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THE PERILS OF CONSTITUTIONALIZING THE BUDGET DEBATE

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSTITUTION, CIVIL RIGHTS AND HUMAN RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

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THE PERILS OF CONSTITUTIONALIZING THE BUDGET DEBATE

WEDNESDAY, NOVEMBER 30, 2011

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS AND HUMAN RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:01 a.m., Room SD–226, Dirksen Senate Office Building, Hon. Richard Durbin, presiding.

Present: Senators Schumer, Whitehouse, Franken, Coons, Blumenthal, Hatch, Graham, Cornyn, and Lee.

OPENING STATEMENT OF HON. RICHARD DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. The Subcommittee on the Constitution, Civil Rights, and Human Rights will come to order. The title of today's hearing is "A Balanced Budget Amendment: The Perils of Constitutionalizing the Budget Debate".

I will first provide a few opening remarks and recognize my Ranking Member, Senator Lindsey Graham, for an opening statement before we turn to witnesses. I'd like to make a short statement of my own at this point.

The Constitution of the United States is the foundation upon which our great Nation has been built. Each Member of Congress takes an oath to support and defend it; it is an oath we take very seriously.

Since the ratification of the Bill of Rights in 1791, Congress has only acted to amend the Constitution a total of 17 times, 17 times in 220 years. The Founding Fathers set the bar high for revising our founding document, and rightfully so. It is a bar that has been met for some fundamental issues, such as ending slavery, establishing the principle of equal protection, and ensuring the right of women to vote.

We are here today because some Members of Congress believe we should enshrine in the Constitution their theories on the Federal budget. It is ironic that the strongest supporters of a balanced budget amendment also proclaim their love for, and fidelity to, the Constitution.

Yet many who claim to revere the Constitution have been trying all year to force a vote on a balanced budget amendment that would radically reshape our constitutional framework of government. This past August, Republicans threatened to default on our

National debt unless the House and Senate held a balanced budget amendment vote this year.

In their political passion to take budgeting decisions out of Congress's hands, the cut, cap and balance crowd even created a fast-track process to try to push their constitutional amendment through Congress with little debate and little opportunity to change the wording.

The Constitution and the American people deserve better than this. Proposals to amend the Constitution should be carefully reviewed, and clearly a proposed amendment should not be adopted unless it is worthy of a place in our Nation's most treasured document.

Two weeks ago, the House of Representatives rejected a flawed balanced budget amendment after a hurried debate on the House floor. Opposition to the amendment was bipartisan, with even the Republican Chairman of the House Rules Committee and House Budget Committee voting against it. This coming month, the Senate is required by law to hold its own vote on a balanced budget amendment that was part of the negotiation for a budget agreement.

Although the Budget Control Act requires this floor vote regardless of whether the Senate Judiciary Committee reports a balanced budget amendment, I thought it was important to hold this hearing to look carefully at what such an amendment would mean.

Proponents claim the balanced budget amendment would solve our current budget problems, but a closer look suggests it would not. Instead, it would create a new and equally serious set of challenges and problems, while shifting the responsibility for solving those problems from Congress to the Federal courts.

I look forward to discussing today the many challenges and perils of the current balanced budget amendment proposals, which would make economic recessions worse, endanger vital safety net programs that millions of Americans rely on, increase the likelihood of debt limit standoffs, increase fiscal burdens on the States, and create serious enforcement challenges that would end up being resolved by un-elected Federal judges.

These concerns, among many others, will make clear that a balanced budget amendment is certainly no easier magic solution. The simple truth is this: putting our Nation's fiscal house in order will require tough decisions about taxes and spending.

The Constitution assigns that job to us, to Congress. Fulfilling this constitutional duty carries the political risk that many Congressmen and Senators are well aware of, but that's the job we signed up for. Members of Congress should not try to change our Constitution to avoid their duty to make these hard choices. It's anathema to our Constitutional democracy to insulate important decisions about our country's values from the people and the political process.

We are at a point now in our budget debate where some in Congress would rather take a red pen to the Constitution than reconsider an anti-tax pledge written by a political lobbyist. I believe these Members need to get their priorities straight. Our oath to support and defend the Constitution of the United States has more

important than any allegiance my colleagues owe to any other individual.

We do not need to go to the extreme step of amending the foundational document of our democracy just to have Congress do its job. All we need is a Congress that's willing to work hard, show some political courage, make tough decisions, and so what's right for the American people.

Senator Graham.

STATEMENT OF HON. LINDSEY GRAHAM, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator GRAHAM. Thank you, Mr. Chairman. I will be very brief because we have Senators Hatch and Cornyn, who have been leading the effort on our side to craft, I think, a balanced budget amendment that would serve the country well.

I would like to say something about the Chairman here. Being a member of the Gang of Six, you've tried to embrace a bipartisan solution to what is becoming a national security/economic crisis in this country. You, with other colleagues, have decided to do something about entitlement growth, you tried to generate revenue in a way without raising taxes, actually lowering taxes.

So I want to acknowledge that what you and the Gang of Six did is really a political breakthrough, and I'd like to be part of that process so that we could eventually solve our problems.

But here's why I think we need a balanced budget amendment. If we were required to balanced the budget, the Gang of Six proposal would have a lot more wind to its back. The Super Committee's efforts to find $1.2 trillion over the next decade failed. Good people could not get there under the political construct that exists today.

I would argue, at $15 trillion of national debt, the political construct that exists today is incapable of saving the American people from financial ruin. The Congress, in a bipartisan fashion, cannot solve our Nation's problems without some help. The missing ingredient, from my point of view, is a constitutional requirement to do what we all desire but were unable to achieve.

The reason I think we need a balanced budget amendment to the Constitution is that all of us would be able to go back home and say, I have to do this because the supreme law of the land requires me to do this. Every special interest group can be heard from but their voice will be drowned out by the supreme law of the land.

Right now, the law of the land is the loudest political voices who say no to every hard idea. The only way they will be trumped and the only way we will find consensus to save this country from becoming Greece, Spain and Italy is to impose a constitutional requirement on the Congress, like many States have imposed upon themselves. If I thought we could do it any other way I would say so.

In 1997, we came within one vote in the U.S. Senate of passing a constitutional balanced budget amendment. I can only imagine what America would look like today if that requirement had been imposed in 1997, because, Mr. Chairman, I am confident that if the States had the opportunity to ratify a reasonable balanced budget

amendment to the Constitution, three-fourths of the States would do so within 1 year.

The problem is not the States wanting to put limitations on constitutional action, the problem is the Congress doesn't want to submit itself to constitutional oversight and a requirement to balance the budget. The day we cross that rubicon and understand that the current political dynamic will never lead to a balanced budget and change that dynamic by adopting a balanced budget amendment to the Constitution, I think America's best days lie ahead. Without that change, I'm afraid that we'll be here 10 years from now talking about a $20 trillion national debt.

With that, I will yield back my time, and I appreciate this hearing.

Senator DURBIN. Thank you very much, Senator Graham.

We're going to turn to our panel of witnesses for opening statements. They'll each have 5 minutes. Their complete written statements will be made a part of the record. As is the tradition of this committee, if you would all please rise and raise your right hand, I would like to administer the oath.

[Whereupon, the witnesses were duly sworn.]

Senator DURBIN. Let the record reflect that all five witnesses have answered in the affirmative.

Let me start, first, with Bob Greenstein, founder and executive director of Center on Budget and Policy Priorities; before that, administrator of the Food and Nutrition Service at the Department of Agriculture. He was appointed by President Clinton in 1994 to serve on the bipartisan Commission on Entitlement and Tax Reform, a graduate of Harvard College.

Mr. Greenstein, glad to have you here today. Please proceed.

STATEMENT OF ROBERT GREENSTEIN, PRESIDENT, CENTER ON BUDGET AND POLICY PRIORITIES, WASHINGTON, DC

Mr. GREENSTEIN. Thank you, Mr. Chairman.

The goal of a constitutional amendment is to address our long-term fiscal problems, but it would be an ill-advised way to do so because it would risk serious economic damage. To require a balanced budget every year regardless of the state of the economy is something large numbers of economists have long counseled against because it would require the largest budget cuts or tax increases when the economy is weakest, and thereby holds risk of tipping faltering economies into recession and making recessions longer and deeper.

When the economy weakens, consumers and businesses spend less and that causes further job loss. But also, revenue growth drops and expenditures for programs like unemployment insurance increase and that automatic drop in tax collections and increase in UI benefits cushions the blow by keeping purchases of goods and services from falling even further. That is why economists term these the automatic stabilizers. They occur when the economy turns down and they help stabilize the economy.

A constitutional balanced budget amendment effectively suspends the automatic stabilizers. It requires Federal expenditures to be cut or taxes raised to off-set the automatic stabilizers, which is the opposite course from what sound economic policy calls for.

As I've noted, leading economists have long counseled against this. Robert Reischauer, a CBO Director in 1992, testified, "If it worked, the constitutional Balanced Budget Act would undermine the stabilizing role of the Federal Government." In testimony earlier this year the current CBO Director, Doug Elmendorf, said the same thing.

A month ago, Macroeconomic Advisors, one of the Nation's leading economic forecasting firms which has advised the Council of Economic Advisors under Presidents Reagan and George W. Bush, among others, issued a conclusion that if a balanced budget amendment had been ratified and were not being enforced, "The effect on the economy would be catastrophic".

Macroeconomic Advisors found that if the 2012 budget were balanced through spending cuts, they would total $1.5 trillion in this year alone, and they forecast that would throw 15 million more people out of work, double the unemployment rate to 18 percent, and cause the economy to contract by 17 percent instead of growing by 2 percent. Macroeconomic Advisors warned that regardless of the year that a balanced budget amendment took effect, its effect over time would be to eviscerate he automatic stabilizers and make recessions "deeper and longer".

Now, proponents of a constitutional amendment often dispute these claims by noting that a three-fifths vote of the House and the Senate, or in some versions a higher percentage, could waive the balanced budget requirement. But as you all know, it is difficult to secure a three-fifths vote in this body on a timely basis for almost anything.

Moreover when the economy turns down it often takes several quarters, many months, before there's economic data showing we're actually in a recession. And even after the data became available, it's all too likely that a minority in the House or the Senate could hold a waiver vote hostage to demand for concessions on other issues.

By the time a recession were recognized to be under way and three-fifths votes were secured in both chambers, if that could be done at all, extensive economic damage could have been done and hundreds of thousands of additional jobs lost. There are a variety of other problems as well.

Consider the savings and loan crisis of the late 1980s. Had there been a constitutional balanced budget amendment, in fact, we couldn't have moved quickly because doing so would have created an unbalanced budget. Valuable time could have been lost.

Now, the comments I've made so far apply to all versions of the balanced budget amendment. Some versions, such as S.J. Res. 10 and 23, raise additional concerns for two reasons: 1) they would require a two-thirds super-majority to raise any revenues for deficit reduction, and that would protect what President Reagan's former Chief Economics Advisor, Martin Feldstein, has called the biggest area of wasteful spending in the Federal budget. Tax expenditures are what Alan Greenspan has called tax entitlements.

In addition, those versions of the balanced budget amendment would bar Federal spending from exceeding 18 percent of GDP in the prior calendar year, which translates into about 16.6 percent

of GDP in the current fiscal year. Now, to comply with that would require truly draconian cuts.

If you consider the Ryan budget, which is stunning in the degree of reductions it has, CBO says the Ryan budget has spending at 20 and three-quarters percent of GDP in 2030. This is four points below that. We used the largest CBO 10-year projections to model what the effect would be if you had to hit this 18 percent of prior calendar GDP stricture starting in 2018, which is the first year you would if Congress passed the balanced budget amendment now and the States ratified it by 2013.

What we found was that in 2018, Congress would have to cut all programs by an average of 25 percent. If you cut all programs the same percentage, Social Security would be cut $1.7 trillion through 2021, Medicare $1.1 trillion, veterans' programs, $120 billion, and defense spending, $880 billion on top of the defense cuts, under the Budget Control Act and the now scheduled sequestration.

Now, of course, Congress wouldn't have to cut every program by the same percentage, but anything you exempted would require deeper cuts in other areas. If you exempted Social Security, everything else, including defense and veterans would have to be cut by an average of 34 percent.

The bottom line is, policymakers do need to begin to change our fiscal trajectory. Like Senator Graham, I would very much commend you and others on the Gang of Six. We need to make hard choices like those reflected in the Gang of Six plan. But a balanced budget amendment in the Constitution would be unwise, as it would exact a heavy toll on the economy and on American businesses and workers in the years ahead.

Thank you.

Senator DURBIN. Thanks, Mr. Greenstein.

[The prepared statement of Mr. Greenstein appears as a submission for the record.]

Senator DURBIN. Robert Romasco is a graduate of Brandeis and Harvard Business School, president-elect of AARP, and will become its president next year. Currently the chair of its National Policy Council, he previously served as secretary/treasurer and worked as an executive at numerous companies, including QVC, J.C. Penney's, Direct Marketing Services, and American Century Investments.

Thanks for being here. Proceed.

STATEMENT OF ROBERT ROMASCO, PRESIDENT-ELECT, AARP, BURKE, VA

Mr. ROMASCO. Thank you, Chairman Durbin, Ranking Member Graham, and members of the Committee. Good morning. On behalf of all Americans aged 50 and older, including our more than 35 million members, AARP appreciates the opportunity to comment on the impact that a balanced budget amendment to the Constitution would have on Social Security and Medicare.

Such an amendment, while seemingly a common-sense answer to America's fiscal challenges, would subject Social Security and Medicare to very deep cuts without regard to the impact on the health and financial security of real people.

Such an amendment would also result in significantly diminished resources for other services, like delivered meals or heating assistance for those Americans who are too frail or poor to take care of these basic needs without some community support.

Such an amendment would prohibit outlays for a fiscal year from exceeding total receipts for that same fiscal year. This is the equivalent of imposing a constitutional cap on all spending that is equivalent to the revenues raised in a given year.

For example, Federal spending in 2011 is projected to be 23.8 percent of GDP, but revenue is only projected to be 15.3 percent. If a constitutional balanced budget amendment were in place today, Federal spending would need to be capped at 15.3 percent of GDP or revenues need to be increased to that 23.8.

Based on an analysis prepared by the Lewin Group for AARP, the American College of Cardiologists, the American Hospital Association, and the AMA, slowly reducing current spending to the less drastic 21 percent of GDP over the next 10 years would still result in significant cuts to Social Security, Medicare, and Medicaid.

Assuming cuts were phased in and distributed proportionately to the rate of growth and the costs of each of these programs, by 2021 it would be $1.2 trillion cut in Social Security spending, a $788 billion cut in Medicare, and a $527 billion cut in Medicaid spending. Such cuts will have a severe impact on real people.

Social Security is currently the principal source of income for nearly 2 out of every 3 American households receiving benefits, and in roughly 1 in 3 households it represents their entire income, or 90 percent or more. These Social Security earned benefits are modest, averaging only about $1,200 a month, for all retired workers of this past year.

Yet according to the same Lewin analysis, capping spending at 21 percent of GDP would increase the number of people living in poverty by 2 million people in 2014 and 3.4 million by 2021. A shocking number of these people reduced to poverty would be older Americans, 1.1 million Americans over 65 in poverty in 2014, and nearly double that, 1.9 million older Americans would be poor by 2021 if the spending were reduced to the 21 percent of GDP.

These outcomes would only be more extreme if a constitutional amendment required spending to be capped at a lower percentage. In fact, if the balanced budget amendment were in place today the average Social Security benefit would be cut 27 percent.

Based on CBO projections of revenue, Federal spending would need to be reduced from 23 percent of GDP to 16.8 of GDP in 2012. If across-the-board cuts were applied to reach balance, a low-earning retiree would see his or her 2012 benefit reduction from $10,300 to $7,500. A median income recipient would see their benefits go from $17,000 to $12,300.

In addition to the possibility of these drastic reductions, there's the issue of predictability. Social Security and Medicare would be undermined by the requirement that spending outlays equal revenues annually. Revenues fluctuate based on many factors, consequently, annual spending would also fluctuate under the balanced budget amendment.

As a result, Social Security and Medicare benefits would fluctuate and individuals who have contributed their entire working

lives to earn a predictable benefit during their retirement would find their income and health care benefits and costs vary significantly year to year, making planning difficult and peace of mind nearly impossible.

Another element of the balanced budget amendment, the requirement of a three-fifths vote to increase the debt limit, is especially likely to wreak havoc with the reliability aspect of Social Security and benefits in the future.

The increased threshold for increasing the debt limit was part of the balanced budget amendment proposal that Congress voted on in 1995, and most recently the House of Representatives considered on November 18th.

In light of the intense debate surrounding the increase in the debt limit earlier this year, the uncertainty that the debate created for millions would make it almost impossible to plan.

We maintain it is particularly inappropriate to subject Social Security to a balanced budget amendment, given that Social Security is an off-budget program that is separately funded through its own revenue stream, including significant trust fund reserves to finance benefits.

Social Security benefits are financed through the payroll contributions of employees and employers each and every year throughout their individual life. The payroll contributions and benefits paid, including administrative costs, are accounted for separately from the rest of the budget. Importantly, Social Security has not contributed to our large deficits.

Our members and older Americans everywhere acknowledge the difficult challenge of getting our Nation's fiscal house in order, but doing so requires a real debate about the choices we need to make and what kind of country we want. A balanced budget amendment would result in forced cuts to Social Security and Medicare rather than informed decisionmaking about the future of our Nation.

We urge Congress to not simply look at the numbers in the budget, but the real people who would be affected by fundamental changes that such an amendment would produce. We look forward to working with members of this committee, as well as members from both houses of Congress and both sides of the aisle, to promote a conversation that will address our Nation's long-term debt without sacrificing the current and future health and retirement security of our Nation's seniors, fulfilling our mission to help Americans of every generation live with dignity and purpose.

Thank you.

Senator DURBIN. Thank you very much, Mr. Romasco.

[The prepared statement of Mr. Romasco appears as a submission for the record.]

Senator DURBIN. Before I introduce our next witness I want to make sure I get her name right: Furchtgott-Roth?

Ms. FURCHTGOTT-ROTH. Furchtgott-Roth. Yes. Thank you very much. Thank you so much.

Senator DURBIN. A collision of five consonants there, and I'm trying to get it. Furchtgott-Roth.

Ms. FURCHTGOTT-ROTH. Yes. Well, please call me Diana. It's my husband's fault. He had the Furchgott. And he's from Columbia, South Carolina, so I'm sure you're going to forgive him.

Senator DURBIN. Senator Graham.

Senator GRAHAM. I've always been a big admirer.

[Laughter.]

Senator DURBIN. Ms. Furtchgott-Roth is Senior Fellow with the Manhattan Institute, and previously served as Chief Economist at the U.S. Department of Labor, and Chief of Staff at the Council of Economic Advisors under President George W. Bush. She served as Deputy Executive Secretary for the Domestic Policy Council under President George H.W. Bush, and as a Staff Economist on the Council of Economic Advisors under President Reagan. She has a B.A. from Swarthmore and an M. Phil in Economics from Oxford.

Please proceed.

STATEMENT OF DIANA FURCHTGOTT-ROTH, SENIOR FELLOW, MANHATTAN INSTITUTE FOR POLICY RESEARCH, WASHINGTON, DC

Ms. FURCHTGOTT-ROTH. Thanks so much for inviting me to testify today.

Look, none of us really want a balanced budget amendment because the best option would be for Congress to work as it's supposed to and pass budgets that would enable us to live within the revenues that we have. But the Senate hasn't passed a budget for over two and a half years. The deficit last year was $1.3 trillion. The Super Committee failed even to get $1.2 trillion of cuts. That's over a decade, not even in 1 year. We borrow 40 cents out of every dollar that we spend.

Congress has considered many balanced budget amendments in the past, which is summarized in an excellent study by the Congressional Research Service. Versions in nine Congressional sessions did not pass. But imagine that the balanced budget amendments of 1982 and 1995 had passed and had gone on to be ratified by three-quarters of the States. Today we would be in a far stronger position, no trillion-dollar deficits, no 100 percent levels of gross public debt.

Of course, everyone prefers for us to be able to restrain government spending through the normal budget process, but we haven't been able to do that, not just in the United States but also in Europe. And look at what's happening to Europe now. If we look at Europe now, that's what we are facing 10, 20 years down the line and that's simply unacceptable.

Of course, one can quibble with details of this proposed constitutional amendment, but the philosophy behind it is laudable. It would impose spending discipline and it would enable us to live within our means.

The Senate balanced budget amendment ties outlays to 18 percent of GDP in the prior calendar year, hence the budget now under construction would be based on GDP in 2010. Now, the final GDP figure for calendar year 2010 was only available in March 2011. This timing is adequate for Congress, but not for the President, who sends his budget to Congress in the first week in February and starts working on the fiscal year 2012 budget in the fall of 2010, when even third quarter GDP is unknown.

But if the fiscal year 2012 budget were based on GDP in calendar 2009 or some multiple thereof, guidelines and limits would

be clearer to the President as well as to Congress. So another way of structuring a balanced budget amendment would be to tie it to spending in a given year, to tie spending to revenues 3 years earlier or a multiple so people would know in advance how much money we had to spend.

We have talked here about the problems of recessions, but in a recession year when revenues are low it would be possible to have a rainy day fund the way many States do, and the rainy day fund that could be set aside and be exempt from these limits, set aside for recessions. As the amendment is worded now, there isn't any provision for a rainy day fund, but I would suggest that this should be added and set aside from surplus funds in high-growth periods.

With regard to wartime spending, I would say the balanced budget amendment as it's written is, if anything, too flexible because the balanced budget amendment provision is weighed for any year in which a declaration of war is in effect or when the United States is engaged in military conflict. Then a simple majority of members can waive the amendment.

But for the past 10 years we've been engaged in military conflicts in Afghanistan, Iraq, Libya, and Somalia, so the current version of the amendment would have already been overridden. In my opinion, an exception should be made only for a declaration of war by the United States against another country, and even in that case expenditures should be limited to military spending rather than all spending.

There are other proposed fixes we could do to help the budget process. One idea is to get rid of the concept of entitlements and put all expenses under the appropriations process. Congress should pass a law that says no money gets spent unless it gets specifically voted out every year.

This could happen with a one-sentence law: "notwithstanding any other provision of law, the United States shall expend no funds and shall be responsible for no liabilities and guarantees except in amounts as specifically appropriated annually by Congress." This would force Congress to take a look every year at spending and not rely on entitlements that build up year after year.

Congress should also consider putting the Federal Government on Generally Accepted Accounting Principles, like these corporations that are the focus of protests by the Occupy Wall Street crowd. They may be evil, but they have to stick within their accounts and within their budgets. If the government had to file its accounts under GAAP, current measures of both deficits and public debt would be far different.

Thanks very much.

Senator DURBIN. Thank you.

[The prepared statement of Ms. Furchtgott-Roth appears as a submission for the record.]

Senator DURBIN. Dr. Douglas Holtz-Eakin is currently the president of the American Action Forum. He served as Chief Economist at the Council of Economic Advisors and as Director of the CBO. During 2007 and 2008, he was Director of Domestic and Economic Policy for John McCain's Presidential campaign. He worked as president of DHE Consulting and at several Washington-based

think-tanks. He has a bachelor's from Denison and a Ph.D. from Princeton.

Thanks for joining us.

STATEMENT OF DOUGLAS HOLTZ-EAKIN, PH.D., PRESIDENT, AMERICAN ACTION FORUM, WASHINGTON, DC

Dr. HOLTZ-EAKIN. Thank you, Mr. Chairman, Ranking Member Graham, and members of the Committee. It's a privilege to be here today.

Let me just make four brief points; you have my written statement.

First and most importantly, we have an enormous and immediate problem in the U.S. The gross debt-to-GDP is now 100 percent, above the 90 percent of GDP line that history has shown imposes two costs: (1) on average, a growth penalty of about a percentage point a year, so we're already paying for our high debt load; and (2) an increased probability of sovereign debt crisis of the type we see in Europe.

Given that we are projected to accumulate massive amounts of debt over the next decade, it is a surety that we will face the problems that Europe is facing right now within that decade. So this is not something which we have the luxury to put off, we have to begin to address it immediately.

The U.S. has all the characteristics of countries that get in trouble. Our debt levels—our projected debt levels, our heavy reliance on short-term borrowing, our continued discovery of contingent and not well-understood liabilities that pop up in the Federal budget, your efforts, Mr. Chairman, and others, I applaud because there simply is no time to avoid taking on this problem.

One of the reasons we have this, and the second point, is the U.S. doesn't have—the Federal Government does not have a coherent fiscal rule that guides its operations. It has no budget that's agreed upon between the Congress and the administration. Often the House and the Senate do not agree on a budget resolution, fail to even do that.

We have an uncoordinated set of mandatory spending programs, discretionary spending programs, taxes and fees that don't add up in any coherent way and often give us bad results. So the Federal Government does not have a fiscal policy, it gets bad fiscal outcomes on a regular basis, and something is needed to put this in coherent order. The notion of a fiscal rule, something guiding the overall process, I think, is essential.

Now, what kind of fiscal rule could you have? You could have a rule that says there's a maximum amount of spending, a maximum amount of spending as a fraction of GDP. You could have a debt-to-GDP ratio, you know, don't exceed 60 percent of GDP. Or you could have something like a balanced budget, and the balanced budget amendment falls as one of the possible fiscal rules that could bring some coherence to a system that's clearly broken.

Now, what would you want in such a fiscal rule? You'd want a couple of things. No. 1, you'd want it to work. We have tried fiscal rules in the past, such as pay-go rules, which were intended to simply stop things from getting worse. They were often waived and

didn't stop things from getting worse and they would not in any way compel Congress to make things better.

So you need something that's going to work. You need something that has a tight link between the decisions made by Congresses and the outcomes. You can't have a lot of intervening steps so that you can't control the outcome, and you have to have something that's simple and transparent because in the end the American public has to buy into the fiscal rule. They have to agree to live under the constraints that we're imposing on the Federal budget.

The balanced budget amendment has those characteristics. It would work. It has a tight link between the decisions made and the outcomes, they have to add up, and it's simple and transparent and allows the possibility for the public to understand it.

Some key features of it—the third set of remarks I'd like to make—are that the ratification process, which will take a fair amount of time in any event, is the opportunity for the public to buy into this. If three-quarters of the States ratify a balanced budget amendment, the public will have agreed that this is how they want to run their fiscal affairs. I think that's a very important thing because that is important in supporting the Members of Congress. They have to have the voters behind them.

Secondly, is that it will be much harder for a Congress to reneg. There are some serious issues in enforcement. You mentioned that at the outset. I want to acknowledge those. Nothing is perfect, but right now nothing constrains the Congress, for example, for waiving the caps imposed in the Budget Control Act. History has shown that's exactly what it will do, so we need something which is stronger and generally constrains the Congress, something it cannot reneg on.

The fact that we're talking about constitutional amendments, I think, is commensurate with the problem we face. This is an enormous and immediate danger to the American economy and our futures. Other panelists have mentioned some concerns. They're legitimate.

How you deal with economic fluctuations, how you deal with wars and other emergencies are things that must be worked into a balanced budget amendment, but I think that's doable. You do as well have to worry about the size of government and the level of taxation, and most balanced budget amendments have additional features to cap the size of government.

So this is not something that I think should be presented as perfect, but it is imperative that we move from a system that is demonstrably imperfect and broken to something better. I think this will be a sensible step in the right direction.

Senator DURBIN. Thanks for your testimony.

[The prepared statement of Dr. Holtz-Eakin appears as a submission for the record.]

Senator DURBIN. Professor Alan Morrison is the Lerner Family Associate Dean for Public Interest & Public Service and a professor at George Washington University Law School. He graduated from Yale and Harvard Law School, served as a commissioned officer in the United States Navy.

Early in his career he worked for Public Citizen Litigation Group, which he directed for over 25 years and argued 20 cases be-

fore the U.S. Supreme Court. He was past president of the American Academy of Appellate Lawyers and served as an U.S. Attorney.

Please proceed.

STATEMENT OF ALAN MORRISON, LERNER FAMILY ASSOCIATE DEAN FOR PUBLIC INTEREST & PUBLIC SERVICE, GEORGE WASHING UNIVERSITY LAW SCHOOL, WASHINGTON, DC

Professor MORRISON. Thank you, Mr. Chairman and members of the Committee.

Even if the balanced budget amendment were a sensible idea, the question I want to ask is, how is it going to be enforced? My first problem is that almost none of the bills that are presently before this house or the other house deals with that question openly and tells the American people who is going to enforce the balanced budget amendment.

It surely is not going to be the Congress. That's the problem. It is surely not going to be the President. The President has no inherent authority to not spend money, and the *Line Item Veto* case proved that Congress cannot delegate that authority to him. So either it will be the courts or no one, and if it's no one we're back where we started from.

Now, let me talk about the courts for a minute. In my written statement I have established that under current constitutional law, no one—taxpayers, Members of Congress—would have standing to go to court to challenge a budget that was alleged to be in violation of the Constitution.

Senator Lee, to his credit, in his proposed amendment has provided that Members of Congress would have that authority to go to court. That deals with the standing problem. It does not deal with three other doctrines that stand in the equal problematic path of any enforcement of a balanced budget amendment.

First is the political question doctrine, and that principally deals with the problem of remedy, which I'll talk about in a second, then there are the problems of ripeness and mootness, that is, getting litigation through in a timely manner so that if a court decided that the budget was unbalanced, it could actually order a remedy before all the money had been spent, and there was nothing left to fix.

So let me talk for a minute about what litigation would look like if we had an actual challenge to an amendment that was supposed to be unbalanced. And let me begin by stating the optimistic, but highly unrealistic, assumption that Congress would actually pass a single bill with a budget before the beginning of the fiscal year on October 1, so that we at least had a target at which a litigation could begin to focus.

Obviously nobody who's going to make a challenge is going to be limited to what the budget actually says. We all know that there will be rosy estimates in the budget and that's how the budget will be "in balance".

So anyone who is a challenger will want to go behind those numbers and will start to go into the papers at the Congressional Budget Office, the Appropriations Committees, and we will start to have

a massive discovery. We will have expert witnesses being deposed, and eventually we will have a trial.

It will make the trial of *United States* v. *Microsoft* look like child's play because this will go on forever, not just with respect to one department like the Defense Department and all of its subsidiaries, but every single department of the government could be subject to the same kind of inquiry.

And then, of course, we'll have to figure out whether the tax estimates are sensible and reasonable. At the end of that there will be a trial. The judge or judges will have to write a decision after the briefs are all in. There will be an appeal to the U.S. Supreme Court.

All of that is supposed to be done within a single fiscal year in time for a remedy to be decided upon, issued, and put into place to correct the unbalanced budget. It seems to me to be impossible, but even if it were possible, think about the problem of Federal judges now deciding that the budget is out of balance by, let's say, $200 billion. Where are they going to make the corrections? Are they going to increase taxes? Are they going to take it out of Social Security? Are they going to take it out of defense?

I cannot imagine a job for which Federal judges are less suited than trying to make those obviously political, very important, value-laden judgments about how the taxpayers' money should be spent, yet that is what is going to happen if we allow the case to go to court.

So you are faced with a choice. Either you're going to have the judges of the United States courts running the Federal budget, or you're going to have to admit that the balanced budget is an idea, it's rhetoric, and it's non-enforceable.

My own view is that this is not the way to go, that the balanced budget amendment is a false promise and that it will only deter you from engaging in the kind of hard work that you need to get done in order to get our fiscal house in order. Slogans and constitutional amendments will not solve the problem, only hard work will. Thank you.

Senator DURBIN. Thank you, Professor Morrison.

[The prepared statement of Professor Morrison appears as a submission for the record.]

Senator DURBIN. We've got a great turnout here at the Subcommittee and we may face a vote, so I talked to Senator Graham and we had thought about 7-minute rounds. Let's do 5-minute rounds so people can have a better chance to ask questions.

I'll kick it off here. Let me just say at the outset, I concede what you said, Dr. Holtz-Eakin. We are facing a global economic challenge. The United States is in stronger position than many other countries, but we are naive to believe that a day of reckoning is not coming. If we don't deal with it early, the later consequences will be much more difficult.

That is what has motivated me through this whole conversation from my side of the political spectrum. It is easier because of the miracle of compound interest and similar economic principles to make decisions today which will play out in a more sensible way than to wait till the last minute. I concede that point.

When we get to the balanced budget amendment I think we are addressing two different levels. We are addressing what Professor Morrison has raised, the very fundamental constitutional questions of the relationships of our branches of government and enforcement between them, and I think you raised some excellent points. Casting our fate to the Federal court system to resolve our budget difficulties may make all of our efforts toward resolving budget issues look like child's play as it would go through that court system.

Secondly, there's the policy question about, if there is to be a balanced budget amendment, where do you draw the line? The sweet spot, if history is any guide, was 11 years ago when we balanced the budget, and if I'm not mistaken—someone can correct me here—it was at 19.5 percent. Revenues and expenditures at 19.5 percent, and an equal balanced budget.

Now today we are somewhere in the range of expenditures in the 24.5 to 25 percent ranges and revenues in the 15 percent range: the delta equals the deficit. Now we have suggestions from Mr. Romasco that even 21 percent won't meed our needs under our entitlement programs, and suggestions by Mr. Greenstein that we're actually talking about somewhere close to 16 percent. These are dramatic changes in terms of how we're going to raise and spend money.

Ms. Furchtgott-Roth, let me ask you this question, if I can. Do you believe that if we are going to honestly deal with the budget deficit we have to put everything on the table, including taxes, tax expenditures, entitlements, and other spending?

Ms. FURCHTGOTT-ROTH. The best way to solve this problem would be to have greater economic growth, and we can accomplish greater economic growth through fundamental tax reform, getting rid of deductions both on the corporate and individual side and lowering tax rates, which we call base broadening.

So, yes, I think that everything should be on the table but we should keep a revenue-neutral tax system. In other words, to raise the same amount of revenue initially but then additional revenue would come in with greater economic growth.

Senator DURBIN. I know I've heard this theory from my friends on the Republican side and I would say dynamic economic growth may be true, may not be true. Our approach in Bowles-Simpson and Gang of Six is trust but verify, to go back to one of your former bosses, or Mr. Holtz-Eakin's former bosses, and that is, CBO plus dynamic scoring.

Let's make sure that we're at least dealing in that world. So when we get to the point where we have an expanding base of recipients of Medicare, just as an example, and Social Security as the baby boomers reach the age of eligibility, how do you deal then with that demographic growth in terms of the budget? Does it require then that either taxes be raised or other spending be reduced?

Ms. FURCHTGOTT-ROTH. Medicare is one of the most challenging problems that we have and Medicare needs to be revamped to allow more competition between providers. I would recommend something like the plan suggested by House Budget Chairman Paul Ryan, where current seniors would keep the traditional Medicare plan but people who are now 55 or below, when they get to

retirement age, would have a choice of different plans with the contributions means tested, and they can put more in to have different levels of health care. And competition among these plans, I believe, would bring down the cost of Medicare, just as it has in Lasik and cosmetic surgery.

Senator DURBIN. It's a controversial approach but it is certainly one approach that we need to consider.

Ms. FURCHTGOTT-ROTH. Yes.

Senator DURBIN. Dr. Holtz-Eakin, when it comes to exceptions under a balanced budget amendment, Ms. Furchtgott-Roth has spoken about war. Would you concede there should be other exceptions? Should there be exceptions for automatic stabilizers that Mr. Greenstein has related to? Should there be an exception for "the big one" in California, God forbid, if we ever face it?

Dr. HOLTZ-EAKIN. So the major objection that comes up and the one that Mr. Greenstein mentioned is this issue of automatic stabilizers. I think this is more a textbook concern than a real one because if you listen to what Diana said about the timing that's necessary to actually do this, you're going to operate off a GDP from at least 2 years ago, maybe three.

So if you're going through a recession you're using a number that's here and you're going to be spending more than you would relative to the economy anyway. When you're coming out, you're going to do the reverse. So instead of actually having a big pro-cyclical problem it's going to build in an automatic stabilizer.

It's going to work exactly the way the textbook says it's supposed to. So I think that's overrated. The exception you want is for Great Depressions. Yes, you ought to—you know, in those cases, those are the only cases when we want Congress doing things in a discretionary fashion.

Senator DURBIN. Look at the current recession. The current recession, with 14 million people out of work, not paying taxes and needing Unemployment as well as food stamps and other things, is a classic example where we need the stabilizers, do we not?

Dr. HOLTZ-EAKIN. So I think you would get the automatic stabilizers, and I would hope that for the typical business cycle the Congress would get out of the business of trying to fine tune it. We tried it in the 1960s and 1970s, it failed miserably. We swore off discretionary fiscal policy in the 1980s and 1990s. That was for the best. Then we unlearned that lesson for some reason in this decade.

We should use fiscal policy to set the parameters for long-run growth, let the Fed take care of short-term business cycle fluctuations, with the exception of major downturns. This is the worst recession since the Great Depression. There's going to be a line at which Congress is going to have to move, and inevitably would. I don't view that as a big deal.

Senator DURBIN. And the question is whether words in the Constitution will allow us the flexibility to accommodate that.

Senator Graham, your turn.

Senator GRAHAM. Thank you.

Let's sort of go down memory lane here and look at previous attempts by Congress to make sure that we don't over-spend. Gramm-Rudman-Hollings. Are all of you familiar with that con-

cept? Do you all agree it didn't work? The Balanced Budget Agreement in 1997. Are you familiar with that concept? Do you agree it worked in the short term but it has failed over time?

Do you agree that the numbers we set in the Balanced Budget Agreement on Medicare spending is continuously weighed by the Congress because the doctors are so adversely affected? Well, you need to go talk to a doctor. We're going to have a $200 billion problem with doctors by the end of the year because under the Balanced Budget Agreement of 1997 the payments to doctors will have to be reduced by $200 billion or waived. So I guess the point I'm making, and I'll let you speak here in a minute, Mr. Greenstein, is that all in-house efforts have failed and I see no hope in sight.

Mr. Romasco is that it?

Mr. ROMASCO. Yes.

Senator GRAHAM. Would you be willing to accept age adjustment, as an organization, for Medicare eligibility, going from 65 to 67 for people under 55?

Mr. ROMASCO. That's one possibility that is being mentioned. You have to look at it in the broad context. The initial kind of look at that suggests that that actually costs society more than it actually reduces it, so I would be very hesitant to——

Senator GRAHAM. Would you be willing to accept a means test on premiums, for Medicare premiums?

Mr. ROMASCO. Senator, I think the concept of going down a checklist, while certainly helpful, really doesn't get at the issue.

Senator GRAHAM. I'm asking a question: would you be willing, as an organization, to accept means testing Medicare premiums?

Mr. ROMASCO. Not as a single solution.

Senator GRAHAM. But would you be willing, as an organization, to accept means testing when it comes to receiving Social Security benefits?

Mr. GREENSTEIN. Again, Senator, the issue is a complex one and any solution that strengthens Medicare or strengthens Social Security has to be——

Senator GRAHAM. I believe that means testing benefits received promised by Social Security would save Social Security from an inevitable bankruptcy. Would you agree to that concept as a way to save Social Security?

Mr. ROMASCO. I think your objective is laudable. I'm not sure your prescription is the right one.

Senator GRAHAM. OK. So therein lies the problem.

Mr. Greenstein, any effort to balance the budget would have a dramatic effect on Social Security and Medicare. Do you agree with that?

Mr. GREENSTEIN. That would probably be true.

Senator GRAHAM. And the reason that would be true is because that's where the most spending occurs over time.

Mr. GREENSTEIN. Tax expenditures now are actually over $1 trillion a year; Medicare and Medicaid combined, about $750 billion.

Senator GRAHAM. Over the next 75 years, the promises made under Medicare. How much revenue shortfall do we have to meet those promises?

Mr. GREENSTEIN. I don't have the specific percentage, but I will agree with you that it is essential over the long run to deal with the rate of growth——

Senator GRAHAM. Over the next 75 years, how much money are we short to honor the benefits promised under Social Security?

Mr. GREENSTEIN. That's a smaller amount. Over——

Senator GRAHAM. It's about $5 trillion.

Mr. GREENSTEIN. Eight-tenths of 1 percent of GDP, less than one-half of the cost over 75 years——

Senator GRAHAM. Do you agree with me——

Mr. GREENSTEIN.—of making the Bush tax permanent.

Senator GRAHAM. Do you agree with me that the entitlement growth of Medicare, Medicaid, and Social Security, that we have close to a $40 to $50 trillion unfunded liability over the next 75 years?

Mr. GREENSTEIN. I agree it's very substantial. Exactly how you do the numbers depends on how you account for Medicare Parts B and D, but your basic concept is correct.

Senator GRAHAM. The only reason I mention that, it is impossible for us as a Nation to achieve a balanced budget without affecting entitlement growth. There is not enough money coming in because there are fewer workers and we all live longer. Everyone is living like a South Carolina Senator, dying at almost 90 years old. That's the good news. The bad news is, we have not planned as a Nation for that event. If I thought there was some other way, Mr. Morrison, to do this without a constitutional requirement I would go down that road.

I would just ask you a question: in South Carolina we have in our constitution the requirement to provide a minimally adequate public education. That has been in litigation in South Carolina. I will tell you, the litigation process has opened the eyes of South Carolinians and that the legislature has responded to the gaps in education funding.

My view is, if we had a trial about Congress spending too much, that it would be a good thing to put the Congress on trial. It would be a good thing to seek remedies. I don't think the court has to take over the Congress, but if the court, through a trial, could show the public how ineffective we are with spending and revenue, I think the remedies would come. They're never going to come with the current system, so that's where I disagree. I think litigation to get the Nation's budget balanced may be the only hope we have because the current political engagement doesn't seem to bring about the result. You may respond.

Professor MORRISON. Well, I wouldn't compare litigation over adequate funding of schools in South Carolina, which doesn't have to be completed within one fiscal year, to a debate about whether a particularized set of spending and revenue meet the constitutional target within that fiscal year.

I would also imagine that there would be lots of debates about all the exceptions to the rules, which would undoubtedly be invoked and people would be litigating over those. I agree with the Senator that litigation is a wonderful tool for getting people's attention focused and bringing the facts to light.

Having said that, I cannot agree that this is an appropriate area for litigation. But if the Senator wants it as an educational tool but not as an actual enforcement tool, then we could have a discussion about that.

Senator DURBIN. Thank you very much.

Under the early bird rule, on the Democrat side we will be recognizing Senators Franken, Whitehouse, Coons, Blumenthal, and on the Republican side, Senators Hatch, Cornyn, and Lee.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

Mr. Greenstein, in the months preceding President Obama's assuming office our economy was sliding precariously into—almost to a depression. We were losing between 750,000 to 850,000 jobs per month. States, most of which have balanced budget requirements, consequently had to cut jobs and services.

But a combination of the Federal Government's automatic stabilizers, as you talked about, Unemployment Insurance, food stamps, along with the Recovery Act cushioned the economy and stopped the downward spiral and us from going into a depression.

Mr. Greenstein, in your estimation, what would have happened in 2009 and 2010 had a balanced budget amendment been in place?

Mr. GREENSTEIN. Well, the effects would have been far more severe. The one analysis we have of this is the one that Macroeconomic Advisors did of what would happen in 2012 if we had a balanced budget amendment right now, and their estimate is the unemployment rate would double to 18 percent and there would be 15 million more unemployed people. Real GDP growth would drop 17 percent this year rather than rising 2 percent.

Senator FRANKEN. And what would that do to our deficit?

Mr. GREENSTEIN. Well, if you had—you'd have this cycle that business activity would drop substantially.

Senator FRANKEN. You'd have a vicious cycle, right?

Mr. GREENSTEIN. You'd have a vicious cycle. Revenue would drop even further and then you'd have to cut more and it would put you on a further downward spiral.

Senator FRANKEN. Mr. Morrison, when they wrote the Constitution the framers gave Congress the power to collect taxes, to borrow money, and to decide how to spend that money. In fact, the power of the purse is the first power granted to Congress under our Constitution. The framers did not give the courts the power of the purse. In fact, Hamilton wrote in *Federalist 78* that the judiciary "will have no influence over the sword or the purse". No influence. That seems pretty clear to me.

But Mr. Morrison, if we passed a balanced budget amendment, won't judges, as you testified, be able to decide budgetary matters? Aren't we giving judges at least some power over the purse?

Professor MORRISON. Well, either judges would have some power over the purse and it would be a very significant power if the amendment actually so provided. I agree with you, Senator Franken, that under the current law judges would have to stay out of that debate.

But the amendment could provide, as all amendments can, that that system which has been in effect for 225 years should be changed. Instead of the Congress being in charge of the budget we

can put the Federal courts in charge of the budget. I think that would be a terrible idea, as I've expressed before, but we could do that. It would be a mess. It would be the wrong people deciding the wrong questions.

But we could amend the Constitution and fundamentally change our system, but that is what would happen, or we could have it as an amendment which has no impact at all, that has no enforcement mechanism, and that it would be empty rhetoric, making some people feel good that they had done something but doing nothing to fix our budget problems.

Senator FRANKEN. All right.

Now, on the other hand, the *Articles of Confederation* sharply limited the legislature's power of the purse. Congress needed a super majority both to borrow money and to send States their tax bills. The *Articles* were a total disaster because of it. You don't have to take my word for it, take George Washington's word for it. His word was good. As the Commander of the Continental Army, Washington famously wrote Hamilton to basically complain about Congress' inability to effectively raise revenues to support the troops.

In 1783, he wrote that unless Congress was given a greater power of the purse, "The distresses we have encountered, the expense we have incurred, and the blood we have spilled in the course of the 8-years war will avail of us nothing." Yet the McConnell-Hatch amendment requires a super majority to raise revenues and another super majority to waive that requirement in times of military conflict.

Mr. Morrison, are these provisions going to be the *Articles of Confederation* all over again?

Professor MORRISON. Well, there are many other flaws with the *Articles of Confederation*, but this would certainly change the balance of power and the allocation of responsibility in our government system and would make it very hard to make changes that are needed for whatever reason.

It seems to me—and this is less a legal question than a political question—that we have struck a balance in terms of checks and balances over the past 225 years that is about right. It doesn't get it right every time, but overall it works to the advantage of the American people most of the time.

I would be very reluctant to tinker with that system by starting to impose new three-fifths requirements for anything, regardless of whether you were in favor of raising revenues or reducing taxes or anything else. It seems to me we ought to stick to majority rule. It's worked pretty well.

Senator FRANKEN. Thank you.

Mr. Chairman, I have some other questions I'd like to put in the record, or if we get to a second round, ask them then. Thank you.

Senator DURBIN. Thanks, Senator Franken.

Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman. I want to thank you and the Ranking Member for the privilege and opportunity to participate in this important hearing today. If I may, I'd like to ask consent to put a statement in the record.

Senator DURBIN. Without objection.

[The prepared statement of Senator Hatch appears as a submission for the record.]

Senator HATCH. Thank you, Mr. Chairman.

Dr. Holtz-Eakin, the Senate has voted on a balanced budget constitutional amendment six times while I have been in the Senate. We passed one back in 1982 when the national debt was about $1.1 trillion. We passed it in the Senate and it was defeated in the House. When we failed by one vote in 1997 to pass a balanced budget amendment that I introduced, the national debt was $5.4 trillion. Today it is more than $15 trillion, larger than our entire economy.

