I believe that, rather than tightening the embargo and further isolating Cuba, the United States should expand contact with the Cuban people and enter into negotiations on all issues of mutual concern to our two countries, including the lifting of the economic embargo.

I say this not because of any regard for the Government in Havana, a one-party state with a record of intolerance toward dissident voices within the society. Rather, I say this because, if our country and Cuba are to break the impasse that has existed in our relations for more than three decades, someone must take the first step in that direction. I believe it is in the U.S. national interest to take that first step—to agree to sit down at a negotiating table, where all issues can be discussed.

In the meantime, there should be greater contact between our own citizens and the Cuban people. Such contact will serve to plant the seeds of change and advance the cause of democracy on that island. Just as greater exchange with the West helped hasten the fall of communism in Eastern Europe and the former Soviet Union, so, too, it can achieve the same results much closer to our shores.

Liberal Democrats are not alone in holding this view. Former President Richard Nixon wrote shortly before his death last year, ''we should drop the economic embargo and open the way to trade, investment, and economic interaction.'' Learned people across the political spectrum have made similar comments and observations about the policy.

Why? Because they have all observed across the globe that policies which foster greater commerce and communication between countries work and those which engender isolation and enforced misery don't work. It has been impossible for those who would seek to defend the status quo to cite an instance in modern history where a policy of forced isolation has successfully transformed a totalitarian state into a democracy.

United States travel restrictions to and from Cuba are among the most prohibitive in the world—this to an island that is only 90 miles from our shores. At this point, only United States Government officials and journalists have unrestricted access to Cuba and only a small percentage of Cubans who apply are allowed to travel to the United States each year. Legislation recently introduced in the Senate would restrict binational contacts even further.

Mr. President, do we as a nation not have enough faith in the power of our democratic system to let contact between our citizens and other peoples flourish? In my view, the strongest advocate for democracy and a free-market economy would be a Cuban student or family member who had recently visited the United States and seen the sharp contrast between our way of life and that in Cuba.

Current policy not only denies the United States the opportunity to promote positive change in Cuba, but it increases the likehihood of widespread political violence and another mass exodus of refugees to Florida. The Cuban Government, which is vigorously pursuing expanding political and economic ties with the rest of the world, is unlikely to give into unilateral United States demands. Nor is there much indication that a viable opposition currently exists within Cuba to wrest power from existing authorities.

We have made it very easy for Cuban authorities to justify the lack of political freedom in Havana. They simply point to the external threat posed by a hostile U.S. policy. That justification would lose all credibility were we to adopt a more reasoned U.S. policy. Cuban authorities would then be hard pressed to justify the denial of political rights and economic opportunities that the Cuban people readily observe elsewhere.

Mr. President, it will be an incredible legacy of whatever administration succeeds in achieving what all the United States administrations of the past 30 years have failed to do—to bring about the peaceful transition to democracy in Cuba. At last all the peoples of the hemisphere would truly be one family, united by common principles and values.

It will require political courage to abandon this antiquated and ineffective policy. Old hatreds and vested interests have, heretofore, held us captive. However, I believe the rewards of a new policy of engagement will be so great that embarking on it will outweigh the political risks.

Mr. President, I urge the administration to take the first step toward a new and enlightened policy—a policy that can once again unite Americans and Cubans. I extend my support and effort in that endeavor. I urge my colleagues to join me as well.

BALANCED BUDGET AMENDMENT TO THE CONSTITUTION

The PRESIDING OFFICER. Under the previous order, the Senate will now resume consideration of House Joint Resolution 1, a joint resolution proposing a balanced budget amendment to the Constitution of United States.

The clerk will report.

The assistant legislative clerk read as follows:

A joint resolution (H.J. Res. 1) proposing a balanced budget amendment to the Constitution of the United States.

The Senate resumed consideration of the joint resolution.

AMENDMENT NO. 248

(Purpose: To prohibit the House from requiring more than a majority of quorum to adopt revenues increases and spending cuts)

Mr. BINGAMAN. Mr. President, I call up amendment No. 248 for consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from New Mexico [Mr. BINGAMAN] proposes an amendment numbered 248.

The amendment is as follows:

On page 3, strike lines 9 through 11, and insert the following:

''SECTION 8. This article shall take effect beginning with the later of the following:

''(1) fiscal year 2002;

''(2) the second fiscal year beginning after its ratification; or

''(3) the end of the first continuous seven-year period starting after the adoption of the joint resolution of Congress proposing this article during which period there is not in effect any statute, rule, or other provision that requires more than a majority of a quorum in either House of Congress to approve either revenue increases or spending cuts.''.

Mr. BINGAMAN. Mr. President, the balanced budget amendment contemplates a 7-year period during which we would go from where we now are—that is, about a $200 billion annual deficit—to a zero deficit. This chart makes the point very obviously that, from 1996 to the year 2002, we need to make substantial progress in getting from where we are to that zero deficit.

My amendment tries to assure that during those 7 years—not after the 7 years—but during those 7 years we can actually reach this goal of a balanced budget. My amendment says that during those 7 years you cannot have a requirement for a supermajority either to cut spending or to raise taxes in either House of the Congress.

Mr. President, I voted for the balanced budget amendment before, and I can honestly say that the intent of the amendment's proponents in those previous debates here on the Senate floor seems to me different from what is their apparent intent this time. In the previous Congresses the amendment was offered as a mechanism to help achieve responsible fiscal policy. It was to be a prod to keep us focused on deficit reduction; an assist to us in pursuing sound fiscal policy. Since I agreed that more discipline was needed, I was willing to support the amendment.

This time the amendment comes to us in a different context, supported by some different arguments. Now, the proponents do not just want deficit reduction and sound fiscal policy. They also want that deficit reduction achieved in their preferred way and in a way which most heavily benefits those they desire to benefit. That is a new and a disturbing aspect of this year's debate, Mr. President.

This year, the amendment comes from the House of Representatives after the House has already amended its own rules to require a three-fifths supermajority for any increase in income tax rates. Other taxes can still be raised with a simple majority. Of course, spending cuts can still be accomplished with a simple majority, but

income tax rates cannot be raised without a three-fifths vote, according to the House rule.

Some argue that this is just a House rule and that we in the Senate do not need to concern ourselves with it. But under the Constitution, all revenue measures must originate in the House, so if the House has a rule that biases deficit reduction against changes in the income tax, that restricts the options available to the entire Congress, not just the House.

Mr. President, this change of rules undermines genuine efforts at deficit reduction, and it undermines our ability to achieve sound fiscal policy. The purpose of the House rule is to advance a conservative political agenda of less taxation for certain taxpayers without regard for and in spite of the consequences for the deficit.

The purposes of the rule are to protect individuals and corporations in the upper tax brackets and to accomplish any increase in revenue by raising regressive taxes that affect middle-income individuals and families, taxes such as the gas tax, Social Security taxes, sales and excise taxes.

Supermajority requirements like the House rule make deficit reduction over the next 7 years even more different than it already is. But more importantly, they drastically alter the fundamental fairness of the way we will allocate the pain of deficit reduction during those 7 years.

