AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Calendar No. 16

104TH CONGRESS, *1st Session* | SENATE | REPORT 104–5

BALANCED-BUDGET CONSTITUTIONAL AMENDMENT

JANUARY 24 (legislative day, JANUARY 10), 1995.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL, MINORITY, AND SUPPLEMENTAL VIEWS

[To accompany S.J. Res. 1]

The Committee on the Judiciary, to which was referred the bill (S.J. Res. 1) to propose an amendment to the Constitution relating to a Federal balanced budget, having considered the same, reports favorably thereon, and recommends that the bill do pass.

CONTENTS

		Page
I.	Purpose	2
II.	Legislative history	3
III.	Discussion	6
IV.	Votes of the committee	12
V.	Text of S.J. Res. 1	14
VI.	Section-by-section analysis	15
VII.	Cost estimate	20
VIII.	Regulatory impact statement	23
IX.	Additional views of Mr. Kyl	24
X.	Additional views of Mr. Biden	26
XI.	Minority views of Messrs. Kennedy, Leahy, and Feingold	31
XII.	Supplemental minority views of Mr. Leahy	60
XII.	Additional views of Mr. Heflin	70
XIV.	Minority views of Mr. Feingold	74
XV.	Changes in existing law	76

I. PURPOSE

The Balanced-Budget Constitutional Amendment sets forth, in the Nation's governing document, the basic principle that the Federal Government must not spend beyond its means. This principle, Thomas Jefferson once said, is of such importance "as to place it among the fundamental principles of government. We should consider ourselves unauthorized to saddle posterity with our debts, and morally bound to pay them ourselves." Thomas Jefferson's words ring true today. The discipline imposed by a balanced-budget amendment may be the only way to avoid leaving future generations of Americans with an overwhelming legacy of debt.

The notion of a limitation of the Government's budgetary authority by a governing document is deeply rooted in our traditions; it is a notion which goes back as far as the Magna Carta. Our predecessors were entirely aware of these traditions when they said:

> The public debt is the greatest of dangers to be feared by a republican government.

And

> Once the budget is balanced and the debts paid off, our population will be relieved from a considerable portion of its present burdens and will find * * * additional means for the display of individual enterprise.

The first statement was made by Thomas Jefferson and the second by Andrew Jackson.

These two quotations illustrate an important truth: No concept is more a part of traditional American fiscal policy than that of the balanced budget. In fact, Jefferson himself wished the Constitution had included a prohibition on government borrowing because he thought that one generation should not be able to obligate the next generation.

James Madison, in explaining the theory undergirding the Government he helped create, had this to say about governments and human nature:

> Government [is] the greatest of all reflections on human nature. If men were angels, no government would be necessary. If angels were to govern men, neither external or internal controls on government would be necessary. In framing a government that is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is no doubt the primary control on government; but experience has taught mankind the necessity of auxiliary precautions.

[*Federalist* No. 51.]

The Balanced-Budget Amendment is an additional "auxiliary precaution" which helps restore two important elements in the constitutional structure: limited government and an accountable deliberative legislative assembly, both of which are vital to a free and vibrant constitutional democracy.

A deliberative assembly, the essence of whose authority is, in Alexander Hamilton's words, "to enact laws, or in other words to prescribe rules for the regulation of society" for the common good, was considered by the Framers of the Constitution the most important branch of government because it reflected the will of the people. Yet, as the maker of laws, it was also considered the most powerful and the one that needed to be guarded against the most.

Recognizing that "[in] republican government the legislative authority, necessarily, predominates" and to prevent "elective despotism," James Madison, the "Father of the Constitution," recommended that the Philadelphia Convention adopt devices in the Constitution that would safeguard liberty. These include: bicameralism, separation of powers and checks and balances, a qualified Executive veto, limiting congressional authority through enumerating its powers, and, of course, the election of legislators to assure accountability to the people.

However, in the late twentieth century, these constitutional processes, what Madison termed "auxiliary precautions," have failed to limit the voracious appetite of Congress to legislate into every area of private concern, to invade the traditional bailiwick of the States, and, consequently, to spend and spend to fund these measures until the Federal Government has become functionally insolvent and the economy placed in jeopardy.

The Balanced-Budget Amendment will go a long way toward ameliorating this problem. It will create an additional constitutional process—an "auxiliary precaution"—that will bring back legislative accountability to the constitutional system. The Balanced-Budget Amendment process accomplishes this by making Federal deficit spending significantly more difficult.

II. Legislative History

In 1936, Representative Harold Knutson of Minnesota proposed the first constitutional amendment to balance the budget (H.J. Res. 579, 74th Cong.). This proposal would have established a per capita limitation on the Federal public debt. Since that time, numerous constitutional provisions have been proposed to require a balanced budget.

S.J. Res. 1 derives from work begun in the Senate Judiciary Subcommittee on the Constitution in the 96th Congress. Throughout 1979 and early 1980, the subcommittee held a series of hearings across the country—eight in total—on the subject of a balanced-budget amendment. Senators Hatch, Thurmond, DeConcini, Heflin, and Simpson introduced S.J. Res. 126, which was reported out of the subcommittee on December 18, 1979, by a vote of 5 to 2. On March 15, 1980, the full Committee on the Judiciary defeated S.J. Res. 126 by a vote of 9 to 8.

The same principal sponsors reintroduced S.J. Res. 126 in the 97th Congress as S.J. Res. 58. During the early part of 1981, the subcommittee held four additional days of hearings. On May 6, 1981, the subcommittee voted 4 to 0 to report out the amendment, but only after adopting an amendment in the nature of a substitute offered by Senator Hatch. On May 19, 1981, the full Committee on the Judiciary favorably reported S.J. Res. 58 by an 11-to-5 vote.

On July 12, 1982, the Senate began consideration of S.J. Res. 58. On August 4, 1982, following the adoption of a package of amendments by Senators Domenici and Chiles and the acceptance of an amendment by Senators Armstrong and Boren, the Senate passed S.J. Res. 58 by a 69-to-31 vote. This marked the first time either House of Congress had approved such a measure.

On October 1, 1982, following a successful discharge petition effort, the House of Representatives considered H.J. Res. 350, the House counterpart to S.J. Res. 58. Although a substantial majority of the House voted in favor of the amendment, the 236-to-187 margin fell short of the necessary two-thirds vote.

In the 98th Congress, the Subcommittee on the Constitution held 2 days of hearings on S.J. Res. 5. On March 15, 1984, the subcommittee approved S.J. Res. 5 by a 4-to-1 vote and referred the measure to the full committee. On September 13, 1984, following the adoption of an amendment offered by Senator DeConcini, the full Committee on the Judiciary approved S.J. Res. 5 by a vote of 11 to 4. However, the full Senate did not vote on the measure before the 98th Congress came to a close.

S.J. Res. 13 was introduced by Senator Thurmond on the first day of the 99th Congress. Following a hearing, the Subcommittee on the Constitution held a markup of S.J. Res. 13 on May 15, 1985, at which the subcommittee adopted an amendment in the nature of a substitute offered by Senator Thurmond, and then approved S.J. Res. 13, as amended, by a unanimous 5-to-0 vote. After considering S.J. Res. 13 during May, June, and July, the full Judiciary Committee reported it favorably on July 11, 1985, by a vote of 11 to 7. At the same time, the committee approved S.J. Res. 225, a simplified proposed amendment introduced by Senators Thurmond, Hatch, DeConcini, and Simon, by a vote of 14 to 4.

On March 25, 1986, the Senate defeated S.J. Res. 225 by a vote of 66 to 34, thus failing to achieve the constitutional two-thirds requirement by a single vote.

In the 100th Congress, the Subcommittee on the Constitution held hearings on S.J. Res. 11, S.J. Res. 112, and S.J. Res. 116, on March 23, 1988. On May 25, 1988, the subcommittee approved S.J. Res. 11, with an amendment in the nature of a substitute, by a vote of 3 to 2, and reported the measure to the full Committee on the Judiciary. The committee considered S.J. Res. 11 in a markup session on August 10, 1988, but no action was taken.

In the 101st Congress, the Subcommittee on the Constitution held hearings on S.J. Res. 2, S.J. Res. 9, and S.J. Res. 12 on July 27, 1989. On the same day, Senator Simon introduced, and the subcommittee approved, S.J. Res. 183, which incorporated ideas from each of the other three bills. By a vote of 4 to 2, the subcommittee reported S.J. Res. 183 to the full Committee on the Judiciary.

On June 14, 1990, the committee accepted an amendment in the nature of a substitute offered by Senators Simon, Thurmond, DeConcini, Hatch, and Heflin, and then approved S.J. Res. 183, as amended, by a vote of 11 to 3.

Following a successful discharge petition effort, the House of Representatives considered H.J. Res. 268, the House counterpart to S.J. Res. 183, on July 17, 1990. The House fell seven votes short of the two-thirds majority required to approve the constitutional

amendment, failing by a vote of 279 to 150. S.J. Res. 183 did not come before the full Senate for consideration in the 101st Congress.

In the 102d Congress, S.J. Res. 18 was introduced by Senator Simon on January 14, 1991. The measure, identical to the bill reported out of the full committee in the previous Congress, was originally sponsored by Senators Thurmond, DeConcini, Hatch, Heflin, Simpson, and Grassley. Senator Specter also became a cosponsor.

The Subcommittee on the Constitution reported S.J. Res. 18 favorably to the full committee on the Judiciary by a vote of 4 to 2, on March 8, 1991. S.J. Res. 5, a similar measure introduced by Senator Specter, was also reported out.

On May 23, 1991, the committee adopted, by a vote of 10 to 4, an amendment to S.J. Res. 18 offered by Senator Heflin regarding military conflict. The committee then approved S.J. Res. 18, as amended, by a vote of 11 to 3. S.J. Res. 5, amended to include a three-fifths vote requirement for tax increases, was defeated by a vote of 6 to 8.

On June 9, 1992, after a series of procedural votes, the House of Representatives took up H.J. Res. 290, a balanced-budget proposal introduced by Representative Stenholm. After extensive negotiations among key House and Senate sponsors, a bicameral, bipartisan, consensus version of the bill was submitted as a substitute amendment. On final passage, the vote in favor of the amendment was 280 to 153, nine votes short of the two-third necessary for adoption. Following this defeat, Senate leaders stated that they would not call up S.J. Res. 18 before the full Senate. Accordingly, the Senate did not vote on S.J. Res. 18 during the 102d Congress.

S.J. Res. 41 was introduced into the 103d Congress by Senators Simon and Hatch on February 4, 1993. The measure was virtually identical to the bicameral consensus proposal hammered out during the summer of 1992. Twenty-one Senators joined Senator Simon and Senator Hatch as original sponsors, including Senators DeConcini, Thurmond, Heflin, Craig, Moseley-Braun, Grassley, Kohl, Brown, Daschle, Cohen, Bryan, Pressler, Shelby, Bennett, Mathews, Smith, Campbell, Kempthorne, Graham, Nickles, and Lugar. In addition, Senators Murkowski, Gregg, Chafee, Feinstein, Warner, Simpson, Robb, Boren, Bingaman, Jeffords, and Roth subsequently joined as cosponsors.

On March 16, 1993, hearings were held on S.J. Res. 41 before the Subcommittee on the Constitution. Soon after the hearing, the subcommittee reported the measure favorably to the full committee by a vote of 4 to 2.

On July 22, 1993, the Senate Committee on the Judiciary approved S.J. Res. 41 by a vote of 15 to 3 [the largest margin of any balanced-budget amendment yet reported out of the Committee on the Judiciary].

S.J. Res. 41 was debated on the floor of the Senate from February 22, 1994, until March 1, 1994. After a resounding defeat of a substitute amendment offered by Senator Reid, by a vote of 22 to 78, S.J. Res. 41 failed to be adopted by only four votes, 63 to 37.

S.J. Res. 1 was introduced into the 104th Congress by Senate Majority Leader Robert Dole, on behalf of the primary sponsors

Senator Orrin G. Hatch, the new chairman of the Senate Judiciary Committee, and Senator Paul Simon, as the first joint resolution of the new Congress, on the first day of the 104th Congress, January 4, 1995. The measure was again virtually identical to the bicameral consensus proposal hammered out during the summer of 1992. Thirty-nine Senators joined Senators Dole, Hatch, and Simon as original sponsors, including Senators Thurmond, Heflin, Craig, Moseley-Braun, Brown, Kohl, Simpson, Grassley, Specter, Kyl, Feinstein, Nickles, Murkowski, Bryan, Hutchison, Exon, Shelby, Campbell, Smith, Cohen, Pressler, Gregg, Gorton, Ashcroft, Burns, McConnell, Inhofe, Gramm, Lott, DeWine, Snowe, Roth, Lugar, Bond, Thomas, Coverdell, Santorum, Grams, and Mack.

On January 5, 1995, Senator Orrin G. Hatch convened and chaired the first full committee hearings of the Senate Judiciary Committee in the 104th Congress to consider S.J. Res. 1. In addition to Senators Thurmond, Simon, Heflin, Craig, Cohen, Feinstein, Kyl, and Snowe, those testifying included Hon. Griffin Bell, former Attorney General of the United States; Hon. Alice M. Rivlin, Director, Office of Management and Budget; Hon. Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Department of Justice; Governor Michael Leavitt, of Utah; Hon. Paul Tsongas, former U.S. Senator from Massachusetts; Professor David Strauss, University of Chicago; Hon. William Barr, former Attorney General of the United States; Hon. Lowell Weicker, former Governor of Connecticut; Herbert Stein, American Enterprise Institute; Edward Regan, former New York State Comptroller; Fred Bergsten, Director, Institute for International Economics; Kenneth Ashby, Utah Farm Bureau Federation; James Davidson, National Taxpayers Union; Martin Regalia, U.S. Chamber of Commerce; Alan Morrison, Public Citizen Litigation Group; Robert J. Myers, former Chief Actuary, Social Security Administration.

On January 18, 1995, the Senate Committee on the Judiciary approved S.J. Res. 1 by a vote of 15 to 3.

III. Discussion

While Congress has the ability to balance the Federal budget, it lacks the discipline to make the difficult, but necessary, decisions. The national debt is now over $4.7 trillion, over three times what it was 10 years ago. Although persistent deficits threaten the Nation's long-term prosperity, the Federal Government has shown itself unwilling or unable to act in a fiscally responsible way. The search for popular, painless ways to limit deficit spending has proved to be futile. A balanced-budget amendment to the Constitution may be the only way to provide the fiscal discipline the Nation desperately needs.

DANGERS OF A BUDGET DEFICIT

Influenced by individuals such as Adam Smith, David Hume, and David Ricardo, the drafters of the Constitution and their immediate successors at the helm of the new government strongly feared the effects of public debt. The taxing and borrowing provisions of the new Constitution reflected a need of the new Republic to estab-

lish credit and governmental notes and negotiable instruments that would spur commerce.

The Founders and early American Presidents were in virtual unanimous agreement on the dangers of excessive public debt. Consequently, for approximately 150 years of our history—from 1789 to 1932—balanced budgets or surplus budgets were the norm.

Indeed, throughout most of the Nation's history, the requirement of budget balancing under normal economic circumstances was considered part of what has been called our "Unwritten Constitution."

Once that unwritten rule was broken, Pandora's Box was opened. In 1929, Federal expenditures of $3 billion represented just 3 percent of GNP. By 1950, the Federal share had risen to 16 percent of GDP or about $43 billion. For fiscal year 1993, Federal Government spending of over $1.4 trillion commanded nearly 23 percent of GDP.

To illustrate this growth in another way, the first $100 billion budget in the history of the Nation occurred as recently as fiscal year 1962, more than 179 years after the founding of the Republic. The first $200 billion budget, however, followed only 9 years later in fiscal year 1971. The first $300 billion budget occurred 4 years later in fiscal year 1975; the first $400 billion budget 2 years later in fiscal year 1977; the first $500 billion budget in fiscal year 1979; the first $600 billion budget in fiscal year 1981; the first $700 billion budget in fiscal year 1982; the first $800 billion budget in fiscal year 1983; the first $900 billion budget in fiscal year 1985; and the first $1 trillion budget in fiscal year 1987. The budget for fiscal year 1993 was over $1.4 trillion.

This tremendous amount of Federal spending does damage to the economy. By consuming such an overwhelming part of the capital in the economy, the Government "crowds out" private sector investment. Thus, when government spending rises unchecked by fiscal responsibility, it chokes off the primary engines of economic growth and risks our long-term security.

In spite of these dangers, during the past three decades the Federal Government has run deficits in all but a single year. The deficits have come during good times, and they have come during bad times. They have come from Presidents who have pledged themselves to balanced budgets, and they have come from Presidents whose fiscal priorities were elsewhere. They have come from Presidents of both parties. Once Congress began to engage in deficit spending it started down the path of sacrificing the long-term health of the economy for short-term gain.

The time has come for a solution strong enough that it cannot be evaded for short-term gain. We need a constitutional requirement to balance our budget. S.J. Res. 1, the Balanced-Budget Amendment, is that solution.

INTEREST ON NATIONAL DEBT

Gross interest on the national debt is now the second largest expenditure in the entire budget—higher than defense spending. Interest payments are the fastest growing item in the budget. Up from $75 billion in fiscal year 1980, this year the Federal Government will spend an estimated $295 billion on interest, an increase of nearly 400 percent. Even controlling for inflation, interest pay-

ments have grown by over 95 percent during the past 12 years. By 1995, service on the gross national debt is projected to surpass Social Security payments as the single largest government expense.

Every day, the Government throws away over $800 million on interest payments. None of this money goes toward education, health care, or the battle against drugs and crime. Spending more and more on interest leaves fewer and fewer resources to spend on the goods and services needed to address other, serious problems facing the Nation.

The money for these payments comes out of the pockets of taxpayers, primarily middle-income families. These same families are also burdened by the high interest rates that the deficit sustains. Furthermore, these payments are going increasingly overseas, to wealthy investors in other countries.

STATUTORY EFFORTS

Critics of the Balanced-Budget Amendment argue that Congress does not need a constitutional amendment to balance the budget; Congress can achieve that goal statutorily, right now, without waiting to ratify a constitutional amendment. Technically, these arguments are, of course, correct. The Balanced-Budget Amendment provides no new authority to cut spending or raise revenues. However, recent efforts have shown that Congress does not have the will to balance the budget.

The Federal Government has not run a budget surplus in over 25 years; the last one was in 1969. And that is the only time in 30 years that we have achieved a balanced budget. Enacting responsible budgets is not easy. While a spending program often has a particular constituency that strongly supports it, the general interest in restricting spending is diffuse.

Statutory efforts to balance the budget previously have failed because it is too easy for Congress simply to change its mind and rescind its previous declarations. Statutory efforts are vulnerable to a change of heart or a weakening of resolve. Deficit reduction targets in such legislation can be continually changed, and the legislation can be several years in operation before the budget must be balanced. An amendment to the Constitution forces the Government to live within its means. S.J. Res. 1 requires a balanced budget by 2002 or 2 years after the amendment is ratified by the States, whichever is latest.

IMPLEMENTATION AND ENFORCEMENT

S.J. Res. 1 contains the flexibility that an amendment to the Constitution must have. It does not prescribe a particular mechanism that Congress must employ in order to achieve a balanced budget. Instead it leaves political decisions to the political system. The amendment is, however, self-enforcing. Because, historically, it has been easier for Congress to raise the debt ceiling, rather than reduce spending or raise taxes, the primary enforcement mechanism of S.J. Res. 1 is section 2, which requires a three-fifths vote to increase the debt ceiling.

The amendment contemplates that Congress will execute its responsibilities under the amendment through the exercise of its cur-

rently existing authority. The Constitution already empowers Congress with such authority. Section 8 of article I grants Congress the power "[t]o make all Laws which shall be necessary and proper * * *." Furthermore, Members of Congress are required by article VI generally to "support this Constitution" while the President is required by article II, section 1, clause 7, to "preserve, protect, and defend the Constitution".

The committee expects fidelity to the Constitution, as does the American public. Both the President and Members of Congress swear an oath to uphold the Constitution, including any amendments thereto. Honoring this pledge requires respecting the provisions of the proposed amendment. Flagrant disregard of the proposed amendment's clear and simple provisions would constitute nothing less than a betrayal of the public trust. In their campaigns for reelection, elected officials who flout their responsibilities under this amendment will find that the political process will provide the ultimate enforcement mechanism.

It is the committee's view that: (1) the language and the intent of S.J. Res. 1 are clear; (2) Congress and the President are to abide by this language and intent; and (3) when necessary, Congress must enact legislation that will better enable the Congress and the President to comply with the language and intent of the amendment.