Now, would we be in this fiscal mess that we are in today if Congress had seized one of those previous opportunities and the balanced budget amendment were today a part of the Constitution?

Dr. HOLTZ-EAKIN. I think, clearly, not.

Senator HATCH. Well, it's been suggested here that the balanced budget amendment would actually be bad for the American economy. Now, this is surprising to me, given the dire fiscal situation in Europe and in this country brought on by escalating sovereign debt.

Now, in your view, what would be the long-term impact on economic growth if a balanced budget amendment like we've been discussing here today—if the balanced budget amendment imposed a spending cap on Congress and limited Congress' ability to raise taxes, if that was ratified by the American people?

Dr. HOLTZ-EAKIN. I think the long-run consequences would be entirely beneficial. Over the long term, economies only grow by putting aside resources in the present to have greater fiscal, technological, or human capital. Persistent Federal deficits eat away at that seed corn and undermine long-term economic growth. Keeping taxes low, I think, is part of the recipe for economic growth.

The Bowles-Simpson Commission, I thought, clearly pointed in the right direction, to say if you want to talk about revenue you need tax reform. I think we could do that within the context of the balanced budget amendment. This is the kind of fiscal policy that we need but have never been able to consistently generate.

Senator HATCH. Let me go to Ms. Furchtgott-Roth. Which is the greater threat to progress in your viewpoint, such as—well, greater threat to programs such as Social Security, Medicare, and Medicaid, the fiscal discipline required by a balanced budget amendment or the spiraling debt that we're actually encountering today?

Ms. FURCHTGOTT-ROTH. It's clearly the spiraling debt. We have these entitlement programs that keep growing because fortunately we are living longer. We need to adjust them as we go along by raising the retirement age or making other modifications, such as means testing for the benefits.

If we had had the balanced budget amendment in place, we might not have been able to spend the $825 billion in stimulus, we might not have had Cash for Clunkers, we might not have had the TARP program. In January 2009, Christina Roman and Jarrett Bernstein had a paper that said that if we did not pass the stimulus package, unemployment would peak at 8 percent and then go down, so perhaps we would have been a lot better off.

Senator HATCH. Now, I reviewed some of the floor debate when the Senate has considered balanced budget amendments in the past. In 1994, for example, one of our friends on the other side of the aisle, who also happens to be a member of this committee, said the following: "We do not need a constitutional amendment to balance the budget. As the Cowardly Lion puts it, 'Courage is not something given to you, it comes from within.'" Now, that was 1994 when the national debt was $4.5 billion, with a b, less than a third of what it is today.

Do you think Congress will find fiscal courage from within or do you believe it has to be supplied from without through a constitutional balanced budget amendment?

Ms. FURCHTGOTT-ROTH. Well, they say those who do not study history are doomed to repeat it, and history has shown that Congress does not find the courage to keep within any kind of spending limit, even spending limits it has set upon itself.

Senator HATCH. Now, Dr. Holtz-Eakin, BBA opponents predict grave consequences for the economy. We've heard that here from our illustrious witnesses here today. And, of course, specific government programs will be hurt.

Now, Mr. Greenstein cites a study that was mentioned often by opponents during the recent House debate, but they all use the same gimmick. They take today's fiscal situation and just slap a ratified balanced budget amendment on top of it. If you stop and think about that, that's not a very fair way to do it. That just seems crazy to me. Had we ratified a BBA in the past, the current economic situation would be very different. And I like your comment on this gimmick that many BBA opponents are using.

Dr. HOLTZ-EAKIN. I think it's utterly unrealistic and sheds no light on the real issues. The balanced budget amendment is important not because of the extreme cases that are cited. It's the fact that when things are good, Congress can't bring itself to balance the budget and, thus, arrives in situations like 2008 and 2009 with a budget that is already badly out of whack. And to pretend that that's sort of the normal starting point you'd want to impose a balanced budget on is, I think, just utterly unrealistic.

Senator HATCH. And we allow for a period of time to adjust to it.

Dr. HOLTZ-EAKIN. Yes.

Senator HATCH. My time is up, Mr. Chairman.

Senator DURBIN. Thanks, Senator Hatch.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you.

States—this will be a question for Mr. Greenstein and for Dr. Holtz-Eakin.

States with balanced budget requirements have capital budgets through which they undertake a variety of borrowing and spending, as do municipalities. Corporations, under Generally Accepted Accounting Principles, assume debt and assume capital investment liabilities that they disclose to their shareholders, but they're perfectly legitimate.

Families that believe they are balancing their family budgets—and I think in the ordinary sense of the word they are balancing

their family budgets—nevertheless have mortgages, they have student loans, they have credit card debt.

We in Congress, on the Budget Committee, at least, have been talking about how you deal with the capital budget problem. We don't do that at the Federal level. How does the problem of not having a capital budget interrelate with a balanced budget amendment? Would it limit the Federal Government's ability to do what corporations, municipalities, States, and families all do, which is to borrow within a balanced budget structure? Mr. Greenstein, first.

Mr. GREENSTEIN. Well, the answer is definitely, yes. There is no State that has a balanced budget requirement anything like the one in these amendments. As you say, States can borrow for capital expenditures. They also can run rainy day funds and draw them down in recessions. Neither of those——

Senator WHITEHOUSE. Would be possible under the proposed——

Mr. GREENSTEIN. Would be possible under this.

Senator WHITEHOUSE. Yes.

Mr. GREENSTEIN. But there is a——

Senator WHITEHOUSE. This is pretty unique and unusual.

Mr. GREENSTEIN. Yes. There's an additional issue, which is one that economists have pointed out for years. That is the fact though that States have to balance their operating budgets in recessions constitutes a drag that makes recessions deeper and it makes it all the more important that the Federal Government not abide by the same circumstance.

The study that I and others cited by Macroeconomic Advisors, a mainstream firm that has worked for Republican administrations as well as Democrats, not only looked at the effect today if the balanced budget amendment had been passed several years ago, they also looked at the effect of the balanced budget amendment were passed during good economic times.

Their conclusion was that because of the "pall of uncertainty" it would create about what would happen in future periods of slow growth that it would fundamentally affect cyclical dynamics and retard economic growth in good times as well as bad.

Senator WHITEHOUSE. Dr. Holtz-Eakin, what should we do about capital budgeting under the proposal, which doesn't appear to permit it?

Dr. HOLTZ-EAKIN. We don't have capital budgeting in the Federal Government and the balanced budget amendment wouldn't change that. I mean, this has been a debate that, going back to 1967, President Johnson's Budget Commission has, in a tiny circle of geeks, raged for decades. On balance, it has always been the conclusion that a capital budget will be too difficult to implement, and we have stayed with what is largely a cash-flow budget at the Federal level.

Now, I would point out that——

Senator WHITEHOUSE.—different than the——

Dr. HOLTZ-EAKIN.—we appropriate the——

Senator WHITEHOUSE.—State budgets that people refer to often as being a model for what we're doing. It's a very significant distinction, is it not? The difference between cash-flow budgeting and capital budgeting. There's a significant distinction.

Dr. HOLTZ-EAKIN. It can be a significant distinction. I will say my experience at the State level is that the ability to have a capital budget is one of the ways that States actually evade all sorts of supposedly self-imposed restrictions, because things that are capital get relabeled all the time. When times are good they put them in the current budget, when times are bad they stick them in the capital budget.

I am not a fan—and I say this lovingly—of letting the Congress have its hands with more gimmicks that they can use to evade discipline. The problem is not finding a way for Congress to borrow, the problem is finding a way to get them to stop.

Senator WHITEHOUSE. I think I took from everybody's answers that every witness concedes that there is a counter-cyclical role at some point for the Federal Government in the economic swings that economies naturally produce. Is that true of everybody across the board at some point?

Professor MORRISON. I'm not an——

Senator WHITEHOUSE. Dr. Holtz-Eakin, you said that you wouldn't want it to do just the ordinary up the bounds of the economy.

Dr. HOLTZ-EAKIN. Right.

Senator WHITEHOUSE. You'd wait for real catastrophes. But then it would be important, correct?

Dr. HOLTZ-EAKIN. Yes. I think that—and every balanced budget amendment has provided for a waiver that would allow a Congress to step in in extreme circumstances.

Senator WHITEHOUSE. And Professor Morrison, you wanted to say something?

Professor MORRISON. Yes. I'm not an economist but I know a little about accounting. This is—in effect, a balanced budget amendment would make everybody on the cash accounting basis, where no corporation in the United States would ever be allowed to be on the cash basis as opposed to the accrual basis.

So if you're going to do this, at the very least you ought to put them on the same basis that everybody else is so that we don't hide things on promises in the future. Accrual basis is a much more sound way of looking at it, but it's surely not the way that our budget has been run.

Senator WHITEHOUSE. Yes. I'd suggest not only no corporation, but no State, no municipality, and no family.

Thank you.

Senator DURBIN. Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman. I think this hearing has been very revealing and important. I guess the problem I had with the parade of horribles being marched out here with regard to what would happen if the Federal Government passed a balanced budget amendment is hard to believe in light of the fact that 49 States have some form of balanced budget requirement.

You may say to me, well, the Federal Government is not a State, I concede that, but I think most Americans would have a hard time believing that while they're required to balance their budget, while every business is required to balance its budget, that the Federal Government can continue spending and is not required to balance the budget because the Federal Government can print money and

the Federal Government can borrow debt that no other person, no other entity, no other government could borrow.

And as far as—the distinguished Chairman has, I think, shown great courage in his participation in the Simpson-Bowles Commission. Actually, I wish the President would embrace his own bipartisan Fiscal Commission report. Instead, he's walked away from it and has barely mentioned it since then. Because I think that really does demonstrate a way that Congress could, working with a leader at the White House, actually solve, or at least make great inroads into solving, this problem.

But because Congress cannot bind future Congresses, we need some sort of restraint. If it's not going to be imposed by self-restraint, we need some sort of constitutional restraint, I believe, in order to require Congress to get back living within its means.

It's not just my idea, it's actually the framers of our Constitution, in Article 5, that said that Congress could take up a joint resolution to amend the Constitution. We've done it 27 times, including the Bill of Rights, so it's not a novelty. We don't do it often. We do it for important things. But surely this would qualify as important.

And you know what? If Congress doesn't act, the States can actually apply and require the invocation of a constitutional convention, which if Congress doesn't act, I hope State legislatures will take a close look at what the power that the people retain in order to force action in Congress unless Congress does act. So this is entirely within the mainstream of constitutional doctrine and thought and it's regretful we find ourselves here.

Mr. Greenstein, is there any level of Federal debt that you would find so threatening to the potential of a sovereign debt crisis, such as we're seeing over in Europe, that you would—where you would say that Congress should be able to accumulate debt without end, or is there some point where you would say, well, in order to stimulate the economy and keep people at work, the Federal Government should have to reign in spending because, notwithstanding its desire to stimulate the economy, it would threaten the sovereign debt crisis?

Mr. GREENSTEIN. Senator, my view that the constitutional balanced budget amendment is unwise does not at all mean that I don't think we face serious fiscal problems. We do. I think the work of our centers indicated we have kind of a fiscal hawk outlook. We very much commend the Gang of Six, for example, as the kind of changes we need to make.

I think the most relevant metric is the debt as a share of the economy. It is the single metric that every bipartisan commission elevated as the key. We're currently at about 67 percent of GDP, but the risk is that in future decades, if we don't change course, the debt rises as a share of GDP above 100 percent, 200 percent, and so forth. That's a serious problem. We need to ensure that doesn't occur.

It's not the case that if you go above 90 or 100 percent of GDP that the world immediately falls apart. We were at 110 percent in World War II, but that wasn't permanent. It then came back down when the war ended. The long-term challenges——

Senator CORNYN. I'm sorry to interrupt you, but unfortunately my time is about up and we have votes, and so I'm going to have to—I would like to get to other people.

So the problem is, Simpson-Bowles has been ignored by the President of the United States, the very same person who appointed the people to serve. I believe that Senator Durbin and others, on a bipartisan basis, showed great courage. I don't agree with all of it, I don't like all of it, but it represents a serious attempt to deal with a real problem, but in fact it hasn't been done.

But I'd like to ask Mr. Romasco, what is AARP's current position on reforms to Social Security benefits and the Social Security system? What's on the table and what's off the table?

Mr. ROMASCO. Our position has been pretty clear. We view that Social Security has a solvency problem and a challenge. It is a long-term one and actions can be taken to strengthen it over the long term. We were active in not wanting to see it part of the Super Committee because we thought there was a need for that discussion, a broad national discussion about how to solve that problem.

Senator CORNYN. Do you agree with Mr. Rother, AARP's longtime policy chief, when he told the press in June that AARP was dropping its longstanding opposition to cutting Social Security benefits as part of an overall reform effort?

Mr. ROMASCO. Those context—those comments were taken out of context. We certainly didn't authorize that.

Senator CORNYN. According to press reports, Mr. Rother defended the decision, stating that, "Some of our members will no doubt be upset by any such effort, but I believe most would welcome a balanced and fair proposal that could strengthen the program for future generations and possibly even approve it for current vulnerable beneficiaries". Are you rejecting his proposal or his statement?

Mr. ROMASCO. Well, he didn't make a formal proposal and we have long maintained that both Social Security and Medicare need full discussion, a broad range of conversation, and a balanced approach.

Senator CORNYN. And you see what discussion has gotten us to this point.

Mr. ROMASCO. I'm sorry, Senator?

Senator CORNYN. And you see what that discussion has gotten us at this point.

Mr. ROMASCO. I have——

Senator CORNYN. Without reform, no changes, and beneficiaries of Social Security in the future may find themselves without the benefits that the Federal Government has promised, and that's, to me, unacceptable.

Senator COONS. Thank you, Senator. As I'm sure both other Senators are aware, the vote has begun, thus explaining the sudden exodus of the rest of the members of the Committee who will return promptly. I've been offered the opportunity to ask questions unexpectedly, given the change in order, if I might. I'll be relatively brief.

I'm someone who served as a county executive and lived under the strictures of a balanced budget amendment, and thus on some

level am intuitively drawn to them as a potential budgetary solution, but find compelling the question Senator Whitehouse asked about the differences between both the Federal practices and State, local, municipal that I'm used to that have a capital budget that have rainy day funds and so forth.

Mr. Morrison—Professor Morrison, what experience has there been across the country with enforcement actions? The State that I'm from, we haven't violated the balanced budget requirements at the State, county, or local level. But given the dysfunction and the challenges that State legislatures and municipal and local legislatures also at times face in maintaining fiscal discipline, there must have been some actions that enforcement—I may have missed that in the portions of this—of your testimony.

What enforcement actions have been taken by courts? Have they been successful, unsuccessful, complex, simple?

Professor MORRISON. I'm not familiar with any actions taken at the State level. My principal experience is at the Federal level and my concerns are that the State level doesn't translate, in part, because of the opportunity for capital budget, for borrowing, and other things like that.

Secondly, certainly at the county level, the States have control over anything to be done at the county level. But as far as the litigation is concerned, I'm not aware of any that has been either helpful or harmful, but I did not look into that specifically. I've principally been concerned with the Federal laws, and the Federal doctrine of standing is rather different than it is in most States.

Most States have provisions under which taxpayers can go to court. You can't do that in the Federal system. So my first proposition is that regardless of whether the States have or have not been successful, I think we need—if we're going to pass a balanced budget amendment, which I do not support—to spell out exactly how it's going to be enforced, what the role of the courts are going to be, who's going to be allowed to go to court, what kind of questions the courts are going to be allowed to resolve and what kind of questions are going to be out of bounds.

The members of the Minority have suggested that we have a dialog with the American people about this. The American people ought to know in advance whether they're turning the process over to the courts or not.

Maybe everyone thinks it's a good idea, but I hear a lot of people criticizing the Federal courts for doing too much. This is the first time I've ever heard anybody actually propose that the remedy for all our problems with our budgets is Federal judges.

Senator COONS. Let me make sure I hear you right, Professor. Your concern is that a balanced budget amendment, if passed without enforcement provisions, is nothing more than puffery, it's just adding to the Constitution something that we all hope we will respect because we respect the Constitution but that has no actual enforcement mechanism.

Given—taking as evidence in front of us the demonstrated inability of the Congress to achieve balanced budgets for any but four of the last 40 years, if memory serves, the likelihood that there would be actions to try and enforcement it fairly promptly are fairly high and, to your testimony, they would inevitably be messy, com-

plicated, and then drag the Federal judiciary into the budgetary process in uneven and unpredictable ways.

Professor MORRISON. Well, they would be messy and drag the Federal courts in only if they got over the threshold requirements of standing.

Senator COONS. Right.

Professor MORRISON. And in my view, and I've never heard anybody suggest to the contrary, that unless you specified in the amendment to the Constitution that the usual rules about standing, political question, ripeness, and mootness were changed specifically for the balanced budget amendment, then you wouldn't have to worry about any messy trials but you wouldn't have any enforcement either.

And worse than just rhetoric and puffery, as you've said, it would be a step backwards because people would say, ah, now we've passed the balanced budget amendment, we don't have to worry about it anymore, and of course we would have to worry about it. So it's not just that it's empty rhetoric, it actually would set us back, in my view.

Senator COONS. Dr. Holtz-Eakin, as one of the advocates of a balanced budget amendment, if I remember your position correctly, is that correct or incorrect? How would it be enforced? How would it actually have an impact in producing fiscal restraint?

Dr. HOLTZ-EAKIN. I'm not a constitutional lawyer so I'm not going to pretend I can weigh in on those. But in terms of what we've seen at the States' level, there are a wide variety of constitutional, statutory, and other balanced budget requirements at the State level. Regardless of their severity, the commitment to a balanced budget appears to affect outcomes. That, in and of itself, I think would be beneficial.

How you do the enforcement is, I think, an important issue, there's no question about it. But to have a public debate that would be necessary for three-quarters of the States to ratify this would be a national commitment to balancing the budget. I cannot believe that wouldn't change things for the better. I really believe that.

And I just want to say on the capital budget, I think this is a distraction. You know, the notion of a company borrowing to make a capital outlay is really—those are outlays that are large relative to the scale of those firms. We have no capital outlays that are large relative to the scale of the U.S. economy. We can afford to fund our capital and we do it.

When we buy a missile, the appropriations process pre-funds that. You have to appropriate all the budget authority, even though the actual outlays might not occur for a long time. You had no trouble handling capital expenditures at the Federal level. I think this misses the point entirely.

Senator COONS. Forgive me, I am at some risk of missing this vote if I don't call a short recess, but I'm just too tempted to follow up on that.

If you could, Mr. Greenstein, any difference of opinion about whether or not a capital budget is simply a dodge? As was suggested previously, a capital budget, despite the restrictions of balanced budget requirements, if I heard your previous testimony cor-

rectly, it is the existence of rainy day funds in capital budgets that allow States to largely evade any enforcement.

Do we actually have capital investments as a Federal Government that are significant relative to the size of our economy? My hunch is you would say yes, but I'd be interested——

Mr. GREENSTEIN. Well, we have highways and transportation, but I don't think the answer—I—the area where I agree with Doug, is I don't think it would be a wise change to change Federal budgeting to bring capital budgeting into Federal budgeting. I think the answer is not to do a constitutional balanced budget amendment with the capital budgeting exception. It's not to do a balanced budget constitutional amendment in the first place.

Senator COONS. Mr. Greenstein, is there a world in which you can imagine a balanced budget amendment that would have the positive effects that Dr. Holtz-Eakin has suggested, meaning you would produce a national debate at the State level about whether or not we should be pursuing balanced budgets and the very real costs that would impose, the very significant potential restrictions on entitlement programs that are broadly popular, and that this National dialog, in and of itself, would have some value, some salutary effect?

Mr. GREENSTEIN. No. I really think it would be a very serious mistake to try to write macroeconomic policy or fiscal policy into the U.S. Constitution. I don't think that's what the Constitution is for. There were all kinds of unforeseen effects that then you can't respond to without having to do a new amendment to the Constitution. I think over time we would come to regret it in the way we did Prohibition, when that was added to the Constitution. We need a national debate on these issues but a constitutional amendment isn't the way to get from there to here.

Senator COONS. Can you suggest any alternative way to get a constructive and meaningful national debate on the importance of achieving a balanced budget and its importance? I mean, I think most of the members I've gotten to know in my year so far agree that we are fiscally on an unsustainable path, but there is obviously, from the failure of the Super Committee, fundamental disagreement over, what are the changes that need to be made to get there.

Mr. GREENSTEIN. A couple of points. First, I think that if you look at all the bipartisan Fiscal Commissions of the last several years they did not erect as the goal balancing the budget. They erected as the goal stabilizing the debt as a share of the economy at a reasonable level.

Senator COONS. Correct.

Mr. GREENSTEIN. I do think it's a significant distinction. I think we—you know, if you compare where we are now to where we were two or 3 years ago, we've had much more of a national debate. If you look at polling data, the public is becoming much more focused on these issues.

Bowles-Simpson, Gang of Six, even the failure of the Super Committee, I think we're moving to a point where there will be significant changes. I don't share the view that Congress's record is nothing but one of failure here.

In 1990, there was a major bipartisan deficit reduction agreement. There was another in 1993. It wasn't bipartisan. Then we had the 1997 Balanced Budget Act. The combination of those three pieces of legislation, combined with a strong economy, got us back to budget surpluses in the late 1990s.

The biggest mistake we made was when we walked away from the pay-as-you-go rules in 2001. Were we to make a decision to fully abide by the pay-as-you-go rules going forward for everything, from the Medicare physicians to the tax cuts that are scheduled to expire, that would produce $7 trillion in deficit reduction and would help stabilize the debt over the coming decade.

Senator COONS. So if we simply followed the policy that is in place and didn't change it, we would make significant progress in terms of——

Mr. GREENSTEIN. Very substantial progress, even bigger than Bowles-Simpson or Gang of Six.

Senator COONS. If you'll forgive me, with that I'm going to call a brief recess. Several members are on their way back, but I must vote or I will miss this vote.

With that, this hearing is in recess.

[Whereupon, at 11:28 a.m. the hearing was recessed.]

AFTER RECESS [11:31 a.m.]

Senator DURBIN. I know this has been irregular with our roll call vote, and some members will be returning and I'll yield the floor immediately when they do. But in the interest of a couple questions here I'd like to continue.

I'd like to ask Professor Morrison to comment on an interesting meeting we had, hearing, of the Senate Judiciary Committee on October 5th with Supreme Court Justices Scalia and Breyer. It was a fascinating hearing. One particular exchange I'd like to share with you between Chairman Leahy and Justice Scalia.

Chairman Leahy asked, "Justice Scalia, under our Constitution, what is the role, if any, the judges play in making budgetary choices or determining what is the best allocation of taxpayer resources? Is that within their proper role or is that somewhere else?" Justice Scalia answered, "You know it's not within our proper role, Mr. Chairman. Of course it's not. Of course it's not."

Naturally, Scalia is pretty outspoken in his response there. That is a reflection of—in fairness to him and both justices, a reflection of the current interpretation of the Constitution. Absent specific language giving the court authority to review the provisions of a constitutional balanced budget amendment, do you believe the courts—the Federal courts have the authority to take up that question?

Professor MORRISON. As my written testimony shows, it's my view that the law is quite clear that the Federal courts would refuse to get into this balanced budget mess unless directed to do so by the Constitution. I think Justice Scalia accurately reflects the view of most Federal judges, that they would be dragged kicking and screaming and try to find every way they could do to possibly avoid having to make the kind of choices between Medicare, defense, Social Security, environmental protection, transportation, and food stamps, which is the kind of choices that would have to be made.

So I don't think that Federal judges are the right people to make those decisions and I think that they would gravely resist any effort to do so. But of course, they would follow the law if they were required by the Constitution explicitly to do that.

Senator DURBIN. Dr. Holtz-Eakin, assuming that the courts have the authority, either they find authority where Justice Scalia did not or it is expressly given in the balanced budget amendment, what are your thoughts about the expertise of Federal judges to make these decisions about the budget?

Dr. HOLTZ-EAKIN. I think it's probably a tie between them and what we see in Congress, sir.

Senator DURBIN. I'm going to take that as faint praise.

Dr. HOLTZ-EAKIN. You should.

Senator DURBIN. But go to the specifics that Professor Morrison raised. If you're faced with a challenge or the argument's being made that the Congress has overspent in its Federal budget, work this through even the quickest Federal judicial schedule and come up with the remedy that you think would allow us to continue to harmoniously govern this country as we go through this question period.

Dr. HOLTZ-EAKIN. Well, again, let's take some of the balanced budget amendments that have been under consideration. They typically say balance, but they also say, you know, spending shall be capped at this level of GDP, taxes at another level of GDP. So, you know, if you've overspent and its clear you're above that level of GDP, you're going to have to solve this problem by cutting spending, and the judges are going to know that. The simplest rule is going to be, they're going to just cut everything across the board and get down to the cap. So I actually don't think that——

Senator DURBIN. Across-the-board cut, you're suggesting?

Dr. HOLTZ-EAKIN. That would be my guess.

Senator DURBIN. Veterans, disability, military——

Dr. HOLTZ-EAKIN. It's strictly—strictly——

Senator DURBIN [continuing]. Retirement?

Dr. HOLTZ-EAKIN. Strictly conjecture. I mean, there's no way to know for sure.

Senator DURBIN. OK.

I'm going to defer immediately to Senator Blumenthal after this question. Would you comment on the notion that has been put forward in a number of these amendments that we should somehow enshrine the question of revenues and taxes so, for example, the court could not order additional revenue be levied against the people of this country, a surtax to pay for the difference.

Assuming we are facing a natural disaster, that someone argues Congress has over-spent and the President signed it, I suppose, and at this point the Federal judiciary could not even consider additional revenue to deal with that type of disaster.

Dr. HOLTZ-EAKIN. So again, every amendment that I think has been taken up with serious consideration has had the capacity for a waiver. So let's—you know, let's acknowledge that there would always be the possibility of raising more revenue, doing more spending in extreme circumstances.

The next question is, you know, how should you set the level of—the scale of the Federal Government? In the end, that's a question

of politics in a representative democracy and you wouldn't get such a balanced budget amendment enshrined in the Constitution unless the American people signed on. And so I think that's how it should be solved.

Senator DURBIN. Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Senator Durbin. Thank you all for being here today. This hearing has been very instructive. I want to sort of pursue the point, Mr. Holtz-Eakin, that you were making just now about the existence of a waiver. Isn't there the very real danger, and knowing how the Congress operates from my brief experience here of less than a year, that the exception of the waiver would swallow the rule?

In other words, that the balanced budget amendment itself would become a sort of message bill, another term that's frequently used around here, and that it would have very little practical effect because the waiver would be in vogue for other reasons, and the difficulties that have been mentioned during this hearing.

Dr. HOLTZ-EAKIN. I'm rarely the one to come to the defense of the Congress, but——

Senator BLUMENTHAL. You did speak of us, to use your word, lovingly.

Dr. HOLTZ-EAKIN. Yes.

Senator BLUMENTHAL. Give me one of your responses.

Dr. HOLTZ-EAKIN. I mean, in the end the mechanical ability to have a super majority waiver of the rules would be there and it could be the case that a Congress would exercise it more frequently than we might anticipate or like.

But remember, prior to that happening the American public is going to have to amend the Constitution. Three-quarters of the States are going to have to ratify this. There's going to be enormous national debate.

If a Congress then turned around and started violating the express wishes of the American public with great frequency, I can't believe that many of the members would keep their jobs.

Senator BLUMENTHAL. Well, I guess that is an optimistic view of the way it would operate. But let me also, going into some of the practical implications, Professor Morrison, it's true that, for example, the education litigation has taken years and years and has proved very unwieldy, but in the end it has had some effect. Can you think of a way to structure the challenge, assuming that the standing obstacle could be overcome, that there could be a practically enforceable result from the courts?

Professor MORRISON. I've thought a lot about that. I think the answer is no. That's because the amendment itself focuses on a fiscal year, and the problem is only in a given fiscal year and you would have to be able to provide a remedy within that fiscal year.

Of course, the amendment could specify that if in year one you improperly run a deficit, then in year two you have to pay back that deficit before you spend more. That's not what any of the amendments say. I can think of 100 objections as a matter of policy to that, but you could legally do that, I suppose, and you would get around the problem of mootness.

I should also point out that even if you manage to get a remedy in place by, say, the middle of August that required a 10 percent

reduction, you're taking 10 percent not out of the whole year's budget, but you're taking it out of what's remaining of the portion of that year so the effect is, in effect, a 50 percent—or close to 50 percent—reduction for the remainder of the year. And so you really have to be very careful with any kind of remedy like that. And then, of course, there would be appeals of that order, and people would argue about it, and Congress might step in and it's very hard to do anything effective.

Senator BLUMENTHAL. But the major obstacle that you have identified, and I think very plausibly and correctly, is the time line and the amount of work and time that would be required to litigate. There are precedents for dealing with very complex and politically charged issues in a narrow window of time.

Professor MORRISON. Yes. Yes. I would say this issue, of course, is quite different from many other constitutional challenges which I've been involved in where the issues are purely legal issues. Here, there are going to be very sharp disputes about facts, about whether estimates are good or not.

Meanwhile, by the way, the economy doesn't stand still while the fiscal year is going on. That is, the unemployment gets worse, tax revenues go up or down, and all of that will have to be factored into what will be a moving target. So, yes, there's surely precedent for very prompt litigation, but not of a kind like this.

Senator BLUMENTHAL. Where massive fact-finding is required.

Professor MORRISON. And discovery and trials and briefs and——

Senator BLUMENTHAL. Well, of course all that could be limited under rules that could be established by the courts for defining what amount of discovery and putting very narrow deadlines on that. But while the litigation is ongoing there would be massive uncertainty in the markets, in the economy, which itself could have a negative effect. Is that true?

Professor MORRISON. Yes. But to the extent that you put limits on discovery, you put burdens on the challenger, and therefore you make enforcement that much less likely and that much less effective.

There's been discussion here about a debate with the American people. If we're going to have a debate, item one on the debate should be, are we prepared to turn this over to the courts if the Congress doesn't do its job, because that's a debate that barely has begun in the Congress and it surely has not begun with the American people.

I don't think anybody has really taken this issue and tried to explain it. It's not an easy issue to explain to ordinary people, that the means by which this amendment is going to be enforced is by turning the case over to the Federal courts.

Senator BLUMENTHAL. Thank you. My time has expired. But thank you all for your testimony today.

Senator DURBIN. Thanks for returning, Senator Blumenthal.

Senator Lee.

Senator LEE. Thank you, Mr. Chairman. I'd like to thank each of you for coming. I also want to thank Chairman Durbin for convening this hearing, which I think addresses one of the most important issues of our generation. This was a central focal point of

my campaign for the U.S. Senate. It's also something that I've focused on extensively since coming to the U.S. Senate.

I feel so strongly about the fact that we need a balanced budget amendment that I've even written a book about it. So needless to say, I am an advocate of this. I'd like to respond, before I get into questions, to some of the points that have been made today.

First of all, I think one of the reasons we need to remember why we need this is because as fun as it is to say that Congress just needs to do its job, one of Congress's jobs, as it has perceived it, and one of its jobs as is made clear in Clause 2 of Article 1, Section 8, is to borrow money on credit of the United States.

The problem is that that power has been abused to the point where we're now $15 trillion in debt, to the point that by the end of this decade we'll be paying close to, if not in excess of, $1 trillion a year just in interest on our national debt.

Now, this is no longer a simple debate between liberals and conservatives, between Republicans and Democrats, because whether you're most concerned on the one hand about shoring up our ability to fund national defense, or on the other hand most concerned about making sure that we have enough money to fund entitlement programs, you have to acknowledge that the roughly $800 billion delta between what we're paying in interest right now and what we could be paying in interest just a few years from now has the potential to bring about devastating consequences for every Federal program, from defense to entitlements.

This isn't a situation in which we can just do nothing because doing nothing will bring about a situation in which we're forced to make abrupt, draconian, and very painful cuts to every Federal program, and including and especially those upon which the most vulnerable members of our civilization have come to rely. That's why I think it's irresponsible for us to pretend that there isn't a problem that we have to address.

I want to address the problem that suggests that somehow this would be dead letter law unless we turn over the entire budgeting process to the courts. I respectfully, but most forcefully, disagree with this point. First of all, we have to remember that, particularly when Congress is entrusted with certain constitutional responsibilities, it does take them seriously. There are a number of instances in which Congress is required to pass certain things by a super majority threshold. That's required in the case of expelling a member under Article 1, Section 5. It takes two-thirds of that House. That's the case under Article 1, Section 7, Clause 2, where it takes two-thirds to override a presidential veto.

And yet, we don't find ourselves mired in litigation every time those thresholds are implicated, or in the case of Senate ratification of a treaty. This is simply that. This is a super majority requirement that says Congress needs to spend no more than it takes in, and Congress needs to spend no more than a fixed percentage of GDP, keeping in mind the fact that there ought to be a limit to how much out of every dollar the Federal Government ought to be able to take and consume before it's even spent, and spend money that future generations have yet to make on behalf of people who one day will have to pay it back, people who are in some cases not old enough to vote, in other cases not yet born, in other cases peo-

ple who will one day be born to parents who have yet to meet. This results in a really nasty, pernicious form of taxation without representation. We fought a war over that. We won that war.

Now, if you're suggesting that if this did result in litigation—and I understand your standing concerns. I address that in Senate Joint Resolution 5. It's not directly addressed in Senate Joint Resolution 10. I wish it were. I will continue to keep that in mind.

But if it were to result in litigation there are benchmarks against which Congress could ensure that the litigation would not be mired down for years, that it wouldn't have to result in extensive discovery. The balanced budget amendment that all 47 Republicans, including myself, have co-sponsored provides that Congress may, by appropriate legislation, enforce the terms of this amendment.

This means that Congress could identify as a particular entity, a particular office—perhaps the Congressional Budget Office—as the entity in charge of deciding whether or not a particular budget is or is not balanced. This could result in a binary compliance standard, one in which the CBO either does or does not say it's in compliance.

Then you could have a court, assuming you could get around the Article 3 justiciability issues that I believe you could, because with respect, I think *Raines* v. *Byrd*, although it makes some important points in this, it's not necessarily the inexorable command that you could never have a Member of Congress with standing, irregardless of what we came up with.

So Professor Morrison, in the few seconds I have left, I'd like you to just answer the question: have we ever had extensive, protracted litigation on issues of public importance, national importance that have focused on whether or not Congress has complied with its mandate to pass certain things by a super majority?

Professor MORRISON. The question is whether a court has never had to decide whether Congress has complied with a requirement like that. The answer is, there is a case involving the question about whether or not a revenue bill originated in the House of Representatives or not. The court decided that question. That's a kind of technical compliance question. But no questions involved——

Senator LEE. And how did the court decide that case?

Professor MORRISON. It decided that the bill had originated in the House of Representatives.

Senator LEE. OK. So in that one case, the one case that you can point to where that resulted in litigation, the court decided it.

Professor MORRISON. But that's a very——

Senator LEE [continuing]. The country in months and months or years and years or decades of litigation, did it?

Professor MORRISON. A very different kind—that's a pure legal question. No facts, no discovery.

Now, can I say a word about the Congressional Budget Office, for which I have great respect? Under the Gramm-Rudman case, it is perfectly clear that, unless you make another part of an amendment to the Constitution, the Congressional Budget Office cannot carry out the function of deciding whether the Congress has complied with the Constitution or not or whether a particular budget is in line with the Constitution. That would either have to be given to the President or to the courts.

The Congressional Budget Office is part of Congress and separation of powers is very clear that the CBO cannot do that. As far as raising standing, I was the losing lawyer in the *Raines* case so it pains me——

Senator LEE. It was masterfully litigated, nonetheless.

Professor MORRISON. Yes, yes. But we won on the merits eventually. If I may say a word, I regret the passing of your father, with whom I worked on many cases on both sides.

Senator LEE. As do I. We miss him. Thank you very much.

Senator DURBIN. Let me ask you, if I can, Professor Morrison. There's a provision in here that was topical a few months ago. I'm referring to Senator McConnell's balanced budget amendment. It's the provision on the limit on the debt of the United States shall not be increased unless three-fifths of the duly chosen and sworn members of each House of Congress shall provide for such an increase by roll call vote.

We went through this debate not long ago, and the question was—and maybe this is something you can or cannot answer, or if someone else would like to—do you feel that the President had any inherent authority to borrow that money absent an express vote of Congress to extend the debt ceiling?

Professor MORRISON. In my opinion, the President does not have that authority, but I have not done the legal research necessary to do that. I say that because in my view the power to borrow money and to incur obligations on behalf of the United States is one that is given to the Congress, that it must be done pursuant to a law.

The problem is a little complicated by the fact that there was an existing law in effect at the time. Had there been no law, if we had had no debt ceiling at all, then it might have been a more arguable question. It's rather like the *Youngstown* case in which there were existing laws that limited the power of the President. If Congress were to eliminate those laws it would be a different question. I'm not sure I would come out the same way, but I would at least want to hear the arguments about it.

Senator DURBIN. I guess the only element there that I would raise is that Members of Congress, having voted for the appropriation, for the spending, or many of them, then turned around and said, but of course I'm not going to vote to borrow the money to cover what I've just voted for. So they had made an inherent decision to borrow money by spending it, voting to spend it, appropriate it, and then turned around and said, but no, not—I wouldn't extend the debt ceiling for that.

Professor MORRISON. I think we will never get an answer to that question because even if something actually happened along those lines, the Federal courts would say we don't have any jurisdiction to decide that question. That's not a case of controversy within Article 3, and nobody's got standing to raise it.

Senator DURBIN. Mr. Greenstein, one of the things that you noted in your testimony and didn't have a chance to put it in your oral statement, is a distinction related to child care, if I'm mistaken. It's an important distinction because this balanced budget amendment enshrines the Tax Code and says to touch the Tax Code you need a super majority vote, but you can cut all the spending you want with a majority vote. You made the point in there,

when it came to child care, that when it came to the poorest families in America that child care was a matter of appropriation.

When it came to families of means, it was a benefit under the Tax Code. So we clearly are creating, on this one single issue, a distinction where, if we are going to change the Tax Code and reduce the benefits for child care for people with means who itemize, we need an extraordinary vote.

But if we're going to cut the appropriation for child care for those who are of limited means, then that can be done by simple majority. It seems to me that is one illustration of why we should not make this distinction, why tax expenditures should be treated as expenditures. They have the same budget impact. I appreciate your comment.

Mr. GREENSTEIN. Well, not all tax expenditures are equal and exactly the same, but a substantial number of tax expenditures are really the pure equivalent of spending just done through the Tax Code. They are subsidies where the mechanism Congress has chosen to provide the subsidies is through the Tax Code rather than through the spending side, and there are distributional implications here.

So the child care example, to elaborate on it a little bit more, is that if you are a low or moderate income family your child care subsidy, if you have one, will come through a Federal spending program, appropriated program, or a mandatory program—child care and development block grant for example. And that's not an open-ended entitlement. Only about 1 of every 6 low-income families with children that are eligible for Federal child care subsidy gets it.

By contrast, if you're an upper-middle or upper income family and you have child care costs, you get a Federal subsidy, too. You get it through the Dependent Care Tax Credit. That is not subject to appropriation. It is not a capped mandatory program. So we have an open-ended subsidy at the top: 100 percent of the eligibles who apply on their tax return get it. We have a limited subsidy at the bottom, where only a percentage, a fraction of the eligibles get it, but they're both child care subsidies.

So if you wanted to say we have a deficit and we think the Federal Government should do less in child care subsidies, why would you want a structure that shields the child care subsidies for the people that need it the least that are going to work anyway and constrains the child care—you'd want to have a level playing field.

Senator DURBIN. So, Ms. Furchtgott-Roth, why would we? Why would we put that in the Constitution? Why would we draw this distinction? It's a government service provided to American citizens, one through direct appropriation, one through the Tax Code, and we are protecting one by arguing that to reduce it takes an extraordinary vote, but we're not protecting the other.

Ms. FURCHTGOTT-ROTH. Well, there are many examples of benefits in the Tax Code that affect lower income individuals also.

Senator DURBIN. Now, let's take this specific—let's stick with this one for a minute. Tell me why you think our Constitution should protect, by requiring a higher vote to reduce it, this tax expenditure, this tax credit for child care for wealthy people but not

protect the appropriation needed to provide child care for people of limited means?

Ms. FURCHTGOTT-ROTH. So I think if you're going to look at particular individual provisions of spending and of the Tax Code you need to look at them in the aggregate because the EITC, for example, that benefits low-income people, would also require a super majority.

But the general idea is that it constrains Congress more because it would be more difficult to raise taxes, because otherwise taxes will just go up and spending will just go up. One can think of other examples where spending initiatives benefit upper income individuals and tax changes benefit lower income individuals. The point of the balanced budget amendment is to make it more difficult for the Federal Government to spend money.

Senator DURBIN. I understand.

Mr. GREENSTEIN. With all due respect, the answer is not correct. The Earned Income Tax Credit and other low-income refundable credits are classified in the Federal budget as spending, not as revenue. You would not need a super majority to cut the refundable Earned Income Tax Credit or the Refundable Child Credit. You would need a super majority to restrain an egregious tax loophole that was on the tax side.

Senator DURBIN. I would just say, and I'll defer to my colleagues here, when we went into the Bowles-Simpson debate that was one of the first things that everyone agreed on: the Tax Code was not sacred. It is earmarked expenditures through the Tax Code to meet certain ends, achieve certain goals, which is comparable to what we do with appropriation spending. Each has an impact on the deficit.

When we start drawing distinctions in the Constitution, that if it's in the Tax Code it somehow is more sacred, I think it belies the reality of politics in Congress. What goes on in the Finance Committee, what goes on in the Appropriations Committee is very similar in terms of the political push-and-pull, and to make this distinction in our Constitution, I think, goes too far.

Senator Blumenthal, did you have any follow-up questions?

Senator BLUMENTHAL. I noticed that at least two of the witnesses wanted to respond to your point, so I'm actually going to give them the opportunity, if you have a response——

Dr. HOLTZ-EAKIN. Thank you, Senator.

Senator BLUMENTHAL.—because I would be interested in it.

Dr. HOLTZ-EAKIN. Thank you, Senator. I guess my reading of this is, there's a super majority needed to raise the level of taxes. It doesn't constrain in any way the composition of the Tax Code, so if one were to eliminate a tax-based subsidy for child care or anything else, and there are lots there, and offset that with reduced revenues somewhere else, you wouldn't need a super majority to do that.

So what you would do, is you would broaden the base and lower the rates, which means this would in fact drive the kind of good policy tax reform that we know we need. So I don't view this——

Senator BLUMENTHAL. But you don't disagree with the point that Senator Durbin was making, that there really is a comparability as to tax expenditures and what we know as appropriations?

Dr. HOLTZ-EAKIN. Oh, I—the notion that we are providing targeted subsidies through both the tax and the spending side, I agree with that. My point is that the balanced budget amendment provides caps on total spending, it provides caps on total taxes, it is silent on the composition. It's a level playing field in that sense.

Senator DURBIN. If the Senator from Connecticut would yield.

Senator BLUMENTHAL. Sure.

Senator DURBIN. Section 4, any bill that imposes a new tax. The elimination of the mortgage interest deduction will result in higher taxes on my family. That, at least, is a question that has to be resolved, maybe in the courts, as to whether that is a new tax on my family.

Now, there is a specific exemption in that same section which says, but this doesn't apply if you're lowering statutory rates of tax. But when it comes to new tax, you know, when you get into this area and try to enshrine the Tax Code and say it's going to be treated in a different fashion, first, we're not paying any attention to the deficit when we do that. Secondly—I'm sure the dynamic growth people see this differently, but this is how I view it. But secondly, we end up protecting earmarks in the Tax Code, as we have condemned earmarks in spending, and that troubles me.

Dr. HOLTZ-EAKIN. Well, I mean, my reading of it is that that would not be a new tax. I view this as, we have an income tax, we can configure it in many ways, and have through history, and that what the amendment would in fact simply do is limit the total level of taxation and allow the Congress to, within that cap, rearrange—and should rearrange, quite frankly.

Senator BLUMENTHAL. Yes. But aren't you troubled, Mr. Holtz-Eakin, by the enforcement issue? You do raise it in your testimony. You say we need to consider it. Without an answer to that enforcement issue and the standing issue that Senator Lee does, as you said, to his credit, address, or I think Professor Morrison said to his credit, address, is only one and might be viewed as the least important of those issues, the most easily soluble. But without enforcement, even with the waiver, isn't this really just dead letter?

Dr. HOLTZ-EAKIN. Again, I'm not a constitutional lawyer, but when I look at this and I hear the debate about it, First, to repeat what the Senator from Utah said, which is that Congress takes its constitutional responsibility seriously and I do not think it would, in a frivolous and large way, violate a balanced budget amendment so the remedy would have to be imposed with this course would be so draconian that—as has been portrayed. I just view that as quite unlikely.

Secondly, the threat of such a remedy would actually impose some discipline on Congress. They would not want to have a judge imposing that. In fact, we know that Congress dislikes the threats of across-the-board cuts and sequesters because it regularly waives its self-imposed——

Senator BLUMENTHAL. But the opposite is also true. The lack of an effective remedy would encourage, in effect, disobeyance by the Congress. I take the point that Congress has a constitutional responsibility, independent of the judiciary, independent of the executive branch, but again, on issues that are so complex and so politi-

cally charged, doesn't that enforcement issue have to be solved before we adopt this kind of very momentous amendment?

Dr. HOLTZ-EAKIN. Again, I think we have learned that this may be the only way to get real enforcement because every budgetary enforcement mechanism that Congress has attempted to impose on itself, it has waived. There is no enforcement at all now. This at least takes us a step in the right direction. So I view this as far less troubling than certainly you and my panelists do.

Senator BLUMENTHAL. Professor Morrison.

Professor MORRISON. There's one other problem that I haven't alluded to yet, and that is that I don't even know which proposed constitutional amendment is going to be on the floor. So when we're discussing what this one means, I say, wait a second. You know, usually we have a debate at the Committee level. We have a target, we know what it is, and we can have perfecting amendments.

Not that I think this can be perfected, but we surely should not be in a position where this kind of question about whether something—whether tax expenditures are or are not subject to this exception—is to be decided, what, by the people out there or by the Federal courts? No. That compounds the felony.

Senator BLUMENTHAL. Thank you, Mr. Chairman.

Senator LEE. Thank you.

Professor Morrison, I just want to pick up on sort of where we left off. I want to clarify, first of all, that in referring to CBO I'm not talking about making CBO the enforcement arm. I share your concern that that would create its own range of constitutional problems. I'm saying simply that that could narrow any discovery that might need to be conducted in court.

If Congress were to say we're going to use CBO numbers, we'll look at those, Congress would then have the opportunity to accept or reject their own estimates and that would narrow the litigation possibilities—the opportunity for discovery significantly to the point that I think it could be shortened.

But I want to get back to the point about the oath to the Constitution. Each of us, when we're sworn in as Members of Congress, are required to take an oath to "uphold the Constitution and to bear true faith and allegiance to the same". That does have an effect.