The supermajority requirement shifts the burden away from wealthy individuals and corporations and onto the backs of low- and middle-income working families. For under the House rule, it is the working families of America, not the wealthy and the corporations, who will feel the spending cuts. It is those working families who will pay the gas taxes and the social insurance taxes and the excise taxes which must get us to a zero deficit.

Never before have the proponents of this balanced budget amendment argued that it is right for middle-income families to pay to balance the budget but not right for the wealthy and the corporations to pay.

So my amendment restores the fundamental fairness of previous balanced budget amendment discussions. It restores the ground rules to what they were during previous balanced budget amendment debates here on the floor by establishing this 7-year period in which to get to a zero deficit without unfair supermajority requirements in either House with regard either to particular spending cuts or particular tax increases.

Now, looking at the second of these charts, it makes a very serious point which I am sure everyone knows here in the Senate and perhaps needs to be repeated. Deficit reduction is not rocket science. It is not difficult to know what to do. It is difficult to have the courage to do it.

Deficit reduction can be accomplished in two ways. You can cut spending or you can increase revenue. Either one of those works. Both of them help get you to a zero deficit and a balanced budget. As the bottom part of the chart shows, my amendment merely says that during the 7 years leading up to 2002 we cannot have supermajority votes required either for spending cuts or for revenue increases.

Our past experience and simple economic sense leads me to conclude that if we are going to seriously approach accomplishing a balanced budget, we will have to look at both spending cuts and revenue increases to get from here to where we need to go.

If we look at history and look at what we have actually done in the last 15 years by way of deficit reduction, we can see the point I am trying to make. There have been five serious efforts at deficit reduction during the 1980's and the first half of the 1990's—under Republican Presidents and under Democratic Presidents I point out.

In 1982, there was a significant deficit reduction effort. The total deficit reduction there was $116 billion. That was, of course, under President Reagan. He signed that bill and approved it. Most of the deficit reduction there was accomplished by revenue increases—not by spending cuts. People need to recognize that in each of the five cases here we have had both revenue increases and spending cuts.

The second serious reduction was when President Reagan was in the White House in 1987, and again we had substantial revenue increases: $75 billion in revenue increases and $118 billion in spending cuts. So there was clearly a combination of the two in that case.

In 1989, under President Bush, we had a deficit reduction effort which was about equally balanced between revenue increases and spending cuts.

In 1990, we had a very major deficit reduction package when President Bush was in the White House. There was more in spending cuts, nearly twice as much in spending cuts or a little over twice as much in spending cuts as there were in revenue increases. But still there was a combination of the two.

Then 2 years ago, in 1993, of course, we had President Clinton's deficit reduction package which involved both spending cuts and revenue increases, totaling, according to the CBO, $433 billion as originally proposed. I think the estimates are that that has increased since.

I think it is interesting to note when we look at this history of how we have actually tried to accomplish deficit reduction, in four of the five deficit reduction efforts that were made in the 1980's and so far in the 1990's we did not have the three-fifths vote necessary in the House which would be required by this House rule. So these packages, four of the five, could not have passed under the House rule as it now stands. Not only does history indicate that serious deficit reduction will require both spending cuts and tax increases, but common sense indicates that it will as well.

Now, looking at the next chart, that chart shows the Federal budget and shows what is available when we start to cut spending. Many previous speakers in the last couple of weeks have pointed to this chart or similar versions of this chart to make the very obvious point that the majority of the Federal budget is so-called mandatory spending, spending not readily available for cuts. Clearly we can change the eligibility requirements for Social Security or Medicare or Medicaid and get savings, but this is mandatory in the sense that it will take a change in the substantive law that we have had on the books for some time in order to bring that about.

Interest accounts for about 15 percent of the debt. There is no way to dodge that. We have to pay that each year. We cannot make up spending cuts there. Medicare and Medicaid is about 17 percent, and as far as I know somebody is talking about cuts in Medicare and Medicaid. All they are talking about is whether we will restrain the rate of increase in those areas.

Social Security, we have had votes in the last 2 or 3 days where everybody has gone on record, both Democrat and Republican, as not wanting to see Social Security counted as part of the way we get to deficit reduction to get to a balanced budget.

And other mandatory spending, other entitlement programs, makes up about 10 percent. The areas that are discretionary are defense, which is about 18 percent of the Federal budget. The proposal I have heard around the Capitol in recent months is not to cut defense. It is added to what the President himself has proposed as increases in defense during the next 5 years.

Of course, some people think we can balance the budget by cutting out international foreign aid. That is 1.4 percent of the Federal budget. I suggest that if we eliminate it entirely, we still would have a long way to go to get to a balanced budget.

Domestic discretionary, 16.5 percent. That is where the cuts will come. I think everybody knows that when we get around to cutting spending, the cuts are going to come in domestic discretionary spending. That is law enforcement funding, that is education funding, that is public health funding, that is funding of a whole variety of things which generally keep the Government running.

While virtually all experts agree that to get to a balanced budget, we will have to both cut spending and raise revenue, the House of Representatives by rule has made it very difficult for us to raise that additional revenue, at least to raise that additional revenue from the income tax.

We are spending a great deal of time in the Congress this year, Mr. President, talking about the Contract With America. I read that contract, and part

of it did contain a promise to the American people not to raise taxes. The contract does not just contain a promise not to raise taxes, it has a promise to require a supermajority to raise taxes. The contract, in fact, proposed to include that supermajority requirement for tax increases in the balanced budget amendment itself.

When the Speaker and the majority in the House finally started looking at their votes, they decided they did not have the votes to pass the balanced budget amendment in that form, but that they did have the votes to put in place a rule which would have the same effect; that is, a rule which would say that you have to have not a majority but you have to have three-fifths of the House voting for any kind of change in income tax rates in order to increase those rates.

Not only has the Republican leadership in the House made good on their promise to require a supermajority to raise taxes and to put it in the rules, they have also committed to a major tax cut this year.

We had quite a debate yesterday about whether or not it was wise to proceed with a tax cut. I believe myself that the 1981 tax cut was not responsible in light of the Federal deficit we faced then. It seems equally clear to me that this proposed tax cut, which is called for in the Contract With America, is also not responsible.

Mr. President, I regret that President Clinton has chosen to advocate tax cuts at this particular time, although his proposal is much more reasonable in size and it is targeted toward families attempting to improve their own education or their children's education.

This is the context in which we are considering a commitment to reach a balanced budget amendment in the next 7 years. The results, in my view, are two:

First, the chances are overwhelming that if we keep this supermajority requirement in the House rules, we will not reach the goals set out in the amendment of a balanced budget by the year 2002.

And second, that if we keep this supermajority requirement in the House rules, whatever steps we take to reach the goal are going to fall hardest on working families.

My amendment tries to ensure a good faith effort by all to reach the goal of a balanced budget. It eliminates all the preconditions, it eliminates all the artificial barriers. No group, and certainly not the wealthy, could assume that it would be spared from sharing in the pain of deficit reduction.

There would be no prohibition against cuts and particular types of spending; there would be no prohibition against increases and particular types of taxes. The House rules requiring three-fifths to change income tax rates would have to either be dropped or judged invalid by the Supreme Court.