JUDICIAL ENFORCEMENT AND PRESIDENTIAL IMPOUNDMENT

The committee believes that S.J. Res. 1 strikes the right balance in terms of judicial review. By remaining silent about judicial review in the amendment itself, its authors have refused to establish congressional sanction for the Federal courts to involve themselves in fundamental macroeconomic and budgetary questions, while not undermining their equally fundamental obligation to "say what the law is," *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). The committee agrees with former Attorney General William P. Barr who stated that there is:

> Little risk that the amendment will become the basis for judicial micromangement or superintendence of the Federal budget process. Furthermore, to the extent such judicial intrusion does arise, the amendment itself equips Congress to correct the problem by statute. On balance, moreover, whatever remote risk there may be that courts will play an overly intrusive role in enforcing the amendment, that risk is, in my opinion, vastly outweighed by the benefits of such an amendment.

There exists three basic constraints that prevents the courts from becoming unduly involved in the budgetary process: (1) limitations on Federal courts contained in article III of the Constitution, primarily the doctrine of "standing"; (2) the deference courts owe to Congress under both the "political question" doctrine and section 6 of the amendment itself, which confers enforcement authority in Congress; and (3) the limits on judicial remedies to be imposed on a coordinate branch of government—limitations on remedies that are self-imposed by courts and that, in appropriate circumstances, may be imposed on the courts by Congress.

To succeed in any lawsuit, a litigant must demonstrate standing to sue. To demonstrate article III standing, a litigant at a minimum must meet three requirements: (1) "injury in fact"—that the litigant suffered some concrete and particularized injury; (2) "traceability"—that the concrete injury was both caused by and is traceable to the unlawful conduct; and (3) "redressibility"—that the relief sought will redress the alleged injury. For example, *Lujan* v. *Defenders of Wildlife,* 112 S.Ct. 2130, 2136 (1992); *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 482–83 (1982). In challenging measures enacted by Congress under a balanced-budget regime, it would be an extremely difficult hurdle for a litigant to demonstrate something more concrete than a "generalized grievance" and burden shared by all citizens and taxpayers, the "injury in fact" requirement. See *Frothingham* v. *Mellon,* 262 U.S. 447, 487 (1923).

Even in the vastly improbable case where an "injury in fact" was established, a litigant would find it near impossible to establish the "traceability" and "redressibility" requirements of the article III standing test. Litigants would have a difficult time in showing that any alleged unlawful conduct—the unbalancing of the budget or the shattering of the debt ceiling—"caused" or is "traceable" to a particular spending measure that harmed them. Furthermore, because the Congress would have numerous options to achieve balanced-budget compliance, there would be no legitimate basis for a court to nullify the specific spending measure objected to by the litigant.

As to the "redressibility" prong, this requirement would be difficult to meet simply because courts are wary of becoming involved in the budget process—which is legislative in nature—and separation of power concerns will prevent courts from specifying adjustments to any Federal program or expenditures. Thus, for this reason, *Missouri* v. *Jenkins,* 495 U.S. 33 (1990), where the Supreme Court upheld the district court's power to order a local school district to levy taxes, is inapposite because it is a 14th amendment case not involving "an instance of one branch of the Federal Government invading the province of another." Id. at 67. Courts simply will not have the authority to order Congress to raise taxes. Furthermore, the well-established "political question" and "justiciability" doctrines will mandate that courts give the greatest deference to congressional budgetary measures, particularly since section 6 of S.J. Res 1 explicitly confers on Congress the responsibility of enforcing the amendment, and the amendment allows Congress to "rely on estimates of outlays and receipts." See *Baker* v. *Carr,* 369 U.S. 186, 217 (1962). Under these circumstances, it is unlikely that a court would substitute its judgment for that of Congress.

The committee believes that the "taxpayer" standing case, *Flast* v. *Cohen,* 392 U.S. 83 (1968), also is not applicable to enforcement of the balanced-budget amendment. First, the *Flast* case has been limited by the Supreme Court to establishment clause cases. See *Valley Forge Christian College,* 454 U.S. at 480. Second, by its terms, *Flast* is limited to cases challenging legislation promulgated under Congress' constitutional "tax and spend" powers when the expenditure of the tax was made for an illicit purpose. Sections 1

and 2 of S.J. Res. 1, limit Congress' borrowing power and the amendment contains no restriction on the purposes of the expenditures. Finally, in subsequent cases, the Supreme Court has reaffirmed the need for a litigant to demonstrate particularized injury, thus casting doubt on the vitality of *Flast.* See *Lujan,* 112 S. Ct. at 2136. The committee also believes that there would be no so-called "congressional" standing because Members of Congress would not be able to demonstrate that they were harmed by any dilution or nullification of their vote and that under the doctrine of "equitable discretion," Members would not be able to show that substantial relief could not otherwise be obtained from fellow legislators through the enactment, repeal or amendment of a statute. See *Melcher* v. *Open Market Comm.,* 836 F.2d 561, 563 (D.C. Cir. 1987).

A further limitation on judicial interference is section 6 of S.J. Res. 1. Under this section, Congress must adopt statutory remedies and mechanisms for any purported budgetary shortfall, such as sequestration, rescission, or the establishment of a contingency fund. Pursuant to section 6, the committee believes that Congress, if it finds it necessary, could limit the type of remedies a court may grant or limit the court's jurisdiction in some other manner to proscribe judicial overreaching. Congress has adopted such limitations in under circumstances pursuant to its article III authority. See, for example, Norris-LaGuardia Act, 29 U.S.C. 101–115; Federal Tax Injunction Act, 28 U.S.C. 2283; Tax Injunction Act, 26 U.S.C. 7421(a).

Finally, it is not the intent of the committee to grant the President any impoundment authority under S.J. Res. 1. In fact, up to the end of the fiscal year, the President has nothing to impound because Congress in the amendment has the power to ratify or to specify the amount of deficit spending that may occur in that fiscal year. In any event, under section 6 of the amendment, Congress can specify exactly what type of enforcement mechanism it wants and the President, as Chief Executive, is duty bound to enforce that particular congressional scheme to the exclusion of impoundment. See *Kendall* v. *United States ex rel. Stokes,* 37 U.S. (12 Pet.) 542 (1838).

THE EXPERIENCE IN THE STATES

In contrast to Federal fiscal policies, continued deficit spending by the States has been a rarity. More States incur general surpluses than incur general deficits. Forty-eight States have constitutional provisions limiting their ability to incur budget deficits. While there are significant differences in the problems and resources that the State and Federal Governments face, the State experience is nonetheless instructive. The constitutional constraints have proven to be workable in the States and have not inhibited their ability to perform their most widely accepted functions. Because it has been required, State legislatures have learned to operate effectively within the external limitation of their constitutions.

CONCLUSION

A balanced-budget amendment steers a disciplined course which protects our future economic strength and national standard of living. Both flexibility and a strong mandate are needed for a fiscally responsible path for our Nation. Senate Joint Resolution 1 provides both these elements. A constitutional balanced-budget amendment can serve as a moral and legal beacon to guide the Nation in the fundamental choices of governance.

IV. VOTES OF THE COMMITTEE

Pursuant to paragraph 7 of rule XXVI of the Standing Rules of the Senate, each committee is to announce the results of rollcall votes taken in any meeting of the committee on any measure or amendment. The Senate Judiciary Committee, with a quorum present, met on Wednesday, January 18, 1995, at 8:30 a.m. to mark up S.J. Res. 1. The following rollcall votes occurred on amendments proposed thereto:

(1) The Feinstein amendment to exempt Social Security. The amendment was tabled: 10 yeas to 8 nays.

YEAS	NAYS
Thurmond (proxy)	Specter (proxy)
Simpson	Biden
Grassley	Kennedy (proxy)
Brown	Leahy
Thompson	Heflin
Kyl	Kohl
DeWine (proxy)	Feinstein
Abraham	Feingold
Simon	
Hatch	

(2) The Biden amendment to exempt capital expenditures. The amendment was tabled: 12 yeas to 5 nays.

YEAS	NAYS
Thurmond (proxy)	Biden
Simpson (proxy)	Kennedy (proxy)
Grassley	Leahy (proxy)
Brown	Feinstein
Thompson	Feingold
Kyl	
DeWine (proxy)	
Abraham	
Heflin (proxy)	
Simon	
Kohl	
Hatch	

The Judiciary Committee met on Wednesday, January 18, 1995, at 2 p.m. to mark up S.J. Res. 1. The following rollcall votes occurred on S.J. Res. 1 and amendments proposed thereto:

(3) The Feingold glide path amendment. The amendment was tabled: 12 yeas to 5 nays.

YEAS	NAYS
Thurmond	Biden
Simpson	Kennedy (proxy)
Grassley	Leahy (proxy)
Brown	Feinstein
Thompson (proxy)	Feingold
Kyl (proxy)	
DeWine (proxy)	
Abraham	
Heflin	
Simon	
Kohl	
Hatch	

(4) The Kennedy impoundment amendment. The amendment was tabled: 11 yeas to 5 nays.

YEAS	NAYS
Thurmond	Biden
Simpson (proxy)	Kennedy
Grassley (proxy)	Leahy
Brown	Kohl (proxy)
Thompson	Feingold
Kyl	
DeWine	
Abraham	
Heflin (proxy)	
Simon	
Hatch	

(5) The Kennedy amendment on enforcement. The amendment was tabled: 12 yeas to 5 nays.

YEAS	NAYS
Thurmond	Biden
Simpson	Kennedy
Grassley (proxy)	Leahy
Brown	Feinstein
Thompson (proxy)	Feingold
Kyl	
DeWine	
Abraham	
Heflin	
Simon	
Kohl (proxy)	
Hatch	

(6) Motion to favorably report S.J. Res. 1. The motion was adopted: 15 yeas to 3 nays.

YEAS	NAYS
Thurmond	Kennedy
Simpson	Leahy
Grassley (proxy)	Feingold
Specter (proxy)	
Brown	
Thompson	

Kyl
DeWine
Abraham
Biden
Heflin
Simon
Kohl (proxy)
Feinstein
Hatch

V. TEXT OF S.J. RES. 1

[104th Cong., 1st sess.]

JOINT RESOLUTION proposing an amendment to the Constitution of the United States to require a balanced budget

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission to the States for ratification:

"ARTICLE —

"Section 1. Total outlays for any fiscal year shall not exceed total receipts for that fiscal year, unless three-fifths of the whole number of each House of Congress shall provide by law for a specific excess of outlays over receipts by a rollcall vote.

"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.

"Section 3. Prior to each fiscal year, the President shall transmit to the Congress a proposed budget for the United States Government for that fiscal year, in which total outlays do not exceed total receipts.

"Section 4. No bill to increase revenue shall become law unless approved by a majority of the whole number of each House by a rollcall vote.

"Section 5. The Congress may waive the provisions of this article for any fiscal year in which a declaration of war is in effect. The provisions of this article may be waived for any fiscal year in which the United States is engaged in military conflict which causes an imminent and 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.

"Section 6. The Congress shall enforce and implement this article by appropriate legislation, which may rely on estimates of outlays and receipts.

"Section 7. 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 for those for repayment of debt principal.

"Section 8. This article shall take effect beginning with fiscal year 2002 or with the second fiscal year beginning after its ratification, whichever is later.".

VI. SECTION-BY-SECTION ANALYSIS

Section 1

The core provision of Senate Joint Resolution 1 is contained in section 1, which establishes as a fiscal norm the concept of a balanced Federal budget. This section mandates that "Total outlays for any fiscal year shall not exceed total receipts for that year, * * *."

The section does not specify the process that Congress must follow in order to achieve a balanced budget. The committee recognizes that there may be many equitable means of reaching that goal; it is therefore not the committee's intent to dictate any particular fiscal strategy upon the Congress. Rather, the committee expects the Congress to use its full range of legislative powers in order to comply with the amendment.

Section 1 also contains an exception; the balanced-budget requirement applies "* * * unless three-fifths of the whole number of each House of Congress shall provide by law for a specific excess of outlays over receipts by a rollcall vote." This provision preserves Congress' flexibility and capacity to respond to economic crises without sacrificing accountability.

Nothing in this section either anticipates nor requires any alteration in the balance of powers between the legislative and executive branches.

"* * * *fiscal year* * * *" is intended as a term defined by statute and, as such, is to have no constitutional standing independent from its statutory definition. The amendment does not require an immutable definition; other fiscal years could be defined without necessarily straining the intent of the amendment.

"* * * *shall not exceed* * * *" is a clear mandate: a command. It means that outlays may not be greater than receipts for any given fiscal year. Receipts may exceed outlays.

"* * * *unless three-fifths* * * *" identifies the minimum proportion of the total membership of each House needed for action by the Congress. Under current law, three-fifths of the Senate membership is 60, and three-fifths of the House of Representatives is 261. [Vacancies would reduce the minimum majorities.]

"* * * *the whole number of each House* * * *" is intended to be consistent with the phrase "the whole number of Senators" in the 12th amendment to the Constitution, denoting the entire membership of each individual House of Congress in turn.

"* * * *for a specific excess of outlays over receipts* * * *" means that the maximum amount of deficit spending to be allowed must be clearly identified. The committee intends that the vote to permit deficit spending be limited to the issue of such a deficit. By forcing Congress to identify and confront any particular deficit, this clause will promote accountability.

"* * * *by a rollcall vote.*" specifies what is already implicit. A rollcall vote will be required to ensure that the required three-fifths vote has been recorded. The committee makes this provision ex-

plicit in order to emphasize accountability in the approval of any deficit.

Section 2

Section 2 provides that "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." Section 2 works in tandem with section 1 to enforce the balanced-budget requirement.

Section 2 focuses public attention on the magnitude of government indebtedness. To run a deficit, the Federal Government must borrow funds to cover its obligations. Section 2 removes the borrowing power from the Government, unless three-fifths of the total membership of both Houses votes to raise the debt limit. As a result, whenever the Government exceeds the debt ceiling, it runs a theoretical risk of default, a powerful incentive for balancing the budget. The committee expects that the three-fifths vote to increase borrowing will be the exception, not the norm.

Votes to suspend the balanced-budget requirement under section 1 and to raise the debt-ceiling under section 2 need not be made separately. [The committee recognizes that, in certain cases, both decisions could be approved together, in one piece of legislation, by the same, three-fifths vote.]

"* * * *the limit on the debt* * * *" assumes the establishment of a new statutory limit on the measure of government indebtedness. This limit may be established in addition to, or as a replacement for, any present statutory limit on the debt held by the public.

"* * * *debt of the United States held by the public* * * *" is a widely used and understood measurement tool. The General Accounting Office, in its "Glossary of Terms Used in the Federal Budget Process" [(Exposure Draft, January 1993)] defines "Debt Held by the Public" as "That part of the gross federal debt held outside the federal government. This includes any federal debt held by individuals, corporations, state or local governments, the Federal Reserve System, and foreign governments and central banks. Debt held by government trust funds, revolving funds, and special funds is excluded from debt held by the public." The current, accepted meaning of "debt * * * held by the public" is intended to be the controlling definition under this article.

Section 3

Section 3 requires that "Prior to each fiscal year, the President shall transmit to the Congress a proposed budget for the United States Government for that fiscal year, in which total outlays do not exceed total receipts."

This section reflects the committee's belief that sound fiscal planning should be a shared governmental responsibility. The section is not intended to grant the President formal authority or power over budget legislation or spending. It is the committee's expectation that, charged with like responsibilities, the President and the Congress will more readily collaborate in fiscal planning.

"*Prior to each fiscal year* * * *" is intended to ensure that the President transmits a budget proposal before the first day of the statutory fiscal year.

"* * * *the President shall transmit to the Congress* * * *" is intended to impose on the President a constitutional duty to communicate to the Congress a proposed budget that is balanced. Article II enumerates several duties currently required of the President, including delivering the State of the Union address, receiving foreign Ambassadors, and commissioning Officers of the United States. It is the committee's belief that this new duty similarly merits constitutional status.

"* * * *a proposed budget* * * *in which total outlays do not exceed total receipts.*" is intended to require a responsible proposal that should anticipate a level of outlays no greater than the level of receipts. Such a proposal necessarily requires a projection of future events. The committee anticipates good faith on the part of the President with respect to projected economic factors.

Section 4

By requiring approval "* * * by a majority of the whole number of each House by a rollcall vote" for any "bill to increase revenue * * *", section 4 provides a responsible and balanced amount of tax limitation and improves congressional accountability for revenue measures.

"* * * *bill to increase revenue* * * *" is intended to include those measures whose intended and anticipated effect will be to increase revenues to the Federal Government.

"* * * *by a majority of the whole number of each House by a rollcall vote.*" is intended, like similar provisions in section 1, to identify the minimum proportion necessary to approve the relevant measure. Here the requirement is a majority. The terms relating to "the whole number of each House" and "rollcall vote" are intended to have the same meaning as in section 1.

Section 5

This section guarantees that Congress will retain maximum flexibility in responding to clear national security crises such as a declared war or imminent military threat to national security.

"* * * *may waive* * * *" is intended to provide Congress with discretionary authority to operate outside of the provisions of this article in the event of declarations of war. The waiver specified in the first sentence of this section would require a concurrent resolution of Congress, but would not have to be submitted to the President for approval.

"* * * *the provisions of this article* * * *" is intended to refer primarily to sections 1, 2, 3, and 4 of the amendment. The Congress may waive any or all of these provisions.

"* * * *declaration of war* * * *" is intended to be construed in the context of the powers of the Congress to declare war under article 1, section 8. The committee intends that ordinary and prudent preparations for a war perceived by Congress to be imminent would be funded fully within the limitations imposed by the amendment, although Congress could establish higher levels of spending or deficits for these or any other purposes under section 1.

"* * * *for any fiscal year* * * *is in effect.*" is intended, in the first sentence of this section, to require a separate waiver of the provisions of the amendment each year. Congress may not adopt a

waiver resolution which applies to more than one fiscal year. Rather, Congress must annually adopt a separate waiver for the fiscal year at issue.

"*The provisions of this article* * * *" in the second sentence has the same meaning as in the first sentence of this section. See above.

"* * * *may be waived* * * *" is intended to provide Congress with discretionary authority to operate outside of the provisions of this article in the event the United States is engaged in certain kinds of military conflict. The waiver specified in the second sentence of this section would require a joint resolution rather than a simple concurrent resolution of Congress.

"* * * *for any fiscal year* * * *" in the second sentence has the same meaning as in the first sentence of this section. See above.

"* * * *is engaged in military conflict* * * *" is intended to limit the applicability of this waiver to situations involving the actual use of military force, which nonetheless do not rise to the level of a formal declaration of war.

"* * * *imminent and serious military threat to national security* * * *" is intended to define those situations in which Congress, in order to respond to urgent national security crises with additional outlays for the defense of the Nation, needs more flexibility than the three-fifths vote requirement in section 1 would provide.

"* * * *so declared by a joint resolution,* * * *which becomes law.*" is intended to require Congress to pass a joint resolution, rather than a simple or concurrent resolution, and to specify that the resolution must be enacted into law before it can be effective for the purposes of this section.

"* * * *a majority of the whole number of each House,* * * *" has the same meaning as the similar provision in section 4. See above.

Section 6

Section 6 states that "[t]he Congress shall enforce and implement this article by appropriate legislation, which may rely on estimates of outlays and receipts." This section makes explicit what is implicit, that Congress has a positive obligation to fashion legislation to enforce this article.

Section 6 underscores Congress' continuing role in implementing the balanced-budget requirement. The provision precludes any interpretation of the amendment that would result in a shift in the balance of powers among the branches of government.

"*The Congress shall enforce and implement* * * *" creates a positive obligation on the part of Congress to enact appropriate legislation to implement and enforce the article. This section recognizes that an amendment dealing with subject matter as complicated as the Federal budget process must be supplemented with implementing legislation.

"* * * *which may rely on estimates of outlays and receipts.*" confirms that Congress has the authority to use reasonable estimates, where appropriate, as a means of achieving the normative result required in section 1. "Estimates" means good faith, responsible, and reasonable estimates made with honest intent to implement section 1, and not evade it.

This provision gives Congress an appropriate degree of flexibility in fashioning necessary implementing legislation. For example, Congress could use estimates of receipts or outlays at the beginning of the fiscal year to determine whether the balanced-budget requirement of section 1 would be satisfied, so long as the estimates were reasonable and made in good faith. In addition, Congress could decide that a deficit caused by a temporary, self-correcting drop in receipts or increase in outlays during the fiscal year would not violate the article. Similarly, Congress could state that very small or negligible deviations from a balanced budget would not represent a violation of section 1. If an excess of outlays over receipts were to occur, Congress can require that any shortfall must be made up during the following fiscal year.

