H9043.

\(^{246}\) Section 701 of the bill provides:

SEC. 701. TREATMENT UNDER PAY-AS-YOU-GO PROCEDURES.

Any amount of new budget authority, outlays, or receipts resulting from the provisions of (and amendments made by) this Act shall not be considered for any purpose under the Balanced Budget and Emergency Deficit Control Act of 1985.


\(^{248}\) Sections 401, 411, and 421 of the bill posed the choice:

TITLE IV — BUDGETARY PROVISIONS

SUBTITLE A — EMERGENCY TREATMENT

SEC. 401. EFFECTIVENESS.

Notwithstanding any other provision of law or any other provision of this Act, section 402 of this Act shall take effect only if, on or before the date of the enactment of this Act—

(1) the President has not submitted to the Congress either of the written declarations described in sections 411 and 421, or

(2) the President has submitted to the Congress both of such declarations.

SEC. 402. EMERGENCY DESIGNATION.

All direct spending amounts provided by the provisions of (and amendments made by) this Act (for all fiscal years) and all appropriations authorized by the provisions of (and amendments made by) this Act (for all fiscal years, whenever appropriated) shall be treated as provisions designated as emergency requirements (for all fiscal years, whenever appropriated or otherwise enacted) by the President and the Congress under
Administration officials and Congressional Leaders agreed to a compromise bill that ostensibly paid for the new spending with new taxes and the President signed the bill into law on November 15. The new law did not include any emergency designation. The Congressional Budget Office and the Office of Management and Budget differed over whether the bill actually paid for itself. One Senior Republican staffer dubious of Office of Management and Budget scorekeeping neutrality is quoted as having said: "We declared an emergency for $1.7 billion — without actually saying so."

5. Natural Disaster Relief Supplemental Appropriations Bill

The fifth major emergency bill passed by Congress and the fourth enacted, the Natural Disaster Relief Supplemental, began on October 10, 1991 as H.R. 3543. As reported to the House on October 17, H.R. 3543 funded a number of domestic programs as well as defense programs. H.R. 3543 nonetheless included section 251(b)(2)(D)(i) or section 252(e) of the Balanced Budget and Emergency Deficit Control Act of 1985.

SUBTITLE B — REDUCTIONS IN FOREIGN AID AND OTHER SPENDING

SEC. 411. EFFECTIVENESS.

Notwithstanding any other provision of law or any other provision of this Act, all of the provisions of this subtitle shall take effect only if:

1. not later than the date of the enactment of this Act, the President submits to the Congress a written declaration of the need for reductions in foreign aid and other spending, under this subtitle; and
2. the President has not submitted on or before such date the written declaration described in section 421.

SUBTITLE C — ALTERNATIVE FINANCING PROVISIONS

SEC. 421. EFFECTIVENESS.

Notwithstanding any other provision of law or any other provision of this Act, all of the provisions of this subtitle [regarding the unemployment surtax and the individual estimated tax requirement] and the provisions of parts II and III of subtitle B [regarding the collection of nontax debts and guaranteed student loans] shall take effect only if:

1. not later than the date of the enactment of this Act, the President submits to the Congress a written declaration of the need for the financing provisions under this subtitle, and
2. the President has not submitted on or before such date the written declaration described in section 411.


251. The Congressional Budget Office estimated that the bill would increase the deficit by $1.225 million and that a related bill would add $522 million, for a total of $1.747 billion in damage to the deficit. CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: FISCAL YEARS 1993-1997 99 (Jan. 1992).


a blanket emergency designation that argued for like treatment of domestic and defense emergencies. Representative Schroeder argued for a yet wider application of the emergency designation to allow appropriations to fund WIC, Head Start, immunization programs, and other children’s programs. The House adopted Representative Schroeder’s amendment — which would have added emergency funding of $1.39 billion in fiscal year 1992 alone — by a vote of 243 to 180. With other amendments, the House passed H.R. 3543 by a 252 to 162 vote. In the Senate, the Presiding Officer referred the bill to the Appropriations Committee under the rules, and it went no further.

To move the substance of the disaster relief supplemental, on November 15, the Senate took up and reported another vehicle, H.J. Res 157, a joint resolution that House Appropriations Committee Chairman Whitten had introduced on February 28 to make technical corrections and correcting enrollment errors in fiscal year 1991 appropriations acts. The Appropriations Committee reported H.J. Res. 157 to the Senate with proposed amendments that would have granted greater discretion to the President in his designation of emergencies. Among its general provisions, the Committee amendment included language like that in H.R. 3543 in which Congress designated all appropriations in the bill as emergency requirements. The Committee amendment went further, however, and stated

256. Section 201 read:

SEC. 201. CONGRESSIONAL DESIGNATION OF EMERGENCY. — Although the President has only designated portions of the funds in this bill pertaining to the incremental costs of Desert Shield/Desert Storm and certain Federal Emergency Management Agency costs as “emergency requirements”, the Congress believes that the same or higher priority should be given to helping American people recover from natural disasters and other emergency situations as has been given to foreign aid “emergency” needs. The Congress therefore designates all funds in this Act as “emergency requirements” for all purposes of the Balanced Budget and Emergency Deficit Control Act of 1985.


258. See id. at H8625 (House vote 347).

259. See id. at H8647 (House vote 352).


262. H.J. Res 157, 102d Cong., 1st Sess. (1991). The House passed H.J. Res 157 on February 28 by voice vote. 137 CONG. REC. H1294-95 (daily ed. Feb. 28, 1991). In the Senate later that day, the Presiding Officer referred it to the Appropriations Committee. See id. at S2506. Appropriations Committee Chairman Byrd asked unanimous consent to take up and pass the joint resolution, but objection was heard. See id. at S2500-02. Congress then included the substance of H.J. Res. 157 in Title IV of H.R. 1281, the Dire Emergency Supplemental, which the Senate began considering on March 19. See id. at S3491 (daily ed. March 1, 1991). (For discussion of H.R. 1281, see supra notes 161-188 and accompanying text.) Thus, after enactment of H.R. 1281, H.J. Res. 157 remained in the Senate Appropriations Committee as an apparently useless vehicle.