I point out to my colleagues that there is pending today in the court a suit brought by the League of Women Voters and 15 House Members challenging the constitutionality of the House rule.

Mr. President, this is essentially a back-to-reality amendment. It is also a basic fairness amendment. I believe it is an important amendment dealing with this issue of a supermajority requirement, particularly as it has been manifested in this House rule.

Let me look at one final chart to make that last point about the importance of the amendment. We have looked at where the spending occurs in Government. Let us look at where the revenue comes from to see what we are taking off the table by adopting that House rule.

The income tax, of course, is our most progressive tax. Here you can see the individual taxes account for 43 percent of the revenue that the Government receives each year, and corporate taxes account for an additional 11 percent. So you add those two together and you have 54 percent of the revenue that comes to the Federal Government by way of taxes.

We are saying if you want to change the amount of revenue you receive from those taxes, if you want to get anymore revenue from those taxes, you have to have three-fifths under the House rule.

That is a major amount. That is a major source of revenue to be building a supermajority requirement around. When you look at where else can we raise revenue, if we are not able to get the three-fifths necessary there, as we have not been able to get the three-fifths necessary in four of the last five major deficit reduction efforts in the Congress, where else can you get those?

Social Security taxes, 37 percent; 37 percent of the total revenue coming into the Federal Government comes from Social Security taxes. So you can raise Social Security taxes. Excise taxes, 4 percent, and other taxes, 5 percent. That is things like the gasoline tax and other matters. I point out that the Social Security tax, excise tax, and gasoline taxes are regressive. That means that they fall most heavily on low- and moderate-income individuals. The income tax is the progressive tax. It is the tax that has higher rates that you are required to pay as your income goes up. So when you say you will not change the income tax, you are clearly looking out for those people with the high incomes.

When we say a supermajority is required to raise rates in that tax but not in others, we are protecting those who are relatively disadvantaged by the progressive rate structure of the income tax, and those are clearly the wealthy in our society.

The people most affected by taxes, other than the income tax, are not protected. Those are the working families, poor families, the elderly. Those other taxes are still available as sources of income. The gasoline tax is there, available, excise taxes. Some of my colleagues have an interest in beer and wine and tobacco taxes and other excise taxes as well. The main other source of income for the Federal Government is the Social Security tax. That accounts for 37 percent of all the revenue we receive.

In addition to these sources of revenue to get from here to a balanced budget, we also, of course, have areas of spending that can be targeted for reduction. And the area of spending which we all know is most likely to be cut is domestic discretionary spending. That category includes programs that primarily go to benefit the average working people in the country—education grants, loans, health care, health clinics in our rural areas, nutrition, school lunch programs, law enforcement, funds needed to make good on the promises that were in last year's crime bill.

To summarize, Mr. President, this amendment that I am offering today lets us go into this 7-year period with ground rules that do not make it virtually impossible to get from here to a balanced budget.

They also let us go into this 7-year period with ground rules that do not require most of the pain—that is, a disproportionate amount of the pain—of deficit reduction to be borne by working families.

In my view, this is a good amendment. I urge all Senators who are seriously committed to deficit reduction and to fairness in the way that we achieve that deficit reduction to support the amendment.

Mr. President, I yield the floor and reserve the remainder of my time.

Mr. HATCH addressed the Chair.

The PRESIDING OFFICER (Mr. FAIRCLOTH). The Chair recognizes the Senator from Utah.

Mr. HATCH. I thank the Chair.

Mr. President, we are now in our 17th day under our balanced budget amendment debt tracker of the increase in the debt as we debate. While we are debating this—this is our 17th day of debate, or 17th day since we started this debate—we can see in this far chart the red line at the bottom is the $4.8 trillion debt that we started with at the beginning of this year. The green lines show how it is going up every day $829 million of additional debt on the backs of our children and our grandchildren. Today, the 17th day, we are now up to, as you can easily see here, $14,100,480,000—in additional debt just while we debate this.

The reason we are doing this is so the American people can understand that this is serious business. For 17 days this has been delayed, a full 3 weeks of Senate floor time, 3 weeks on something that a vast majority of Senators are for, and we believe 67 of us will vote for it in the end because it is the only chance we have to get spending under control, the only chance we have. It is the first time in history that the House of Representatives has passed a balanced budget amendment.

Now they have sent it to us. It is the amendment we have been working on now for my whole 19 years in the Senate, and I have to say it is a bipartisan consensus, Democrat-Republican amendment. It is not perfect, but it is the best we can do, and it is much better than anything I have seen in all the time we have debated it. It will put a mechanism in the Constitution that will help us in the Congress to do that which we should have been doing all these years anyway, and that is to live within our means.

The distinguished Senator from New Mexico is very sincere. He does not like the three-fifths vote over in the House that they have on a statutory basis. It can be changed anytime by a mere 51 percent vote. When they get a majority over there that can do it, they will change it. But that has nothing to do, in my opinion, with whether or not we should pass the balanced budget amendment in the Senate.

I oppose the amendment offered by the distinguished Senator from New Mexico. The Bingaman amendment, while seemingly aimed at supermajority voting requirements to raise revenues or cut spending, would in fact kill the balanced budget amendment, not merely delay its implementation. As I will explain in a few moments, the Bingaman amendment, if adopted, would render the balanced budget amendment inherently contradictory and never, ever capable of going into effect.

The Bingaman amendment would ostensibly delay the effective date of the balanced budget amendment until the end of the 7-year period after Congress adopts it, ''during which period there is not in effect any statute, rule or other provision that requires more than a majority of a quorum in either House of Congress to approve either revenue increases or spending cuts.''

Now, it may seem that this amendment is aimed at the other body's recent rule that Federal income tax increases are effective only if they receive a three-fifths vote, but it hits the balanced budget amendment right in the heart. And this is not an errant, leftover arrow from Cupid's quiver. This is a poisoned dart.

Section 4 of House Joint Resolution 1 states that ''no bill to increase revenue shall become law unless approved by a majority of the whole number of each House by a rollcall vote.'' That means at least 51 Senators and 218 Members of the House of Representatives must be recorded in favor of any revenue increase. In other words, it is a constitutional majority that our amendment requires.

If we adopt the Bingaman amendment into House Joint Resolution 1, however, then House Joint Resolution 1 can never, ever go into effect. The Bingaman proposal says that House Joint Resolution 1 cannot go into effect so long as a provision such as section 4 is law. After all, the Bingaman proposal says that a majority of a quorum can raise taxes. House Joint Resolution 1 says that only a majority of the whole number of both Houses can raise taxes. You cannot put the two provisions in the same constitutional amendment, at least not if you are really trying to enact that constitutional amendment into law.

So the Bingaman amendment is about much more than raising the supermajority requirement for revenue increases or spending cuts. It is about killing the balanced budget amendment by making it incapable of ever going into effect.

I might point out that had this section 4 provision been in effect in 1993, then President Clinton's huge tax increase in 1993 would not have become law. That tax increase only garnered 50 votes in the Senate and needed Vice President GORE's tie breaker in order to be sent to the President. But while the Vice President is President of the Senate, he is not a Member of the Senate. Accordingly, the 1993 tax increase would have been killed by the 50–50 vote of the Senators under the pending balanced budget amendment.