Section 7

Section 7 is intended to clarify further the relevant amounts that must be balanced.

"* * * *Total receipts* * * *" is intended to include all moneys received by the Treasury of the United States, either directly or indirectly through Federal or quasi-Federal agencies created under the authority of acts of Congress, except those derived from borrowing. In present usage, "receipts" is intended to be synonymous with the definition of "budget receipts," which are not meant to include offsetting collections or refunds.

"* * * *except those derived from borrowing.* * * *" is intended to exclude from receipts the proceeds of debt issuance. To borrow is to receive with the intention of returning the same or equivalent. It is intended that those obligations the title to which can be transferred by the present owner to others, like Treasury notes and bonds, be excluded from receipts. Contributions to social insurance programs, though also carrying an implied obligation, are not transferable and should be included in receipts.

"* * * *Total outlays* * * *" is intended to include all disbursements from the Treasury of the United States, either directly or indirectly through Federal or quasi-Federal agencies created under the authority of acts of Congress, and either "on-budget" or "off-budget," except those for repayment of debt principal.

Among the Federal programs that would not be covered by S.J. Res. 1 is the electric power program of the Tennessee Valley Authority. Since 1959, the financing of that program has been the sole responsibility of its own electric ratepayers—not the U.S. Treasury and the Nation's taxpayers. Consequently, the receipts and outlays of that program are not part of the problem S.J. Res. 1 is directed at solving.

"* * * *except for those for repayment of debt principal.*" is intended to exclude from outlays the repurchase or retirement of Federal debt. Debt principal is intended to be distinguished from interest payments, which are not excluded from outlays, and refers to a capital sum due as a debt.

Section 8

This section states that the amendment will take effect some specified time after it is adopted, so as to allow Congress a period

to consider and adopt the necessary procedures to implement the amendment, and to begin the process of balancing the budget.

"* * * *beginning with fiscal year 2002* * * *" states that, once ratified, the amendment will go into effect no earlier than fiscal year 2002.

"* * * *or with the second fiscal year* * * *" provides that the amendment will go into effect 2 years after ratification by the States, so long as that period is later than 2002.

"* * * *its ratification,* * * *" is intended to be construed as ratification of this article under article V of the Constitution.

VII. Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, January 19, 1995.

Hon. Orrin G. Hatch,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S.J. Res. 1, a joint resolution proposing a balanced budget amendment to the Constitution of the United States, as ordered reported by the Senate Committee on the Judiciary on January 18, 1995.

S.J. Res. 1 would propose an amendment to the Constitution to require that the Congress, each year, adopt a budget in which total outlays of the United States do not exceed total receipts, unless the Congress approves a specific excess of outlays over receipts by a three-fifths vote in each House. The proposed budget submitted by the President would have to be balanced as well. The amendment also would require a three-fifths vote in each House to raise the limit on federal debt held by the public and a simple majority on a roll call vote in each House to increase revenue. Such provisions could be waived for any fiscal year in which a declaration of war is in effect or in which the United States is engaged in military conflict that causes an imminent and serious military threat to national security. The amendment would have to he ratified by three-fourths of the states within seven years of its submission for ratification, and would take effect beginning with fiscal year 2002 or the second fiscal year after its ratification, whichever is later.

The budgetary impact of this amendment is very uncertain, because it depends on when it takes effect and the extent to which the Congress would exercise the discretion provided by the amendment to approve budget deficits. The earliest the amendment could take effect would be for fiscal year 2002.

According to CBO's latest projections of a baseline that assumes inflation adjustments for discretionary spending after 1998, some combination of spending cuts and tax increases totaling $322 billion in 2002 would be needed to eliminate the deficit in that year. The amounts of deficit reduction called for in the years preceding 2002 depend both on the exact policies adopted and on when the process is started.

For illustrative purposes, CBO has devised one possible path leading to a balanced budget in 2002 (see table on next page).

Starting from the baseline that assumes an inflation adjustment for discretionary spending after 1998, that path first shows the savings that would be achieved if discretionary spending were instead frozen at the dollar level of the 1998 cap through 2002. Such a freeze, along with the resulting debt-service effects, would produce $89 billion of the required savings of $322 billion in 2002. Under this freeze policy, the buying power of total discretionary appropriations in 2002 would be approximately 20 percent lower than in 1995.

CBO also built into the illustrative path a possible course of savings from further policy changes. The amounts of those savings are not based on the adoption of any particular set of policies, but they do assume that policy changes are phased in between 1996 and 1999 in a pattern that is similar to the changes in mandatory spending enacted in the last two reconciliation acts. After 1999, the assumed savings increase at the baseline rate of growth for entitlement and other mandatory spending, excluding Social Security. Such a pattern of savings implies that the cuts implemented in earlier years are permanent and that no additional policy changes are made. If those savings were achieved entirely out of entitlement and other mandatory programs (excluding Social Security), they would represent about a 20 percent reduction from current-policy levels for those programs.

Over the entire 1996–2002 period, the savings in CBO's illustrative path that result directly from policy changes total more than $1 trillion (in relation to a baseline that includes an inflation adjustment for discretionary spending after 1998). Savings from policy changes, measured relative to a baseline with discretionary spending frozen after 1998, would be about $200 billion less. The required savings from policy changes would be smaller, and the debt service savings would be greater, if, as we would anticipate, ongoing deficit reduction efforts over this period were to result in lower interest rates.

This resolution would not directly affect spending or receipts, so there would be no pay-as-you-go scoring under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

Enactment of this legislation would not directly affect the budgets of state and local governments. However, steps to reduce the deficit so as to meet the requirements of this amendment could include cuts in federal grants to states, a smaller federal contribution towards shared programs or projects, an increased demand for state and local programs to compensate for reductions in federal programs, and/or an increase in federal mandates imposed on states or localities.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are James Horney and Mark Grabowicz.

Sincerely,

ROBERT D. REISCHAUER,
Director.

ILLUSTRATIVE DEFICIT REDUCTION PATH

[By fiscal year, in billions of dollars]

	1995	1996	1997	1998	1999	2000	2001	2002	1996–2002
CBO January Baseline Deficit With Discretionary Inflation After 1998 [1]	176	207	224	222	253	284	297	322	NA
Freeze Discretionary Outlays After 1998 Discretionary reduction	0	0	0	0	—19	—38	—58	—78	—193
Debt service	0	0	0	0	—1	—2	—6	—10	—19
Total deficit reduction	0	0	0	0	—19	—40	—63	—89	—212
CBO January Baseline Deficit Without Discretionary Inflation After 1998 [2]	176	207	224	222	234	243	234	234	NA
Additional Deficit Reduction Policy changes [3]	0	—32	—65	—97	—145	—156	—168	—180	—843
Debt service	0	—1	—4	—10	—18	—28	—40	—54	—156
Total deficit reduction	0	—33	—69	—106	—163	—184	—208	—234	—998
Resulting Deficit	176	174	155	116	71	59	26	([4])	NA
Total Change from Baseline.									
Deficit With Inflation After 1998 Policy changes	0	—32	—65	—97	—164	—194	—225	—259	—1,035
Debt service	0	—1	—4	—10	—19	—31	—46	—64	—175
Total deficit reduction	0	—33	—69	—106	—182	—225	—271	—323	—1,210

[1] Assumes compliance with discretionary spending limits of Balanced Budget and Emergency Deficit Control Act through 1998. Discretionary spending is assumed to increase at the rate of inflation after 1998.

[2] Assumes compliance with discretionary spending limits of Balanced Budget and Emergency Deficit Control Act through 1998. Discretionary spending is frozen at the 1998 level after 1998.

[3] This represents only one of an infinite number of possible paths that would lead to a balanced budget. The exact path depends on when the deficit reduction begins and the specific policies adopted by the Congress and the President. This path is not based on any specific policy assumptions, but does assume policies are fully phased in by 1999.

[4] Less than $500 million.

Source: Congressional Budget Office.

Note: NA = Not applicable.

VIII. Regulatory Impact Statement

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the committee, after due consideration, concludes that Senate Joint Resolution 1 will not have direct regulatory impact.

IX. ADDITIONAL VIEWS OF MR. KYL

S.J. Res. 1, the Balanced Budget Amendment, establishes the framework and imposes the discipline that is so urgently needed to force Congress to put its fiscal house in order. I support it, believing it represents the best and only chance to send a Balanced Budget Amendment to the States for ratification in the foreseeable future.

Nevertheless, it is not the amendment I would have written. Ideally, it should have included an explicit tax or spending limitation. I support either kind of limit, but prefer a spending limitation as the most direct approach and the easiest to implement.

The Balanced Budget/Spending Limitation Amendment, S.J. Res. 3, which I introduced on January 4, 1995, includes such a spending limit. It requires a balanced budget *and* limits spending to 19 percent of Gross National Product (GNP), which is roughly the level of revenue the federal government has collected for the last 40 years.

Limit spending and there is no need to consider tax increases. Congress wouldn't be allowed to spend the additional revenue that is raised. Link federal spending to economic growth, as measured by GNP, and an incentive is created for Congress to promote pro-growth economic policies. The more the economy grows, the more Congress is allowed to spend, but always proportionate to the size of the economy.

A spending limitation has a further advantage. It reflects the fact that the economy has already imposed an effective limit on revenues, relative to GNP.

Despite tax rate increases and tax cuts, recessions and expansions, and fiscal policies pursued by Presidents of both political parties, revenues as a share of GNP have fluctuated only around a relatively narrow band of 18 to 20 percent for the last generation.

That is because changes in the Tax Code change people's behavior. Lower tax rates stimulate the economy, resulting in more taxable income and transactions, and more revenue to the Treasury. Higher tax rates discourage work, production, savings and investment, so there is ultimately less economic activity to tax.

Revenues amounted to about 19 percent of GNP when the top marginal income tax rate was in the 90 percent range in the 1950's. They amounted to just under 19 percent of GNP when the top marginal rate was in the 28 percent range in the 1980's. Revenues amounted to about 19 percent of GNP in the 1970's during one of the longest post-war economic contractions, and about 19 percent during the longest peacetime expansion during the 1980's.

Since revenues remain relatively constant at about 19 percent of GNP, the significance of our nation's tax policy is how Congress taxes, not how *much* it can tax. The key is whether tax policy fosters economic growth and opportunity, measured in terms of GNP,

or results in a smaller and weaker economy. In other words, 19 percent of a larger GNP represents more revenue to the Treasury than 19 percent of a smaller GNP.

The benefit of writing a spending limitation into the Balanced Budget Amendment is that it will preclude futile attempts by Congress to balance the budget by raising taxes. Raising taxes will merely impede economic growth and harm the nation's standard of living. A spending limitation provides Congress with the guidance at the outset that there is really only one way to balance the budget—by cutting government spending.

While my preference is that a spending limit be included in the Balanced Budget Amendment, I believe the issue can also be addressed if need be in subsequent implementing or enforcement legislation. The quest for the perfect should not become an excuse to defeat the very good. The stakes are too high, in terms of the mountain of additional debt Congress is passing on to future generations, to miss yet another opportunity to send a Balanced Budget Amendment to the States for ratification.

If there is insufficient support for inclusion of a spending limit in the Amendment itself I believe Congress should approve S.J. Res. 1 as reported by the Judiciary Committee and then turn to consideration of a federal spending limit as the means of implementing the balanced budget requirement.

X. ADDITIONAL VIEWS OF MR. BIDEN

I have long supported the concept of a balanced budget amendment. Amending the Constitution of the United States is an extraordinary step, but I believe an extraordinary response is necessary to address the continuing deficit problems facing the country. Notwithstanding my support for the concept of a balanced budget amendment, I remained concerned about the form such an amendment takes. The stakes are never higher, as we all recognize, than when we consider amending our basic document of governance.

Although I believe the amendment could be substantially improved in form, and I attempted unsuccessfully to offer such improvements in committee, I voted in favor of reporting the amendment so that the Senate as a whole would have the opportunity to consider and vote on this important issue. I offer these additional views to summarize my specific concerns about the form of this balanced budget amendment in advance of floor consideration of S.J. Res. 1.

The form of the amendment raises the following questions:

Do we risk unsettling—permanently—the balance of powers carefully struck by the framers of the Constitution?

Do we risk skewing—permanently—the budget process by failing to recognize that long-term capital investment may best be paid for by long-term borrowing, and that Social Security is a unique institution with unique, and vast, demands and effects?

Do we risk an economic catastrophe by setting a target date for a balanced budget, without ensuring that we follow a measured "glide path" to that goal that will avoid a sudden one-year contraction of our entire economy?

Constitutional Concerns: Maintaining the Balance of Powers

My greatest concern is that this balanced budget amendment will fundamentally shift the constitutional balance of powers between Congress and president that has served us so well. The remarkable resiliency of our Constitution is due to the prudence of its authors, who restricted their prescriptions to how decisions are made, and who crafted a self-regulating balance of powers that has endured for two centuries.

We now consider a change in that Constitution. I am in full agreement with my colleagues who—quite appropriately citing Thomas Jefferson—conclude that the decision to pass debt on to future generations is one worthy of constitutional treatment. I am less certain that the vehicle we are considering today can accomplish its goal without unintended consequences in other areas of the Constitution.

The founders gave taxing and spending powers to Congress because that is the branch of our system that is closest to the people.

Indeed, some delegates at the Constitutional Convention favored restricting these powers to the House of Representatives alone, because the Senate—at that time, to be appointed by the state legislatures, not elected by the people—was too distant from popular needs and desires. The founders compromised by requiring that all revenue bills originate in the House, and then pass on to the Senate. But the principle was set—the people's representatives should hold the purse-strings.

The founders also intended the power of the purse to be one of the legislative branch's strongest bulwarks against incursions by the executive, and the key to maintaining an enduring balance of powers. James Madison—truly named in the main body of this report the "Father of the Constitution"—wrote in The Federalist Papers (No. 58) that this "power over the purse" is

> the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

It is my fear that S.J. Res. 1 may fundamentally rearrange that allocation of powers by sharing that power of the purse with the president. I agree with the many noted constitutional scholars who argue that presidents will seize on the language of the balanced budget amendment as a justification to impound funds duly appropriated by Congress.

This power to impound would give the president an unprecedented and powerful tool with which to oppose Congress. With a stroke of his impoundment pen, the president could undo spending decisions made by Congress, and in the process impose his own political and policy biases—concluding that too much is being spent on a particular program, or in a particular region or state. The balance of power over spending will have shifted dramatically away from the branch closest to the people, where the framers wisely placed it.

Because of my substantial constitutional concerns, I strongly supported Senator Kennedy's amendment in committee that would have made it clear that "[n]othing in this article shall authorize the President to impound funds appropriated by Congress by law," or to impose taxes, another fear expressed by some constitutional scholars. This language, if added to the balanced budget amendment, would permanently foreclose the claim that the amendment gives the President substantial new power, power that the Constitution gives to the Congress.

For these same reasons I supported a second amendment offered by Senator Kennedy, to require Congress to pass legislation now to clarify what the role of the President and the courts should be in the enforcement of this balanced budget amendment. That amendment, too, was defeated in committee.

The durable yet delicate balance of powers struck by our founding fathers has served us well for over 200 years. I will continue to work on the floor of the Senate to modify this balanced budget amendment to make it clear that nothing in this amendment should be construed to unsettle that delicate balance.

Practical Concerns: Properly Accounting for the Long-Term Needs of the Nation

I have two concerns about the way that S.J. Res. 1 will work in practice. Both concerns arise from the fact that S.J. Res. 1 sets a blanket rule—"Total outlays for any fiscal year shall not exceed total receipts for that fiscal year"—without properly accounting for the long-term needs of the nation.

My first practical concern is that S.J. Res. 1 fails to provide for a capital budget for such items as roads, bridges, buildings, and defense needs. My second practical concern is that S.J. Res. 1 fails to properly account for the Social Security Trust Fund.

Creating a Capital Investment Budget

My concern about the lack of a capital budget is shared by one of the most respected conservative publications in the nation. When I opened the Wall Street Journal following last November's election and saw an editorial on the balanced budget amendment to the Constitution, I was struck by the fact that it cautioned that we not move precipitously on the balanced budget amendment.

Among its concerns, the Journal stressed that the proposed amendment does not recognize the need for long-term investing by the federal government. The Journal editorial says, "To understand the economics, start here: if all Americans were required to balance their budgets every year, no one could ever buy a house." The Journal continues: "Of course, households don't think about their budgets that way; they figure 'balance' means meeting their mortgage payments. Similarly, state and local governments with 'balanced budget' requirements can still borrow money for capital improvements * * *."

S.J. Res. 1 throws all manner of programs and responsibilities and government functions into the same annual budget, and does not provide for a capital budget. By failing to do so, this balanced budget amendment will pit major investments with long-term payoffs against programs with more attractive short-term economic and political returns. The result will be to put the future at a disadvantage compared to the present—just the opposite of what our budget policy should be.

Long-term investments should not be counted the same way as salaries for the FBI or purchases of office supplies. No individual, no business, no state or local government—indeed, no other industrial economy—keeps its books that way.

I do not believe we should keep our books that way either. I proposed an amendment in committee to provide for an investment budget in the balanced budget amendment that would not be included in the "total outlays" of the federal budget. This amendment, which was based on the experiences of the states, including my own state of Delaware, was narrowly drawn. It created a capital budget for "major public physical capital investments," limited that capital budget to 10 percent of annual outlays (about what the federal government has been spending on such major physical capital items in recent years), and required a three-fifths vote of both houses to place an item within the capital budget. I did not want to make it easy to treat an item as a "capital investment"—I wanted to make it hard. But I wanted to create a mechanism for distin-

guishing between long-term investment that merits long-term borrowing, and short-term operating needs that should be balanced every year.

Although my amendment was defeated in committee, I will work to include such a narrowly-drawn capital budget in S.J. Res. 1 on the floor.

Properly Accounting for Social Security

A second practical concern—shared by many citizens in my own state of Delaware—has to do with the treatment of the Social Security Trust Fund. S.J. Res. 1 makes no special provision for this unique institution, and instead includes the Social Security Trust Fund in the revenues and expenditures of the federal government.

I support Senator Feinstein's effort to keep the Social Security Trust Fund where it is today, independent from the calculations of the federal budget. If we throw it into the mix with every other program, we will make it more difficult—and thus, less likely—that we will undertake the reforms necessary to keep the system healthy in the future.

With its sizeable surpluses in the near future—a hundred billion dollars per year—and its impending deficits in the next century, the Social Security System presents unique problems. I fear that those problems will take a back seat to annual budget pressures unless it is protected. I also fear that if Social Security is not set apart, we will rely on its substantial surpluses in the near future to mask substantial deficits in the rest of the federal government.

For all these reasons, I supported Senator Feinstein's amendment in committee, and will support efforts on the floor of the Senate to extend to Social Security the protection it deserves.

A "Glide Path" to a Balanced Budget

In committee, I also supported an amendment offered by Senator Feingold to require Congress to spell out how it will achieve a balanced budget before sending it to the states for ratification. I consider such disclosure important for two reasons. First, the states should understand how a balanced budget amendment will affect them.

Second, and more important, we need to ensure that we do not arrive at the target date of 2002 without a measured plan to reduce the annual deficit gradually. As the economics experts who testified before the Judiciary Committee agreed, a sudden one-year cut in the deficit as we reach 2002 could have severe economic consequences for the nation. This balanced budget amendment would be improved if it provided for such a "glide path" to a balanced budget.

Conclusion

These are my concerns, and I have long held them. I am concerned as well, though, that after years of budget deficits and trillions of dollars of growing debt, we must take aggressive action towards fiscal responsibility. Despite my doubts about potential side-effects of this proposed amendment, I have no doubt that we must change the way we make budget choices. In crafting the final form of the amendment, I hope we will work to be as certain as possible

that the change we adopt will have the effects we desire, and that we understand what those effects will be.

As I have in past years, I voted in committee to report this amendment to the full Senate so that the important issues it presents can receive the treatment they deserve. Once on the floor, I will continue to support attempts to improve how the amendment will work and to clarify what it will do.

XI. MINORITY VIEWS OF SENATORS KENNEDY, LEAHY, AND FEINGOLD

CONTENTS—INTRODUCTION AND SUMMARY

I. The Proposed Amendment Would Undermine the Separation of Powers Under Our Constitution.

A. The Amendment Would Force the State and Federal Courts to Resolve Budgetary Issues Appropriately Left to the Elected Branches of Government.

