A SUSTAINABLE BUDGET SHOULD ENDURE ANY STORM

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INTRODUCTION

In October 2012, Hurricane Sandy devastated the East Coast of the United States. The storm struck one of the country's most populous and economically important regions a mere two years after Hurricane Irene, a similar though weaker storm, struck the New York area and shut down the entire New York City public transportation system for the first time in its history.[1] These events, while inconsistent with

1. Kim Severson & Campbell Robertson, *Hurricane Irene Puts East Coast in Line for Fury*, N.Y. TIMES, Aug. 26, 2011, http://www.nytimes.com/2011/08/27/us/27hurricane.html?pagewanted=all.

historical regional weather patterns,[2] are representative of the dramatic increase in extreme weather events that North America has experienced over the past few decades.[3] It is abundantly clear that anthropogenic climate change is causing a vast increase in natural disasters globally, but nowhere is this trend more profound than North America, which has experienced a fivefold increase in such events since 1980.[4] As states appear unwilling to sufficiently address global climate change, this trend is expected to continue.[5]

In response to these changes, "[f]ederal spending for disaster relief and recovery will only increase as extreme weather events become more intense and/or frequent."[6] Unfortunately, this necessary spending increase coincides with grim short- and long-term federal fiscal scenarios in the U.S.[7] To address "the explosive path of federal debt"

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2. *See* Jason Samenow, *Hurricane Sandy May Be Unprecedented in East Coast Storm History*, WASH. POST BLOG (Oct. 26, 2012, 9:55 AM), http://www.washingtonpost.com/blogs/capital-weather-gang/post/hurricane-sandy-may-be-unprecedented-in-east-coast-storm-history/2012/10/26/4f6660e6-1f6e-11e2-9cd5-b55c38388962_blog.html; *see also Hurricane Sandy: An Unprecedented Disaster*, SCI. AM. (Nov. 7, 2012), http://www.scientificamerican.com/report.cfm?id=hurricane-sandy-2012; Melissa Breyer, *9 Records Blown Away by Superstorm Sandy*, TREEHUGGER (Oct. 31, 2012), http://www.treehugger.com/natural-sciences/9-records-blown-away-superstorm-sandy.html (quoting Bill Read, former director of the Nat'l Hurricane Ctr.) ("There are no precedents for Sandy.").

3. *See* Press Release, *North America Most Affected by Increase in Weather-Related Natural Catastrophes*, MUNICH RE (Oct. 17, 2012), http://www.munichre.com/en/media-relations/publications/press-releases/2012/2012-10-17-press-release/index.html [hereinafter MUNICH RE]; *see also* DANIEL J. WEISS ET AL., CTR. FOR AM. PROGRESS, HEAVY WEATHER: HOW CLIMATE DESTRUCTION HARMS MIDDLE- AND LOWER-INCOME AMERICANS 13 (2012), *available at* http://www.americanprogress.org/wp-content/uploads/2012/11/ExtremeWeather.pdf (stating that some climatologists believe climate change increased Hurricane Sandy's strength).

4. MUNICH RE, *supra* note 3, at 1.

5. *See* WEISS ET AL., *supra* note 3, at 1; *see also Post-Landfall Loss Estimates for Superstorm Sandy Released*, EQECAT (Nov. 1, 2012), http://www.eqecat.com/catwatch/post-landfall-loss-estimates-superstorm-sandy-released-2012-11-01/. (providing estimates of Sandy's post-landfall economic damages).

6. WEISS ET AL., *supra* note 3, at 34.

7. CONG. BUDGET OFFICE, THE 2012 LONG-TERM BUDGET OUTLOOK 18 (2012), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/06-05-Long-Term_Budget_Outlook_2.pdf ("[T]he federal government faces a daunting long-term budgetary shortfall if it continues to maintain the major tax and spending policies that are currently in effect or have recently been in effect."); *see also* CONG. BUDGET OFFICE, UPDATED BUDGET PROJECTIONS: FISCAL YEARS 2013 TO 2023 1 (May 2013), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/44172-Baseline2.pdf (indicating an improved short-term fiscal situation resulting mainly from higher-than-expected revenues, but maintaining the projection of "high and rising debt later in the coming decade . . . [which] increases the risk of a fiscal crisis."); *cf.* David Kamin, *Are We There Yet?: On a Path to Closing America's Long-Run Deficit*, TAX NOTES, Oct. 2012, at 53, 54, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2157688 (arguing that while admittedly there is a "significant long-term fis-

predicted, many have clamored "for large and timely policy changes to put the federal government on a sustainable fiscal course."[8] This conflict finally came to the fore when a group of fiscal conservatives excoriated the administration for its purportedly excessive funding request for response, recovery, and mitigation efforts after Hurricane Sandy.[9]

Despite the rhetorical pushback, the Republican-controlled House still complied with the President's request, exposing the current fiscal regime's inability to adequately control spending on natural disaster relief. Congress appropriated $60.2 billion in response to Sandy, $33 billion of which was emergency-designated "'funding for longer-term recovery efforts and infrastructure improvements.'"[10] Both the aggregate level of spending (more or less full funding of the President's request[11]) and the extent of supplemental long-term recovery and mitigation funding demonstrates that the Budget Control Act of 2011 (BCA), which was designed to bind Congress to certain discretionary spending levels, has failed to adequately control disaster relief funding.

This Note will offer a reworking of the current fiscal regime by examining how the federal government has paid for natural disaster relief and offering suggestions for how it should. In offering revisions to the BCA, this Note will address the difficulties presented in funding natural disaster relief. Namely, it will confront the vexing problem that despite a somewhat predictable long-term national need for natural disaster relief funding, the timing of annual funding needs is largely uncertain, preventing accurate forecasting. To adequately address this budgetary profile, a fiscal rule must focus on the separate but interconnected issues of controlling the overall level of spending

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cal challenge," it is not as grim as CBO's projections would suggest if one assumes the enactment, or non-expiry, of deficit reduction measures on which there is bipartisan consensus).

8. CONG. BUDGET OFFICE, *supra* note 7, at 3.

9. *See, e.g.*, Erik Wasson & Bernie Becker, *Republicans Question Need for $60.4 Billion in Hurricane Sandy Aid*, HILL BLOG (Dec. 11, 2012, 7:33 PM), http://thehill.com/blogs/on-the-money/budget/272239-gop-frustrated-with-obama-request-for-sandy-money-.

10. Press Release, *Chairman Rogers Introduces Emergency Legislation for Hurricane Sandy Recovery*, H. COMM. ON APPROPRIATIONS (Jan. 4, 2013), *available at* http://appropriations.house.gov/news/documentsingle.aspx?DocumentID=316339.

11. This accounts for both P.L. 113–1 and P.L. 113–2, whereby Congress appropriated approximately $60.2 billion of the $60.4 billion requested, with only minor changes as to which accounts were funded. *See* WILLIAM L. PAINTER & JARED T. BROWN, CONG. RESEARCH SERV., R42869, FY2013 SUPPLEMENTAL FUNDING FOR DISASTER RELIEF 8–9 (2013) [hereinafter PAINTER & BROWN, SUPPLEMENTAL FUNDING]. For a fuller discussion, see *infra* Part III.D.

on disasters, while thwarting an uncontrolled raid on the public fisc when disaster strikes. I argue that appropriations should predominantly be made ex ante, through the regular budgetary process, where disaster relief spending will be considered along with other demands on the federal budget.[12] This impedes legislators' ability to evade discretionary spending caps by disguising non-disaster related or foreseeable funding needs as "emergency" disaster relief;[13] facilitates congressional oversight;[14] leads to a more realistic budget, fostering public debate about spending tradeoffs; and promotes greater and more equitable mitigation funding.[15]

Applying these considerations to the BCA, three issues become apparent: first, the ex ante "regular" budgeting process, while normatively preferable, has yielded woefully inadequate appropriations; second, the BCA "disaster relief" escape clause is poorly designed and wholly inappropriate for the expected increase in funding needs; and third, the BCA "emergency" clause is too loose, providing free rein to spend inequitably and inefficiently. To remedy these shortcomings, the President should request, and Congress should appropriate, fuller funding of FEMA's Disaster Relief Fund. Additionally, the disaster relief funding adjustment to the BCA's discretionary caps should reflect inflation and be adjusted to account for expected increases in disaster expenditures, thereby limiting the need to resort to emergency-designated appropriations. However, as all fiscal rules need flexibility to encourage adherence, the "emergency" escape clause should be retained, with its definition narrowed to preclude supplemental mitigation or prevention spending, and an affirmative and separate vote should be required to "emergency"-designate any appropriations, creating greater accountability.

Part I explores the changes in weather and fiscal patterns that create a pressing need for a revised disaster relief funding architecture. Part II reviews the background and history of federal funding of disas-

12. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-314, SUPPLEMENTAL APPROPRIATIONS: OPPORTUNITIES EXIST TO INCREASE TRANSPARENCY AND PROVIDE ADDITIONAL CONTROLS i (2008). One of the biggest drawbacks of supplemental appropriations is that they create the illusion of not requiring the same tradeoffs necessary during the regular appropriations process. *See id.* at 2.

13. *See id.* at 16 ("[I]tems that are not emergency designated may benefit from the urgency of [emergency supplemental] legislation").

14. *See* Veronique de Rugy & Allison Kasic, *The Never-Ending Emergency: Trends in Supplemental Spending* 23–24 (Mercatus Ctr., George Mason Univ., Working Paper No. 11–30, 2011), *available at* http://mercatus.org/publication/never-ending-emergency.

15. *See* Marvin Phaup & Charlotte Kirschner, *Budgeting for Disasters: Focusing on the Good Times*, OECD J. ON BUDGETING, Oct. 2010, at 21–22.

ter relief, which have been primarily effectuated through supplemental appropriations. Part III argues that ex ante, regular budgeting would remedy the BCA's disaster relief shortcomings, while Part IV details my specific proposal laid out above.

I. THE CONVERGENCE OF DISASTROUS CLIMATIC AND FISCAL CONDITIONS

A. *"The New Normal"*

The United States faces a series of climatic conditions that make severe weather events more likely with each passing year. Global climate change is expected to exacerbate extreme weather conditions on many fronts.[16] While global climate change is perhaps a more accurate descriptor than the more popular term "global warming," warming has certainly occurred. From September 2011 to August 2012, the U.S. suffered its warmest twelve-month period in history,[17] leading to catastrophic drought[18] and the "worst wildfire season on record."[19] These recent disasters are indicative of what climatologists are calling "the new normal,"[20] a continuous "increase [in] extreme weather events in North America."[21] "What was once considered a 100-year flood will happen every 3 to 20 years."[22] For the U.S., "the new normal" includes two additional months of wildfire season each year,[23] a doubling of Category 4 and 5 hurricanes[24] along the Atlantic seaboard,[25] a thirty-five percent increase in the size of storms in the Gulf of Mex-

16. Lauren Morello, *Climate Change Will Worsen Extreme Weather*, SCI. AM. (Nov.18, 2011), http://www.scientificamerican.com/article.cfm?id=climate-change-will-worsen-extreme-weather.

17. WEISS ET AL., *supra* note 3, at 5.

18. *Id.* at 6 (estimating a resultant $10 billion in costs to U.S. taxpayers).

19. Darryl Fears, *U.S. Runs Out of Funds to Battle Wildfires*, WASH. POST, Oct. 7, 2012, http://www.washingtonpost.com/national/us-runs-out-of-funds-to-battle-wildfires/2012/10/07/d632df5c-0c0c-11e2-bd1a-b868e65d57eb_story.html.

20. *See, e.g.*, Christopher R. Schwalm et al., Op-Ed., *Hundred-Year Forecast: Drought*, N.Y. TIMES, Aug. 12, 2012, at SR6, *available at* http://www.nytimes.com/2012/08/12/opinion/sunday/extreme-weather-and-drought-are-here-to-stay.html?_r=1&; *Cyclones and Climate Change: The New Normal?*, ECONOMIST, Nov. 16, 2013, at 44.

21. WEISS ET AL., *supra* note 3, at 22 (citing a NOAA-led study).

22. Kate Sheppard, *Flood, Rebuild, Repeat: Are We Ready for a Superstorm Sandy Every Other Year?*, MOTHER JONES, July–Aug. 2013, *available at* http://www.motherjones.com/environment/2013/07/hurricane-sandy-global-warming-flooding.