There are other serious problems with the Bingaman amendment. If Congress wants to adopt supermajority requirements for raising taxes and does so in a constitutional manner, I think that it will be perfectly appropriate protection for the taxpayers. I wish we could get the votes to pass the balanced budget amendment with such a requirement, but we cannot. I certainly do not believe that we should, in our fundamental charter, put in a provision that explicitly says as few as 26 Senators out of 100 can raise taxes. I think it is a terrible idea to write that explicitly into the Constitution. As I say, we should put into our Constitution stronger protections against tax raises.

While section 4 is not as strong as some would prefer it, certainly in the House, it is better than the status quo. The Bingaman amendment, in contrast, would make the status quo an explicit part of our Constitution.

Now, my colleagues should bear in mind that a vote for the Bingaman amendment is a vote in favor of stating right in the Constitution itself that as few as 26 Senators can pass tax raises. Statutory or internal congressional rules seeking to impose a higher hurdle for tax increases would be, on their face, invalid. Today at least we have a fighting chance to have such statutory or internal congressional rules imposing higher voting requirements for tax increases upheld.

Moreover, if Congress adopts House Joint Resolution 1 and sends it to the States with the Bingaman language, even aside from the fatal flaw that I mentioned earlier, take a look at the hurdles House Joint Resolution 1 would have to go through, even within the terms of the Bingaman amendment itself. If the other body does not repeal its three-fifths rule on tax increases, its statutory rule, for, say, 2 years, then House Joint Resolution 1 would have to wait 7 more years after such repeal before it can be effective under the Bingaman language. That puts us into the year 2004. We cannot wait that long for the discipline of the balanced budget amendment to go into effect.

President Clinton's proposed budgets would add another $400 billion to the national debt in those 2 years alone, even under optimistic assumptions, and $1.8 trillion over that period to the year 2004.

If my friend from New Mexico does not like the other body's rules on tax increases, I say with all respect that concern should not be addressed by tampering with the effective date of this badly needed constitutional mandate to balance the budget.

Frankly, America cannot wait any longer than the balanced budget amendment already provides for the Congress to be placed under such a mandate. I certainly believe the distinguished Senator from New Mexico is sincere, but I think these arguments against it are overwhelming, and I hope our fellow Senators will vote down the Bingaman amendment.

I reserve the remainder of my time.

The PRESIDING OFFICER. The Chair recognizes the Senator from New Mexico.

Mr. BINGAMAN. Mr. President, let me just respond to some of the points my friend and colleague from Utah has made.

He suggests that the amendment I am offering would make the balanced budget amendment internally contradictory, because of section 4, as I understand his argument. I do not see it that way, and let me explain my view of it.

As I understand the procedure that the balanced budget amendment contemplates, there is a 7-year period during which we try to get to a balanced budget. Section 8 says, ''This article shall take effect beginning with fiscal year 2002 or with the second fiscal year beginning after its ratification, whichever is later.'' So there is a 7-year period from where we are to the balanced budget. Then the balanced budget amendment, including section 4, takes effect.

He is correct, section 4 says, ''No bill to increase revenue shall become law unless approved by a majority of the whole number of each House by a rollcall vote.'' My amendment does not affect that. What my amendment says is during the first 7 years, during the time we are trying to get to the balanced budget, we should not have supermajority requirements. Once we have a balanced budget, section 4 says you have to have a majority of the whole number of each House to raise revenue, and I am not challenging that. My amendment does not challenge that. I do not know that it is great policy but my amendment does not challenge that.

So I do not see anything inconsistent between my amendment, which deals with the first 7 years, from now until

the time we get to a balanced budget, and section 4, which deals with the time from the effective date of the balanced budget amendment, 7 years down the road, from then on in our Nation's history.

So I do not see there is any inconsistency. If I am missing something in the argument I would be anxious to hear the response of the Senator from Utah on that. But I do not believe I am missing anything. I believe my amendment would improve the balanced budget amendment as it now stands before the Senate and would not build in any internal contradiction into it.

The second point he makes is that if we were to invalidate the House rule, we would in fact be allowing as few as 26 Senators—we could be putting in the Constitution a provision which says that as few as 26 Senators can raise taxes. I would just point out that is what the Constitution provides. That is what the Constitution has provided for 206 years, that as few as 26, a majority of a quorum, is all that is required by both Houses to either raise taxes or cut spending. That is not changed.

I do not see anything terrible about us putting a sentence in saying that is what the Constitution provides because that is what the Constitution provides. That is what it has always provided.

This is not just a casual result. There was a great debate at the time the Constitution was being written about whether a supermajority should be required. In fact, one of the most famous of the Federalist Papers, No. 58, written by James Madison, dealt with this specific subject. I understand the Speaker of the House of Representatives has assigned this as one of the books he is requiring all House Members to read. So I am sure they are all familiar with this, but maybe some of my colleagues here in the Senate are not. Let me just read a short passage from the Federalist No. 58. This is James Madison writing. He wrote:

> It has been said that more than a majority ought to have been required for a quorum; and in particular cases, if not in all, more than a majority of a quorum for a decision. That some advantages might have resulted from such a precaution cannot be denied. It might have been an additional shield to some particular interests, and another obstacle generally to hasty, impartial measures. But these considerations are outweighed by the inconveniences in the opposite scale. In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule: The power would be transferred to the minority.

That is James Madison's explanation for why the drafters of the Constitution did not put in there a requirement for a supermajority. They did not permit rules to exist such as the rule in the House. And we need to clarify that rules such as the rule in the House would not be permitted during this 7-year period while we get to a balanced budget. So I think it is clear that the argument for maintaining the right of the majority to rule is a strong argument. It is not a new argument in our democratic system. It is a strong argument we should stick with.

The Senator from Utah made one final point. He said if my amendment were adopted we could delay the time that we are required to have a balanced budget by 2 years, or whatever period until the House decided to change its rule.

I would point out the House could meet this afternoon and change its rule. There is nothing in my amendment which in any way prevents the House from changing its rule or any court—and we do have a court case pending on this—from determining that that rule is unconstitutional and invalid. As soon as that happens the 7 years begins to run.

So if the concern is we cannot get the 7 years running fast enough, I would say there is a ready remedy for that, once my amendment is adopted, and that is a repeal of the rule.

Mr. President, I yield the floor and reserve the remainder of my time.

The PRESIDING OFFICER. The Chair recognizes the Senator from Utah.

Mr. HATCH. Mr. President, I appreciate the arguments of the distinguished Senator from New Mexico and I appreciate his sincerity. I just do not think it refutes what we said earlier.

Could I ask the remaining time? On both sides?

The PRESIDING OFFICER. The Senator from Utah has 5 minutes and it looks like 52 seconds. The Senator from New Mexico has 17 minutes and 22 seconds.

Mr. HATCH. I am prepared to yield back the remainder of my time if the Senator from New Mexico is.

Mr. BINGAMAN. Mr. President, I have been advised by the Cloakroom that there are certain Senators who expect to have this vote at 10:30. I do not need to keep all my time but perhaps we should check on that before I yield back the remainder of my time.