Much as our popularity rating among the American people—which is somewhere to the south of that of Fidel Castro—might suggest otherwise, Members of Congress, when faced with very specific commands, do tend to take those very specific constitutional obligations quite seriously.

Let me point to one of the examples that rarely gets brought up, which is the impeachment and removal of sitting presidents. You had a situation a few years ago in which a Democratic President was not removed—after having been impeached by the House, was not removed by the Senate, notwithstanding the fact that the Senate was Republican controlled and this President was a Democrat.

One of the reasons why that President was not removed, even though the votes might have been there if they wanted to, there was extensive discussion about what it means to have committed a high crime or misdemeanor. There was Founding Era documenta-

tion of what that really meant and there were a number of members of this body in both parties who said, you know, I don't think this is it.

Congress does police itself fairly well, especially when it knows that the buck stops with Congress. So I really think that we ought to avoid any situation in which we are simply going to assume Congress won't follow it, this has to result in litigation, and the only way that this could ever be enforced would be through litigation. I simply reject that viewpoint.

I'd like to ask a question to you, Dr. Holtz-Eakin. Do you think an argument can be made—do you agree with my viewpoint, and if so, why, that the longer we postpone requiring Congress to balance its budget and to live within certain parameters of spending, that we really are jeopardizing the very same programs that we're talking today about that many have expressed concern about preserving.

Dr. HOLTZ-EAKIN. Absolutely. Our social safety net is broken. I mean, the Social Security rate now is running a $50 billion cash-flow deficit. The current "plan"—and I put that in quotes because it's a disgrace—is for future retirees to get an across-the-board cut of 23 percent so that we maintain the solvency of the system. That's terrible. That should be fixed.

Medicare, right now, there's a gap of $280 billion between premiums and payroll taxes in and spending going out. Ten thousand seniors are retiring every day. That program will not survive for the next generation of seniors. So we should be fixing these now for the programs' and beneficiaries' sakes, plus the red ink and the economic consequences.

Senator LEE. So those are problems that in some respects go above and beyond the present-day problems that we face from our debt, in other words.

Dr. HOLTZ-EAKIN. Yes.

Senator LEE. How far do you think we have to go before our interest rates, or the yield rates we have to pay on U.S. Treasury instruments, start to return even just to historical levels, let alone start to go Greece on us?

Dr. HOLTZ-EAKIN. The truth is, we don't know. In the end, these are relative comparisons and we have the virtue of being the best-looking horse in the glue factory at the moment. But those relative comparisons can switch quickly and I don't think we should take any comfort in that.

I was asked the same question on a panel in the other body. I was sitting next to Carmen Reinhart, who is a subject matter expert in this. My answer was, "I don't know how long we have. We should pretend we have no time." And she said, "Doug's an optimist". I take that seriously.

Senator LEE. Great. That's very helpful. Thank you.

Dr. Diana.

[Laughter.]

Ms. FURCHTGOTT-ROTH. Yes.

Senator LEE. I did want to point out, in response to your testimony, the provision dealing with the military conflict or declaration of war. That is different in the consensus Republican proposal, Senate Joint Resolution 10. That extends only to the extent of the

funds required to be—that have to be expended in connection with that war or military conflict. So the specific excess has to be identified and then the specific excess above the spending rates of this provision would be limited to that military conflict.

Ms. FURCHTGOTT-ROTH. Right.

Senator LEE. So that isn't present at that moment.

Ms. FURCHTGOTT-ROTH. Yes. That's a big improvement.

Senator LEE. Oh, thank you. I thought so. We worked pretty hard on that.

I see that my time has expired. I thank each of you for coming.

Senator DURBIN. Senator Lee, you've been very patient and returned. If you'd like to continue for a couple minutes, please feel free.

Senator LEE. Thank you very much. I appreciate that, Mr. Chairman.

Mr. Morrison, with respect to standing, couldn't Congress, pursuant to what I analogized to, our version of Section 5 of the 14th Amendment, the portion of this that says Congress may, through appropriate legislation, take steps to enforce this provision.

Couldn't Congress provide through that legislation that Members of Congress could, under certain limited circumstances, have standing to sue under this provision and establish standing? Or is it your position that *Raines* v. *Byrd* conclusively resolves that issue and that there is no possibility that they could satisfy Article 3 standing requirements in that circumstance?

Professor MORRISON. My view is that *Raines* would control and that Congress could not, and the Supreme Court would agree that it could not, create standing for Members of Congress or anybody else.

But if—as you are aware of the standing problem and believe that standing is important to have enforcement, then I agree that your S.J. Res. 5 does the right thing if you want to confer standing on Members of Congress by putting it in the Constitution. The Supreme Court would honor that.

It would not necessarily agree to hear the case because, as my testimony points out, the political question doctrine, as well as ripeness and mootness, would also stand in the way, and surely the political question doctrine, focusing mainly on the issue of remedy, I think, as the quotation from Justice Scalia indicates, the court would be very reluctant to assume that Congress intended to make it the arbiters of the Federal budget.

Senator LEE. And you may well be right in that respect in that the court may well be reluctant to become the first and last arbiter of the Federal budget. That being the case, I think that plays in exactly to my point about how Members of Congress, particularly when they understand that the buck stops with them as far as their interpretation of a particular constitutional provision.

For example, those clauses dealing with the impeachment power, the power to remove individual Members of Congress, the power to ratify treaties, the power to override a Presidential veto, things like that, Members of Congress have tended, have they not, to abide by the Constitution.

Professor MORRISON. Yes. If you want to say that the Federal court shall stay out of it then you ought to say that in your amend-

ment to make it absolutely clear the Federal courts don't get into it, then the American people can then decide, based upon a clear statement in the amendment, that we're going to depend upon Congress to enforce this amendment and we're not going to depend on anybody else.

I think many people would think that it would be empty rhetoric, and by the time the amendment got passed and got enacted by all the States, we'd be another 5 years down the road, and everybody would say, we're waiting for the amendment to take place, then Nirvana will arrive and all our problems will go away. I don't think that's a very good bet.

Senator LEE. But aren't there countless circumstances in which we benefit from the fact that there is some perhaps minimal uncertainty, the Sword of Damocles effect, in the fact that the courts could step in in a given circumstance? Doesn't that that keep Members of Congress honest?

Professor MORRISON. I don't think in this situation they would.

Senator LEE. Why is this situation any different than any other situation?

Professor MORRISON. Because in this situation the temptations to exceed the budget limits are so great, given all the pressures from outside groups. The very reason we have this problem today is because it's easier to say yes than it is to say no. That's why we have the problem. The once-in-a-generation impeachment is not the same as the regular, annual budget cycle, campaign contributions, all the things that cause Members of Congress to do what they do in creating deficits.

I don't think that this alone may do it. Maybe Congress should just pass a joint resolution that every Member of Congress takes an oath to see that there's a balanced budget, and everyone say we'll run upon it next year in the election. At least that wouldn't be enshrined in the Constitution and we wouldn't have any litigation over that.

Senator LEE. Although we could find a way to litigate that, too.

Professor MORRISON. Well——

Senator LEE. I'm sure we'd want to retain you.

Professor MORRISON. I'm pretty good at that. I think I would have—there's also the speech and debate clause, which I've got backed up for you if you don't want to worry about that kind of litigation.

Senator LEE. OK.

But your bottom-line analysis is: fish or cut bait. Either put standing in the amendment itself or leave it out and leave it something that is committed constitutionally to Congress's discretion.

Professor MORRISON. I would say standing and political question also.

Senator LEE. OK. Thank you.

Senator DURBIN. Thanks a lot, Senator Lee. And thanks to all the witnesses. Professor Morrison, I was with you until the end until you talked about a new pledge for Members of Congress. We've got enough of those. Let's stick with our oath to the Constitution.

Thanks, everybody for coming, and especially thanks to the witnesses, for your patience. It's been a good hearing. I want to note that there's been a great deal of interest in it.

I'd like to place into the record statements of the following individuals and organizations that oppose the balanced budget amendment: a letter from 281 national organizations, 424 State and local organizations; 8 leading economists, including 5 Nobel laureates; the Leadership Conference on Civil and Human Rights; the National Women's Law Center; Constitutional Accountability Center; AFSME; Age United; National Educational Association; and an issue brief from the American Constitution Society.

Without objection, they'll be placed in the record.

[The letters and brief appear as a submission for the record.]

Senator DURBIN. The hearing record is going to be open for a week, and I think some questions may come your way, which is always a possibility. I hope you can answer them promptly so we can complete the record.

If there are no further comments, I'd like to bring this hearing to a close and thank the witnesses and colleagues.

The hearing is adjourned.

[Whereupon, at 12:20 p.m. the hearing was adjourned.]

[Questions and answers and submissions for the record follows.]

QUESTIONS AND ANSWERS

Senate Judiciary Committee
Hearing on "A Balanced Budget Amendment:
The Perils of Constitutionalizing the Budget Debate"
November 30, 2011

Questions for the Record from U.S. Senator Al Franken
for Mr. Robert Greenstein

1. Eleven winners of the Nobel Prize for Economics condemned the last proposed balanced budget amendment for mandating perverse actions in the face of recessions. They said it was unsound and would aggravate recessions. More recently, Macroeconomic Advisers, a private economic forecasting firm, said that if a balanced budget amendment took effect in 2012, unemployment would double from 9 percent to 18 percent and our national GDP growth would be reduced by 19 percent.

Would a balanced budget amendment make our current economic recession worse?

No matter the state of the economy, a balanced budget requirement would increase the risk of recession and make recessions worse. As I mentioned in my testimony, "This is an unwise stricture that large numbers of mainstream economists have long counseled against, because it would require the largest budget cuts or tax increases precisely when the economy is weakest. It holds substantial risk of tipping faltering economies into recessions and making recessions longer and deeper. The additional job losses would likely be very large."

2. The Federal Deposit Insurance Corporation keeps my bank accounts safe. They hold a large number of Treasury securities as insurance. The Pension Benefit Guarantee Corporation makes sure that if a Minnesota company goes bankrupt, Minnesotans don't lose their pensions. The PBGC has assets they hold in order to help pay for this when they need to. These financial agencies keep "rainy day" reserves, just like most states do, reserves they built up when economic times were good. They use these reserves to fulfill their national obligations when times are hard.

Do any of the current balanced budget amendment proposals allow for the use of this type of fund without a supermajority vote or a subsidy from some other part of the government?

Under a balanced budget amendment, all federal spending in any year must be offset by revenues collected in that same year — including spending for programs paid for through trust fund savings. As Richard Kogan and I noted in a November 14, 2011 report by the Center on Budget and Policy Priorities, under a balanced budget amendment "Social Security could not draw down its reserves from previous years to pay benefits in a later year but, instead, could be forced to cut benefits even if it had ample balances in its trust funds, as it does today. The same would be true for military retirement and civil service retirement programs. Nor could the Federal Deposit Insurance Corporation or the Pension Benefit Guaranty Corporation respond quickly to bank or pension fund failures by using their assets to pay deposit or pension insurance, unless they could do so without causing the budget to slip out of balance." In other words, programs such as Social Security and PBGC could draw

on their reserves only if there is an offsetting surplus in the rest of the budget (either through budget cuts elsewhere or revenue increases), or if the balanced budget requirement were waived. All current balanced budget amendment proposals would require a supermajority vote to waive the balanced budget requirement, except in times of war (and, under Rep. John Carney's proposal, times of economic downturn). All Republican-sponsored balanced budget amendment proposals would also require a supermajority vote to raise taxes, and only some of these proposals would allow a simple majority vote to raise taxes in times of war. In short, each current balanced budget amendment proposal would endanger the economy and threaten the integrity of programs like Social Security, FDIC, and PBGC as described in my testimony.

Senate Judiciary Committee
Hearing on "A Balanced Budget Amendment:
The Perils of Constitutionalizing the Budget Debate"
November 30, 2011

Questions for the Record from U.S. Senator Al Franken
for Mr. Robert Romasco

1. Minnesota is required to balance its budget by the state Constitution. However, that requirement only applies to the operating budget, not the capital budget. Capital-intensive programs like bridge building, new schools, and new highways can be financed by borrowing money without needing to balance that spending with revenue in the same fiscal year. If Minnesotans are having a tough time finding jobs, and revenue drops as a result, we can draw against "rainy day" money we put aside when times were good to make sure that the streets get plowed, police are paid to patrol those streets, and teachers are paid to educate our children.

   a. Would any of the currently proposed balanced budget amendments allow for the use of "rainy day" funds like those used in Minnesota and many other states?

      There is no formal federal budget stabilization fund currently established, and neither S.J. Res. 10 nor S. J. Res. 24 is worded in a way that would allow the use of a federal rainy day fund to balance the budget.

   b. Would any of the currently proposed balanced budget amendments allow for borrowing money for capital programs, or do they require balancing or do they require balancing the total budget each year?

      Neither S.J. Res. 10 nor S. J. Res. 24 permits for borrowing money for capital programs if it would result in total annual outlays that exceed total annual receipt of revenues. Both amendments require that total outlays for any fiscal year not exceed total receipts for that fiscal year, unless a supermajority of each House of Congress votes to do so. S. J. Res. 24 requires three-fifths of the whole number of each House of Congress to approve a specific excess of outlays, and S. J.Res. 10 requires two-thirds of the duly chosen and sworn Members of each House of Congress to approve a specific excess of outlays.

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Lee A. Saunders
Secretary-Treasurer
Vice Presidents
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5/11

SUBMISSIONS FOR THE RECORD

Statement for the Record By the American Federation of State, County and Municipal Employees (AFSCME)

For the Hearing on A Balanced Budget Amendment: The Perils of Constitutionalizing the Budget Debate

Before the Subcommittee on the Constitution Committee on the Judiciary U.S. Senate November 30, 2011

American Federation of State, County and Municipal Employees, AFL-CIO
TEL (202) 429-1000 FAX (202) 429-1293 TDD (202) 659-0446 WEB www.afscme.org 1625 L Street, NW, Washington, DC 20036-5687

Statement for the Record
By the American Federation of State, County and Municipal Employees (AFSCME)

For the Hearing on
A Balanced Budget Amendment: The Perils of Constitutionalizing the Budget Debate

Before the
Subcommittee on the Constitution
Committee on the Judiciary
U.S. Senate
November 30, 2011

Mr. Chairman and members of the Subcommittee, on behalf of the 1.6 million members of the American Federation of State, County and Municipal Employees (AFSCME), please include the following statement in the hearing record for *"A Balanced Budget Amendment: The Perils of Constitutionalizing the Budget Debate."*

AFSCME strongly opposes amending the U.S. Constitution for the purpose of requiring a balanced budget. We think it is unwise and impractical and it would lead to economic disaster. Americans continue to endure the lingering effects of the worst economy and jobs crisis since the Great Depression. A constitutional balanced budget amendment would eviscerate vital programs and services including programs like Social Security, Medicare and Medicaid, veterans' benefits, homeland security, law enforcement and many other programs that have directly helped millions of Americans and prevented a weak economy from becoming worse. The balanced budget requirement would also be particularly devastating for the most vulnerable Americans, those who already suffered the greatest from a weak economy and job losses.

A constitutional balanced budget amendment would also undermine the democratic principle of majority rule and make it even more difficult for an already divisive Congress to do its work. We are concerned that a constitutional balanced budget amendment would usher in an era of judicial budget making, as the judiciary would be called upon to enforce its provisions. This would result in diminished legislative authority in budget decisions and cause even greater economic harm for the country. A constitutional balanced budget amendment would be a simplistic answer to a complicated issue and be disastrous for the following reasons:

1. A Balanced Budget Amendment is More Likely to Damage the Economy Than to Improve It

The prudent fiscal path forward must be driven by the goals of creating jobs and strengthening our nation's economy rather than imposing indiscriminate levels of cuts. A balanced budget amendment, however, would require large spending cuts during economic downturns, precisely the opposite of what is needed to stabilize the economy and avert or emerge from recessions. This would cause recessions to last longer and turn recessions into more harmful depressions.

The federal government's economic responsibilities in a cyclical economy make any attempt to limit federal revenue or balance the budget senseless and impractical. A balanced budget amendment would cripple the ability of the federal government to function and paralyze fragile state and local economies which rely on federal investments. One-third of non-security discretionary spending grants are in the form of aid to state and local governments, and cutting off these resources could cause state and local governments to spiral farther downward.

The worst recession since the Great Depression has resulted in this next fiscal year being one of the most difficult budget years on record for the states, with 44 states and the District of Columbia projecting budget shortfalls totaling $125 billion. As states have struggled with steep revenue losses, tepid revenue growth, and high unemployment, federal resources have been a critically important assistance stream. The loss of this vital funding stream, coupled with slow revenue growth ($21 billion below 2008 levels), is forcing state and local governments to cut jobs (455,000 since the beginning of 2010) and is cancelling out employment gains in the private sector. Federal resources play an integral role in local and state economies in addition to employment that is critical to national economic recovery.

A new analysis by Macroeconomic Advisors warns that if a balanced budget amendment restricting outlays to equal receipts were applied to the current fiscal year, cuts would total $1.5 trillion, throw 15 million people out of work and double the unemployment rate from nine to 18%. That is unacceptable, and it would be irresponsible to set our country down this dangerous and precarious path.

2. A Balanced Budget Amendment Would Eviscerate Education, Health Programs, Homeland Security, Labor Enforcement, Transportation and Many Other Critical Programs

The budget cuts required by a balanced budget amendment would be severe and far-reaching. These deep cuts would restrict investments in critical state and local government programs that support jobs and vital public services, including health care, education, transportation and social services that are critical investments and essential to working families. Deep cuts would also cost millions of jobs and harm our national security. The report of the National Commission on Fiscal Responsibility and Reform states, "...we must invest in education, infrastructure, and high-value research and development to help our economy grow, keep us globally competitive, and make it easier for businesses to create jobs."

States have already slashed budgets and reduced services to address budget shortfalls, and helpful Recovery Act assistance has all but run out. Instead of balancing the budget on the backs of middle-class families and the most vulnerable Americans, we should focus cuts on wasteful spending and make sure that the wealthiest in our society are paying their fair share.

3. A Balanced Budget Amendment Would Hurt Vulnerable Populations the Most

Much of the increased federal budget spending that automatically takes place during a recession benefits the unemployed, the poor, the elderly and the disabled; the people most adversely affected by an economic downturn. A balanced budget amendment would force cuts in spending on this population and endanger their access to health care, food stamps, childcare, jobs programs, and aging services precisely when they need help the most. Indiscriminate cuts to these programs will jeopardize the health, economic

security, and education of millions of Americans. We will fail to get the economy back on track, and an even heavier burden will fall on states that are already struggling to meet the needs of vulnerable populations.

The proposed ratio of spending to Gross Domestic Product (GDP), as low as 18% as proposed in S.J. Res. 10, is dangerously low– dipping far below national federal spending averages that pre-date the addition of a prescription drug benefit to Medicare, increased investments in homeland security necessary in a post-9/11 world, and the retirement of the baby boomers. Such low levels would eviscerate all federal programs indiscriminately. A balanced budget amendment would violate our responsibility, as stated by the National Commission on Fiscal Reform and Responsibility to, "protect the truly disadvantaged." They went on to note, "we must ensure that our nation has a robust, fair, affordable and sustainable safety net."

4. A Balanced Budget Amendment Would Undermine the Democratic Principle of Majority Rule

In requiring a supermajority vote threshold, the balanced budget amendment violates the democratic principle of majority rule. Some versions, including S.J. Res. 10, introduced by Sen. Orrin Hatch (R-UT), set unrealistically high thresholds to waive the congressional requirements to raise taxes, while other proposed amendments do the same thing to waive the requirements or to raise the debt limit. Under these restrictions, even if a majority of the House and Senate believe that it is in the national interest to waive the balanced budget requirement in order to deal with an economic downturn or some other emergency, a minority in either chamber could override the majority's will. The current difficulties in achieving cloture in the Senate and the overall impasse created by partisanship regarding annual budget and appropriations remind us every day that supermajorities are nearly impossible to achieve even when they are urgently needed.

The supermajority required to raise taxes would hamstring any attempts to lower the federal deficit, rob Congress of one of its constitutional responsibilities and violate the core democratic principle of majority rule. Ignoring the role of revenues in balancing the budget and reducing the deficit is irresponsible. This blind focus on spending cuts only without including revenues into the equation is a less than transparent effort to protect millionaires, billionaires, and corporations. Removing revenues from the equation is as senseless as removing spending reductions from the equation. Both should and must be on the table if we are to be realistic about addressing the deficit.

5. A Balanced Budget Amendment Would Inaugurate an Era of Judicial Budget Making

There is real concern over whether there is any enforcement mechanism in the balanced budget constitutional amendment. It is easy to require that the federal budget be balanced, but saying it does not make it so. Some supporters of the amendment have subtlety suggested that the amendment will not be enforced at all, that its effects are merely political so that members of Congress can claim credit for fiscal austerity without worrying about the consequences. However, others have suggested in the absence of clear enforcement language, the judicial branch will be compelled to take on this role, thus making unelected officials with no budget experience part of the day-to-day decision-making and enforcement process.

Bringing the courts into day-to-day budget decisions, stripping away much of the budget-making power intentionally charged to Congress by the Founding Fathers in the Constitution, would result in an abdication of legislative power to the judiciary.

Summary

In summary, if such an amendment were to pass, we believe it would absolutely wreck the U.S. economy. Adding a constitutional amendment to balance the federal budget is not a real solution to the problems we face. It would put the economy in a straitjacket, making it next to impossible to address changing economic circumstances. It would cripple the ability of the federal government to operate, and violate the democratic principle of majority rule. It would hurt citizens who rely on services provided by all levels of governments while they still struggle through hard times caused by the misdeeds of others.

Further, the amendment does not reflect the basic values of America. It would tarnish the enduring values of the U.S. Constitution by attempting to write into it economic policy which must remain flexible to address constantly changing conditions. For these reasons, AFSCME strongly opposes any version of the balanced budget constitutional amendment.

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November 29, 2011

The Honorable Dick Durbin, Chairman
Subcommittee on the Constitution, Civil Rights, and Human Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Lindsey Graham, Ranking Member
Subcommittee on the Constitution, Civil Rights, and Human Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Graham:

On behalf of the Public Policy Committee of AIDS United, and staff I write to express our opposition to S.J. Res. 3, S.J. Res 23, or any other proposed balanced budget amendment (BBA) to the United States Constitution. AIDS United fully understands the need to get the United States fiscal house in order, but a balanced budget amendment to the Constitution is not the solution to the current deficit situation we find the country in at this time. Many economists believe a balanced budget amendment would be a terrible idea. Macroeconomic Advisor (a nonpartisan mainstream firm) has said that, "any version of a balanced budget amendment would do significant harm to the American economy", according to an article entitled *Economic Forecasting Firm Harshly Criticizes Proposed Constitutional Balanced Budget Amendment* posted here at the Center for Budget and Policy Priorities.

The fact that the versions being considered in the Senate includes a provision for a supermajority vote of both the House of Representatives and the Senate to increase the debt ceiling is putting the minority party in control of the United States' credit worth. This is not a logical way to keep the United States' fiscal house in order, since political gridlock has become a mainstay lately in Washington.

We do not need to amend our Constitution to have a balanced budget. While Congress and the Administration strive to bring the budget as close to balanced as possible, there are many extenuating circumstances that often come to bear, such as wars, natural disasters, high unemployment, and need for government programs to cover safety net issues for the poor and disenfranchised. We must ensure the United States government is able to take care of those who are no longer able to care for themselves, especially those individuals that are living with or at risk for HIV/AIDS.

AIDS United is opposed to this legislation. We urge you to vote "No" on the Balanced Budget Amendment whenever it comes to the Senate floor.

Sincerely,

Ronald S. Johnson
Vice President of Policy and Advocacy

COALITION *for* HEALTH FUNDING

Emily J. Holubowich, MPP, Executive Director

December 2, 2011

Hon. Dick Durbin, Chairman
Subcommittee on the Constitution, Civil Rights and Human Rights
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Hon. Lindsey Graham, Ranking Member
Subcommittee on the Constitution, Civil Rights and Human Rights
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Graham:

The Coalition for Health Funding, comprised of more than 100 million patients, health care providers, public health professionals, and scientists, appreciates the opportunity to provide a written statement for the record on the Subcommittee on the Constitution, Civil Rights and Human Rights' hearing entitled, "A Balanced Budget Amendment: The Perils of Constitutionalizing the Budget Debate." The Coalition for Health Funding strongly opposes a balanced budget amendment to the United States Constitution and urges you to oppose any efforts to pass and ratify such an amendment.

A balanced budget constitutional amendment would endanger the federal government's ability to provide its core functions that are most necessary when times are difficult. In fact, an amendment requiring steep spending cuts, even when the economy is weak, would actually weaken our country's fiscal outlook. According to a recent analysis conducted by one of the nation's preeminent private economic forecasting firms, Macroeconomic Advisers, had a balanced budget amendment been in place and now enforced for fiscal year 2012, "the effect on the economy would be catastrophic." Cuts would need to total $1.5 trillion in 2012 alone – putting millions of Americans out of work, doubling the unemployment rate and shrinking the economy. Congress has even recognized that such an amount of deficit reduction could not be done in one year as the target for the Joint Select Committee on Deficit Reduction was nearly that amount over a decade.

Several versions of a balanced budget amendment have been proposed in the Senate and voted on in the House, including one that would impose an 18 percent cap on federal outlays and a two-third threshold in both chambers for tax increases, as well as one that would have neither of these mechanisms. Either of these proposals would expose domestic discretionary non-security spending to drastic cuts that are simply unsustainable. **For example, an approach that relied solely on discretionary spending cuts to meet an 18 percent cap would require the elimination of all domestic programs and half of the budget for the Department of Defense.**

Cavarocchi • Ruscio • Dennis Associates • 600 Maryland Avenue SW, Suite 935W • Washington, DC 20024 • T: 202-484-1100 • F: 202-434-1244

To cut such an amount of the federal budget would have an immeasurable impact on our nation's economy and security in terms of the public health continuum. Public health is the science and art of preventing disease and disability, promoting physical and behavioral wellness, supporting personal responsibility and prolonging and improving life in communities where people live, work, and learn. **A balanced budget amendment to the Constitution would do more harm than good.** Forcing such cuts via a balanced budget amendment could require the closure of the National Institutes of Health, the Food and Drug Administration, the Centers for Disease Control and Prevention, the Health Resources and Services Administration, Indian Health Service, the Substance Abuse and Mental Health Services Administration and the Agency for Healthcare Research and Quality. Each of these agencies performs key functions of the federal government, and contributes directly to our nation's strength. The implementation of devastating cuts to discretionary health funding that would limit our ability to, for example:

- **Discover the cures for illness and disease.** Investing in research will not only improve lives, but help save money. For example, the costs to Medicare and Medicaid and out-of-pocket expenses of treating Alzheimer's disease over the next 40 years will increase five-fold, from $172 billion annually to $1.08 trillion. The federal government should not divest in the search for an Alzheimer's cure when the financial burden of this disease is sky-rocketing.

- **Address the health workforce shortage.** In less than ten years the United States will not have enough health care providers and public health professionals to care for Americans; for example, experts estimate we'll need 200,000 more physicians and 1 million more nurses. We need greater investment in the next generation of health care providers and public health professionals to meet America's growing health needs.

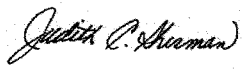
- **Reduce rates of chronic disease.** Health services research tells us that the treatment of chronic disease is 75 percent of all that we spend on health care. Within Medicare, spending growth is mostly attributable to diabetes, arthritis, heart disease, high blood pressure, and kidney disease that in most cases could have been prevented with public health investment. Chronic conditions also threaten our national security. Department of Defense data indicate that being overweight or obese is the leading medical reason why applicants fail to qualify for military service. Funding for state and community efforts that prevent chronic disease will reduce demands for high cost health care, enhance our national security, and improve people's health and well-being.

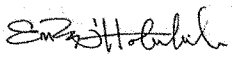
Congress should work to address the budget deficit, but not at the expense of the health and welfare of our families, our communities, and our nation, for our nation's strength is inextricably linked to our health. **A balanced budget amendment does more harm than good by putting our nation at greater risk in terms of our health, economy, and security.**

For more information on the impact of the balanced budget amendment on health, please

contact Emily Holubowich (202-484-1100 or eholubowich@dc-crd.com) or visit the Coalition for Health Funding's Website, www.publichealthfunding.org.

Sincerely,





Judy Sherman
President

Emily J. Holubowich
Executive Director

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November 29, 2011

Hon. Richard Durbin
Chairman, Senate Judiciary Committee
Subcommittee on the Constitution, Civil
Rights and Human Rights
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Durbin:

To assist the Subcommittee in its consideration of the issues to be presented at its November 30, 2011 hearing on "A Balanced Budget Amendment: The Perils of Constitutionalizing the Budget Debate," we write to briefly chronicle why a Balanced Budget Amendment would be a stark departure from our Constitution's scheme of government created more than two centuries ago. The proposals for a Balanced Budget Amendment pending before the 112th Congress vary greatly in their particulars, but share the same general defect: they are inconsistent with the founding generation's vision of an agile, responsive, and effective federal government with broad powers to protect national security and solve national problems. Out of sync with the fundamental principles underlying our constitutional order for the last 224 years, the proposed Amendments would tie Congress' hands and disable our national government from properly responding to serious national problems. We face a high duty when amending the Constitution: to match the Framers' maturity and foresight. A Balanced Budget Amendment flunks this test.

Congress's express powers to raise and spend money for the general welfare are at the heart of our Constitution. It is no accident that the first two enumerated powers that Article I, Section 8 of the Constitution vests in Congress – even before the commerce power – are "[t]o lay and collect Taxes . . . to pay the Debts and provide for the common Defense and general Welfare of the United States" and "[t]o borrow money on the credit of the United States."[1] The Constitution's broad textual grant of power was a direct response to the failed Articles of Confederation, which imposed crippling restrictions on Congress' power to borrow and tax. These restrictions had plagued the Revolutionary War effort and made a deep and lasting impression on George Washington and other war veterans. As General Washington wrote to Alexander Hamilton in 1783, if broad powers were not conferred on the federal government, "the blood we have spilt, in the course of an eight years' war, will avail us nothing."[2]

Although Congress under the Articles could nominally borrow money to serve the common good, it was entirely reliant on the states to finance these efforts. Congress could not

[1] U.S. CONST., ART. I, § 8.
[2] *See* 1 WORKS OF ALEXANDER HAMILTON 342 (John Hamilton ed. 1850).

borrow or appropriate funds without nine votes from the states – a two-thirds supermajority. Centralized revenue was necessary, but revenue-raising measures had to pass the even higher threshold of unanimity. Indeed, as Professor Akhil Amar writes, New York's veto of the revenue plan to pay the war debts in 1786 was "the last straw, confirming the imbecility of the Confederation and the practical impossibility of reforming the Articles from within."[3] In response to the failure of the Articles, our Constitution "form[s] a more perfect Union,"[4] predicated upon the promise of effective government, including the express powers to borrow and tax for the general welfare.

History vindicates the Founders' wisdom in giving Congress ample tools to respond to national crises and problems, including by borrowing money and contracting a debt. Debt helped fund the War for Independence, complete the Louisiana Purchase, and preserve the Union during the Civil War. Debt not only helped us weather the Great Depression, but it also gave us the tools we needed to emerge victorious from two world wars. In short, because of the Founders' wisdom in giving Congress broad, express constitutional powers to borrow and tax, our country has grown, prospered, and survived to become the great nation it is today. Proposals to amend the Constitution to require a balanced budget fly in the face of both the Framers' carefully crafted constitutional design and our experience of living under the Constitution for more than two centuries.

Moreover, in creating a supermajority requirement, the sponsors of Balanced Budget Amendment proposals do violence to another central tenet of the Framers' project: the need for majority rule. The Framers of the Constitution made majority rule the default rule for our democratic government. As Thomas Jefferson wrote, majority rule "is the natural law of every assembly of men, whose numbers are not fixed by another law."[5] The Constitution specifies a handful of departures from this default rule, but each exception warrants a particular justification that is consistent with the Constitution's democratic structure. Nowhere does our Constitution burden a substantive enumerated congressional power with the leaden weight of a supermajority.

Finally, in a Constitution filled with broad principles of governance, a Balanced Budget Amendment would be fundamentally out of place and could not be enforced without a massive transfer of budgetary authority from Congress to the courts. Lawsuits would abound, and courts would be forced into an activist, political role. As Robert Bork noted in opposing a Balanced Budget Amendment more than three decades ago, "[b]y the time the Supreme Court straightened the whole matter out, the budget in question would be at least four years out of date and lawsuits involving the next three fiscal years would be slowly climbing towards the Supreme Court."[6] The nation's budget would be in a perpetual state of doubt, and the courts would be thrust into the task of formulating budgetary policy in the process of devising a remedy for an unconstitutional budget, activity far outside the judicial ken. The result would be judicial activism run amok.

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[3] *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 312 n.* (2005)

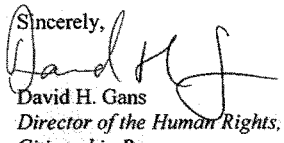
[4] U.S. CONST., preamble.

[5] *See* THE JEFFERSON CYCLOPEDIA: A COMPREHENSIVE COLLECTION OF THE VIEWS OF THOMAS JEFFERSON 525, 735 (John P. Foley ed. 1900).

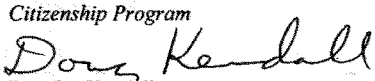
[6] Robert Bork, *On Constitutional Economics*, AM. ENT. INST. J. ON GOV'T & SOC'Y 14, 18 (Sept-Oct 1983).

We thank the Subcommittee for providing a forum to discuss these significant issues, which are of great consequence to every American and particularly to those of us who work to secure the Constitution's promise of effective government of, by, and for the people.

Sincerely,



David H. Gans
Director of the Human Rights, Civil Rights and Citizenship Program



Douglas Kendall
Founder and President
CONSTITUTIONAL ACCOUNTABILITY CENTER

cc: Members of the Senate Judiciary Committee,
Subcommittee on the Constitution, Civil
Rights and Human Rights

July 28, 2011

President Barack Obama
The White House
Washington, D.C.

The Honorable John Boehner
United States House of Representatives
Washington, D.C.

The Honorable Nancy Pelosi
United States House of Representatives
Washington, D.C.

The Honorable Harry Reid
United States Senate
Washington, D.C.

The Honorable Mitch McConnell
United States Senate
Washington, D.C.

Dear President Obama, Speaker Boehner, Minority Leader Pelosi, Majority Leader Reid, and Minority Leader McConnell,

We, the undersigned economists, urge the rejection of proposals to add a balanced-budget amendment to the U.S. Constitution. While the nation faces significant fiscal problems that need to be addressed through measures that start to take effect after the economy is strong enough to absorb them, writing a requirement into the Constitution that the budget be balanced each year would represent very unsound policy. Adding additional restrictions, as some balanced budget amendment proposals would do, such as an arbitrary cap on total federal expenditures, would make the balanced budget amendment even worse.

1. A balanced budget amendment would mandate perverse actions in the face of recessions. In economic downturns, tax revenues fall and some outlays, such as unemployment benefits, rise. These so-called built-in stabilizers increase the deficit but limit declines of after-tax income and purchasing power. To keep the budget balanced every year would aggravate recessions.

2. Unlike many state constitutions, which permit borrowing to finance capital expenditures, the federal budget makes no distinction between capital investments and current outlays. Private businesses and households borrow all the time to finance capital spending. A balanced budget amendment would prevent federal borrowing to finance expenditures for infrastructure, education, research and development, environmental protection, and other investment vital to the nation's future well being.

3. A balanced budget amendment would invite Congress to enact unfunded mandates, requiring states, localities, and private businesses to do what it cannot finance itself. It also invites dubious accounting maneuvers (such as selling more public lands and other assets and counting the proceeds as deficit-reducing revenues), and other budgetary gimmicks. Disputes on the meaning of budget balance would likely end up in the courts, resulting in judge-made economic policy. So would disputes about how to balance an unbalanced budget when Congress lacks the votes to inflict painful cuts.

4. Balanced budget amendment proposals typically contain escape hatches, but in peacetime they require super-majorities of each House to adopt an unbalanced budget or to raise the debt limit. These provisions are recipes for gridlock.

5. An overall spending cap, which is part of some proposed amendments, would further limit Congress's ability to fight recessions through either the built-in automatic stabilizers or deliberate changes in fiscal policy. Even during expansions, a binding spending cap could harm economic growth because increases in high-return investments — even those fully paid for with additional revenue — would be deemed unconstitutional if not offset by other spending reductions. A binding spending cap also would mean that emergency spending (for example on natural disasters) would

necessitate reductions elsewhere, leading to increased volatility in the funding for non-emergency programs.

6. A Constitutional amendment is not needed to balance the budget. The budget not only attained balance, but actually recorded surpluses and reduced debt, for four consecutive years after Congress enacted budget plans in the 1990s that reduced spending growth and raised revenues. This was done under the existing Constitution, and it can be done again. No other major nation hobbles its economy with a balanced-budget mandate. There is no need to put the nation in an economic straitjacket. Let the President and Congress make fiscal policies in response to national needs and priorities as the authors of our Constitution wisely provided.

7. It is dangerous to try to balance the budget too quickly in today's economy. The large spending cuts and/or tax increases that would be needed to do so would greatly damage an already-weak recovery.

Signed,

Kenneth Arrow
Stanford University
Winner of the Nobel Prize in Economics and the John Bates Clark Medal, and Past President of the American Economic Assn.

Peter Diamond
Massachusetts Institute of Technology
Winner of the Nobel Prize and Past President of the American Economic Association

William Sharpe
Emeritus, Stanford University
Winner of the Nobel Prize in Economics

Charles Schultze
Emeritus, Brookings Institution
former Chairman of the Council of Economic Advisers and Past President of the American Economic Assn.

Alan Blinder
Princeton University
Former Vice Chairman of the Board of Governors of the Federal Reserve System and former member of the Council of Economic Advisers

Eric Maskin
Princeton University
Winner of the Nobel Prize in Economics

Robert Solow
Massachusetts Institute of Technology
Winner of Nobel Prize in Economics and the John Bates Clark Medal, and Past President of the American Economic Assn.

Laura Tyson
University of California, Berkeley
Former Chair of the Council of Economic Advisers and former Director of the National Economic Council

The Advantages of a Balanced Budget Amendment

Diana Furchtgott-Roth
Senior Fellow, Manhattan Institute

Testimony before the Subcommittee on the Constitution, Civil Rights and Human Rights of the Senate Committee on the Judiciary

November 30, 2011

The Advantages of a Balanced Budget Amendment

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Chairman Durbin, members of the Committee, I am honored to be invited to testify before you today on the subject of the advantages of a balanced budget amendment. I am a senior fellow at the Manhattan Institute. From 2003 until April 2005 I was chief economist at the U.S. Department of Labor. From 2001 until 2002 I served at the Council of Economic Advisers as chief of staff. I have served as Deputy Executive Secretary of the Domestic Policy Council under President George H.W. Bush and as an economist on the staff of President Reagan's Council of Economic Advisers.

With the Super Committee failing to cut spending by $1.2 trillion over the next decade, there is no better time to examine the federal budget process.

The deficit for fiscal year 2011 reached $1.3 trillion. According to the Congressional Budget Office, the deficits as a percentage of GDP for 2009, 2010 and 2011 have been the largest since the end of World War II.

One approach is to raise additional tax revenue to bridge the gap. President Obama proposed a five percent surtax on millionaires as part of the American Jobs Act. That bill was defeated in the Senate on October 11.

In September the president proposed raising the two top brackets to 2000 levels, which would have affected individuals with taxable income over $200,000 and joint filers with over $250,000—despite making the case to the country in December 2010 that these tax rates should stay at current levels. This proposal is not being actively considered by Congress at present.

Another approach is to cut spending. The budget resolution passed by the House of Representatives for fiscal year 2012 would cut $6 trillion from spending over the next decade, and bring outlays to 2008 levels. But the Senate has failed to pass a budget for over two years.

Budget reform would make it more difficult for Congress to spend taxpayer dollars. Currently few limits exist on congressional spending, and Congress finds innumerable ways to get around its self-imposed rules.

Corporations may be evil, according to the Occupy Wall Street crowd, but at least they have to stick to a budget. Their accounts must adhere to Generally

Accepted Accounting Principles, or GAAP. Shareholders, accounting firms, and the Internal Revenue Service carefully review different sets of books. No corporation would be able to get away with the accounting practices used by Uncle Sam.

One example of a budget gimmick that recently made news is the Community Living Assistance Services and Supports program, the CLASS Act, a long-term care insurance program passed as part of the new health care law. Since payouts from the CLASS Act would have started five years after the program began collecting insurance premiums, the program showed a net gain of $86 billion in the decade 2010 to 2020. This "gain" lowered the cost of the new health care law within the ten-year window required for scoring revenue effects of legislation.

The program would have lost money in subsequent decades because the premiums collected would not have covered the expenses from long-term care for the beneficiaries. The Department of Health and Human Services Secretary Katherine Sibelius admitted on October 14 that HHS actuaries could not find a way to make the program fiscally solvent, so she was ending the program. The way the program was originally scored made it look like a revenue raiser, but in the long run it would have been a drain on the budget. Now, the health care plan will appear to cost more over the next decade.

Senator Jeff Sessions (R-AL), ranking member of the Senate Budget Committee, told me in a telephone conversation on October 14, "In a time of debt crisis, Congress first has to have a budget, then has to adhere to that budget. It's been almost 900 days since the Senate last passed a budget."

Mr. Sessions, in a bill cosponsored by Senator Olympia Snowe (R-ME) called the Honest Budget Act, has proposed changes to the budget process to try to limit congressional budgeting gimmicks. Since 2005, Congress has spent more than $350 billion using the maneuvers outlined in his bill, according to estimates by the Congressional Budget Office and the Office of Management and Budget.

The Honest Budget Act contains eminently sensible suggestions to improve the budget process, such as scoring transfers from general revenues to the Highway Trust Fund; scoring emergency funding; including the probability of lender defaults in federal loan guarantees; and tying appropriations to a budget passed by Congress.

A balanced budget amendment would be a more substantial change. Such fundamental budget process reform would stem the tide of red deficit ink spewing from Washington.

Congress has considered many balanced budget amendments in the past. These are summarized in a recent study by the Congressional Research Service.[1] Versions in nine congressional sessions did not pass either chamber. The Senate approved one in 1982, sponsored by South Carolina Senator Strom Thurmond. The House passed one in 1995, sponsored by Texas Representative Joe Barton. In each instance, the sponsor was a Republican and the GOP had a majority.

If our politicians were able to craft series of budgets on their own that did not result in continually wider deficits, a balanced budget amendment to the constitution would not be necessary. But the budget process has broken down. The deficit is at $1.3 trillion this year, or 8.7 percent of GDP. Total outstanding public debt is projected to be 100 percent of GDP this year.

Imagine that the balanced amendments of 1982 and 1995 had passed both chambers of Congress and had gone on to be ratified by three-quarters of the states. Today America would have been in a far stronger fiscal position. No trillion dollar deficits, no 100 percent levels of gross public debt.

Everyone prefers politicians to restrain government spending through the existing budget process. But politicians appear to be incapable of doing so, not just in the United States, but also in many European countries, which has led to the current crisis in the Eurozone. States, which are not allowed to run deficits, manage to balance their budgets. Even with its imperfections, a balanced-budget amendment would be a step in the right direction, an improvement on what we have now.

Balanced budget amendments proposed in the 112th Congress come in several versions.

H.J. Res. 1 in the House and S.J. Res. 10 in the Senate would require the president to submit a balanced budget to Congress every year, and would cap spending both relative to a measure of revenues, and as a percent of economic output. Both Senate and House versions call for a supermajority of three-fifths or two-thirds of members to vote for spending and debt above pre-set levels, as well as to approve tax increases.

If each chamber gives a two-thirds supermajority to the proposed balanced budget amendment, it then goes to the states for approval. Approval by three-fourths of them, or 38, is necessary. The most recent amendment, the twenty-seventh, was ratified in 1992, and holds that salary increases for members of Congress can take effect only at the start of the next House term.

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[1] James V. Saturno and Megan Suzanne Lynch, "A Balanced Budget Constitutional Amendment: Background and Congressional Options," Congressional Research Service, July 8, 2011.

Under the balanced budget amendments under consideration in this Congress, a three-fifths majority of all members in each chamber would be required to increase the public debt, or authorize additional spending over what had been specified.

Revenue increases by virtue of tax legislation and any outlays above 18 percent of economic product would have to be approved by two-thirds of all members of each chamber.

One can quibble with details of this proposed constitutional amendment, but the philosophy behind it is laudable.

A balanced budget amendment would impose spending discipline, and would protect the American economy against the down-to-the wire bargaining over spending and taxes that is a habitual feature of our budget process.

And it is clear that America is in disarray. Just look at the headlines in last week's papers, with the failure of the Super Committee, and the ensuing fall in stock markets. Or the headlines last December, when taxpayers did not know what tax rates they would face on January 1. Although a two-year tax package was passed at the end of 2010, some members of Congress are today trying to revisit tax hikes. Is this any way to run America?

Additional certainty about fiscal policy would make investment and consumption decisions easier, and would facilitate economic growth and job creation. With unemployment at 9 percent, after cumulative deficits of trillions of dollars, we clearly need another path.

What we have seen since World War II is that the government is profligate and incapable of disciplining itself when it comes to spending. It writes laws that lead to increased spending over time without further congressional action, so-called entitlements such as Medicare and food stamps.

There are significant differences between the House and the Senate versions of the Balanced Budget Amendment, and, of the two, the Senate version is more practical.

The House version uses "economic output" as a base to calculate outlays. "Economic output" is poorly-defined. The Senate version uses gross domestic product. Although GDP is not defined in law, the Department of Commerce has a standard published measure, which is used by the Congressional Budget Office and the Office of Management and Budget.

The House amendment limits outlays to 18 percent of current economic output, making it difficult to know the precise target at the time that Congress is fashioning the budget. In the House version, the balanced budget amendment depends on the accuracy of forecasters. If revenues or GDP fall below forecast, the amendment might be violated—with no mechanism to cut back excess spending. For that reason, critics of such an amendment portray it as more symbolic than binding.

In contrast, the Senate version ties outlays to 18 percent of GDP in the prior calendar year. Hence, the budget now under construction would be based on GDP in 2010.

The final GDP figure for calendar year 2010 was only available in March 2011. This timing is adequate for Congress, but not for the president, who sends his budget to Congress the first week in February. The president starts working on the FY 2012 budget in the fall of 2010, when even third quarter GDP is unknown. But if the FY 2012 budget were based on GDP in calendar year 2009, guidelines and limits would be clear to the president as well as to Congress.

Another way of structuring a balanced budget amendment would be to tie spending in a given year to revenues three years earlier, or some multiple of revenues three years earlier. This would mean that the president and Congress would know in advance unequivocally how much money to spend. It would know that it could not spend more than revenues from calendar year 2009, which ended December 31, 2009.