263. Section 201 of the Committee amendment read:

SEC. 200. CONGRESSIONAL DESIGNATION OF EMERGENCY. — Although the President has only designated portions of the funds in this joint resolution pertaining to the
that no funds in the joint resolution would be available for obligation unless they either constituted Desert Shield emergency costs or were designated by the President to be emergency requirements. This item-by-item contingency emergency language would have given the President the functional equivalent of an absolute line-item veto over the appropriations in the joint resolution. The President could have exercised that veto to reduce or eliminate any funding levels in the joint resolution. Further, Congress could not have overridden the choices the joint resolution would have thus delegated to the President to make. After a cloture threat, the Senate moved to and debated H.J. Res. 157 on November 22, passing the joint resolution with emergency language similar to what the Committee had recommended.

As the end of the Session neared, the conference committee met quickly and reported to the House an agreement that addressed emergencies in a number of places. The conference committee reverted to a general provision like that in the House vehicle. The conference agreement language designated all items in the first two titles of the joint resolution as emergency requirements, in

incremental costs of Desert Shield/Desert Storm and certain Federal Emergency Management Agency costs as "emergency requirements", the Congress believes that the same or higher priority should be given to helping American people recover from natural disasters and other emergency situations as has been given to foreign aid "emergency" needs. The Congress therefore designates all funds in this joint resolution as "emergency requirements" for all purposes of the Balanced Budget and Emergency Deficit Control Act of 1985.  


264. Section 202 of the Committee amendment read:

Sec. 202. Notwithstanding any other provision of this joint resolution, funds in this joint resolution are available for obligation only for costs of Desert Shield/Desert Storm or to the extent and only in the amount designated by the President, not later than the date of enactment of this joint resolution, to be emergency funding requirements within the meaning of part C of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended.

Id. § 202.

267. See id. S17,634 (resolution passed by 75 to 17 vote, Senate vote 270).

The Senate-passed provision added the language italicized in the following to the Committee amendment:

Sec. 202. Notwithstanding any other provision of this joint resolution, funds in this joint resolution, other than those made available by transfer, are available for obligation only to the extent and only in the amount designated by the President, not later than the date of enactment of this joint resolution, to be emergency funding requirements within the meaning of part C of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended.


After agreeing to a conference with the Senate, the House instructed (on a voice vote) its conferees to choose a clean emergency package that the President would be likely to sign over a product containing extraneous and nonemergency items that the President would be likely to veto. See id. at H11,119-21 (daily ed. Nov. 25, 1991) (McDade motion).

effect inviting the President to choose whether to designate them or not, but it did not include the sweeping item-by-item contingent emergency language in the Senate-passed joint resolution. In three provisions, however, the conference agreement did delegate to the President power to fund particular expenditures to whatever dollar level the President chooses. One section of the conference agreement granted the President authority to transfer up to $100 million from the defense category to transport international assistance to the Soviet Union (or parts of it), upon the President’s designation of an emergency under the budget law. The provisions funding the Federal Emergency Management Agency and the Commodity Credit Corporation (both of which fall under the general congressional emergency designation) provide funding (of up to $143 million for the former and $755 million for the latter) contingent on the President’s submitting formal budget requests that include emergency designations. The provision on


272. Section 109 of the joint resolution provides:

SEC. 109. In addition to other transfer authority available to the Department of Defense, the Secretary of Defense, upon the declaration of an emergency by the President under the terms of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended, may transfer from amounts appropriated to the Department of Defense for fiscal year 1992 or from balances in working capital accounts established under section 2208 of title 10, United States Code, not to exceed $100,000,000, to the appropriate accounts within the Department of Defense, in order to transport by military or commercial means, food, medical supplies, and other types of humanitarian assistance to the Soviet Union, or its Republics, or localities therein — with the consent of the relevant Republic government or its independent successor — in order to address emergency conditions which may arise therein, and for the purposes set forth in section 301 of H.R. 3807, as passed the Senate on November 25, 1991, and under the terms and conditions of such section 301 of H.R. 3807: Provided, That the readiness of the United States Armed Forces shall not be diminished by such transfer of funds: Provided further, That the Committees on Appropriations be notified of transfers under this provision fifteen days in advance.

H.J. Res 157, § 202; H.R. CONF. REP. No. 394, at 9 (the original prints the entire section in italics).

273. Under the headings “FEDERAL EMERGENCY MANAGEMENT AGENCY,” “DISASTER RELIEF,” and “(INCLUDING TRANSFER OF FUNDS),” the conference report provides:

For emergency disaster assistance payments necessary to provide for expenses in presidentially-declared disasters under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, an additional amount for “Disaster relief”, $943,000,000, to remain available until expended, of which $143,000,000 shall be available only after submission to the Congress of a formal budget request by the President designating the $143,000,000 as an emergency: . . . Provided further, That hereafter, beginning in fiscal year 1993, and in each year thereafter, notwithstanding any other provision of law, all amounts appropriated for disaster assistance payments under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. §121 et seq.) that are in excess of either the historical annual average obligation of $330,000,000, or the amount submitted in the President’s initial budget request, whichever is lower, shall be considered as “emergency requirements” pursuant to section 251(b)(2)(D) of the Balanced Budget and Emergency Deficit Control Act of 1985, and such amounts shall hereafter be so designated.

H.J. Res 157; H.R. CONF. REP. No. 394, at 9 (the original prints the entire section in italics).

Under the headings “CHAPTER III,” “DEPARTMENT OF AGRICULTURE,” and “COMMODITY CREDIT CORPORATION,” the conference report provides:

In view of the occurrence of recent natural disasters — similar to the volcano eruption of 1980, the earthquake of 1989, and the hurricane of 1989 — droughts, floods, freezes, tornadoses, and other catastrophes which resulted in billions of dollars in damages, and in an effort to restore the economy and to alleviate the effects of the disasters, an additional $1,750,000,000, to remain available until expended, is hereby made available
the Federal Emergency Management Agency also directs that (beginning in fiscal year 1993) all amounts appropriated under the Stafford Disaster Relief and Emergency Assistance Act above either a historical average or the President's budget request shall be considered emergency requirements, regardless of Presidential designation.274 The House passed the conference agreement by a 303 to 114 vote,275 the Senate passed it by a voice vote,276 and the President signed it into law December 12.277

After designations by the President, the Natural Disaster Relief Supplemental enacted $10.4 billion in budget authority and $6.8 billion in emergency requirements in the defense category and $1.9 billion in budget authority and $1.4 billion in outlays in the domestic category.278