Mr. HATCH. If we both yield back our time I will move to table, get the yeas and nays, and then we will put it into a quorum call until then?

Mr. BINGAMAN. Let me also check to see if Senator BUMPERS is coming to the floor. Let me also ask unanimous consent to add Senator BUMPERS and Senator DORGAN as cosponsors of the amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HATCH. Mr. President, I suggest the absence of a quorum and ask we charge it equally to both sides.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BINGAMAN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BINGAMAN. Mr. President, how much time remains for the proponents?

The PRESIDING OFFICER. Twelve minutes.

Mr. BINGAMAN. Mr. President, I yield 2 minutes to the Senator from North Dakota.

Mr. DORGAN. Mr. President, I do not believe I shall use the entire time. I want to stand in support of the amendment offered by the Senator from New Mexico [Mr. BINGAMAN] this morning.

I find it interesting that those who most loudly profess to want a balanced budget find ways to try to provide handcuffs on those who ultimately want to achieve a balanced budget. I do not remember who it was who said it, but someone once said, ''The louder they boast of their honor, the faster I count my spoons.'' I sort of sense that is the situation here.

We have a lot of people who say, ''Gee, we want to get to a balanced budget.'' Then they put into law these notions about supermajorities in order to do one thing or another. The other body now has a supermajority on raising revenue. What if you have a circumstance where the revenue system is out of kilter and you have one group of people, let us say wealthiest group, that are substantially underpaying what they ought to pay and we feel the need to raise rates on that group, and maybe use the money to provide partial benefits to somebody else who is overpaying. You would not be able to do that because it would take a supermajority. That does not make any sense.

Why do we prejudge the answer on any taxing or spending issue to reach a balanced budget amendment? Some say we do not want anybody to increase taxes. I do not, either. In fact, sign me up for a zero tax rate for my constituents. That is what I want. No taxes. But the fact is, we have roads, we have schools, we have law enforcement, and we have defense to pay for, the defense of this country. So we have to pay for the things that we spend in the public sector.

The question is, Who pays? How do they pay? We can construct a tax system to do that. Nobody likes it, but it is necessary. It is part of our life in this country. We spend money. We raise taxes. Should we cut spending? Yes. We should, and we will. Should we raise taxes? Probably not. But is it necessary in some instances probably to do that? We found in 1993 that we had to raise some taxes. I voted for it. I did not like it. The medicine does not taste good, but I was willing to do it because I felt it contributed to reducing the Federal deficit.

But to allow either body of Congress to prejudge what is necessary to achieve a balanced budget is wrong. Senator BINGAMAN is saying during the 7-year period, you cannot do that. You cannot create supermajorities to try to prejudge those kinds of choices that we

must take in both the House and the Senate to try to achieve a balanced budget.

I do not ever question motives with respect to Members of Congress. I think some feel very strongly that we ought to have this balanced budget amendment. Others feel equally strongly that we should not. All the Senator from New Mexico is saying is that if you feel strongly that we ought to have a balanced budget amendment or a balanced budget, either through an amendment or without an amendment, then you ought not put handcuffs on either the revenue or the spending side so that in the next 7 years, freethinking people of good will serving in the House and the Senate can decide on a range of items, on a menu of issues, on how to achieve that goal. It is much more important to achieve the goal of getting our fiscal house in order than it is to preach ideology about taxes.

The goal is important. Those who crow on the floor of the Senate and the House about the balanced budget amendment are the ones who now say to us, yes, we want a balanced budget but we also want to straitjacket people by creating goofy rules. And the Senator from New Mexico says let us all be honest about these things. Let us decide if we are going to do this. We will do it the right way.

I am happy to cosponsor this. I am pleased to speak for it. I hope that my colleagues who believe that we should balance the budget in this country, who agree with me that we ought to balance the budget to get our fiscal house in order, will understand that this is a necessary ingredient in doing so.

I compliment the Senator from New Mexico for offering it.

Mr. President, I yield the floor.

Mr. BINGAMAN. Mr. President, I yield 5 minutes to my friend from Arkansas, Senator BUMPERS.

The PRESIDING OFFICER. The Senator from Arkansas [Mr. BUMPERS].

Mr. BUMPERS. Mr. President, I rise in support of what I believe is a very well-crafted and thoughtful amendment by the Senator from New Mexico. If this is going to be a permanent arrangement, then the House could legitimately say you have no business interfering with House rules. After all, we hate your 67-vote filibuster rule. But that is not what this amendment says. People should not confuse it with any Senate rules. This amendment is crafted to help the people who really believe in this amendment, and especially the people who have signed on to the Contract With America and promised the American people that they will balance the budget by the year 2002. In my opinion, a House rule that requires a 60-percent majority to raise only one kind of tax does not keep you from raising the gasoline tax, does not keep you from raising user fees, excise taxes, does not keep you from raising Social Security taxes. What the House has done is say that for now and ever you cannot raise taxes—income taxes only—without a 60-vote majority. The Senator from New Mexico is simply saying that this cannot go until the House backs off of that for this 7-year period.

Let me say to my colleagues on the other side of the aisle that if this passes or if this does not pass, I will continue to cooperate with every soul in this body who is genuinely concerned about deficit spending and trying to balance the budget. I will help you cut spending. I might even help raise taxes if they are properly targeted. I will do anything to keep from ending my career in the Senate without having addressed this most crucial problem facing this Nation. But you cannot—the Republicans voted yesterday, and a few Democrats, who said you cannot take Social Security off the table. It has to be a part of this whole plan to balance the budget. Yet, the House says income taxes are off the table.

What kind of logic is that, to say that the most regressive taxes, sales taxes—and we may go with a value added tax here, we may raise gasoline taxes, excise taxes, user fees and, yes, even the FICA tax that pays for Social Security. But if you say income taxes are off the table, you are saying the only progressive tax that the Congress might want to use to balance the budget is off the table. Only the regressive taxes that fall heaviest on the people who can least afford it, that is where you must find it.

Mr. President, I do not want to be preaching about this, but that is nonsense and it is not fair. It is not fair to the elderly. It is not fair to the working people of this country. The people who applaud this are the wealthiest people in America, because they pay an inordinately small part of their incomes for these regressive taxes like gasoline taxes and so on. There are people in my hometown of Charleston, AR, who commute 50 miles to Fort Smith to work. We are sort of a suburb to Fort Smith, and most people work in Fort Smith. They drive their cars as much as I do every year and pay the same tax on that gasoline that I pay. And I make $133,000 or $135,000 a year—I forget which—and they are working for $25,000 a year or less, and we are saying that is just Jakey, and we may raise taxes on you some more, but we will not raise the taxes on the wealthiest people in America.

Mr. President, I ask for 1 additional minute from the Senator from New Mexico.

Mr. BINGAMAN. I yield an additional minute to the Senator from Arkansas.