Pegging spending to a measure of revenues three years earlier might reduce Congress's incentive to raise taxes, because additional revenue could be spent only three years in the future. This would always be after the next election for members of the House of Representatives. So, even if two-thirds of members wanted to raise taxes, they could not spend the money right away, giving them a disincentive to raise taxes for pet projects in their districts or at the request of lobbyists who might be contributing to their campaigns.

In addition, both measures would not allow spending in a fiscal year to exceed projected receipts for that fiscal year. This is difficult to calculate, and should be changed to actual receipts two years back.

In the absence of a recession, receipts as a percent of GDP have generally exceeded 18 percent, so the binding constraint on spending would be 18 percent of revenues collected in the prior year, or prior two years.

However, in a recession year, such as 2010, when receipts as a percent of GDP were 15 percent, this would prevent counter-cyclical spending on unemployment

benefits, Medicaid, Food Stamps, and other safety net measures unless two-thirds of members were convinced that additional spending was necessary.

One modification might be to have a "rainy day fund" that is exempt from the limits, and that could be set aside for recessions. As the amendments are worded, there is no provision for spending such funds because outlays are generally limited to 18 percent of GDP and to outlays in a particular year.

The rainy day fund for recessions could be set aside from surplus funds in high-growth periods, just as states reserve rainy day funds. If deficit spending in a recession is discouraged for the federal government, just as it is for states, then the government should be provided with a way of ensuring that it has a means of meeting demands on social safety net programs during a recession.

With regard to wartime, the proposed amendments are, if anything, too flexible, allowing room for increased spending. Balanced budget provisions are waived for any year in which a declaration of war is in effect, or when the United States is engaged in military conflict. Then, a simple majority of members in both chambers can waive the amendment.

Yet for the past 10 years we have been engaged in military conflicts in Afghanistan, Iraq, Libya, and Somalia. Hence, as worded, the current version of the amendment would have been already overridden. In my opinion, an exception should be made only for a declaration of war by the United States against another country. Even in this case, the exceptions should be limited to military spending, rather than to all spending. Otherwise, Congress has an excuse to restart the spending machine once again.

Another possible improvement would be to change the way spending programs are funded. Currently, programs are constructed so as to obligate the government to pay programs indefinitely. This leads to the current result that an increasingly larger share of the budget is obligated by prior Congresses, because few politicians have the courage to reduce benefits.

In contrast, if Congress could vote for a new program only as a percent of total spending, then the upward trend in program expenses would have to be approved as the program expanded. A housing program, for instance, could be set at 1.5 percent of spending. If revenues fell in a recession year, Congress would have to vote to maintain spending at the prior level.

Even better, Congress should get rid of the concept of entitlements, and put all expenses under the appropriations process. It is an abdication of responsibility to say that prior Congresses obligate the current Congress to spend money. Instead, Congress should pass a law that says that no money gets spent unless it

gets specifically voted out each year. This could happen with a one-sentence law: "Notwithstanding any other provision of law, the United States shall expend no funds and shall be responsible for no liabilities and guarantees, except in amounts as specifically appropriated annually by Congress."

Congress should also consider putting the federal government on Generally Accepted Accounting Principles, like businesses. Congress has exempted itself from GAAP, and has adopted accounted conventions that only apply to the federal government. To most accountants, the federal budget is nonsensical.

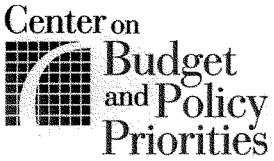
If the federal government had to file its accounts under GAAP, our current measures of both deficit and public debt would be much greater. Today, no obligations are counted beyond 10 years. They just do not exist. We count our deficit and debt on a cash basis, with no accrual accounting. Therefore, obligations decades out do not show up. This should change.

America would benefit economically from regaining control over our spending. The American people share this view, because most members of Congress were elected on a platform of spending cuts—although not all had the same cuts in mind.

In the absence of fiscal discipline from our politicians, some form of balanced budget amendment would improve the budget process, put spending on a lower path, and increase GDP growth.

The U.S. budget faces deficits as far as the eye can see. It is a sad commentary on our budget process that these deficits, with open budgeting, would actually be even larger than they now appear. Perhaps restoring some sense to budget rules would rescue Congress from its low approval ratings and rehabilitate its reputation with the public.

Thank you for giving me the opportunity to testify today. I would be glad to answer any questions you might have.



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Testimony of Robert Greenstein, President, Center on Budget and Policy Priorities, Before the Subcommittee on the Constitution, Civil Rights and Human Rights Hearing Entitled, "A Balanced Budget Amendment: The Perils of Constitutionalizing the Budget Debate"

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Thank you for the invitation to testify today. I am Robert Greenstein, president of the Center on Budget and Policy Priorities, a policy institute that focuses both on fiscal policy and on policies affecting low- and moderate-income Americans. We, like most others who analyze fiscal policy developments and trends, believe that the nation's fiscal policy is on an unsustainable course. As part of our work, we have been analyzing proposed changes in budget procedures for more than 20 years. We have conducted extensive analyses of proposals to write a balanced-budget requirement into the Constitution, among other proposals.

The purpose of changing our fiscal policy course is to strengthen our economy over the long term and to prevent the serious economic damage that would likely occur if the debt explodes in future decades as a share of the economy. But we need to choose our fiscal policy instruments carefully. We want to avoid "destroying the village in order to save it."

The goal of a constitutional balanced budget amendment is to address our long-term fiscal imbalance. Unfortunately, a constitutional balanced budget amendment would be a highly ill-advised way to try to do that and likely would cause serious economic damage. It would require a balanced budget every year regardless of the state of the economy, unless a supermajority of both houses overrode that requirement. This is an unwise stricture that large numbers of mainstream economists have long counseled against, because it would require the largest budget cuts or tax increases precisely when the economy is weakest. It holds substantial risk of tipping faltering economies into recessions and making recessions longer and deeper. The additional job losses would likely be very large.

When the economy weakens, revenue growth drops and revenues may even contract. And as unemployment rises, expenditures for programs like unemployment insurance — and to a lesser degree, food stamps and Medicaid — increase. These revenue declines and expenditure increases are temporary; they largely disappear as the economy recovers. But they are critical for helping to keep struggling economies from falling into a recession and for moderating the depth and length of recessions that do occur.

When the economy weakens, consumers and businesses spend less, which in turn causes further job loss. The drop in tax collections and increases in unemployment and other benefits that now occur automatically when the economy weakens cushions the blow, by keeping purchases of goods and services from falling more. That is why economists use the term "automatic stabilizers" to describe the automatic declines in revenues and automatic increases in UI and other benefits that occur when the economy turns down; these actions help stabilize the economy.

A constitutional balanced budget amendment, however, effectively suspends the automatic stabilizers. It requires that federal expenditures be cut or taxes increased to offset the effects of the automatic stabilizers and prevent a deficit from occurring — the opposite course from what sound economic policy calls for.

Over the years, leading economists have warned of the adverse effects of a constitutional balanced budget amendment. In Congressional testimony in 1992, Robert Reischauer — then director of the Congressional Budget Office and one of the nation's most respected experts on fiscal policy — explained: "[I]f it worked [a constitutional balanced budget amendment] would undermine the stabilizing role of the federal government." Reischauer noted that the automatic stabilizing that occurs when the economy is weak "temporarily lowers revenues and increases spending on unemployment insurance and welfare programs. This automatic stabilizing occurs quickly and is self-limiting — it goes away as the economy revives — but it temporarily increases the deficit. It is an important factor that dampens the amplitude of our economic cycles." Under the constitutional amendment, he explained, these stabilizers would no longer operate automatically.[1]

Similarly, when a constitutional balanced budget amendment was under consideration in 1997, more than 1,000 economists including 11 Nobel laureates issued a joint statement that said, "We condemn the proposed 'balanced-budget' amendment to the federal Constitution. It is unsound and unnecessary. … The proposed amendment mandates perverse actions in the face of recessions. In economic downturns, tax revenues fall and some outlays, such as unemployment benefits, rise. These so-called "built-in stabilizers' limit declines of after-tax income and purchasing power. To keep the budget balanced every year would aggravate recessions."[2] This summer, five Nobel laureates in economics issued a new statement opposing a constitutional balanced budget amendment for this reason.

Earlier this year, the current CBO director, Douglas Elmendorf, sounded a similar warning when asked about a constitutional balanced budget amendment at a Senate Budget Committee hearing. Elmendorf observed:

> "Amending the Constitution to require this sort of balance raises risks .... [t]he fact that taxes fall when the economy weakens and spending and benefit programs increase when the economy weakens, in an automatic way, under existing law, is an important stabilizing force for the aggregate economy. The fact that state governments need to work … against these effects in their own budgets — need to take action to raise taxes or cut spending in recessions — undoes the automatic

[1] Statement of Robert D. Reischauer before the House Budget Committee, May 6, 1992.

[2] This statement was issued on January, 30, 1997.

> stabilizers, essentially, at the state level. Taking those away at the federal level risks making the economy less stable, risks exacerbating the swings in business cycles." [3]

Finally, a month ago, Macroeconomic Advisers (MA) analyzed the economic impacts of a constitutional balanced budget amendment. One of the nation's preeminent private economic forecasting firms, Macroeconomic Advisers provides analysis to major corporations and government entities, such as the President's Council of Economic Advisors under President's of both parties, including Presidents Reagan and George W. Bush.

MA concluded that if a constitutional balanced budget amendment had already been ratified and were now being enforced for fiscal year 2012, "the effect on the economy would be catastrophic." If the 2012 budget were balanced through spending cuts, MA found, those cuts would total about $1.5 trillion in 2012 alone — and would throw about 15 million more people out of work, double the unemployment rate from 9 percent to approximately 18 percent, and cause the economy to shrink by about 17 percent instead of growing by an expected 2 percent.

Even if a BBA were implemented when the budget was already in balance, MA concluded, it would still put "new and powerful uncertainties in play. The economy's 'automatic stabilizers' would be eviscerated [and] discretionary counter-cyclical fiscal policy would be unconstitutional .... Recessions would be deeper and longer."

MA also warned that "The pall of uncertainty cast over the economy if it appeared a BBA could be ratified and enforced in the middle of recession or when the deficit was still large would have a chilling effect on near-term economic growth." MA concluded that a BBA would have detrimental effects on economic growth in both good times and bad.

Proponents of a constitutional amendment often respond to these admonitions by noting that the proposed constitutional amendment would allow the balanced-budget requirement to be waived by a vote of three-fifths of the House and the Senate, so the BBA would be set to the side in recessions. But this response is too facile, and the three-fifths waiver provision does not solve the problem. It is difficult to secure three-fifths votes for anything; consider the paralysis that marks much of the work of the Senate. Moreover, it may take months after a downturn begins before sufficient data are available to convince three-fifths of the members of both houses of Congress that a recession is underway. Furthermore, it is all too likely that even after the evidence for a downturn is clear, a minority in the House or Senate would hold a wavier vote hostage to demands for concessions on other matters (such as new, permanent tax cuts). By the time that a recession were recognized to be underway and three-fifths votes were secured in both chambers, if such support could be obtained at all, extensive economic damage could have been done and hundreds of thousands or millions of additional jobs unnecessarily lost.

The bottom line is that the automatic stabilizers need to continue to be able to work automatically to protect American businesses and workers. The balanced budget amendment precludes that.

Nor is a recession the only concern. Consider the savings and loan crisis of the 1980s, or the financial meltdown of the fall of 2008. A constitutional balanced budget amendment would have

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[3] Federal Service, Transcript of Senate Budget Committee hearing, January 27, 2011.

hindered swift federal action to rescue the savings and loan industry or to rapidly put the Troubled Assets Relief Program in place. In both cases, history indicates that federal action helped save the economy from what otherwise likely would have been far more dire problems.

Moreover, the federal government provides deposit insurance for accounts of up to $250,000; this insurance — and the confidence it engenders among depositors — is critical to the sound functioning of our financial system so that we avoid panics involving a run on financial institutions, as occurred in the early 1930s. A constitutional prohibition of any deficit spending (unless and until a supermajority of both houses of Congress voted to authorize it) could seriously weaken the guarantee that federal deposit insurance provides. That is a risk we should not take.

These are illustrations of why fiscal policy should not be written into the Constitution.

A parallel problem is that the proposed constitutional amendment would make it even harder than it already is to raise the debt limit, by requiring a three-fifths vote of both the House and Senate to raise the limit. This is playing with fire. It would heighten the risk of a federal government default. A default would raise our interest costs and could damage the U.S. economy for years to come.

Mistaken Analogies to States and Families

Proponents of a constitutional amendment sometimes argue that states and families must balance their budgets every year and the federal government should do so, too. But statements that the constitutional amendment would align federal budgeting practices with those of states and families are mistaken.

While states must balance their *operating* budgets, they can borrow to finance their *capital* budgets — to finance roads, schools, and other projects. Most states do so. States also can build reserves during good times and draw on them in bad times *without* counting the drawdown from reserves as new spending that unbalances a budget.

Families follow similar practices. They borrow — they take out mortgages to buy a home or student loans to send a child to college. They also draw down savings when times are tight, with the result that their expenditures in those periods exceed their current incomes.

But the proposed constitutional amendment would bar such practices at the federal level. The *total* federal budget — including capital investments — would have to be balanced every year, with no borrowing allowed for infrastructure or other investments that can boost future economic growth. And if the federal government ran a surplus one year, it could *not* draw it down the next year to help balance the budget.

I would also note that the fact that states must balance their operating budgets even in recessions makes it all the more important from the standpoint of economic policy that the federal government *not* be subject to the same stricture. American Enterprise Institute analyst Norman Ornstein addressed this matter in an article earlier this year, where he wrote: "Few ideas are more seductive on the surface and more destructive in reality than a balanced budget amendment. Here is why: Nearly all our states have balanced budget requirements. That means when the economy slows, states are forced to raise taxes or slash spending at just the wrong time, providing a fiscal drag when

what is needed is countercyclical policy to stimulate the economy. In fact, the fiscal drag from the states in 2009-2010 was barely countered by the federal stimulus plan. That meant the federal stimulus provided was nowhere near what was needed but far better than doing nothing. Now imagine that scenario with a federal drag instead."[4]

S.J. Res. 10 and S.J. Res 23 Raise Additional Issues

The foregoing concerns apply to all versions of the balanced budget amendment that have been introduced. Some versions of the balanced budget amendment, such as S.J. Res 10 and S.J. Res 23, which are identical, raise additional concerns, because they would write into the Constitution new barriers to raising any revenues — including closing wasteful tax loopholes — to help balance the budget and also would prohibit federal expenditures in any year from exceeding a figure such as 18 percent of the Gross Domestic Product in the previous calendar year. These constitutional requirements could be overridden only by supermajority votes in both the House and the Senate.

This requirement for a supermajority to raise taxes would be extremely unwise. It would protect what President Reagan's former chief economic advisor, Harvard economist Martin Feldstein, has called the biggest area of wasteful government spending in the federal budget — what economists call "tax expenditures" and Alan Greenspan has called "tax entitlements."

In 2010, tax expenditures amounted to $1.1 trillion, more than the cost of Medicare and Medicaid combined (which was $719 billion), Social Security ($701 billion), defense ($689 billion, including expenditures in Iraq and Afghanistan), or non-defense discretionary spending ($658 billion, including expenditures from the Recovery Act). Many of these tax expenditures are fully the equivalent of government spending. Let me use child care as an example.

If you are low- or moderate-income, you may get a federal subsidy to help cover your child care costs, and the subsidy is provided through a spending program. If you are higher on the income scale, you still get a government subsidy that reduces your child care costs, but it is delivered through the tax code, as a tax credit. (Moreover, if you are a low- or moderate-income parent with child care costs, you likely will miss out because the spending programs that provide child care subsidies are *not* open ended and can only serve as many people as their capped funding allows. By contrast, if you are a higher income household — and there is no limit on how high your income can be — your child care subsidy is *guaranteed*, because the tax subsidy that you get operates as an open-ended entitlement.) It is difficult to justify making the tax-code subsidy sacrosanct and the program subsidy a deficit-reduction target merely because one is delivered through a "spending" program and the other is delivered through the code.

And as the child care example illustrates, sharply distinguishing between subsidies delivered through the tax code and those delivered through programs on the spending side of the budget also has a "reverse Robin Hood" aspect. Low- and moderate-income households receive most of their government assistance through spending programs; affluent households receive most of their federal subsidies through tax expenditures. Effectively barring reductions in tax expenditures from contributing to deficit reduction is a prescription for placing the greatest burden of deficit reduction on those who can least afford to bear it.

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[4] Norman Ornstein, "Four Really Dumb Ideas That Should Be Avoided," *Roll Call*, January 26, 2011.

The problems do not stop there. If it requires a supermajority to raise any revenue, another likely outcome is a proliferation of tax loopholes. New loopholes — including loopholes that Congress *did not intend* but that high-priced tax lawyers and accountants have found ways to create — could become untouchable once they appeared, because it would require a supermajority of the House and Senate to raise any revenue. It would become more difficult to close tax loopholes that opened up, since (under S.J. Res 10 and S.J. Res 23) special-interest lobbyists could block such action simply by securing the votes of one-third plus one member in one chamber.

Finally, as noted, S.J. Res 10 and S.J. Res 23 would bar federal spending from exceeding 18 percent of GDP in the *prior calendar year*, which translates into a limit of about 16.6 percent of the *current fiscal year's* GDP. To hit that level would require cuts of a truly draconian nature. Consider the austere budget that the House of Representatives passed on April 15, sometimes referred to as the Ryan budget. Under that budget, Medicare would be converted to a voucher system under which, the Congressional Budget Office has said, beneficiaries' out-of-pocket health-care costs would nearly triple by 2030 (relative to what those costs would be that year under the current Medicare program). CBO also has written that under the Ryan budget, federal Medicaid funding in 2030 would be 49 percent lower than it would be if the Affordable Care Act's Medicaid expansion were repealed but Medicaid otherwise was unchanged. And funding for non-security discretionary programs would be cut more than one-third below its real 2010 level. Yet CBO says that under this budget, total federal spending would be *20¾ percent of GDP in 2030*, so it would breach the allowable limit under S.J. Res 10 and S.J. Res 23 by four percentage points of GDP. This illustrates the draconian nature of the proposed 16.6 percent-of-current-GDP requirement.

Another way to look at this stricture is to examine federal expenditures under Ronald Reagan. Under President Reagan, who secured deep budget cuts at the start of his term, federal expenditures averaged 22 percent of GDP. And that was at a time *before* any members of the baby boom generation had retired and when health care expenditures throughout the U.S. health care system (including the private sector) were one-third lower as a share of GDP than they are today. It also was before the September 11 terrorist attacks led policymakers to create a new category of homeland security spending, and before the wars in Iraq and Afghanistan led to increases in veterans' health-care costs that will endure for a number of decades.

Estimating the Effects of Spending Cap in S.J. Res 10 and S.J. Res 23

To provide a more precise and detailed analysis of the impact that the spending cap in S.J. Res 10 and S.J. Res 23 would have, we recently conducted an analysis of its effects, using the latest Congressional Budget Office ten-year budget projections. We considered the impact if the balanced budget requirement would take effect in fiscal year 2018, as would occur if Congress approved it now and the requisite number of states ratified it by September 30, 2013. Here are the results.[5]

[5] This analysis uses the current policy baseline — that is, it adjusts CBO's current-law baseline to reflect the extension of current tax cuts (other than the current, temporary payroll tax reduction) and relief from scheduled cuts in Medicare physician fees (we assume a freeze in the Medicare physician reimbursement rates), and it assumes a phasedown of the costs of the wars in Iraq and Afghanistan as CBO depicts in Table 1-8 of its August 2011 budget baseline report. It also assume compliance with the discretionary caps enacted under the Budget Control Act as well as a sequestration of $1.2 trillion in federal spending pursuant to that Act. Finally, our analysis assumes additional tax reductions (beyond an extension of current tax policy) in the amount that would place the budget in balance with spending at the level of the cap that S.J. Res 10 and S.J. Res 23 would set.

- Congress would have to cut all programs (except interest on the debt) by an average of 24.9 percent in 2018. It would have to cut programs by $1.1 trillion in 2018 alone, and by $6.1 trillion through 2021.

- If all programs were cut by the same percentage, Social Security would be cut $265 billion in 2018 alone and $1.7 trillion through 2021; Medicare would be cut $168 billion in 2018 and $1.1 trillion through 2021; and Medicaid and the Children's Health Insurance Program (CHIP) would be cut $115 billion in 2018 and $724 billion through 2021.

- Veterans disability payments, compensation, and other such benefits would be cut $19 billion in 2018 and $122 billion through 2021.

- Defense spending would be cut $141 billion in 2018 and $879 billion through 2021, on top of the reductions made to comply with the discretionary spending caps that the Budget Control Act establishes and the reductions made under the sequestration order that is expected to be issued in January 2013, pursuant to that act.

Congress would not, of course, have to cut all programs by the same percentage and likely would not do so. But if Congress chose to spare certain programs, others would have to be cut even more deeply. For example, if Social Security were spared, the average cut to all other programs would rise by more than one third, from 24.9 percent in 2018 to 34.2 percent. Similarly, if the defense budget were increased by placing it at 4 percent of GDP (exclusive of war costs) and maintaining it at that level, as presidential candidate Mitt Romney has proposed, then all other programs — including Social Security — would have to be cut an average of 38.2 percent in 2018 under S.J. Res 10 and S.J. Res 23.

Even if the so-called "plain vanilla" version of the BBA is pursued, rather than S.J. Res 10 and S.J. Res 23, the required level of budget cuts would be massive, assuming taxes are not raised to help balance the budget. Congress would have to cut everything an average of 17.3 percent in 2018, an average of 23.8 percent if Social Security were protected, and an average of 29.4 percent if the defense budget were set at 4 percent of GDP and Social Security were *not* protected.

Conclusion

Policymakers need to begin to change our fiscal trajectory. As various recent commissions have indicated, we need to stabilize the debt as a share of GDP in the coming decade and to keep it stable after that (allowing for some fluctuation over the business cycle). But establishing a balanced budget amendment in the Constitution would be exceedingly unwise. It would likely exact a heavy toll on the economy and on American businesses and workers in the years and decades ahead. It is not the course that the nation should follow.

Statement of United States Senator Orrin G. Hatch
Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights
Hearing on "A Balanced Budget Amendment: The Perils of Constitutionalizing the Budget Debate"

November 30, 2011

Thank you, Chairman Durbin and Ranking Member Graham, for allowing me to participate in this hearing. As my colleagues know, I have been working for a balanced budget amendment to the Constitution for as long as I have served in the Senate.

With our national debt now over $15 trillion, what was always important is now essential. Congress must pass a balanced budget amendment to the Constitution and send it to the people for ratification. Our debt is itself a constitutional crisis, and the American people should be given the opportunity to resolve it by publicly debating and ratifying a balanced budget amendment. Our current debt crisis threatens the freedom and security of all Americans, and Congress has proven itself unwilling or unable to address it head on. It is past time that the American people, who have ultimate authority over the Constitution, be given the opportunity to decide whether to impose meaningful fiscal restraints on Congress.

Since I was first elected, I have sponsored five balanced budget amendments and originally co-sponsored 18 others. When I sponsored my first BBA in 1979, the national debt was less than $827 billion. When the Senate actually passed a BBA that I co-sponsored in 1982, the national debt was $1.1 trillion dollars. When the Senate failed by one vote to pass a BBA four years later, the national debt had almost doubled.

Fast forward to 1997, when the Senate again failed by one vote to pass a BBA that I sponsored. The national debt had more than doubled again to $5.4 trillion. And today, the national debt stands at more $15 trillion dollars, a number larger than our entire economy.

Over those years, foreign holdings of U.S. Treasury securities rose from $39 billion to $4.7 trillion this year. In the last decade alone, that overall total has more than quadrupled, and the amount held by China has skyrocketed by more than 1,900 percent.

Each time the Senate debates a balanced budget amendment, opponents tell us that it is unnecessary, that Congress can make the tough fiscal decisions and reduce deficits and rein in debt by itself. Each time, opponents predict grave and horrific consequences for the economy and for government programs. Those claims were not true in the past and they are not true today. The debt tsunami now sweeping Europe is only the latest confirmation that it is the debt crisis, and not its solution, that threatens our freedom and security.

Those who claim that politics can solve the debt crisis are fiddling while our the nation's fiscal position burns. Year after year, the evidence keeps mounting that Congress cannot and will not solve the debt crisis by itself. Congress will make the necessary tough choices, rearrange its priorities, and get its fiscal house in order

only if it is forced to do so. The only way to do that is for the American people to change Congress' rulebook by amending the Constitution.

Finally, I want to address a few of the most persistent myths used by opponents of a balanced budget amendment. First, in warning of dire consequences for the economy and government programs, opponents falsely suggest that a balanced budget amendment will deny Congress the power to make tough choices about these programs. The truth is exactly the opposite. The truth is that right now we are in this debt crisis because Congress and the President have refused to make the tough choices. The President wants to maintain current levels of spending, which are high and going higher, while suggesting falsely that such spending is possible without massive tax increases on the middle class. Ratification of a balanced budget amendment will actually require Congress and the President to make the tough choices they otherwise refuse to make..

Second, in making their catastrophic warnings, opponents simply apply a balanced budget amendment's requirements to the world as it exists today. A study often cited by opponents, for example, bases its economic assumptions on a world in which a balanced budget amendment has been ratified but is being enforced with our current budget and in our current economy. This is a very odd way of analyzing the impact of a balanced budget amendment. It ignores that our current budget, and our current economy, are the result of not having had a balanced budget amendment. It ignores that an America which has debated and ratified a balanced budget amendment will already be a different America than we see today. The American people will have made clear their commitment to smaller government, impacting elections and changing priorities along the way. And it ignores the positive impact on economic growth that will result when the private sector's share of the economy grows, and capital that can be used for job creation is not diverted to senseless and wasteful government spending.

Third, opponents falsely suggest that a balanced budget amendment will prevent Congress from making appropriate fiscal or policy choices in different economic times. The truth is that none of those choices, including deficit spending or raising taxes, are prohibited by this amendment. A balanced budget amendment only makes those choices more difficult; after all, we are in our current debt crisis because excessive spending and taxing have been too easy. A balanced budget amendment will allow Congress to do what it needs to do, so long as there is a compelling reason to do it, and Congress takes responsibility for its choices.

And finally, opponents falsely suggest that Congress can add a balanced budget amendment to the Constitution. The truth is that Congress can only propose an amendment for the American people to consider. A proposed amendment becomes part of the Constitution only when ratified by at least three-fourths of the states.

And therein lies the real truth. Opponents of a balanced budget amendment really oppose letting the American people decide how they want their government to function. The American people want a balanced budget amendment to the Constitution. But Congress continues to deny them the opportunity to debate and ratify such an amendment. It is unfortunate that the Democratic Party, the party that celebrates its heritage at an annual

dinner named after Thomas Jefferson, is so committed to denying this opportunity to the American people. I suspect this is because these members of Congress, and the interest groups they are allied with, do not want to adhere to the fiscal discipline they know the American people want to impose.

The debt crisis threatens the freedom and security of all Americans, and it is only getting worse. Congress will not solve the debt crisis by itself. We must send a balanced budget amendment to the states and let the American people decide whether to impose fiscal restraint on Congress.

A Constitutional Amendment for a Balanced Budget

Testimony to the
Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights and Human Rights

Douglas Holtz-Eakin, President
American Action Forum*

November 30, 2011

* The opinions expressed herein are mine alone and do not represent the position of the American Action Forum. I am grateful to Gordon Gray and Cameron Smith for assistance.

Introduction

Chairman Durbin, Ranking Member Graham and members of the Committee, I am pleased to have the opportunity to appear today. In this testimony, I wish to make four basic points:

- The U.S. faces a dramatic threat from the current and projected levels of federal debt,
- The adoption of a "fiscal rule" would be a valuable step toward budgetary practice that would address this threat and preclude its recurrence,
- A balanced budget amendment to the U.S. Constitution is one such fiscal rule; one whose very nature would render it an effective fiscal constraint immune from the forces that have generated a history of Congresses reneging on budgetary targets, and
- Recent incarnations of a balanced budget amendment contain provisions that address some traditional concerns regarding balanced budget requirements.

I will pursue each in additional detail.

The Threat from Federal Debt

The federal government faces enormous budgetary difficulties, largely due to long-term pension, health, and other spending promises coupled with recent programmatic expansions. The core, long-term issue has been outlined in successive versions of the Congressional Budget Office's (CBO's) *Long-Term Budget Outlook*[1]. In broad terms, over the next 30 years, the inexorable dynamics of current law will raise federal outlays from an historic norm of about 20 percent of Gross Domestic Product (GDP) to anywhere from 30 to 40 percent of GDP. Any attempt to keep taxes at their post-war norm of 18 percent of GDP will generate an unmanageable federal debt spiral.

This depiction of the federal budgetary future and its diagnosis and prescription has all remained unchanged for at least a decade. Despite this, action (in the right direction) has yet to be seen.

Those were the good old days. In the past several years, the outlook has worsened significantly.

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[1] Congressional Budget Office. 2011. *The Long-Term Budget Outlook.* Pub. No. 4277. http://www.cbo.gov/ftpdocs/122xx/doc12212/06-21-Long-Term_Budget_Outlook.pdf

Over the next ten years, according to the Congressional Budget Office's (CBO's) analysis of the President's Budgetary Proposals for Fiscal Year 2012[2], the deficit will never fall below $750 billion. Ten years from now, in 2021, the deficit will be 4.9 percent of GDP, roughly $1.2 trillion, of which over $900 billion will be devoted to servicing debt on previous borrowing. As a result of the spending binge, in 2021 debt in the hands of the public will have more than doubled from its 2008 level to 90 (87.4) percent of GDP and will continue its upward trajectory.

Clearly, the passage of the Budget Control Act of 2011, its embodied caps on discretionary spending, and the formation of the Joint Select Committee on Deficit Reduction reflected a commitment to move the nation's finances in a better direction. With the Super Committee having failed to report recommendations to reduce future deficits, the fallback sequester is scheduled to go into effect for FY 2013. Even if the sequester is allowed to be fully imposed, the long-term budget challenge will remain. Nothing could be more important than addressing this challenge.

The "Bad News" Future under Massive Debt Accumulation. A United States fiscal crisis is now a threatening reality. It wasn't always so, even though – as noted above – the Congressional Budget Office has long published a pessimistic *Long-Term Budget Outlook*. Despite these gloomy forecasts, nobody seemed to care. Bond markets were quiescent. Voters were indifferent. And politicians were positively in denial that the "spend now, worry later" era would ever end.

Those days have passed. Europe is embroiled in a debt crisis that may fundamentally alter the EU. Despite the wherewithal of some European nations, Moody's is questioning the ratings of all European sovereign debt. And the U.S. is by no means immune – as witnessed by the decision of S&P to downgrade the federal credit rating. The federal government ran a fiscal 2010 deficit of $1.3 trillion – nearly 9 percent of GDP, as spending reached nearly 24 percent of GDP and receipts fell below 15 percent of GDP.

What happened? First, the U.S. frittered away its lead time. It was widely recognized that the crunch would only arrive when the baby boomers began to retire. Guess what? The very first official baby boomer already chose to retire early at age 62, and the number of retirees will rise as the years progress. Crunch time has arrived and nothing was done in the interim to solve the basic spending problem – indeed the passage of the Medicare prescription drug bill in 2003 made it worse.

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[2] Congressional Budget Office. 2011. *An Analysis of the President's Budgetary Proposals for Fiscal Year 2012.* Pub. No. 4258. http://www.cbo.gov/ftpdocs/121xx/doc12130/04-15-AnalysisPresidentsBudget.pdf

Second, the events of the financial crisis and recession used up the federal government's cushion. In 2008, debt outstanding was only 40 percent of GDP. Already it is over 60 percent and rising rapidly.

Third, active steps continue to make the problem worse. The Affordable Care Act "reform" adds two new entitlement programs for insurance subsidies and long-term care insurance without fixing the existing problems in Social Security, Medicare, and Medicaid.

Financial markets no longer can comfort themselves with the fact that the United States has time and flexibility to get its fiscal act together. Time passed, wiggle room vanished, and the only actions taken thus far have made matters worse.

As noted above, in 2021 debt in the hands of the public will have more than doubled from its 2008 level to 90 (87.4) percent of GDP and will continue its upward trajectory. Traditionally, a debt-to-GDP ratio of 90 percent or more is associated with the risk of a sovereign debt crisis.

Indeed, there are warning signs even before the debt rises to those levels. As outlined in a report[3], the credit rating agency Moody's looks at the fraction of federal revenues dedicated to paying interest as a key metric for retaining a triple-A rating. Specifically, the large, creditworthy sovereign borrowers are expected to devote less than 10 percent of their revenues to paying interest. Moody's grants the U.S. extra wiggle room based on its judgment that the U.S. has a strong ability to repair its condition after a bad shock. The upshot: no downgrade until interest equals 14 percent of revenues.

This is small comfort as the 2012 Obama Administration budget targets 2015 as the year when the federal government crosses the threshold and reaches 14.2 percent. Moreover, the plan is not merely to flirt with a modest deterioration in credit-worthiness. In 2021, the ratio reaches 20.3 percent.

Perhaps even more troubling, much of this borrowing comes from international lending sources, including sovereign lenders like China that do not share our core values.

For Main Street America, the "bad news" version of the fiscal crisis occurs when international lenders revolt over the outlook for debt and cut off U.S. access to international credit. In an eerie reprise of the recent financial crisis, the credit freeze would drag down business activity and household spending. The resulting deep recession would be exacerbated by the inability of the federal government's

[3] Moody's determines debt reversibility from a ratio of interest payments to revenue on a base of 10 percent. Wider margins are awarded to various governments to indicate the additional "benefit of the doubt" Moody's awards. The US finds itself on the upper end at 14 percent. The ratios are "illustrative and are not hard triggers for rating decisions." See: *Aaa Sovereign Monitor Quarterly Monitor No. 3*. Moody's Investor Service. March 2010.

automatic stabilizers – unemployment insurance, lower taxes, etc. – to operate freely.

Worse, the crisis would arrive without the U.S. having fixed the fundamental problems. Getting spending under control in a crisis will be much more painful than a thoughtful, pro-active approach. In a crisis, there will be a greater pressure to resort to damaging tax increases. The upshot will be a threat to the ability of the United States to bequeath to future generations a standard of living greater than experienced at the present.

Future generations will find their freedoms diminished as well. The ability of the United States to project its values around the globe is fundamentally dependent upon its large, robust economy. Its diminished state will have security repercussions, as will the need to negotiate with less-than-friendly international lenders.

The "Good News" Future under Massive Debt Accumulation. Some will argue that it is unrealistic to anticipate a cataclysmic financial market upheaval for the United States. Perhaps so. But an alternative future that simply skirts the major crisis would likely entail piecemeal revenue increases and spending cuts – just enough to keep an explosion from occurring. Under this "good news" version, the debt would continue to edge northward – perhaps at times slowed by modest and ineffectual "reforms" – and borrowing costs in the United States would remain elevated.

Profitable innovation and investment will flow elsewhere in the global economy. As U.S. productivity growth suffers, wage growth stagnates, and standards of living stall. With little economic advancement prior to tax, and a very large tax burden from the debt, the next generation will inherit a standard of living inferior to that bequeathed to this one.

The Value of Fiscal Rules

At present, the federal government does not have a fiscal "policy." Instead, it has fiscal "outcomes". The House and Senate do not reliably agree on a budget resolution. Annual appropriations reflect the contemporaneous politics of conference committee compromise, and White House negotiation. Often, the annual appropriations process is in whole or part replaced with a continuing resolution. Annual discretionary spending is not coordinated in any way with the outlays from mandatory spending programs operating on autopilot. And nothing annually constrains overall spending to have *any* relationship to the fees and tax receipts flowing into the U.S. Treasury. The fiscal outcome is whatever it turns out to be – usually bad – and certainly not a policy choice.

I believe that it would be tremendously valuable for the federal government to adopt a fiscal rule. Such a rule could take the form of an overall cap on federal

spending (perhaps as a share of gross domestic product (GDP)), a limit on the ratio of federal debt in the hands of the public relative to GDP, a balanced budget requirement, or many others. Committing to a fiscal rule would force the current, disjointed appropriations, mandatory spending, and tax decisions to fit coherently within the adopted fiscal rule. Accordingly, it would force lawmakers to make tough tradeoffs, especially across categories of spending.

Most importantly, it would give Congress a way to say "no." Spending proposals would not simply have to be good ideas. They would have to be *good enough* to merit cutting other spending programs or using taxes to dragoon resources from the private sector. Congress would more easily be able to say, "not good enough, sorry."

What should one look for in picking a fiscal rule? First, it should work; that is, it should help solve the problem of a threatening debt. A fiscal rule like PAYGO at best stops further deterioration of the fiscal outlook and does not help to solve the problem.

Second, it is important that there be a direct link between policymaker actions and the fiscal rule outcome.

Finally, the fiscal rule should be transparent so that the public and policymakers alike have a clear understanding of how it works. This is a strike against a rule like the ratio of debt-to-GDP. The public has only the weakest grip on the concept of federal debt in the hands of the public, certainly does not understand how GDP is produced and measured, and (God help us) may not be able to divide. Without transparency and understanding, public support for the fiscal rule will be too weak for it to survive.

As documented by the Pew-Peterson Commission on Budget Reform[4] other countries have benefitted from adopting fiscal rules. The Dutch government established separate caps on expenditures for health care, social security and the labor market. There are also subcaps within the core sectors.

Sweden reacted to a recession and fiscal crisis by adopting an expenditure ceiling and a target for the overall government surplus (averaged over the business cycle). Later (in 2000) a balanced budget requirement was introduced for local governments. Finally, in 2003 the public supported a constitutional amendment to limit annual federal government spending to avoid perennial deficits.

A lesson is that, no matter which rule is adopted, it will rise or fall based on political will to use it and the public's support for its consequences.

A Balanced Budget Amendment

[4] http://budgetreform.org/

In this consequence, how should one think of proposals to amend the Constitution of the United States to require a balanced federal budget? It would clearly be quite significant. Despite the good intentions of the Budget Control Act of 2011, there is little indication that the resultant savings will do anything but delay the fiscal threats outlined above. Absent significant fiscal reform, these challenges will continue to evolve from pressing to irreversible. The distinguishing characteristics of a Constitutional amendment to address these challenges make it a far more robust tool in this endeavor.

First, fiscal constraints, in the form of spending caps, triggers, and other like devices are laudable, but fall short of Constitutional amendment in their efficacy as a fiscal rule similar to those pursued by nations such as the Netherlands and Sweden. A Constitutional amendment, by design, is (effectively) permanent, and therefore persistent, even if bypassed in certain exigent circumstances, in its effect on U.S. fiscal policy. Fiscal rules should allow policy figures to say "no." A Constitutional amendment will not only allow that, but given the gravity inherent in a Constitutional amendment, hopefully dissuade contemplation of legislative end-arounds that other rule might invite.

Second, there is a clear link between Congressional actions – cutting spending, raising taxes – and the adherence to a balanced budget amendment. Of course, Congressional action is not *all* that determines annual expenditures and receipts.

Military conflicts and other such contingencies can incur costs without advance Congressional action, while economic conditions can effect spending, such as with unemployment insurance and other assistance programs, and tax revenues. However, these fluctuations are ultimately not the driving force between the U.S. fiscal imbalance. Indeed, in a world with stable tax revenue and without frequent military contingencies, the U.S. would still be headed towards fiscal crisis. Rather, enacted spending and tax policy largely set forth the U.S. fiscal path that must be altered to avert a fiscal crisis. A meaningful constraint on these factors would confront policymakers with the necessity to alter those polices, and as discussed above, to make the choices and tradeoffs needed to shore up the nation's finances. Tying those choices to an immutable standard, in the form of a Constitutional amendment would facilitate that process.

A third facet of a Constitutional amendment that augurs well for its efficacy is the ratification process itself. This is a process that takes years. While the two-century long ratification of the 27th amendment may be an extreme example, suffice it to say successful ratification of a Constitutional amendment requires acceptance at many levels of public engagement. For the purpose of constraining federal finances, this is beneficial, as it necessarily requires public "buy-in." Without question, the changes needed to address federal spending policy will be difficult. Any process that engages the public, and by necessity, requires public complicity to be successful will ease the process of enacting otherwise difficult fiscal changes.

Lastly, the very nature of a Constitutional amendment shields it from the annual, or perhaps more frequent, vicissitudes of federal policymaking. It cannot be revised, modified, or otherwise ignored in the fashion of the many checks on fiscal policy enacted or attributable to the Congressional Budget Act of 1974 or its successors. Congress cannot renege on its obligations with such an amendment in place. While unquestionably a constraint on Congress, as a parameter of federal policymaking it would be one by which all must abide.

Auxiliary Features of a Balanced Budget Proposal

As noted above, a balanced budget amendment to the Constitution has several unique characteristics that distinguish it as an effective fiscal rule. However, not all balanced budget amendments are created equal. Balanced budget amendments can differ significantly, with considerable variation in the consequence of their design.

While largely the result of choices by policymakers, the U.S. fiscal situation is, and will be in the future, shaped in some way by forces outside of the legislative process, such as war, calamity, of economic distress. Critical to an effective balanced budget amendment is the acknowledgment of this reality with a mechanism for adjusting to these forces without undermining the goal of the amendment to constrain fiscal policy. The abuse of emergency designations in legislation to get around budget enforcement is an example of what can happen when the goal of constraining fiscal policy is subordinated to flexibility in the face of some crisis, real or otherwise. Stringent accountability, such as the requirement of supermajority, affirmative votes can mitigate this problem.

Past iterations of balanced budget amendments have legitimately raised questions as to their capacity to limit the scale of the federal government. There is nothing inherent in a balanced budget amendment to limit federal spending beyond the belief that at some point, the tax burden necessary to balance the expenditure of a large federal government ultimately reaches an intolerable level. But there is nothing about a balanced budget amendment alone that precludes reaching tax and spending levels just approaching that tipping point, which is far from desirable policy. Accordingly, recent examples of balanced budget amendments seek to staunch the accumulation of debt, which is ensured by balance, while also limiting the spending to the historical norm. Likewise, recent examples of balanced budget amendments limit the Congress's ability to raise taxes. In each case these limitations can be waived by supermajority votes. These are sound approaches that address concerns that a requirement to be in balance will add tax policy to the share of fiscal policy already on autopilot.

The last issue of concern, but with a less obvious remedy relates to enforcement. It is not obvious in any of the extent amendments what would occur if the requirements of the amendment were violated. The enforcement mechanism for these requirements arguably may not exist, and may not exist until tested after the ratification of a balanced budget amendment. The various waivers provide

Congressional allowances for specific overages as a means of establishing compliance should U.S. finances fail to balance or exceed certain limits assuming one of the proposed amendments is successfully ratified. The provision in the prevailing Senate balanced budget amendment prohibiting courts from raising revenues in the event of a "breach" entertains the possibility that the U.S. may indeed find itself in an *ex post* violation of a balanced budget amendment. That suggests that irrespective of the waiver provisions, there is nothing within the amendment itself that addresses enforcement, whether by sequestration or some other means. While many ciriticisms of past approaches to balanced budget amendments have been meaningfully addressed in recent efforts, the question of enforcement remains a challenge that should be thoughtfully considered.

Thank you for the opportunity to appear today. I look forward to answering any questions the Committee may have.

The Balanced Budget Amendment: A Threat to the Constitutional Order

By Neil Kinkopf

November 2011

All expressions of opinion are those of the author or authors.
The American Constitution Society (ACS) takes no position on specific legal or policy initiatives.

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The Balanced Budget Amendment: A Threat to the Constitutional Order

Neil Kinkopf*

At the heart of the balanced budget debate is a disagreement over economic policy. Many economists believe that fiscal policy (increasing spending and/or cutting taxes to promote growth in the private economy or decreasing spending and/or raising taxes to mollify inflationary pressures) is an important tool for promoting the nation's economic goals. Others believe that fiscal policy either cannot or should not be employed to promote economic growth. I am a constitutional law professor, not an economist. As such, I have no special expertise to offer on this dispute and, in fact, take no position on which economic school of thought has the better of the argument.

Over the last few years, there have been renewed calls not only to resolve this policy dispute, but to place its resolution effectively beyond question or revision by amending the Constitution to require a balanced budget.[1] This suggestion raises constitutional questions of the highest order. Below, I offer my analysis of these questions and the extremely serious threats that a balanced budget amendment would pose for our constitutional order.

I. The Balanced Budget Amendment Contradicts Our Constitutional Design

The Constitution does not bind the nation or future generations to adhere to any particular conception of the public good or of appropriate social or economic policy. Rather, the Constitution recognizes that our vast nation will encompass groups and individuals with starkly contrasting and sharply conflicting notions of the public good and sound policy. Instead of trying to resolve these disagreements, the Constitution focuses on structuring governmental power and establishing decision-making processes that will promote deliberation and public-interested measures over oppressive or special-interested ones.

Our foundational law goes on to supplement these procedural and structural protections by enshrining individual rights. Together these structures and rights allow us to resolve policy disagreements in a manner that we all can agree is fair, even if we disagree with specific outcomes. It is precisely because of this basic design that we regard ourselves as a free and self-

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[1] The leading proposals to amend the Constitution refer to the provision as a "balanced budget amendment" and virtually all public rhetoric employs this phrase. For this reason, I adopt it as well to refer to the proposals collectively, even though the phrase is an inaccurate expression of what the amendment would require. The so-called balanced budget amendment would forbid federal spending to exceed federal revenues for any fiscal year. Thus, the amendment would forbid the federal government to run a deficit. The amendment, however, would not require that expenditures *equal* revenues. The amendment thus would not forbid the federal government to run a surplus, and thereby to employ fiscal policy as a means of contracting economic activity in order, for example, to restrain inflation.

governing people. This may also explain why ours is the world's longest enduring written Constitution.[2]

It is no accident that our Constitution does not dictate outcomes. The founding generation faced divisive controversies that were every bit as momentous as the present-day budget crisis. Yet they consciously designed the Constitution not to resolve these issues, instead leaving them to be resolved through the constitutionally ordained process of legislation in accordance with constitutionally guaranteed individual rights. For example, the founding generation was deeply divided over whether to allow the federal government to establish and maintain a standing army.[3] Rather than resolving this issue, the Constitution authorized Congress to provide and maintain an army and navy, and designated the President as commander in chief, without requiring that Congress deploy this power and establish a standing military force.[4] Thus, the first Congress could decide whether to create a standing army and subsequent Congresses, and subsequent generations, could decide for themselves whether to follow suit.

There was broad public agreement at the time of the Constitution's adoption regarding the need to provide for a judicial power and a Supreme Court to exercise that power. There was no consensus regarding the need for, much less the structure and powers of, a system of lower federal courts. The Constitution expressly left this contentious and significant issue to be resolved by Congress.[5]

One final example, not from the period of the Constitution's original ratification, is the controversy over the adoption of a federal income tax. In 1895, the Supreme Court held that the Constitution as originally ratified did not allow the federal government to impose an income tax.[6] The Constitution was amended not to establish an income tax, but to authorize the federal government to create one.[7] As a result, Congress remains free to abolish the income tax if it chooses to do so. When the public determined in the late-nineteenth century that the best way to

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[2] *See* TOM GINSBURG & ROSALIND DIXON, COMPARATIVE CONSTITUTIONAL LAW (2011).