B. The Amendment Would Give the President Broad Powers to Impound Appropriated Funds.

C. The Proposed Amendment may also Confer upon the President the Authority to Impose Taxes, Duties and Fees.

D. No Amendment Should be Proposed Before the Enforcement Legislation Called for by Section 6 is Considered.

E. Proposing A Balanced Budget Constitutional Amendment That Was Enforceable Only by Congress would be a Serious Mistake.

II. Congress should Pass a Concurrent Resolution Spelling Out How to Get to a Balanced Budget Before Any Amendment is Sent to the States.

III. The Balanced Budget Amendment Would Shift Financial Burdens to State and Local Governments.

A. Ratification of the Proposed Amendment Would Result In the Imposition of Greater Financial Burdens on State and Local Governments.

B. No Statutory Ban on Unfunded Mandates Can Bind Congress.

IV. The Proposed Constitutional Amendment is Unsound Economic Policy.

A. The Proposed Amendment Would Hamper The Government's Ability to Deal with Recessions and Natural Disasters.

B. The Proposed Constitutional Amendment Would Undermine the Value of Treasury Bonds and Drive Up Interest Costs Paid by the Federal Government.

C. The Experience of the States Does Not Support Passage of the Proposed Constitutional Amendment.

V. The Proposed Constitutional Amendment Would Forbid Placing Social Security Off Budget, and Would Prohibit Establishing a Separate Capital Budget.

A. The Proposed Constitutional Amendment Would Imperil Social Security.

B. The Proposed Constitutional Amendment Would Prohibit Exempting Capital Expenditures from the Balanced-Budget Calculation.

VI. The Balanced Budget Amendment Would Promote Gridlock and Undermine Majority Rule.

INTRODUCTION AND SUMMARY

We agree with the Committee majority that the Federal Government should maintain a balanced budget. Indeed, all of us believe that the huge budget deficits run up during the 1980's unfairly and irresponsibly saddled future generations with burdensome debt; and all of us believe that Congress must take dramatic action to reduce the deficit and place the Nation on a course of sound fiscal management.

We part company with the Committee majority on but one point: We believe that the so-called balanced budget constitutional amendment is an unwise and unsound political gimmick that will pose a threat to our economy and seriously damage the separation of powers enshrined by the Framers of the Constitution while doing nothing to reduce the deficit.

Congress does not have to amend the Constitution to balance the budget. All we have to do is make the difficult decisions on taxing and spending needed to achieve that goal.

The entire Federal deficit for the current fiscal year—estimated at $176 billion—represents the interest owed on the huge national debt—$2.462 trillion—run up in the twelve years of the Reagan and Bush Administrations. The rest of the budget is already balanced, and it didn't require a constitutional amendment to do it.

The progress we have made in the past two years toward reducing the deficit is the result of the success of President Clinton's economic plan, which was approved by Congress in 1993, and which will achieve approximately $500 billion in deficit reduction over the period 1994 to 1998. There is nothing preventing Congress from continuing to reduce the deficit. A constitutional amendment is not needed. If it is not necessary to amend the Constitution, it is necessary not to amend it.

As we discuss below, the proposed constitutional amendment would drastically alter the constitutional system of checks and balances. It would give the President broad authority when an unauthorized deficit arises to impound appropriated funds and impose taxes, duties and fees. And it would give State and Federal courts extraordinary power to curtail unauthorized deficits by enjoining spending and ordering the imposition of taxes.

Supporters of the proposed amendment contend that Congress could avoid these outcomes through the passage of the enforcement legislation required by section 6 of the proposed amendment. But those supporters have steadfastly refused to provide anyone with that enforcement legislation; and both the President and the judiciary have powers and duties under the Constitution far beyond those that might be granted to them by such a statute.

At the same time, by requiring supermajorities to authorize a deficit or increase the debt ceiling, the amendment would undermine majority rule—the core principle of our Democracy—by giving a forty-percent-plus-one minority in one House of Congress unprecedented power to dictate to the majority. In so doing, it would constitutionalize the gridlock occasioned by filibusters in the Senate, and extend it to the House of Representatives as well.

When the economy is in a recession, revenues fall (due to rising unemployment and falling profits) while expenditures increase (be-

cause of increased demand for unemployment benefits, food stamps, and other programs to assist the unemployed). This "countercylical" spending helps to maintain consumer demand and thereby reduce the length and seriousness of the recession.

Because the proposed constitutional amendment requires a balanced budget each fiscal year (rather than over the course of the business cycle), it would prohibit the government from engaging in this form of "countercylical" spending; in fact, it would require the government to raise taxes and/or cut spending during economic downturns. As a result, the amendment could turn recessions into depressions, causing untold economic misery for our citizens.

The amendment would also prohibit capital budgeting, a practice used by 42 States and millions of American businesses and households, under which expenditures for major assets with long useful lives are paid for over the period when the asset is in use. Any American who has taken out a mortgage to finance the purchase of a home appreciates the need for capital budgeting.

The amendment would also require that all revenues received, and all expenditures made, by the Social Security Trust Fund be included in the calculations made to determine whether the budget is in balance. This requirement would undermine the long-term security of Social Security by allowing Congress to use the current surplus in the Trust Fund to avoid making the difficult decisions necessary to achieve a balanced overall budget in the near term. And it would encourage Congress to refrain from addressing the long-term deficit that Social Security will face in the next century.

At the same time, the proposed constitutional amendment will create a strong incentive for Congress to place additional financial burdens on the States. These burdens are likely to occur through the imposition by Congress of so-called "unfunded mandates" on the States; and no legislation curtailing unfunded mandates passed by this Congress could stop a subsequent Congress from waiving that legislation and imposing new mandates on the States. In addition to unfunded mandates, the proposed constitutional amendment is likely to increase the financial burden on the States by prompting Congress to cease Federal involvement in a host of activities that would have to be undertaken by State and local governments.

For these reasons, and many others, we strongly believe that before any balanced budget constitutional amendment is submitted to the States for ratification, Congress should pass a concurrent resolution specifying in detail the nature of the steps that will have to be taken over the next seven years to achieve a balanced budget by 2002. Before they are called upon to amend our Constitution, the American people, and their representatives in the State Legislatures, have a right to know the kinds of actions that will have to be taken to achieve a balanced budget.

Supporters of the proposed constitutional amendment argue against giving the public this important information before the amendment is submitted for ratification, contending that the tough actions required to balance the budget will be so unpopular with the electorate that State Legislatures will recoil, and refuse to pass the amendment. If so, one might ask, won't Congress refuse to take any tough action to balance the budget until after an amendment

is ratified? Won't passage of a balanced budget constitutional amendment without this information just give Congress an excuse not to act to cut the deficit for years to come?

Supporters of the amendment also argue that if the ratification process is delayed until Congress passes a resolution spelling out how to balance the budget, the amendment will never be submitted to the States for ratification, because Congress will forever lack the nerve to make the tough decisions necessary to balance the budget.

Congress does not lack the nerve to balance the budget; some Members do. Not everyone voted for the irresponsible tax cuts in 1981 that caused the deficit to balloon out of control; not one of us did. In the past two years, with President Clinton's leadership, Congress for the first time in more than a decade has made impressive progress in shrinking the deficit. Passage of his economic plan reduced by $500 billion for fiscal years 1994–1998. For the first time since the Truman Administration, deficits are projected to decline for three years in a row. And the annual deficit has fallen from 4.9% of gross domestic product to 2.4%.

Rather than tinkering with the Constitution that has served Americans so well for over two hundred years, let us focus our attention on reducing the deficit and building our economy to enable our children and grandchildren to live in as prosperous and secure a Nation as we inherited from our parents. Let us put aside the balanced budget constitutional amendment as an ineffective, ill-advised and pointless distraction from that urgent task.

I. THE PROPOSED AMENDMENT WOULD UNDERMINE THE SEPARATION OF POWERS UNDER OUR CONSTITUTION

As James Madison wrote in THE FEDERALIST NO. 48, "the legislative department alone has access to the pockets of the people." Our Constitution now gives Congress the primary authority, and responsibility, with regard to the raising and expenditure of outlays. Article I, section 7 stipulates that "all Bills for raising Revenue" must originate in the House of Representatives; article I, section 8 grants Congress the powers "to lay and collect Taxes, Duties, Imposts and Excises," and "to borrow Money on the credit of the United States; and article I, section 9 provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

The proposed amendment would dramatically alter the allocation of powers set forth in the Constitution. It would cast the State and Federal courts in the role of "super Budget Committees," deciding in myriad cases whether the Federal budget is impermissibly out of balance, and where it is, ordering spending cuts and revenue increases to remedy the constitutional violation. And it would give the President broad powers to impound appropriated funds or raise taxes.

A. The amendment would force the State and Federal courts to resolve budgetary issues appropriately left to the elected branches of Government

In the memorable words of Chief Justice Marshall, "[i]t is, emphatically, the province and duty of the judicial department, to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 176

(1803). Since that historic decision, the Supreme Court has had the preeminent role in defining the scope and meaning of our Constitution.

If the proposed constitutional amendment were ratified, the fulfillment of this role by the Supreme Court and the inferior Federal and State courts would inevitably require them to address complex budgetary issues that courts are singularly ill-suited to resolve. As de Tocqueville wrote more than one hundred forty-six years ago, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[1] If the proposed constitutional amendment were ratified, several of its provisions would give rise to cases and controversies that the courts would be compelled to resolve.

Section 1 of the amendment contains a flat prohibition on "total outlays" exceeding "total receipts" in any fiscal year by an amount greater than that specifically authorized by a three-fifths vote of each House of Congress. What happens when total outlays do exceed total receipts in a fiscal year, and Congress fails to muster the votes, or the political will, to authorize the excess?

Similarly, section 2 provides that "[t]he 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." What happens when the government incurs obligations that increase the debt, such as entering into loan guarantees, or committing to clean up toxic waste sites, without the requisite congressional supermajorities?

Disputes over these matters will inevitably wind up in the State and Federal courts. Taxpayers will claim standing to sue under *Flast* v. *Cohen*, 392 U.S. 83 (1968). There the Supreme Court found that taxpayers had a standing to challenge government spending that violated the Establishment Clause. It ruled that taxpayer standing exists where the claim is that the action in question "*exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power* and not simply that the enactment is generally beyond the powers generally delegated to Congress by Article I, section 8." Id. at 103 (emphasis added).

It may be argued that the proposed constitutional amendment would impose exactly the kind of "specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power" referred to in *Flast*. There is thus a strong likelihood that a court would find that taxpayers have standing to challenge alleged violations of the amendment.

In addition, the Houses of Congress, and individual members of Congress will undoubtedly assert standing to challenge the failure to obtain the requisite supermajorities. See, e.g., *Burke* v. *Barnes*, 479 U.S. 361 (1987); *Kennedy* v. *Sampson*, 511 F.2d 430 (D.C. Cir. 1974).

Even if courts were to reject taxpayer or congressional standing, however, ample opportunities will exist for the courts to resolve cases under the proposed constitutional amendment.

---

[1] Alexis de Tocqueville, Democracy in America, pt. I, ch. 16 (1848).

> If a President impounds Social Security benefits to avoid an unauthorized deficit, Social Security recipients will surely have standing to sue.
>
> If a President withholds a pay increase due Federal workers in order to avoid an unauthorized deficit, the workers will surely have standing to sue.
>
> It total outlays exceed total receipts in a fiscal year in an amount higher than that authorized by the congressional supermajorities, then persons who suffer injury by reason of those outlays will surely have standing to sue.

These are but a few of the examples of disputes that will arise in Federal courts around the United States if the proposed constitutional amendment were adopted. Moreover, neither the requirement of standing nor the political question doctrine prevent state courts from resolving any of the myriad issues that will be presented by the amendment.[2]

For that reason, scholars as diverse in legal philosophy and approach as Harvard University Law School Professor Laurence H. Tribe and former Solicitor General and Federal judge Robert Bork have opposed the balanced budget constitutional amendment before us because it would embroil the courts in endless lawsuits over its enforcement. As Judge Bork stated:

> The result * * * would likely be hundreds, if not thousands, of lawsuits around the country, many of them on inconsistent theories and providing inconsistent results. By 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 toward the Supreme Court.[3]

The questions that would be presented by the balanced budget constitutional amendment litigation would inevitably be complex, difficult, and expensive for the courts to address. When a deficit is challenged as being greater than that authorized by a congressional supermajority, a court would be required to receive evidence on what constitutes an "outlay," what constitutes a "receipt," and on what amounts of each were expended and received by the Unit-

---

[2] The political question doctrine will not prevent disputes under the balanced budget constitutional amendment from reaching the courts because none of the criteria laid down in *Baker* v. *Carr*, 369 U.S. 186 (1962), for determining whether a case presents a political question are met. There is no textual commitment in the amendment to resolution of disputes by the political branches; to the contrary, the amendment is silent as to how it would be enforced.

Judicially manageable legal standards for resolving disputes are not lacking.The amendment specifically prohibits "total outlays" from exceeding "total receipts" in a fiscal year, except by an amount specifically authorized by a three-fifths vote of each House of Congress; and any increase in the debt limit must be authorized by a similar vote.

There is no need for unquestioning adherence to a political decision already made on the questions presented. Indeed, the very reason why supporters of the proposal claim that a constitutional amendment is needed is their view that the political branches cannot be relied upon to balance the budget. Recent cases suggest a narrowing of the political question doctrine. E.g., *United States* v. *Munoz-Flores*, 495 U.S. 385 (1990); *Department of Commerce* v. *Montana*, 112 S. Ct. 1415 (1992).

[3] Robert H. Bork, "On Constitutional Economics," AEI J. on Gov't and Soc'y (Sept.–Oct. 1983), reprinted in "Proposed Balance Budget Constitutional Amendments: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary," 100th Cong., 1st Sess. 645, 649 (1987). See "Constitutional Amendment to Balance the Budget: Hearings Before the Comm. on the Budget," United States Senate, 102nd Cong., 2d Sess. 23–32 (1992) (hereafter "1990 Budget Committee Hearings") (statement of Professor Laurence H. Tribe).

ed States Government during a particular fiscal year. The trial in each such case could take years, years during which the status of the accounts and obligations of the United States would be under a legal cloud.

In suits where a violation were found, courts would be required to make remedial decisions that should properly be the responsibility of the political branches. The authority of the Federal courts to remedy constitutional violations is broad indeed, as was demonstrated in *Missouri* v. *Jenkins,* 495 U.S. 33 (1990), where the Supreme Court upheld a court of appeals decision setting forth the circumstances under which a Federal district court could order a local jurisdiction to levy taxes to pay for the cost of complying with an order remedying unconstitutional school desegregation.

Should an across-the-board freeze on Federal spending be ordered? Should spending cuts be targeted so as to minimize the resulting harm? If so, which programs should be cut and by how much? Should Congress be ordered to raise taxes to remedy the constitutional violation? These are but few of the questions that courts would be called upon to answer in proceedings to establish the appropriate remedy for a violation of the proposed constitutional amendment.

That the amendment is likely to be construed to authorize courts to enjoin spending and order taxes to be raised is confirmed by the omission from S.J. Res. 1 of the language of the Danforth Amendment that was adopted as part of S.J. Res. 41 when the latter measure was before the Senate in the 103rd Congress. That amendment added to section 6 of the proposal the following sentence:

> The power of any court to order relief pursuant to any case or controversy arising under this Article shall not extend to ordering any remedies other than a declaratory judgment or such remedies as are specifically authorized in implementing legislation pursuant to this section.[4]

The absence of such language in the pending proposal strongly supports the view that S.J. Res. 1 would authorize the courts to order cuts in spending and increases in taxes to remedy unauthorized deficits.

In The Federalist No. 78, Alexander Hamilton described the judiciary as "the least dangerous branch" because it "has no influence over either the sword or the purse, no direction either of the strength or the wealth of the society." He then qualified his description, quoting Montesquieu as warning "that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'"

Adopting a balanced budget constitutional amendment would create precisely the peril warned against by Hamilton, because it would force unelected judges to decide policy questions of this kind, and in so doing to exercise powers heretofore largely reserved to the legislative and executive branches. It would be a mistake of historic proportions to ignore Hamilton's warnings and enact such a proposal.

---

[4] 140 Cong. Rec. S2089 (March 1, 1994).

The Committee majority suggests that problems raised by the prospect of judicial enforcement could be addressed in the enforcement legislation required by section 6, in which, they assert, Congress could limit courts' role in the balanced budget constitutional amendment cases. But as former Solicitor General Fried has testified, if Congress attempted through legislation passed pursuant to section 6 to eliminate Federal court jurisdiction of questions arising under the balanced budget constitutional amendment, "that limitation itself might very well be unconstitutional." "Balanced Budget Amendment—S.J. Res. 41: Hearings Before the Senate Comm. on Appropriations," 103rd Cong., 2d Sess. 84 (1994) (hereinafter "1994 Appropriations Committee Hearings").

The majority's argument is also inconsistent with the approach that the Federal courts have taken under other constitutional amendments. When legislation enacted by Congress did not provide an effective remedy for a constitutional violation, the courts have found the existence of other, judicial remedies. See, e.g., *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Davis* v. *Passman*, 442 U.S. 228 (1979); *Carlson* v. *Green*, 446 U.S. 14 (1980). Thus, if Congress were to adopt enforcement legislation that failed to provide an effective remedy for violations of the amendment, there is every reason to believe that the courts would permit a judicial remedy.

The Committee majority also asserts that the experience of state courts in enforcing state constitutional balanced budget requirements suggests that fears of excessive judicial involvement in the enforcement of the Federal balanced budget constitutional amendment are unwarranted. But as former Solicitor General Charles Fried has testified, "[t]he experience of state court adjudication under state constitutional provisions that require balanced budgets and impose debt limitations shows that courts can get intimately involved in the budget process and that they almost certainly will." 1994 Appropriations Committee Hearings at 86. General Fried went on to state that while "the greatest part of [state] litigation has dealt with the validity of debt instruments issued to supplement budgets that would otherwise have been out of balance, "[t]here is no reason to believe that litigation under a Federal balanced budget amendment would be so confined."[5]

B. The amendment would give the President broad powers to impound appropriated funds

That the balanced budget constitutional amendment would authorize the President to impound funds appropriated by Congress is clear from the text of the Constitution and the proposed amendment. Article II, section 3, obligates the President to "take care that the Laws be faithfully executed," and article II, section 7, requires the President to take an oath to "preserve, protect and defend the Constitution."

Section 1 of the proposed constitutional amendment provides that "[t]otal outlays for any fiscal year shall not exceed total receipts for that fiscal year, unless three-fifths of the whole number

[5] See also letter from Assistant Attorney General Walter Dellinger to Chairman Orrin Hatch, January 9, 1995 (discussing state court experience and reaching the same conclusion as General Fried).

of each House of Congress shall provide by law for a specific excess of outlays over receipts by a rollcall vote." The amendment thus would forbid outlays from exceeding revenues by more than the amount specifically authorized by a three-fifths supermajority of each House of Congress. In any fiscal year in which it is clear that in the absence of congressional action, "total outlays" will exceed "total receipts" by a greater-than-authorized amount,[6] the President is bound by the Constitution and the oath of office it prescribes to prevent the unauthorized deficit.

The powers and obligations conferred upon the President by the Constitution and the proposed constitutional amendment would clearly be read by the courts to include the power to impound appropriated funds where the expenditure of those funds would cause total outlays to exceed total receipts by an amount greater than that authorized by the requisite congressional supermajorities.

This commonsense reading of the proposed constitutional amendment is shared by a broad range of highly regarded legal scholars. Assistant Attorney General Walter Dellinger, who as head of the Office of Legal Counsel at the Department of Justice is responsible for advising the President and the Attorney General regarding the scope and limits on presidential authority, testified before the Judiciary Committee that the proposed constitutional amendment would authorize the President to impound funds to insure that outlays do not exceed receipts.[7] Similarly, Harvard University Law School Professor Charles Fried, who served as Solicitor General during the Reagan Administration, testified that in a year when actual revenues fell below projections and a bigger-than-authorized deficit occurred, section 1 "would offer a President ample warrant to impound appropriated funds."[8] Others who share this view include former Attorney General Nicholas deB. Katzenbach,[9] Stanford University Law School Professor Kathleen Sullivan,[10] Yale University Law School Professor Burke Marshall,[11] and Harvard University Law School Professor Laurence H. Tribe.[12]

The fact that the proposed constitutional amendment would confer impoundment authority on the President is confirmed by the actions of the Judiciary Committee this year. Supporters of the amendment opposed and defeated an amendment offered by Senator Kennedy before the Judiciary Committee that would have added the following section to the proposed amendment:

> SECTION . Nothing in this article shall authorize the President to impound funds appropriated by Congress by law, or to impose taxes, duties or fees.[13]

---

[6] Such an excess can occur for a wide range of reasons: Congress may lack the political will to cast a vote authorizing a deficit as large as the one it actually anticipates; or unanticipated drops in revenue or increases in expenditures may result from natural disasters or the vagaries of the business cycle.