Mr. BUMPERS. My administrative assistant and I were having a discussion on the way to work this morning, not just about this amendment but about the Senate. I said, ''You know, I feel so strongly about the balanced budget amendment and I am so adamantly opposed to it because I think it guarantees utter chaos.'' It is going to, at some point, absolutely render the U.S. Congress a eunuch. We are not going to be able to deal with it under that amendment. I said, ''I do not like to speak unless I feel strongly about something.'' I have a tendency to speak on maybe too many amendments. You can wear your welcome out around here by talking too much. So I try to choose carefully. It is very difficult for me because I detest this amendment so much. It is difficult to be as choosy about what I talk about. But I want you to know that the Senator from New Mexico is on to something very, very important.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. BINGAMAN. I yield an additional minute.

Mr. BUMPERS. Mr. President, I just say to my colleagues that I have not seen the debate change a vote since the third battle of Manassas in 1988. People walk on the floor, and they may listen to it in their offices, but most do not even do that. So the debate does not change it. I daresay that when people walk in here on both sides, they are going to say, ''What is our vote?'' without realizing the deadly consequences of what the House has done.

Senator BINGAMAN and I and Senator DORGAN, want to help Republicans keep their commitment to balance the budget by the year 2002. I think it is utterly and wholly implausible and impossible. But I promise my cooperation in helping in any way I can. But to say the one thing you cannot do is to raise taxes that are progressive, but you can raise all the regressive taxes you want to to deal with this when we all know that working people in this country are having a terrible struggle just keeping their head above water.

So I applaud the Senator from New Mexico. I am pleased he asked me to speak on this because I do feel strongly about it.

I urge my colleagues to think very carefully before they vote on this amendment.

Mr. BINGAMAN. Mr. President, Is there additional time?

The PRESIDING OFFICER. The time has expired.

Mr. HATCH. Mr. President, I move to table the amendment and ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays are ordered, and the clerk will call the roll.

The bill clerk called the roll.

Mr. LOTT. I announce that the Senator from Kansas [Mrs. KASSEBAUM] is necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 59, nays 40, as follows:

[Rollcall Vote No. 69 Leg.]

YEAS—59

Abraham	Gorton	McConnell
Ashcroft	Graham	Murkowski
Bennett	Gramm	Nickles
Bond	Grams	Packwood
Brown	Grassley	Pressler
Burns	Gregg	Reid
Campbell	Hatch	Roth
Chafee	Hatfield	Santorum
Coats	Heflin	Shelby
Cochran	Helms	Simon
Cohen	Hutchison	Simpson
Coverdell	Inhofe	Smith
Craig	Jeffords	Snowe
D'Amato	Kempthorne	Specter
DeWine	Kohl	Stevens
Dole	Kyl	Thomas
Domenici	Lott	Thompson
Exon	Lugar	Thurmond
Faircloth	Mack	Warner
Frist	McCain	

NAYS—40

Akaka	Feingold	Lieberman
Baucus	Feinstein	Mikulski
Biden	Ford	Moseley-Braun
Bingaman	Glenn	Moynihan
Boxer	Harkin	Murray
Bradley	Hollings	Nunn
Breaux	Inouye	Pell
Bryan	Johnston	Pryor
Bumpers	Kennedy	Robb
Byrd	Kerrey	Rockefeller
Conrad	Kerry	Sarbanes
Daschle	Lautenberg	Wellstone
Dodd	Leahy	
Dorgan	Levin	

NOT VOTING—1

Kassebaum

So the motion to lay on the table the amendment (No. 248) was agreed to.

Mr. HATCH. Mr. President, I move to reconsider the vote.

Mr. LEAHY. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

MOTION TO REFER

Mr. WELLSTONE. Mr. President, on behalf of Senator FEINGOLD, Senator BRADLEY and myself, I move to refer House Joint Resolution 1 to the Budget Committee with instructions to report back forthwith, House Joint Resolution 1 in status quo, and at the earliest date possible to issue a report. I send my motion to the desk.

The PRESIDING OFFICER. The clerk will report the motion.

The bill clerk read as follows:

The Senator from Minnesota [Mr. WELLSTONE], for himself, Mr. FEINGOLD, and Mr. BRADLEY, moves to refer.

Mr. WELLSTONE. Mr. President, I ask unanimous consent that further reading be dispensed.

The PRESIDING OFFICER. Without objection, it is so ordered.

The motion is as follows:

I move to refer House Joint Resolution 1 to the Budget Committee with instructions to report back forthwith House Joint Resolution 1 in status quo and at the earliest date possible, to issue a report, the text of which shall be the following:

The Committee finds that—

(1) Congress is considering a proposed amendment to the Constitution of the United States which will require a balanced budget by the year 2002, or the second fiscal year after its ratification, whichever is later;

(2) the Congressional Budget Office has estimated, using current baselines, that between 1996 and 2002, Congress would have to enact some combination of spending cuts and revenue increases totalling more than $1 trillion to achieve a balanced budget;

(3) some taxpayers now receive preferential tax treatment and tax subsidies through such things as special industry-specific exemptions, exclusions, deductions, credits, allowances, deferrals or depreciations which are not available to other taxpayers;

(4) some special industry-specific tax preferences do not serve any compelling public purposes, but simply favor some industries over others and serve to distort investment and other economic decisionmaking;

(5) certain of these tax preferences, which serve no compelling public purpose, are special exceptions to the general rules of the tax law to which most Americans are required to adhere;

(6) the costs of such tax preferences are borne in part by middle-income taxpayers who pay at higher tax rates than they would otherwise;

(7) special tax treatment and tax subsidies constitute a form of tax expenditures which should be subjected to the same level of scrutiny in deficit reduction efforts as that applied to direct spending programs, and

(8) it is the sense of the Committee that in enacting the policy changes necessary to achieve the more than $1 trillion in deficit reduction necessary to achieve a balanced budget, that tax expenditures, particularly industry-specific preferential treatment, should be subjected to the same level of scrutiny in the budget as direct spending programs.

Mr. WELLSTONE. Mr. President, I want to yield myself such time as I may consume but before doing so, I would like to defer for a moment to the Senator from Washington who I know has another engagement. The Senator wanted to speak, I think, in opposition to this amendment, but I would like to give him the opportunity to do so since he will not have any time later on.

Mr. GORTON addressed the Chair.

The PRESIDING OFFICER. The Senator from Washington is recognized.

Mr. GORTON. First, Mr. President, I would like to thank my distinguished colleague from Minnesota for giving me the courtesy and referring me this time. It is, of course, appropriate for the maker of the motion to speak first. It is very nice of him to allow this.

It does, however, seem to me that this motion is very closely related to the debate that we have had earlier on the proposition that there should be a condition which takes place before or during the time that the constitutional amendment is submitted to the States relating to the methods by which we are to meet the requirement of a balanced budget.

In this case, I gather, most of the motion refers to tax expenditures.The bottom line, however, Mr. President, is that these motions and the amendments which have been proposed heretofore have almost, without exception, come from those who oppose amending the Constitution to require a balanced budget, and they are designed to inhibit or to slow down either its passage by this body or its ratification by the States.