23. Fears, *supra* note 19.

24. "The Saffir-Simpson Hurricane Wind Scale is a 1 to 5 rating based on a hurricane's sustained wind speed," with 5 being the most destructive. *Saffir-Simpson Hurricane Wind Scale*, NAT'L HURRICANE CTR., http://www.nhc.noaa.gov/aboutsshws.php (last modified May 24, 2013).

ico,[26] rising sea levels that will exacerbate storm surges,[27] and an even higher rate of tornadoes.[28] As a result, FEMA's emergency and major disaster declarations have steadily increased since FEMA's founding in 1979.[29]

B. Fiscally Demanding

The expected increase in extreme weather events will place large financial demands on the federal treasury, necessitating even greater emphasis on cost control and efficient spending. Over the past three fiscal years, Congress has appropriated over $136 billion to disaster relief, equaling about $400 per American household per year.[30] This is partially due to the fact that extreme weather events now exact a far greater economic toll than in the past, particularly with respect to hurricanes as Americans have built feverishly by the ocean.[31] As a result, it is predicted that Category 5 Hurricane Andrew would cause twice the damage today as it did when the storm struck Florida in 1992.[32]

Not only is property more vulnerable but the extremity and frequency of devastating hurricanes will only continue to increase. As a result, the U.S. is likely to experience more unprecedented natural disasters. One inherent aspect of unprecedented and infrequent events is that communities are unlikely to have undertaken an efficient level of *ex ante* measures to mitigate and prevent damage.[33] For Sandy in par-

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25. Morris A. Bender et al., *Modeled Impact of Anthropogenic Warming on the Frequency of Intense Atlantic Hurricanes*, 327 SCI. 454, 454 (2010) (predicting the increase during the latter half of the 21st century).

26. *See* WEISS ET AL., *supra* note 3, at 12 (noting the increase since 1995).

27. *See id.* at 16.

28. *See id.* at 19–20 (discussing the higher rate of tornadoes over the past two years, including the deadliest tornado in U.S. history in 2011).

29. *See* BRUCE R. LINDSAY ET AL., CONG. RESEARCH SERV., R42352, AN EXAMINATION OF FED. DISASTER RELIEF UNDER THE BUDGET CONTROL ACT 11–12 (2013) (questioning whether this is due to an increase in the number of disasters or an increase in the disasters for which federal aid is requested).

30. DANIEL J. WEISS & JACKIE WEIDMAN, CTR. FOR AM. PROGRESS, DISASTROUS SPENDING: FEDERAL DISASTER-RELIEF EXPENDITURES RISE AMID MORE EXTREME WEATHER 1 (2013), *available at* http://www.americanprogress.org/wp-content/uploads/2013/04/WeissDisasterSpending-1.pdf.

31. *Coastal Cities and Climate Change: You're Going to Get Wet*, ECONOMIST, June 13, 2013, *available at*, http://www.economist.com/news/united-states/21579470-americans-are-building-beachfront-homes-even-oceans-rise-youre-going-get-wet.

32. *Id.*

33. *See infra* Part III.C.3 (discussing the savings accruing from efficient levels of mitigation). People also suffer from recency bias, which describes how recent experiences skew one's future expectations. *See* Carl Richards, *Tomorrow's Market Probably Won't Look Anything Like Today*, N.Y. TIMES BUCKS BLOG (Feb. 13, 2012, 12:23 PM), http://bucks.blogs.nytimes.com/2012/02/13/tomorrows-market-probably-wont-look-anything-like-today/?_r=0 ("[W]e're inclined to use our recent experience as the

ticular, FEMA's flood maps, which guided homeowner preparedness and flood insurance purchases, were wildly inaccurate, misleading many homeowners who were told they were not in flood-prone zones.[34]

While Hurricane Sandy should serve as a wakeup call, America's preparedness has not markedly improved after previous natural disasters, and Sandy's aftermath is unlikely to be different.[35] An MIT survey found U.S. cities to be among the world's least likely to have plans for adapting to changing weather.[36] While this survey does not take into account the response to Hurricane Sandy, it certainly shows that American governmental entities have not heeded previous warnings, such as Hurricane Katrina, and are unlikely to be more responsive in Sandy's wake. Consequently, natural disaster relief spending will continue to constitute a meaningful portion of the federal budget.[37] A renewed focus on controlling such spending through fiscal rules is needed.

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baseline for what will happen in the future."). Given the unusual nature of Hurricane Sandy, see sources cited *supra* note 2, it is unsurprising that insufficient mitigation efforts were undertaken prior to Sandy.

34. Al Shaw et al., *Federal Flood Maps Left New York Unprepared for Sandy—and FEMA Knew It*, ProPublica (Dec. 6, 2013, 4:00 AM), http://www.propublica.org/article/federal-flood-maps-left-new-york-unprepared-for-sandy-and-fema-knew-it.

35. *See* Press Release, *Despite Sandy's Damage, U.S. Coastal Residents Still Unprepared*, Am. Red Cross (May 31, 2013), http://www.redcross.org/news/press-release/Despite-Sandys-Damage-US-Coastal-Residents-Still-Unprepared (finding that half of U.S. coastal residents lack an evacuation plan).

36. JoAnn Carmin et al., Mass. Inst. of Tech., Progress and Challenges in Urban Climate Adaptation Planning 14 (2012), *available at* http://web.mit.edu/jcarmin/www/urbanadapt/Urban%20Adaptation%20Report%20FINAL.pdf (finding that the U.S. has the lowest proportion worldwide of its cities engaged in adaptation planning); *see also Coastal Cities and Climate Change*, *supra* note 31, at 27.

37. After the sequester, the over $50 billion appropriated beyond the BCA's discretionary caps for Hurricane Sandy relief constituted over one-third of total BCA cap adjustments for FY 2013, as well as an over five percent supplement to the initial discretionary budget of $987.5 billion, all deficit spending. *Appropriations Update: Appropriations Status Fiscal Year 2014*, H.R. Comm. on Budget, http://budget.house.gov/appropriationsupdate/ (last updated July 17, 2013). Moreover, Hurricane Sandy relief dwarfed the 2012 budgets for many important federal programs and agencies, equaling approximately the combined budgets of the Departments of Agriculture and Education. Sheppard, *supra* note 22.

II.
Budgeting for Disaster Relief: Facing the Challenge Prior to the BCA

A. *Conceptualizing Natural Disasters and Their Relief*

Before considering further how best to fund disaster relief efforts, some basic understanding of disaster management is necessary. Modern disaster management tends to be broken into four phases: mitigation,[38] preparedness, response, and recovery.[39] For simplicity's sake, this Note will focus on three categories of disaster relief: 1) *mitigation*, which encompasses all measures taken before disaster strikes, including prevention[40] and preparedness,[41] 2) *response*, which refers to all "[a]ctivities undertaken immediately following a disaster to provide emergency assistance to victims and remove further threats,"[42] and 3) *recovery*, which refers to all activities undertaken to return the affected areas "to at least their pre-disaster condition of well-being."[43] Relief will be used as a catchall term for expenditures, both ex ante and ex post, designed to ameliorate the negative affects of natural disasters.[44]

Due to their particular funding profile, this Note will focus on natural disasters, particularly weather-related disasters, but its conclusions will be readily applicable to the funding of all disasters. Natural disasters refer predominantly to extreme weather events, but can also

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38. Mitigation activities are those long-term steps taken to prevent emergencies and reduce the impacts of natural disasters when they do strike. Amy K. Donahue & Philip G. Joyce, *A Framework for Analyzing Emergency Management with an Application to Federal Budgeting*, 61 Pub. Admin. Rev. 728, 730 (2001).

39. *Id.* at 730 (citing a framework, known as comprehensive emergency management, developed by the National Governors Association).

40. Prevention, employed in the BCA's "emergency" definition and discussed at Part IV.C.1 *infra*, is very similar to the concept of mitigation, but is more applicable to man-made disasters, as they can more likely be prevented or reduced in intensity. *See* James F. Smith, *Budgeting for Disasters: Part I. Overview of the Problem*, Pub. Manager, Spring 2006, at 11, 17 [hereinafter Smith, *Overview of the Problem*] ("Prevention operates through control of the disaster, and mitigation operates on the effects and impacts of the disaster without trying to control the disaster itself.").

41. Differentiating between mitigation/prevention and preparedness is even more difficult, and an unnecessary line to draw for this Note's purposes. *Id.* at 18.

42. Donahue & Joyce, *supra* note 38, at 730.

43. *Id.* at 730.

44. While many use the term disaster management as a catchall, *see, e.g.*, *About Disaster Management*, Int'l Fed'n Red Cross & Red Crescent Societies, http://www.ifrc.org/en/what-we-do/disaster-management/about-disaster-management/ (last visited Apr. 6, 2014), disaster relief seems more appropriate when addressing disaster funding because the vast majority of funding has historically been ex post and ameliorative rather than ex ante and proactive. Additionally, disaster management carries connotations of the efforts themselves, rather than just the funding thereof.

include naturally-occurring pandemics,[45] the threat of which is continually heightened by an increasingly interconnected world.[46]

While exact timing and location are always uncertain, natural disasters generate a somewhat predictable overall national need.[47] Comparatively, certain man-made disasters, ranging from wars to terrorist attacks, occur with far less regularity.[48] Admittedly, even distinguishing between natural and man-made disasters can be difficult. Consider the Fukushima Daiichi meltdown, where the greatest impact from an initially natural disaster resulted from human error.[49] Regardless of their cause, extraordinary disasters tempt Congress to appropriate supplementary funds, carrying the potential to break even a well-designed statutorily-imposed fiscal rule.[50] Congress would never have permitted a fiscal rule to constrain post-9/11 spending on disposal of hazardous materials from Lower Manhattan or rebuilding the Pentagon, for example. Therefore, catastrophic man-made disasters implicate many of the same concerns about controlling federal spending as purely natural disasters.

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45. *See* Edward C. Liu, Cong. Research Serv., RL34724, Would an Influenza Pandemic Qualify as a Major Disaster Under the Stafford Act? (2009) (analyzing whether an influenza pandemic would qualify as a "natural catastrophe" under the Stafford Act, allowing for a major disaster declaration and the provision of greater federal resources).

46. *See* Ctrs. for Disease Control & Prevention, Protecting the Nation's Health in an Era of Globalization: CDC's Global Infectious Disease Strategy 5 (2002) ("[I]ncreased rates of air travel and international trade [have provided] infectious microbes . . . many opportunities to spread across borders.").

47. This is addressed in-depth in Part II.B.2. *infra*.

48. *See* Jonathan M. Black, *How to Un-Supplement a Tsunami of Fiscal Proportions: An Examination of the Supplemental Appropriations Process* 21 n.147 (Georgetown Law Fiscal Law & Pol'y Reform Briefing Papers, Paper No. 4, 2009), *available at* http://scholarship.law.georgetown.edu/flpr/4/ (remarking that there has been no consistent interval between major American military operations over the past 40 years); *cf.* Jack Guttentag, *5 Inescapable Truths about Financial Disasters: Striking Difference in Man-Made Vs. Natural Catastrophes*, Inman News (May 24, 2010), http://www.inman.com/2010/05/24/5-inescapable-truths-about-financial-disasters/ (arguing that natural disasters are much more predictable than financial disasters).

49. *See* Yoko Wakatsuki & Jethro Mullen, *Japanese Parliament Report: Fukushima Nuclear Crisis Was 'Man-Made'*, CNN (July 5, 2012, 7:54 PM), http://www.cnn.com/2012/07/05/world/asia/japan-fukushima-report (reporting that "[t]he nuclear crisis at the Fukushima Daiichi power plant in Japan was a 'man-made disaster,'" according to an independent parliamentary panel).

50. *See* Phaup & Kirschner, *supra* note 15, at 32 (referencing the Samaritan's dilemma, which makes it difficult for governments to not provide ex post response and recovery).

B. Crafting a Fiscal Rule to Control Disaster Relief Spending

1. Effective Fiscal Rules: Toeing the Line between Constraint and Flexibility

In the face of massive deficits, an enormous long-term fiscal gap and a historically high debt-to-GDP ratio,[51] there is little consensus on federal fiscal policy. Congress has addressed this uncertainty by "tying itself to the mast" through the adoption of fiscal rules, or procedural constraints, on budgetary policy.[52] In order to assess whether Congress has succeeded in creating effective fiscal rules, it is necessary to understand their theoretical underpinnings.