6. Anticipated Desert Shield Costs

Desert Shield exceptions already enacted may have greater effects than at first anticipated, notwithstanding their emergency status. The Congressional Budget Office projects that more Desert Storm spending will take place in fiscal years 1992 and 1993 than the Office of Management and Budget projected.279 Consequently, if the Office of Management and Budget closely adheres to the law, participants in the budget process will find it more difficult to stay within the 1993 limits than they had thought due to the out-year effects of fiscal year 1991 emergency spending.280

Additional Desert Shield legislation is in the pipeline. In late July 1991, the Senate debated the National Defense Authorization Act for Fiscal Years 1992 and 1993, giving notice of further issues as to whether items constituted emergency Desert Shield costs or not. The Chairman of the Senate Budget Committee

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Id.; H.R. CONF. REP. NO. 394, at 12.
276. See id. at S18,570 (daily ed. Nov. 27, 1991). For Senate debate on the conference agreement, see id. at S18,569-70, S18,664.
279. See CONGRESSIONAL BUDGET OFFICE, supra note 222, at 57-59.
280. Id. at 58-59. The Congressional Budget Office report states:

Policymakers . . . may find the 1993 caps to be a bit tighter than they now anticipate . . . [M]ore Desert Storm-related defense outlays than originally thought will probably spill into 1993. Although appropriations for Desert Storm were an emergency and thus entailed a revision to the caps, this revision took place just once. [The Office of Management and Budget] is not free to update estimates of emergency legislation for technical reasons (such as slower-than-expected spending). Thus, unless [the Office of Management and Budget] turns a blind eye to this spending when gauging compliance with the 1993 caps, other defense outlays will be cramped.

Id.
criticized the liberal use of designations of incremental costs of Desert Shield in that bill. Similarly, a Boren amendment offered to the authorization bill on

281. During debate on the Defense Authorization Bill, Senator Sasser said:

When we get beneath the surface of this bill, this bill would actually push defense spending over the caps agreed to in the budget summit agreement and enacted into law if the Appropriations Committee would follow the spending plan that is outlined in this authorization bill.

The problem occurs as a result of several line items which the bill just arbitrarily declares to be off budget. Using a term of art established last year for the cost of the Iraqi war, and that term of art is called incremental cost of Desert Storm. It has a very explicit definition. It means those defense costs that are a direct consequence of the war effort over and above programs already planned that would normally have been requested by the Pentagon had there not been a war effort.

One simple way to determine that a program is not caused by the war is if it appears in the President’s 1992 budget request either for fiscal year 1992 or subsequent years. If it appears there, if it is requested by the administration in any case, then it surely is not an incremental cost of Desert Shield or Desert Storm because the administration was planning on spending that money whether or not there was a war. So it cannot fall into the category of an incremental cost of Desert Storm.

Another test is whether or not it is the administration’s estimate of direct cost of Desert Storm. If it is not, and we choose to add it, we are inevitably going to exceed the administration’s estimate of total cost for the war which the administration now says is some $61 billion.

Of course, it is very easy to construct some rationale whereby any expenditure is somehow declared to be war related. That is not the issue. An expenditure must be directly caused by the war effort. That is the definition of an incremental cost of Desert Storm or Desert Shield.

The bill that we are debating today declares some $1.3 billion to be incremental cost of Desert Storm, none of which was requested by the President under the heading of incremental cost of Desert Shield and most of which appears in the President’s Pentagon budget request for fiscal year 1992 or beyond. It was there whether there was going to be a war or not.

Mr. President, we simply cannot get into an arbitrary designation of what is war costs. It opens the door to absolutely massive amounts of military spending that we cannot afford.

This bill designates $652 million in “incremental cost of Desert Shield” spending for two JSTARS aircraft, $326 million apiece for an airplane. And the justification in this report is as follows:

The committee believes that an ongoing JSTARS presence in Southwest Asia — like AWACS — is a stabilizing presence and is likely to be a permanent feature of the U.S. military presence in the region.

The committee continues:

As such, the committee believes it is thoroughly appropriate to buy two additional JSTARS aircraft with residual cooperation account funds.

Mr. President, a prominent presence in Southwest Asia, that is not a rationale for buying two new airplanes that cost over $350 million, charging the taxpayers and saying, oh, well, that is an incremental cost of Desert Storm.

Under the same logic, why do we not go out and buy five or six new aircraft carriers. We could find plenty of places to put those, I suppose, and charge those off to war efforts. The possibilities here are virtually endless.

Yes, the existing JSTAR aircraft, when they participated in the gulf effort, were not shot down. They were not even fired on. So do they need replacing?

We simply cannot allow a simple definition of what is “incremental costs of Desert Shield.”

But to be perfectly clear, Mr. President, I put these questions to the Congressional Budget Office last night and received the following answer this morning. . . .
November 25 used contingent emergency language similar to that in the Senate-reported Disaster Relief Supplemental to shield funding to transport aid to the Soviet Union from points of order.282

IV. IMPLICATIONS FOR THE RELATIONSHIP BETWEEN THE CONGRESS AND THE PRESIDENT

While the Constitution’s first Presentment Clause283 sets forth a procedure for the Congress to present bills to the President for approval or veto in their totality, the process of designating or not designating emergencies creates another, intermediate option for the President, a middle ground between signing and vetoing. As President Bush did with the unemployment insurance bill, the President may sign the bill but not designate the emergency. Cases, like the unemployment insurance bill, that make effectiveness of the bill contingent on the President’s designation of the bill’s spending as emergency requirements highlight the relationship of this intermediate option to the normal constitutional process. In such cases, the President gets the effect of an absolute veto over the bill by not declaring an emergency. How does this middle ground relate to the Presentment Clauses?

In Wright v. United States,284 the Supreme Court explained the purposes behind the Presentment Clauses:

The constitutional provisions have two fundamental purposes; (1) that the President shall have suitable opportunity to consider the bills presented to him, and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes. Edwards v. United States, 286 U. S. 482, 486. We should not adopt a construction which would frustrate either of these purposes.285

$200 million for heavy equipment transporter tactical trailers, and an additional $10 million weapons and combat vehicles production base support.

We should not put the items I have discussed here today into the Desert Storm supplemental and assume they will be funded from the defense cooperation account. CBO is not going to score these expenditures as “incremental costs of Desert Shield.” They will, therefore, count against the defense cap.