[7] 1995 Hearings at 99.

[8] 1994 Appropriations Committee Hearings at 86.

[9] 1994 Appropriations Committee Hearings at 166 ("the proposed amendment provides a powerful constitutional argument for a Presidential right to impound grounded in the language of section 1 * * *").

[10] 1994 Appropriations Committee Hearings at 182.

[11] 1994 Appropriations Committee Hearings at 204–05.

[12] 1990 Budget Committee Hearings at 26–27.

[13] The amendment was tabled by a vote of 11–5, with Senators Hatch, Thurmond, Simpson, Grassley, Brown, Thompson, Kyl, Abraham, DeWine, Simon and Heflin voting in favor of tabling

Continued

If the supporters of the proposed constitutional amendment do not intend to give impoundment authority to the President, there is no legitimate explanation for their failure to include the text of the Kennedy amendment in the proposed article.

The impoundment power that would be conferred on the President by the proposed constitutional amendment is far broader than any proposed presidential line-item veto authority now under consideration by the Congress. The line-item veto proposals would allow a President to refrain from spending funds proposed to be spent by a particular item of appropriation in a particular appropriations bill presented to the President. As Assistant Attorney General Dellinger testified, the impoundment authority conferred upon the President by the proposed constitutional amendment would allow a President to order across-the-board cuts in all Federal programs, target specific programs for abolition, or target expenditures intended for particular States or regions for impoundment.[14]

The Committee majority makes two arguments to support its assertion that the balanced budget constitutional amendment does not give the President impoundment authority. Both are wrong.

The first is the suggestion that "up to the end of the fiscal year, the President has nothing to impound because Congress in the amendment has the power to ratify or to specify the amount of deficit spending that may occur in that fiscal year." In essence, the majority asserts that there will never be an unauthorized, and therefore unconstitutional, deficit, because Congress will always step in at the end of the year and ratify whatever deficit has occurred. If true, then the balanced budget is a complete sham, because it would impose no fiscal discipline whatsoever.

But if the majority is wrong in its prediction—that is, if a Congress failed to act before the end of a fiscal year to ratify a previously unauthorized deficit, all of the expenditures undertaken by the Federal government throughout the fiscal year would be unconstitutional and open to challenge in the state and Federal courts (see part I.A, supra). It is inconceivable that the President, sworn to preserve, protect and defend the Constitution, would be found to be powerless to prevent such a result.

Second, the majority argues that "under section 6 of the amendment, Congress can specify exactly what type of enforcement mechanism it wants and the President, as Chief Executive, is duty bound to enforce that particular congressional scheme to the exclusion of impoundment." The fact that Congress is required by section 6 of the proposed amendment to enact enforcement legislation certainly does not suggest that the amendment itself would not grant the president authority to impound appropriated funds. Nothing in the proposed article stipulates that the enforcement legislation must be effective to prevent violations of the amendment. Indeed, there is every reason to believe that no enforcement legislation could prevent violations from occurring.[15]

---

the amendment, and Senators Biden, Kennedy, Leahy, Kohl, and Feingold voting against tabling.

[14] 1995 Judiciary Committee Hearings at 100.

[15] Even when Congress authorizes a specific deficit in advance, an unanticipated circumstance, such as a deterioration in economic conditions or an earthquake or other natural catastrophe, may cause revenues to drop below expectations while outlays increase. The result would be a

The President's obligation to faithfully execute the laws is independent of Congress's. That duty is not "limited to the enforcement of acts of Congress * * * according to their express terms, * * * it include[s] the rights, duties and obligations growing out of the Constitution itself, * * * and all the protection implied by the nature of the government under the Constitution[.]" *In re Neagle,* 135 U.S. 1, 64 (1890). If an unconstitutional deficit were occurring, Congress could not constitutionally stop the President from seeking to prevent it.[16]

C. The proposed amendment many also confer upon the President the authority to impose taxes, duties and fees

As discussed above, when a greater-than-authorized deficit occurs, the balanced budget constitutional amendment would impose upon the President an obligation to stop it. While greater attention has been paid to the prospect that the amendment would grant the President authority to impound appropriated funds, the amendment would enable future Presidents to assert that they have the power unilaterally to raise taxes, duties or fees in order to generate additional revenue to avoid an unauthorized deficit. See Testimony of Assistant Attorney General Walter Dellinger, 1995 Judiciary Committee Hearings at 102.

This outcome would turn on its head the allocation of powers envisioned by the Framers. No longer would "the legislative department alone ha[ve] access to the pockets of the people" as Madison promised in The Federalist No. 48. Instead, intermixing of legislative and executive power in the President's hands would constitute the "source of danger" against which Madison warned.

D. No amendment should be proposed before the enforcement legislation called for by section 6 is considered

Despite the contention of the Committee majority that the proposed constitutional amendment "is self-enforcing," it is clear that the amendment is anything but that. The amendment sets forth no procedure for enforcing the balanced-budget requirement in section 1. If "total outlays" exceed "total revenues" in any fiscal year by an amount greater than that specified by the requisite supermajority vote by each House of Congress, what happens?

---

deficit larger than the one authorized by Congress. No enforcement legislation enacted by Congress can eliminate the business cycle or outlaw unanticipated events such as natural disasters, wars, and other catastrophes.

[16] See 1994 Appropriations Committee Hearings at 182 (testimony of Professor Kathleen Sullivan) ("this amendment if enacted would, of course, be constitutional law, fundamental law. It would trump [the Impoundment Control Act of 1974] or any other statute designed to umpire disputes between the President and Congress * * *").

Kendall v. *United States ex rel. Stokes,* 37 U.S. (12 Pet.) 524 (1838), cited by the committee majority, actually supports the view that the balanced budget constitutional amendment would grant impoundment authority to the President. In that case, Congress had ordered the Postmaster General to pay the claimant whatever sum an outside arbitrator determined was the appropriate settlement. When the Postmaster General paid a smaller amount that he deemed to be an appropriate settlement, the Supreme Court held that the Postmaster General could be ordered to comply with the congressional directive. The Court ruled that the President, and those under his supervision, did not possess inherent authority to impound funds that Congress had ordered to be spent: "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." Id. at 611. But if the balanced budget constitutional amendment were part of the constitution, the President's obligation "to see the laws faithfully executed" would itself authorize the President to take necessary acts, including impounding appropriated funds, to ensure that the amendment's balanced-budget requirement were obeyed.

May the President impound funds appropriated by Congress in order to avoid such a deficit?

Can a Social Security recipient whose check is impounded file suit in State or Federal court to challenge the impoundment?

Can the President refuse to pay interest on Treasury bonds, because doing so would add to the deficit?

Can a bondholder file suit to recover?

Can a State or Federal court enjoin government spending to eliminate the unauthorized deficit?

Can a State or Federal court order Congress to raise taxes to eliminate the unauthorized deficit?

May the President raise taxes or fees in order to eliminate an unauthorized deficit?

The balanced budget constitutional amendment itself contains no answer to any of these questions.

The Committee majority responds by claiming that the enforcement legislation required by section 6 will provide answer to all questions about how the balanced budget constitutional amendment would be enforced. But although balanced budget constitutional amendments have been before the Judiciary Committee and the Congress for the past fifteen years, the supporters of an amendment have steadfastly declined to make available proposed enforcement legislation.

For that reason, Senator Kennedy offered an amendment before the Judiciary Committee providing that the proposed constitutional amendment should not be submitted to the States for ratification until "the enactment of legislation specifying the means for enforcing the provisions of the amendment." The supporters of the balanced budget constitutional amendment opposed the Kennedy amendment, and it was tabled by a vote of 12–5.[17]

In the past decade, Congress has repeatedly enacted legislation establishing binding procedures for limiting the deficit. These include the so-called Gramm-Rudman-Hollings law of 1986, as well as the 1990 and 1993 reconciliation laws. There is thus absolutely no justification for the persistent refusal of supporters of the proposed constitutional amendment to offer enforcement legislation.[18]

E. Proposing a balanced budget constitutional amendment that was enforceable only by Congress would be a serious mistake

When confronted with the above problems with the balanced budget constitutional amendment, the measure's supporters sometimes assert that Congress would or should be given exclusive authority to enforce the amendment. But even if Congress were given exclusive enforcement authority, and the courts and the President were given absolutely no role, passage of a constitutional amendment would be a serious mistake.

The central premise of the supporters' argument for a constitutional amendment is that Congress cannot be trusted to make the

[17] Senators Hatch, Thurmond, Simpson, Grassley, Brown, Thompson, Kyl, DeWine, Abraham, Simon, Heflin and Kohl voted to table the Kennedy amendment; Senators Biden, Kennedy, Leahy, Feinstein and Feingold voted against tabling.

[18] There is solid precedent for passing enforcement legislation before a constitutional amendment is ratified. When the Eighteenth Amendment was pending, Congress passed the Volstead Act (to take effect upon ratification of the Amendment).

tough decisions necessary to balance the budget. By their reasoning, giving Congress the exclusive power to determine whether a violation of the balanced budget constitutional amendment has occurred would thus be putting the proverbial fox in charge of the chicken coop.

Supporters of the amendment respond that if a balanced budget requirement were included in the Constitution, then Congress would be more likely to obey it. But Congress has certainly been known to violate the Constitution. Indeed, the Supreme Court has found that Congress has violated the Constitution in no fewer than 125 cases.[19]

In these circumstances, giving Congress exclusive authority to enforce the balanced budget constitutional amendment would be tantamount to enacting an unenforceable constitutional amendment. When the American public learns that there is no meaningful sanction for violating the constitutional requirement, the result would be understandable cynicism about the Constitution and the rule of law. Because so much of the public's lack of faith in our governmental system already results from the failure of many in Congress to confront the deficit, it would be a tragic mistake to compound that loss of faith by placing an unenforceable promise in the Constitution.

II. CONGRESS SHOULD PASS A CONCURRENT RESOLUTION SPELLING OUT HOW TO GET TO A BALANCED BUDGET BEFORE ANY AMENDMENT IS SENT TO THE STATES

The proposed constitutional amendment suffers an essential defect: it does not balance the budget nor outline a single spending cut or tax increase. As the distinguished economist Herbert Stein, who was Chairman of the Council of Economic Advisors during the Nixon Administration, noted in his testimony before the Committee:

> Objection to a balanced budget amendment is not an objection to balancing the budget. It is, instead, objection to using an appeal to a traditional symbol as a smoke-screen behind which to hide unwillingness to face our real problems.

The Constitution is our great national contract, intended to bind our Nation now and for generations to come. Before the people are asked to support a change in that contract, they are entitled to read the fine print and to see a specific plan of action. Professor Stein was right when he said:

> I believe it is basically improper and unfair to propose a balanced-budget amendment without revealing how the balance would, or might, be achieved—by what combination of expenditure cuts and tax increases. I do not think the American people should be asked to commit themselves to a Constitutional limit on their future decisions without knowing what would be involved.

---

[19] "The Constitution of the United States of America: Analysis and Interpretation" (J. Killian & G.A. Costello eds.) 1885–1912 and 1990 Supp. at 239–242.

A specific plan of deficit reduction is the only way the budget will be balanced, and conditioning the proposed constitutional amendment on enactment of such a plan will do what the supporters of the proposed constitutional amendment state is their goal: force Congress to make the tough decisions needed to eliminate the deficit.

During the Judiciary Committee's markup, Senator Feingold offered an amendment to require a specific plan of action. The Feingold amendment would have required that before a proposed constitutional amendment is submitted to the States, Congress must first adopt a concurrent resolution outlining a budget plan for each of the fiscal years from fiscal year 1996 through to the first fiscal year in which the proposed amendment would take effect. That budget plan would have required a detailed list, description, and effective date of the spending cuts or revenue increases, and the resulting changes in Federal law required to carry out the plan.

But the supporters of the amendment refused to require that a specific plan be spelled out. The Feingold amendment was rejected in Committee by a vote of 12 to 5.[20]

Supporters of the proposed constitutional amendment assert that a constitutional mandate is necessary to prod lawmakers into doing what they are otherwise unwilling to do. According to this logic, a constitutional requirements of a balanced budget would give lawmakers the backbone to make the requisite tough decisions because they will be able to tell angry constituents: "The Constitution made me do it."

This flawed and cynical view of our political process ignores its own logical conclusion: those who require the political cover of a constitutional amendment to make the tough decisions necessary to balance the budget are unlikely to make those decisions until that constitutional amendment is in force. This would mean that no specific deficit reduction plan would be offered until after the States have ratified the amendment, and the amendment were in effect, i.e., fiscal year 2002 at the earliest, or possibly not until 2004.

Indeed, under the supporters' reasoning, Congress would have but two years to achieve a balanced budget if the amendment were ratified any time after 1999. The so-called glide path needed to balance the budget would turn into an economic kamikaze dive.

Without a specific deficit reduction plan before us, Congress could adopt the proposed amendment, declare victory, and do nothing until 2002. Those same lawmakers who refuse to propose a specific plan of action concurrent with a constitutional amendment would declare victory in the war on the deficit and hide behind a smokescreen, as professor Stein suggested. Holding Congress' proverbial feet to the fire by forcing formulation of a specific plan before the proposed amendment is sent to the States would prevent delay and evasion on balancing the budget.

Equally important, a specific deficit reduction plan would provide the voters, local; government officials, and State legislators with the minimum information they need before considering whether to ratify this proposed amendment. They are entitled to know what

[20] Senators Hatch, Thurmond, Simpson, Grassley, Brown, Thompson, Kyl, DeWine, Abraham, Simon, Heflin and Kohl voted to table the Feingold amendment; Senators Biden, Kennedy, Leahy, Feinstein and Feingold voted against tabling.

the supporters of the proposed constitutional amendment intend to do to achieve a balanced budget by 2002 before they modify the Constitution of the United States to require that action.

Indeed, the effort to reduce the deficit could be severely jeopardized without the broad-based support of the Nation. In the end, without popular support, a plan that makes the difficult decisions necessary to achieve a balance budget would be rejected by the American people.

House Majority Leader Richard Armey, a strong supporter of the proposed constitutional amendment, offered one explanation for the supporters' refusal to offer a detailed budget reduction plan, stating that if Members of Congress knew what it took to comply with the proposal, "their knees will buckle."[21] He also is reported to have said that "putting together a detailed list beforehand would make passing the balanced budget amendment virtually impossible."[22]

Treating the process by which we amend our Constitution as a game, with the cards held close to the vest, does a disservice to our Nation. Proponents of this amendment must deal honestly and forthrightly with the American people if they hope to persuade them that this amendment to our Constitution is necessary.

A specific plan to reduce the deficit should be passed before any constitutional amendment requiring a balanced budget is forwarded to the states for ratification. Such a budget reduction plan would not only serve as a safeguard against later inaction, but also ensure that Congress deals with the American people in a manner that does not invite additional cynicism and frustration with their elected representatives.

III. THE BALANCED BUDGET AMENDMENT WILL SHIFT BURDENS TO STATE AND LOCAL GOVERNMENTS

The proposed constitutional amendment, in the form of S.J. Res. 1, is a prescription for shifting of financial burdens to State and local governments. Cost shifting to State and local governments will be an irresistible impulse—the easy way out of our Federal deficit. Consequently, State and local leaders rightfully fear that ratification of the proposed constitutional amendment would result in a massive shift of the Federal Government's responsibilities and financial requirements to the shoulders of State and local governments and the pocketbooks of State and local taxpayers.

Governor Michael O. Leavitt, of Utah, testified that consideration of the proposed amendment and of its likely effect on the States are linked, that "the two topics cannot be separated."[23] Nevertheless, the Committee majority simply ignore this issue, apparently because addressing the two issues together would, in the words of one supporter, "needlessly complicate the debate."[24]

Complicated issues do not disappear, however, simply because we ignore them. The impact of a constitutional amendment on State and local governments would not go away, and it must not be ignored. State and local governments should not be left holding the

---

[21] CNN Late Edition, January 8, 1995.
[22] Washington Times, January 7, 1995, at A1.
[23] 1995 Judiciary Committee Hearings at 3 (statement of Honorable Michael O. Leavitt).
[24] Response of the U.S. Chamber of Commerce to written questions propounded by Senator Leahy.

bag and having to raise their taxes so that the Federal government can appear to pare its deficit.

A. Ratification of the proposed amendment would result in the imposition of greater financial burdens on State and local governments

In its January 19, 1995 letter to the Committee analyzing the impact of the proposed constitutional amendment, the Congressional Budget Office notes:

> [S]teps to reduce the deficit so as to meet the requirements of this amendment could include cuts in Federal grants to states, a smaller Federal contribution towards shared programs or projects, an increased demand for state and local programs to compensate for reductions in Federal programs, and/or an increase in Federal mandates imposed on states or localities.

Can anyone honestly deny that this balanced budget amendment will likely shift burdens to State and local government? We need only remember our recent history: In the 1980s, tax reductions for the wealthy and a bloated defense budget resulted in burgeoning deficits and massive reductions in the amounts of Federal grants and assistance to the States. The Senate Committee on Governmental Affairs reports that Federal aid to State and local governments fell sharply in the 1980s. Indeed, during those years, Federal funds went from 18.6% of State and local revenues to only 13.2%, a drop of almost one-third. S. Rep. No. 104–1, 7–8. In order to meet the critical needs that were left unmet by these Federal reductions, local and State property and other taxes had to be increased in many States across the country.

If the proposed constitutional amendment were ratified, we would likely enter another period in which State and local taxes were significantly increased to pay for the shifts in the cost burdens and State and local government being left to catch those who fall through a shredded Federal "safety net" of nutrition, housing, education and medical care programs.

As Governor Roy Romer, of Colorado, cautioned in his testimony before the Constitution Subcommittee earlier this year: "Before we take on that kind of burden [from the balanced budget amendment], the people of Colorado need to understand the impact such a burden will have on their daily lives."[25]

This is the ultimate budget gimmick—passing the buck to the States. The U.S. Treasury Department recently released a study of what may happen to State and local taxes under the proposed constitutional amendment. Assuming that Social Security and defense cuts were "off the table," the Treasury Department's analysis predicts cuts in Federal grants to States of $71.3 billion and cuts of an additional $176.4 billion in other Federal spending that directly benefits State residents in such programs as Medicaid, highway funds, Aid To Families With Dependent Children (AFDC), education, job training, environment, housing and other areas.

---

[25] Hearings on Balanced Budget/Unfunded Mandates before the Senate Judiciary Subcommittee on the Constitution, 103rd Cong., 2nd Sess. (January 3, 1995) (Statement of Honorable Roy Romer at 2).

The Treasury Department also estimated how much each State's taxes would have to be raised if the State attempted to offset the reduction in Federal grants necessitated by passage of the proposed constitutional amendment.[26] As the following chart shows, the results are startling.

Balanced budget amendment—Impact on States required State tax increases

State	*Required State tax increase in percent*
Alabama	16.4
Alaska	9.8
Arizona	10.4
Arkansas	16.5
California	9.2
Colorado	11.8
Connecticut	11.2
Delaware	7.2
DC	20.4
Florida	10.2
Georgia	12.0
Hawaii	6.8
Idaho	9.9
Illinois	11.6
Indiana	13.8
Iowa	10.9
Kansas	13.0
Kentucky	14.5
Louisiana	27.8
Maine	17.5
Maryland	9.9
Mass.	12.6
Michigan	13.2
Minnesota	9.4
Miss.	20.8
Missouri	15.5
Montana	19.8
Nebraska	13.3
Nevada	6.2
N.H.	17.6
New Jersey	12.7
New Mexico	12.9
New York	17.4
N. Carolina	11.1
N. Dakota	19.7
Ohio	14.4
Oklahoma	12.4
Oregon	12.2
Penn.	12.7
R.I.	21.4
S. Carolina	14.3
S. Dakota	24.7
Tennessee	19.5
Texas	14.0
Utah	11.4
Vermont	17.4
Virginia	8.2
Washington	8.4
W. Virginia	20.6
Wisconsin	10.3
Wyoming	18.7

A February 1994 study by the Wharton Econometrics Forecasting Associates likewise concludes that a balanced budget amend-

[26] Letter from Joyce Carrier, Deputy Assistant Secretary for Public Liaison, Department of Treasury to the Honorable Howard Dean, Chairman, National Governor's Association (January 12, 1995).

ment would devastate the States' economies. In particular, the study found that such an amendment would cause severe job losses—an average of 135,000 jobs lost per State by 2003—and a drastic cut in personal income—an average of 13.5% by 2003.