Fiscal rules can constrain the race to the money trough (or pork barrel, if you will).[53] While a legislative majority may prefer lower spending in the aggregate, each legislator, regardless of their overall policy preference, typically pursues spending measures that favor their district or interests.[54] Advance agreement to constrain spending can allow politicians to simultaneously tout their support for reduced spending while seeking their desired expenditures.[55] While every Congressman may have less spending to which they can lay claim, they are compensated by being able to campaign as budget/fiscal hawks, without ever having to vote against particular spending measures that may be sacrosanct to their constituents. One might rightly be skeptical about the effects of procedural rules written and enforced by the rule makers. That is, fiscal rules that are not constitutionally enshrined can be overridden by, at most, Congress passing a law. Nonetheless, Alan J. Auerbach, Director of the Robert D. Burch Center for Tax Policy and Public Finance at the University of California, Berkeley, has

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51. CONG. BUDGET OFFICE, THE 2010 LONG-TERM BUDGET OUTLOOK ix, xi (2010), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/115xx/doc11579/06-30-ltbo.pdf; *see also* sources cited *supra* note 7.

52. The IMF has defined a fiscal rule as "a permanent constraint on fiscal policy in terms of a summary indicator of fiscal performance," or "a numerical limit on a budget aggregate or on a fiscal performance indicator, such as the deficit, debt, or one of their components." PETERSON-PEW COMM'N ON BUDGET REFORM, TIED TO THE MAST: FISCAL RULES AND THEIR USES 4 (2011) [hereinafter TIED TO THE MAST].

53. *See, e.g.*, *id.* at 6–7 (noting that fiscal rules can overcome lawmakers' short-sighted "deficit bias"); *see also id.* at 14 (citing an IMF report that showed improved fiscal performance among countries with fiscal rules).

54. Alan J. Auerbach, *US Experience with Federal Budget Rules*, CESIFO DICE REPORT, Jan. 2009, at 41, 43–44, *available at* http://www.cesifo-group.de/portal/page/portal/DocBase_Content/ZS/ZS-CESifo_DICE_Report/zs-dice-2009/zs-dice-2009-1/dicereport109-rm.pdf.

55. *Id. at* 43.

found that fiscal rules in the U.S. have successfully constrained non-defense discretionary spending.[56]

Though one would presume the tightest fiscal rules would be the most effective,[57] overly constraining fiscal rules can hamper budgetary flexibility. Flexibility is important because fiscal rules can be pro-cyclical in crisis (particularly in economic crises, as they constrain spending when Keynesian economists would advocate "priming the pump"),[58] but also because flexibility "aids long-term adherence" to fiscal rules.[59] To address this, fiscal rules typically contain escape clauses that allow adjustments to fiscal targets under extraordinary circumstances, such as natural disasters, wars, and severe recessions.[60] It should be quite apparent that in a country as large as the U.S., such "extraordinary" events, particularly natural disasters, are certain to occur with some frequency.[61] As a Peterson-Pew Commission on Budget Reform report argued, "[p]retending year after year to be surprised by "unexpected" adversity is an exercise in self-delusion that increases costs."[62] One might argue that this would suggest a need for more flexibility, but "[t]oo flexible a fiscal rule is no rule at all."[63] Instead, a fiscal rule for natural disasters should only be "flexible enough to be sustained in the face of inevitable shocks and cycles."[64] Therefore, balancing flexibility and exactitude in constructing fiscal rules is critical.

56. *Id.* at 44–45. Auerbach reached this conclusion despite the difficulty of assessing the impact of fiscal rules due to their endogeneity. *Id*. at 44. On the endogeneity of fiscal rules as an impediment to measuring their effectiveness, see also TIED TO THE MAST, *supra* note 52, at 16.

57. *But see* Auerbach, *supra* note 54, at 43 (suggesting that U.S. fiscal rules cease to operate once they deviate too far from consensus policy).

58. *See* Nicholas von Hoffman, *Priming the Economic Pump*, NATION, Jan. 26, 2009, *available at* http://www.thenation.com/article/priming-economic-pump.

59. TIED TO THE MAST, *supra* note 52, at 17.

60. *Id.* at 15.

61. PETERSON-PEW COMM'N ON BUDGET REFORM, GETTING BACK IN THE BLACK 28 (2010) [hereinafter BACK IN THE BLACK]. If each state in the U.S. were its own country, each would individually experience far fewer disasters than the current U.S. does in the aggregate. That the Gulf and Atlantic coasts are prone to hurricanes, the Central Plains to tornadoes, and the West to forest fires and earthquakes means that in any given year, there is a greater likelihood that an extraordinary disaster will occur somewhere in the U.S. *See supra* Part I.A.

62. BACK IN THE BLACK, *supra* note 61, at 28.

63. TIED TO THE MAST, *supra* note 52, at 17.

64. *Id.*

2. *The Profile of Natural Disaster Relief Funding*

In crafting a fiscal rule for natural disaster funding, lawmakers should consider that natural disasters present the following budgetary profile: (i) the potential for large and sudden financial needs; (ii) individual unpredictability; (iii) some degree of certainty in the regularity of their occurrence, unlike man-made disasters;[65] and (iv) a need for immediate funding for response and initial recovery efforts combined with the bulk of long-term recovery funding. Whereas rapid-response funding cannot await the next budget cycle's regular appropriations, long-term recovery funding is unlikely to be necessary until the next regular appropriations cycle and may continue to be obligated long thereafter. In sum, natural disaster relief funding is characterized by some constant national need, composed of desperately needed immediate funding followed by large long-term financial demands.

3. *Why a Federal Fiscal Rule?*

In constructing a federal fiscal rule, one might ask if it is best for the federal government, as opposed to the states or local governments, to bear the cost and risk of funding relief efforts. The greater predictability of national funding needs is the best justification for why disaster recovery costs should be borne mainly by the federal government. A severe disaster could overwhelm the economic and logistical capacity of any individual state or municipality.[66] The federal government can plan for more certain spending levels,[67] reap economies of scale by minimizing the resources each state needs to have on hand (this has also been addressed by inter-state resource sharing agreements, called "mutual aid pacts"),[68] and minimize the economic burden on the most devastated areas. That is, federal funding reinforces the regularity aspect of the funding profile discussed in Part II.B.2.

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65. *See* BACK IN THE BLACK, *supra* note 61, at 28.

66. Indeed, one definition of "disaster" is an event that overwhelms the "ordinary coping capabilities of local or state governments and cannot be prevented by political or economic action." Smith, *Overview of the Problem*, *supra* note 40, at 12; *see also* Donahue & Joyce, *supra* note 38, at 728 ("By definition disasters exceed the capacity of the governments whose jurisdiction they strike.").

67. "Most communities experience few, if any, disasters during the average tenure of a political official or the average citizen's time of residence. These inherent qualities of disasters leave governments in a quandary about whether, when, and what action to take to manage them." Donahue & Joyce, *supra* note 38, at 729.

68. *See generally* James F. Smith, *Budgeting for Disasters: Part II. Solutions*, PUB. MANAGER, Summer 2006, at 58, 60–61 [hereinafter Smith, *Solutions*] (discussing the virtues of local mutual aid pacts and equipment redundancies).

From a practical perspective, the predominant reason why the federal government has in fact borne much of the cost of natural disaster relief is its deep borrowing power to finance a recovery. States would need to deficit-finance a recovery from a catastrophic natural disaster, from which many are impeded by their balanced budget amendments.[69] In general, the federal government is better placed to bear what would be far more onerous and unforeseeable burdens to individual states. The federal government's superior financing capacity is most visible in the severest disasters, when a state's economy may be so hampered that it is unable to raise the revenue needed to recover and reconstruct. For example, Hurricane Katrina so devastated the economies of Louisiana and Mississippi, and caused such a population exodus that the States' tax bases were severely reduced.[70]

Of course, some have questioned the benefits of the federal government bearing so much of the cost of natural disaster relief. In particular, some argue that federal funding disincentivizes states and municipalities from efforts to mitigate their vulnerability to natural disasters, creating a moral hazard problem.[71] For example, federal funding from the National Flood Insurance Program[72] has led some states not to take preventative measures such as relocating their popu-

69. Every state, except Vermont, has a constitutional balanced budget provision. Tyler J. Siewert, *The Cloying Use of Unallotment: Curbing Executive Branch Appropriation Reductions During Fiscal Emergencies*, 95 MINN. L. REV. 1071, 1074 n.23 (2011) (citing Ronald Snell, *Budget-Balance Requirement*, *in* THE ENCYCLOPEDIA OF TAXATION & TAX POLICY 27, 27 (Joseph J. Cordes et al. eds., 2d ed. 2005)). While each state constitution has its own particular terms, recent proposed federal balanced budget amendments have lacked a disaster relief exception, instead requiring offsetting cuts. Karoun Demirjian, *Sen. Harry Reid Cites Natural Disasters to Argue Against Balanced-Budget Amendment*. LAS VEGAS SUN (Sept. 7, 2011, 6:27 PM), http://www.lasvegassun.com/news/2011/sep/07/sen-harry-reid-cites-natural-disasters-argue-again/; *see also* Brendan Fischer, *Wisconsin Moving to Advance ALEC Constitutional Convention Scheme*, CTR. FOR MEDIA & DEMOCRACY'S PR WATCH (Feb. 10, 2014), http://www.prwatch.org/news/2014/02/12379/constitutional-convention-could-cripple-federal-capacity-combat-recession ("[D]isaster relief can [ ] require deficit spending. A Balanced Budget Amendment would handcuff the government at a time when economic crises, drought, and catastrophic hurricanes are on the rise.").

70. *See* Smith, *Solutions*, *supra* note 68, at 62 (arguing that Katrina so damaged Louisiana and Mississippi's capacity to generate local and state revenue "that fiscal impacts will be longstanding").

71. *See, e.g.*, Phaup & Kirschner, *supra* note 15, at 26 ("The availability of insurance or other forms of financial assistance weakens the incentives of asset owners to avoid loss.").

72. The National Flood Insurance Program is one of the nation's largest fiscal liabilities and insures more than $1 trillion in assets. Despite receiving a $9.7 billion borrowing authority increase after Hurricane Sandy, Pub. L. No. 113–1, 127 Stat. 3 (codified as amended at 42 U.S.C.A. § 4016(a) (2013)), the program is expected to be $25 billion in the red. *See* Sheppard, *supra* note 22.

lations from floodplains.[73] Irrespective of the previously discussed arguments advanced in favor of federal funding, over the past few decades the federal government has funded so much of disaster relief efforts that it is only reasonable to expect that pattern to continue.[74] When disaster strikes, the public expects the federal government to respond effectively, as demonstrated by the uproar after the federal government's botched Hurricane Katrina relief.[75] Federal funding in times of disaster also helps to bind the country together, by expressing national unity.[76] Therefore, irrespective of theoretical preferability, federal funding has occupied the field and is what begs for control.

C. *Supplemental Appropriations: The Historical Funding of Natural Disaster Relief*

1. *Sexy Supplementals: The Allure of Supplemental Appropriations*

Over the last few decades, most federal expenditures for natural disaster response and recovery have been through supplemental appropriations. "Supplemental appropriations are budget authority provided by Congress over and above the budget authority in the annual appropriations bills."[77] They are intended to "provide additional funding to an agency during the course of a fiscal year for programs and activities that are considered too urgent to wait until next year's budget."[78] Such a definition clearly covers disaster relief, as some funding is typically urgently needed and disasters occur without regard for the budget cycle.

Perhaps more importantly, despite compelling policy reasons to appropriate ex ante,[79] there are strong political incentives to supplementally appropriate. While the Executive can always take credit for

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73. *See, e.g.*, Chris Conover, *What Hurricane Sandy Teaches Us About Medicaid, Medicare*, FORBES (Nov. 30, 2012, 10:24 AM), http://www.forbes.com/sites/chrisconover/2012/11/30/what-hurricane-sandy-teaches-us-about-medicaid-medicare/.

74. *See* discussion *infra* Part II.C.

75. *E.g.*, Anna Shoup, *FEMA Faces Intense Scrutiny*, PBS NEWSHOUR (Sept. 9, 2005, 12:02 PM), http://www.pbs.org/newshour/updates/government_programs/july-dec05/fema_09-09.html.