282. See id. at S18,047 (daily ed. Nov. 25, 1991) (amendment number 1441).


284. 302 U.S. 583 (1938). The Court in Wright held that where the Congress has not adjourned and the House in which a bill originated is in recess for not more than 3 days while Congress is in session, the bill does not become a law if the President has delivered the bill with his objections to the appropriate officer of that House within the prescribed 10 days and the Congress does not pass the bill over his objections by the requisite votes. Id. at 598.

285. Id. at 596. Similarly, in Edwards v. United States, 286 U.S. 482 (1932), the Court said:

The last sentence of [the first Presentment Clause] clearly indicates two definite and controlling purposes: First. To insure promptness and safeguard the opportunity of the Congress for reconsideration of bills which the President disapproves; hence the fixing of a time limit so that the status of measures shall not be held indefinitely in abeyance through inaction on the part of the President. Second. To safeguard the opportunity of the President to consider all bills presented to him, so that it may not be destroyed by the adjournment of the Congress during the time allowed to the President for that purpose.

Id. at 486. Later, the Court reiterated: “Regard must be had to the fundamental purpose of the constitutional provision to provide appropriate opportunity for the President to consider the bills presented to him.” Id. at 493.
The Court thus divides analysis of the Presentment Clause into its two purposes. In *The Pocket Veto Case*, the Court highlighted the importance of Constitution's plan to give the President's an adequate opportunity to consider bills:

The Constitution in giving the President a qualified negative over legislation — commonly called a veto — entrusts him with an authority and imposes upon him an obligation that are of the highest importance, in the execution of which it is made his duty not only to sign bills that he approves in order that they may become law, but to return bills that he disapproves, with his objections, in order that they may be reconsidered by Congress. The faithful and effective exercise of this momentous duty necessarily requires time in which the President may carefully examine and consider a bill and determine, after due deliberation, whether he should approve or disapprove it, and if he disapproves it, formulate his objections for the consideration of Congress. To that end a specified time is given, after the bill has been presented to him, in which he may examine its provisions and either approve it or return it, not approved, for reconsideration. . . . The power thus conferred upon the President cannot be narrowed or cut down by Congress, nor the time within which it is to be exercised lessened, directly or indirectly. And it is just as essential a part of the constitutional provisions, guarding against ill-considered and unwise legislation, that the President, on his part should have the full time allowed him for determining whether he should approve or disapprove a bill, and if disapproved, for adequately formulating the objections that should be considered by Congress, as it is that Congress, on its part, should have an opportunity to re-pass the bill over his objections.

The emergency procedures require the President to make a decision as to designation no later than five days after enactment of a piece of legislation. The unemployment insurance legislation called on the President to make that decision no later than the date of enactment. Under these limitations, the President does “have suitable opportunity to consider the bills presented to him.” As the emergency scheme does not require the President to make any decision before enactment, it adds no burdens more onerous than the constitutional scheme laid out in the Presentment Clauses. To the President, the emergency procedure is equivalent to a decision whether to approve or disapprove a complex statute, or whether to approve or disapprove two related statutes, where one of the two legislates contingent on the enactment of the other. This burden does not violate the Constitution's requirements under the Presentment Clause.

Not so clear a case would exist if a statute somehow required the President to make a decision before the date of enactment. In such a case, the President

286. 279 U.S. 655 (1929). The *Pocket Veto Case* Court held that the adjournment of the first session of a Congress can prevent the President from returning a bill within 10 days, and thus a bill passed within 10 days of such an adjournment that is not signed by the President does not become law. 279 U.S. at 691-92.

287. *Id.* at 677-78 (footnotes omitted). The Court further extolled the “imperative” significance of the President’s role under the Presentment Clauses in Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 946-48.

288. *See supra* note 95 and accompanying text.

289. *See supra* note 225 and accompanying text.

might well argue that the Congress sought to cut down the ten day opportunity for consideration that the Presentment Clause grants the President.

The emergency procedure has more dramatic consequences for Congress's powers under the Presentment Clause. As the President may sign the bill including such an emergency provision but not designate an emergency, the emergency procedure deprives the Congress of its opportunity to enact that particular bill into law notwithstanding the President's objections. With regard to the Congress's opportunity, the Court in Wright stated:

Where the President does not approve a bill, the plan of the Constitution is to give to the Congress the opportunity to consider his objections and to pass the bill despite his disapproval. It is for this purpose that the time limit for return is fixed. This opportunity is as important as that of the President.291

The Federal Convention of 1787 that drafted the Constitution considered early and resoundingly rejected a proposal to grant the President "an absolute negative," that is, a veto without the possibility of override.292 On June 4, 1787, James Wilson of Pennsylvania, seconded by Alexander Hamilton, moved to strike the provision for overriding the President's veto.293 Elbridge Gerry of Massachusetts "saw no necessity for so great a [control] over the legislature[,] as the best men in the Community would be comprised in the two branches of it."294 Benjamin Franklin rejected the proposal as tending toward the corruption of the executive, recounting how the Pennsylvania Governor had extorted personal gain in exchange for withholding his veto.295 Roger Sherman of Connecticut opposed

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291. Id.
293. See King, supra note 292, at 847 (reporting the motion by Wilson seconded by Hamilton). Cf. Madison, supra note 292, at 61 (reporting the motion by Wilson and Hamilton); Yates, supra note 292 (reporting the motion but not the mover).
295. See Madison, supra note 292, at 62; King, supra note 292, at 847-48. James Madison's notes recount Franklin's speech:

[Doctor] Franklin, said he was sorry to differ from his colleague for whom he had a very great respect, on any occasion, but he could not help it on this. He had had some experience of this check in the Executive on the Legislature, under the proprietary Government of [Pennsylvania]. The negative of the Governor was constantly made use of to extort money. No good law whatever could be passed without a private bargain with him. An increase of his salary, or some donation, was always made a condition; till at last it became the regular practice, to have orders in his favor on the Treasury, presented along with the bills to be signed, so that he might actually receive the former before he should sign the latter. When the Indians were scalping the western people, and notice of it arrived, the concurrence of the Governor in the means of self-[defense] could not be got, till it was agreed that his Estate should be exempted from taxation: so that the people were to fight for the security of his property, whilst he was to bear no share of the burden. This was a mischievous sort of check. If the Executive was to have a Council, such a power would be less objectionable. It was true, the King of [Great Britain] had not, as was said, exerted his negative since the Revolution; but that
the proposal, as he thought it unlikely that any single person would so outshine the Congress in wisdom. James Madison thought the absolute negative unnecessary, as it would grant little power that a veto subject to override would not, as the President would likely be unable to resist the Congress unless he had some congressional support. Pierce Butler of South Carolina warned of the specter of constantly increasing executive power. Gunning Bedford, Jr., of Delaware

matter was easily explained. The bribes and emoluments now given to the members of parliament rendered it unnecessary, every thing being done according to the will of the Ministers. Franklin was afraid, if a negative should be given as proposed, that more power and money would be demanded, till at last [enough] would be gotten to influence [and] bribe the Legislature into [complete] subjection to the will of the Executive.