Most of those Members, I am certain, including the distinguished Senator from Minnesota, do speak of their devotion to fiscal responsibility and to a balanced budget. It seems to me that under those circumstances, the thrust, the duty to explain what they will do to deal with the terrible $200 billion-a-year budget deficits from now to eternity rests on them, those who feel that the status quo is perfectly all right; that we should not change the rules relating to budget deficits; that the way we have dealt with them in the past is the way we should deal with them in the future. It is they, Mr. President, who ought to explain to us precisely how it is that they would change either our spending processes or our taxing programs to bring the deficit of the United States into balance.

Those of us who favor the passage of this constitutional amendment unadorned are those who feel that the system is broken, that the system is not working, that 25 consecutive years of mounting budget deficits and a $4 to $5 trillion debt require a drastic and a fundamental change in the way in which it would work and are doing so because we observe the history of those 25 years. We have observed all of the unsuccessful attempts to reach a degree of fiscal sanity and fiscal responsibility, and we have observed that those alternate methods have not worked and that it is unlikely that they will work in the future.

We propose a constitutional amendment because a constitutional amendment will bring everyone into the fold. Presidents, liberal Members, conservative Members, Democrats and Republicans will be forced by the constraints of the Constitution to deal with budget deficits in the future in a way in which they have refused to deal with them in the past.

The latest example of this failure, of course, is the President's budget itself, a budget which simply gives up on dealing with the deficit, which calls for no significant reductions in the deficit, not just for the 5 years that it covers but for 10-year projections out from today. It is a confession of failure. But more than a confession of failure, it is a confession of failure coupled with the proposition that there will be no attempt to cure that failure, to do better at any time in the future.

So, Mr. President, I believe that the best thing, the desirable thing, for us to do in the Senate is to recognize that the system is broken, that the system needs fixing, that the only fix that is likely to be successful is a constitutional amendment, that we should pass it and begin the process by which the States can consider its ratification as quickly as possible.

But in the alternative, it seems to me that it is up to those who oppose this constitutional amendment to tell us how they are going to cure the problem operating under exactly the system which has created the problem in the first place.

I thank my colleague from Minnesota very, very much for yielding to me. I yield the floor.

The PRESIDING OFFICER (Mr. KYL). The Senator from Minnesota.

PRIVILEGE OF THE FLOOR

Mr. WELLSTONE. Mr. President, I ask unanimous consent that Douglas Johnson and Mark Miller be given the privilege of the floor for the duration of this debate.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. WELLSTONE. Mr. President, just to be very, very clear because I believe that all of us, Democrats and Republicans, should be clear about what we are voting on, this amendment does not in any way, shape or form have any kind of conditions vis-a-vis the balanced budget amendment. There is not any language in this amendment that so states.

What this amendment says is:

It is the sense of the Senate that in enacting the policy changes necessary to achieve the more than $1 trillion in deficit reduction necessary to achieve a balanced budget, that tax expenditures, particularly industry-specific preferential treatment, should be subject to the same level of scrutiny in the budget as direct spending programs.

It just simply says that since we know we are going to be involved in a serious effort on deficit reduction and since we know we all share the common goal of balancing the budget, though we may not agree a constitutional amendment is the way to do so, that we ought to make sure that tax expenditures, which Senator FEINGOLD and I are going to explain at some length during the course of this debate, be on the table; that that be part of what we look at; that we look at certain breaks, loopholes, and certain deductions. That is all. There is no condition vis-a-vis the balanced budget amendment. The Senator from Washington is wrong on that point.

Second, I might add, that procedurally, this is really identical to the motion of the majority leader dealing with Social Security. It is identical, and I believe that motion was passed by over 80 Senators. So this has nothing to do with your position on the balanced budget amendment one way or the other.

Let me go on and explain.

Mr. President, this motion will put the Senate on record saying that in our effort to balance the budget, in our effort to go forward with deficit reduction—whether it be by a balanced budget constitutional amendment or otherwise; we are all aiming in the same direction—that we will scrutinize all Federal spending not just, Mr. President, cuts of least resistance.

What I am worried about, speaking for myself, and I look forward to hearing the remarks of the Senator from Wisconsin, is that when it comes to deficit reduction or when it comes to balancing the budget, what we will do is make cuts according to the path of least political resistance. That is to say, when it comes to ordinary citizens who do not have the clout, who do not have the lobbyists, who do not make the large contributions, they will be called upon to sacrifice.

I think most people in the country are willing to sacrifice. We just want to make sure that there is a standard of fairness and that large interests, large corporations, financial interests, wealthy people, and others who, as a matter of fact, benefit disproportionately by some of the tax breaks which cause other people to pay more in taxes, also are called upon to pay their fair share or to sacrifice.

Mr. President, in all of the debate on the balanced budget amendment, in all of the debate about how we are going to essentially have budget cuts of $1.4 trillion or thereabouts there is an enormous credibility gap. Because so far all I have heard on the Republican side is proposals for budget cuts of $277 billion. There is a big difference between $277 billion and $1.481 trillion.

In all of the debate so far, whether it be right to know vis-a-vis States saying that the people back in our States ought to have a right to know what the impact would be on them or, for that matter, whether it is our right to know, I still believe that the most important principle of all is that Senators ought to have the right to know what they are voting on, where the cuts will take place, and how they will affect the people.

There has not been a word uttered about one particular kind of spending that enjoys a special status within the Federal budget. I am talking about tax breaks for special classes or categories of taxpayers, many of whose benefits go largely to large corporations or the other wealthy interests in our society.

I remind you, Mr. President, that when we have these tax breaks and when we have these deductions and loopholes and when certain citizens or certain large interests are forgiven from having to pay their fair share, all of the rest of us end up paying more.

Let me make a simple point here that is often overlooked. We can spend money just as easily through the Tax Code through what are called tax expenditures as we can through the normal appropriations process. Spending is spending, whether it comes in the form of a government check or in the form of a tax break for some special purpose, like a subsidy, a credit, a deduction, or accelerated depreciation for a type of investment that is made. These tax expenditures—in some cases they are tax loopholes—allow some taxpayers to escape paying their fair share and thus they make everyone else pay at higher rates.

The Congressional Joint Tax Committee has estimated that these tax expenditures cost the U.S. Treasury $420 billion every single year. These loopholes, these deductions cause the U.S. Treasury to lose $420 billion every single year, and this amount will grow on present course by $60 billion to over $485 billion by 1999.

Mr. President, these tax expenditures, often they are tax dodges, should be on the table along with other spending as we look for places to cut the deficit. That is our point. That is, by any standard of fairness, what we should do. Just because certain people have a tremendous amount of political clout does not mean they should not be asked also to be a part of this sacrifice.

Mr. President, when we begin to weigh, for example, scaling back special treatment, depreciation allowance for the oil and gas industry—and the Congressional Budget Office estimates that eliminating this tax break would generate $3.4 billion over the next 5 years—when we start to compare and measure tax breaks for oil companies compared to cuts we are going to be making in food and nutrition programs for hungry children, we might have a very different answer.

We have to make tough choices. And what Senator FEINGOLD, myself, and Senator BRADLEY want to make sure of is that all of the options are on the table, and that when we make these choices, and we do the painful deficit reduction, we do it according to some basic standard of fairness.