76. *E.g.*, Carl Hulse, *Federal Austerity Changes Disaster Relief*, N.Y. TIMES, Aug. 30, 2011, http://www.nytimes.com/2011/08/31/us/politics/31disaster.html (quoting Sen. Bernard Sanders), ("Historically in this country we have understood that when communities and states experience disasters, we as a nation come together to address those. That is what being a nation is about.").

77. WILLIAM L. PAINTER, CONG. RESEARCH SERV., R42458, OFFSETS, SUPPLEMENTAL APPROPRIATIONS, AND THE DISASTER RELIEF FUND: FY1990–FY 2013 3 (2012).

78. *See* THOMAS L. HUNGERFORD, CONG. RESEARCH SERV., RL33134, SUPPLEMENTAL APPROPRIATIONS: TRENDS AND BUDGETARY IMPACTS SINCE 1981 2 (2005).

79. *See* discussion *infra* Part II.C.

the successful implementation of disaster response and recovery efforts,[80] Congress can only gain political credit by appropriating in the wake of a disaster.[81] This makes supplemental appropriations especially alluring. However, excessive use of supplemental appropriations creates bad policy, as it tends to be "subject to fewer restrictions and restraints than regular appropriations."[82] Moreover, even when there are restraints, they struggle to effectively constrain spending. At the very least, the unnecessary use of supplementary appropriations has been, and should be, discouraged.[83]

2. *The First Fiscal Rules: Congressional Budget Act & Gramm-Rudman-Hollings*

While supplemental appropriations have been used since the First Congress,[84] it is only since the 1974 enactment of the first comprehensive budgeting process, the Congressional Budget and Impoundment Control Act (CBA),[85] that they have been used to evade fiscal rule regimes. The CBA first mandated the use of a comprehensive budgetary process through annual budget resolutions, which set aggregate spending and revenue levels.[86] The only impediment to the use of supplemental appropriations to evade established annual spending levels was that the President's budget request was required to include an allowance for expected supplemental spending.[87] Unsurprisingly, with little to constrain them, supplemental appropriations accounted for between four and seven percent of annual appropriations and even exceeded ten percent in one year.[88] During this period, supplemental

80. *See* Joshua J. Rinesmith, Federal Emergency Management Agency: Statistics, Political Influences and Policy Recommendations 7 (2004) (unpublished student article), *available at* landuse.law.pace.edu/landuse/documents/StudentArticle/FEMA Final.doc (highlighting how the presidential use of disaster declarations increases during reelection cycles); *see also* Julian E. Zelizer, *When Natural Disasters Become Political Disasters*, CNN (Aug. 29, 2011, 7:15 AM), http://www.cnn.com/2011/OPINION/08/27/zelizer.natural.disaster.politics/index.html (discussing the political impact on various Presidents of their disaster relief responses).

81. Concededly, Congress can gain some political credit from critiquing the Executive's disaster management style or success. However, natural disasters are akin to wars in that hasty criticism can be viewed as inappropriately disloyal, except when the relief efforts are completely botched, à la the Bush Administration after Hurricane Katrina.

82. Phaup & Kirschner, *supra* note 15, at 26.

83. HUNGERFORD, *supra* note 78, at 2.

84. de Rugy & Kasic, *supra* note 14, at 2.

85. Pub. L. No. 93–344, 88 Stat. 297 (1974) (codified as amended at 31 U.S.C. §§ 1301–1407).

86. de Rugy & Kasic, *supra* note 14, at 5.

87. *See id.* at 6.

88. *See* ALLEN SCHICK, THE FEDERAL BUDGET 258 (3d ed. 2007).

appropriations were used to top off both mandatory and discretionary spending. In particular, during the stagflation of the early 1980s, supplemental spending was fairly high, paying for the frequent salary raises necessitated by high inflation, and shoring up the unemployment insurance program that was put under strain by the recession's increased demand.[89]

In response to the impotence of the CBA, Congress passed the Balanced Budget and Emergency Deficit Control Act of 1985, commonly referred to as Gramm-Rudman-Hollings (GRH).[90] GRH was the first U.S. fiscal rule to set deficit reduction targets and threaten sequestration, "an automatic cancellation of budget resources,"[91] if the targets were exceeded.[92] However, GRH utterly failed to contain growing budget deficits,[93] in part because supplemental appropriations were initially fair game to evade the deficit targets.[94] OMB only instructed agencies that supplementals would require full justifications as to why offsetting cuts should not be required.[95] However, GRH did not exclusively fail because of supplementals, as their use was still relatively light compared to the 1970s.[96]

Despite the minimal constraints on supplementals, they were kept in check during the GRH era by political pressures. When concern about the abuse of supplemental appropriations arose in the 1987 budget summit, Congress and President Reagan agreed in a memo, never codified, that supplemental spending only be used "in the case of dire emergency."[97] As a result, Congress thereafter included in the title of supplemental appropriations bills the phrase "dire emergency supplemental appropriations."[98] Despite the lack of constraints that

89. *See* HUNGERFORD, *supra* note 78, at 2, 4.
90. Pub. L. No. 99–177, 99 Stat. 1037.
91. LINDSAY ET AL., *supra* note 29, at 7.
92. SCHICK, *supra* note 88, at 15.
93. *Id.* at 22.
94. GRH prescribed deficit targets and each fiscal year's budget and congressional budget resolution needed to meet the target or sequestration would result. David Burd & Brad Shron, *Analysis & Critique of Specialized Rules: Discretionary Caps, Spending Targets, and Committee Allocations* 6 (Harvard Law Sch. Fed. Budget Policy Seminar, Briefing Paper No. 1, 2009), *available at* http://www.law.harvard.edu/faculty/hjackson/SpecializedRules_1(rev).pdf. But, any supplemental appropriations made during the fiscal year would not need to be offset against the deficit targets; that is, no sequestration would occur due to supplemental appropriations. SCHICK, *supra* note 88, at 22.
95. *See* de Rugy & Kasic, *supra* note 14, at 6.
96. SCHICK, *supra* note 88, at 258; *see also* Burd & Shron, *supra* note 94, at 10–11 (arguing that GRH failed because of overly optimistic revenue projections, susceptibility to budget gimmickry, and inflexible deficit targets).
97. William G. Dauster, *Budget Emergencies*, 18 J. LEGIS. 249, 251–52 (1992).
98. *Id.* at 252.

would later be imposed by the BEA or OMB's definition of emergency,[99] the push to curtail spending in the second half of the 1980s succeeded, stymieing the use of supplementals.[100] This about-face was enforced in part by President Reagan's threats to veto any non-emergency supplemental spending.[101] Yet, when the budget deficit ended up higher in 1990—GRH's last year in force—than the year preceding GRH's enactment,[102] Congress enacted the Budget Enforcement Act of 1990 (BEA).[103]

a. The Presidential Veto Is Inadequate to Control the Abuse of Supplemental Appropriations

As President Reagan achieved some success in controlling supplemental spending, it bears addressing why a presidential veto threat is not likely to be a dependable means of control. Firstly, it requires a President committed to curtailing spending. While a statutorily-enforced constraint also requires Congress have such a goal, Congress' commitment to fiscal rectitude may be more fleeting as statutes, once enacted, are much harder to reverse than a presidential veto threat.[104] Secondly, even with a committed President, there are substantial impediments to a veto threat's effectiveness. As will be addressed at Part III.C.1, non-emergency supplemental appropriations (or "emergency" supplemental appropriations that are excessive, unnecessary or unrelated to the disaster precipitating the bill) are often bundled with necessary "emergency" appropriations. If Congress passes such a bill, the President would be hard-pressed to delay the arrival of emergency appropriations by risking a showdown with Congress over appropriations that likely constituted a minority of the emergency supplemental. At best, the threat of a presidential veto would deter the inclusion of such frivolous spending, lest it be highlighted and the emergency funding be threatened. Lastly, even if a veto threat were an effective means, it is unlikely that any President would have cause to announce such a veto threat before a disaster necessitating supplemental appro-

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99. *See infra* Part II.C.3.

100. HUNGERFORD, *supra* note 78, at 5 fig.1.

101. *See* de Rugy & Kasic, *supra* note 14, at 13.

102. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT OF THE U.S., FISCAL YEAR 2015 HISTORICAL TABLES: BUDGET OF THE U.S. GOVERNMENT 24 (2014), *available at* http://www.whitehouse.gov/sites/default/files/omb/budget/fy2015/assets/hist.pdf.

103. Pub. L. No. 101–508, 104 Stat. 1388–573 (1990).

104. Statutory abrogation requires bicameralism and presentment, whereas public perceptions of weakness or indecisiveness are the only constraints on a President's commitment to a veto threat.

priations arose. When such disasters occur, the pressure not to announce such a rule will be greatest. Since no President wants to be seen as impeding the appropriation of needed funds, Congress is better positioned to enact and implement the long-term constraint of supplemental appropriations.

3. The Budget Enforcement Act & Emergency Defined

The BEA, the fiscal regime preceding the BCA, imposed statutory caps on discretionary spending, required mandatory cuts, and left in place the clauses from GRH that threatened sequestration if the deficit targets were exceeded.[105] While all supplemental spending was not exempted from sequestration, Congress exempted any supplemental spending designated as "emergency."[106] This escape hatch was enacted to provide sufficient flexibility to respond to changing circumstances.[107] Yet, such an ambiguous definition lacked any standard by which the public could assess congressional compliance. Instead, the more powerful check on the designation's abuse was that the designation had to be made by both Congress and the President.[108] However, given the political incentives for Congress to appropriate supplementally,[109] these restrictions were as inadequate as one might expect in deterring the use of supplemental appropriations to evade the BEA's discretionary spending caps and hide increased spending.[110]

While a definition for "emergency" was not codified until passage of the BCA, the Director of OMB did develop a definition in 1991 designed to rectify the previously ambiguous standard, which would serve as the basic framework for the definition adopted by the BCA. OMB defined an emergency expenditure as "a necessary expenditure that is sudden, urgent and unforseen [sic], and is not permanent," with each term further defined.[111] Notably, "unforeseen" explicitly excluded "an emergency that is part of an aggregate level of

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105. Dauster, *supra* note 97, at 259–62.

106. Budget Enforcement Act of 1990 § 13101(a), 2 U.S.C. § 901(b)(2)(D)(i) (2012); de Rugy & Kasic, *supra* note 14, at 8.

107. Dauster, *supra* note 97, at 255 & n.24.

108. 2 U.S.C. § 902(e); de Rugy & Kasic, *supra* note 14, at 9; Dauster, *supra* note 97, at 250.

109. *See* discussion *supra* Part II.C.1.

110. de Rugy & Kasic, *supra* note 14, at 17 (showing that there were $206.6 billion in supplemental appropriations during the BEA regime, although 26.7 percent of that was offset by rescissions, which have become far less common since).

111. Dauster, *supra* note 97, at 275. For a critique of defining such terms with specificity, see Roy T. Meyers, *The "Ball of Confusion" in Federal Budgeting: A Shadow Agenda for Deliberative Reform of the Budget Process*, 69 PUB. ADMIN. REV. 211, 214 (2009) (arguing that "budget process rules often have been ignored or waived").

anticipated emergencies, particularly when normally estimated in advance."[112] This exclusion sought to limit emergency supplemental appropriations to situations where the funding needed for the year had exceeded a reasonably anticipatable level of annual spending. However, as this definition was vague and non-binding, serving only as Executive guidance, at best it could only facilitate public reprisal for noncompliance. While it is difficult to assess whether the OMB definition had any impact on supplemental spending, it coincided with a shift in supplemental appropriations towards discretionary spending.[113] It was unable to deter the Clinton, and especially the George W. Bush administrations from eventually taking the abuse of supplemental appropriations to new heights, peaking in Fiscal Year (FY) 2009 at $174 billion.[114]

While supplemental spending did not explode until the 2000s, what supplemental spending did occur after the BEA's enactment and OMB's definition shifted markedly towards discretionary spending, particularly natural disaster relief.[115] From 1990 through 2005, over ninety percent of supplemental spending was discretionary.[116] However, supplemental appropriations stayed at fairly low levels (below one percent of total budget authority) throughout the 1990s, until FY 1998,[117] when they started to increase as tight discretionary caps were imposed under the 1997 budget deal.[118] With tighter caps inevitably come attempts to evade them through supplemental appropriations. A particularly nefarious example was the application of the BEA's "emergency" designation to funding for conducting the 2000 census,[119] when this clearly met none of the OMB "emergency" definition criteria.[120] Such supplemental spending mocked the BEA's supposed constraints. However, it was not until the BEA's expiration, in FY 2002,[121] coinciding with the advent of the Bush administration and the Global War on Terror (GWOT), that supplemental appropriations skyrocketed.