MADISON, supra note 292, at 62.

Rufus King's notes state:

Franklin opposed — Our former [Governor] in [Pennsylvania] abused this power of a full Negative and extorted money from the Legislature, before he would sign their acts — in one instance he refused his Signature to a Bill to march the Militia [against] the Indians, till the Bill exempted from Taxes the Estate of the Proprietors on account of the expense of the Militia.

One man cannot be believed to possess more wisdom than both Branches of the Legislature — the Royal Negative has not been exercised since the Revolution; he easily does by corruption what could be done with some risk by his negative.


Robert Yates's notes summarize: "Dr. Franklin [was] against the motion — The power [would be] dangerous, and would be abused so as to get money for passing bills." R. YATES, supra note 292.

296. See MADISON, supra note 292, at 62-63. Madison's notes record Sherman's statement:

Mr. SHERMAN was [against] enabling any one man to stop the will of the whole. No one man could be found so far above all the rest in wisdom. He thought we ought to avail ourselves of his wisdom in revising the laws, but not permit him to [overrule] the decided and cool opinions of the Legislature.

Id. Note that King's notes appear to attribute these thoughts to Franklin. See supra note 295.

297. See MADISON, supra note 292, at 63; KING, supra note 292, at 848; YATES, supra note 292.

According to his own notes, Madison said:

Mr. MADISON supposed that if a proper proportion of each branch should be required to overrule the objections of the Executive, it would answer the same purpose as an absolute negative. It would rarely if ever happen that the Executive constituted as ours is proposed to be would, have firmness [enough] to resist the legislature, unless backed by a certain part of the body itself. The King of [Great Britain] with all his splendid attributes would not be able to withstand [the] unanimous and eager wishes of both houses of Parliament. To give such a prerogative would certainly be obnoxious to the temper of this Country; its present temper at least.

MADISON, supra note 292.

King's notes state: "Madison — opposed — No man would dare negative a Bill unanimously passed. It is even doubtful whether the King of England [would] have Firmness enough to do so."

KING, supra note 292, 848.

Yates's notes report: "Mr. Madison against it — because of the difficulty of an executive venturing on the exercise of this negative, and [Madison] is therefore of [the] opinion that the revisional authority is better." YATES, supra note 292.

298. See MADISON, supra note 292, at 63. Madison's notes report:

Mr. BUTLER had been in favor of a single Executive Magistrate; but could he have entertained an idea that a [complete] negative on the laws was to be given him[,] he certainly should have acted very differently. It had been observed that in all countries the executive power is in constant course of increase. This was certainly the case in [Great Britain]. Gentlemen seemed to think that we had nothing to apprehend from an abuse of the Executive power. But why might not a Cataline or a Cromwell arise in this Country as well as in others[?]

Id. Butler referred to Lucius Sergius Catiline, a Roman conspirator in the First Century B.C., and to Oliver Cromwell, who took the title of Lord Protector of the Commonwealth in Great Britain in the mid 17th Century.

King's notes summarized: "Butler opposed — because it [the executive] will become king."

KING, supra note 292, at 847.
objected to any check on the Congress beyond laying out the congressional powers in the Constitution and allowing the one House of Congress to check the other.\textsuperscript{299} George Mason of Virginia expressed his fear that the Convention was creating an elective monarch more dangerous than the British King.\textsuperscript{300} Franklin closed the debate by echoing Butler’s fears of a power-hungry President and

\begin{quote}
\textsuperscript{299} See Madison, supra note 292, at 64; Yates, supra note 292. Madison's notes recount: Mr. Bedford was opposed to every check on the legislature, even the Council of Revision first proposed. He thought it would be sufficient to mark out in the Constitution the boundaries to the Legislative Authority, which would give all the requisite security to the rights of the other departments. The Representatives of the people were the best Judges of what was for their interest, and ought to be under no external [control] whatever. The two branches would produce a sufficient [control] within the Legislature itself.

Yates's notes state: "Mr. Bedford is against the whole, either negative or revisional — the two branches are sufficient checks on each other — no danger of subverting the executive, because his powers may by the convention be so well defined that the legislature cannot overleap the bounds."

\textsuperscript{300} See Madison, supra note 292, at 64-65; King, supra note 292, at 848. Madison's notes relate Mason's speech:

[Colonel] Mason observed that a vote had already passed . . . for vesting the executive powers in a single person. Among these powers was that of appointing to offices in certain cases. The probable abuses of a negative had been well explained by Dr. [Franklin] as proved by experience, the best of all tests. Will not the same door be opened here? The Executive may refuse its assent to necessary measures till new appointments shall be referred to him; and having by degrees engrossed all these into his own hands, the American Executive, like the British, will by bribery [and] influence, save himself the trouble [and] odium of exerting his negative afterwards. We are[,] Mr. Chairman[,] going very far in this business. We are not indeed constituting a British Government, but a more dangerous monarchy, an elective one. We are introducing a new principle into our system, and not necessary as in the British [Government] where the Executive has greater rights to defend. Do gentlemen mean to pave the way to hereditary Monarchy? Do they flatter themselves that the people will ever consent to such an innovation? If they do[,] I venture to tell them, they are mistaken. The people will never consent. And do gentlemen consider the danger of delay, and the still greater danger of a . . . rejection, not for a moment but forever, of the plan which shall be proposed to them[?] Notwithstanding the oppressions [and] injustice experienced among us from democracy; the genius of the people is in favor of it, and the genius of the people must be consulted. He could not but consider the federal system as in effect dissolved by the appointment of this Convention to devise a better one. And do gentlemen look forward to the dangerous interval between the extinction of an old, and the establishment of a new [Government] and to the scenes of confusion which may ensue[?] He hoped that nothing like a Monarchy would ever be attempted in this Country. A hatred to its oppressions had carried the people through the late Revolution. Will it not be [enough] to enable the Executive to suspend offensive laws, till they shall be coolly revised, and the objections to them overruled by a greater majority than was required in the first instance[?] He never could agree to give up all the rights of the people to a single Magistrate.