Reduction of the Federal deficit should not be financed by unfairly increasing the burdens or other jurisdictions and requiring our partners in State and local government to pay for the profligate budgetary practices of the Federal Government. Most importantly, working people can afford tax increases no more easily simply because they are imposed by State and local authorities, rather than by the Federal government.

Governors, local authorities and the people of every State are correctly concerned about the potential "double whammy" of S.J. Res. 1: increased shifting of responsibility from the Federal Government to State and local governments, at the same time that direct Federal assistance is being reduced or terminated. Mayor Jeffrey N. Wennberg, of Rutland, Vermont, testifying this month on behalf of the National League of Cities, warned that "[a]ny balanced budget amendment would almost certainly increase unfunded mandates on cities and towns as well as decrease what little Federal assistance currently remains to fund existing mandates."[27]

B. No statutory ban on unfunded mandates can bind Congress

Legislation such as S.1, the so-called "Unfunded Mandate Reform Act of 1995," offers minimal protection from the likely shift of burdens to State and local government. Even if enacted, S. 1 would not become effective until 1996 and, by its terms, applies only to legislation introduced on or after it becomes effective. It would not apply to current legislation and programs or to unmet needs that arise from cutbacks in Federal assistance.

As Governor Roy Romer recently testified:

> [T]he Governors are concerned that attempts to balance the Federal budget will come at the cost of states and localities. I appreciate that we may see a Federal provision protecting state and local governments from new unfunded mandates. But this will not protect us from having to pick-up the cost of programs, such as child care, mass transit and education, that were previously supported with Federal funds.[28]

Moreover, it is axiomatic that mere legislation restricting unfunded Federal mandates cannot prevent Congress from waiving or ignoring that legislation in order to comply with a constitutional mandate for a balanced Federal budget. Governor Michael O. Leavitt analogized unfunded mandates legislation to a "barrier of sand bags" that will not hold up against a balanced budget amendment, which is "a structural barrier of concrete and steel."[29]

Legislation by its nature is subject to modification or waiver by passage of legislation by a simple majority in Congress. It is not irrevocably binding on future Congresses. Mayor Wennberg pre-

---

[27] H.J. Res. 1: Hearings before the House Judiciary Subcommittee on the Constitution, 104th Cong., 1st Sess. (1995) (statement of Honorable Jeffrey N. Wennberg at 5) (hereinafter House Judiciary Hearings).

[28] Senate Judiciary Subcommittee Hearings (statement of Honorable Roy Romer at 2).

[29] 1995 Judiciary Hearings (statement of Honorable Michael O. Leavitt at 3).

dicted that "[t]he pressure to order state and local spending will grow geometrically under a balanced budget amendment unless an equally powerful restriction on [unfunded Federal] mandates is enacted."[30]In the absence of constitutional protection against unfunded Federal mandates, Governor Howard Dean of Vermont, the Chairman of the National Governors Association, described "a vote for such a balanced budget amendment as a vote to raise state and local taxes."[31]

In light of these concerns, it would irresponsible for Congress to propose a constitutional amendment before it has determined how the requirements of the amendment will be implemented, how the State will be affected, how our partnership with State and local government will be altered, and what kinds of additional responsibilities and financial burdens State and local governments will be called upon to meet. See part II, supra.

We ill serve our State and local governments, and ultimately our constituents, by not considering and not assembling the information necessary for them to consider the likely impact at the State and local level of ratification of the proposed constitutional amendment. Before they consider such an amendment, they have a right to know how we in the Congress intend to meet out obligations to eliminate Federal deficits under this constitutional amendment, given that the manner by which we do so will likely affect their responsibilities and increase their burdens for many years to come. And they have a right to know what additional responsibilities ratification of this constitutional amendment would likely impose on them.

IV. THE PROPOSED CONSTITUTIONAL AMENDMENT IS UNSOUND ECONOMIC POLICY

That a balanced budget amendment is unsound economic policy is a view shared by a hundreds of the Nation's most respected economists, including at least seven Nobel Laureates, as well and present and former government officials, including the former Chair of President Nixon's Council of Economic Advisors, Herbert Stein, and the current Director of the Office of Management and Business, Alice Rivlin.

A. The proposed amendment would hamper the government's ability to deal with recessions and natural disasters

Tying the Nation's fiscal policy, and with it the economic prosperity of its citizens, to the arbitrary political schedule of Congress is both futile and reckless. The proposed constitutional amendment can no more prevent a recession than it can an earthquake, but it can restrict our ability to deal with the effects of both. The constitutional straitjacket in which the advocates for the proposed amendment would put our national economic policy could well be disastrous.

In a March 1993 report, the General Accounting Office detailed the dire implications for our Nation's economy if the balanced budget amendment were ratified:

---

[30] House Judiciary Hearings, (statement of Honorable Jeffrey N. Wennberg at 1).

[31] Governor Howard Dean, "Trickle-Down Tax Increase," Washington Post, January 19, 1995, at A25.

> The Federal budget's unique macroeconomic role could be compromised by a strict balanced budget mandate. For example, the federal budget acts as an automatic stabilizer during economic downturns primarily because spending is maintained as revenue declines, but also because spending for unemployment assistance and other forms of aid rises. However, it could be turned into a destabilizing influence if the mandated response to a recession were an automatic spending cut or tax increase that could only be overridden by a three-fifths majority vote, as proposed in recent amendments.

Although the Committee majority outlines the dangers of a budget deficit, their report fails to address how the proposed amendment will affect the Federal Government's ability to stabilize our economy during times of economic stress. It ignores the testimony of OMB Director Rivlin at this year's hearing:

> [E]nforcing a rule that we must balance the budget every year, regardless of the state of the economy, would be a big economic mistake. Now one can think that, and still think that budget deficits ought to be much smaller than they are now, and I do believe that.
>
> But if we were living in a world in which the budget had to be balanced every year, when a recession threatened—and we have not repealed the business cycle and I do not know how one would do that—when a recession threatened, and people were laid off, they would naturally be paying less taxes.
>
> So there would be an automatic deficit in the Federal budget. Now, if the Congress were then required to rectify that by either cutting spending, or raising taxes, the recession would be worse. People would have less income. More people would be laid off. The Congress might have to cut back on unemployment benefits, and things like that.
>
> So you would have exactly the wrong kind of fiscal policy in a recession. Now, you might say three-fifths of the Congress could be wise enough to foresee that, and do something about it, even if the amendment were in place.
>
> But forecasting is very uncertain. Even people who do it professionally, full time, are not very good at it, and the Congress of the United States is unlikely to be very good at it.
>
> So I think we would have worse recessions, and it would just exaggerate the boom/bust cycle if we had to balance every year.[32]

Similarly, a natural disaster, such as a large-scale flood, earthquake or fire, could require the Federal government to expend large sums to assist the victims and begin to rebuild the ravaged area. The proposed constitutional amendment would make these kinds of sudden emergency expenditures difficult, if not impossible, because they would cause an unauthorized increase in the deficit. Humanitarian efforts could and would be held hostage while the

[32] 1995 Judiciary Committee Hearings at 97–98 (emphasis added).

requisite supermajorities were rounded up in each House of Congress; and a minority in either House could block such efforts altogether or extort other benefits from the majority.

B. The proposed constitutional amendment would undermine the value of treasury bonds and drive up interest costs paid by the federal government

Section 2 of the proposed constitutional amendment provides that "[t]he 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 rollcall vote." As Deputy Secretary of the Treasury Frank Newman explains in a letter to Senator Sarbanes, this supermajority requirement will hamper the ability of the Federal government to finance the debt and increase the interest costs paid by the government, and the taxpayers.

> First, the proposed Amendment's requirement for a three-fifths majority of each House to raise the debt limit raises significant problems for the stability and cost of Treasury financing because a minority in either House could hold our Government's finances hostage.
>
> The Treasury sells over $2 trillion of debt each year, mainly to refinance maturing debt issues, as well as to finance the deficit and other cash needs. Increasing market uncertainty about our ability to sell debt would increase Treasury's interest rates and thereby increase the interest expense for taxpayers. Interruptions in our legal ability to sell debt could risk default on the Government's financial and programmatic obligations, with negative financial, economic, legal, and human consequences.
>
> Second, even if the budget is fully balanced, the proposed debt limit provision of the Amendment would be virtually unworkable. There are legitimate reasons for the debt to increase even with a balanced budget, and a constitutionally constrained limit could create significant problems in financing Congressionally mandated programs even after these programs have been fully authorized, appropriated and accounted for in the balanced budget. Cash requirements, and the corresponding debt issuance, can vary from year to year due to timing mismatches in outlays and receipts and the vagaries of the calendar. * * *
>
> Third, cash requirements can vary from one fiscal year to the next. In the area of federal deposit insurance, for example, it is difficult to estimate the timing and cost of bank and thrift failures. Also, resolving bank or thrift failures requires the deposit insurer to have working capital funds in order to hold assets in some years until they can be sold to recover the Government's funds in subsequent years. These potentially large and unpredictable changes would affect outlays and debt subject to limit and would complicate efforts to balance the budget each year. * * *
>
> Finally, the Amendment's provisions would make it harder to pass programs with least-cost financing and easier to pass programs in forms which can cost the taxpayers

> real money. For example, because of our lower cost of financing compared with other borrowers, purchasing essential capital assets is usually cheaper for the Government than leasing over several years, but a purchase would have a bigger one-time impact on the budget, as well as on the debt limit. Additionally, more costly off-budget mechanisms, such as Refcorp, could be exempt from the three-fifths requirement.[33]

It is thus ironic, but true, that because of the supermajority requirement for increasing the debt limit, the proposed constitutional amendment could significantly increase the cost of refinancing the debt, and thereby exacerbate the deficit.

C. The experience of the atates does not support passage of the proposed constitutional amendment

The Committee majority ignores the inevitable negative consequences of the proposed constitutional amendment. It points instead to the experience of the forty-eight States that have balanced budget requirements. But for the reasons stated below, using the States as models for the impact of the proposed constitutional amendment is inappropriate, however.

The States do not have the critical role in forming national economic policy and in stabilizing our economy that the Federal government has, nor are they responsible for overseeing a foreign policy or our national defense.

Moreover, the States are hardly the model of responsible budgeting that advocates for the proposed constitutional amendment suggest they are. Mr. Edward V. Regan, who was New York State Comptroller from 1979 through 1993, told the Committee that state balanced-budget requirements "have tended to push public officials into manipulative actions and outright deceptions."[34]

Mr. Regan and other experts have noted that states engage in a variety of dubious practices to disguise actual deficits. These include shifting expenditures off budget; manipulating receipt and payment activities; accelerating tax revenues; postponing expenditures; delaying refunds to taxpayers and salaries to employees into a following fiscal year; delaying vendor payments, especially medical payments, to mask deficits in one year; reducing contributions to pensions funds by forcing changed actuarial assumptions; and, borrowing repeatedly against the same assets by refinancing them after the original debt has been mostly repaid.

If these budgeting practices are what we can expect under the proposed constitutional amendment, then the provision will do little more than degrade the Constitution.

Furthermore, more than forty States and virtually all cities except from their balanced budget requirements capital, enterprise or trust funds that are financed primarily by borrowing rather than by current revenue. State and local governments, as well as major corporations, spread the cost of long-term capital investments over time—often over the useful life of the investment. By contrast, the

---

[33] Letter from Deputy Secretary of the Treasury Frank N. Newman to Senator Paul Sarbanes, January 20, 1995.

[34] Statement of Edward V. Regan, 1995 Judiciary Committee Hearings at 1.

proposed constitutional amendment provides no such leeway. See part V, infra.

V. THE PROPOSED CONSTITUTIONAL AMENDMENT WOULD FORBID PLACING SOCIAL SECURITY OFF BUDGET, AND WOULD PROHIBIT ESTABLISHING A SEPARATE CAPITAL BUDGET

A. The proposed constitutional amendment imperils social security

Social Security is unique in our history as an economic safety net for retirees, and as a political covenant with the American people. Unlike other Federal programs, which no matter how worthy, are competitors for a common pool of resources, Social Security is self-sustaining. Social Security currently operates with a surplus that masks the true size of our budget problem, and will do so into the next century. Without explicit exclusion from the balanced budget requirement in the proposed constitutional amendment, the Social Security surplus will prove to be a tempting target for a Congress seeking to balance the budget.

Refusing to exempt Social Security from the proposed constitutional amendment would risk the integrity of the Social Security system and obscure the very problem that the amendment's proponent seek to address—reducing the Federal deficit.

At the Judiciary Committee's consideration of the proposed constitutional amendment, supporters of the amendment suggested that Social Security would be protected as part of the implementing legislation. They asserted that including special provisions in the Constitution to exempt the Social Security Trust Fund would only allow Congress to avoid the provisions of the proposed constitutional amendment by including other programs in the Trust Fund.

But this argument has a critical problem. Section 7 of the proposed constitutional amendment would *prohibit* Congress from exempting the Social Security Trust Fund from the balanced-budget calculation. It states that "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 for those for repayment of debt principal. (emphasis added)"

While Congress undoubtedly has some leeway in interpreting a constitutional amendment, "all" means "all." Section 7 would thus require that all contributions made by Americans to the Social Security Trust Fund be included in the calculation required by Section 1 to determine whether the budget is in balance.

To avoid this outcome, Senator Feinstein offered an amendment during the Judiciary Committee's deliberations to exempt Social Security. But supporters of the proposed constitutional amendment opposed the Feinstein amendment, which was defeated by a 10 to 8 vote.[35]

Enactment of the proposed constitutional amendment thus would essentially force Congress to include the Social Security Trust fund in its balanced-budget calculations. As a result, a historic covenant

[35] Senators Hatch, Thurmond, Simpson, Grassley, Brown, Thompson, Kyl, DeWine, Abraham, and Simon voted to table the Feinstein amendment; Senators Biden, Kennedy, Leahy, Kohl, Heflin, Feinstein, Feingold and Specter voted against tabling.

between the American people and their government would be threatened.

B. The proposed constitutional amendment would prohibit exempting capital expenditures from the balanced-budget calculations

Forty-two States and most cities except from their balanced-budget requirements capital, enterprise or trust funds that are financed primarily by borrowing rather than by current revenue. Like American families when they borrow to purchase a home, State and local governments and most businesses spread the cost of long-term capital investments over time—generally over the useful life of the investment. By contrast, the proposed constitutional amendment prohibits this kind of commonsense accounting.

Some supporters of the proposed constitutional amendment suggest that while a separate capital budget is a good idea, it should be included in implementing legislation, not in the proposed amendment itself. They maintain that constitutional recognition of a capital budget would be a loophole Congress could use to avoid their budgeting responsibilities.

As wasrue with regard to the Social Security Trust fund, however, section 7 of the proposed constitutional amendment would prohibit excluding capital expenditures from the balanced-budget requirement. For that reason, Senator Biden offered an amendment during the Committee's deliberations to exclude "major public physical capital investments" from the balanced budget requirement, limit such capital investments to 10 percent of total outlays each fiscal year, and require a three-fifths vote for passage of the capital budget. By a 12 to 5 vote, however, supporters of the proposed amendment defeated the Biden amendment.[36]

The failure to permit a capital budget may have severe consequences by discouraging long-term investment. Just as a budget deficit unfairly harms future generations, so too does the failure to differentiate capital expenditures from consumption expenditures, because the inevitable result will be more current consumption and less investment in our country's future.

VI. THE PROPOSED CONSTITUTIONAL AMENDMENT WOULD PROMOTE GRIDLOCK AND UNDERMINE MAJORITY RULE

The proposed constitutional amendment would require three-fifths supermajorities in each House of Congress to designate specific amounts by which "total outlays" could "exceed total receipts" in any fiscal year and like supermajorities to increase "the limit on the debt of the United States held by the public." Supporters of the proposal rely on these supermajority vote requirements as the proposed constitutional amendment's "primary enforcement mechanism" to make "Federal deficit spending significantly more difficult." See Committee majority report at 3.

These supermajority voting requirements are inconsistent with the principle of majority rule upon which our constitutional democracy rests. Requiring a supermajority to enact ordinary legislation

[36] Senators Hatch, Thurmond, Simpson, Grassley, Brown, Thompson, Kyl, DeWine, Abraham, Simon, Heflin and Kohl voted to table the Biden amendment; Senators Biden, Kennedy, Leahy, Feinstein and Feingold voted against tabling.

is unprecedented, dangerous and in the words of former Solicitor General Fried, "profoundly undemocratic."[37]

In essence, we are being asked to subject our ability to govern ourselves as a Nation to the tyranny of a minority on economic matters. Rather than setting the stage for the consensus and cooperation we need to confront our fiscal problems, the proposed amendment would direct us toward institutional gridlock and increased opportunities for brinkmanship. Empowering a minority to override the will of the majority is, as Yale University Law School Professor Burke Marshall noted, an "invitation to gridlock"[38] and would undercut congress' ability to address national problems.

Alexander Hamilton painted an alarming picture in The Federalist No. 22 of the destructive consequences of these supermajority voting requirements:

> [W]hat at first sight may seem a remedy, is in reality a poison. To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision) is, in its tendency, to subject the sense of the greater number to that of the lesser number * * * This is one of those refinements which, in practice, has an effect the reverse of what is expected from it in theory. The necessity of unanimity in public bodies, or of something approaching towards it, has been founded upon a supposition that it would contribute to security. But its real operation is to embarrass the administration, to destroy the energy of the government, and to substitute the pleasure, caprice, or artifices of an insignificant, turbulent, or corrupt junto to the regular deliberations and decisions of a respectable majority. In those emergencies of a nation in which the goodness or badness, the weakness or strength, of its government is of the greatest importance, there is commonly a necessity for action. The public business must in some way or other go forward. If a pertinacious minority can control the opinion of a majority, respecting the best mode of conducting it, the majority in order that something may be done must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater and give a tone to the national proceedings. Hence, tedious delays; continual negotiation and intrigue; contemptible compromises of the public good. And yet, in such a system it is even happy when such compromises can take place: for upon some occasions things will not admit of accommodation; and then the measures of government must be injuriously suspended, or fatally defeated. It is often by the impracticability of obtaining the concurrence of the necessary number of votes kept in a state of inaction. Its situation must always savor of weakness, sometimes border upon anarchy.

We should heed Hamilton's warning. The supermajority requirements in the proposed constitutional amendment are intended permanently to fix the congressional scales in favor of those who op-

---

[37] Appropriations Committee Hearings at 85.
[38] Appropriations Committee Hearings at 201.

pose spending, deficit budgets, or tax increases by requiring more than a majority to take action raising the debt limit or allowing a fiscal year deficit. As Hamilton recognized, however, adding these supermajority requirements to the Constitution may lead to the opposite result. Professor Fried cautioned that these requirements would give each recalcitrant member on Congress a potent lever to extract advantages from the majority, with the perverse result that spending, and perhaps deficits, would be increased rather than decreased.[39] Assistant Attorney General Walter Dellinger, as well as other eminent constitutional scholars, have concurred in this assessment.[40]

Nicholas Katzenbach, Attorney General in the Johnson Administration, testified, for example:

> If, due to the size of the existing deficient or poor economic conditions, a balance cannot be achieved without serious damage to other national objectives, a minority, even a shifting minority, is in a stronger position than it would be today to insist that its sacred cow not be the one to be gored. Thus, in reality, the effect of requiring a three-fifth vote to have any deficit may well lead to a far greater deficit than would otherwise occur.[41]

Professor Kathleen Sullivan of Stanford University also testified about the risks of supermajority voting requirements in the balanced budget amendment. She explained:

> [S]upermajority requirements in the context of legislative, substantive policymaking enable a minority of each House to hold the legislative agenda hostage, blocking majority choices until the minority factions can exact the policy concessions that they want from the majority as the price of their acquiescence to a supermajority vote. * * * It might be a particularly acute problem of minority veto in this context, because permitting minority vetoes here might permit people to have their favorite spending program be the ticket to their vote in a request for deficit spending by the majority—which would, of course, be counterproductive in the end. It would increase spending, rather than rein it in.[42]

Not only do the supermajority requirements risk increasing the deficits, they also tempt Congress to engage in more budget gimmickry. Inaccurate and unrealistic budget estimates could be used to avoid triggering the supermajority requirements and empowering a parochial minority faction.[43]

For small States, the supermajority voting requirements in the balanced budget amendment could be particularly devastating. In the House, only 175 votes would be necessary to defeat any appropriations bill that might result in a fiscal year deficit. This means that concerted action by the representatives of as few as six States—California, New York, Texas, Florida, Illinois and Penn-

---

[39] Appropriations Committee Hearings at 85, 88.
[40] Id. at 134.
[41] Appropriations Committee Hearings at 165.
[42] Appropriations Committee Hearings at 179–80.
[43] Appropriations Committee Hearings at 165 (testimony of Nicholas Katzenbach).

sylvania, with a total of 177 representatives—could thwart the requirement of a three-fifths vote to waive the requirement of a balanced budget or increase the debt ceiling. This results in a virtual veto power to a very small number of populous States.[44]

What could this mean for small states? We need look no further than last year's crime bill to see the possible ill effects of a supermajority voting requirement. In authorizing funds for community policing, corrections programs and crime victims assistance, each State received a minimum allocation. Under the proposed constitutional amendment, the most populous states could forestall any deficit spending until such formulas were modified to be based solely on population.