[3] *Compare* George Washington, Sentiments of a Peace Establishment (May 2, 1783), *reprinted in* 3 PHILIP KURLAND, THE FOUNDER'S CONSTITUTION 128 (1987) (favoring a standing military force) and Alexander Hamilton, *id.* at 130 (same) *with* Richard Henry Lee, Letter to James Monroe (Jan. 5, 1784), *reprinted in id.* at 131 (opposing the establishment of a standing army), Federal Farmer No. 3 (Oct. 10, 1787), *reprinted in id.* at 132 (same), and A Democratic Federalist (Oct. 17, 1787), *reprinted in id.* at 133 (same). The records of the drafting convention show that the delegates held conflicting views on the subject. *See id.* at 132.

[4] *See* U.S. CONST. art I, sec. 8, cl. 12; U.S. CONST. art. II, § 2, cl. 1. In advocating for the ratification of the Constitution, Alexander Hamilton urged the public to recognize that the Constitution would neither require nor forbid the establishment of a standing army, but would leave the matter in the discretion of Congress, which could then exercise its judgment as circumstances might dictate. *See* THE FEDERALIST No. 24 (Alexander Hamilton).

[5] *See* U.S. CONST. art. I, § 8, cl. 9 (authorizing Congress to "constitute Tribunals inferior to the supreme Court'); U.S. CONST. art. III, § 1 ("The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). At the drafting convention, for example, John Rutledge moved to strike from the initial draft of the Constitution the provision establishing lower federal courts on the ground that this function should be left to state courts. After Rutledge's motion passed, James Madison and James Wilson moved to authorize Congress to create lower federal tribunals. "They observed that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them." This motion passed overwhelmingly. *See* Records of the Federal Convention (June 5, 1787), *reprinted in* 3 PHILIP KURLAND, THE FOUNDER'S CONSTITUTION 61 (1987).

[6] Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895).

[7] *See* U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes ....").

raise revenue for the federal government was through an income tax, they did not impose that judgment in the Constitution, but left ensuing generations free to select for themselves the most appropriate means of raising federal revenue.

There is one counter example, but it ultimately reinforces the general constitutional design outlined above. Effective in 1920, the Constitution was amended to prohibit "the manufacture, sale, or transportation of intoxicating liquors" in the United States.[8] The amendment clearly did not involve the structure of governmental power or the processes of governmental decisionmaking, nor did it protect an individual right. Rather, it sought to enshrine in the Constitution a resolution of general social policy. Such a failure was this deviation from the Constitution's design that it stands as the only amendment ever to be repealed.[9] The repealing amendment is instructive in this regard. It does not, so to speak, prohibit prohibition. Rather, it leaves the question of whether to permit the sale and possession of alcoholic beverages (and if so under what regulations) to be determined by each state through its own democratic process.[10]

It may seem that these observations about the Constitution's design operate at too high a level of abstraction to have any practical relevance to the debate over the balanced budget amendment. These concerns, however, play out in very practical ways that raise insuperable objections to the proposed amendment. In particular, the Framers understood fully well that attempts to define and resolve disputes in the Constitution itself would render the Constitution a charter of useless "parchment barriers" that could not be enforced.[11] This concern informs the following analysis of the balanced budget amendment.[12]

II. The Disastrous Consequences of Enforcing the Proposed Amendment

The proposed balanced budget amendment provides no express enforcement mechanism.[13] The leading proposals simply declare that total outlays shall not exceed total receipts, without explaining how this balanced budget is to be achieved. Merely imposing a mandate does not mean Congress will be able to fulfill it. One Member of Congress might vote to raise taxes, another to reduce entitlement benefits, a third to cut military spending, and a fourth to adopt a combination of each. No single measure may gain a majority in the House or Senate, with each individual legislator honestly claiming to have fulfilled the new constitutional

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[8] U.S. CONST. amend. XVIII.

[9] *See* OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 247 (Kermit Hall ed., 1992). To be sure, some amendments, such as those dealing with the process of presidential succession, have been refined and improved by successive amendments. Nonetheless, the Prohibition amendment stands as the only amendment actually to have been repudiated.

[10] U.S. CONST. amend. XXI, § 2.

[11] THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

[12] In referring to the balanced budget amendment, I refer principally to H.J. Res. 2, which I understand to be the version that Congress is presently focused on. The problems with H.J. Res. 2, however, inhere in the very concept of a balanced budget amendment, and so apply to varying degrees to any proposal to adopt such a constitutional amendment.

[13] I use the term "enforcement mechanism," as distinguished from an "enforcement clause." While some balanced budget amendment proposals do include clauses providing that Congress shall enforce the amendment through appropriate legislation, they do not articulate how the amendment would be implemented and, rather, leave the matter to future legislation and/or judicial decision.

duty to support a budget that is balanced.

It is also possible for Congress and the President to fully comply with their constitutional obligations and nevertheless enact outlays in excess of receipts. Congressional budgeting depends on forecasting of both receipts and outlays. If these forecasts turn out to be in error – for example, because a subsequent economic downturn substantially reduces government receipts and significantly increases outlays due to a greater than foreseen number of individuals becoming eligible for various forms of government assistance – then the federal budget would be out of balance even though it appeared to be balanced when Congress and the President enacted it.

The omission of an enforcement mechanism is not likely an oversight, as this same problem plagued the last several significant efforts to ratify a balanced budget amendment.[14] This problem, moreover, is insurmountable. Every conceivable enforcement mechanism would do serious violence to the fundamental structure of our government and of our Constitution.

There is little doubt that the sponsors of the amendment intend for it to be an enforceable legal requirement. In advocating the amendment's ratification, sponsors repeatedly speak of what the amendment would require or mandate. For example, Senator Orrin Hatch, the measure's principal sponsor in the Senate, states that a balanced budget amendment "is the only way to *force* Washington to act."[15] Senator Mike Lee asserts that "a balanced-budget *requirement* will *ensure* we do not continue to drive our country further into debt ...."[16] Representative Bob Goodlatte introduced the measure in the House, declaring "Mr. Speaker, I rise to re-introduce legislation that will amend the United States Constitution to *force* Congress to rein in spending by balancing the federal budget.... Unless Congress is *forced* to make the decisions necessary to create a balanced budget, it will always have the all-too-tempting option of shirking this responsibility. A Constitutional balanced budget *requirement* ... will set our nation's fiscal policies on the right path. This is a common sense approach to *ensure* that Congress is *bound* by the same fiscal principles that guide America's families each day"[17]

In the absence of an express enforcement mechanism, this role will fall to the judiciary and so I will focus on this prospect. After examining the consequences of assigning this power to the judiciary, I will consider alternative enforcement mechanisms.

A. The Perils of Judicial Enforcement

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[14] Robert H. Bork, *On Constitutional Economics*, AM. ENT. INST. J. ON GOV'T AND SOC'Y 14, 18 (1983), *reprinted in Proposed Balanced Budget Constitutional Amendments: Hearings Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 100th Cong. (1989) 645, 649; *The Balanced Budget Amendment: Hearing Before the Joint Economic Committee*, 104th Cong. (1995) (statement of Walter E. Dellinger), *available at* http://www.justice.gov/olc/jtecon.95.8.htm#N_26_.

[15] *See* Orrin Hatch, *Balanced Budget Amendment Needed to Fix National Debt Crisis*, U.S. NEWS, Apr. 25, 2011 (emphasis added), *available at* http://www.usnews.com/opinion/articles/2011/04/25/balanced-budget-amendment-needed-to-fix-national-debt-crisis.

[16] Mike Lee, *Why We Need a Balanced Budget Amendment*, WASH. POST, Mar. 4, 2011 (emphasis added), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2011/03/03/AR2011030304714.html.

[17] *See* Balanced Budget Amendment Introduced in House (emphases added), http://bbanow.org/news/2011-01-07/bba-introduced-congress (last visited Nov. 11, 2011).

If a balanced budget amendment were ratified, it would in all likelihood empower the courts to make appropriate remedial orders for any violation of the newly enacted provision. Indeed, the Supreme Court jealously guards its authority to interpret the Constitution and to provide remedy for its violation.[18] This is not a recent development, but one that extends back to *Marbury v. Madison* and Chief Justice Marshall's famous declaration that "it is emphatically the province and duty of the judicial department to say what the law is."[19] Perversely, many supporters of the balanced budget amendment have criticized the judiciary's lack of self-restraint in interpreting the Constitution in other contexts. Why, then, would they expect reticence and restraint with respect to a balanced budget amendment?

If the courts were to play their usual role as constitutional interpreter and enforcer with respect to the balanced budget amendment, however, it would threaten not merely to alter but to eviscerate the fundamental character of the judiciary. Our judiciary is able to perform its function because it is independent of politics, and because the public trusts that independence. This character stems from the Constitution's specific design.[20] Federal judges do not depend on politics to maintain office and do not participate in the political functions of government. In advocating for the Constitution's ratification, Alexander Hamilton wrote, in *The Federalist* No. 78, that "The judiciary [has] no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment."[21] The Constitution's framers understood that the judicial role was to decide cases according to law and completely independent of political considerations or influence.

Our independent federal judiciary is highly skilled at deciding legal questions. It is not at all competent to make decisions of a political or policy nature. Judges are not, generally speaking, trained in matters of economics or finance. They have no special competency that would recommend committing such decisions to them. Moreover, the processes of litigation are not well adapted to resolving disputes over sound economic policy. Judges can hear and weigh evidence from witnesses, witnesses who are chosen and called by the parties and not by the judge. But they do not hold hearings of a legislative sort. Legislators can call any witness they like and ask whatever questions they like. Legislative hearings allow the legislature to call all interested parties, not just the parties to a lawsuit, and allow legislators to pursue any line of inquiry they believe to be worthwhile. Finally, legislators are politically accountable for their decisions. Judges are not and should not be. Decisions regarding how to achieve a balanced budget are precisely the type of decisions that involve will and not judgment, to use Hamilton's phrase, and so should be made by accountable officials rather than judges.

If the balanced budget amendment were ratified and Congress were to fail to enact a balanced budget, the judiciary would be pressed into declaring the constitutional violation. In a

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[18] *See, e.g.*, Dickerson v. United States, 530 U.S. 428 (2000); Boerne v. Flores, 521 U.S. 507 (1997); Cooper v. Aaron, 358 U.S. 1 (1958).
[19] 5 U.S. (1 Cranch) 137, 177 (1803).
[20] The Constitution allows judges to retain office during "good behavior," which effectively guarantees life tenure subject to removal through impeachment and conviction. The Constitution further secures the independence of the judiciary by forbidding their compensation to be reduced. U.S. CONST. art. III, § 1.
[21] THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

prospective suit[22] for relief, however, there would be no way of ordering a remedy without making decisions that would be inextricably political. Such a decision inevitably would involve a judgment about tradeoffs between spending reduction and revenue raising and, within each of these categories, between types of spending reductions (national defense spending or entitlement spending, for example) and between types of revenue raising (income tax, capital gains tax, estate tax, etc.).

For these reasons, one might expect the courts to regard questions raised regarding the balanced budget amendment to be non-justiciable political questions. In fact, there is no reason to expect that this is the road the courts would follow. Indeed, there is a consensus that the courts will become embroiled in controversies over balancing the budget. As Judge Robert Bork declared in opposing a balanced budget constitutional amendment,, "[t]he result . . . would likely be hundreds, if not thousands, of lawsuits around the country, many of them on inconsistent theories and providing inconsistent results."[23]

Professor Charles Fried of Harvard Law School, has observed that neither the political question doctrine nor limitations on standing would necessarily preclude litigation that would ensnare the judiciary in the thicket of budgetary politics.[24] To be sure, "the political question doctrine . . . is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government,"[25] but many Supreme Court decisions indicate the Court is prepared (wisely or unwisely) to resolve questions that might once have been considered "political." For example, in *United States v. Munoz-Flores*,[26] the Court adjudicated a claim that an assessment was unconstitutional because Congress had failed to comply with the Origination Clause, which mandates that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." U.S. Const. art. I, § 7, cl. 1. The Court rejected the argument that this issue was a nonjusticiable political question. And in 1992, the Court held that congressional selection of a method for apportionment of congressional elections is not a "political question" and is therefore subject to judicial review.[27]

Following these cases, the Supreme Court decided a case, *Clinton v. Jones*, in which a sitting President was sued personally. The Court did not see lawsuits involving a sitting President as inherently political and authorized a federal trial court to exercise jurisdiction over the claim and over the President personally.[28] Most blatantly, the Supreme Court decided a case, *Bush v. Gore*, where the political nature of the question presented was evident from the caption itself. In that case, of course, the Supreme Court actually decided the outcome of a presidential

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[22] By "prospective suit," I mean a suit brought before outlays actually exceed receipts.
[23] *See* Bork, *supra* note 14, at 14, 18.
[24] *Balanced Budget Amendment -- S.J. Res. 41: Hearings Before the Senate Comm. on Appropriations*, 103d Cong. 82-83, 86-87 (1994) [hereinafter *1994 Senate Hearings*].
[25] United States v. Munoz-Flores, 495 U.S. 385, 394 (1990); *see also* Baker v. Carr, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is . . . a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government.").
[26] 495 U.S. 385 (1990).
[27] Department of Commerce v. Montana, 503 U.S. 442 (1992).
[28] 520 U.S. 681 (1997).

election.[29]

The judiciary has not shied away from disputes over the budget or the budgeting process. The Supreme Court struck down Congress's first attempt to impose a structure that would yield a balanced budget – the Gramm-Rudman-Hollings Act.[30] It has also struck down the so-called Line Item Veto Act.[31] The Court also heard a case involving President Richard Nixon's assertion of constitutional authority to impound funds.[32] Lastly, some of the legislative history surrounding previous versions of the balanced budget amendment suggests that at least limited judicial review is contemplated. In light of this background, it is doubtful that courts would refuse to hear balanced budget claims on political question grounds.[33]

In the end, there is a range of views as to the extent to which courts would involve themselves in issues arising under the balanced budget amendment. Judge Bork believes that there "would likely be hundreds, if not thousands, of lawsuits around the country" challenging various aspects of the amendment.[34] Similarly, the late Professor Archibald Cox of Harvard Law School predicted that "there is a substantial chance, even a strong probability, that . . . federal courts all over the country would be drawn into its interpretation and enforcement,"[35] and Professor Charles Fried has testified that "the amendment would surely precipitate us into subtle and intricate legal questions, and the litigation that would ensue would be gruesome, intrusive, and not at all edifying."[36] Other commentators, such as former Attorney General William Barr, believe that the political question and standing doctrines likely would persuade courts to intervene in relatively few situations, and that there will not be an "avalanche" of litigation, but that, "[w]here the judicial power can properly be invoked, it will most likely be reserved to address serious and clearcut violations."

Former Attorney General Barr may well be right that courts would be reluctant to get involved in most balanced budget cases -- and it would be proper for them to be so reluctant. However, none of the commentators, including former Attorney General Barr himself, believes

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[29] 531 U.S. 98 (2000). For a discussion of the justiciability of the case, *see* Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093 (2001).
[30] *See* Bowsher v. Synar, 478 U.S. 714 (1986).
[31] Clinton v. New York, 524 U.S. 417 (1998).
[32] Train v. New York, 420 U.S. 35 (1975) (holding that the president must spend funds if a statute requires that they be spent).
[33] It might also be thought that the requirement that a plaintiff have standing could serve as a barrier to litigation involving the balanced budget amendment. This is doubtful as well. *See The Balanced Budget Amendment: Hearing Before the Joint Economic Committee*, 104th Cong. (1995) (statement of Walter E. Dellinger), *available at* http://www.justice.gov/olc/jtecon.95.8.htm#N_26_. Since that testimony, the Court has narrowed both congressional standing, *see* Raines v. Byrd, 521 U.S. 811 (1997), and taxpayer standing, Hein v. Freedom from Religion Found., 551 U.S. 587 (2007). The Court has not, however, closed off these bases of standing entirely. The Court, for example, quite emphatically refused to abolish the doctrine of taxpayer standing in *Hein*. *See id.* (Scalia, J., concurring). Aside from these specialized categories of potential plaintiffs, any party who is adversely affected by government spending in excess of revenues would appear to suffer an injury-in-fact for standing purposes and so would have a strong claim to hold standing to litigate.
[34] *See* Bork, *supra* note 14, at 14, 18.
[35] *1994 Senate Hearings*, at 157 (statement of Archibald Cox, Professor of Law, Harvard University).
[36] *Id.* at 83 (testimony of Charles Fried, Professor of Law, Harvard University).

that the amendment would bar courts from at least occasional intrusion into the budget process.[37] Accordingly, whether we would face an "avalanche" of litigation or fewer cases alleging "serious and clearcut violations," there is a consensus that the amendment creates the potential for the involvement of courts in issues arising under the balanced budget amendment, and that while judicial review of alleged constitutional violations is appropriate, judicial resolution of budget disputes is not. In the end, it matters little whether the number of cases brought under a balanced budget amendment would be large or small. A single case could easily represent an avalanche of litigation in terms of its far-reaching consequences.

There is also a set of cases, unnoticed in previous commentary on balanced budget amendment proposals, over which the Court would seem to have undeniable authority to exercise review. Prior commentary has considered litigation brought at a time when a budget is passed but before it has actually taken effect and so before outlays have actually exceeded receipts. In this setting, as discussed above, there are very significant problems relating to the sort of prospective remedy a court might order and to what parties might satisfy the constitutional and prudential requirements of standing. None of these problems is present if the litigation is brought *after* the fiscal year's receipts have been exhausted. If outlays exceed receipts for a given year, the federal government would be in violation of the balanced budget amendment for every expenditure it makes from that point through the end of the fiscal year. The Constitution already contains a separate provision that would render such spending illegal: "no money shall be drawn from the Treasury but in consequence of appropriations made by law."[38] The balanced budget amendment would establish the invalidity of any outlay, or appropriation of funds, in excess of receipts, and therefore such an appropriation would not be "made by law."

A single lawsuit could be sufficient to have government operations declared invalid once the year's revenues have been exhausted and this, in turn, could require the entire federal government to shut down, because everything the federal government does involves an expenditure of funds to pay the official or officials that undertake the government action. Thus, for example, any individual who is subject to a criminal prosecution on the day after federal receipts have been exhausted would have standing to assert that the prosecutor is illegally in court, because his salary for that day represents an outlay in excess of receipts. Or, a coal mine operator who is subject to a mine safety inspection could seek an injunction to prohibit federal officials from carrying out the inspection on the same grounds.

While a prospective suit would raise serious concerns with respect to remedy, requiring federal judges to determine which spending to cut or how to raise revenues, a lawsuit brought after federal outlays exceed receipts would not. For such a suit, the remedy would be quite simple and judicially manageable: an order prohibiting further outlays. This remedy is judicially manageable in that it does not require a judge to make any inappropriate determination of economic policy, but the consequences of such a remedy would be catastrophic. This remedy would require a complete government shutdown, unlike the much more limited statutory

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[37] Attorney General Barr has stated that "I would be the last to say that the standing doctrine is an ironclad shield against judicial activism. The doctrine is malleable and it has been manipulated by the courts in the past." *The Balanced-Budget Amendment: Hearing on S.J. Res. 1 Before the Senate Comm. on the Judiciary*, 104th Cong. 126 (1996) (statement of former Attorney General William Barr).

[38] U.S. CONST. art. I, § 9, cl. 7.

shutdowns that have occurred from time to time.[39]

There are several illuminating distinctions between a constitutionally compelled complete shutdown and a statutory shutdown. First, unlike a statutory shutdown, Congress could not solve the problem through the simple expedient of passing a continuing resolution. Congress would have to actually raise the revenue to pay for the continuance of federal operations. Second, the relevant statutes have been interpreted to allow for exceptions where the obligation of funds in advance of an appropriation is necessary to protect life or property and in other "emergency" situations.[40] The balanced budget amendment contains no such exceptions[41] and thus, on its face, could require the federal government to cease all operations, including the operation of federal prisons, air traffic control facilities, food and workplace safety inspections, border control, military operations, and other critical functions.[42]

There would be an alternative judicial route to enforcing compliance with the balanced budget amendment: federal courts might impose taxes or other revenue raising measures to fund the continuing operations of the federal government. In *Missouri v. Jenkins*, the Supreme Court held that a federal district court could mandate that a state increase taxes in order to fund a school desegregation program. This would avoid the seriously harmful consequences of requiring a cessation of federal operations, but at the expense of the judiciary taking on a role that, in our constitutional system, is properly assigned to the politically accountable branches.

Thus, once federal expenditures equal federal revenues in a given year, a small number of cases or even a single lawsuit would do lasting damage to the judiciary and to our constitutional structure. To put it differently, a single case could represent an avalanche of litigation. And, should it turn out that courts do not become involved, we would be faced with the prospect of an

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[39] I refer to these as statutory government shutdowns because the requirement that the government cease operations and the scope of the cessation are defined by statute, particularly the Anti-Deficiency Act, 31 U.S.C. §§ 1341-1342 (2006).

[40] *See* Memorandum from Walter Dellinger, Assistant Attorney Gen., Office of Legal Counsel, to Alice Rivlin, Dir., Office of Mgmt. and Budget (Aug. 16, 1995), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/m95-18.pdf; Applicability of the Antideficiency Act Upon A Lapse in an Agency's Appropriations, 4A Op. O.L.C. 16 (1980).

[41] It is true that many proposals, such as H.J. Res. 2, include an exception for times when the nation is at war or is engaged in military conflict. But none of the leading proposals includes an exception for emergencies generally. Presumably, this is because such an exception could be made to render the amendment meaningless, since Congress would then be free to declare an emergency whenever it lacks the political will to balance the budget. While understandable, the result is that the amendment, if ratified, would not allow deficit spending for such non-military emergencies as the need to keep federal prisons or air traffic control systems operating.

[42] It is possible that, under the guise of constitutional interpretation, the Supreme Court would create exceptions to make the balanced budget amendment workable and to avoid the serious dislocation that would attend a literal application of its terms. I am not confident that the Court would do so. The Court has been willing, for example, to accept dramatic dislocation of the criminal justice system as the consequence of the literal application of other constitutional guarantees. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466 (2000). In another instance, the Supreme Court ruled the entire system of federal bankruptcy courts to be constitutionally defective. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). The Court employed its equitable powers to toll the effective date of its ruling and give Congress time comply with its ruling. Since that case, the Court has disavowed such an exercise of equitable power and ruled that its constitutional decisions must be applied retroactively. *See* Harper v. Va. Dep't of Revenue, 509 U.S. 86 (1993). Even if the Court were to accept the invitation to eviscerate the balanced budget amendment through interpretation, it is difficult to see how this counts in the amendment's favor. If we are not serious about forcing compliance with the amendment, why pass it in the first place?

amendment that includes no enforcement mechanism, and of constitutional violations for which there is no judicial remedy. As discussed below, this prospect also would be deeply troubling.

B. Alternative Enforcement Mechanisms Offer No Solution

1. Executive Enforcement

It is possible that, in the alternative, the power to enforce balance in the federal budget would devolve upon the president.[43] The president could plausibly[44] interpret the constitutional command of the balanced budget amendment that expenditures not exceed revenues to take precedence over mere statutes, including appropriations bills, entitlement packages, and the Congressional Budget and Impoundment Control Act of 1974.[45] Although the president might interpret that command to authorize him to impound funds, nothing in the amendment would guide the exercise of such a power. For example, the proposal does not say whether the President may select particular areas of his choosing for impoundment, or whether certain areas -- such as Social Security and other entitlement programs -- would be beyond the purview of his impoundment authority. Under this potentiality, it would be up to the President and the President alone to make fundamentally important policy choices about what spending should continue and what spending should be cut. This prospect is in deep tension with the existing Constitution. The framers assigned the power of the purse in no uncertain terms to Congress. This was an intentional decision. In our constitutional system, Congress is most directly accountable to the public.[46] Moreover, Congress is structured in a way that facilitates debate and deliberation, allows for a wide range of interests and viewpoints to be heard, and permits the public to follow and participate in the deliberation.[47] The President and the executive cabinet are not similarly constructed and are, in fact, designed to operate with greater dispatch and secrecy. Those who wrote and ratified our Constitution thought that decisions about how to fund the operations of the government and what operations to continue funding were the sort of decisions that should be committed to the open and deliberate process of the legislative branch rather than

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[43] I do not mean to suggest that this would be the best reading of the balanced budget amendment.

[44] Such an interpretation would be plausible not only because the Constitution vests the President with the executive power, but also because it imposes on the President the duty to take care that the laws be faithfully executed. U.S. CONST. art. II, § 3, cl. 4. This duty includes the obligation that the President take care that the Constitution be faithfully executed. *See generally* Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (2000); CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS: REVIVING THE ROYAL PREROGATIVE (1998).

[45] 2 U.S.C. §§ 601-692 (2006).

[46] Congress's direct popular election stands in contrast to the President's, which is mediated through the Electoral College. Moreover, the House of Representatives stands for election every two years, leaving it most closely connected to current public sentiment. It is for this very reason that the Constitution requires that all bills for raising revenue originate in the House of Representatives.

[47] *See, e.g.*, U.S. CONST. amend. 1 (securing the right to petition); *id.* art. I, § 5 (authorizing Congress to establish its own internal structures and anticipating that these would foster deliberation through mechanisms such as the committee structure and, in the Senate, the filibuster); *id.* ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.").

closed and unitary action of the executive. To reassign this power to the President would represent a fundamental break with the original design of the Constitution.[48]

The assignment of this power to the President would undermine the Constitution's structure in an additional way. It would upset the balance of power between the President and Congress. The framers of the Constitution understood that allocating the power of the purse to Congress would serve to make it "the most dangerous branch."[49] Indeed, the framers thought it inevitable that, in a representative republic, the legislative branch would predominate. To check against the potential for abuse of its relatively vast powers, the Constitution imposes a range of internal checks on Congress, such as dividing the legislature into two chambers of notably different character. There are no corresponding internal checks on the operations of the executive branch. Thus, the reallocation of Congress's power of the purse to the President would significantly alter the balance of power between Congress and the President and would leave that power unconstrained by the constitutional structures that promote deliberation and that deter Congress from exercising its powers oppressively. Uniting these powers to formulate fiscal policy and to then enforce that policy in the hands of the President alone would represent what the framers considered to be the paradigmatic violation of the principle of separation of powers.[50]

2. Independent Enforcement

Given that either judicial or executive enforcement of the balanced budget amendment would subvert our constitutional framework and possibly lead to substantial practical harm, it might be tempting to revise the amendment to provide for enforcement by an independent agency on the model of the Federal Reserve. Such a model would not only repeat but exacerbate the problems that inhere in executive enforcement. Because an independent agency is, by definition and design, insulated from political accountability, the fundamental fiscal policy choices involved in balancing the budget would be even more effectively removed from public input and accountability. The insulation of monetary policy, which the Federal Reserve presently sets, from immediate political control and accountability can be justified by the peculiar dangers of allowing political manipulation of the money supply. Whatever the merits of this justification with respect to monetary policy, [51] it does not apply to fiscal policy.

3. No Enforcement: The Balanced Budget Amendment as Empty Platitude

In the absence of enforcement mechanisms such as presidential impoundment of funds or judicial involvement in the budgeting process, a balanced budget amendment is unlikely to bring about a balanced budget. To have the Constitution declare that the budget shall be balanced,

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[48] This argument derives from the position of the Department of Justice set forth by then-Assistant Attorney General Walter Dellinger. *See The Balanced Budget Amendment: Hearing Before the Joint Economic Committee*, 104th Cong. (1995) (statement of Walter E. Dellinger), *available at* http://www.justice.gov/olc/jtecon.95.8.htm#N_26_.

[49] THE FEDERALIST NOS. 47, 48, 51 (James Madison). *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819) ("the power to tax involves the power to destroy").

[50] THE FEDERALIST NO. 47 (James Madison) (uniting the power of one branch with the power of another "may justly be pronounced the very definition of tyranny.").

[51] This judgment finds affirmation from the nearly universal practice of economically developed democracies in committing decisions over monetary policy to independent central banks.

while providing no mechanism to make that happen, would place an empty promise in the fundamental charter of our government and lead to countless constitutional violations. Moreover, to have a provision of the Constitution routinely violated would inevitably make all other provisions of the Constitution seem far less inviolable. As Alexander Hamilton noted:

> Wise politicians will be cautious about fettering the government with restrictions that cannot be observed, because they know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of a country, and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable.[52]

Some have suggested that even if the amendment failed to eliminate the deficit, it would nonetheless have the salutary effect of creating pressure to reduce the deficit. While this might be true, the effect would come at considerable cost. Even supposing that the amendment brought about a reduction in the size of the deficit, the remaining excess of expenditures over receipts would constitute a continuing multi-billion-dollar violation of the Constitution, every day that the budget is not in balance. For how long would we as a people continue to make difficult decisions to comply with the First Amendment or with the Due Process or Takings Clauses of the Fifth Amendment if we had routinely failed, for lack of an enforcement mechanism, to come within billions of dollars of complying with the most recent amendment to our Constitution?

If only we could declare by constitutional amendment that from this day forward justice would prevail and sound economic policy would be followed. But merely saying those things in the Constitution does not make them happen. As nations around the world have discovered, placing a statement of principle in a constitution does not mean the principle will be obeyed. Many constitutions "guarantee" a clean environment or freedom from poverty; the only effect when such promises fail is that the constitution is not taken seriously as positive law, the kind of law that may be invoked in court by litigants. The framers of our Constitution, on the contrary, understood that its provisions must be enforceable if the rule of law is to be respected. We

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[52] THE FEDERALIST NO. 25, at 167 (Alexander Hamilton) (Clinton Rossiter ed., 1961). For further expression of this concern, as it relates to proposed balanced budget amendments quite similar to this one, *see, e.g.*, Peter W. Rodino, *The Proposed Balanced Budget/Tax Limitation Constitutional Amendment: No Balance, No Limits*, 10 HASTINGS CONST. L.Q. 785, 800 (1983); *Proposed Balanced Budget Constitutional Amendments: Hearings Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 100th Cong. 614-15 (1989) (letter from William Van Alstyne, Professor of Law, Duke University to Warren Grimes, Counsel, House Judiciary Committee); *id.* (letter from Jonathan Varrat, Professor of Law, U.C.L.A. to the Honorable Peter W. Rodino, Jr., Chairman, House Judiciary Committee); and *Constitutional Amendments to Balance the Federal Budget: Hearings Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 96th Cong. 22 (1980) (testimony of Paul A. Samuelson, Nobel-prize-winning economist) ("If the adopted amendment provides escape valves so easy to invoke that the harm of the amendment can be avoided, the amendment degenerates into little more than a pious resolution, a rhetorical appendage to clutter up our magnificent historical Constitution. . . . There is no substitute for disciplined and informed choice by a democratic people of their basic economic policies.").

should hesitate long before placing an unenforceable promise in the fundamental document that binds our nation together.[53]

III. Conclusion

A balanced budget amendment would threaten to tear irrevocably the fabric of our constitutional structure. First, amending the Constitution to require a balanced budget would be a unique and dangerous experiment. It is fundamentally inconsistent with the bedrock constitutional value of democratic self-government. A balanced budget amendment would be the only constitutional provision, other than the failed attempt to mandate prohibition, that dictates the outcome of a policy dispute rather than governing the process by which decisions are made or protecting individual rights.

Second, as a practical matter, enforcing a balanced budget amendment would have catastrophic consequences. Previous commentary on balanced budget amendment proposals has focused on whether the courts would find the failure to enact a budget that is balanced to present the sort of controversy that judges can resolve. There appears to be a broad consensus that in at least some, and perhaps in many, instances, judges would resolve balanced budget controversies. In such instances, this would mean judges would be required to order either spending cuts or tax increases. This prospect is so troubling that it has justly alarmed commentators across the political spectrum.

In this Issue Brief, I have identified an additional type of lawsuit – one brought not before, but rather, after the year's outlays exceed receipts – where there can be no question that the courts would have authority to make a ruling and where there would be no issue as to what the proper remedy would be. In this setting, a balanced budget amendment operating in tandem with the Appropriations Clause would compel all government functions to cease immediately and for the remainder of the fiscal year. There is no hyperbole in calling this result catastrophic. It would mean that the balanced budget requirement would force the federal government to close prisons, to stop air traffic control, to end border patrol and other national security enforcement, to withdraw criminal prosecutions, to abandon all military activities not involving actual conflict or the prosecution of a declared war, to close Veterans Administration hospitals, and to withhold Social Security payments. These, of course, are only a few examples of what a balanced budget amendment would inflict on the nation.

In light of these dramatic consequences, attention has understandably shifted to the possibility of alternatives. As shown above, there are no viable options. If the power to enforce the requirement of balance were vested in the President, it would undo the constitutional separation of powers. The Constitution quite intentionally located the power of the purse in Congress. To join that power with the executive power would create the very threat of tyranny the framers specifically designed the Constitution to safeguard against. Allocating enforcement power to an independent agency modeled on the Federal Reserve would only heighten this threat.

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[53] This argument also derives from the position of the Department of Justice. *See The Balanced Budget Amendment: Hearing Before the Joint Economic Committee*, 104th Cong. (1995) (statement of Walter E. Dellinger), *available at* http://www.justice.gov/olc/jtecon.95.8.htm#N_26_.

Finally, it may be tempting to treat a balanced budget amendment as a symbolic and aspirational statement that is not legally enforceable; that, indeed, is not law at all. This is clearly not how the advocates of an amendment see it. Moreover, even a purely hortatory declaration would be far from harmless. There is no reason to expect that Congress, even a Congress composed of members in good faith committed to the principle of a balanced budget, would agree on how to balance the budget. The result would be an open and notorious constitutional violation. This would undermine in previously unknown ways the binding force of the Constitution's otherwise binding legal norms. I do not mean to suggest that this would lead straightaway to anarchy, but it would almost certainly water down the force of other constitutional guarantees. Over time this erosion could leave some constitutional provisions as empty as the illusory promise of a balanced budget.

The threat a balanced budget amendment would pose to our constitutional order is unavoidable. Congress, of course, remains free to enact a balanced budget if it believes this is sound economic policy. It also remains fully equipped to institute effective controls to ensure restraint and balance in the budgeting process. Therefore, there is no sufficient reason to incur the dramatic risks that the balanced budget amendment would entail for our Constitution and our nation.

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OPPOSE ANY BALANCED BUDGET AMENDMENT

November 28, 2011

The Honorable Dick Durbin, Chairman
Subcommittee on the Constitution, Civil Rights, and Human Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Lindsey Graham, Ranking Member
Subcommittee on the Constitution, Civil Rights, and Human Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Graham:

On behalf of The Leadership Conference on Civil and Human Rights, we write to express our opposition to S.J.Res.3, S.J.Res.23, or any other proposed balanced budget amendment (BBA) to the United States Constitution. While the notion of a BBA may have a certain political appeal, its impact in reality would be disastrous for the economy as a whole and for the communities we represent. As you know, a supposedly less extreme version of the BBA, H.J.Res.2, already failed in the House on November 18.

The BBA in its various forms would require a balanced budget every year, regardless of the state of the economy. While it punts on the specifics, it would require extreme spending cuts precisely when the economy is at its weakest and government revenues are at their lowest, preventing the government from resorting to countercyclical policies right when they are needed most. As a result, the BBA would tip a struggling economy into a recession and keep it there for a protracted period of time.

Moreover, the various proposals on the table would require a supermajority to increase revenues – even in order to close outrageous loopholes or to end corporate welfare in the form of tax expenditures. Such a requirement would virtually guarantee that in the event of any shortfall, the budget would be balanced on the backs of people who least can afford it.

According to a new analysis of a balanced budget amendment by Macroeconomic Advisers, one of the nation's preeminent private economic forecasting firms, if a constitutional balanced budget amendment had already been ratified and were now being enforced for fiscal year 2012, "the effect on the economy would be catastrophic." The analysis reports that if the 2012 budget were balanced through spending cuts, those cuts would have to total about $1.5 trillion in 2012 alone, which they estimate would throw about 15 million more people out of work, double the unemployment rate from 9 percent to approximately 18

percent, and cause the economy to shrink by about 17 percent instead of growing by an expected 2 percent.[1]

Additionally, all versions of the balanced budget amendment being considered also contain a provision requiring a supermajority of both houses to raise the debt limit, making the risk of default more likely and empowering a willful minority to hold the creditworthiness of the U.S. hostage to whatever other political demands they may have. The difficulty of raising the debt limit this summer illustrates how hard it can be to secure the necessary votes even when the consequences are so grave. Only two of the last ten debt limit increases achieved a three-fifths vote, and in those two cases, it was only because the increases were imbedded in other must-pass legislation. In short, a balanced budget amendment is a recipe for making recessions more frequent, longer, and deeper, while requiring severe cuts that would harshly affect seniors, children, veterans, people with disabilities, homeland security activities, public safety, environmental protection, education and medical research. It would almost certainly necessitate massive cuts to vital programs including Social Security, Medicare, Medicaid, and veterans' benefits, with cuts even more drastic than the House-passed Ryan budget.

S.J.Res.23 is even more extreme than other versions of the BBA. It would require a supermajority of two-thirds in each chamber to increase revenues, and would drastically reduce government expenditures overall to 18 percent of GDP, a level not seen in decades. Taken together, these provisions would force massive if not devastating cuts in many of our most important governmental functions and programs, cuts that have clearly not yet been fully thought out by proponents.

For these reasons, we urge you to oppose S.J.Res.3, S.J.Res.23, or any other balanced budget amendment – either as a free standing proposal or as a prerequisite to raising the debt ceiling. Thank you for your consideration. If you have any questions, please contact Senior Counsel Rob Randhava at 202-466-6058.

Sincerely,

Wade Henderson
President & CEO

Nancy Zirkin
Executive Vice President

[1] Macroeconomic Advisers LLC, "Man Up: AJ(obs)A vs. J(obs)TGA," *Macroadvisers* (blog), Oct. 21, 2011, at http://macroadvisers.blogspot.com/2011/10/man-up-ajobsa-vs-jobstga.html.

Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee
Hearing n
"A Balanced Budget Amendment: The Perils of Constitutionalizing the Budget Debate"
Subcommittee on the Constitution, Civil, and Human Rights
November 30, 2011

Earlier this month, the House of Representatives rejected by a bipartisan vote a proposed constitutional amendment to require a so-called balanced budget. That should have ended the matter. Nonetheless, as a result of this summer's brinksmanship, which resulted in lowering the credit rating of the United States and brought the Government to the brink of a shutdown, the Senate is still required to vote on something that is entitled a "Joint Resolution proposing a balanced budget amendment to the Constitution of the United States". The absurdity of this required vote is driven home by the fact that it does not require any particular provisions, just that whatever is voted on bear this specific title. I hope the Senate will follow the House's lead and withhold its endorsement of such a change to our fundamental charter, the Constitution of the United States.

I thank Senator Durbin for chairing this hearing of the Constitution Subcommittee. I expect that today's hearing will highlight many problematic provisions of the McConnell-Hatch proposal to alter the Constitution, and the dire consequences for our Nation were it to be adopted. The legislation passed this summer requiring the Senate vote did not allow for thoughtful Committee consideration. Rather it required that within five days of receiving a constitutional amendment adopted by the House, it be discharged from the Judiciary Committee. There were months of maneuvers behind closed doors within the House Republican caucus before its leadership could concoct a procedure to vote on a newly-minted version of their constitutional amendment, which failed.

The Constitution is not a posting wall for bumper stickers. It is our fundamental charter. Amendments to the Constitution are permanent. Each word matters to hundreds of millions of Americans and future generations.

The McConnell-Hatch proposal is the most extreme of the pending proposals. In fact, it does nothing to remedy our Nation's deficit, nor does it set forth any mechanism to balance the budget. What it does is incorporate an arbitrary economic estimation into fundamental law. This amendment runs contrary to any previous amendment to our Constitution and has not been carefully considered.

In particular, section six of this proposal relies on estimates for outlays and receipts. We know that economists' estimates and recommendations do not always agree. So what do these proposed constitutional provisions really mean? We know that estimates are not static but ever changing. What if during the course of a fiscal year, there is a natural disaster, a terrorist attack, or a shift in the economy? What then? What if estimates were recalculated or revised, as employment statistics are every month? Would that make every penny expended by the Government unconstitutional? Would that mean we could not help disaster victims or could not respond to a terrorist attack?

The language of the McConnell-Hatch proposal is also a recipe for a flood of lawsuits and for judges, rather than the people's elected representatives, deciding what the Government can and should spend. That could force a Government shutdown of everything from border patrol to food safety to Social Security. Do the proponents of this constitutional amendment really want to turn fiscal policy over to the same Federal judges they have spent years railing against as unelected activists?

I recently asked Justice Scalia at a hearing before the Senate Judiciary Committee whether the Federal judiciary was equipped to handle such a task. He laughed, and indicated that budget issues and determining the proper allocation of resources is not the judiciary's proper role. Of course, he is right, and the proponents of this effort to constitutionalize fiscal policy are wrong.

Fighting two unfunded wars and insisting simultaneously on the Bush tax cuts for the wealthy are prime examples of how to run up deficits and our national debt. Working with President Clinton, Democrats in Congress voted for a balanced budget. We did so without a single Republican vote to help. Our strong economy in the Clinton years led to budget surpluses. If we are serious about reducing deficits and paying down our debt, we need to get to work improving our economy, getting Americans back to work and continuing to recover from the worst economic conditions since the Great Depression.

When I consider proposals to amend the Constitution, I start with my oath as a Senator to protect and defend the Constitution and to bear true faith and allegiance to it. I wish those who ran for office professing reverence for the Constitution would show some. The McConnell-Hatch proposal has the potential to create a constitutional crisis by threatening the checks and balances that have guided us for 223 years. Our Constitution deserves better. I respect the wisdom of the Founders and will oppose this ill-conceived effort.

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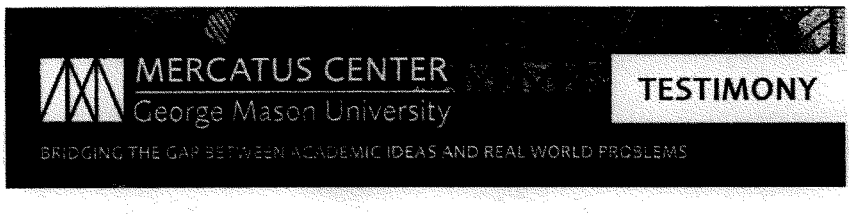

A BALANCED BUDGET AMENDMENT: WHAT CAN WE LEARN FROM STATE EXPERIENCE?

Testimony Prepared for

"A Balanced Budget Amendment to the Constitution"

United States House of Representatives, Committee on the Judiciary

October 4, 2011

Matthew Mitchell, PhD

Research Fellow

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The ideas presented in this document do not represent official positions of the Mercatus Center or George Mason University.

A BALANCED BUDGET AMENDMENT: WHAT CAN WE LEARN FROM STATE EXPERIENCE?
OCTOBER 4, 2011

Matthew Mitchell, PhD
Research Fellow, Mercatus Center at George Mason University

United States House of Representatives, Committee on the Judiciary

INTRODUCTION

On its current course, United States fiscal policy threatens to hobble the nation's prospects for economic growth. Economic theory suggests that an important source of the problem is the government's ability to purchase services for current voters with taxes levied on future generations. A balanced budget requirement, by "internalizing" both the costs and benefits of government services, would therefore seem to be a natural solution.

In this testimony, I summarize the scope of the fiscal problem and then review state-level evidence to consider the ways that a federal balanced budget amendment might impact the nation's fiscal and economic future.

THE SCOPE OF THE PROBLEM

The Congressional Budget Office (CBO) projects that, absent policy change, the nation's public debt will exceed 90 percent of Gross Domestic Product (GDP) within seven years.[1] The ninety percent figure is important. At that point, according to economists Carmen Reinhart and Kenneth Rogoff, debt begins to hamper economic growth. Using data from forty-four countries spanning 200 years, they find that when a nation's debt level exceeds 90 percent of GDP, its growth rate slows. In the median case, real growth slows by about 1 percentage point; in the mean case, growth is cut in half.[2]

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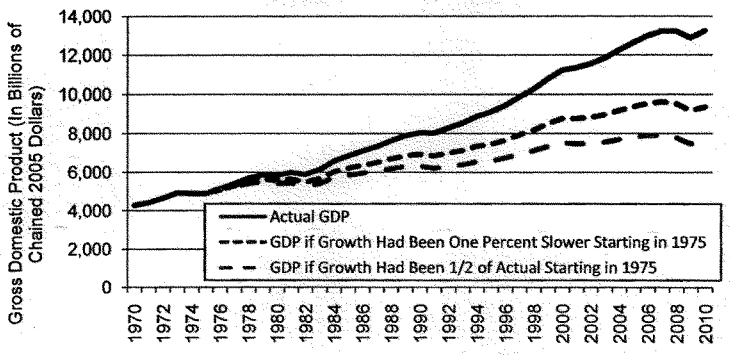
[1] Congressional Budget Office, *2011 Long-Term Budget Outlook*, Alternative Fiscal Scenario, June 2011. The "Baseline Scenario" assumes no change in *law*, while the "Alternative Fiscal Scenario" assumes no change in *policy*. Current law calls for a number of policy changes that are unlikely to materialize. For example, under current law, physician reimbursements will be cut by about 30 percent. Since Congress has repeatedly intervened to ensure that such reductions do not take place, most experts believe the "Alternative Fiscal Scenario" is a more realistic projection of future policy.

[2] Carmen Reinhart and Kenneth Rogoff, "Growth in a Time of Debt," *NBER Working Paper*, No. 15639, 2010, http://www.nber.org/papers/w15639. See Table 1. These figures are from advanced economies.

Figure 1: Actual and Alternative Growth Paths



Sources: Bureau of Economic Analysis, author's calculations.

To put these numbers in perspective, consider Figure 1. The top line shows the actual growth of United States GDP over the last four decades. Below that are two hypothetical paths: GDP if the country had grown 1 percentage point slower and GDP if it had grown at half its actual pace. Note that the most calamitous economic contraction in decades—the Great Recession that began in 2008—is just a blip compared with the lost income associated with persistently anemic economic growth.

As the operator of the world's reserve currency, the United States enjoys what has been called an "exorbitant privilege."[3] Because the world's central banks and international traders conduct their business in the dollar, the United States may be able to accumulate debt levels in excess of 90 percent before experiencing the type of slowdown that other nations have experienced. That said, CBO expects debt to reach 100 percent of GDP within 10 years, and nearly 200 percent within 25 years. Not even a reserve currency nation can withstand these debt levels without experiencing a significant slowing of economic growth. Moreover, the economic pain will be more pronounced if our debt levels threaten the dollar's status as the world currency or if they trigger a precipitous flight of capital.

These crippling debt projections are the result of two distinct problems.