Yates's notes summarize: "Mr. Mason [was] against the negative power in the executive, because it will not accord with the genius of the people." Yates, supra note 292.
\end{quote}
Mason's fear of monarchy. The ten states then present and voting at the Convention then voted unanimously against the motion.

The contingent emergency procedure deprives Congress of an override. Whose fault is that, however, if not the Congress's? The President did not force the Congress to enact the Budget Enforcement Act, or the law providing the contingent emergency power, for that matter. The effect of the contingent emergency procedure is similar to the case where the Congress of its own choosing adjourns, preventing the President's return of a bill with his objections. The Congress's actions there prevent the Congress from having the chance to override. With regard to that case, the Court in the *Pocket Veto Case* rejected the Congress's predicament as its own doing.

As well, the emergency procedure is similar to a delegation of Congressional power to the President. Congress may condition the operation of legislation on the President's determination of certain facts.


[Doctor] Franklin. A Gentleman from [South Carolina] [Mr. Butler] a day or two ago called our attention to the case of the [United] Netherlands. He wished the gentleman had been a little fuller, and had gone back to the original of that [Government]. The people being under great obligations to the Prince of Orange whose wisdom and bravery had saved them, chose him for the Stadtholder. He did very well. Inconveniences however were felt from his powers; which growing more [and] more oppressive, they were at length set aside. Still however there was a party for the [Prince] of Orange, which descended to his son who excited insurrections, split a great deal of blood, murdered the de Witts, and got the powers revested in the Stadtholder. Afterwards another Prince had power to excite insurrections [and] to make the Stadtholdership hereditary. And the present [Stadtholder] is ready to wade [through] a bloody civil war to the establishment of a monarchy. [Colonel] Mason had mentioned the circumstances of appointing officers. He knew how that point would be managed. No new appointment would be suffered as heretofore in [Pennsylvania] unless it be referred to the Executive; so that all profitable offices will be at his disposal. The first man put at the helm will be a good one. No body knows what sort may come afterwards. The Executive will be always increasing here, as elsewhere, till it ends in a Monarchy[.]

Id.

King's notes record: "Franklin — The Prince of Orange at first had limited Powers, and his office was for Life — his son raised a faction & caused himself to be declared hereditary — we may meet the same fate." *King*, supra note 292, at 848.

302. See *Madison*, supra note 292, at 66; *Yates*, supra note 292.

303. The Court said:

[It] is plain that when the adjournment of Congress prevents the return of a bill within the allotted time, the failure of the bill to become a law cannot properly be ascribed to the disapproval of the President — who presumably would have returned it before the adjournment if there had been sufficient time in which to complete his consideration and take such action — but is attributable solely to the action of Congress in adjourning before the time allowed the President for returning the bill had expired. Thus, in *La Abra Silver Mining Co. v. United States*, supra, 454, this Court said that "if by its action, after the presentation of a bill to the President during the time given him by the Constitution for an examination of its provisions and for approving it by his signature, Congress puts it out of his power to return it, not approved, within that time to the House in which it originated, then the bill fails, and does not become a law."

279 U.S. at 678-79

In a footnote, the Court noted: "And if Congress so desires the same bill may be re-introduced and passed when Congress resumes its session, and after receiving the due consideration of the President, if returned with his objections, may be then passed by the requisite vote in both House." *Id.* at 679 n.6. *But see* Kennedy v. Sampson, 511 F.2d 430, 435 n.17 (D.C. Cir. 1974) (noting that passing a measure a second time is by no means an easy thing).

304. See *The Cargo of the Brig Aurora, Burnside v. U.S.*, 11 U.S. (7 Cranch) 382 (1813) (where
Note another similarity as well. To the extent that the emergency provisions of a bill constitute only part of the spending in the bill, the emergency procedure has the same effect as granting the President an absolute line-item veto over the emergency items. The President can and does designate appropriation emergencies by dollar amounts and can designate spending or revenue emergencies by provision. The President’s power over these spending items thus has the surgical precision of a line-item veto. As the President may sign the law and not designate the emergency (in whole or in part), the President has the equivalent of an absolute line-item veto over the emergency spending items.

Thus, although the Founders vehemently disapproved of granting the President “an absolute negative” over all bills, the Congress through its actions may surrender such power to the President for particular bills or portions of bills. In sum, the emergency procedure is an abdication of legislative power of the sort of which the Court has ruled constitutional in the past, but of which many of the Framers would not have approved.

V. CONCLUSION

Creating fixed limits on spending for a period of time poses a dilemma for the policy-maker. If the limits bind too tightly or cannot accommodate changed circumstances, then participants in the process will reject them, as they did the fixed Gramm-Rudman-Hollings deficit targets in 1987 and again in 1990. If the limits do not bind tightly enough, then they fail in their fundamental purpose, contributing to deficit reduction.

Recent budget agreements between the President and Congress have attempted to address this dilemma by creating an exception for emergencies. The emergency exception serves as a safety valve to let off steam and prevent an agreement from blowing up. The safety valve itself, however, poses the same dilemma. Too tight a setting on the valve lets off too little pressure. Too loose a setting on the valve allows spending to increase, presenting an opportunity for those who wish to escape the machine altogether. Several Senators and the Director of the Office of Management and Budget have expressed the concern that the emergency exception may result in too much spending.

The Court upheld a legislative scheme made operational by a Presidential proclamation with regard to whether Great Britain violated the neutral commerce of the United States; Laurence H. Tribe, American Constitutional Law 362 (2d ed. 1988). Congress has granted the President a number of emergency powers. See generally Staff of Senate Special Comm. on National Emergencies and Delegated Emergency Powers, 93d Cong., 2d Sess., A Brief History of Emergency Powers in the United States (Comm. Print 1974) (prepared by H. Relyea of the Library of Congress under direction of Committee staff).