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112. Dauster, *supra* note 97, at 275.

113. *See* HUNGERFORD, *supra* note 78, at 2.

114. de Rugy & Kasic, *supra* note 14, at 11.

115. *See* HUNGERFORD, *supra* note 78, at 2.

116. *See id.*

117. de Rugy & Kasic, *supra* note 14, at 13.

118. VERONIQUE DE RUGY, AM. ENTERPRISE INST., ENABLING A SPENDING EXPLOSION: THE TREND IN SUPPLEMENTAL SPENDING 7–8 (2006), *available at* http://www.aei.org/files/2006/06/12/20060612_SupplementalSpendingExplosion.pdf.

119. SCHICK, *supra* note 88, at 259.

120. Budget Control Act of 2011 § 102(4), 2 U.S.C. § 900(c)(20) (2012).

121. de Rugy & Kasic, *supra* note 14, at 9.

4. *Inappropriate Appropriations: Uncontrolled Supplemental Spending in the Post-BEA Era*

After the BEA's expiration in 2002, Congress budgeted outside of any long-term fiscal regime, instead intermittently operating under yearly discretionary caps and other rules often enforced only through the rules of one House.[122] Effectively, Congress reverted to the CBA regime, constrained only by the minimal budgetary processes discussed in Part II.C.2, and any self-imposed temporary constraints, such as the incorporation of OMB's "emergency" definition in some Concurrent Budget Resolutions.[123] As a result, supplemental spending reached unprecedented levels both nominally and as a percentage of discretionary spending. In FY 2005, it represented over six percent of budget authority[124] and fifteen percent of discretionary budget authority.[125]

Critics inveighed against the Bush Administration's budgetary practices, alleging many of the shortcomings associated with supplemental appropriations detailed at Parts III.C & IV.C.2. In particular, much ink has been spilt over funding the GWOT through supplemental appropriations.[126] Suffice it to say that the post-BEA era demonstrated the ill effects that can come from budgeting outside of a solid fiscal rule regime. Would the BEA have changed the funding of the GWOT and/or curtailed the Bush administration's profligacy? It seems unlikely that the BEA would have had much impact, as it was so easily evaded.[127] However, the Bush administration's budget hijinks certainly provoked a reaction, convincing the public and Congress of the need for a fiscal rule stronger than any the U.S. had seen.

III.
The Budget Out-of-Control Act: Why the Current Fiscal Rule Is Broken

A. *The Budget Control Act of 2011*

In an effort to further constrain federal discretionary spending, Congress enacted the Budget Control Act of 2011.[128] It caps annual

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122. *Id.* at 9 n.17; *see* Schick, *supra* note 88, at 15.
123. U.S. Gov't Accountability Office, *supra* note 12, at 14.
124. de Rugy & Kasic, *supra* note 14, at 13.
125. Schick, *supra* note 88, at 259.
126. *See, e.g.*, Mark Thompson, *The $1 Trillion Bill for Bush's War on Terror*, Time (Dec. 26, 2008), www.time.com/time/nation/article/0,8599,1868367,00.html; Black, *supra* note 49, at 17; *see also infra* Part III.C.1.
127. *See* discussion *supra* Part II.C.3.
128. *See* Pub. L. No. 112-25, 125 Stat. 240 (2011).

discretionary spending during FY 2012–2021, imposing sequestration if the caps are exceeded.[129] As with any good fiscal rule, the BCA has escape clauses for certain types of spending.[130] It created one limited escape hatch for "disaster relief" spending,[131] and an unlimited spigot for "emergency" spending.[132] The disaster relief hatch allows appropriations in excess of the discretionary caps up to the ten-year average funding provided for disaster relief, excluding the highest and lowest years.[133] If the disaster relief hatch is not fully appropriated in any given year, the excess becomes available to increase the cap adjustment in future years.[134] OMB is tasked with calculating the adjustment allowable for "disaster relief" spending based on appropriations that explicitly cited the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act),[135] which provides authority for major federal disaster declarations. As the "disaster relief" category is a hard and overly conservative cap,[136] the BCA allowed for unlimited "emergency" spending. However, unlike previous fiscal rules, the BCA codified a definition for "emergency" as "a situation that— (A) requires new budget authority and outlays . . . for the prevention or mitigation of, or response to, loss of life or property, or a threat to national security; and (B) is unanticipated," defined as sudden, urgent, unforeseen, and temporary.[137] Some have said that this seemingly minor change effectively codified the "emergency" definition created by OMB in 1991, and incorporated by Congress in Concurrent Budget Resolutions throughout the 2000s.[138] Moreover, most budget experts consulted prior to the BCA believed that mere codification of OMB's definition would have little practical effect.[139] Nonetheless, the BCA's definition contained some notable shifts from OMB's definition.

129. LINDSAY ET AL., *supra* note 29, at 7.
130. *See* discussion *infra* Parts III.B, IV.B.
131. Budget Control Act of 2011 § 101(b)(2)(D)(i), 2 U.S.C. § 901(b)(2)(D)(i) (2012).
132. *Id.* § 901(b)(2)(A).
133. *Id.* § 901(b)(2)(D)(i)(I).
134. *Id.* § 901(b)(2)(D)(i)(II).
135. LINDSAY ET AL., *supra* note 29, at 14. OMB's "disaster relief" calculation methods may be too strict, because they exclude any funding that did not explicitly mention the Stafford Act, despite that "it has not always been the practice to include a specific reference to the Stafford Act in supplemental appropriations for assistance in response to major disasters." *Id.* at 15. For example, some substantial post-Katrina appropriations have not been included. *Id.* at 16. *See generally* Pub. L. No. 93–288, 88 Stat. 143 (1974).
136. *See* discussion *infra* Part IV.B.
137. Budget Control Act of 2011 § 102(4), 2 U.S.C. § 900(c)(20) (2012).
138. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 12, at 14.
139. *Id.* at 22.

B. A Flawed Codification: The "Emergency" Clause

The definition implicitly replaced OMB's definition for a necessary expenditure, which explicitly excluded nonessential and non-vital expenditures (an arguably high but admittedly ambiguous threshold) with an utterly vague "requires." Expenditures on prevention and mitigation are also expressly permitted,[140] while recovery is strikingly absent. This is exemplary of an ideological tension between the desire to promote prevention and mitigation, and the typically foreseeable and non-urgent need for such expenditures. That is, ex post supplemental appropriations that override the discretionary caps should be used exclusively for spending that cannot await the subsequent year's appropriations. This favors immediate response and recovery spending over mitigation efforts. However, discouraging mitigation is inefficient when every dollar spent on mitigation typically yields large long-term savings in response and recovery expenditures.[141] Additionally, given that two of the three categories of disaster relief are explicitly included,[142] one can reasonably conclude under the principle of statutory interpretation *expressio unius*,[143] that "recovery" was intentionally excluded. While recovery funding was perhaps admirably excluded, as will be discussed, it was certainly not absent in the post-Sandy appropriations bill.[144]

Another notable shift is the failure to incorporate OMB's explicit exclusion of emergencies that are "part of an overall level of anticipated emergencies."[145] This exclusion was unlikely the product of a mere oversight. Towards the end of the George W. Bush administration, the President's Budget proposed codifying OMB's definition, even rephrasing OMB's exclusion from "unforeseen" as "an emergency that is part of the average annual level of disaster assistance funding would not be 'unforeseen.'"[146] Whether or not the BCA's drafters were aware of the definition of "unforeseen" offered by Presi-

140. 2 U.S.C. § 900(c)(20)(A).
141. *See* Multihazard Mitigation Council, *Natural Hazard Mitigation Saves: An Independent Study to Assess the Future Savings from Mitigation Activities* 5 (2005), http://c.ymcdn.com/sites/www.nibs.org/resource/resmgr/MMC/hms_vol1.pdf.
142. 2 U.S.C. § 900(c)(20)(A).
143. "*[E]xpressio unius est exclusio alterius*: A canon of construction holding that to express or include one thing implies the exclusion of the other." BLACK'S LAW DICTIONARY (9th ed. 2009).
144. *See infra* Part III.C.3
145. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 12, at 14.
146. de Rugy & Kasic, *supra* note 14, at 41–42. Of course, this definition was completely ambiguous, as there were no criteria to indicate whether a particular emergency was part of the average annual disaster assistance funding. If it merely meant that funding required in excess of that appropriated was not foreseen, then it was

dent Bush's Budget, they were aware of the full OMB "emergency" definition, making it unlikely that they inadvertently omitted the exclusion. Therefore, the BCA definition may not adequately deter the ex post funding of disaster relief needs that, while not individually and specifically foreseen, are readily foreseeable in the aggregate.

C. *Ex Ante vs. Ex Post (or, Regular vs. Supplemental Appropriations)*

While historically the federal government has primarily paid for disaster relief through ex post supplemental appropriations, budgeting and appropriating for natural disasters is best done ex ante. Firstly, ex ante appropriations through the "regular" budget process ensure one of this Note's primary considerations—that disaster relief spending be considered along with other demands on the federal budget.[147] This mitigates legislators' ability to evade discretionary spending caps by disguising non-disaster-related or foreseeable funding needs as "emergency" disaster relief.[148] Relatedly, supplemental budget requests contain fewer details than "regular" requests, resulting in less congressional oversight.[149] Secondly, it helps the budget more realistically reflect the year's expected expenditures, fostering public debate. Lastly, ex ante budgeting also promotes mitigation efforts,[150] which are, on average, very cost-effective, as well as saving lives and property.

1. *Procedural Protections: Ensuring Adequate Scrutiny*

When disaster recovery and relief are funded ex post, the procedures that discipline the regular appropriations process are sidelined in the name of efficiency. "The regular budget and appropriations process provides for greater legislative deliberation, procedural hurdles, and funding trade-offs" than the supplemental appropriations process.[151] In fact, during the BEA and post-BEA eras, even though supplemental funds not designated as "emergency" did not receive any special budgetary treatment, they still received less scrutiny than "regular" appropriations.[152] The nefariousness of this problem is particu-

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entirely circular, as supplemental funding would only be sought when regular appropriations were exceeded.

147. *See* U.S. Gov't Accountability Office, *supra* note 12, at 4–5.

148. Phaup & Kirschner, *supra* note 15, at 22.

149. de Rugy & Kasic, *supra* note 14, at 23–24.

150. Phaup & Kirschner, *supra* note 15, at 22.

151. U.S. Gov't Accountability Office, *supra* note 12, at 4.

152. *Id.* at 11.

larly evident when non-emergency appropriations are added to mainly "emergency"-designated supplemental appropriations. Non-emergency appropriations can ride on the coattails of the emergency legislation, mitigating the scrutiny received by the non-emergency funding.[153] According to a GAO review of emergency-designated supplementals, from fiscal years 1997 to 2006 (a period spanning the BEA and post-BEA eras), this scheme was used in eight of twenty-five supplementals, totaling over $11 billion in funding hidden amongst emergency spending.[154] The tactic of bundling non-emergency spending with emergency is both alluring and dangerous. The use of the word "emergency" increases public pressure to quickly pass the bill and makes a presidential veto unlikely,[155] regardless of what the bill contains.[156] On a lesser scale, another abuse has been the provision of emergency funding to address so-called "emergencies" unrelated to that which prompted the supplemental, leading to $710 million in spending on the coattails of more pressing emergencies between 1997 and 2006.[157] The tradeoffs of the regular budget process are evaded while Congress is publicly dishonest about the emergency justifying the procedural bypass.

The democratic process is further affected by the greater likelihood of supplemental requests to "effectively give [ ] the departments and agencies of the Executive Branch a blank check,"[158] while avoiding congressional control and oversight. Supplemental budget requests[159] are prepared hastily and tend to be short on detail (which conveniently leaves less room for objection).[160] Without detail, executive agencies receive funds without much congressional direction. For example, the President's post-Sandy funding request acknowledged

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153. *See id.* at 16.