We should not hold our policymaking hostage to House or Senate minorities.[45] Instead of hamstringing Congress with supermajority requirements, we should be seeking ways to increase our ability to take action to reduce the deficit and to deal with a fast-changing and increasingly global economy. To require economic policymaking to be subject to minority rule pursuant to constitutional mandate is to proceed in precisely the wrong direction.

Our Founding Fathers wisely rejected requiring supermajorities to enact legislation. The constitutional exceptions to majority rule can be counted on one hand. Each is justified by the need to protect our Democracy, not to weaken it.[46]

In matters of substantive policymaking within the jurisdiction of Congress, our constitutional democracy has from its inception been predicated upon the concept of majority rule. Federal legislative power is nowhere in the Constitution subjected to a supermajority requirement.

As Professor Sullivan pointed out:

> In Federalist 58 * * * James Madison argued that if 'more than a majority' were required for legislative decision, then 'in all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principles of free government would be reversed. It would be no longer the majority that would rule: the power would be transferred to the minority.' *In other words, according to Madison, requiring a supermajority to pass ordinary legislation turns democracy on its head.*[47]

Former Solicitor General Fried testified with considerable reluctance in opposition to this proposed amendment. He recognized, however, that the proposed supermajority requirements are "against the spirit and genius of our Constitution, which is a char-

---

[44] Appropriations Committee Hearings at 101 (testimony of Professor Burke Marshall, Yale University).

[45] Alternatively, in the Senate the combination of representatives from 21 of the smallest States representing approximately only 11.2% of the nation's population could block any action. Thus, it would encourage unholy alliances and splintering regional combination in order to exact tribute on parochial matters.

[46] The exceptions, each of which requires a two-thirds vote are to override a Presidential veto (Art. I, sect. 3); impeach a federal officeholder (Art. I, sect. 3); approve treaties made by the President (Art. II, sect 2); expel a Member from either House (Art. I, sect. 5); and amend the Constitution. Only the first and last require a two-thirds vote of each House.

[47] Appropriations Committee Hearings at 184–85 (emphasis added).

ter for democracy; that is, for majority rule."[48] His comments are worth quoting at length:

> So I am brought to why a balanced budget amendment in any form, even if workable, is a bad idea. The reason quite simply is that the political judgments underlying the amendment—sound and important though they are—are just that: political judgments, and as such they should not be withdrawn from the vicissitudes of ordinary majoritarian politics that the Constitution establishes as the general rule for our public life as a nation. I am not entitled to have my bias against government spending enshrined in the Constitution, to frustrate the will of my fellow citizens expressed by a majority of our representatives.
>
> Majority rule is so basic a principle of our Constitution that it is nowhere state explicitly, but pervades the whole document. It is striking that in Article I the Constitution nowhere states that the ordinary action of the two Houses shall be by majority vote of a quorum. The Constitution speaks only of a bill 'passed' by a House. Details about the type of majority contemplated come up only in the five instances in which a vote greater than a simple majority is required: veto override, ratification of treaties, the proposal of constitutional amendments to the states, convictions of impeachments and expulsion of members of either House. In none of these instances does the Constitution specify a particular subject matter, as would the balanced budget amendment. Rather, in the first two instances the Constitution seeks to maintain the balance between the two branches. * * * In short, the constitutional norm is that the elected bodies act by majority rule.
>
> * * * My point is that majority rule—imperfect as it is—is the rule that best expresses democracy. * * * To put this all more practically, the balanced budget amendment would just make it that much harder to govern, giving those who want to put obstacles in the way of government new opportunities for obstruction. * * *
>
> People choose a President and Congress to govern. If they govern badly they should be thrown out, not provided with excuses. It is simple enough, and this is what majority rule is about.[49]

Professor Sullivan recognized another important respect in which the proposed amendment undermines our Democracy. It reflects a profound lack of faith in the ability of voters to hold responsible those Members of Congress who irresponsibly drive up the deficit.

> What this amendment is saying to the coal miner, the domestic worker, the office worker, the person on the street is we do not trust you enough to impose fiscal responsibility on your elected officials at the ballot box. * * *

---

[48] Appropriations Committee Hearings at 84.
[49] Appropriations Committee Hearings at 87–88.

> We do not trust you to be as prudent with respect to your children and the deficit burdens that you might impose on them. We think that you are likely to support all this taxing and spending, taxing and spending, and we do not trust politics to cure that.
>
> Now, I think the American people are a good deal smarter than that and capable of taking serious consideration of the issues posed by the deficit, debating them in the crucible of politics, which is the normal forum for fiscal debates to take place, and to fight the tendencies to leave to tomorrow burdens of debt because everyone can understand that concept. * * *[50]

Nowhere in this year's proceedings, in the Judiciary Committee's hearing, its deliberations, or the Committee majority's report do the supporters of the amendment satisfactorily explain this unprecedented departure from the underlying principle of our constitutional democracy. Nowhere does the Committee majority acknowledge the radical damage this proposal will do to the fundamental principles of our democratic form of government.

This proposal for constitutional supermajority requirements has already spawned a series of look-alikes proposals for constitutional amendments addressing revenue measures and so-called unfunded mandates. There will undoubtedly be more.

We should not proceed down the road to constitutionally-mandated minority rule. Rather, let us have "faith in ourselves to act responsibly, and in the people to discipline [us] if [we] do not."[51]

CONCLUSION

Majority rule, in Congress and at the ballot box, has been the central rule of our representative democracy for over two centuries. It should not be tossed aside because some Members of Congress lack the will to make the tough decisions and cast the tough votes needed to balance the budget.

The fault is not in the Constitution. Let us rededicate ourselves to achieving lasting economic prosperity for the Nation in ways that count, and spend no more time debating gimmicks that have no place in the Constitution.

---

[50] Appropriations Committee Hearings at 187–88.

[51] Appropriations Committee Hearings at 85 (testimony of Professor Fried).

XII. SUPPLEMENTAL MINORITY VIEWS OF MR. LEAHY

During the course of the last 15 years, the Senate Judiciary Committee has considered at least 11 resolutions calling for a constitutional amendment purporting to require a balanced budget. Once again, I have voted against it. While I share the anger, frustration and impatience of those who want greater deficit reduction, I am convinced that a constitutional amendment is not the way to achieve that goal.

The current version of such a constitutional amendment, S.J. Res. 1, is not only unnecessary, it is dangerous. It would demean our Constitution, endanger our economy and destabilize the balance of power among our three branches of government that provide us our greatest protection. It would head us down the road to minority rule and undermine our constitutional democracy. It would likely result in a shifting of burdens, responsibilities and costs to Vermont's State and local governments that they are ill-equipped to assume.

Both because of what it would do and what it would not accomplish, I oppose passage of S.J. Res. 1 as the 28th amendment to the Constitution.

I endorse the Minority Views in opposition to S.J. Res. 1. In addition, I submit the following supplemental views:

1. S.J. Res. 1 does not reduce the debt or the deficit

The proposed constitutional amendment will not cut a single penny from the federal budget or deficit this year, next year or any year. By its terms, S.J. Res. 1 cannot, even if passed and ratified, become effective before 2002, seven years and three federal election cycles from now. It is a cop-out.

There are only two responsible ways to reduce our budget deficit—cut spending or raise taxes. The majority report acknowledges that Congress already has all the constitutional power necessary to take these steps. Indeed, in exhorting a balanced budget, Congress is merely being called upon to exercise its currently existing authority.

Proceeding with further consideration of the proposed amendment serves to delay us from making progress against the deficit. In addition, I fear that its passage will be used by some as an excuse to delay further deficit reduction far into the future as they await congressional consideration of the amendment, then the lengthy ratification process in the states, then the consideration of implementing legislation, and then the consideration of budgets consistent with such implementing legislation, which is where the necessary cuts will finally have to be specified.

It makes more sense to cast votes that will cut the deficit now and not wait until the next century. I want to continue to lower the deficit now, not wait until sometime after the year 2002. We

showed in the last Congress that we can make progress on undoing the mistakes of the deficit-building decade of the 1980's without this proposed amendment to the Constitution. The past Congress cut the deficit by 40 percent. As a share of our gross domestic product, the deficit has been cut in half, from 4.9 percent in fiscal year 1992 to a projected 2.4 percent in fiscal year 1995. For the first time since Harry Truman was President, the deficit is projected to decline for three years in a row.

As part of our efforts, we passed legislation that has cut tens of billions of dollars of taxpayer-financed government programs. For example, Senator Lugar and I sponsored legislation that reorganized the U.S. Department of Agriculture to become a more efficient and effective agency. The Leahy-Lugar bill passed Congress at the end of last year and will result in saving over $3 billion and closing about 1,200 USDA field offices—including eight offices in my home State of Vermont.

This proposed constitutional amendment is a "feel good" vote that does nothing now to balance the federal budget or address the federal debt. Many of the same people who so eagerly support S.J. Res. 1 are responsible for the huge and unprecedented budget deficits of the Reagan and Bush years. I am one of seven remaining Senators, who voted against the 1981 Reagan budget package that increased defense spending while cutting taxes—causing our debt to explode. Twelve years of Republican administrations left us with over $2.6 trillion in additional debt.

This proposed constitutional amendment remains now what it was then—political cover for those failed policies of the 1980's and their tragic legacy. Those mistakes continue to cost our country almost half a billion dollars every workday in interest on the deficits rung up during the last two Republican administrations. Indeed, were it not for the interest on this Republican debt, we would have had a balanced budget last year.

Of course, this year there is additional irony in that the Republican Party has assumed majority status in both the House and Senate. As such it can likely pass any budget it wants. That only requires a majority vote. If they want to balance the budget, eliminate the deficit, pay off the debt—they can do all that by a simple majority vote in both Houses. They do not need a constitutional amendment to do any of this, and to do it now. Yet in the opening days of the resumption of Republican control of Congress they are proceeding not toward building consensus of a deficit reduction package but, instead, insisting on consideration of a constitutional amendment whose justification is a lack of political will and political courage by the legislative majority in each House. Instead, we should heed the advice of our former Republican colleague Lowell Weicker, to quit looking for an automatic pilot to make the hard choices and do it ourselves.

2. S.J. Res. 1 will shift burdens to state and local governments

The proposed amendment contains no protection against the Federal Government seeking to balance its budget by shifting costs and burdens to the States. If it were to be passed, ratified and effective, it would be a prescription for a disaster for small States that are ill-equipped to handle the extra load.

Can anyone honestly deny that any impact from a balanced budget amendment would likely be to shift burdens to State and local government? Can anyone deny that we will be sending less assistance to State and local government? As the Minority Views note, during the 1980's Federal contributions to State and local governments fell sharply—a drop of almost one-third. During that same decade, Vermont was forced to make up the difference and had to raise its State income tax rate from 23 percent to 28 percent. In addition, State and local property taxes and taxes of all kinds had to be increased.

That is not the way to cut the Federal deficit—shifting burdens to State and local government and requiring them to raise the revenues necessary to take up the slack. As we state in our Minority Views: "Working people cannot afford tax increases any more easily because they are imposed by State and local authorities." This is the ultimate budget gimmick—pass the buck to the States. I know that the Governor, local authorities and people of my State are vitally concerned about this likelihood.

Recently, in response to a request from Governor Dean, the Treasury Department made a study of what can happen to State and local taxes under the balanced budget amendment and the Federal tax reductions of the so-called "Contract with America." Assuming that Social Security and Defense cuts were "off the table," the Treasury analysis predicts cuts in Federal grants and other Federal spending that directly benefits State residents. Treasury estimates that Vermont would loose over $200 million in Federal assistance and over $400 million in other Federal spending in Vermont. To try to offset these losses, Vermont would have to increase State taxes by 23.9 percent across the board.

These Treasury Department numbers are not the only ones to forecast hardship for the States under a balanced budget amendment. A study released in February 1994 by the Wharton Econometrics Forecasting Associates concluded that a balanced budget amendment would devastate the State's economy. In particular, the study found that such an amendment would cause severe job losses and a drastic cut in personal income. For Vermont, this study predicted a loss of personal income of $1.2 billion, an average of 5.4 percent, and 3,900 lost jobs, resulting in a .5 percent rise in Vermont's unemployment rate.

As I prepare these additional views, the Senate is currently debating how exactly to define "unfunded mandates". My concerns extend beyond what the lawyers would determine were "legally binding obligations" to those programs that respond to basic needs of individuals. Human needs are no less real because they are not set forth in a Federal statute. Hunger and illness do not need statutory definition to cause suffering. If we try to balance the Federal budget by scaling back essential services, we will just as surely be shifting these costs and burdens on State and local governments.

I know that the people of Vermont are not going to let their neighbors go hungry or without medical care and I expect people elsewhere will not either. As much as our churches, synagogues, charities and volunteers will contribute, a large part of the problem and a large share of the costs will fall to State and local governments.

Representative Richard Armey, the new House Republican Majority Leader said a few days ago that he did not want to spell out the effects of this constitutional amendment before it was passed because he was afraid that Congress would not vote to pass it if we knew what it would do. He later reinforced his remark by warning supporters not to reveal where the necessary cuts would be made because "knees would buckle."

Thus, we are deliberately being asked to buy a pig in a poke or, as I believe it should be renamed, a "STEALTH" amendment. I call it "STEALTH" because we do not know and are not supposed to investigate and consider the likely impact, such as the likely burdens that will be shifted to State and local governments. "STEALTH", because that is an acronym for what the amendment will likely become: "The State Tax Enhancement and Local Tax Heightening" amendment.

This vagueness of the terms in the proposed constitutional amendment and the manner in which we are proceeding does not allow us to consider its likely consequences. No record of likely impacts on each State were presented at the Committee hearings. On the contrary, I asked the question of a number of witnesses and none could give a definitive answer.[1] Where is the testimony of the state legislatures and local governments? Where is the careful study of likely impact?

I believe that before we are called upon to consider S.J. Res. 1, we need to know what its impact is likely to be. Certainly before any State is called upon to consider ratification of such a constitutional amendment, it should be advised of the likely effects on its economy and, in particular, on personal income levels and jobs losses in the State. Let us get some answers and know where we are headed.

3. S.J. Res. 1 will encourage budget gimmickry

This proposed constitutional amendment would invite the worst kind of cynical evasion and budget gimmickry. The experience of States with balance budget requirements only bears this out.

Indeed, the majority report describes the State experience as "instructive". I agree, but for different reasons. While the majority report cites the States' experience with balanced budget requirements as proof that the proposed constitutional amendment will work, the testimony presented at the Committee hearing demonstrates the contrary.

The former chief financial officer of New York State, Edward Regan, presented startling testimony that many States with a balanced budget requirement achieve compliance only with "dubious practices and financial gimmicks." These gimmicks include shifting expenditures to off-budget accounts or the financing of certain functions to so-called independent agencies or authorities. States have engaged in a number of other ploys as well to help the bottom line

[1] Senator Leahy asked in written questions: "What is your estimate of the effect on each State's economy and, in particular, on personal income levels and job losses in each State, of requiring a balanced budget?" In response, the American Farm Bureau Federation bluntly stated, "Not known," and the U.S. Chamber of Commerce explained, "The complexity of discerning reliable answers is further heightened by the uncertainty over which programs Congress will decide to cut as it moves to a balanced budget." Former Attorneys General Griffin Bell and William Barr indicated that they had no information on which to answer the question.

and avoid developing red ink, including accelerating revenue receipts such as tax payments, postponing payments to localities and school district suppliers, delaying refunds to taxpayers and salary and expense payments to employees until the next fiscal year, deferring contributions to pension funds or forcing changes in actuarial assumptions, and selling State assets.

The proposed balanced budget amendment does not prohibit the Federal Government from using these same "dubious practices and gimmicks." With Congress facing a constitutional mandate, the overwhelming temptation will be to exaggerate estimates of economic growth and tax receipts, underestimate spending and engage in all kinds of accounting tricks, as was done before the "honest budgeting" effort of 1993. The result will be that those who do business with the Government may never be certain in what fiscal year the Government will choose to pay up or deliver and those who rely on tax refunds can expect extended delays from the IRS.

Passing a constitutional directive that will inevitably encourage evasion, will invite public cynicism and scorn not only toward Congress, but toward the Constitution itself. Let us not debase our national charter in a misguided, political attempt to curry favor with the American people by this declaration against budget deficits. Let us not make the mistake of other countries and turn our Constitution into a series of hollow promises.

4. S.J. Res. 1 is loaded with loopholes

The loopholes in S.J. Res. 1 already abound. One need only consult the language of the proposed amendment and the majority report for the first sets of exceptions and creative interpretations that will allow Congress to reduce the deficit only so far as Members choose to cast responsible votes.

Of course, the proposed amendment itself includes a number of escape hatches, like the three-fifths majority provision of section 1, the waiver provisions of section 5 and the reliance on estimates in section 6.

The majority report chooses to add additional "flexibility". For example, although the proponents of the constitutional amendment have made clear their intention to include the Social Security trust funds, the highway trust funds, the crime trust fund and other self-sustaining funds and programs in their calculations of outlays and receipts, they expressly exempt the Tennessee Valley Authority as "[a]mong the Federal programs that would not be covered by S.J. Res. 1." What other exemptions are contemplated or will be granted? What is the basis or principled distinction for such off-budget matters as Social Security? Why are the user-fee funded operations of the Patent and Trademark Office not exempt? When the Post Office is fully spun off, will its operations and funding be included? What about the FDIC, the RTC, OPIC, loan guarantee programs, and obligations backed by the full faith and credit of the United States but not directly from the Government? What else will be off-budget for purposes of the constitutional amendment?

Further, the majority report ultimately recognizes the arbitrary and artificial nature of the "fiscal year" as a basis for measuring budget balance. The proponents of this constitutional amendment seek in their report to ameliorate the express language of the pro-

posed amendment by according the seemingly straightforward concept "fiscal year" with a flexible definition. According to the majority report "fiscal year" is not subject to "constitutional standing," "does not require an immutable definition," and "other fiscal years could be defined without necessarily straining the intent of the amendment." What this all means is that "fiscal year" can mean whatever a majority in Congress wants it to mean. It may mean one thing this year and another the next. It can be shifted around the calendar as Congress deems appropriate. Watch out for the shifting of "fiscal years" in order to juggle accounts when elections are approaching.

The majority report also explains that in relying on estimates to measure the budget, they need only be "reasonable" and "appropriate". Indeed, the majority report describes bust how much discretion Congress will have in exercising the "appropriate degree of flexibility" when it notes:

> Congress could decide that a deficit caused by a temporary, self-correcting drop in receipts or increase in outlays during the fiscal year would not violate the Article. Similarly, Congress could state that very small or negligible deviations from a balanced budget would not represent a violation of Section 1. If an excess of outlays over receipts were to occur, Congress can require that any shortfall must be made up during the following fiscal year.

Just think about those loopholes.

Congress could decide that it is not violating the proposed amendment because it deems the deficit "a temporary, self-correcting drop in receipts" or "a temporary self-correcting * * * increase in outlays." My guess is that unless it becomes a political bone of contention between political parties as we approach an election, we could go a long time without Congress declaring itself in violation of this proposed amendment.

Congress could state that "very small" or "negligible" violations are not violations of the express directive of the proposed amendment. What is "small", what is "negligible"? To paraphrase the words of Everett Dirksen: "A billion here, a billion there, after a while it does not add up." Does a congressional statement of a de minimis shortfall require a vote, a recorded roll call vote, a simple majority, a so-called "constitutional" majority, a three-fifths majority? Is a congressional declaration of "no violation" binding on the President or the courts?