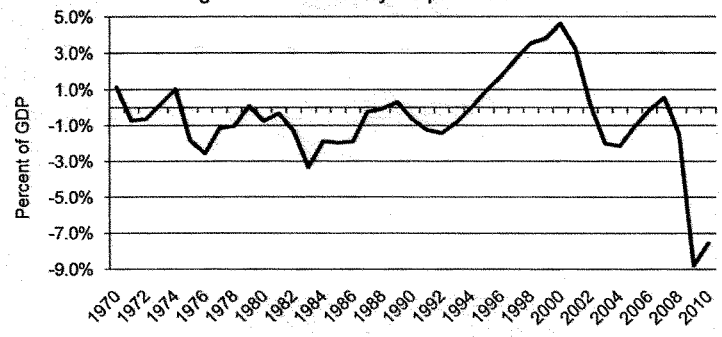
The first problem is a long-running, systematic bias toward deficit spending. This is evident when one looks at the historical record. The most conservative measure of the deficit does not count interest payments as expenses and is called the "primary deficit." Figure 2 shows the United States' federal primary deficit from 1970 through 2010. Positive values indicate a surplus while negative values indicate a deficit. For most of this period—83 percent of the time—the United States economy was expanding.[4] Therefore one would

[3] The term is often attributed to Charles De Gaulle, though it appears that it was actually coined by his lieutenant, Valery Giscard d'Estaing. Barry Eichengreen, *Exorbitant Privilege: The Rise and Fall of the Dollar and the Future of the International Monetary System*. (New York: Oxford University Press, 2011).

[4] US Business Cycle Expansions and Contractions, National Bureau of Economic Research, http://nber.org/cycles/cyclesmain.html.

expect that the federal government would have run a primary surplus for most of these years.[5] Instead, the federal government ran a primary deficit 66 percent of the time. When one uses a less-conservative measure of the deficit and counts interest payments as expenses, the government ran a deficit 90 percent of the time.[6] The bias toward deficit spending is systematic in that it is evident in both good and bad economic times and in both Republican and Democratic administrations.

Figure 2: U.S. Primary Surplus / Deficit



Sources: White House Office of Management and Budget, Historical Tables, 2.1 and 3.1; Bureau of Economic Analysis, National Income and Product Accounts; author's calculations.

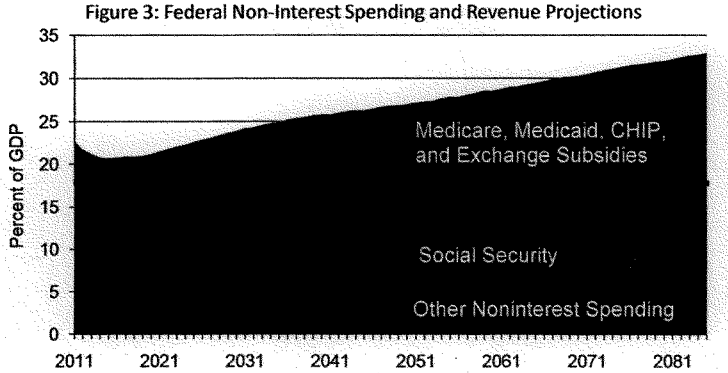
The second problem threatening to push the debt to dangerous heights is an explosion in entitlement spending. As indicated in Figure 3, CBO projects that, absent policy change, noninterest spending on entitlement programs, particularly Medicare, will consume an ever-larger share of national output. As these programs consume more of the nation's resources, they will also consume more of the federal government's resources, crowding out spending on national defense, domestic security, education, energy and all other discretionary programs.[7]

[5] If the government were to attempt to run a sustainable Keynesian counter-cyclical fiscal policy, it would need to run deficits when the economy was in recession and surpluses when it was expanding. The surpluses are needed to pay off the debt accumulated during the recessions. See Paul Krugman, "Hard Keynesianism," *The Conscience of a Liberal* (May 2, 2011), http://krugman.blogs.nytimes.com/2011/05/02/hard-keynesianism/.

[6] Office of Management and Budget, Historical Tables, Table 1.2.

[7] Within three years, the federal government will spend more on entitlement programs than on all other discretionary programs combined.

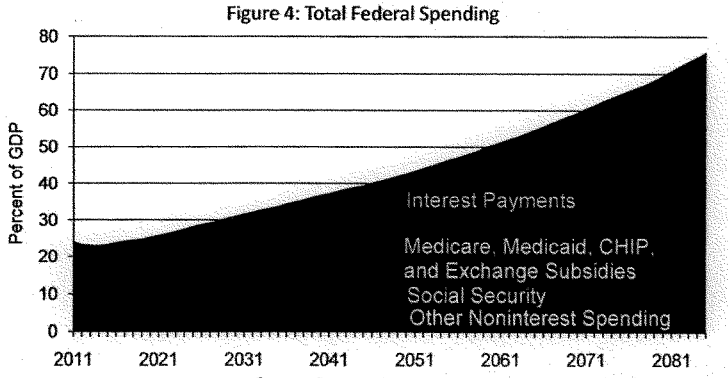
Figure 3: Federal Non-Interest Spending and Revenue Projections



Source: Congressional Budget Office, Long Term Budget Outlook, Alternative Fiscal Scenario, June 2011.

Because noninterest spending is projected to exceed revenue, the difference must be financed by ever-larger deficits. As borrowing increases, the debt grows. And as the debt grows, payments on the debt grow. These payments on the debt then become part of the problem, adding to the government's spending. As shown in Figure 4, total federal spending as a share of GDP will be twice its historical average within just a few decades. Note, also, that interest on the debt will soon become the single largest line item in the budget, dominating all other programs. In other words, the debt and payments on the debt make it ever more difficult for government to perform its core functions.

Figure 4: Total Federal Spending



Source: Congressional Budget Office, Long Term Budget Outlook, Alternative Fiscal Scenario, June 2011.

Ultimately, the problem is one of incentives. The federal government's bias toward deficit spending has been evident for decades. And the long-run fiscal problems with the entitlement programs have been known for just as long. But politicians of neither party have an incentive to fix these problems. This is because the costs of the status quo are mostly borne by those who are too young to vote (or not yet born), while the costs of reform would be borne by today's median voter.

The problem is akin to the simple externality problem familiar to environmental economists. If, in the process of producing goods for consumers, a factory owner is allowed to bilge smoke into the sky without accounting for the costs it imposes on others, he will inefficiently produce too much of his product. Similarly, if in the process of providing services to current voters, government is allowed to push off the cost onto future generations, it will produce an inefficiently large quantity of services. This problem was identified by Nobel-Prize-Winning economist James Buchanan and his fellow economist, Richard Wagner, over thirty years ago:

> This bias toward deficits produces, in turn, a bias toward growth in the provision of services and transfers through government. Deficit financing creates signals for taxpayers that public services have become relatively cheaper. Because of these signals, voters will demand a shift in the composition of real output toward publicly provided services (including transfers).[8]

The solution to both problems is to "internalize the externality" by making those who benefit from the good or service pay for all the costs involved in producing it. At the federal level, a balanced budget requirement would internalize the fiscal externality imposed on future generations. Buchanan and Wagner argue that a cultural balanced budget requirement existed for most of the history of the American republic and that that cultural requirement was weakened by the advent of Keynesian theory.[9] In its place, policy makers have contemplated a legal balanced budget requirement for the better part of a century.[10] How might such a requirement work and what would be its effect?

LESSONS FROM THE STATES[11]

Fortunately, federal policy makers are not flying blind. Nearly every state in the Union has a balanced budget requirement, and there is much to be learned from their experience.

Justice Brandeis famously referred to the federal system as a "laboratory" in which each state was free to implement novel social and economic experiments.[12] For the social scientist interested in understanding how a balanced budget amendment might affect policy outcomes, the metaphor is apt. While every state but Vermont has a balanced budget requirement, the stringency of these requirements varies widely, allowing researchers to exploit the variation to understand the impact of more or less-stringent requirements. At the same time, many other factors that might influence fiscal outcomes are invariant across the states. In other words, cross-state studies effectively control for factors such as macroeconomic conditions, culture, and the

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[8] James Buchanan and Richard Wagner, *Democracy in Deficit: The Political Legacy of Lord Keynes* (Indianapolis: Liberty Fund, [1977] 1999), Chapter 7.

[9] In their words, "Keynesian economics has turned the politicians loose; it has destroyed the effective constraint on politicians' ordinary appetites. Armed with the Keynesian message, politicians can spend and spend without the apparent necessity to tax." Ibid, Chapter 1.

[10] The first such proposal appears to have been made by Harold Knutson (R-MN), in May of 1936.

[11] Parts of this section are drawn from Matthew Mitchell, "Institutions and State Spending: An Overview" (working paper, Mercatus Center at George Mason University, Arlington, VA, 2011).

[12] *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=285&invol=262.

broad legal/constitutional setting in which each state operates. Furthermore, researchers are able to employ various econometric techniques to control for the influence of those factors that *are* different across states, such as climate or demography. In sum, the setting provides a rich laboratory in which to test the effect of different balanced budget rules on budgetary outcomes.

How do balanced budget requirements vary across the states? In some states, the "requirement" of balance only applies to the governor's proposed budget. In other words, the governor must submit a balanced budget, but the legislature need not pass one. In other states, *estimates* of the enacted budget need to show balance, but there are no consequences if these estimates prove wrong at the end of the fiscal year and the actual budget is out of balance. In some states, the legislature may carry-over a deficit from one year to the next, while in others they may not. Lastly, in some states an independently elected Supreme Court is the ultimate enforcer of the requirement, while in others the legislature appoints the members of the Supreme Court.

A number of studies have found that states with stricter balanced budget requirements tend to tax and spend less than other states. Henning Bohn of U.C. Santa Barbara and Robert Inman of the University of Pennsylvania, for example, find that per-capita spending is about $189 less in states with strict balanced budget requirements relative to those with weak requirements.[13] David Primo of the University of Rochester arrives at a remarkably similar result, finding that strict balanced budget requirements reduce spending by about $184 per capita.[14] If this is the impact of moving from a weak to a strict balanced budget requirement at the state level, it is possible that if the federal government were to adopt a balanced budget requirement where none now exists, the impact would be even greater.

Strict balanced budget requirements have other beneficial effects. Bohn and Inman find that states with strict requirements tend to have larger rainy day funds and larger surpluses. They also find that states with these requirements tend to balance their books through spending reductions rather than revenue increases. This is helpful given the fact that most recent evidence suggests that tax increases are a more economically damaging way to close deficits than spending reductions.[15]

Shanna Rose of New York University finds that states without strict balanced budget requirements are more likely to suffer from a "political business cycle" whereby policy makers increase spending just prior to an election, only to cut back following the election.[16]

But there may be some unintended consequences of a strict balanced budget requirement. Economists Noel Johnson, Steven Yamarik, and I recently examined the impact of rules that make it difficult to carry a deficit over from one year to the next. On the one hand, we found that these rules limit the likelihood of

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[13] This estimate, and all others in this paper, has been converted into 2008 dollars for ease of comparison. When authors report a range of estimates, I take the average and then convert that average into 2008 dollars. Henning Bohn and Robert Inman, "Balanced Budget Rules and Public Deficits: Evidence from the U.S. States," (working paper No. 5533, National Bureau of Economic Research, 1996).

[14] David Primo, *Rules and Restraint: Government Spending and The Design of Institutions* (Chicago: University of Chicago Press, 2003). Mark Crain has also corroborated this result. See Mark Crain, *Volatile States: Institutions, Policy and the Performance of American State Economies* (Ann Arbor: University of Michigan Press, 2003).

[15] See, for example, Alberto Alesina and Silvia Ardagna, "Large Changes in Fiscal Policy: Taxes Versus Spending," *Tax Policy and the Economy*, Vol. 24 (2010): 35-68. See, also, Daniel Leigh, Pete Devries, Charles Freedman, Jaime Guajardo, Douglas Laxton, and Andrea Pescatori, "Will It Hurt? Macroeconomic Effects of Fiscal Consolidation," in *World Economic Outlook: Recovery, Risk, and Rebalancing* (Washington, D.C.: International Monetary Fund, 2010).

[16] Shanna Rose, "Do Fiscal Rules Dampen the Political Business Cycle?" *Public Choice* 128, no. ¾ (September 2006): 407–431.

partisan fiscal outcomes. On the other, they may increase the likelihood of partisan regulatory outcomes. When Democratic-controlled states were unable to carry a deficit forward to the next fiscal cycle, they were more likely to raise the minimum wage, less likely to adopt a right-to-work statute, and more likely to regulate personal freedoms (as measured by an index of personal freedom).[17]

WAYS TO IMPROVE ON A BALANCED BUDGET REQUIREMENT

Rainy Day Fund

Some commentators worry that a balanced budget requirement exacerbates the ups and downs of the business cycle. Since budgets tend to be the tightest at the bottom of an economic downturn, this argument goes, strict balanced budget requirements force governments to cut back on spending at the worst time.[18] I think this is a fair critique. One institutional answer to it is a "budget stabilization fund," better known as a rainy day fund. States contribute to these funds during good years and then draw on them when the budget is strained due to a downturn or some other event such as a natural disaster. Forty-seven states currently maintain such funds, but like many institutions, their design varies on a state-by-state basis.[19]

Studies of rainy day funds suggest that they can smooth out the spending-cycle, but the details matter. Gary Wagner of Duquesne University and Erick Elder of the University of Arkansas conducted the most-comprehensive recent study of rainy day funds. They find that states whose rainy day funds have strict rules governing deposits and withdrawals tend to experience a $14 per-capita reduction in spending volatility (as measured by the cyclical variability of per capita spending over time).[20]

Balance Over the Business Cycle

Alternatively, the pro-cyclicality of a balanced budget requirement may be avoided with a stipulation that the budget be balanced over some period longer than a year. This would allow the government to run a deficit during contractions, but would force a surplus during the next expansion. As Alex Tabarrok, an economist at George Mason University, has recently reported, Sweden has had such a rule for over a decade now and it has met with success.[21] Economists Glenn Hubbard and Tim Kane recently made a similar point.[22]

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[17] Noel Johnson, Matthew Mitchell, and Steven Yamarik, "Pick Your Poison: Do Politicians Regulate When They Can't Spend?" (working paper, Mercatus Center at George Mason University, Arlington, VA, 2011), http://mercatus.org/sites/default/files/publication/Partisan_Policies_Johnson_Mitchell_Yamarik_WP1128_0.pdf.

[18] Norman Ornstein, "Why a Balanced-Budget Amendment Is Too Risky," *Washington Post*, July 29, 2011, http://www.aei.org/article/103883.

[19] Kim Rueben and Carol Rosenberg, "State and Local Tax Policy: What Are Rainy Day Funds and How Do They Work?" in *The Tax Policy Briefing Book*, Tax Policy Center, August 12, 2009, http://www.taxpolicycenter.org/briefing-book/state-local/fiscal/rainy-day.cfm.

[20] Gary Wagner and Erick Elder, "The Role of Budget Stabilization Funds in Smoothing Government Expenditures over the Business Cycle," *Public Finance Review*, Vol. 33, No. 4 (July 2005): 439–465.

[21] Alex Tabarrok, "The Virtues of an Unbalanced-Budget Amendment," *Time*, http://www.time.com/time/specials/packages/article/0,28804,2086781_2086783_2086788,00.html. For a review of international experiences with budget rules see Manmohan Kumar, et al., "Fiscal Rules: Anchoring Expectations for Sustainable Public Finances," *International Monetary Fund*, December 2009, http://www.imf.org/external/np/pp/eng/2009/121609.pdf.

[22] Glenn Hubbard and Tim Kane, "In pursuit of a balanced budget," *Politico*, July 28, 2011, http://dyn.politico.com/printstory.cfm?uuid=61211C7E-4B46-45EB-B4AE-FE6EF30DEADD

A Transition Period

Another concern with a balanced budget amendment has to do with the transition. Given that the nation currently borrows 45 cents for every dollar spent, a requirement to immediately achieve balance would require either draconian spending cuts or dramatic tax increases.[23] This can easily be remedied, however, with a smooth glide-path to achieve balance.

CONCLUSION

On almost every conceivable measure, the U.S. states are more fiscally fit than the federal government. On a per-capita basis, states spend about one half of what the federal government spends. Their debt loads are about one seventh that of the federal government.[24] And state unfunded liabilities are about one third as large as federal unfunded liabilities (taking the most conservative estimate of the latter).[25] Furthermore, states manage to balance their operating expenses (some gimmickry aside) on an annual or biennial basis while the federal government is out-of-balance more years than not. When states do borrow, it is typically for long-term capital projects, so that future generations end up paying for roads and bridges that they themselves will use. In contrast, much of the federal bill that my daughter's generation will inherit is to pay for my generation's consumption.

This is all the more surprising given the fact that, constitutionally, states essentially have a blank check whereas the federal government does not. As Madison put it in Federalist No. 45:

> The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite.[26]

In my view, the relative probity of the state governments owes much to the simple fact that each generation of state taxpayers must bear both the costs and the benefits of government services. As long as the federal government is allowed to vote benefits for the current generation while passing the costs onto future generations, I believe the national debt will continue to grow.

Thank you for your time. It has been an honor to speak with you today, and I welcome any questions.

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[23] Office of Management and Budget, Historical Tables, Table 1.1.

[24] Author's calculation, based on data from U.S. Census Bureau, State Government Finances Page, http://www.census.gov/govs/state/; and Office of Management and Budget, op. cit.

[25] For state unfunded liabilities, see *State and Local Governments: Fiscal Pressures Could Have Implications for Future Delivery of Intergovernmental Programs*, Government Accountability Office, No. 10-899 (July 2010), http://www.gao.gov/new.items/d10899.pdf. For Social Security's unfunded liabilities, see *2011 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplemental Medical Insurance Trust Funds*, (Washington, D.C.: U.S. Government Printing Office, May 13, 2011), http://www.ssa.gov/oact/tr/2011/tr2011.pdf. For Medicare unfunded liabilities, see *2011 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds*, (Washington, D.C.: U.S. Government Printing Office, May 13, 2011), https://www.cms.gov/ReportsTrustFunds/downloads/tr2011.pdf.

[26] James Madison, "No. 45," in *The Federalist*, by Alexander Hamilton, James Madison, and John Jay, ed. Clinton Rossiter (New York: Signet Classics, [1787] 1961).

TESTIMONY OF ALAN B. MORRISON
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Subcommittee on the Constitution, Civil Rights and Human Rights
Senate Committee on the Judiciary
"A Balanced Budget Amendment:
The Perils of Constitutionalizing the Budget Debate"

November 30, 2011

Senator Durbin, members of the Subcommittee. Thank you for inviting me to appear before your Subcommittee today to testify on this very important subject. There are many problems with the concept of enshrining a balanced budget in the Constitution, but I want to speak about only one today: enforcement. If a balanced budget amendment becomes law, how will it actually be enforced? And if the answer is, turn the matter over to federal judges, will that solve our budget problems or make them worse?

In my current position at George Washington University Law School, I am teaching both civil procedure and constitutional law this academic year. I have taught at various law schools, mainly on a part-time basis for over thirty years, but my principal work relevant to my testimony today occurred when I was at the Public Citizen Litigation Group, where I was involved in almost all of the major separation of powers cases that reached the Supreme Court from the early 1980s to 2000. It is that experience that is the primary basis of my testimony today.

Almost 15 years ago I appeared before the Senate Judiciary Committee and discussed this same subject. I ask that a copy of that testimony, plus the testimony that I gave in the House in 1995, be included in the record of this proceeding. I made three points, all of which are true today: (1) it is up to Congress to include within any balanced

budget amendment its decision on the role of judicial review, and this is not an area where leaving it for the courts to decide whether there shall be judicial review is an acceptable answer; (2) if the amendment does not expressly provide for judicial review, it is virtually certain that the Supreme Court will hold that no one has standing to sue for alleged violations of the amendment (and that any challenge involves a political question and is also unreviewable for that reason). That will mean that the amendment, which is being sold as an elixir for all our budgetary ills, will be virtually toothless; and (3) if the amendment does provide for judicial review, the courts are a wholly inappropriate entity to resolve the kind of questions that must be faced, and remedies ordered, so that there is a balanced budget for a given fiscal year. I will discuss each point in turn.

1. Don't Leave Judicial Review to the Courts.

Assuming that some version of a balanced budget constitutional amendment became law, it is inevitable that there will be claims that the laws enacted by Congress produce a budget that violates the Constitution. Either those claims would be subject to judicial review, or they would be "resolved" by the same political process that produced those laws that created the unbalanced budget. Because this is an amendment to the Constitution, Congress could explicitly provide, as does Senator Mike Lee (R. Utah) in S. J. Res. 5, section 6, that "Any Member of Congress shall have standing to seek judicial enforcement of this article, when authorized to do so by a petition signed by one third of the Members of either House of Congress." I applaud Senator Lee for his willingness to make a clear choice on the issue of judicial review, which is something that was not done in the House Bill (H. J. Res. 2) that received a majority of votes in the House on

November 18, 2011 (261-165), but not the two-third required for passage of a constitutional amendment.

Nor is the issue squarely faced in S.J. Res. 10 and S.J. Res. 23, which have been co-sponsored by all Senate Republicans, including Senator Lee, although the possibility of judicial review is recognized by section 8, which provides that "No court of the United States or of any State shall order any increase in revenue to enforce this article." Similarly, S.J. Res. 24, section 7, implicitly recognizes that there will be judicial review, but does not provide for standing for anyone: "No court of the United States or of any State shall enforce this article by ordering any reduction in the Social Security benefits authorized by law, including any benefits provided from the Federal Old-Age and Survivors Insurance Trust Fund, the Federal Disability Insurance Trust Fund, or any fund that is a successor to either such fund." Indeed, so far as I am aware, the only other proposed constitutional balanced budget amendment introduced in this Congress that has been explicit on the issue of judicial review is H. R. 2685, which provides in section 3(6) for the enactment of a balanced budget amendment under which "Any Member of Congress and any Governor or Attorney General of any State shall have standing and a cause of action to seek judicial enforcement of the amendment."

Just as "War is too important to be left to the generals," the issue of whether there should be judicial review of claims that a violation of the balanced budget constitutional amendment has occurred is too important to be left to the courts. As I explain below, thrusting the courts into budget battles is to me, and I believe to most others who have given the matter any serious thought, a terrible idea. At the very least, it is very strong medicine. But if that is what the sponsors think is needed, they should have the courage

to say so. On the other hand, if the cure of judicial review is seen as worse than the ills of an unbalanced budget, Congress should make that clear in the amendment itself. If that option is taken, then the amendment will probably end up being little more than empty rhetoric, to be followed when it is convenient, and ignored when it is not. Meanwhile, serious efforts to bring our spending more in line with our revenues will be put on the back burner while Congress relies on the hope that the balanced budget amendment will do its job.

The choice between these two alternatives is important not primarily for the courts that will be asked to decide claims of unbalanced budgets, but for Members of Congress who are being asked to vote on the amendment and, if it achieves two-thirds in both Houses, the States that will be asked to ratify it. Judicial review or no judicial review is not a peripheral matter, but one that every responsible Member of both Houses should insist on knowing what the amendment will do before voting on it. The gulf between courts running the federal budget on the one hand, and a balanced budget constitutional amendment with no teeth on the other, is not a mere detail than can be worked out later, but goes to the essence of whether to pass such an amendment.

Some have suggested that the President will enforce the amendment if the courts do not. That hope seems ill-advised for several reasons. First, each President has his favorite programs, and he must sign all bills into law, making him an unlikely candidate to cut-back programs that he supports. Second, the Supreme Court held unconstitutional the Line-Item Veto Act in which Congress expressly authorized the President not to spend certain items in future laws enacted by Congress. *Clinton v. City of New York,* 524 U.S. 417 (1998). That significantly narrows the window in which a President might be

able to effect reductions in spending that might be needed to balance a budget to laws in which the President is given that power in the annual spending bills themselves. It might be possible to authorize the President to make spending cuts on his own if the amendment itself expressly granted him that power, but no bill that I have seen does that. Third, there is no reason to believe that Congress, no matter which party is in control of both Houses and the Presidency, will turn over the political job of balancing the budget to the President alone. It is equally hard to imagine Congress even agreeing on the areas and general parameters in which the President can refuse to spend appropriated funds, when Congress cannot agree on how to actually balance the budget. Finally, while it is possible that Congress could constitutionally delegate to the President the power to *increase* some taxes within some limits in some circumstances, it is almost impossible to believe that Congress would actually give the President that power, let alone give him sufficient authority to cure a serious budget deficit through increasing taxes.

2. Silence Will Mean No Judicial Review.

To be sure, if a balanced budget amendment specifically stated that taxpayers or members of Congress may sue to enforce it, the courts would follow that direction. But without a clear direction, no one would be able to sue to stop a violation if the amendment becomes law- no matter how egregious or intentional it is. Article III of the Constitution limits federal courts to deciding what are denominated as "cases or controversies," which requires much more than that the plaintiff has sued the defendant over a disagreement about whether the defendant is acting in a manner permitted by the Constitution. Embedded in that phrase are the doctrines known as standing, ripeness, mootness, and political question to mention the four that bear on possible judicial review

of claims that a budget enacted by Congress violates the balanced budget amendment. For purposes of the discussion in this section and the final one, I will assume for simplicity purposes (and counter to all known experiences with how Congress has enacted recent budgets) that Congress (a) passes a single bill with the entire budget for the forthcoming fiscal year, and (b) does that before that year begins. Should Congress act as it has in recent years and pass multiple continuing resolutions and not enact all the laws necessary to constitute the federal budget until six months or more into the fiscal year, judicial review would even more difficult to conduct, let alone to provide meaningful relief if a violation were found.

The first and most difficult hurdle to surmount is lacking of standing, a situation that has become much worse since I last appeared before the full Committee in early 1997. The principal problem is caused by the Supreme Court decision in *Raines v. Byrd,* 521 U.S. 811 (1997), in which the Court held unconstitutional a provision contained in the Line-Item Veto Act that gave Members of Congress standing to challenge the constitutionality of the Line-Item Veto. The clear message of that opinion is that the Court believes that Members of Congress have no business asking the federal courts to overturn laws with which they disagree, even when their claim is that the law violates rights given to them by the Constitution. As Senator Lee recognizes, if Congress wants Members to have standing, it must say so in the amendment itself.

Nor are taxpayers able to obtain standing, unless the amendment specifically authorizes them to do so. The Court has always been very clear that the federal courts generally may not entertain suits by taxpayers alleging that particular spending violates the Constitution. *Frothingham v. Mellon,* 262 U.S. 447 (1923). In 1968 in *Flast v. Cohen,*

392 U.S. 83, the Court created an exception for taxpayer standing for laws authorizing spending alleged to be in violation of the Establishment Clause. But in recent years it has made clear that the exception applies only to Establishment Clause cases, *DaimlerChrysler Corp v. Cuno,* 547 U.S. 332 (2006) (rejecting taxpayer standing under Commerce Clause), and it has narrowed the circumstances in which even that kind of challenge may be made by taxpayers. *Arizona Christian School Tuition Organization v. Winn,* 131 S.Ct. 1436 (2011); *Hein v. Freedom from Religion Foundation, Inc.,* 551 U.S. 587 (2007).

Standing is only the first hurdle that must be surmounted. The Court must also find that the challenge is ripe, which means in this context that the Court is sufficiently certain that an alleged violation will occur that it should step in to determine the legality of the conduct at issue. *Ohio Forestry Association, Inc. v. Sierra Club,* 523 U.S. 726 (1998); *National Park Hospitality Association v. Department of Interior,* 538 U.S. 803, 811 (2003) (raising ripeness *sua sponte*). The federal courts will (rightly) be extremely reluctant to wade into these budget battles and thus will want to be sure that there is likely to be a violation before agreeing to decide the merits. But budgets are inherently uncertain in their impact, depending on such factors as whether revenue targets are met, whether the demand for entitlements is higher or lower than anticipated, whether discretionary spending is fully realized, and whether an existing war winds down or a new one starts, each with great uncertainties accompanying them. Thus, it will be far from clear on October 1st of a given fiscal year whether a duly enacted budget will or will not be in balance, assuming that the question is reasonably close, as it is likely to be in at least some years. Unless Congress makes it clear, either in the amendment or perhaps by

subsequent legislation, that the courts should resolve all doubts in favor of finding claims ripe, the courts are likely to be very reluctant to reach the merits even for those persons who are expressly given standing in the amendment.

Third, there is the political question doctrine and its admonition for courts not to become involved in cases in which there are no manageable standards for judges to apply. *Baker v. Carr,* 369 U.S. 186 (1962). The main problem for the courts will be at the remedy stage: what programs may they cut and by how much, assuming that they cannot order tax increases to close the gap? If there was ever a question for which the courts were ill-suited, it is surely this one. Therefore, unless the amendment surmounts this problem as well, the Supreme Court will almost certainly declare this area out of bounds for the federal courts. *See also Nixon v. United States,* 506 U.S. 224 (1993)(question of whether procedures used by Senate to impeach federal judge constitutes a "trial" within Article I, section 3, clause 6 of the Constitution held to be political question).

Finally, there is likely to be a serious problem of mootness under cases such as *Hall v. Beals,* 396 U.S. 45 (1969). What can or should the courts do if they find a violation, but the fiscal year is over, and the money has all been spent? Can they order the recipients (of salaries, social security benefits, Medicare payments, payments under Government contracts etc) to "pay back" the excess? Or can it order Congress to rectify the balance in the next year's budget, which would almost certainly trigger a new lawsuit? To be sure, the courts will not dismiss as moot claims that are capable of repetition, yet evade review because the duration of the violation is so limited that the courts can not decide its legality before it has ceased. *Doe v. Bolton,* 410 U.S. 179, 188

(1973) (abortion case brought by doctor). While a court may be willing to say that there are likely to be budget deficits in the future, the current doctrine requires that the future problems must involve the same parties and that the legal issues be the same or very similar to those at issue in the present case, *Weinstein v. Bradford,* 423 U.S. 147 (1975). That will be very difficult to satisfy in the context of an ever-shifting set of budget debates and a different set of facts relating to the budget each year. Again, if the amendment directs the federal courts not to be troubled by mootness issues, they will find a way to create some kind of remedy. But unless there is a clear direction to disregard problems of mootness, the courts are likely to dismiss the challenges on this ground once the fiscal year has concluded, or perhaps once it becomes clear that there is no longer any available remedy for the violation that the court has found.

3. Litigation May Be Worse Than No Judicial Review.

As the foregoing discussion makes clear, there are a series of basic problems surrounding the use of the courts to remedy violations of a balanced budget amendment. Assuming that they can be surmounted, the actual litigation over whether there has been a violation, and what to do about it, are also fraught with difficulties that should give great pause to any Member who cares about maintaining the limited role of the federal courts, which will ultimately mean the Supreme Court. Let me explore just a few to give the Subcommittee the flavor of what is likely to transpire.

First, there are the very substantial issues of uncertainties in almost every part of the budget. Budgets are built on assumptions which may turn out to be too high, too low, or about right. It is often unclear what those assumptions are, beyond the fact that the Congressional Budget Office has "scored" them, and that score is used to provide the

numbers for the budget. It is possible that Congress will enact a budget that, on its face, is in violation of the amendment, but it is more likely that Congress will purport to balance the budget, but use very favorable assumptions or even wishful thinking. Suppose Congress, through the CBO or otherwise through its committees, estimates that corporate income taxes will produce $200 billion in revenue, and the challengers dispute that number. Will they get discovery of CBO and the committees to see what assumptions they made and whether their numbers add up? Will that mean examining their work papers and/or taking depositions of those in charge of the estimates, including both staff and Members? Presumably the challengers will have experts of their own, and they will have to produce reports and then be deposed. Meanwhile, the U.S. economy will not be standing still and doing exactly what Congress predicted. Presumably that reality – whichever way it affects corporate tax receipts – will have to be factored into the process, and probably more than once. The court will then be faced with the question of whether it is constitutional to pass a budget that is in balance as enacted (assuming good faith estimates), but becomes unbalanced afterwards – and vice versa.

Of course, corporate tax receipts are only one item in the budget, and so there are likely to be multiple challenges to the many different items from the many different agencies whose expenses and income comprise the entire budget. Thus, the questions raised in the prior paragraph have the potential for being repeated scores of times for all of the major agencies of the Federal Government, and all at the same time and perhaps in multiple forums.

That gets to the next major problem: time and timing. Unlike some constitutional challenges, such as those testing the Affordable Care Act, in which the issues are purely

legal and no discovery is required, these cases would be very fact intense, requiring both discovery and in all likelihood a trial, presumably before a judge not a jury. In reality, it will be much more like a greatly expanded version of the challenge to the Bipartisan Campaign Act of 2002, which produced a massive record on issues that were ultimately legal and not factual in nature. *McConnell v. FEC,* 540 U.S. 93 (2003). Assuming that a challenge was filed shortly after the fiscal year began (itself a quite optimistic assumption since the plaintiffs would have to figure out which parts of the budget were most likely to be challengeable), and assuming that there were no legal motions made by the Government that would slow things down (another highly dubious assumption), massive discovery, with its own set of disputes and motions, would ensue, and have to be resolved for each separate area of dispute. This would mean that Government attorneys and budget experts to back them up would have to be assigned almost full-time on the case, if it is to be decided in time to provide meaningful relief. That would also mean that one judge would be doing little else besides this case (unless the case was assigned to a three judge court – to avoid an appeal to the court of appeals – in which event three judges would be doing that). Then would come the trial, after which the parties would have to file briefs keyed to the trial record, and the judge or judges would have to reach a decision, explaining whether they found a violation or not and on what basis. And, of course, there would be an appeal by whichever side lost, ultimately ending up in the Supreme Court, which would be expected to sort out this ever-changing controversy – all before the end of the fiscal year on September 30th – only to be repeated again the next year.

And I have not even mentioned the difficulty of finding an appropriate remedy, assuming the decision came early enough in the fiscal year to give the court some options – another highly dubious assumption, but one that is essential for there to be meaningful judicial review. For example, would the remedy have to relate to the violation? Thus, suppose that the corporate tax receipts were found by the court to be only $150 billion instead of $200 billion, must the remedy be directed at corporate taxes so that they would have to be raised by the shortfall to balance the budget? Sticking only to taxes, there are many ways to make up $50 billion – would the judge get to decide how to do it or would there be some formula? Senator Lee's bill would forbid raising taxes as a remedy for a violation, but the Democrats are not likely to agree to such a limitation, and it is hard to see how Congress will get the two-thirds votes in both Houses with no (or virtually no) Democrats supporting it, let alone find 38 States that will ratify that version of the amendment.

Moving away from the tax area, suppose that the Defense Department's actual expenses were found to be likely to be $250 billion larger than anticipated. That budget is comprised of many sub-budgets, at least one for each service. How would the short-fall be allocated among the Armed Services or between materials and personnel within each? Or could the cuts be taken from EPA or Social Security, even if the estimates for those agencies were not challenged or were found to be accurate? And if so, how would the judges decide which areas to cut and in which amounts or proportions? This does not even take into account the fact that by the time that a court has decided that a violation has occurred, and in what amount, and for what categories of expenses or revenues, most of the money that might be cut will have already been spent. It would be bad enough for

any agency to lose 10% of its annual budget spread out over 12 months, but the more likely scenario is that the agencies would have to absorb that 10 percent cut in a period of three months or less, which would mean that their spending for that time period would be reduced by about 50%.

I could go on, but I hope you have seen my point already. As someone who has brought many constitutional challenges in federal court, and defended others, the idea of litigating the issue of whether the budget passed by Congress for a given fiscal year is in balance, as required by a balanced budget constitutional amendment, is almost unthinkable. Do we really want to turn over the job of assuring that our financial house is in order to federal judges who have no expertise in budget matters and no mandate to pick and choose among areas of the budget for massive cuts or perhaps tax increases? If Congress is serous about balancing the budget, a constitutional amendment is the wrong way to do it, and enacting such an amendment will impede the hard work required to bring our deficits under control. In 1997 the Senate came within one vote of sending a balanced budget amendment to the States, but that failure did not prevent Congress from balancing the budget in subsequent years the old-fashioned way: by imposing sufficient taxes to cover controlled spending, without using gimmicks like a constitutional amendment, enforced by the federal courts, to do so. The Balanced Budget Amendment was a bad idea in 1997, and it remains one today. The Senate should vote it down and get back to the real work of controlling our deficits.

Thank you and I stand ready to respond to your questions or supply any additional information that you may request.

PREPARED STATEMENT OF ALAN B. MORRISONPUBLIC CITIZEN LITIGATION GROUPBEFORE THE HOUSE COMMITTEE ON THE JUDICIARYSUBJECT: H.J. RES 1, REGARDING THEBALANCED BUDGET CONSTITUTIONAL AMENDMENT Federal News Service JANUARY 10, 1995, TUESDAY

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PUBLIC CITIZEN LITIGATION GROUP
BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY
SUBJECT: H.J. RES 1, REGARDING THE
BALANCED BUDGET CONSTITUTIONAL AMENDMENT

BODY:
Mr. Chairman, Members of the Committee, thank you for the invitation to appear before this Committee to testify regarding the Balanced Budget Constitutional Amendment, H. J. Res. 1. While it is similar in many respects to other proposed amendments, there are a number of rather significant differences between it and the current Senate proposal, S.J. Res. 1, that I have noted in the brief time that I have had to review it since it was first made available to me on Monday morning January 9, 1995.

I am now and have been for nearly 23 years an attorney with the Litigation Group of Public Citizen, an organization of more than 100,000 members that was rounded by Ralph Nader. There are 10 lawyers in our office who principally litigate cases in the federal courts. Among our areas of specialty are administrative law, separation of powers, and the Supreme Court. With regard to the subject areas covered by my testimony, we have litigated impoundment questions both prior and subsequent to the passage of the Impoundment Control Act of 1974, and we were counsel for the successful plaintiffs challenging the constitutionality of the Gramm-Rudman-Hollings Act. Moreover, and perhaps as pertinent as anything else for this hearing, we were the lawyers who represented more than 100 Members of the House of Representatives who challenged the President's authority to commit U.S. Armed Forces to the escort tanker operations in the Persian Gulf, without complying with the War Powers Resolution, but whose case was dismissed when the courts refused to decide the merits.

My testimony today will not deal with constitutional theory regarding what does and does not belong in the United States Constitution, nor will I deal with matters of economics or political science. Those subjects have been amply dealt with by others in earlier hearings. Today I want to focus on the question of what to do about potential litigation that is certain to arise regarding the Balanced Budget Constitutional Amendment, if it becomes law.

Congress Must Decide on Reviewability

It has often been said that war is too important to be left to the generals, and so here, the question of the judicial reviewability of compliance with H.J. Res. I is too important to be left to federal Judges. It is up to Congress to state loudly and clearly, in the amendment itself, whether it wishes to make compliance with it subject to judicial review. It is vital for everyone who is asked to vote on this amendment in Congress, and in the States if they called upon to ratify it, to know precisely the extent to which the Judicial Branch will be involved in its interpretation and implementation.
When I first looked at this issue several years ago, I thought that perhaps its sponsors had simply not focussed on the issue of judicial review. Perhaps, I thought, they might have believed that there was a ready and satisfactory answer so that there was no need to say anything on the topic in the amendment itself. I also thought that perhaps, because many of its sponsors were not lawyers, let alone lawyers who litigated cases involving constraints on the federal budgetary process, they had not

thought through the consequences of what would happen if there were judicial review, or if there were not.

I now know that omissions on the issue of judicial review are by clear design and not inadvertence- I testified at length on the issue before the House Budget Committee in 1992 where one of the leading sponsors of the amendment, Pep. Charles Stenholm of Texas, was present and asked me a number of questions. I have written about the issue in the Washington Post, discussed it with Members and staff of its supporters, and appeared on It's Your BusineSs last year with Senator Orrin Hatch, where I attempted to press him on his views on the issue and the need for a clear congressional statement about it. Indeed, in the floor debates last year in the Senate, an addition to section 6, introduced by Senator John Danforth, was approved on the floor, which would have dealt explicitly with judicial review.1 As I explain at the end of this statement, that solution would not resolve the problems that discuss below, but at least it had the virtue of recognizing the need for Congress to decide the question of the appropriate role for the courts in the enforcement of this amendment.

BUt now it appears that the sponsors of the Balanced Budget Constitutional Amendment are unwilling even to go that far and state their position on Judicial review- That became most clear to me from the hearing before the Senate Judiciary Committee last Thursday on S.J. Res. 1, where I and others testified at great length about the issue of Judicial review, and not a single sponsor of the amendment suggested that anything should be added to clarify the issue. At one point former Attorney General William Barr, a supporter of the amendment who believes that there will only be limited judicial review, was asked whether he favored including clarifying language. His reply on the issue (paraphrased since I do not have the transcript) is telling: "Yes, but not if it would cost any votes." Translated, that means, "don't tell Members of congress, State legislators, and the public what we mean because some of them may disagree and vote against the amendment."

It is no longer plausible for the sponsors 0 this amendment to claim that the absence of mention of judicial review is an oversight, nor that the issue is of no significance. The only explanation is that the issue is deliberately being avoided, in the hope that no one will notice until the amendment is ratified. Given the consequences of both judicial review and no judicial review, I can understand .why the sponsors would prefer to sweep the question under the rug, but I cannot agree that such an approach is proper. Indeed, although the amendment is part of what the Contract With America calls the "Fiscal Responsibility Act," it would be the height of legislative irresponsibility for Congress to duck this vital question before loosing the amendment on the states and the public. Moreover, another part of the Contract, the mislabelled "Common Sense Legal Reform Act," would mandate a legislative check list for each bill being considered by Congress, one of whose items is the availability of judicial review. For all of these reasons, the sponsors of this amendment should include a specific provision in the amendment itself, stating precisely the role, if any, that they envision for the courts.
However, if H.J. Res 1 remains silent on judicial review, it is my opinion that neither taxpayers, nor legislators, nor citizens generally would have standing to go to court to enforce the spending limits in this amendment. Thus, in the absence of a clear statement to the contrary in the amendment itself, it is likely that the only parties who could show sufficient injury to meet the case or controversy requirement in Article III of the constitution would be those seeking greater spending or reduced taxes, whereas actions to assure lesser spending will be thrown out of court on standing grounds. If, as I discuss below, the President attempts to exercise the power to impound, as the current Administration claims would exist under the amendment, those whose funds were reduced or eliminated would have standing, but those who wanted less spending would not if the President chose not to impound any funds to bring about a balanced budget. The same result is likely to occur for the doubtless myriad of challenges to increases in receipts, all of which must be approved by a three-fifths majority under Section 2- The end result will be that this litigation bias will further increase the deficit, precisely the opposite of what the proponents of the amendment are seeking.

It is also possible that other reasons for the courts refusing to hear suits, such as the political question doctrine, would preclude judicial review of alleged violations of this amendment. The inclusion in Section 1 of a requirement that Congress and the President, but not the courts, ensure compliance with the requirement that actual outlays do not exceed those in the budget, increases the likelihood that the courts will abstain. Therefore, unless Congress intends to foreclose review, it must act affirmatively to provide for it now, in the amendment, and not just in its legislative history. Nor should Congress assume that implementing legislation can solve the problem. It would have to be enacted,

perhaps over a Presidential veto, and the courts might conclude that Congress lacks the power to confer jurisdiction on the federal courts to resolve disputes under this amendment.

Once Congress decides that it wishes to take a position regarding judicial review, it has three choices. All actions taken in purported compliance with the amendment could be subject to judicial review, no such actions could be subject to judicial review, or some of them could. The last alternative is the least attractive. Besides having the problems discussed below that are associated with the two polar positions, it has the further disadvantages of producing in litigation over whether a given claim is litigable, a debate which profits no one save the lawyers who are being paid to litigate it, and it leaves to the unelected Judiciary the crucial job of deciding which cases it will hear and which ones it will refuse even to consider. I can think of nothing less appropriate in this area than to turn the issue of reviewability over to the federal courts.
If I am not assuming too much by supposing that Congress will not refuse to make its wishes on this important issue as clear as possible, I first want to discuss the non-justiciability option and then discuss what living with the amendment would be like if Congress opts for full judicial review.

The No Judicial Review Option

In theory, there is nothing wrong with precluding judicial review of constitutional provisions. For instance, each House decides, pursuant to Article I, Section 5, Clause 3, whether its journal of proceedings shall be made public, and its decisions are not subject to judicial review. Similarly, if the government ever conferred a title of nobility, contrary to Article I, Section 9, Clause 8, no one could challenge that in court, but that would not be such a serious matter. More significantly, Article I, Section 6, Clause 1 specifically insulates the speech and debate of Members of Congress from being questioned in any other forum. While conduct involving these and other provisions in the Constitution is immune from judicial scrutiny, none of these activities has so fundamental an effect on the well-being of the country as would this amendment.

One way to examine the effect of making H.J. Res. 1 judicially unenforceable is to look at two statutes for which there is essentially no judicial review. The first is the Gramm-RudmanHollings Act, which is the statutory precursor of H.J. Res. 1. I do not intend to debate the impact of that statute; it probably has had some effect, but not nearly as much as its sponsors had promised. It has one feature that has substantially eliminated the need for judicial review and that is the automatic sequestration. While there is a broad anti- judicial review provision in GrammRudman-Hollings, if the President failed to issue the sequestration order as the statute directs him to do, a court would almost certainly order him to carry out that largely ministerial act. On the other hand, there is no review of any of the crucial estimates under the statute that determine whether the budget targets will be met or not. I would also note that the statute is much longer, is far more detailed, and thus gives much less to litigate, than does the less than two pages in H.J. Res. 1. Most important of all, unlike a statute that can be fine-tuned from time-to-time, the Balanced Budget Constitutional Amendment is forever, or at least until the time-consuming amendment process can correct it. As Congress has shown several times in the past, Gramm-Rudman is amendable, if the votes of both Houses are there to pass a change.

Perhaps more poignant than Gramm-Rudman is the effect of nonenforcement on the War Powers Resolution. This statute, which was passed by two-thirds of the Senate and House over the veto of thenPresident Richard Nixon in 1973, when he was at one of his weakest moments in his relationship with Congress, was the great congressional hope for controlling the President and the war-making power. As we all know, that hope was quickly dashed, and it is now apparent to all that the War Powers Resolution has no teeth.

This became absolutely clear to me when I was counsel for more than 100 Members of the House of Representatives who sought to require the President to do no more than to send to the Congress the statement required by the Resolution regarding the activities that he had undertaken in the Persian Gulf to protect Kuwaiti tankers. our lawsuit did not seek to stop the escort operations or to require the President to do or not do anything other than submit a simple report to Congress that met the statutory requirements of the War Powers Resolution. Indeed, the President never defended his refusal to comply with the statute on the merits, but simply said that the courts had no business getting into this controversy. Eventually, the courts agreed and dismissed the case. while one can read the published opinion of the district court and the brief unpublished order of the court of appeals

and debate their legal meaning, the Judiciary's message to Congress is quite clear: keep these cases out of our courts because we are not going to rescue you.

As a result, the War Powers Resolution has no impact whatsoever- It leaves Congress in the position that it was in before the Resolution: if both Houses can muster two-thirds of the Members, Congress can prevent the President from engaging in warmaking activities, but it cannot do so without those votes. obviously, the War Powers Resolution is not needed to achieve that end. But perhaps worse than being ineffective, it has prevented Congress from making other efforts to control the President. The matter has gotten so bad now that, when war-making activities commence, the popular press now believes that it is Congress that must "invoke" the War Powers Resolution, by trying to stop the President, rather than the President who must comply with the Resolution by sending the necessary reports and meeting the statutory deadlines. It seems to me that the experience under these two statutes that preclude virtually all litigation makes clear the real danger of no Judicial review; Congress passes the amendment, and then it is routinely disregarded, making the situation worse than if there were no amendment at all.