154. *Id.* at 16; *see also* HUNGERFORD, *supra* note 78, at 3; de Rugy & Kasic, *supra* note 14, at 36–38 (detailing the non-emergency, and certainly unrelated, "pork" included in GWOT and post-Katrina supplemental appropriations).

155. *See* de Rugy & Kasic, *supra* note 14, at 36.

156. *Id.* at 24; *see also* Irene Rubin, *The Great Unraveling: Federal Budgeting, 1998–2006*, 67 PUB. ADMIN. REV. 608, 612 (2007).

157. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 12, at 16–17.

158. *See* de Rugy & Kasic, *supra* note 14, at 23.

159. For both regular and supplemental appropriations, the Executive typically initiates the process by requesting that Congress appropriate funds. 31 U.S.C. § 1107 (2011) ("The President may submit to Congress proposed deficiency and supplemental appropriations the President decides are necessary because of laws enacted after the submission of the budget or that are in the public interest.").

160. de Rugy & Kasic, *supra* note 14, at 23; Black, *supra* note 49, at 11. *But see* 31 U.S.C. § 1107 (2012) ("The President shall include the reasons for the submission of the proposed appropriations and the reasons the proposed appropriations were not included in the budget.").

that it was "too early to know exact response and recovery needs," so the appropriations should provide departments with the "necessary flexibility to allocate at a later date" and "notify the Congress of the activities funded."[161] This provides less of a measuring stick for Congress to critique and oversee the use of its appropriations.[162]

However, some have argued the opposite. For example, the Bush administration justified its reliance on supplemental appropriations as allowing a more accurate assessment of wartime needs because of the temporal proximity to their expenditure.[163] This argument seems spurious when the largest expenditures in those supplementals were for highly predictable National Guard salaries.[164] By its fourth year, the Vietnam War was funded entirely through regular defense appropriations, despite that conflict's comparably unpredictable duration.[165] This argument may be more persuasive in the context of natural disaster relief, when the exact needs to which appropriations will be put are never clear in advance. Notwithstanding that caveat, as ex ante disaster relief appropriations are directed almost exclusively to FEMA's Disaster Relief Fund (DRF), their use is statutorily controlled.[166] Congress' ability to oversee the DRF would be more effective than it could ever be over ad hoc appropriations, even if they're more detailed. While ex ante disaster relief appropriations must necessarily involve some delegation of discretion to the Executive,[167] a well-considered statutory scheme should exert more effective control than rushed directives.

161. Letter from Jeffrey D. Zients, Deputy Dir. for Mgmt., Office of Mgmt. & Budget, to the Honorable John Boehner, Speaker, U.S. House of Representatives 17 (Dec. 7, 2012), *available at* http://www.whitehouse.gov/sites/default/files/supplemental__december_7_2012_hurricane_sandy_funding_needs.pdf.pdf (outlining the use of the requested $200 million appropriation for HHS' Public Health and Social Services Emergency Fund).

162. *See* de Rugy & Kasic, *supra* note 14, at 23–24.

163. *Id.* at 27–28.

164. *Id.* at 28 (citing THOMAS DONNELLY, THE MILITARY WE NEED: THE DEFENSE REQUIREMENTS OF THE BUSH DOCTRINES 81–86 (2005)).

165. *Id.* at 29.

166. Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, 102 Stat. 4689 (1988) (codified as amended in scattered sections of 42 U.S.C.)

167. *See* de Rugy & Kasic, *supra* note 14, at 23 (noting that flexibility is important to respond to unpredictable emergency needs).

2. *Honest Accounting Yields Greater Transparency & Fuller Debate*

More realistic ex ante appropriations for natural disaster spending would allow for a more honest accounting of federal expenditures and a healthier national debate. While ex post appropriations will eventually be reflected in the national debt, they are not accounted for in the President's Budget[168] or the Congressional Budget Resolution, the cornerstones of the annual budgeting process. That means that the President and Congress can agree to a budget with a deficit of X, while knowing full well that they are likely to eventually spend X + $Y billion in supplemental appropriations, without having to reveal that higher number during annual budget posturing.[169] This tactic was perfected during the George W. Bush administration, which predominantly funded the GWOT (including the wars in Afghanistan and Iraq) through supplemental appropriations.[170] Thus, more realistic projections of annual expenditures were obscured during the public debate. When spending decisions are made with regard to matters as controversial as unpopular wars, their exclusion from annual deficit projections can be a powerful tool to influence the funding's approval.[171] By preventing "'the public from lapsing into sticker shock,'" supplementals buttressed the maintenance of whatever support existed for the wars.[172] The unnecessary use of supplemental appropriations obstructs the democratic process, creating an information asymmetry between the nation's democratically elected leaders and the voting

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168. For FY 2012, the Obama Administration's Budget began to reflect requested appropriations for the DRF, based on OMB's formula discussed at Part IV.A *infra*. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT OF THE U.S., FISCAL YEAR 2014 BUDGET OF THE U.S. GOVERNMENT 220 (2013), *available at* http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/budget.pdf. For fiscal year 2014, this is a mere $6.2 billion. *Id.* at 105. The budget's only acknowledgement that additional disaster relief or emergency funding might be requested is a total of $5 billion budgeted over the next three fiscal years under the line "Proposed BCA disaster relief cap adjustment." *Id.* at 184.

169. *Cf.* Brad Plumer, *The Government Is Spending Way More on Disaster Relief than Anybody Thought*, WASH. POST BLOG, (Apr. 29, 2013, 8:45 AM), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/04/29/the-government-is-spending-way-more-on-disaster-relief-than-anybody-thought/ (quoting Daniel J. Weiss, Ctr. for Am. Progress) ("If we don't even know how much natural disasters are costing us, then Congress is going to keep under-budgeting for disaster relief and recovery . . . [a]nd lawmakers will end up doing deficit spending to pay for it.").

170. *See* SCHICK, *supra* note 88, at 259.

171. *See* de Rugy & Kasic, *supra* note 14, at 30 ("President Bush would likely have had a hard time getting his large defense spending increases approved if he had included the cost of the wars in his regular defense budget requests.").

172. *Id.* at 31 (quoting *Budget Tricks*, DEF. NEWS, Feb. 14, 2005, at 74).

public, and leading to an arguably worse allocation of public resources.

A counterargument to the push for a more honest upfront accounting is that supplemental appropriations counteract the incrementalism of the regular budgetary process, reducing spending in the long run. Incrementalism describes the predilection of Congress and the President to use the prior year's funding as a starting point for the subsequent year's appropriations, as opposed to presuming that any suggested expenditures lack justification and assessing the utility of all expenditures for that fiscal year.[173] If regular ex ante appropriations were made at higher, more accurate historic levels, the argument is that this spending would more likely become entrenched.[174] Applying this argument to the GWOT, if war funding had been provided through regular appropriations, the termination of operations might not necessarily have led or lead to a commensurate funding reduction. Instead, the defense appropriations subcommittee might have sought to cut the defense budget only incrementally, while transferring a portion of wartime funding towards a more permanent enlargement of DOD.[175] However, this sort of entrenchment in natural disaster relief funding is just what this Note advocates. While the entrenchment of higher spending levels can be dangerous if it encourages more spendthrift habits, unlike wars, there is no end to natural disasters. With no hope for a respite from natural disasters, some incrementalism may be just what the doctor ordered.

3. Ex Ante Funding Promotes Mitigation, Which Is Cost-Effective

Finally, the more that funding is provided ex ante, the more likely that sufficient and equitable mitigation funding will be appropriated. Mitigation efforts, when done intelligently, can be a cost-effective way of reducing disaster response and recovery costs. In fact, a study by the Multi-Hazard Mitigation Council showed that the average dollar spent on mitigation provided four dollars in future benefits.[176] While a dollar spent in mitigation is more valuable than a dollar spent on response or recovery, mitigation will only receive its due allotment if funding is provided ex ante.

173. *See* SCHICK, *supra* note 88, at 240. The latter is known as zero-base budgeting. *Id.*

174. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 12, at 15 (noting that proponents of funding the GWOT supplementally argue that "it avoids inflating DOD's "baseline" budget).

175. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 12, at 15–16.

176. Multihazard Mitigation Council, *supra* note 141, at iii.

If the bulk of disaster relief appropriations are made ex post, Congress must first focus resources on mitigating the horrors to which the public is exposed by 24/7 news coverage ("response"). Then, Congress must fulfill the inevitable government promise to restore the affected community to its preexisting condition ("recovery"). Only as a last priority will Congress seek to fund mitigation efforts for the future. However, as an analysis of Sandy relief reveals,[177] where mitigation efforts are funded ex post, they will almost exclusively be designed to "fight the last war."[178] That is, legislators will react to prevent the recurrence of what has just happened, rather than properly analyzing the likelihood of future catastrophes. By myopically focusing on the most recent disaster, the resultant funding will be less efficient (not directed to where it is most needed) and inequitable (by preferencing protection of the region most recently struck by disaster).

If instead, the bulk of disaster relief funding were provided ex ante, mitigation could be funded with "careful planning and attention to projecting impacts of the full range of probable disaster intensities."[179] Since such projects can be immensely expensive,[180] it is inequitable to fund them supplementally, without weighing their costs and benefits against those of other demands on the federal budget. Whether the federal government should pay to protect New Orleans or New York against the next Katrina or Sandy should not be decided hastily in the wake of a catastrophe.

D. Sandy: How the BCA Performed

Prior to Hurricane Sandy, the BCA's constraints on disaster relief spending were greeted with mixed reactions.[181] However, once fiscal conservatives saw the quantity and quality of spending proposed in Sandy's wake, they tore into the BCA, decrying the disaster relief cap adjustments and the "emergency" clause as two huge loopholes that are "Congress's proxy budget—to exceed the BCA's spending limits

177. *See* discussion *infra* Part III.D.

178. Smith, *Overview of the Problem*, *supra* note 40, at 17.

179. *Id*.

180. For example, rebuilding and upgrading the New Orleans levees after Katrina to protect against a Category 5 hurricane cost $34 billion. *Id.*

181. Some critics foresaw potential for large off-budget expenditures and called for Congress to eliminate loopholes in the BCA to offset emergency supplemental spending. *See e.g.*, Press Release, *CRFB Urges Policymakers to Offset Emergency Spending*, COMMITTEE FOR RESPONSIBLE FED. BUDGET (Sept. 6, 2011), http://crfb.org/blogs/crfb-urges-policymakers-offset-emergency-spending; Patrick Louis Knudsen, *Courting Disaster: Two Gaping Loopholes in the Debt Deal That Will Drive Up Spending*, FOUNDRY (Nov. 7, 2011, 2:26 PM), http://blog.heritage.org/2011/11/07/courting-disaster-two-gaping-loopholes-in-the-debt-deal-that-will-drive-up-spending/.

by any amount they desire."[182] When the dust finally settled and a bill was passed, the critics turned out to have the better argument.

The Disaster Relief Appropriations Act, 2013 (DRAA)[183] contained $5.379 billion in funding for the DRF, designated as "disaster relief," $41.69 billion designated as "emergency" funding, and only $3.461 billion that counted against the discretionary budget caps (Army Corps of Engineers' construction account).[184] Of the $50.7 billion appropriated through the DRAA, the House Appropriations Committee described only $17 billion as necessary to meet "immediate and critical needs," and the remaining $33 billion for "longer-term *recovery* efforts and infrastructure *improvements that will help prevent damage caused by future disasters*."[185] While the former $17 billion is a mixture of response and recovery spending, the $33 billion is clearly recovery and mitigation. As the DRF funding must have been included in the more immediate $17 billion, almost all of the $33 billion in recovery and mitigation spending must have been emergency-designated. However, as noted in Part III.B, the BCA's emergency definition explicitly excluded recovery spending.

IV.
Fixing the BCA

A. *Ex Ante & the Disaster Relief Fund*

The DRF is the rare example of ex ante budgeting, but leaves much to be desired. The DRF is a FEMA no-year account (available until expended) that has historically been the primary federal mechanism for disaster response and recovery.[186] While any administration is free to request any amount of funding for the DRF, the President's budget request has been based primarily on a rolling average of "normal" or so-called "non-catastrophic" disaster costs.[187] This would

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182. Patrick Louis Knudsen, *Hurricane Sandy Relief: An Early Opportunity for Budgeting*, FOUNDRY (Jan. 14, 2013, 8:00 AM), http://blog.heritage.org/2013/01/14/hurricane-sandy-relief-an-early-opportunity-for-budgeting/.