305. See supra note 92 and accompanying text.

306. See Gramm-Rudman-Hollings § 252(e); 2 U.S.C. § 902(e) (Supp. II 1990); supra text accompanying note 91.


308. With the Budget Enforcement Act of 1990.

309. See, e.g., Senate Mid-Session Hearings, supra note 138, at 181-82 (statement of Sen. Domenici); id. at 222-23 (statements of Sen. Bond and Director Darman).

Senator Grassley went on to turn the use of the word “emergency” around, questioning whether the deficit itself constituted an emergency:

Could I suggest this, that, you know, one way of some pressure value approach, when Congress cannot see far enough ahead, is this declaration of emergency. Well, if
Some have suggested that just as families have to meet their emergencies by spreading the emergency costs out over time, the law should merely facilitate shifting among years within the caps. This rule might lead to an increase in shifts among years like that caused by the one-year focus of the 1985 Gramm-Rudman-Hollings Act. The opportunity to put off painful choices to another day sorely tempts participants in the budget process. The rule would thus have to limit the exception, once again. One might well question, then, whether a limited opportunity to postpone pain provides enough of a release from the constraints of the system to avoid building up pressures to overturn the system in its entirety.

Some have expressed the fear that the contingent emergency designation has such subtle appeal that a large share of all legislation could be designated as an emergency. A widespread use of contingent emergencies would transfer an even wider scope of fiscal powers to the President, who could then pick and choose among spending that he wanted. This appears an unlikely result at present, as even advocates of heavy spending want to have some certainty that at least some of the spending advocated will eventually take place. If contingent emergency spending bills become too common, the President will find it all that much easier not to designate the emergencies. The contingent emergency has utility only if it would be embarrassing for the President to turn down the proffered emergency funding, as was the case with the unemployment insurance bill.

At this writing, the emergency exception has not led to a significant increased in the deficit. So far, in the words of the Congressional Budget Office, "The budget summit agreement . . . is holding." As that Office notes, the vast

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310. See, e.g., supra note 216 (statement of Sen. Domenici). Additional evidence for this proposition appeared in the large number of amendments filed during consideration of the unemployment insurance bill. See supra note 198.

311. CONGRESSIONAL BUDGET OFFICE, supra note 222, at 41. See also CONGRESSIONAL BUDGET OFFICE, supra note 251, at 40 ("The Congress and the President have hewed closely to the terms of the Budget Enforcement Act."). The Congressional Budget Office summarizes the effect of emergency
majority of emergency spending has been for Desert Shield costs for which foreign governments have reimbursed or will reimburse the United States.\textsuperscript{312}

Another concern raised by the emergency procedures is the possibility that participants in the budget process might use them as a means of avoiding financing contingency funds. For example, the Government regularly sets aside pools of money to address natural disasters.\textsuperscript{313} The budget agreement levels take into account a certain predicted amount of funding for these contingency funds. If participants in the budget process finance these contingency funds at unrealistically low levels, relying on emergency designations when the expected disaster does come, then the emergency procedure will have resulted in increased spending by the amount of the underfunding. Although it is difficult not to consider these natural disasters as emergencies within the plain meaning of the term, the Office of Management and Budget has legitimately sought to distinguish these amounts as expected.\textsuperscript{314}

Another concern is that the emergency exception merely creates another species of off-budget spending that can escape regulation through the regular budget process.\textsuperscript{315} "Taken along with recent statutory changes taking the Postal Service,\textsuperscript{316} the Social Security Trust Funds,\textsuperscript{317} and parts of the savings and loan and bailout\textsuperscript{318} off the books, this concern is legitimate. For the items that the budget process declares to be exceptions to annual limits, the process loses control. One can question whether funding on these ends, as worthy as they are, should necessarily be beyond any review. Should Congress not consider the funding levels for these Government programs along with those for all others? As well, removing these amounts from spending limits makes the residual limits all the more unrealistic as tools to measure the activities of Government.\textsuperscript{319}

One might welcome the result if Congress took \textit{all} programs off budget. The Budget Committees would change their names to the Off-Budget Committees.

spending as follows:

The budget summit agreement, as codified in the Budget Enforcement Act, is holding. Appropriation bills moving through the Congress are hewing to the dollar caps set in the act. Emergency legislation, specifically envisioned in the law, was enacted to pay for the costs of Operation Desert Storm; much of this spending will be recouped from foreign contributions. A handful of other urgent needs, totaling about $2 billion, also received the emergency designation. Still uncertain is the fate of a bill passed in early August that would extend unemployment insurance benefits for some recipients if the President declares an emergency. Policymakers have enacted no other significant entitlement or tax legislation this year (under the rules of the summit, such legislation in total must not raise the deficit).

\textsuperscript{312} \textit{See} \textsc{Congressional Budget Office, supra} note 222, at 41-42.; see \textsc{Congressional Budget Office, supra} note 148 and accompanying text (citing the high share of defense — that is, Desert Shield — expenditures among emergencies).

\textsuperscript{313} That is the mission of the Federal Emergency Management Agency.

\textsuperscript{314} See \textit{Office of Management and Budget, Report on the Costs of Domestic and International Emergencies and on the Threats Posed by the Kuwaiti Oil Fires} (June 27, 1991); \textit{see} \textsc{Office Of Management and Budget, supra} note 134 and accompanying text.

\textsuperscript{315} \textit{See supra} notes 28-30 and accompanying text (remarks of Senator Graham expressing concern about taking items off budget).

\textsuperscript{316} \textit{Omnibus Budget Reconciliation Act of 1989}.

\textsuperscript{317} \textit{Budget Enforcement Act of 1990} § 13301, 104 Stat. at 1388-623.

\textsuperscript{318} \textit{Financial Institutions Reform, Recovery and Enforcement Act of 1989}.