When I have raised the specter of a toothless balanced budget amendment, the usual response is that Congress and the President will honor it anyway because it is in the Constitution. Would that it were so. Does anyone believe that the First, Fourth, Fifth, Tenth or Fourteenth Amendments, to mention Just a few, would be respected by our governments if the federal judiciary were not there to back up the words with court orders? The President is no less obligated to follow the dictates of the War Powers Resolution than he would be of the Balanced Budget Constitutional Amendment, but no President has complied with the former, despite its clear mandates, and there is no reason to believe that any President will follow the latter, unless it suits his or her political objectives at the time. And given Congress's failure to meet various deficit reducing requirements over the years, I would be very surprised if Congress did not join the President in routinely disregarding the amendment if their actions are immune from judicial review.

I recognize that judicial review is not the only remedy. The President, but not the Congress, could be impeached for violating the constitutional requirements for a balanced budget. As for Members of Congress, they can be voted out, although there is no indication of any willingness on the part of the electorate to do so for having failed to live up to their budgetary responsibilities under Gramm-Rudman and elsewhere. And, as we know, balancing the budget does not seem to be the kind of single issue on which Members lose their right to return to Washington, especially for Senators who are elected only once every six years.

The Litigation Option

In discussing the litigation option, I want to describe the steps envisioned by the amendment and then point out some of the questions that the courts would almost certainly be called upon to resolve-

Section 1 requires that "Congress shall, by law, adopt a statement of receipts and outlays for [each] fiscal year in which total outlays do not exceed total receipts," unless Congress, by a three-fifths vote "of the whole number of each House" provides otherwise. It also requires that "Congress and the President shall ensure that actual outlays do not exceed the outlays set forth in such statement-" The latter provision is not contained in S-J- Res 1, and it appears to apply only to outlays not receipts, where a shortfall based on optimistic revenue projections (such as from capital gains tax reductions) is often the cause of increased deficits.

The first question that arises is, what happens if Congress and the President cannot reach agreement on a budget? Does that mean that no money can be appropriated for that fiscal year? And what if a majority of Congress (and the President vote for a deficit, but the three-fifths requirement for an unbalanced budget is not met? And how is Congress supposed to "ensure" that the budget targets are actually met, especially if the President claims that there is no problem, and Congress cannot muster the two-thirds vote necessary to pass a bill changing the spending levels already enacted? And what if both Congress and the President insist that all is well, but that others think that the budget will be far out of balance? And what will happen if the required three-fifths of each House does not vote to increase the national debt, as mandated by Section 6, but there is a projected deficit that cannot be avoided? Do the sponsors really intend to hold the entire government hostage to 40% of each House,

who could insist on wholly unreasonable demands, including those unrelated to the budget, as the price of increasing the debt limit?

I assume that Section 1 must mean more than that the numbers must simply add up (for political as well as other reasons, the President and Congress could not say that two plus two equals five or three). But could the budget optimistically project a 2 or 5 or 10% growth in the economy, from which the tax revenues will increase accordingly, or is it stuck with last year's figures? Would the law comply with Section i if the budget included a "saving" from "fraud, waste, and abuse" of $250 billion this year, especially if there are similar (and unrealized) savings for each of the last five years? Would it be proper for the budget to include the savings from the demise of 50 programs that Congress has repeatedly refused to eliminate in the past? Or must the budget have some aura of reality to it? And what if the budget turns out to be out of balance at the end of the year, which is the first time that actual outlays and receipts will be known? can anyone do anything about it at that late date, or is it grounds for impeachment of the President or removal of Members of Congress from office? Or would it operate like the Internal Revenue code, such that a shortfall in one year would have to be offset by further cuts the following year?

Presumably, the courts will sort that out, and they will probably conclude that actual balance, not phony accounting, is what the sponsors intended. But suppose that despite approving a budget that was in balance when enacted (again assuming reasonable estimates and good faith), it later appears that money is being spent at a rate that, by the end of the year, will result in the Constitution being violated. A lawsuit is then brought, presumably to enjoin the excess spending, and the parties and the courts are left in the position of having to determine, at a fixed point in time, whether the Constitution is going to be violated later that fiscal year.

If such a lawsuit were allowed to go forward, the federal courts would be in the business of having to review all of the complicated budget data to decide whether the spending laws were in compliance with the Constitution, on a highly accelerated schedule, with new data coming in all the time, with conflicting opinions on the meaning of that data from experts retained by the various parties (and there are likely to be many who will want to join in the battle), and with the extraordinary time pressures that the inevitable end of the Fiscal Year places upon the litigants and the trial Judge, let alone the judges in the courts of appeals and the Supreme Court. Presumably, this would call upon the courts to enter temporary restraining orders and preliminary injunctions regarding spending, since awaiting the end results for that Fiscal Year would obviously be inconsistent with the purpose of the amendment, which is to prevent spending in violation of its terms.

Assuming that these problems could be surmounted (which I rather doubt), there would be the question of remedy. One of the virtues of Gramm-Rudman is that, when cuts had to be made, the statute was quite clear as to how they should be carried out. This amendment says nothing on that issue. Thus, if spending must be cut, will all appropriations be reduced on an across-the-board basis, or will some other method be employed? If Congress attempts to establish such a method, will that be upheld, or will the Constitution be read to mandate something else? What about the protections for the President and federal judges against salary reduction? Will they continue to apply, and even if they do, what will happen to their staffs? Will the departments have discretion to furlough employees, or will everyone have to work at reduced pay or reduced hours, or some of each? And how will the federal courts decide all of these questions?

So far, I have not dealt with what is probably the biggest problem which H.J. Res. 1 attempts to answer in Section 5, by its all- inclusive definitions of receipts and outlays, which is identical to that in S.J. Res. 1, except for variations in punctuation:

Total receipts shall include all receipts of the United States Government except those derived from borrowing, and total outlays shall include all outlays of the United States Government except those for repayment of debt principal.
Initially, I would note that the accounting method used for both receipts and outlays is cash, unlike most large entities which use the accrual method. Thus, it is not the obligations of the government that matter, but only the amount of money actually spent in the sense of checks written. This fact makes manipulation easy by postponing payment of admitted obligations that any sensible person would believe ought to be counted toward the fiscal year in which they occurred and in which the

benefits were received. The question will undoubtedly arise as to whether payments that are plainly late may be counted in the next fiscal year, rather than in the one in which they were due. Moreover, the focus on actual receipts and outlays will require very close scrutiny of thousands of expenditures to determine when the actual payment was made or received. For example, will the operative date be when the check is written, deposited, or received for collection by the Treasury of the United States?

A number of witnesses in prior hearings, as well as the sponsors of this amendment, have indicated that items such as the social security trust fund, the money set aside for the RTC, and the highway and airport trust funds would all be included within this broad definition. I see no reason to disagree with that assessment, but that is simply the beginning of the inquiry. For instance, what about entities such as AMTRAK, the Smithsonian, and the Legal Services Corporation which receive some, but not exclusive federal funding? Are they part of the Government of the United States for these purposes so that their budgets are counted in the balance? The same could be asked of the Postal Service, which used to be part of the government and still receives substantial government subsidies. But suppose that it runs a deficit; will that be counted against the total?

Other quasi-government entities, which are not agencies for many purposes, might or might not be counted against the federal budget. Included in these would be the Corporation for Public Broadcasting, the National Academy of Sciences, and government sponsored entities such as Fanny Mae and Sally Mae. There is more than ample ground for litigation over each of these entities, and given the size of their budgets, it may well be that the questions will be quite significant, at least in some cases. And, assuming that some of them are covered, will they be treated identically to all other government agencies if there is overspending, or will some other method of expense reduction be used, and if so, who will devise it and on what basis? And if any of these quasi-government entities turns a profit, can that be used to offset a loss elsewhere? Then, of course, there is the possibility of a whole new generation of entities -- no one heard of the RTC when GrammRudman became law -- for which there will be a whole new generation of litigation, not to mention negotiations in Congress over their status at the time they are created.

Undoubtedly, at some point the budget crunch will start to be felt, and Congress will be creative, as it has been in the past, in finding ways to avoid this amendment. I fully envision new meaning given to the term "off-budget," as Congress attempts to shift to the States, or more likely private parties, obligations that were formerly undertaken by the federal government.

Take the issue of health care, in particular the cost of Medicare and Medicaid. A creative Congress might well direct private health care system to pick up Medicare and Medicaid patients, allowing increased premiums to cover costs, but with no government funding whatsoever. This would be rather like the ultimate assigned risk pool for automobile insurance. There would, of course, have to be a complex regulatory scheme to see that the law was administered in a reasonably fair manner, but the cost of that system would be far less to the federal government than the Medicare and Medicaid costs that would be shifted to employers in what is essentially a hidden tax on the businesses and other entities that must pay health insurance premiums. Or, at least for Medicaid, Congress might attempt to shift the entire cost to the States, or an increased percentage of them, as a means of eliminating a projected shortfall.

Surely, some clever lawyer would argue that this scheme is in fact a tax, that it was not voted on in accordance with this amendment, and that the imposition of the hidden tax violated the Constitution. The Supreme Court has recognized, in a somewhat analogous area, that not only physical takings are covered by the Fifth Amendment, but that the Takings Clause applies when the government so substantially regulates a person's property that it has no use left at all. Thus, it could easily be argued that this kind of law would be "regulatory spending," as opposed to governmental spending, and it too should be outlawed by the Constitution. Do you want the courts to decide that question, or should the entire issue be immune from judicial review?

Moreover, if the privatization precedent works in the health care area, Congress might well apply it to efforts to clean up the environment and to protect workers, and even to replace social security pensions with a private pension system, all mandated by law, none of which would "cost" the federal government anything, in order to assure that it has a balanced budget. Undoubtedly, some types of

regulation will be upheld, but there will be good grounds for litigation in some of the more extreme cases.

Another area for litigation is created in Section i by the three-fifths vote requirement "for a specific excess of outlays over receipts by a vote directed solely to that subject." The underscored portion is not contained in S.J. Res. 1, but it raises the possibility of litigation over both its meaning and the effect of non-compliance. Furthermore, leaving aside the question how specific a "specific excess" vote must be (must it be on an item by item basis or is an overall vote satisfactory), what if five Senators wanted an excess, but refused to go along with the budget without it, so that there was neither 50 for the budget nor 60 for the excess? Or suppose the House had 50% and the Senate 60%, and neither of them would budge? Similar kinds of questions and problems exist with respect to the provision in Section 6 requiring a three-fifths vote to increase the public debt (assuming that the term can be defined without an excessive amount of litigation), and to increase revenue, as required by Section 2. And, of course, it is unclear what would happen if the various provisions of the amendment result in conflicts that prevent either the raising of revenue or spending it because estimated outlays and receipts do not coincide.

Ironically, one of the consequences of all of this might be a substantial increase in the President's power over the purse. The Executive Branch would undoubtedly argue, as it did last week before the Senate Judiciary Committee, that only the President can control the budget situation and that he has a sworn obligation to enforce the Constitution- The President's position is greatly strengthened by the final sentence in Section 1, which requires him to "ensure that actual outlays do not exceed the outlays" in the budget. This is virtually an open invitation for the President to impound appropriated funds and to decide for himself which funds to cut, including making cute that Congress specifically rejected in that very fiscal year. Those cuts could include the militaryx social security, and the pay of federal employees (other than the President and federal judges who have other constitutional protections), with the result that the President would become, as a practical matter, the real controller of federal spending- Such power would vastly exceed that of the line item veto which, until now, Congress has consistently (and wisely) refused to grant to the President. There will undoubtedly be an enormous amount of litigation over that issue, especially where entitlement programs are concerned and the President seeks to cut the programs which he does not support as his preferred means o balancing the budget.

Most intriguing of all is Section 4, which provides that "Congress may waive the provisions of this Article for any fiscal year in which a declaration of war is in effect" or "in which the united States faces and. imminent an serious military threat to national security and is so declared by a joint resolution, adopted by a majority of the whole number of each House, which becomes law-" Perhaps this would be a means of reviving the War Powers Resolution, by putting pressure on the President to ask Congress to declare war in order to avoid the consequences of an unbalanced budget. That effect might be a cute way of controlling the President's war-making activities, but is it a sensible one? Surely, it would not have been advisable in August 1990 to have declared war on Iraq, or even to have demanded a vote on whether there was am "imminent and serious threat to national security," simply to enable additional money to be spent on the pre-war buildup.

More importantly, most wars are not fought based on a congressional declaration, and even those that are need money for preparations before the war begins. Indeed, this provision seems to invite Congress to refuse appropriations and demand as a price the request of the President for a declaration of war. If this is not what this Section means, the courts will have to sort it out. Moreover, given the conditions in this provision on when, short of a declaration of war, Congress may waive the requirements of the amendment, will the courts be asked to decide whether there is a serious threat to national security, and how will they do so? If they decline, will this be a loophole for avoiding the effect of the amendment entirely?

It might be useful to look at the other end of the war process as well, focusing on the question of when a declaration of war ceases to be "in effect." Would it mean Congress would have to vote to "undeclare war," or would a declaration of war, like the temporary emergency court of appeals, continue for more than 20 years because no one had ever revoked it? Could the war be a permanent cold war that existed from 1945 until 1991, or would the courts require that a war be a shooting war in order to constitute an exception, and then would Judges be in the business of deciding when

hostilities began and/or ended to assure that there was no violation of this Section? And as for the serious threat alternative, could Congress make such a declaration effective for all future fiscal years until it is revoked by another Joint resolution?
There is another area that will certainly cause lawsuits and is probably unwise from a policy perspective as well. H.J- Res. 1 focuses solely on the cash flow of the government, more or less like an individual's checkbook. But no sensible person looking at the finances of any entity would only examine the income statement without looking at the balance sheet as well. Moreover, no properly run business would operate without a capital as well as an operating budget- Yet the focus of H.J. Res. 1 on cash flow alone is likely to encourage a number of dubious practices that either make no economic sense, or be subject to litigation, or both. For example, it will always be "cheaper," from an annual cash flow perspective, for the government to lease a building than to purchase it, although in the long run the cost will often be much higher by choosing the lease option. Yet the focus on short-term outlays will inevitably drive the government into leasing rather than purchasing, unless the court forbids that subterfuge or encourages the opposite by allowing the President and Congress to "count" only a percentage of this year's purchase price, a result that would be hard to justify given the broad definition of outlays, with the only exception for debt repayments.

Second, the government could easily sell assets, either because they are not producing revenue, or because the receipts would generate cash that would alleviate some of the budget problems. Perhaps Congress would not attempt to sell the White House to a private developer, who would lease it back to the President, nor would it dispose of Glacier National Park to an outdoor recreation company, but there are other dispositions of assets that would be less of a national disgrace and hence a greater temptation to those who were worried about staying within the constitutional budget limitations for a given year, but not worried about the ultimate future of our country. Of course, for each of these attempted subterfuges, someone would surely argue that they violate the spirit, if not the letter, of this amendment, and the courts would have to decide the legality of each of them.

One of the more likely scenarios is a sale of a government office building to a private owner, with a leaseback to the government, and perhaps an option to buy at the end of the term. As a short-term solution to a budget crunchy, the idea is almost irresistible, but it surely makes no economic sense, especially since the tax breaks for depreciation would all go to the private party, thereby increasing the long-term cost to the government. Surely, someone would catch on, and the courts would then be thrown into the middle of it all, in the end either creating a huge loophole or finding themselves entangled in the minutiae of federal property management.

The Danforth Amendment

As noted above (p.3 and note 1), last year the Senate adopted an amendment offered by Senator Danforth to S.J. Res. 41, under which there would be Judicial review, in at least some cases, under which the courts could only issue declaratory relief unless Congress specifically authorized another form of relief through implementing legislation. Although that addition would resolve the issue of whether the courts would be free to abstain entirely, it raises as many questions as it solves, if not more.

First, it ducks the issue of standing entirely by not saying who can sue to enforce the amendment. In fact, its reference to "case or controversy" suggests, if it does not require, that the usual standing rules would apply here, which would mean that only those whose taxes were improperly increased, or whose funding was unlawfully cut off, would have standing. Thus, if a taxpayer or legislator claimed that the budget was not properly in balance, the Danforth amendment would probably not permit that person to sue over that alleged violation.

Second, it would plainly outlaw preliminary injunctive relief, which means that there would be a tremendous incentive for those defending the budget to delay the case until the year's end, when a declaration would be of no significance at all. Indeed, once the year was over, the controversy would almost certainly be moot, which would mean that the courts would probably not even be able to rule of the validity of the budget of the just-concluded year, unless the plaintiff could show that the same controversy was likely to recur. In recent years the courts, especially the Supreme Court, have generally declined to uphold claims for such exceptions to the mootness doctrine, even in relatively simple cases, let alone in ones as complex as those under this amendment.

Third, the authorization for implementing legislation extends only to remedies and, by its terms, does not appear applicable to attempts by Congress to cure standing and other problems. More importantly, it seems highly unlikely that such legislation will pass or that it would provide for meaningful interim relief. And if it does, then we are right back to where we were under the full litigation option. described above. Accordingly, while I applaud the willingness of Senator Danforth to address the issue of judicial review, his solution turns out to solve very few of the problems plaguing the whole question of Judicial review and the balanced budget amendment.

Mr. Chairman and Members of the Committee, if my testimony has frightened you, that was my intention. Each of you should ask yourselves whether you really want the federal courts to control the federal budget. Do you really think that litigation is a preferable solution to negotiation between the Congress and the President? or do you so abhor litigation, that you are willing to disregard all of these attempts to conduct an end run on a constitutionally balanced budget, and thereby keep the courts out of the process entirely, making this amendment into the budgetary equivalent of the War Powers Resolution and thereby turning over to the President the effective control of the entire federal budget? While some of these problems can be fixed by better drafting, most cannot, and those that are fixed now will resurface later in another form.

I respectfully suggest that both the litigation and the no litigation options are terrible ideas because the Balanced Budget Constitutional Amendment is a terrible idea. Unbalanced budgets may be bad for the economy, but this solution is plainly worse for everyone, except perhaps for the lawyers who will be handling the litigation- I thank the Committee for the invitation, and I stand ready to answer any questions that you may have.

END

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TESTIMONY January 22, 1997 ALAN B. MORRISON PUBLIC CITIZEN SENATE JUDICIARY BALANCED BUDGET AMENDMENT Federal Document Clearing House Congressional Testimony January 22, 1997, Wednesday

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STATEMENT OF **ALAN B. MORRISON**

PUBLIC CITIZEN LITIGATION GROUP

BEFORE THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

REGARDING THE BALANCED BUDGET CONSTITUTIONAL AMENDMENT

JANUARY 22, 1997

Mr. Chairman, Members of the Committee, thank you for the invitation to appear before this Committee to testify regarding the Balanced Budget Constitutional Amendment. It is my understanding that the Amendment being considered is the same as the text of S.J. Res. 1 as reported by the Senate Judiciary Committee in 1995. Accordingly, this statement will, from time to time, refer to S.J. Res. 1 and to certain of its sections to illustrate the problems that I foresee if any such Amendment becomes law.

I am now and have been for nearly 25 years an attorney with the Litigation Group of Public Citizen, an organization of more than 100,000 members that was founded by Ralph Nader. There are 10 lawyers in our office who principally litigate cases in the federal courts. Among our areas of specialty are administrative law, separation of powers, and the Supreme Court. With regard to the subject areas covered by this hearing, we have litigated impoundment questions both prior and subsequent to the passage of the Impoundment Control Act of 1974, and we were counsel for the successful plaintiffs challenging the constitutionality of the Gramm-Rudman-Hollings Act. I was also lead counsel for the more than 300 Members of the House of Representatives who challenged the President's authority to commit U.S. Armed Forces to the escort tanker operations in the Persian Gulf, without complying with the War Powers Resolution, but whose case was dismissed when the courts refused to decide the merits. I am currently one of the counsel for the congressional plaintiffs challenging the constitutionality of the Line Item Veto Act of 1996 in the case of Urd v. Rainers, No. 97-0001 (D.D.C. filed January 2, 1997).

My testimony today will not deal with constitutional theory regarding what does and does not belong in the United states constitution, nor will I deal with matters of economics or political science. Those subjects have been amply dealt with by others in earlier hearings, although I would note that, if a Balanced Budget Amendment does become law, we will undoubtedly see many of the gimmicks that I discuss from pages 17 to 23 of this statement in describing what issues are likely to arise and will require resolution by the courts or some other institution. Today I want to focus on the question of how the Balanced Budget Constitutional Amendment, if it becomes law, will be enforced.

Every Member of Congress and every officer of the United States, from the President on down, takes

an oath to support and defend the laws of the United States, which includes the Constitution, but that oath applies equally to statutes, rules, and court decisions. Some supporters of the Amendment have argued that, by placing the obligation for a balanced budget in the Constitution, there will be a significant increase in the willingness of Congress and the President to enact balanced budgets that would not occur if the same words were in the statute books. As I understand the argument, the moral suasion of placing this command in the Constitution would make a major difference in compliance. But legally, the obligation and the oath of office make no such distinction, and I personally doubt that Government officials regardless of branch would treat a command for a balanced budget differently if it became part of the Constitution. But if Congress disagrees, that only reinforces my point that Congress should make it clear that conscience and the oath of office are to be the sole means of enforcing the Amendment.

There are three methods by which this Amendment could be enforced: the courts, Presidential impoundment, and the three- fifths vote to increase the debt of the United States. As former Attorney General William Barr testified, Hearings before the Committee on the Judiciary, United States Senate on S.J. Res. 1, January 5, 1995 at 121-22 ("1995 Hearings"), the requirement in Section 2 that three-fifths of the whole number of each House must approve an increase in the debt limit is largely self-enforcing since the Treasury Department will never attempt to sell bills or notes, representing obligations of the United States, unless authorized to do so, and if such an end run were attempted, Wall Street would almost certainly refuse to purchase it. I will return to that problem later in my testimony (pp 25- 27), but for now I want to focus on the issues of judicial review and impoundment.

Congress Must Decide on the Means of Enforcement

It has often been said that war is too important to be left to the generals, and so here, the question of the judicial reviewability of compliance with S.J. Res. 1 is too important to be left to federal judges. It is up to Congress to state loudly and clearly, in the Amendment itself, whether it wishes to make compliance with it subject to judicial review. It is vital for everyone who is asked to vote on this Amendment in Congress, and in the States if they called upon to ratify it, to know precisely the extent to which the Judicial Branch will be involved in its interpretation and implementation.

When I first looked at this issue several years ago, I thought that perhaps its sponsors had simply not focussed on the issue of judicial review. Perhaps, I thought, they might have believed that there was a ready and satisfactory answer so that there was no need to say anything on the topic in the Amendment itself. I also thought that perhaps, because many of its sponsors were not lawyers, let alone lawyers who litigated cases involving constraints on the federal budgetary process, they had not thought through the consequences of what would happen if there were judicial review, or if there were not.

There is no longer any doubt that the issue is a real one and that the principal reason that there is no answer in the Amendment itself is that there is no consensus on what the answer should be. The issue was thoroughly debated before this Committee in 1995 and on the floor of the Senate in both 1992 and 1995, and yet there is not a word in S.J. Res. 1 on how Congress wishes to decide it. In fact, the 1995 version, that came within one vote of being approved in the senate, contained a provision dealing with judicial review, sponsored by Senator Nunn, although the House-passed version did not.

Much of the 1995 testimony before this Committee given by an array of distinguished legal scholars concerned what the courts would do on the issue of judicial review in the absence of any direction in the Amendment itself. I respectfully suggest that that is the wrong question. Because this is the Constitution that is being amended, the sponsors have the power -- and, I submit, the obligation -- to spell out precisely whether there will be judicial review or not, and if so, on what terms. The availability of judicial review, or lack thereof, in other comparable situations may inform the Committee on how it wishes to decide the issue here, but nothing done in the past prevents those who are amending the Constitution from providing whatever type or level of judicial review they want for decisions made under a Balanced Budget Amendment.

The same is true for enforcement through impoundment. For many years, Presidents have claimed various powers to impound (refuse to spend) appropriate funds under a variety of circumstances. In general, the courts rejected such claims in the absence of a statute specifically granting the President

(or some other official) discretion not to spend all the funds that were appropriated for a particular program. But the passage of a Balanced Budget Amendment would change all of that rather radically. As then-Assistant Attorney General Walter Dellinger testified at the 1995 Hearings, if the Amendment became law, and if it appeared that the command for a balanced budget in Section I was about to be violated, he would advise the President that he not only had the right, but also the constitutional obligation, to step in and prevent the violation by impounding money before the budget became imbalanced (pp. 81-84, 70, 75).

Although there is no clear answer, I believe that, especially with no explicit judicial review provision, the President would probably prevail. That would mean not only that he could refuse to spend appropriated funds, but that he alone would decide which programs to cut and which to spare. His power would not be confined to certain categories of spending or limited to discretionary items; it would extend to entitlements such as social security, medicare, and the highway trust fund. A power to impound in this manner would make the Line Item Veto Act look like a child's plaything.

Congress could attempt to control the President's discretion by implementing legislation, if it could reach agreement and if the President were willing to surrender his unlimited discretion. Even then the President might argue that any attempt to restrict his enforcement powers violated the Amendment since it jeopardized a balanced budget, although I think he should not prevail on that claim, but the courts might disagree. Indeed, if there were no judicial review at all, that might be seen as a decision to deny judicial review to the decisions of the President to impound, even in violation of enabling legislation.

There may be legitimate grounds for debate on whether, as a matter of policy, there should or should not be judicial review and whether there should or should not be impoundment by the President, if a Balanced Budget Amendment is enacted. But there is no reasonable basis to debate that these choices are among the most significant that will be made in constructing such an Amendment, and it is the height of irresponsibility for this Committee, or for the Congress as a whole, to refuse to take a stand on both issues. Guessing what the courts might do is not a substitute for accepting responsibility for deciding how to deal with judicial review and impoundment. Former Attorney General Barr was candid when he said that he thought that the Amendment itself should take a position on judicial review, but then explained quite poignantly why there is no such clarification in S.J. Res, 1: "But if I felt that that would mean killing the amendment because I lost support, I would seek to put it forth with clear legislative history . . ." (1995 Hearings at 139). In other words, if Members had to make a choice, or if they knew what they were voting for, this Amendment would never pass! Given the consequences of both judicial review and no judicial review, I can understand why the sponsors would prefer to sweep the question under the rug, but I cannot agree that such an approach is proper. Indeed, although the Amendment is part of what the Contract with America calls the "Fiscal Responsibility Act," it would be the height of legislative irresponsibility for Congress to duck this vital question, and the related question of Presidential impoundment, before turning the Amendment loose on the states and the public.

The Likely outcome if Congress Abdicates

If Congress nonetheless remains silent on judicial review, it is my opinion that neither taxpayers, legislators, nor citizens generally would have standing to go to court to enforce the spending limits in this Amendment. On the other hand, in the absence of a clear statement to the contrary in the Amendment itself, it is likely that parties who claimed that, for example, the requirements for revenue increases in Section 4 had not been satisfied, would show sufficient injury to meet the case or controversy requirement in Article III of the Constitution. The same is also true for those objecting to a Presidential impoundment. Thus, those seeking greater spending or reduced taxes could have their claims adjudicated, whereas actions to assure lesser spending will be thrown out of court for lack of standing. The end result will be that this litigation bias will further increase the deficit, precisely the opposite of what the proponents of the Amendment are seeking.

It is also possible that other reasons for the courts refusing to hear suits, such as the political question doctrine, would preclude judicial review of alleged violations of this Amendment. Therefore, unless Congress intends to foreclose review, it must act affirmatively to provide for it now, in the Amendment, and not just in its legislative history. Nor should Congress assume that implementing

legislation can solve the problem. It would have to be enacted over a near-certain Presidential veto, and the courts might conclude that Congress lacks the power to confer jurisdiction in the federal courts to resolve disputes under this Amendment. Thus, unless modified in this Amendment, the requirements of an Article III case or controversy would still control and could not be changed by Congress.

Predictions regarding the legality of possible Presidential impoundments are also hazardous, but my present view is that, especially if there is no express judicial review provision, the courts would uphold Presidential impoundment (assuming the courts would entertain a challenge to it). My opinion is based on the clear statements by the Administration of its intent to use the power, the failure of Congress to prohibit him from doing so and the assumption that major constitutional provisions should not be entirely unenforceable, absent highly unusual circumstances. As noted above, these predictions are relevant principally to delineate the consequences of no action on these crucial issues, not to suggest that they are satisfactory answers to the questions or a valid excuse for inaction.

The options on Judicial Review

Once Congress recognizes that it must take a position regarding judicial review, it has three choices. All actions taken in purported violation of the Amendment could be subject to judicial review, no such actions could be subject to judicial review, or some of then could. The last alternative is the least attractive. Besides having the problems discussed below that are associated with the two polar positions, it has the further disadvantage of producing litigation over whether a given claim is litigable, a debate which profits no one save the lawyers who are being paid to litigate it, and it leaves to the unelected Judiciary the crucial job of deciding which cases it will hear and which ones it will refuse even to consider. I can think of nothing less appropriate in this area than to turn the issue of reviewability over to the federal courts. 1 I first want to discuss the nonjusticiability option and then discuss what living with the Amendment would be like if Congress opts for full judicial review. 1 These and other problems relating to the Danforth and Nunn amendments, which take a middle ground, are discussed at the end of this statement at pages 23-25.

The No Judicial Review option

In theory, there is nothing wrong with precluding judicial review of constitutional provisions. For instance, each House decides, pursuant to Article I, Section 5, Clause 3, whether its journal of proceedings shall be made public, and its decisions are not subject to judicial review. Similarly, if the government ever conferred a title of nobility, contrary to Article I, Section 9, Clause 8, no one could challenge that in court, but that would not be such a serious matter. More significantly, Article I, Section 6, clause 1 specifically insulates the speech and debate of Members of congress from being questioned in any other forum. While conduct involving these and other provision in the Constitution is immune from judicial scrutiny, none of these activities has so fundamental an effect on the well-being of the country as would this Amendment.

One way to examine the effect of making S.J. Res. 1 judicially unenforceable is to look at two statutes for which there is essentially no judicial review. The first is the Gramm- Rudman-Hollings Act, which is the statutory precursor of S.J. Res. 1. I do not intend to debate the impact of that statute; it probably has had some effect, but not nearly as much as its sponsors had promised. It has one feature that has substantially eliminated the need for judicial review and that is the automatic sequestration. While there is a broad anti-judicial review provision in Gramm-Rudman-Hollings, if the President failed to issue the sequestration order as the statute directs him to do, a court would almost certainly order him to carry out that largely ministerial act. On the other hand, there is no review of any of the crucial estimates under the statute that determine whether the budget targets will be met or not. I would also note that the statute is much longer, is far more detailed, and thus gives much less to litigate, than does the less than a page and a half in S.J. Res, 1. Most important of all, unlike a statute that can be fine-tuned from time-to-time, the Balanced Budget Constitutional Amendment is cast in stone, or at least until the time-consuming amendment process can correct it. As the Congress has shown several times in the past, Gramm-Rudman is amendable, if the votes of both Houses are there to pass a change.

Perhaps more poignant than Gramm-Rudman is the effect of nonenforcement on the War Powers

Resolution. This statute, which was passed by two-thirds of the senate and House over the veto of thenPresident Richard Nixon in 1973, when he was at one of his weakest moments in his relationship with Congress, was the great congressional hope for controlling the President and the war- making power. As we all know, that hope was quickly dashed, and it is now apparent to all that the War Powers Resolution has no teeth.

This became absolutely clear to me when I was counsel for more than 100 Members of the House of Representatives who sought to require President Reagan to do no more than to send to Congress the statement required by the Resolution regarding the activities that he had undertaken in the Persian Gulf to protect Kuwaiti tankers. Our lawsuit did not seek to stop the escort operations or to require the President to do or not do anything other than submit a simple report to Congress that met the statutory requirements of the War Powers Resolution. Indeed, the President never defended his refusal to comply with the statute on the merits, but simply said that the courts had no business getting into this controversy. Eventually, the courts agreed and dismissed the case. While one can read the published opinion of the district court and the brief unpublished order of the court of appeals and debate their legal meaning, the Judiciary's message to Congress is quite clear: keep these cases out of our courts because we are not going to rescue you.

As a result, the War Powers Resolution has no impact whatsoever. It leaves Congress in the position that it was in before the Resolution: if both Houses can muster two-thirds of the Members, Congress can prevent the President from engaging in war-making activities, but it cannot do so without those votes. Obviously, the War Powers Resolution is not needed to achieve that end. But perhaps worse than being ineffective, it has prevented Congress from making other efforts to control the President. The matter has gotten so bad now that, when war- making activities commence, the popular press now believes that it is Congress that must "invoke" the War Powers Resolution, by trying to stop the President, rather than the President who must comply with the Resolution by sending the necessary reports and meeting the statutory deadlines. It seems to me that the experience under these two statutes makes clear the real danger of no judicial review; if the Amendment is enacted, and then it is routinely disregarded, it will make the situation worse than if there were no Amendment at all.

When I have raised the specter of a toothless Balanced Budget Amendment, the usual response is that Congress and the President will honor it anyway because it is in the Constitution. Would that it were so. Does anyone believe that the First, Fourth, Fifth, Tenth or Fourteenth Amendments, to mention just a few, would be respected by our governments if the federal judiciary were not there to back up the words with court orders? The President is no less obligated to follow the dictates of the War Powers Resolution than he would be of the Balanced Budget Constitutional Amendment, but no President has complied with the former, despite its clear mandates, and there is no reason to believe that any President will follow the latter, unless it suits his or her political objectives at the time. And given Congress's failure to meet various deficit reducing requirements over the years, I would be very surprised if Congress did not join the President in routinely disregarding the Amendment if their actions are immune from judicial review.

To be sure, the President, but not the Congress, could be impeached for violating his constitutional obligations to have a balanced budget, but he is only one actor in the process. As for Members of Congress, they can be voted out, after the fact, although there is no indication of any willingness on the part of the electorate to do so when Members have failed to live up to their budgetary responsibilities under Gramm-Rudman and elsewhere. More importantly, balancing the budget does not seem to be the kind of single issue on which Members of Congress lose their right to return to Washington, especially for Senators who are elected only once every six years.

The Litigation Option

In discussing the litigation option, I want to describe the steps envisioned by the Amendment and then point out some of the questions that the courts would almost certainly be called upon to resolve. Section 3 of S.J. Res. 1 requires that " p rior to each Fiscal Year, the President shall submit to the Congress a proposed budget for the United States Government for that fiscal year in which total outlays do not exceed total receipts." First, Section 3 leaves open the critical issue of when the President must transmit his proposed budget to Congress. Would it be proper for him to send the budget on September 30th for the Fiscal Year starting October 1st? Normally, the budget precedes the

State of the Union Address which is given in January, but the absence of any explicit requirement suggests that the President need not submit his budget at the time of the State of the Union and hence would be free to submit it when he thought it was convenient.

The Section also requires that, in the President's budget, "total outlays do not exceed total receipts." Does this mean that the numbers must simply add up (I assume that, for political as well as other reasons, the President could not say that two plus two equals five, or three), or does it mean more? Could the President optimistically project a 2 or 5 or 10% growth in the economy, from which the tax revenues will increase accordingly, or is he stuck with last year's figures? Would the President comply if his budget included a "saving" from "fraud, waste, and abuse" of $250 billion this year, especially if there are similar (and unrealized) savings for each of the last five years? Would it be proper for the President to include the savings from the demise of 50 programs that Congress has repeatedly refused to eliminate in the past? Or must the budget have some aura of reality to it?

Turning to Section 1, which is the heart of the Amendment, it provides that "Total outlays for any fiscal year shall not exceed total receipts for that year, unless three-fifths of the whole number of each House shall provide by law for a specific excess of outlays over receipts by a rollcall vote." The first question is, what is the impact or effect of such a provision? Reading the first part of the provision, it appears that the Amendment is simply announcing a result, without any direction to anyone as to how the result is to be achieved. What if the budget turns out to be out of balance at the end of the year, which is the first time that actual outlays and receipts will be known? Can anyone do anything about it at that late date, or is it grounds for impeachment of the President or removal of Members of Congress from office? Or would it operate like the carryover provisions of the Internal Revenue Code, such that a shortfall in one year would have to be offset by further cuts the following year?

The second part of Section I suggests a possible alternative reading. It provides that an excess of outlays can occur if threefifths of each House approves it. Under that reading, both parts of Section I would be directed to the President and Congress, in essence forbidding them to vote for an unbalanced budget. But is voting for a balanced budget all that is required, or must the balance actually occur? It is difficult to fathom how the first phrase in Section I can mean both, yet unless it does, it is hard to see how the Amendment could have the practical impact that its sponsors seek.

If the courts have to sort that out, they will probably conclude that actual balance, not phony accounting, is what the sponsors intended. But suppose that, despite approving a budget that was in balance when enacted (again assuming reasonable estimates and good faith), unemployment increases dramatically raising expenses and reducing tax receipts -- and that money is being spent at a rate that, by the end of the year, will result in the Constitution being violated. A lawsuit is then brought, presumably to enjoin the excess spending, and the parties and the courts are left in the position of having to determine, at a fixed point in time, whether the Constitution is going to be violated later that fiscal year.

If such a lawsuit were allowed to go forward, the federal courts would be in the business of having to review all of the complicated budget data to decide whether the spending laws were in compliance with the Constitution, on a highly accelerated schedule, with new data coming in all the time, with conflicting opinions on the meaning of that data from experts retained by the various parties (plus the many others who are likely to want to join in the battle), and with the extraordinary time pressures that the inevitable end of the Fiscal Year places upon the litigants and the trial judge, let alone the judges in the courts of appeals and the Supreme court. Presumably, this would call upon the courts to enter temporary restraining orders and preliminary injunctions regarding spending, since awaiting the and results for that Fiscal Year would obviously be inconsistent with the purpose of the Amendment, which is to prevent spending in violation of its terms.

Assuming that these problems could be surmounted (which I rather doubt), there would be the question of remedy. One of the virtues of Gramm-Rudman is that, when cuts had to be made, the statute was quite clear as to how they should be carried out. This Amendment says nothing on that issue. Thus, if spending must be cut, will all appropriations be reduced on an across-the- board basis, or will some other method be employed? If congress attempts to establish such a method, will that be upheld, or will the Constitution be read to mandate something else? What about the protections for the President and federal judges against salary reduction? Will they continue to apply, and even if they

do, what will happen to their staffs? Will the departments have discretion to furlough employees, or will everyone have to work at reduced pay or reduced hours, or some of each? And how will the federal courts decide all of these questions?

So far, I have not dealt with what is probably the biggest problem which S.J. Res. 1 attempts to answer in Section 7, by its all-inclusive definitions of receipts and outlays:

Total receipts shall include all receipts of the United States

Government except those derived from borrowing. Total outlays

shall include all outlays of the United States Government except

those for repayment of debt principal.

Initially, I would note that the accounting method used for both receipts and outlays is cash, unlike most large entities which use the accrual method. Thus, it is not the obligations of the government that matter, but only the amount of money actually spent in the sense of checks written. This fact makes manipulation easy, by postponing payment of admitted obligations that any sensible person would believe ought to be counted toward the fiscal year in which they occurred and in which the benefits were received. The question will undoubtedly arise as to whether payments that are plainly late may be counted in the next fiscal year, rather than in the one in which they were due. Moreover, the focus on actual receipts and outlays will require very close scrutiny of thousands of expenditures to determine when the actual payment was made or received. For example, will the operative date be when the check is written, deposited, or received for collection by the Treasury of the United States?

A number of witnesses in prior hearings, as well as the sponsors of this Amendment, have indicated that items such as the social security trust fund, the money set aside for the RTC, and the highway and airport trust funds would all be included within this broad definition. 2 I see no reason to disagree with that assessment, but believe that it is simply the beginning of the inquiry. For instance, what about entities such as AMTRAK, the Smithsonian, and the Legal Services Corporation which receive some, but not exclusive federal funding? Are they part of the Government of the United States for these purposes so that their budgets are counted in the balance? The same could be asked of the Postal Service, which used to be part of the government and still receives substantial government subsidies. But suppose that it runs a deficit; will that be counted against the total? 2 Various proposals have been floated to exclude social security from the Amendment, presumably as a means of attracting additional votes. Given the size of social security, to allow it to run at a deficit would undermine the whole concept of a balanced budget. Moreover, there is no definition of social security in the constitution and it would be extremely unwise and productive of litigation and political maneuvering to try to write one. If there is to be a Balanced budget Constitutional Amendment, there should be no exceptions.

Other quasi-government entities, which are not agencies for many purposes, might or might not be counted against the federal budget. included in these would be the Corporation for Public Broadcasting, the National Academy of Sciences, and government sponsored entities such as Fanny Mae and Sally Mae. There is more than ample ground for litigation over each of these entities, and given the size of their budgets, it may well be that the questions will be quite significant, at least in some cases. And, assuming that some of them are covered, will they be treated identically to all other government agencies if there is overspending, or will some other method of expense reduction be used, and if so, who will devise it and on what basis? And if any of these quasi-government entities turns a profit, can that be used to offset a loss elsewhere? Then, of course, there is the possibility of a whole new generation of entities -- no one heard of the RTC when Gramm-Rudman became law -- for which there will be a whole new generation of litigation, not to mention negotiations in Congress over their status when they are created.

Undoubtedly, at some point the budget crunch will start to be felt, and Congress will be creative, as it has been in the past, in finding ways to,avoid this Amendment. I fully envision new meaning given to the term "off-budget," as Congress attempts to shift to the states, or more likely private parties, obligations that were formerly undertaken by the federal government.

Take the issue of health care, in particular the cost of Medicare and Medicaid. A creative Congress might well direct the private health care system to pick up Medicare and Medicaid patients, allowing increased premiums to cover costs, but with no government funding whatsoever. This would be rather like the ultimate assigned risk pool for automobile insurance. There would, of course, have to be a complex regulatory scheme to see that the law was administered in a reasonably fair manner, but the cost of that system would be far less to the federal government than the Medicare and Medicaid costs that would be shifted to employers in what is essentially a hidden tax on the businesses or on other entities who must pay health insurance premiums.

Surely, some clever lawyer would argue that this scheme is in fact a tax, that it was not voted on in accordance with Section 4 of this Amendment, and that the imposition of the hidden tax violated the Constitution. The Supreme Court has recognized, in a somewhat analogous area, that not only physical takings are covered by the Fifth Amendment, but that the Takings Clause applies when the government so substantially regulated a person's property that it has no use left at all. Thus, it could easily be argued that this kind of law would be "regulatory spending," as opposed to governmental spending, and it too should be outlawed by the Constitution. Do you want the courts to decide that question, or should the entire issue be immune from judicial review?

Moreover, if the privatization precedent works in the health care area, Congress might well apply it to efforts to clean up the environment and to protect workers, and even to replace social security pensions with a private pension system, all mandated by law, none of which would "cost" the federal government anything, in order to assure that it has a balanced budget. Undoubtedly, some types of regulation will be upheld, but there will be good grounds for litigation in some of the more extreme cases.

Another area for litigation is created in Section 1 by the three-fifths requirement "for a specific excess of outlays over receipts." Leaving aside the question how specific a "specific excess" vote must be (must it be on an item by item basis or is an overall vote satisfactory), what if five Senators wanted an excess, but refused to go along with the budget without it, so that there were neither 50 votes for the budget nor 60 for the excess? Or suppose the House had 50% and the Senate 60%, and neither of them would budge? Similar kinds of questions and problems exist with respect to the provision in Section 2 requiring a three-fifths vote to increase the public debt (assuming that the term can be defined without an excessive amount of litigation), and to increase revenue, as required by Section 4. And, of course, it is unclear what would happen if the various provisions of the Amendment result in conflicts that prevent either the raising of revenue or spending it because outlays and estimated receipts do not coincide.

Most intriguing of all is Section 5, which provides that "Congress may waive the provisions of this article for any fiscal year in which a declaration of war is in effect. Perhaps this would be a means of reviving the War Powers Resolution, by putting pressure an the President to ask Congress to declare war in order to avoid the consequences of an unbalanced budget. That effect might be a cute way of controlling the President's war- making activities, but is it a sensible one? Surely, it would not have been advisable in August 1990 to have declared war on Iraq simply to enable additional money to be spent on the pre-war build-up.

More importantly, most wars are not fought based on a congressional declaration, and even those that are, need money for preparations before the war begins. Indeed, this provision seems to invite Congress to refuse appropriations and demand as a price the request of the President for a declaration of war. If this is not what this Section means, the courts will have to sort it out.

It might be useful to look at the other end of the war process as well, focussing on the question of when a declaration of war ceases to be "in effect." Would Congress have to vote to "undeclare war," or would a declaration of war, like the temporary emergency court of appeals, continue for more than 20 years because no one had ever revoked it? Could the war be a permanent cold war that existed from 1945 until 1991, or would the courts require that a war be a shooting war in order to constitute an exception, and then would judges be in the business of deciding when hostilities began and/or ended to assure that there was no violation of this Section?

There is another area that will certainly cause lawsuits and is probably unwise from a policy perspective as well. S.J. Res. 1 focuses solely on the cash flow of the government, more or less like an individual's checkbook. But no sensible person looking at the finances of any entity would examine simply the income statement without looking at the balance sheet as well. Moreover, no properly run business would operate without a capital as well as an operating budget. Yet, since S.J. Res. 1 limits only cash flow, that is likely to encourage a number of dubious practices that either make no economic sense, or be subject to litigation, or both. For example, it will always be "cheaper," from an annual cash flow perspective, for the government to lease a building than to purchase it, although in the long run the cost will often be much higher by choosing the lease option. Yet the focus on short-term outlays will inevitably drive the government into leasing rather than purchasing, unless the court forbids that subterfuge or encourages the opposite by allowing the President and Congress to "count" only a percentage of this year's purchase price, a result that would be hard to justify given the broad definition of outlays, since the only exception is for debt repayments.

Second, the government could easily sell assets, either because they are not producing revenue, or because the receipts would generate cash that would alleviate some of the budget problems. Perhaps Congress would not attempt to sell the White House to a private developer, who would lease it back to the President, nor would it dispose of Glacier National Park to an outdoor recreation company, but there are other dispositions of assets that would be less of a national disgrace and hence a greater temptation to those who were worried about staying within the constitutional budget limitations for a given year, but not worried about the ultimate future of our country. Of course, for each of these attempted subterfuges, someone would surely argue that they violate the spirit, if not the letter, of this amendment, and the courts would have to decide the legality of each of them.

The Danforth and Nunn Amendments

In 1992 the Senate adopted an amendment offered by Senator Danforth to S.J. Res. 41, under which there would be judicial review, in at least some cases, but under which the courts could only issue declaratory relief unless Congress specifically authorized another form of relief through implementing legislation. Senator Nunn sponsored a similar provision again in 1995, and a modified version became part of the final version of Section 6 of H.J. Res. 1 that came within one vote of passage in the Senate: "The judicial power of the United States shall not extend to any case of sic controversy arising under this Article except as may be specifically authorized by legislation adopted pursuant to this section. 141 Cong. Rec. S. 3312 (March 2, 1995, daily ed.).