183. Pub. L. No. 113–2, 127 Stat. 4.

184. PAINTER & BROWN, SUPPLEMENTAL FUNDING, *supra* note 10, at 10.

185. Press Release, *Chairman Rogers Introduces Emergency Legislation for Hurricane Sandy Recovery*, H. COMM. ON APPROPRIATIONS (Jan. 4, 2013), *available at* http://appropriations.house.gov/news/documentsingle.aspx?DocumentID=316339.

186. LINDSAY ET AL., *supra* note 29, at 2; *see also* Video, *Chairman Rogers Urges Congress to Pass Emergency Funding for Hurricane Sandy Recovery*, H. COMM. ON APPROPRIATIONS (Jan. 15, 2013), http://appropriations.house.gov/videos/?VideoID=CeGPaE-hweM (describing the DRF as "the most direct source of relief and recovery funding").

187. *Id.* at 2–3; U.S. DEP'T OF HOMELAND SEC'Y, FEDERAL EMERGENCY MANAGEMENT AGENCY DISASTER RELIEF FUND: FISCAL YEAR 2013 CONGRESSIONAL JUSTIFI-

seem reasonable, except that "normal" disasters only include those on which FEMA spent less than $500 million on recovery efforts.[188] Yet, over $500 million was expended on each of twenty declared disasters over the past twenty years.[189] Therefore, it is standard practice to not budget for each year's most expensive disaster.

Given FEMA's practice of distinguishing catastrophic from non-catastrophic costs, and the fact that Congress rarely complies with the full administration DRF request[190] (already less than fifty percent of funds typically needed), the DRF is perpetually under-funded.[191] The meager sums appropriated to the DRF are not intended to pay for major natural disasters, but only to cover FEMA's costs until Congress appropriates supplementally.[192] In fact, FEMA's budget request even states that its "request assumes that new catastrophic events . . . will be funded with emergency supplemental funds."[193] Disturbingly, but probably accurately, it has been argued that the administration requests and Congress appropriates inadequate sums "in order to mask potential disaster costs and project smaller deficits" during annual budget negotiations.[194]

While FEMA's practice of limiting its request for ex ante funding is logical, the DRF request calculation should only exclude extraordinary disasters, not all catastrophic disasters. Given the numerous advantages of ex ante funding, the goal should be to appropriate to the DRF such that only truly unusual events require supplemental appropriations. A fairly inclusive cutoff would provide for ex ante funding more appropriate to the "new normal" without appropriating at a level where funds could wait multiple years for a disaster of sufficient magnitude to utilize them. Appropriating purely on the basis of average costs incurred could effectively render the DRF a "rainy day" fund, particularly after major disasters.[195] Given the country's immense bor-

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CATION 2 (2012) [hereinafter BUDGET JUSTIFICATION], *available at* http://www.fema.gov/pdf/about/budget/11f_fema_disaster_relief_fund_dhs_fy13_cj.pdf (last updated Oct. 27, 2012).

188. LINDSAY ET AL., *supra* note 29, at 2 n.6.

189. *Id.* at 3.

190. *See id.* at 6 fig.2 (indicating DRF requests and appropriations from 1991–2011).

191. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 12, at 20.

192. BUDGET JUSTIFICATION, *supra* note 187, at 5–6.

193. *Id.* at 6.

194. *See* LINDSAY ET AL., *supra* note 29, at 5.

195. A "rainy day" fund is a savings mechanism employed by U.S. states, municipalities, and foreign states with less borrowing capacity than the U.S. *See generally* ELIZABETH MCNICHOL & KWAME BOADI, CTR. ON BUDGET POL'Y & PRIORITIES, Why and How States Should Strengthen Their Rainy Day Funds (2011), *available at* http://www.cbpp.org/files/2-3-11sfp.pdf.

rowing capacity,[196] and in light of efforts to reduce current demands on the Treasury, this politically infeasible option would be inappropriate. To strike the right balance, ex ante funding should approach one hundred percent of the need in years not containing a remarkable natural disaster.

In revising the cutoff, FEMA should exclude from its DRF funding request formula only disasters in excess of $7 billion, rather than the antiquated[197] and overly tight current cutoff.[198] A $500 million cutoff effectively only measures the number of low-level disasters in a year. While any cutoff will be somewhat arbitrary, a $7 billion cutoff would only have excluded the truly memorable and extraordinary disasters since the 1980s: 9/11 and Hurricanes Katrina and Sandy.[199] Concededly, a somewhat lower threshold would also be reasonable, as only six disasters since 1992 have exceeded $3 billion (many were in the $1–2 billion range).[200] Yet, in consideration of the trend expected for natural disaster relief funding, a more inclusive cutoff is preferable.

As for the window over which expenditures should be averaged, a ten-year window would mitigate the risk of overfunding due to a run of a few disastrous years. For many years, FEMA used a five-year window,[201] but this was too short. Unless the DRF formula has a very low disaster inclusion cutoff, the small sample size will be overly sensitive to the recent occurrence of outlier disasters. Thankfully, FEMA has recently adopted a ten-year window,[202] which includes all but the most disastrous events. As for why the window should not be a longer period like twenty years with a more inclusive cutoff,[203] such a long period would less accurately reflect funding needs due to the increasing costs associated with global climate change. While this rationale is explained further below, the important point is that a reasonable win-

196. John S. McCallum, *Don't Count the U.S. Out*, IVEY BUS. JOURNAL, NOV.–Dec. 2011, *available at* http://www.iveybusinessjournal.com/departments/viewpoint/don%e2%80%99t-count-the-us-out#.

197. The $500 million cutoff has been used for over a decade, unadjusted for inflation. LINDSAY ET AL., *supra* note 29, at 3 & n.11.

198. *See id.* at 2.

199. *See* BRUCE R. LINDSAY ET AL., CONG. RESEARCH SERV., R42352, AN EXAMINATION OF FED. DISASTER RELIEF UNDER THE BUDGET CONTROL ACT 3 fig. 1 (2012). Note that this report is an earlier version of the report cited, *supra* note 29, prior to the occurrence of Hurricane Sandy.

200. *See id.; see also* LINDSAY ET AL., *supra* note 29, at 4 fig. 1.

201. *See* BUDGET JUSTIFICATION, *supra* note 192, at 5–6.

202. *See id.* at 5.

203. *Cf.* Black, *supra* note 49, at 19.

dow on which to base fuller DRF appropriations window requires balance.

B. Tight Caps: Adjusting the Discretionary Caps & Natural Disaster Relief Funding

The BCA's main proviso for natural disaster spending is the cap adjustment allowed for "disaster relief" spending. The "disaster relief" adjustment allows appropriations in excess of the discretionary caps up to the ten-year average funding provided for disaster relief, excluding the highest and lowest years.[204] Any year in which the disaster relief adjustment isn't fully appropriated increases the cap adjustment commensurately in future years.[205] The separation of "disaster relief" and "emergency" spending (which sound admittedly practically indistinguishable) was an innovation intended to prevent the need to open the "emergency" clause floodgates.[206]

However, as demonstrated by Hurricane Sandy, this noble attempt has failed because the hard and overly conservative cap led Congress to resort to the "emergency" clause for far too many disasters. An unrealistically conservative cap is particularly detrimental because once Congress believes it can justify (and appropriates) emergency-designated funding, there is every incentive to fully exploit the opportunity. For example, the DRAA appropriated $363.3 million for accounts that are traditionally funded by the Commerce, Justice, Science and Related Agencies appropriations bill, including $25 million for improvements to weather forecasting and hurricane intensity forecasting capabilities and $50 million for laboratories associated with sustained weather observations research programs.[207] These expenditures bore no direct relationship to Hurricane Sandy or the damaged regions. Yet, even when the funding is directly related to the precipitating emergency, the "emergency" definition permits the use of mitigation funding,[208] bringing with it all the attendant problems of providing such funding ex post.[209] Congress, aware that the disaster relief caps are tight and that it will therefore likely need to resort to emergency funding after the next major disaster, may refrain from appropriating for mitigation efforts ex ante because any funds appropri-

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204. Budget Control Act of 2011 § 101(b)(2)(D)(i), 2 U.S.C. § 901(b)(2)(D)(i) (2012).
205. *Id.*
206. Painter & Brown, Supplemental Funding, *supra* note 10, at 10.
207. *Id.* at 12–14.
208. 2 U.S.C. § 900(c)(20).
209. *See supra* Part III.C.3.

ated after a disaster will be less politically contentious. Despite, in a sense, condoning higher spending levels, a more realistic cap adjustment is preferable because it will discourage Congress from utilizing uncontrolled emergency-designated supplemental appropriations.

More complex is revising the criteria for the "disaster relief" cap adjustments. At first glance, the current ten-year rolling average with outliers excluded would seem like a reasonable way to estimate the expenditures needed in subsequent years. Ten years is a large enough sample size to create an accurate average and the exclusion of outliers prevents a distorted average. Yet, as there is no ceiling on disaster relief expenditures but always a floor of zero dollars, the exclusion of the highest and lowest years creates an illusion of providing a truer average. In reality this actually skews the calculation in favor of more frequently needing emergency funding. To explain, while the lowest funding year will likely be only slightly lower than the second lowest, the highest year could be like 2005, where $53.1 billion was appropriated to the DRF alone, vastly exceeding appropriations for the second highest.[210] The current method would be logical if the annual funding levels followed a normal distribution, such that outlying years were likely to deviate relatively equally and substantially from the median. While the law of large numbers would recommend diminishing this effect by expanding the period averaged further back in time,[211] global climate change reduces the allure of this approach as the likelihood of extreme weather events increases with each passing year.[212] Thus more recent years are most likely to be predictive of future spending needs.

There are other reasons not to average back further than ten years. Inflationary pressures and growth in property values for which insurance payouts are sought would lead to dissonance with modern spending needs.[213] Though these days inflation is a tame beast, it could nonetheless generate a significant impact over ten-plus years.[214] Additionally, the Great Recession demonstrated that property values

210. LINDSAY ET AL., *supra* note 29, at 6 fig. 2.

211. *Law of Large Numbers*, INVESTOPEDIA, http://www.investopedia.com/terms/l/lawoflargenumbers.asp (last visited June 16, 2013) ("[A] rule that assumes that as the number of samples increases, the average of these samples is likely to reach the mean of the whole population.").

212. WEISS ET AL., *supra* note 3, at 2.

213. Phaup & Kirschner, *supra* note 13, at 23 (indicating that there is a "rising trend in global property losses from disasters" between 1975 and 2008).

214. Tim McMahon, *Average Annual Inflation Rates by Decade*, INFLATIONDATA.COM (Nov. 5, 2012), http://inflationdata.com/Inflation/Inflation/DecadeInflation.asp (showing cumulative U.S. inflation of 27.93 percent from 2000-2009, although the rate from 2009-2012 has annually averaged a below-trend 2.29 percent).

fall as well as rise.[215] Nonetheless, these considerations could be fairly easily accounted for in any funding formula, particularly the ubiquitous rate of inflation.

However, the main concern that more flexible and realistic caps should reflect is the expected increase in disaster relief needs. Therefore, the average could incorporate a multiplier derived from the projected annual increase in the likelihood of extreme weather events. An alternative, and perhaps simpler, fix would be to exclude more years at the lower end without excluding the commensurate years at the higher end.[216] This Note recommends taking a fifteen-year inflation-adjusted average but excluding the years with the highest and four lowest levels of expenditures. While there is nothing scientific to this window or ratio of excluded years, it is a simple formula that will skew cap adjustments to better handle rising disaster relief expenditures, while leaving ten years of expenditures within the calculation. If disaster expenditures were to rise at an even greater rate in the future, the number of lower years excluded could be increased.