\textsuperscript{319} \textit{See Report of the President's Commission on Budget Concepts} (1967).
Congress would once again make choices among all of the Government's programs. Indeed, one can rationally argue for eschewing all fixed limits on spending, as then Congress and the President would be free to decide among programs strictly on their merits, without regard to their short-term costs. Quite frequently short-term costs (that is, costs within the lifetime of a budget agreement) might appear large for a program that saves money in the long term.\footnote{For example, advocates of funding for education of low-income children make this argument.} One can imagine a world outside of the limits of Gramm-Rudman-Hollings and the Budget Enforcement Act: the English-speaking world enjoyed such an existence at least from the founding of the Parliament's Ways and Means Committee in 1641 to Gramm-Rudman-Hollings's enactment in 1985. In this pre-1985 environment, before supermajority points of order and sequestration, a majority of the Congress (barring a filibuster or a veto) decided spending issues.\footnote{But see \textsc{Articles of Confederation} art. IX, \S~6 (requiring a supermajority for requisitions from the states to collect revenue for the Government). The difficulty of raising funds under the Articles of Confederation proved its undoing. See, e.g., \textsc{Madison}, supra note 292, at 7, 13 (citing the "radical infirmity" and "inefficiency" of the system under the Articles of Confederation).}

Congress's habit of putting large portions of the Government's spending beyond its effective control merely encourages those favored programs to grow beyond reasonable amounts. The emergency exception, by providing another passage to the favored land off budget, contributes to the quest among those programs within the budget limits to exit.

For the emergency procedures to succeed, neutral or democratic principles must govern the determination of what becomes an emergency. If the process of determining emergencies does not appear open, it will justifiably breed resentment.\footnote{The Chairman and the Ranking Republican Member of the Budget Committee have expressed some concern about the breadth of the process by which the President and Congress designate emergencies in a letter to the Director of the Office of Management and Budget, the Senate Majority Leader, and the Senate Republican Leader:}

\begin{quote}
We are writing you to address the procedures for designating emergency funding requirements pursuant to the Gramm-Rudman-Hollings law as amended by the Budget Enforcement Act of 1990. We believe that we must work together to maintain the integrity of the congressional budget process. Just as the joint leadership of Congress — including representatives of the Budget Committee — came together with the President's staff to craft the budget agreement, we believe that a joint effort is needed to enforce the budget agreement.
\end{quote}

In congressional budget enforcement under the Congressional Budget Act and Gramm-Rudman-Hollings as amended by the Budget Enforcement Act, the Senate turns to its Budget Committee to assess the costs of legislation. (\textit{See, e.g.}, sections 201(g), 302(g), 310(d)(4), 311(c), 313(e), of the Congressional Budget Act and section 258B(h)(4) of Gramm-Rudman-Hollings.) Put in practical terms, the Presiding Officer turns to the Chairman of the Budget Committee to advise the Chair of the Budget Committee's position on whether a piece of legislation spends or cuts taxes so much that it violates the constraints of the law.

In order for the Budget Committee to advise the Chair accurately whether a provision will violate constraints in the law, the Budget Committee must make a determination as to whether the provision falls within the emergency exception. This determination necessarily involves a degree of judgment, as the legislation designating the provision in all likelihood will not yet have become statute. Similarly, the President may make his designation at any time up to and including the time of enactment of the provision.

To ensure the orderly accounting for the costs of legislation on the floor of the Senate, the leadership of the Budget Committee must be included in any negotiations
constitutes an emergency in detail. The Director of the Office of Management and Budget appears headed down this route.\textsuperscript{323} It behooves the President to maintain the powers so far delegated to the executive and to define more precisely "emergencies" so as to have apparently neutral bases on which to deny spending requests not to the executive branch's liking.

One is tempted to consider arbitration of disputes over emergency designations, but the step toward arbitrating disputes between the Congressional Budget Office and the Office of Management and Budget in the original Gramm-Rudman-Hollings led the Supreme Court to overturn that law in \textit{Bowsher v. Synar}.

If one then follows down the road that the drafters of the 1987 revision of Gramm-Rudman-Hollings did, one would next consider neutral (or at least more neutral) outside agency heads as arbiters. For example, could the Chairman of the Federal Reserve Board make such determinations? Alternatively, Congress could give the power to the head of the Federal Emergency Management Agency, give that officer a fixed, multi-year term longer than that of a President, and make that officer removable only for cause. Going down this road risks creating too clever a machine, and attributing too little cleverness to the regular legislative process.

Another way to ensure openness of the process of choosing emergencies is to designate a larger defined group to address the issue. Problems arise in picking a membership of such a group that would be small enough to be practical yet large enough to be democratic.

The Congressional Budget Act provides its own safety valve in the form of procedures whereby a supermajority may waive limits provided by the Act.\textsuperscript{325} This takes a step further in openness and participation. The system might be better served by a simple supermajority requirement than a requirement that the President agree.

The complexity of administering the safety valve demonstrates the difficulty of long-term budget agreements. Planning far in advance requires leaving room for adjustments to accommodate changed circumstances. These exceptions can well grow to eat up the rule. The more significant the exceptions become, the more sense it makes simply to negotiate limits for shorter periods.

The better solution is more regular deals, tailor made to the facts of the day. It would be better simply to set more realistic caps and hold to those than to create peculiar exceptions to get around obsolete ones. To be realistic, caps must be set frequently. The Congressional Budget Act system of annual budgets had something right with it, after all.

The system that requires parties to negotiate all exceptions does not work where one party to an agreement is plainly more interested in avoiding exceptions that lead up to the designation of provisions as emergency requirements. We urge you to involve us in your discussions on this matter.

The budget summit called for both executive and congressional enforcement. Congress has expressed its concerns about the Office of Management and Budget's potential for abusing its role in this process. We hope that you will consult with us as both branches of Government work to implement the budget summit agreement.


\textsuperscript{323} \textit{See supra} notes 132-136 and accompanying text.

\textsuperscript{324} 478 U.S. at 721-34.

\textsuperscript{325} \textit{See} Congressional Budget Act § 904(b) & (c).
than the other; the first party will get the whip hand. By giving the President an irrevocable veto over exceptions, Congress gave the President more power than it realized. If one assumes that the Congress will find it hard not to declare an emergency given an opportunity, then the President will get relief from the pressures of spending constraints when the executive branch needs it, but Congress will not get relief from constraints unless the President chooses to grant it. In a zero-sum game, administering the safety valve is a powerful position. That power will grow as the pie begins to shrink, as it will under the existing caps.\textsuperscript{326}

In the end, an observer might ask why Congress chooses to bind itself in such straightjackets as Gramm-Rudman-Hollings and the Budget Enforcement Act. Senator Stevens may have asked the right, and indeed a telling, question during the debate in the Senate on the amendment that would later become the Budget Enforcement Act: "What I question is why a group of grown people need to put parameters around themselves and their future colleagues in order to do our job and to do it right."\textsuperscript{327}

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