If the Nunn addition were to be included, it still leaves open the vital issue of standing by not saying who can sue to enforce the Amendment. In fact, its reference to "case or controversy" suggests, if it does not require, that the usual standing rules would apply, even if Congress passed full enabling legislation. That would probably mean that only those whose taxes were improperly increased, or whose funding was unlawfully cut off, would ever have standing. Thus, if a taxpayer or legislator claimed that the budget was not properly in balance, and even if Congress provided standing for them in enabling legislation, the Nunn addition would probably not permit that person to sue over an alleged violation. Accordingly, while I applaud the willingness of Senator Nunn to address the issue of judicial review, and recognize that his amendment eliminated some of the problems that the Danforth amendment contained, it did not answer the most fundamental issue regarding judicial review: would anyone be entitled to sue when a budget was not in balance, assuming Congress passed a statute permitting such a lawsuit? 3

Enforcement through the Debt Ceiling Provision

I am deeply troubled by the prospect of judicial review and Presidential impoundment, and by the fact that S.J. Res. 1 refused to deal with either of them. But in some ways the most troubling aspect of the Amendment is what is contained in Section 2: "The limit on the debt of the United States held by the public shall not be increased, unless three-fifths of the whole number of each House shall provide by law for such an increase by a rollcall vote."

As the Committee knows, it is virtually impossible to have an unbalanced budget without having to raise the debt ceiling. And, unlike the budget itself, whose status as being in balance or not is always subject to reasonable debate, especially at the start of a fiscal year when Congress must rely on

estimates, it is generally quite clear when the debt ceiling must be raised. To be sure Secretary of Treasury Rubin engaged in some maneuvers that delayed the matter for a couple of weeks, but even he soon ran out of tricks, and the ceiling had to be raised or the Government could not finance its operations. The necessity to raise money outside the Government will become, as former Attorney General Barr observed, a self-enforcing method of assuring that the budget does not go out of balance. 3 Some observers questioned whether the Nunn and Danforth amendments would nonetheless allow suits in state courts, because the exclusion applies only to the "judicial power of the United States." It is not clear that state courts have any power to order Congress or the President to do or not do anything, nor do I share the view that the Nunn amendment would be construed to allow state courts what is forbidden to federal courts. If this approach were adopted, it would be advisable to eliminate the debate by adding the phrase "or of any state, territory or other unit of government" after "Judicial power of the United States." However, to assure that the ordinary rules do not bar Congress from conferring standing on either taxpayers, Members, or the President to sue to enforce the requirements of Section 1, that power must be specifically set forth in the Amendment itself.

The problem is that this power is given to two-fifths of either House, and there is absolutely nothing that the remainder of Congress, the President, or the courts can do about it. Surely, no one would attempt to sell billions of dollars of debt unless they were authorized to do so, and even if someone tried, there would be no buyers. The Committee will recall the near chaos in 1995 when the Government was twice shut down, and how close we came to not getting it open again, when all that was needed was a majority. But suppose that those opposed to increasing the debt ceiling were not the majority party, and they were willing to shut down the government to assure that the budget was in balance, as they saw it. This Amendment would, in essence, turn over control of our Government to 41 Senators or 175 Representatives, virtually ending the principle of majority rule.

As frightening as are the prospects of full judicial review or unlimited presidential impoundment, I am even more frightened by the idea that we will be allowing two-fifths of either House to halt an increase in the debt ceiling. Indeed, their reasons for objection to the increase may have nothing to do with a balanced budget. Rather, they may simply seize the debt ceiling increase as an opportunity to insist on cuts or even increases in some specific programs, not to mention holding the debt ceiling as a hostage to demand that the President withdraw a treaty or a Supreme Court nomination. Of course, such strong-arm tactics can always be tried, but having to muster only 40% of either House makes it much more likely that they will succeed. The Framers established a government of majority rule, and this is no place to alter that basic assumption.

In conclusion, I want to urge the committee again to consider how the Balanced Budget Amendment will be enforced, to answer the questions relating to judicial review and impoundment in the Amendment itself, and to eliminate the ability of two- fifths of either House to bring the Government of the United States to a halt. I thank the Committee for the invitation, and I stand ready to answer any questions that you may have.

LOAD-DATE: January 23, 1997

1201 16th St., N.W. | Washington, DC 20036 | Phone: (202) 833-4000

Dennis Van Roekel
President

Lily Eskelsen
Vice President

Rebecca S. Pringle
Secretary-Treasurer

John Stocks
Executive Director

November 29, 2011

Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Human Rights
United States Senate
Washington, DC 20510

Dear Senator:

In advance of this week's hearing in the Subcommittee on the Constitution, Civil Rights and Human Rights, we would like to express our strong opposition to any constitutional balanced budget amendment. While we understand the need to get our nation's fiscal house in order, such proposals are not the right mechanism. The effect would be devastating for public education and retirement security, undermining economic recovery and jeopardizing our future strength as a nation.

Overall, a balanced budget amendment could result in the largest cuts in federal spending in modern history. In fact, it simply will not be possible to achieve the spending levels required under any balanced budget amendment without massive cuts in education, Medicare, Medicaid, Social Security, and other programs that meet crucial national needs.

Educators understand that Congress must work to ensure America's long-term economic prosperity and that we must address the nation's serious fiscal challenges. However, cutting education funding and slashing programs that serve children, seniors, and working families is not the answer. Claims that families and states balance their budgets are misleading. Most families have mortgages and car loans, and take on other debt to provide for their children's futures. In addition, while many states must balance their operating budgets, they take on debt for capital costs and job-creating projects such as building roads, bridges, and schools.

NEA members see first-hand every day the struggles of many of their students and their families. A balanced budget amendment will make their struggles even harder - essentially abandoning them while continuing to cater to the wealthiest in our nation.

Mandating a balanced budget would constitute exceedingly unwise economic policy. It would risk tipping a faltering economy into recession and slowing economic recovery. It would determine spending levels for decades and tie future Congress' hands. And, it would render impossible the sorts of investments necessary to continue economic recovery and grow the skilled workforce necessary for future economic strength.

A balanced budget amendment would decimate public education and other programs that ensure a competitive workforce and future economic vitality. We urge your opposition to any such proposal.

Sincerely,

Kim Anderson
Director, Center for Advocacy

Mary Kusler
Manager, Federal Advocacy

NATIONAL ORGANIZATIONS OPPOSING THE BALANCED BUDGET AMENDMENT

November 16, 2011

Dear Representative/Senator:

The 281 undersigned national organizations strongly urge you to oppose any balanced budget amendment to the United States Constitution.

A balanced budget constitutional amendment would damage the economy, not strengthen it. Demanding that policymakers cut spending and/or raise taxes, even when the economy slows, is the opposite of what is needed to stabilize a weak economy and avert recessions. Such steps would risk tipping a faltering economy into recession or worsening an ongoing downturn, costing large numbers of jobs while blocking worthy investments to stimulate jobs and growth and address the nation's urgent needs in infrastructure and other areas.

According to a new analysis of a balanced budget amendment by Macroeconomic Advisers, one of the nation's preeminent private economic forecasting firms, if a constitutional balanced budget amendment had already been ratified and were now being enforced for fiscal year 2012, "the effect on the economy would be catastrophic." The analysis reports that if the 2012 budget were balanced through spending cuts, those cuts would have to total about $1.5 trillion in 2012 alone, which they estimate would throw about 15 million more people out of work, double the unemployment rate from 9 percent to approximately 18 percent, and cause the economy to shrink by about 17 percent instead of growing by an expected 2 percent.

Additionally, all versions of the balanced budget amendment being considered also contain a provision requiring three-fifths of the whole membership of both houses to raise the debt limit, making risk of default more likely and empowering a willful minority to hold the full faith and credit of the U.S. hostage to whatever other political demands they may have. The difficulty of raising the debt limit this summer illustrates how hard it can be to secure the necessary votes even when the consequences are so grave. Only three of the last 11 debt limit increases obtained three-fifths vote in both chambers; two of those instances occurred amidst the financial crisis in 2008 when the debt limit increases were included in larger legislation to respond to the meltdowns already occurring in the housing and financial markets, and the third occurred this August as part of the Budget Control Act and came only after a bitter process that led the nation to the brink of default.

In short, a balanced budget amendment is a recipe for making recessions more frequent, longer, and deeper, while requiring severe cuts that would harshly affect seniors, children, veterans, people with disabilities, homeland security activities, public health and safety, environmental protection, education and medical research. It would almost certainly necessitate massive cuts to vital programs including Social Security, Medicare, Medicaid, veterans' benefits and lead to even deeper cuts than the House-passed budget.

A balanced budget amendment has no place in the Constitution of the United States. Our Constitution has served the nation well because it represents enduring principles that are the foundations of our government. It should not be used as a substitute for real leadership on fiscal policy.

We strongly urge you to oppose any constitutional balanced budget amendment.

Sincerely,

9to5, National Association of Working Women
AFL-CIO
AIDS Alliance for Children, Youth & Families
AIDS Community Research Initiative of America
The AIDS Institute
AIDS Project Los Angeles
AIDS United
Alliance for a Just Society
Alliance for Excellent Education
Alliance for Justice
Alliance for Retired Americans
American Association of Colleges for Teacher Education
American Association of Community Colleges
American Association of School Administrators (AASA)
American Association of University Professors
American Association of University Women (AAUW)
American Counseling Association
American Dance Therapy Association
American Educational Research Association
American Federation of Government Employees, AFL-CIO
American Federation of School Administrators, AFL-CIO
American Federation of State, County and Municipal Employees (AFSCME)
American Federation of Teachers, AFL-CIO
American Jewish Committee
American Medical Rehabilitation Providers Association (AMRPA)
American Medical Student Association (AMSA)
American Network of Community Options and Resources
American Postal Workers Union, AFL-CIO
American Psychiatric Association
American Public Health Association
American Rights at Work
American School Counselor Association
Americans for Democratic Action
American-Arab Anti-Discrimination Committee (ADC)
The Arc of the United States
Asian American Justice Center, member of Asian American Center for Advancing Justice
Asian & Pacific Islander American Health Forum
Association for Career and Technical Education
Association of Adult Literacy Professional Developers
Association of Assistive Technology Act Programs (ATAP)
Association of Education Service Agencies (AESA)
Association of Flight Attendants - CWA
Association of School Business Officials
Association of University Centers on Disabilities (AUCD)
Autism National Committee
AVAC: Global Advocacy for HIV Prevention

Bazelon Center for Mental Health Law
Bienestar Human Services
Bread for the World
Break the Cycle
Building and Construction Trades Department, AFL-CIO
B'nai B'rith International
Campaign for America's Future
Campaign for Community Change
CANN - Community Access National Network
Cascade AIDS Project
Center for Family Policy & Practice
Center for Law and Social Policy (CLASP)
The Center for Media and Democracy
Center for Medicare Advocacy
Center on Budget and Policy Priorities
Child Welfare League of America (CWLA)
Children's Defense Fund
Children's Dental Health Project
Cities for Progress, Institute for Policy Studies
Citizens for Global Solutions
Citizens for Responsibility and Ethics in Washington
Citizens for Tax Justice
Clinical Social Work Association
Coalition for Health Funding
Coalition of Labor Union Women
Coalition on Human Needs
Commission on Adult Basic Education
Committee for Education Funding
Common Cause
Communications Workers of America (CWA)
Community Action Partnership
Community Food Security Coalition
Community Organizations in Action
Corporation for Enterprise Development (CFED)
Council for Children with Behavioral Disorders
Council for Exceptional Children
Council for Opportunity in Education
Council of Administrators of Special Education
Council of the Great City Schools
CREDO Action
Defenders of Wildlife
Democracy 21
Demos
Department for Professional Employees, AFL-CIO
Direct Care Alliance
Disability Rights Education and Defense Fund
Division for Early Childhood of the Council for Exceptional Children (DEC)
Easter Seals
Elev8 (Baltimore, Chicago, New Mexico, and Oakland)

Every Child Matters Education Fund
FairTest, the National Center for Fair & Open Testing, Inc.
Families USA
Farmworker Justice
Feminist Majority
First Focus Campaign for Children
Food & Water Watch
Food Research & Action Center (FRAC)
Forum for Youth Investment
Foster Family-based Treatment Association
Franciscan Action Network (FAN)
Friends Committee on National Legislation
Friends of the Earth
Gamaliel
Gay Men's Health Crisis (GMHC)
Generations United
GLSEN
Gray Panthers
Growth & Justice
Half in Ten
Health & Disability Advocates
Health Care for America Now
Health GAP (Global Access Project)
HealthHIV
HIV Law Project
Horizons for Homeless Children
Housing Works
Interfaith Worker Justice
International Association of Fire Fighters
International Association of Machinists and Aerospace Workers
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, AFLCIO
International Brotherhood of Electrical Workers
International Brotherhood of Teamsters
International Society for Technology in Education
International Union of Police Associations, AFL-CIO
International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW)
Jewish Council for Public Affairs
Laborers' International Union of North America, (LiUNA!)
Latino Commission on AIDS
The Lawyers' Committee for Civil Rights Under Law
The Leadership Conference on Civil and Human Rights
Leadership Team, Sisters of St. Francis of Philadelphia
League of Conservation Voters
League of Rural Voters
League of United Latin American Citizens (LULAC)
League of Women Voters of the United States
Learning Disabilities Association of America

Main Street Alliance
Medicare Rights Center
Mental Health America
NAACP
National Academy of Elder Law Attorneys
National Active and Retired Federal Employees Association (NARFE)
National Alliance for Partnerships in Equity
National Alliance of State & Territorial AIDS Directors (NASTAD)
National Assembly on School-Based Health Care
National Association for Adults with Special Learning Needs
National Association for Children's Behavioral Health
National Association for College Admission Counseling
National Association for Hispanic Elderly
National Association for Music Education
National Association for the Education of Young Children
National Association of Area Agencies on Aging (n4a)
National Association of Colored Women's Clubs, Inc. (NACWC)
National Association of Councils on Developmental Disabilities
National Association of County Behavioral Health and Developmental Disability Directors (NACBHDD)
National Association of Elementary School Principals
National Association of Federally Impacted Schools
National Association of Government Employees/SEIU
National Association of Housing and Redevelopment Officials (NAHRO)
National Association of Letter Carriers
National Association of Nutrition and Aging Services Programs (NANASP)
National Association of People with AIDS (NAPWA)
National Association of Private Special Education Centers
National Association of School Psychologists
National Association of Secondary School Principals (NASSP)
National Association of State Directors of Career Technical Education Consortium
National Association of State Directors of Special Education (NASDSE)
National Association of State Head Injury Administrators
National Association of Thrift Savings Plan Participants
National Black Child Development Institute
National Center for Family Literacy
National Center for Law and Economic Justice
National Center on Domestic and Sexual Violence
National Coalition Against Domestic Violence
National Coalition for Asian Pacific American Community Development
National Coalition for LGBT Health
National Coalition for Literacy
National Committee to Preserve Social Security and Medicare
National Congress of American Indians
The National Consumer Voice for Quality Long-Term Care
National Council for Community and Education Partnerships (NCCEP)
National Council for Community Behavioral Healthcare
National Council for the Social Studies
National Council of Jewish Women
National Council of La Raza (NCLR)

National Council of Women's Organizations (NCWO)
National Council on Independent Living
National Disability Rights Network
National Education Association (NEA)
National Employment Law Project (NELP)
National Fair Housing Alliance
National Family Caregivers Association
National Federation of Federal Employees
National Gay and Lesbian Task Force Action Fund
National Health Care for the Homeless Council
National Hispanic Council on Aging (NHCOA)
National Housing Trust
National Immigration Law Center
National Latina Institute for Reproductive Health
National Law Center on Homelessness & Poverty
National Low Income Housing Coalition
National Organization for Women (NOW)
National Partnership for Women & Families
National Pediatric AIDS Network
National People's Action
National Priorities Project
National Respite Coalition
National Rural Education Advocacy Coalition
National Rural Education Association (NREA)
National School Boards Association
National Skills Coalition
National Superintendents Roundtable
National Treasury Employees Union
National Urban League
National WIC Association
National Women's Conference Committee
National Women's Law Center
Natural Resources Defense Council (NRDC)
NETWORK, A National Catholic Social Justice Lobby
Not Dead Yet
OMB Watch
Paralyzed Veterans of America
People For the American Way (PFAW)
Population Action International
Progressive States Action
Project Inform
Public Citizen
Public Education Network
Racial and Ethnic Health Disparities Coalition (REHDC)
Rebuild The Dream
RESULTS
Sargent Shriver National Center on Poverty Law
School Social Work Association of America
Service Employees International Union (SEIU)

Sexuality Information and Education Council of the U.S. (SIECUS)
Share Our Strength
Sisters of Mercy Institute Justice Team
Social Security Disability Coalition
Social Security Works
Southeast Asia Resource Action Center
Stand Up for Rural America, Robert S. Warwick, Steering Committee
Stewards of Affordable Housing for the Future (SAHF)
Strengthen Social Security Campaign
Sugar Law Center for Economic and Social Justice
TESOL International Association
Transportation Communications Union
Transportation Equity Network
Transportation Trades Department, AFL-CIO
Treatment Access Expansion Project
Treatment Action Group (TAG)
Trust for America's Health (TFAH)
Union for Reform Judaism
United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada
United Cerebral Palsy
United Church of Christ Justice and Witness Ministries
United Electrical, Radio and Machine Workers of America (UE)
United for a Fair Economy
The United Methodist Church – General Board of Church and Society
United Methodist Women
United Mine Workers
United Spinal Association
United States Student Association (USSA)
United Steelworkers (USW)
USAction
US Psychiatric Rehabilitation Association (USPRA)
VillageCare
Voices for America's Children
Voices for Progress
Wider Opportunities for Women (WOW)
Women's Institute for a Secure Retirement (WISER)
The Woodhull Sexual Freedom Alliance
Working America
YouthBuild USA
YWCA USA
ZERO TO THREE

November 29, 2011

The Honorable Dick Durbin, Chairman
Subcommittee on the Constitution, Civil Rights, and Human Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Lindsey Graham, Ranking Member
Subcommittee on the Constitution, Civil Rights, and Human Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Graham:

The National Women's Law Center writes in strong opposition to a constitutional balanced budget amendment. We ask that this statement be made a part of the hearing record.

While the nation needs to address its long-term fiscal challenges, Congress should accept its responsibility to develop policies that meet the nation's changing needs and finance them fairly and adequately. Amending the Constitution to require a balanced budget each year could require deep cuts in programs that women and their families depend on and force the federal government to take steps that weaken the economy.

For example, the spending cap in S. J. Res. 23 would limit federal spending to a level last seen in the mid-1950s, before Medicare and Medicaid even existed. It would force drastic cuts to these and other critical programs, including Social Security. Adding insult to injury, S. J. Res. 23 would require a two-thirds vote in both houses to approve any bill that imposes a new tax, increases tax rates, or increases total revenues – so tax breaks for millionaires and corporations would be virtually untouchable.

Even without a cap on total spending and a super-majority requirement for revenue increases, a balanced budget amendment would threaten critical programs and the economy. Although S. J. Res. 24 would exempt Social Security from the operation of the balanced budget requirement, the amendment's application to Medicare, Medicaid and other programs would reduce needed assistance for those who rely most on Social Security, including elderly women. In 2007 nearly seven in ten elderly individuals who relied on Medicaid were women, and women comprise a majority of beneficiaries in Medicare. Because women, on average, live longer, are poorer, and have more health care needs than men (as a new report from the Census Bureau shows), Medicare – sometimes combined with Medicaid – plays a greater role for them in preventing illness and destitution.

With the law on your side, great things are possible.
11 Dupont Circle # Suite 800 # Washington, DC 20036 # 202.588.5180 # 202.588.5185 Fax # www.nwlc.org

The requirement that the federal budget be balanced every year would dangerously weaken the federal government's ability to respond to recessions, emergencies, and new challenges. During economic downturns, the expansion of federal programs such as extended unemployment benefits, Medicaid, and SNAP (formerly Food Stamps) helps struggling families, relieves pressure on state budgets, and helps stabilize the economy. The federal government's ability to respond quickly to natural disasters and national emergencies can alleviate suffering and prevent further harm. In contrast, a balanced budget requirement would force the federal government to cut spending and/or raise taxes during economic downturns, potentially making recessions deeper and longer.

The argument that the federal government should be required to balance its budget as states and families do also does not hold up. Unlike states and families, the federal government would be prevented from borrowing for important investments and saving for the future under a balanced budget amendment. Although states typically balance their *operating* budgets, they can borrow money to fund investments like schools and roads and can build up reserves ("rainy day funds") that they can draw down when necessary. Likewise, a family can borrow money for important investments such as a mortgage or college expenses, and draw on savings in emergencies. Under a balanced budget amendment, the federal government would be unable to do either – and the states and families who rely on the federal government's ability to respond quickly in tough times would suffer.

We urge you not to support any balanced budget amendment.

Sincerely,

Nancy Duff Campbell
Co-President

Joan Entmacher
Vice President, Family Economic Security

TESTIMONY

Before The Senate Judiciary Committee

Subcommittee on the Constitution,

Civil Rights and Human Rights

United States Senate

ON

"A Balanced Budget Amendment:

The Perils of Constitutionalizing the Budget Debate"

November 30, 2011

WITNESS:

Robert Romasco

President-Elect

AARP

For Further information, contact:

Cristina Martin Firvida
Government Affairs

Chairman Durbin, Ranking Member Graham, and Members of the Senate Judiciary Subcommittee on the Constitution, Good morning.

On behalf of our members and all Americans age 50 and over, AARP appreciates the opportunity to submit written comments on the impact that a balanced budget amendment to the Constitution would have on Social Security and Medicare. A balanced budget amendment, while seemingly a common-sense answer to America's fiscal challenges, would likely subject Social Security and Medicare to potentially very deep cuts, without regard to the impact on the health and financial security of individuals. It would also likely result in significantly diminished resources for many other services that provide assistance to Americans least able to provide for themselves – services like delivered meals or heating assistance for those who are too frail or poor to take care of these basic needs without some community support.

A balanced budget amendment to the Constitution would prohibit outlays for a fiscal year (except those for repayment of debt principal) from exceeding total receipts for that same fiscal year. This is the equivalent of imposing a constitutional cap on all spending that is equivalent to the revenues raised in any given year. For example, Federal spending in 2011 is projected to be 23.8 % of the gross domestic product (GDP), but revenues are only projected to be 15.3% of GDP. If a constitutional balanced budget amendment were in place today, federal spending would need to be capped at 15.3% of GDP, or revenues would need to be increased to 23.8% of GDP. Based on an analysis prepared by the Lewin group for AARP, the American College of Cardiology, the American Hospital Association, the American Medical Association, and Leading Age, slowly reducing current spending to a less drastic 21% of GDP over the next ten years would result in significant cuts to Social Security, Medicare and Medicaid. Assuming cuts were phased in and distributed proportionate to the rate of growth in costs of each of these programs, by 2021 there would be a $1.2 trillion cut in Social Security spending, a $788 billion cut in Medicare and a $527 billion cut in federal Medicaid spending.

These kinds of cuts would have an impact on real people. Social Security is currently the principal source of income for nearly two-thirds of older American households receiving benefits, and roughly one third of those households depend on Social Security benefits for nearly all (90 percent or more) of their income. Despite its critical importance, Social Security's earned benefits are modest, averaging only about $1,200 per month for all retired workers in March 2011. Yet, according to the same Lewin analysis prepared for AARP and others, capping Social Security and programs which assist those least able to support themselves to 21% of GDP would increase the number of people living below the federal poverty level by 2.0 million people by 2014 and 3.4 million people by 2021. A shocking number of those reduced to poverty would be older Americans – 1.1 million Americans age 65 and older would live below the federal poverty level in 2014, and 1.9 million older Americans would be poor by 2021, if federal spending were to be slowly

reduced to 21% of GDP over the next ten years. These outcomes would only be more extreme if a constitutional amendment required spending to be capped at lower levels.

In fact, if the balanced budget amendment were in place today, the average Social Security benefit would be cut 27%. Based on the revenue and spending projections of the Congressional Budget Office, and assuming no new revenues, federal spending would need to be reduced from 23% of GDP to 16.8% of GDP in 2012. If across the board cuts were applied to reach balance, a low-earning retiree would see a 2012 benefit reduction from $10, 281 to $7,510, and a middle-income retiree would experience a 2012 cut from $16,932 to $12,368. Of course, it is likely that the cut in annual Social Security benefits would be even deeper than this, as it is not realistic to apply any cuts to interest on the national debt, leaving a greater proportion of cuts to be absorbed by all other federal spending.

Even if such drastic reductions were not required by a balanced budget amendment, the predictability of both Social Security and Medicare would be undermined by the requirement that spending outlays equal revenues on an annual basis. Revenues fluctuate based on many factors, including the health of the economy and the rate of labor participation. Consequently, spending would of necessity also fluctuate under a balance budget amendment. As a result, it would not be feasible to provide predictable Social Security and Medicare benefits that can be reliably delivered during an individual's retirement years. Individuals who have contributed their entire working lives to earn a predictable benefit during their retirement would find that their retirement income and health care out of pocket costs would vary significantly year to year, making planning difficult, and peace of mind impossible.

Another element of the balanced budget amendment– the requirement of a 3/5 vote to increase the debt limit – is especially likely to wreak havoc with the reliable provision of Social Security and Medicare benefits in the future. This increased threshold for increasing the debt limit was part of the balanced budget amendment proposal that Congress voted on in 1995, and most recently, in the House of Representatives on November 18. In light of the brinkmanship surrounding the increase in the debt limit earlier this year, and the uncertainty that created for millions of retirees, widows, surviving children and disabled workers who were unsure if they would receive timely Social Security benefits, a 3/5 requirement on future debt limit increases does not seem prudent. Such a requirement would likely invite future threats of disruptions in the provision of Social Security and Medicare benefits.

Furthermore, it is particularly inappropriate to subject Social Security to a balanced budget amendment given that Social Security is an off-budget program that is separately funded through its own revenue stream, including significant trust fund reserves to finance benefits. Social Security benefits are financed through payroll contributions from employees and their employers, each and every year, throughout an individual's working

life. The payroll contributions and benefits paid, including any administrative costs, are accounted for separately from the rest of the federal budget. Importantly, Social Security has not contributed to our large deficits.

In fact, Social Security has had cash surpluses for almost the past 30 years, taking in more in revenue than it has needed to pay benefits. These surpluses, generated by the payroll contributions made by the American people, have been used to meet other expenses of the federal government. In exchange for use of these surpluses, the federal government has issued Social Security U.S. Treasury bonds of equal value. That is, Social Security has reduced the past need for additional government borrowing from the public and resulted in publicly held debt that is less today than what it otherwise would have been. Consequently, imposing a cap on Social Security, as a balanced budget amendment would do, is unjustifiable.

There are additional, serious concerns with a balanced budget amendment. To be enforceable, a constitutional balanced budget amendment would shift the power to tax and spend from elected officials to an unelected judiciary. Such a change would weaken the accountability of Congress and the President for fiscal decisions and could lead to a constitutional conflict with the courts. As a practical matter, a strict constitutional requirement for a balanced budget would limit the government's ability to respond to changes in the economy and emergencies that require counter-cyclical measures or unexpected expenditures. While supporters assert that a balanced budget amendment would mirror the balanced budget requirements in many states, the structure of state requirements differs from the proposal presented for a vote in Congress. In particular, "budget balance" in the states generally relates only to their general fund, approximately half of a state budget, and not to the total budget, including capital spending. As a result, "balance" in state budgets does not automatically mean that current revenues equal current spending.

Our members and older Americans everywhere acknowledge the difficult challenge of getting our nation's fiscal house in order. But, doing so requires a real debate about the choices we need to make. A balanced budget amendment would result in forced cuts to Social Security and Medicare, rather than informed decision-making about the future of our nation. We urge Congress to not simply look at the numbers in the budget, but the real people that would be affected by the fundamental changes that a balanced budget amendment would produce. We look forward to working with Members of this Committee, as well as Members from both Houses of Congress and both sides of the aisle, to promote the conversation that will address our nation's long-term debt without sacrificing the current or future health and retirement security of our nation's seniors.

STATE AND LOCAL ORGANIZATIONS OPPOSING THE BALANCED BUDGET AMENDMENT

November 16, 2011

Dear Representative/Senator:

The 424 undersigned state and local organizations strongly urge you to oppose any balanced budget amendment to the United States Constitution.

A balanced budget constitutional amendment would damage the economy, not strengthen it. Demanding that policymakers cut spending and/or raise taxes, even when the economy slows, is the opposite of what is needed to stabilize a weak economy and avert recessions. Such steps would risk tipping a faltering economy into recession or worsening an ongoing downturn, costing large numbers of jobs while blocking worthy investments to stimulate jobs and growth and address the nation's urgent needs in infrastructure and other areas.

According to a new analysis of a balanced budget amendment by Macroeconomic Advisers, one of the nation's preeminent private economic forecasting firms, if a constitutional balanced budget amendment had already been ratified and were now being enforced for fiscal year 2012, "the effect on the economy would be catastrophic." The analysis reports that if the 2012 budget were balanced through spending cuts, those cuts would have to total about $1.5 trillion in 2012 alone, which they estimate would throw about 15 million more people out of work, double the unemployment rate from 9 percent to approximately 18 percent, and cause the economy to shrink by about 17 percent instead of growing by an expected 2 percent.

Additionally, all versions of the balanced budget amendment being considered also contain a provision requiring three-fifths of the whole membership of both houses to raise the debt limit, making risk of default more likely and empowering a willful minority to hold the full faith and credit of the U.S. hostage to whatever other political demands they may have. The difficulty of raising the debt limit this summer illustrates how hard it can be to secure the necessary votes even when the consequences are so grave. Only three of the last 11 debt limit increases obtained three-fifths vote in both chambers; two of those instances occurred amidst the financial crisis in 2008 when the debt limit increases were included in larger legislation to respond to the meltdowns already occurring in the housing and financial markets, and the third occurred this August as part of the Budget Control Act and came only after a bitter process that led the nation to the brink of default.

In short, a balanced budget amendment is a recipe for making recessions more frequent, longer, and deeper, while requiring severe cuts that would harshly affect seniors, children, veterans, people with disabilities, homeland security activities, public health and safety, environmental protection, education and medical research. It would almost certainly necessitate massive cuts to vital programs including Social Security, Medicare, Medicaid, veterans' benefits and lead to even deeper cuts than the House-passed budget.

A balanced budget amendment has no place in the Constitution of the United States. Our Constitution has served the nation well because it represents enduring principles that are the foundations of our government. It should not be used as a substitute for real leadership on fiscal policy.

We strongly urge you to oppose any constitutional balanced budget amendment.

Sincerely,

Alaska

NEA-Alaska

Alabama

Alabama Education Association
Montgomery Transportation Coalition

Arkansas

Arkansas Education Association
Arkansas Hunger Relief Alliance
Arkansas Interfaith Alliance
The Platypus Society

Arizona

Arizona Education Association
Concilio Latino de Salud Inc.
Foundation for Senior Living
World Hunger Ecumenical Arizona Task Force (WHEAT)

California

9to5 Bay Area (CA)
9to5 Los Angeles
ACLU of Southern California
Avant-Garde Foster Family and Adoption Agency, Inc
California Alliance for Retired Americans
California Association of Social Rehabilitation Agencies
California Budget Project
California Food Policy Advocates
California Housing Partnership Corporation
California Pan-Ethnic Health Network
California Partnership
California Reinvestment Coalition
California Teachers Association
California WIC Association
California/Nevada Community Action
Californians for Cures
Centro Binacional para el desarrollo indigena Oaxaqueno
Community Action Marin
Diaz and Associates
Earth Mama Healing, Inc.
Food Bank of Contra Costa and Solano
Gray Panthers Association of California Networks

California continued

Guam Communications Network
Irvine United Congregational Church Advocates for Peace and Justice
Korean Resource Center
L.A Gay & Lesbian Center
Madera Coalition
Maternal and Child Health Access
Nana's Wish
National Council of Jewish Women, California State Public Affairs
Pacific Islanders Cancer Survivors Network (PICSN)
Peace and Freedom Party of California
Proteus Inc.
Silicon Valley Independent Living Center
Southern California Association of Non-Profit Housing
St. Mary's Center
Western Center on Law and Poverty

Colorado

9to5 Colorado
Colorado AIDS Project
Colorado Center on Law and Policy
Colorado Coalition for the Homeless
Colorado Fiscal Policy Institute
Colorado Progressive Coalition
Colorado Education Association
Denver Oncology Consortium
Green Peace Corps
Health Care for All Colorado
Interfaith Alliance of Colorado
Kebaya Coaching Consulting
Mental Health America of Colorado
Otero County Housing Authority
Pipefitter Local 208
Rights for All People
Rocky Mountain Care Solutions
Servicios de La Raza, Inc.
Southwest Statistical Consulting, LLC
The Consortium
University of Denver

Connecticut

AFSCME Council 4
All Our Kin, Inc.
Collaborative Center for Justice, Inc.
Connecticut Association for Human Services
Connecticut Education Association
Connecticut Food Bank
Connecticut Housing Coalition
Connecticut Voices for Children
Gilead Community Services
Middlesex County Coalition on Housing and Homelessness

Connecticut continued

National Association of Social Workers, CT Chapter
National Cambodian American Health Initiative (NCAHI)
People of Faith
Together We Shine

District of Columbia

D.C. LEARNs
Federal Education Association
NAKASEC
National Latino Farmers & Ranchers Trade Association
RESULTS, Washington DC Area Chapter
The Capital Area Food Bank
Washington Legal Clinic for the Homeless

Delaware

Delaware Ecumenical Council on Children and Families
Delawareans for Social and Economic Justice
Delaware State Education Association

Florida

Center for Independent Living of South Florida Inc.
El Bethel Missionary Church Inc.
Family Care Council
Farmworker's Self-Help
Florida Center for Fiscal and Economic Policy
Florida CHAIN
Florida Education Association
Florida Impact
Florida NOW
National Association of Social Workers- Florida Chapter
National Council of Jewish Women Florida State Policy Advocacy Chair
North Florida Education Development Corporation
Pax Christi Northeast Florida
REG
The Farmworker Association of Florida
The Good Shepherd of Northeast Fla, Inc
Unitarian Universalist Legislative Ministry of Florida

Georgia

9to5 Atlanta
9to5 Atlanta Working Women
Community Connections
DEW Consultants
Georgia Association of Educators
Georgia Rural Urban Summit

Hawaii

Hawaii State Teachers Association

Iowa

Iowa State Education Association
Child and Family Policy Center
Children and Families of Iowa
Des Moines Area Ecumenical Committee for Peace
Iowa Book Works
Iowa Policy Project
JC & Associate
Methodist Federation for Social Action, Iowa Chapter
Sister of the Presentation of the Blessed Virgin Mary
South Central Iowa Federation of Labor AFL-CIO

Idaho

Idaho Education Association

Illinois

AIDS Foundation of Chicago
Bethel New Life Inc.
Campaign for Better Health Care
Chicago Area Fair Housing Alliance
Chicago Jobs Council
Chicago Metropolitan Association for the Education of Young Children
Chicago Rehab Network
CL Enterprises
Comprehensive Community Solutions, Inc.
Health Care Justice Campaign, Illinois
Heartland Alliance for Human Needs & Human Rights
HIV Prevention Justice Alliance (HIV PJA)
Holy Family Ministries
Holy Spirit Missionary Sisters
Housing Action Illinois
Illinois Action for Children
Illinois Education Association
Illinois Hunger Coalition
National Council of Jewish Women Illinois State Public Affairs Committee
Project IRENE
Protestants for the Common Good
Voices for Illinois Children
Women Employed

Indiana

Indiana State Teachers Association
Lafayette Urban Ministry
NASW- Indiana chapter
Sojourner Truth House

Kansas

Kansas National Education Association

Kentucky

Clients Council of Kentucky
Covering Kentucky Kids and Families
Kentucky Center for Economic Policy
Kentucky Education Association
Kentucky Task Force on Hunger
Sisters of Charity of Nazareth Congregational Leadership

Louisiana

Community United for Change (CUC)
Louisiana Association of Educators
Louisiana Budget Project
Louisiana Federation of Teachers
Mental Health America of Louisiana

Massachusetts

AAUW-MA
AIDS Action Committee of Massachusetts
Massachusetts Citizens for Children
Massachusetts Law Reform Institute
Massachusetts Teachers Association
National Alliance of HUD Tenants
Project Bread - The Walk for Hunger
Stavros Center for Independent Living

Maryland

Maryland State Education Association
PeterCares House
Public Justice Center

Maine

Advocacy Initiative Network of Maine
ElderCare Network of Lincoln County
Maine Association of Interdependent Neighborhoods (MAIN)
Maine Center for Economic Policy
Maine Children's Alliance
Maine Education Association
Maine Equal Justice Partners, Inc
MSEA-SEIU Local 1989
Preble Street

Michigan

Detroit Methodist Federation for Social Action

Michigan continued

Detroit RESULTS
Groundcover News
LoLaDiVa, Inc.
Michigan League for Human Services
Michigan Legal Services
Michigan Unitarian Universalist Social Justice Network
Michigan Alliance of Cooperatives
MichUHCAN
National Council of Jewish Women- MI
Michigan Education Association

Minnesota

A Minnesota Without Poverty
HOME Line
Litchfield Early Childhood Programs
Minneapolis Highrise Representative Council
Minnesota Coalition for the Homeless
Minnesota Head Start Association
Minnesota Public Health Association
Northwest Community Action, Inc
Our Saviour's Community Services
Phyllis Wheatley Community Center
Project for Pride in Living (PPL)
The Arc Minnesota
TPS LLC
Education Minnesota

Missouri

Caruthers Street Charities, Inc. dba Project HOPE
Delta Area Economic Opportunity Corp.
East Missouri Action Agency, Inc.
Jewish Community Relations Council of St. Louis
Kansas City Criminal Justice Taskforce
Lutheran Family and Children's Services of Missouri
Mental Health America of Eastern Missouri
Metro St Louis Coalition for Inclusion and Equity, M-SLICE
Missouri Alliance for Retired Americans
Missouri Association for Social Welfare
Missouri Budget Project
Missouri Health Advocacy Alliance
Missouri Health Care for All
National Council of Jewish Women- St. Louis Section
Saint Louis Effort for AIDS
Women's Voices Raised for Social Justice
Missouri NEA

Mississippi

Public Policy Center of Mississippi
Mississippi Association of Educators

Montana

Helena Indian Alliance
MEA-MFT
Mental Health America of Montana
Montana Association of Area Agencies on Aging
Montana Budget and Policy Center
Montana Coalition for the Homeless
Montana Food Bank Network
Montana Organizing Project
Montana Small Business Alliance
Montana Women Vote
Musikanten Montana

North Carolina

MDC
Sisters of Mercy
Sisters of Mercy South Central Community
North Carolina Association of Educators

North Dakota

Mental Health America of ND
North Dakota Education Association

Nebraska

Center For People in Need
Lutheran Metro Ministry
Piper Farms
Sisters of Mercy West Midwest Justice Team

New Hampshire

Children's Alliance of NH
Housing Action NH
Marguerite's Place, Inc.
New Hampshire Fiscal Policy Institute
NH Council of Churches
NEA-New Hampshire

New Jersey

Englewood Housing Authority
National Council of Jewish Women, NJ State Policy Advocacy Network
RESULTS, Central NJ Domestic Group
Speech Therapy Fun
Statewide Parent Advocacy Network
New Jersey Education Association

New Mexico

National Education Association-New Mexico
New Mexico Coalition to End Homelessness
New Mexico Voices for Children
NM Center on Law and Poverty
NEA-New Mexico

Nevada

Nevada State Education Association
Food Bank of Northern Nevada
Northern Nevada Center for Independent Living

New York

504 Democratic Club
An Empowered Life
Center for Independence of the Disabled, NY
Disabled In Action of Metropolitan NY
Dutchess County Community Action Agency
Early Care & Learning Council
Harlem United Community AIDS Center
Human Services Council
Independent Living Inc
Long Term Care Community Coalition
Metro New York Health Care for All Campaign
National Council of Jewish Women- New York Section
New York State Community Action Association
New York State Council for Community Behavioral Healthcare
New York State United Teachers
New Yorkers for Accessible Health Coverage
Peninsula Counseling Center
Schenectady Inner City Ministry
Supportive Housing Network of New York
Tioga Peace & Justice
Westchester for Change
Xavier Mission
YWCA of the Greater Capital Region, Inc.
Neighborhood Family Services Coalition
West Side Campaign Against Hunger

Ohio

COHHIO
Community Action Committee of Pike County
Community Peace Builders
Legal Aid Society of Southwest Ohio
Ohio Association of Second Harvest Foodbanks
Ohio Poverty Law Center
Plymouth Shiloh Food Pantry
RESULTS Columbus
Shared Harvest Foodbank

Ohio continued

The Arc of Greater Cleveland
The Hunger Network of Greater Cleveland
Tri-County Independent Living Center
UHCAN Ohio
Voices for Ohio's Children
Ohio Education Association
CDCRC Inc
Ohio Association of Community Health Centers

Oklahoma

Joyland Child Development Center
Oklahoma Policy Institute
Oklahoma Education Association

Oregon

501 Drive LLC
Brainstormers Inc.
Oregon AFSCME Council 75
Partners for a Hunger-Free Oregon
ROSE Community Development
Oregon Education Association

Pennsylvania

Advocacy Committee for Justice and Peace of the Sisters of St. Francis of Philadelphia
All Hands United, Inc.
Catholic Social Services of Lackawanna/Wayne Counties
Central Pennsylvania Food Bank
Christian Churches United
Community Intervention Center
Family Connection of Easton
Just Harvest: A Center for Action Against Hunger
PA Coalition for the Children
Pennsylvania Council of Churches
Pennsylvania Hunger Action Center
Providence Connections
Resident Advisory board
United Way of Beaver County
Pennsylvania State Education Association

Puerto Rico

One Stop Career Center

Rhode Island

Feinstein Center for a Hunger Free America
Mental Health Association of RI
Rhode Island Coalition for the Homeless

Rhode Island continued

Rhode Island KIDS COUNT
NEA Rhode Island

South Carolina

SC Appleseed Legal Justice Center
South Carolina Education Association

South Dakota

South Dakota Education Association

Tennessee

(Changer) Chattanoogans and North Georgians for Economic Rights
The Black Children's Institute of Tennessee
Tennessee Education Association

Texas

Brazos Valley Community Action Agency, Inc.
Cameron County Homeless Partnership
Center for Public Policy Priorities
Dominican Sisters of Houston
La Fe Policy Research and Education Center
National Council of Jewish Women Texas
Senior Community Outreach Services, Inc.
Texas Tenants' Union
Van Zandt County Democratic Party
Texas State Teachers Association

Utah

Utah Education Association
Disabled Rights Action Committee
Crossroads Urban Center
Utahns Against Hunger

Virginia

A & K Enterprise, Inc.
CPHAR-Charlottesville Public Housing Association of Residents
Crossroads Community Services
Housing Opportunities Made Equal of Virginia Inc.
RePHRAME
Social Action Linking Together (SALT)
The Commonwealth Institute for Fiscal Analysis
Virginia Interfaith Center for Public Policy
Virginia NOW
Virginia Poverty Law Center
World Knowledge Bank

Virginia continued

Virginia Education Association

Vermont

Gilman Housing Trust, Inc.
Hunger Free Vermont
National Association of State Head Injury Administrators
Vermont Affordable Housing Coalition
Vermont-NEA
Voices for Vermont's Children

Washington

Catholic Charities Housing Services
Children's Alliance of WA
Community services of Moses Lake
Faith Action Network
FISH Food Banks of Pierce County
Northwest Harvest
Northwest Health Law Advocates
Northwest Housing Development
Nutrition First
Pierce County Housing Authority
Positive Solutions
Seattle RESULTS
Solid Ground
South King County Food Coalition
Statewide Poverty Action Network
WA State National Organization for Women
Washington Education Association
Washington Food Coalition
Washington State Budget & Policy Center

Wisconsin

AFSCME Wisconsin (Councils 24, 40, and 48)
ARC of Greater Milwaukee
Disability Rights Wisconsin
Hunger Task Force
Influencing State Policy
Mental Health America of Wisconsin
One Wisconsin Now
St. Matthew Justice & Human Concerns
Voces de la Frontera
Wisconsin Board for People with Developmental Disabilities
Wisconsin Community Services, Inc.
Wisconsin Education Association Council
9to5 Milwaukee
League of Women Voters of Wisconsin Education Network

West Virginia

Direct Action Welfare Group
Huntington Area Food Bank
Mountain CAP of West Virginia, Inc., a CDC
West Virginia Education Association
West Virginia UU Advocacy Network
WV Center on Budget and Policy
WV Citizen Action Group

STRENGTHEN SOCIAL SECURITY
...don't cut it.

December 6, 2011

The Honorable Richard Durbin
Chairman
Subcommittee on the Constitution,
Civil Rights and Human Rights
United States Senate
Washington, D.C. 20510

The Honorable Lindsey Graham
Ranking Member
Subcommittee on the Constitution,
Civil Rights and Human Rights
United States Senate
Washington, D.C. 20510

Dear Chairman Durbin, Ranking Member Graham, and Members of the Subcommittee on the Constitution, Civil Rights, and Human Rights:

We write to express our opposition to a balanced budget amendment. We are a broad-based coalition comprised of 320 leading national and state aging, labor, disability, women's, and other organizations representing more than 50 million Americans.

Social Security, by law, already must balance its outgo against its income and has no borrowing authority. Moreover, it currently has an accumulated reserve of $2.7 trillion, which is projected to grow to $3.3 trillion by the beginning of the next decade. Notwithstanding those facts, a constitutional requirement to balance the budget could be devastating to the seniors, women, children, people with disabilities, and others who rely on Social Security benefits. Under a balanced budget amendment, all government outlays could be affected – including Social Security. Because the outlays must be balanced on an annual basis, Social Security benefits could be cut significantly despite its accumulated reserve. Many Americans already believe Congress has stolen those accumulated funds. A balanced budget amendment could make that false perception a reality.

Even a balanced budget amendment that exempted Social Security would have harmful consequences to Social Security. As just one example, Social Security's administrative expenses are paid from dedicated funds but would be subject to automatic cuts, even if the benefits themselves were exempt. Benefits are worthless if beneficiaries are unable to access them because offices are closed and telephones go unanswered.

For all these reasons, we urge Congress to exercise the authority is already has and not propose an amendment to the Constitution which will harm the American people whom Members of

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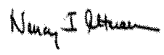
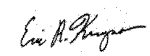
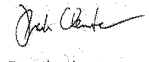
www.strengthensocialsecurity.org • 202-955-5665

Congress have been elected to serve. We appreciate this opportunity to make our concerns known.

Sincerely,

Nancy Altman Campaign Co-Chair	Eric Kingson Campaign Co-Chair	Frank Clemente Campaign Manager	Alex Lawson Executive Director Social Security Works

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