Another source of inaccuracy is that appropriations included in the calculations only include those that explicitly mention the Stafford Act, which controls major federal disaster declarations, even when the funding was clearly in response to natural disasters.[217] Such explicit statements may not have been included in disaster relief funding measures enacted prior to the BCA, because it was not known at the time that they would be used for such a calculation.[218] While this problem will eventually diminish, as post-BCA appropriations all reference the Stafford Act, OMB should be more inclusive in calculating disaster relief expenditures in pre-BCA years.[219]

Another difficult aspect in designing the disaster relief clause is whether ex ante regular appropriations to the DRF should be included within the cap adjustment. Currently, ex ante DRF funding is included within the cap adjustment.[220] If it were excluded, it would incentivize Congress to appropriate ex ante to the DRF. However, such an ap-

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215. Average home prices in hurricane-prone Florida dropped thirty-eight percent from their 2007 peak by the end of 2009. RAJASHRI CHAKRABARTI ET AL., HOUSEHOLD DEBT AND SAVING DURING THE 2007 RECESSION 2 (2011), *available at* http://www.newyorkfed.org/research/staff_reports/sr482.pdf.

216. Under either solution, an inflation-adjusted calculation of each year's expenditures before exclusion and averaging would be ideal.

217. LINDSAY ET AL., *supra* note 29, at 14.

218. *See id.* at 14–15.

219. *See id.* at 16–17.

220. Budget Control Act of 2011 § 101(b)(2)(D)(i), 2 U.S.C. § 901(b)(2)(D)(i) (2012). Any appropriations "that Congress designates as being for disaster relief in statute" are within the cap adjustment. *Id.*

proach would somewhat undermine the logical coherence of the disaster relief cap formula discussed above. Therefore, ex ante funding to the DRF should continue to be considered when assessing the disaster relief cap adjustment.

C. Emergencies: A Clause Too Loose

The BCA's "emergency" clause is too loose, providing little constraint on spending in response to "unanticipated" situations.[221] Under this clause, the President requested $60.4 billion in supplemental appropriations in the wake of Hurricane Sandy, quite a hefty increase from the $359 billion cap on non-security discretionary spending for FY 2013 imposed by the BCA.[222] Congress eventually appropriated $50.7 billion, much of which was designated as "emergency" spending, but nonetheless described by OMB as designed "to mitigate the damage from future disasters in the impacted region."[223] It is debatable whether such spending fit within the BCA's "emergency" definition, but, as all of the funding was in response to an arguably "unanticipated" situation, one can assume that it did. This definition clearly failed to deter large-scale supplemental spending without offsetting rescissions.

1. Funding Equitably and Efficiently: Excluding Mitigation and Prevention

Mitigation and prevention spending should not be included in the "emergency" clause because they are not urgent and, as such, would be both unfair and inefficient to fund supplementally. The bulk of mitigation and prevention efforts in the wake of a natural disaster such as Hurricane Sandy will be targeted at the affected area. This is, of course, reasonable for response and recovery appropriations, but illogical and inequitable for mitigation and prevention efforts. If mitigation and prevention efforts can be paid for completely outside the discretionary caps, as was done after Sandy, the affected areas essentially reap a windfall. Meanwhile, Congress is not forced to make tradeoffs against other, potentially more deserving, claims on the public fisc. This is not to say that such appropriations are by any means free. The funding will eventually have to be paid for through higher taxes or lower spending. Rather, such appropriations are merely inappropriate and inequitable to make supplementally, because the trade-offs are

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221. The BCA requires that emergencies be "unanticipated," defined as sudden, urgent, unforeseen, and temporary. *Id.* § 900(c)(21).

222. *Id.* § 901(c)(2)(B).

223. PAINTER & BROWN, SUPPLEMENTAL FUNDING, *supra* note 10, at 1.

less evident to the public when not included in the regular budget figures.[224]

Competing claims could consist of any beneficial federal spending, but, for argument's sake, are most easily conceived of as other mitigation needs. Effectively, the areas affected by Hurricane Sandy have not only received funding to restore them to their pre-disaster condition (in theory) but have received substantial funding to protect them from future similar events. Meanwhile, there could be other natural disaster threats that have received no funding, such as the Emergency Watershed Protection floodplain easement program, which engages in mitigation efforts and hasn't received funding since FY2009.[225] If one thinks geographically, funding after hurricanes Sandy and Katrina has put the New Orleans and NY/NJ areas in a relatively better position than other hurricane-prone areas to weather the next storm, merely because they recently suffered extreme weather events. The concentration of mitigation funding in areas that recently suffered major weather events is certainly not an effective cost-benefit analysis of the nation's most dire mitigation needs. Instead, it diminishes funding available for other needed mitigation, thereby perpetuating the cycle of waiting for catastrophic extreme weather events to strike in order to mitigate the impact should a similar event be repeated. Such a vicious cycle stems from an understandable desire of Congress to promise "never again!" after major catastrophes. Yet, it is able to occur because of a fiscal rule too loose.

The mitigation tension may be unsolvable, and today's fiscal constraints suggest it should be resolved in favor of conservative budgeting. All fiscal rules rely on Congress' adherence, which need never use the emergency clause and can always make regular appropriations for mitigation efforts. Therefore, the somewhat imperfect incentive scheme must be disregarded in favor of dissuading unhampered spending by eliminating mitigation and prevention from the "emergency" definition.

2. *Require an Affirmative Vote for "Emergency" Designations*

To bring greater attention to the proposed revised "emergency" definition, each House of Congress should amend its rules such that an affirmative vote is required to emergency-designate any appropriation.[226] Currently, in the Senate, Section 314(e) of the Congressional

224. *See* discussion *supra* Part III.C.2.

225. PAINTER & BROWN, SUPPLEMENTAL FUNDING, *supra* note 10, at 11–12.

226. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 12, at 22.

Budget Act permits any Senator to raise a point of order to strike an emergency designation in an appropriations bill.[227] Yet it is rarely raised[228] because there is little political gain from striking an emergency designation. As a result, there is little forcing the legislator offering the bill or amendment containing emergency-designated provisions to adhere to the definition. Instead, an affirmative vote in support of any emergency-designation contained within a proposed bill or amendment would create greater accountability. If a legislator supported an outrageously inappropriate emergency-designation, political opponents would have better evidence with which to vilify their fiscal profligacy. This procedure would even enable legislators to support particular spending measures while opposing their emergency designation. If an emergency designation was stricken but the appropriation still passed without it, this would result in sequestration or require adequate offsetting rescissions. By requiring such trade-offs, this would make the suspect appropriation less politically palatable, inhibiting its chances for passage.

D. Alternatives to the BCA Framework

While this Note has critiqued the BCA, it has predominantly accepted its structure as a reasonable strategy to constrain disaster relief funding and spending. However, many have proposed various means to constrain supplemental spending, as well as budgeting for natural disaster relief particularly.

One idea is to limit the time availability of appropriated funds,[229] thereby constraining Congress' capacity to appropriate long-term recovery funds supplementally. One-third of supplemental appropriations from fiscal years 1997 through 2006 were available until expended.[230] Limiting the period in which funds must be spent forces congressional review of the spending.[231] An extreme version of such a limitation would be to cabin supplemental appropriations to only the fiscal year in which appropriated. A more reasonable approach would be to restrict it to any fiscal year for which the regular appropriations process had already occurred. This would ensure that the spending truly be of an urgent nature, such that it could not await a fuller debate

227. *Budget Act Points of Order in the Senate for Enforcing the Deemed Budgetary Levels for FY 2013*, S. Comm. on Budget Republicans, http://www.budget.senate.gov/republican/public/index.cfm/points-of-order (last visited Aug. 8, 2013).

228. U.S. Gov't Accountability Office, *supra* note 12, at 22.

229. *Id.* at 5.

230. *Id.* at 21.

231. *See id.* at 21.

and consideration during the regular budgetary process. Contrarily, such a restriction would reduce certainty of funding, which is desirable for long-term recovery or mitigation projects, potentially hampering them until the next fiscal year begins. Additionally, imposing such a restriction could distort the use of "emergency" funding by encouraging the rushed obligation of all supplemental "emergency" spending into the acceptable fiscal year window. This would further act to discourage mitigation by pushing long-term funding (by which mitigation is likely to be supported) towards the regular budget. However, these concerns are insufficient to justify casting aside what most budget experts surveyed by GAO in 2008 sought.[232] A within-fiscal year limitation is logically coherent because supplemental appropriations are designed to provide funding for unforeseen needs until the next budget cycle.[233] With the encouraged shifting of more disaster-related appropriations to the regular budget cycle, appropriations are less likely to be driven by sympathy for the natural disaster's victims and more likely to be weighed rationally against other spending needs, likely reducing the amount spent.

One suggested check on emergency designations inconsistent with the statutory definition is to require their review by a supplementals subcomittee.[234] This would presumably be justified by consistency in how the emergency criteria are applied.[235] However, emergency-designated appropriations may not be made frequently enough to allow for the generation of expertise. Additionally, if this committee held so much power over supplemental appropriations, its acquiescence could be bought more easily than that of an entire house of Congress. Those interested in seeing dubious supplemental spending passed could more easily engage in logrolling with members of a small subcommittee. Additionally, if the subcommittee were comprised of appropriations committee members, greater control over emergency designations might prove too enticing as a means to fund that which they were unable to include in past budgets or to remove certain expenditures from future consideration, creating greater flexibility in the next budget cycle to dole out favors. As recommended earlier in this Note, the accountability of an affirmative vote of each house would provide a more effective check.

An emergency reserve fund is a common means of reducing the need for supplemental appropriations and its attendant shortcomings,

232. *See id.* at 5.
233. *See* HUNGERFORD, *supra* note 78, at 2.
234. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 12, at 23.
235. *Id.*

as well as encouraging mitigation funding. Quite a few U.S. and foreign states use reserve funds to save for increased spending needs in crises.[236] The idea behind such funds is that states should save in order to smooth out the costs associated with a catastrophic disaster.[237] Such funds are most appropriate for states most vulnerable to particularly devastating catastrophes, such as Japan.[238] Because Japan is so earthquake-prone, most of the death and destruction it suffers are from intermittent earthquakes and resultant tsunamis.[239] Its citizenry understand the need to save for a shaky day.

However, emergency reserve funds present many design difficulties, may not be necessary for a country with such regular disaster relief funding needs as the U.S., and would be difficult to sell politically when annual deficits are so high. Most confounding is that it is difficult to prevent such a fund from being raided to fund other needs.[240] Additionally, even the most devastating disasters, such as Hurricane Katrina, create losses that are relatively small in relation to national GDP.[241] For that reason, socking away money in advance of disaster may not be necessary. But, even if it were desirable, existing deficit levels render it politically unpalatable to appropriate so far in advance. Such a fund is distinguishable from the DRF in that the DRF is intended to be expended almost entirely each year. It is an account to which appropriations are made, not a long-term savings mechanism.

CONCLUSION

To budget for the certain increase in natural disasters to come while adhering to self-imposed fiscal constraints, Congress must re-

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236. Phaup & Kirschner, *supra* note 15, at 33.

237. *See id.* at 40 ("*Ex ante* budgeting can also be useful in limiting the relief responses to a level consistent with a considered decision . . . In general, public policies for addressing catastrophes are presumed to be more consistent with long-term objectives if they are established in advance of the loss event.").

238. *See id.* at 13–14 (stating that Japan is particularly prone to natural disasters and "actively promotes ex ante saving for disasters," for example through its contingency reserve fund).

239. *See id.* ("From 1996 to 2005, 20% of the [world's] earthquakes reaching a magnitude of 6.0 or higher had an epicentre [sic] in Japan," but the 1995 Kobe earthquake alone caused over eighty-three percent of deaths from natural disasters from 1995 to 2005.).

240. Phaup & Kirschner, *supra* note 15, at 27 (noting the "numerous instances where public funds designated for one purpose have been redirected to another"); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 12, at 26 (stressing the need to design a reserve so that it's not pillaged when budget caps are unrealistic).

241. Phaup & Kirschner, *supra* note 15, at 31 ("[F]or developed countries, the losses from natural disasters are small relative to national income, rarely exceeding 2% of gross domestic product.").

vamp its budgetary practices and the BCA's natural disaster provisions. It would be wise to fully fund the DRF, at a level commensurate with its true needs. Additionally, the "disaster relief" cap adjustment should be revised to more accurately reflect the costs imposed by natural disasters in an era of increasing extreme weather events. Finally, mitigation and prevention efforts should not be funded through the "emergency" clause, as this dynamic leads to inequitable funding opportunities. These revisions would make federal budgeting and appropriations for natural disasters more honest, productive, equitable and, hopefully, less costly.