Under what circumstances is "an excess of outlays over receipts" not a deficit? Under what circumstances are deficits carried forward into other years? Is such a carry forward limited to the next fiscal year or can it be rolled over again and again? Over what period of time may such a carry forward be effectuated. If we can have deficits carried forward, can they also be carried back? Can past successes be netted against future failure? Can surpluses be carried forward, as well? The accountants and tax lawyers are going to have a field day with this.

5. S.J. Res. 1 may harm the economy

This proposed constitutional amendment could be economically ruinous. During recessions, deficits rise because tax receipts go down and various Government payments, like unemployment insurance go up. By contrast, S.J. Res. 1 would demand that taxes be raised and spending be cut during a recession or depression. As Herbert Hoover taught us in the 1930's, that is precisely the wrong medicine at the wrong time.

Of course, a supermajority of both Houses of Congress could waive the balanced budget requirements, but why should we hold economic policy hostage to House or Senate minorities?

Economic policy must be flexible enough to deal with a changing and increasingly global economy. Yet, the requirements of S.J. Res. 1 will tie Congress' hands to address national problems that may necessitate deficit spending. Alexander Hamilton, this Nation's first Secretary of Treasury, vigorously defended Congress' broad powers over the purse and warned against limits on those powers. In words that we should heed today, Hamilton wrote in Federalist Paper No. 36:

> I acknowledge my aversion to every project that is calculated to disarm the government of a single weapon, which in any possible contingency might be usefully employed for the general defense and security.

We should not hamstring the legislative power expressly authorized in Article I, section 8 of the Constitution. Let us not undo that which our Founding Fathers wisely provided—flexibility. Let us not limit choices and accountability. Instead, let us exercise our constitutional responsibilities in the best interests of the American people.

6. S.J. Res. 1 invites constitutional clashes with the executive

This proposed constitutional amendment risks seriously undercutting the protection of our constitutional separation of powers. No one has yet convincingly explained how the proposed amendment will work and what roles the President and the courts are to play in its implementation and enforcement. The majority report concedes that the amendment is "silent about judicial review," but asserts that this provides "the flexibility that an amendment to the Constitution must have."

Notwithstanding this ominous silence, even the proponents of this proposed amendment concede that the President would have a constitutional duty to uphold and enforce it. They fail to reconcile this presidential duty with the purportedly "self- enforcing" nature of this proposed amendment, however. A balanced budget amendment is not merely an open invitation to the President to control federal spending, it would mandate the President's involvement in achieving a balanced budget.

Suppose, for example, that estimated receipts and outlays proved wrong and that, nine months into a fiscal year, it became clear that outlays would exceed receipts. This is hardly a fanciful notion—OMB just forecast an increase of almost $25 billion in the deficit for fiscal year 1995 over its previous estimates.

In such a situation, arguments would be heard that S.J. Res. 1 allowed the President to exercise power to impound funds—not just a line-item veto, but the unfettered authority to control all spending and all cuts through the rest of the fiscal year. In the absence of implementing legislation or prompt congressional action, the President would likely argue that the Executive was ensuring that the Constitution was being "faithfully executed," as is its duty. Not since the dark days of Watergate and the Nixon impoundments have we faced such a constitutional crisis, but S.J. Res. 1 invites it.

Instead of creating future constitutional crises, let us do the job we were elected to do. Let us make the tough choices and cast the difficult votes and make progress toward a balanced budget.

7. S.J. Res. 1 will shift power to unelected judges

Constitutionalizing the budget and economic policy would inevitably throw the nation's fiscal policy into the courts, the last place issues of taxing and spending should be decided.

This proposed constitutional amendment flatly states: "[T]otal outlays for any fiscal year shall not exceed total receipts for that fiscal year." But who, after all, is going to determine what is an "outlay" and what is a "receipt"? What happens if estimates and projections are off and during the course of a year, at its end or thereafter, there is reason to believe that "total outlays" do exceed "total receipts"? Does the President then have the unilateral authority to cut programs to ensure compliance? Do the courts? Can program beneficiaries or taxpayers who rush to court first, frame the court's decision regarding which spending to enjoin? Can the courts be called upon to require increased revenue—that is higher taxes—to comply with the constitutional imperative of balance?

Robert Bork, among others, points out that once fiscal policy is made a matter of constitutional law the courts could be called upon to interpret and enforce it. Former Attorney General Barr raised concerns during Committee hearings that state courts might involve themselves, as well.

The effect of the proposed amendment could be to toss important issues of spending priorities and funding levels to thousands of lawyers, hundreds of lawsuits and dozens of federal and state courts. If approved, S.J. Res. 1 would have let Congress off the hook by kicking massive responsibility for how tax dollars are spent to unelected judges. Constitutional scholars may not agree on many things, but one thing they do agree on is that the judiciary will be called upon to decide important matters of compliance with S.J. Res. 1.

8. S.J. Res. 1 erodes the fundamental principle of majority rule

Our Founding Fathers rejected requirements of supermajorities. We should look to their sound reasons for rejecting supermajority requirements before we impose on our citizens a three-fifths supermajority vote to adopt certain budgets.

Alexander Hamilton painted an alarming picture in Federalist Paper No. 22 of the consequences of the "poison" of supermajority requirements that serve "to destroy the energy of the government, and to substitute the pleasure, caprice, or artifices of an insignifi-

cant, turbulent, or corrupt junto to the regular deliberations and decisions of a respectable majority." These supermajority requirements are a recipe for increased gridlock not more efficient action. As Hamilton noted long ago: "Hence, tedious delays; continual negotiation and intrigue; contemptible compromises of the public good."

Such supermajority requirements reflect a basic distrust not just of Congress, but of the electorate itself. I reject that notion and am prepared to keep faith with and in the American people.

9. S.J. Res. 1 will result in distressing surprises

There is much truth to the axiom that the "devil is in the details." We do not have the details for the proposed constitutional amendment, S.J. Res. 1. Indeed, the majority report admits that the proposed amendment "does not specify the process that Congress must follow in order to achieve a balanced budget." The proposed constitutional amendment uses such general terms that even its sponsors and proponents concede that implementing legislation will be necessary to clarify how it will work.

What are the issues that proponents seek to defer to implementing legislation? Definitions of the programs that will be off-budget, explanation of the roles of the courts and the President in executing and enforcing the amendment, directions on what will be considered "compliance" with the amendment, guidance on how much of a deficit may be financed and carried over to the next year, and other core matters that are critical to our understanding of what this amendment means.

I do not think that Congress should be asked to amend the Constitution by signing what amounts to a blank check. Nor should any State be asked to ratify a pig in a poke. In the interests of fair disclosure, Congress should first determine the substance of any implementing legislation, as it did in connection with the 18th Amendment, the other attempt to draft a substantive behavioral policy in to the Constitution.

Proper consideration of how the amendment would be implemented before having to vote on it need not affect the measure's distant effective date. Let us get the horse in front of the cart and not seek to evade accountability. This proposed constitutional amendment is hardly the work of an "accountable deliberative legislative assembly," as the majority report contends. Rather, its proponents seek to delay until after its approval any attempt to specify how the proposed amendment would work and how it would be implemented. For my colleagues who are enamored of popular polling, I note that current polls demonstrate that over 75 percent of the American people are sensible enough to believe that we should specify how we intend to cut the deficit before we vote on S.J. Res. 1.

10. S.J. Res. 1 is not constitutionally necessary

Amending the Constitution of the United States should not be a matter undertaken lightly, but only after careful deliberation. Instead of a sloganeering amendment, what we need is the wisdom to ask what programs we must cut and how much we need to raise revenues, and the courage to explain to the American people that

there is no procedural gimmick that can cut the deficit or the debt. Let us not proceed with a view to short-run popularity, but with vision of our responsibilities to our constituents and the nation in accordance with our cherished Constitution.

Last year, our distinguished colleague from West Virginia, Senator Robert C. Byrd, conducted a series of extraordinary hearings before the Appropriations Committee on this subject. I urge all of my Senate colleagues to review those comprehensive hearings and not merely to rely on the slender reed of our Judiciary hearing on the second date of this Congress.

I am confident that upon serious reflection the Senate should collectively determine that S.J. Res. 1 does not meet the requirements of Article V of the Constitution for proposal to the States—it is not constitutionally "necessary".

I look forward to our discussion and debate. I hope that we will use this opportunity to try to learn more about how the proposed amendment would work, how we might reach a balanced budget, what cuts will be needed, how we intend to protect against the temptation to shift burdens onto local and State governments, how we will ensure that the safety net is not shredded, how the proposal would be implemented and enforced, what effects it will have on our basic constitutional protection of separation of powers and what consequences it would have for our democratic form of government.

XI. ADDITIONAL VIEWS OF MR. HEFLIN

I believe that the opportunity to adopt a constitutional amendment requiring a balanced federal budget and submitting it to the states for ratification may now be at hand, and I look forward to help guiding its passage on the floor of the U.S. Senate. I have introduced such a proposal at the beginning of each Congress, and the proposal I introduced this year, S.J. Res. 13, is identical to measure, S.J. Res. 1, which I have cosponsored and which the Judiciary Committee has just considered and approved by a vote of 15–3. S.J. Res. 1 will now go to the floor for debate and a vote by the entire body, and I expect it will receive the necessary two-thirds vote of the entire membership of the Senate.

I congratulate Chairman Hatch on the way and manner in which he expeditiously conducted the committee hearing and mark-up. I and a number of Senators were allowed to testify at the hearing on January 5, 1995, and a wide cross section of additional witnesses were heard at the committee hearing. Further, a number of amendments were offered, debated, and voted upon publicly at the committee executive meetings which were held on January 17 and 18, 1995. This is American democracy at work and, in my judgement, at its best—there was no effort to stifle debate nor prevent votes on any amendments.

I want to reiterate a couple of points that I made in my floor speech when I introduced identical legislation on this issue. First, it is particularly important that the Senate and House of Representatives go ahead and act now. Interest rates are going up * * * how far we do not yet know. A major portion of our nation's operating budget—$295 billion in fiscal year 1995—deals with debt service. Interest payments are the second largest expenditure of the federal budget—interest payments are greater than defense spending.

It does not take a rocket scientist to see how this cancer is eating up resources which are badly needed in other areas such as infrastructure repair, the battle against cancer, the war on drugs and crime, and health care. If interest rates were to double from current rates, and they well could, one can plainly see that the amount of money needed to service the federal debt would immediately soar also further eroding our nation's ability to carry out its constitutional responsibilities.

I want to emphasize several matters of particular interest to me. First, Section 5 contains a provision allowing a waiver of the amendment in the time of war or where the United States finds itself engaged in military conflict which causes an imminent and serious threat to national security. That provision reads as follows:

> Section 5. The Congress may waive the provisions of this article for any fiscal year in which a declaration of war is in effect. The provisions of this article may be waived for

> any fiscal year in which the United States is engaged in military conflict which causes an imminent and 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.

Section 5 maintains the traditional approach that Congress has given throughout our nation's history towards national defense: when the Congress and the President have formally declared war, financing the war effort should have priority with regard to our nation's budget. The waiver mentioned in the first sentence of Section 5 would require a concurrent resolution of Congress, but it would not have to be submitted to the President for approval. The waiver mentioned in sentence two of Section 5, however, requires a joint resolution of Congress, which would have to be submitted to the President for approval.

Earlier versions contained only the first sentence of Section 5 relating to a "declared" war. In 1982, I offered an amendment on the floor of the Senate, which failed to carry by a few votes, which would have contained a provision also allowing for a waiver of the amendment where the United States found itself in a serious military conflict, yet short of an outright formally declared war. Working with my colleagues, we were successful subsequently in including such a provision which is now sentence two of Section 5 of S.J. Res. 1.

This particular provision of Section 5 goes to the problem of national security in as much as this nation has fought relatively few declared wars as compared to the vast number of "conflicts" or undeclared wars. The Korean Conflict, the Vietnam War, and Gulf War were all undeclared wars which have occurred within the last fifty years of our nation's history.

I firmly believe that Congress should have the option to waive the requirement for a balanced budget in cases of less than an outright declaration of war. Looking back over the history of our nation, we find that we have had only five declared wars: the War of 1812, the Mexican War, the Spanish-American War, the First World War, and the Second World War.

While the United States has engaged in only five declared wars, it has engaged in hostilities abroad which required no less commitment of human lives or American resources than declared wars. In fact, our nation has been involved in approximately 200 instances in which the United States has used military forces abroad in situations of conflict.

The most recent encounters of the United States in armed conflict with enemies have been undeclared wars. We fought the Gulf War without a declaration of war. In addition, we fought both the Vietnam War and the Korean Conflict without formal declarations of war.

In other instances, American troops have been sent to foreign countries in times of crisis—Lebanon in 1958, and the Dominican Republic in 1965. Other critical situations, including the confrontation in the Formosa Straits in 1955, the Cuban Missile Crisis in 1962, the seizure of the *Mayaquez* in 1975, have been met by the use of American military forces.

There are other instances in which our nation has been involved in conflicts, short of a formally declared war, but which have been of a serious nature. During 1914 to 1917, a time of revolution in Mexico, there were at least two major armed actions by U.S. forces in Mexico. The hostilities included the capture of Vera Cruz and Pershing's subsequent expedition into northern Mexico.

In June and July of 1918, marines landed at Vladivostok to protect the American consulate. The United States landed 7,000 troops which remained until January 29, 1919, as part of an allied occupation force. In September of 1918, American troops joined the allied intervention force at Archangel and suffered some 500 casualties.

In 1927, fighting at Shanghai caused American naval forces and marine forces to be increased in the area. In March of 1927, a naval guard was stationed at the American consulate at Nanking after Nationalist forces captured the city. A United States and British warship fired on Chinese soldiers to protect the escape of Americans and other foreigners. By the end of 1927, the U.S. had 44 naval vessels in Chinese waters, and 5,670 men ashore.

Thirty-one years later when a pro-Nasser coup took place in Iraq in January of 1958, the President of Lebanon sent an urgent plea for assistance to President Eisenhower, saying Lebanon was threatened by both internal rebellion and indirect aggression. President Eisenhower responded by sending 5,000 marines to Beirut to protect American lives and help the Lebanese maintain their independence. This force was gradually increased to 14,000 soldiers and marines who occupied strategic positions throughout the country.

This country can be faced with military emergencies which threaten our national security, without a formal declaration of war being in effect. The most recent circumstance occurred on January 12, 1991, when the Senate, agreeing with the House of Representatives, voted by a slim margin of 52–47 to approve the use of force to stop Iraqi aggression against the state of Kuwait. This slim margin illustrates how difficult it would be without my provision, to achieve the needed sixty votes to take the budget into a deficit posture in order to finance the Gulf War. Thus, circumstances may arise in which Congress may need to spend significant amounts on national defense without a declaration of war. Congress and the President must be given the necessary flexibility to respond rapidly when a military emergency arises.

I also support Senator Feinstein's amendment to exempt Social Security from the balanced budget calculation. In the Budget Enforcement Act of 1990, Congress clearly declared that the Social Security trust fund is off-budget. In the past, the surplus which is accumulating in the trust fund has been used to mask the true size of the federal budget deficit.

Social Security is a self financing, contributory retirement program—workers must contribute 6.2 percent of their salaries to the program and employers are required to match that amount. These funds, by law, are held in a trust, and the American people have a right to expect that Congress will maintain the integrity of that fund.

The funds are now in surplus and this is expected to continue until the year 2012, when the baby boom age begins to dramatically draw these funds down as they reach retirement age. Thus,

failure to exempt the Social Security trust funds from the balanced budget calculation will surely place the trust fund in jeopardy.

Finally, some of the criticism that has been raised centers on the concerns that such an amendment places fiscal policy in a straitjacket and upsets the balance within Congress, and between the executive and judicial branches of Government. These two issues are legitimate points of discussion; however, the real point to be remembered is that the nation's budget deficits are simply out of control, and a drastic dose of constitutional medicine is required and must be taken in order to restore this nation's health.

XIV. MINORITY VIEW OF MR. FEINGOLD

During the Committee's consideration of S.J. Res. 1, I proposed but did not press for a vote on a Sense of the Senate Resolution focused upon the fact that proposals being advanced in the 104th Congress to enact middle class and other general tax cuts are inconsistent with the goal of reducing the federal deficit and achieving a balanced budget. I intend to raise this issue at an appropriate point on the Senate floor and take this opportunity to address this conflict.

I strongly believe that deficit reduction should be our highest economic priority although I oppose the proposed constitutional amendment because I do not believe that it is an effective mechanism for bringing about real deficit reduction. Indeed, I believe that the proposed constitutional amendment will only make deficit reduction and a balanced budget more difficult to achieve.

But irrespective of one's views of the efficacy of the proposed constitutional amendment as a tool for deficit reduction, it is essential to recognize that we simply cannot cut taxes and sufficiently reduce the federal deficit at the same time.

It is truly ironic that just as the 104th Congress begins its deliberations over the balanced budget amendment to the Constitution, a bidding war appears to be starting over proposed tax cuts. Some proponents of such cuts have not even identified any areas for spending reductions to offset the costs of these tax cuts. The Administration has been far more responsible in identifying specific areas for spending reductions to pay for proposed tax cuts. Yet, those spending reductions would be better used to continue to reduce the federal deficit and move us towards a balanced budget.

The way to reduce the federal deficit is to enact specific spending cuts. Enacting those spending cuts is a difficult and painful process, as we have learned in the last two years. Every federal program which is cut has a constituency that struggles to maintain its funding, and many Americans, from veterans to farmers, have made real sacrifices in the past two years as the federal government has reduced spending in specific areas in order to achieve deficit reduction. The savings produced by the additional spending cuts under consideration should be used to reduce the federal deficit, not offset new tax cuts.

During the 103rd Congress, we made a good start on reducing the federal deficit created in large part by the irresponsible budget policies of the 1980's. President Clinton's 1993 deficit reduction package was a critical turning point in our fight to reduce the deficit. We are now in the third straight year of progressively lower deficits, something that has not happened since Harry Truman was President.

But there is still a great deal to be done, and there are signs that the progress that we have made is at considerable risk. The new

tax cut fever is the most recent example of how far we seem to be straying from the path toward economic stability.

It is interesting to note that some of the most vocal supporters of the proposed constitutional amendment are also leading the stampede to cut taxes. That should serve as a warning to anyone who believes that the proposed change to our Constitution will do anything to actually lower our budget deficits.

Though obviously contradictory economic policy goals, the balanced budget amendment and various tax cut proposals do share one common theme—they are both politically appealing proposals that involve no tough or painful choices.

Indeed, those who advocate both the balanced budget amendment and new tax cuts also refuse to reconcile the inconsistencies of the two proposals by offering a specific plan to balance the budget while cutting taxes.

Yet, contrary to the conventional and cynical wisdom that produces both the proposed constitutional amendment and the new tax cut proposals, many taxpayers recognize that these tax cut proposals, however appealing, are poor public policy. They recognize the importance of reducing the federal budget deficit, and getting our nation's fiscal house in order.

In just the last few weeks, phone calls and letters to my office have been running about 10 to 1 in favor of reducing the deficit over cutting taxes.

A gentleman from Birnamwood, Wisconsin, wrote to me:

> By all means, cut government spending. But use that savings to eliminate the deficit and pay down the debt that threatens to overwhelm us. That is the only responsible thing to do.

A woman from Cornucopia, Wisconsin, wrote:

> * * * I can't figure out why this is happening—this race to cut taxes—when the majority of people, according to all I've seen, heard, and read, don't care. We want the deficit cut, and we want our money spent more wisely * * *

And a gentleman from Waupaca, Wisconsin, wrote this to me:

> I want you to know that I strongly support your position against the proposed tax cuts. With an income of $50,000 I guess I would benefit from most of the tax cut plans, but I feel the benefit would be short lived and would clearly be detrimental to the country. I hope that you will continue to oppose these tax cut plans that are clearly nothing more than attempts to buy votes.

These views are widely shared outside Wisconsin as well. A USA Today/CNN poll published on December 20 found that 70 of those polled said if Congress is able to cut spending, then reducing the deficit is a higher priority than new tax cuts.

It is frustrating to hear constituents, who could certainly use the money, urge Congress to make deficit reduction a higher priority than tax cuts, and then watch the rush to see who can propose the biggest tax cut.

With or without a balanced budget amendment, we will not make any progress on reducing the federal deficit if we get into another bidding war on tax cuts.

XV. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the committee finds no changes in existing law caused by passage of Senate Joint Resolution 1.

○