What this motion does is simply state the sense of the Senate that we will carefully examine tax expenditures when the Budget Committee makes recommendations as to how we are going to continue on this path of deficit reduction and how we are going to balance the budget. At the moment, these tax expenditures are unexamined. They are hidden. They are untouchable. And, essentially, these are the real entitlements because we do not even examine any of these large subsidies.

What we are saying in this amendment is that we ought to at least examine these tax expenditures, we ought to at least examine these subsidies. This motion does not specify what specific subsidies might be eliminated. It just says tax expenditures ought to be a part of our process here in the Congress as we make these decisions about where we are going to make the cuts.

As I have listened to this debate—and again I am struck by this figure of $1.4 trillion worth of cuts that would have to be made by 2002 to balance the budget—I must say that I have heard little discussion, first of all, about where we are going to make the cuts, and second of all, I have heard little discussion about any sacrifice from large corporations and special interests who have disproportionately enjoyed all of these breaks, all of these benefits, all of these preferences, all of these deductions that many, many middle-class Americans do not enjoy.

And so that is why we offer this motion to refer this amendment to the Budget Committee with instructions to report back a sense of the Senate that these breaks and preferences should be put that on the table when we are talking about how we do our deficit reduction.

Now, Mr. President, not all of these tax expenditures are bad. Let me be

clear. Not all of them should be eliminated. Some of them serve a real public purpose, providing incentives to investment, bolstering the nonprofit sector, enabling people to purchase a home. That is very important. However, some of them are simply tax dodges that can no longer be justified, but we do not even examine them. What we are saying in this amendment is, let us at least examine these tax expenditures and especially let us get strict and rigorous when we are looking at some of these tax dodges.

Mr. President, this motion simply states that if we are going to move toward balancing the budget, tax expenditures that provide this preferential treatment to certain taxpayers should be subject to the same scrutiny as all direct spending programs. That is all we are saying. This is really a matter of accountability.

I think it is also, Mr. President, a simple question of fairness. If we are going to make all of these cuts, then we should make sure that the wealthy interests in our society, those who have the political clout, those who hire the lobbyists, those who make the large contributions, those who we call the big players are also asked to sacrifice as much as regular middle-class folks in Minnesota and in Wisconsin; they should be asked to sacrifice as much as anybody else, especially when we know there are going to be deep and severe cuts in programs like Medicare and Medicaid, veterans programs, and education.

The General Accounting Office issued a report last year. It is titled ''Tax Policy—Tax Expenditures Deserve More Scrutiny.'' I commend it to my colleagues' attention. I really think that my colleagues ought to read it.

I ask unanimous consent that an executive summary of the report be printed in the RECORD following my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. WELLSTONE. The GAO report of 1993 makes a compelling case for subjecting these tax expenditures to greater congressional and administration scrutiny just as direct spending is scrutinized. The GAO notes that most of these tax expenditures currently in the Tax Code are not subject to any annual reauthorization or any kind of periodic review. And they observe that many of these special tax breaks were enacted in response to economic conditions that no longer exist. In fact, they found that of the 124 tax expenditures identified by the committee in 1993, half of these tax expenditures, half of these special breaks were enacted before 1950.

Now, that does not automatically call them into question, and our amendment does not talk about any specific tax expenditure that should be eliminated. But it does illustrate the problem of not annually reviewing these tax expenditures. These tax expenditures should not be treated as entitlements. They should not go on year after year and decade after decade without there being any careful examination. There has been no systematic review of these expenditures.

Indeed, the GAO reports that most of the revenue losses through tax expenditures come from provisions enacted during the years 1909 to 1919. Let me repeat that. Most of the revenue lost from these tax breaks—some of them necessary but many of them just blatant tax dodges—must be made up by either regular taxpayers through higher taxes or revenue not there for deficit reduction, comes about from provisions enacted during the years 1909 to 1919.

When I looked at the Republican Contract With America, I did not see one single sentence, not one single word in this Contract With America that called upon any large financial interest or any large corporation or, wealthy citizens, to be a part of this sacrifice. Let me just finish up by listing a few provisions, to give a sense of where we could have it. And, again, we call for no specific elimination of any specific tax expenditure.

Mr. President, I think actually what I will do for the moment is yield myself the rest of the time I might need but defer to the Senator from Wisconsin for a moment.

I yield the floor.

EXHIBIT 1

[From GAO Report 94–122]

TAX POLICY—TAX EXPENDITURES DESERVE MORE SCRUTINY—EXECUTIVE SUMMARY

PURPOSE

At a time when the federal government faces hard choices to reduce the deficit and use available resources wisely, no federal expenditure or subsidy, whether it involves outlays (i.e., discretionary or direct spending) or tax revenues forgone, should escape careful examination. Congressional and executive branch processes do not subject existing tax expenditures to the same controls that apply to programs receiving appropriated funds.

Congressman William J. Coyne was concerned that a lack of attention to income tax expenditures has allowed them to increase and was interested in how they could be controlled. GAO examined a wide range of alternatives for the review and control of income tax expenditures. This report describes the size of increases in tax expenditures; examines whether tax expenditures need increased scrutiny; and identifies options that could be used to increase the scrutiny of and/or control the growth of tax expenditures, discussing the advantages and disadvantages of each.

BACKGROUND

Tax expenditures are reductions in tax liabilities that result from preferential provisions in the tax code, such as exemptions and exclusions from taxation, deductions, credits, deferrals, and preferential tax rates. Many tax expenditures are subsidies to encourage certain behaviors, such as charitable giving. A few tax expenditures exist, at least in part, to adjust for differences in individuals' ability to pay taxes, such as deductions for catastrophic medical expenses. Some tax expenditures may also compensate for other parts of the tax system. For example, some argue the special tax treatment of capital gains may in part offset the increased taxes on capital income that result from such gains not being indexed for inflation. Congress sometimes reviews tax expenditures and has limited some tax expenditures by various means, such as by limiting the benefits as taxpayers' incomes increase.

Although widely used to describe preferential provisions in the tax code, the term tax ''expenditures'' is not universally accepted. Some observers believe that labeling these provisions tax ''expenditures'' implies that all forms of income inherently belong to the government. However, the concept was developed to show that certain tax provisions are analogous to programs on the outlay side of the budget, and it was intended to promote better informed decisions about how to achieve federal objectives. In using this term, GAO is recognizing that, as a practical matter, tax expenditures are part of the federal budget, and Congress already uses the tax expenditure concept to a limited extent in budgetary processes.

Currently, the House Committee on Ways and Means and the Senate Committee on Finance have jurisdiction over both new and existing tax expenditures. These Committees propose the mix of tax rates and tax expenditures to be used to obtain a specified amount of revenue. In reviewing tax expenditures, these Committees have used several techniques to limit individual tax expenditures or groups of them. These reviews, however, are not conducted systematically and may not explicitly consider possible trade-offs between tax expenditures and federal outlay programs and mandates.

RESULTS IN BRIEF

Tax expenditures can be a valid means for achieving certain federal objectives. However, studies by GAO and others have raised concerns about the effectiveness, efficiency, or equity of some tax expenditures. Substantial revenues are forgone through tax expenditures but they do not overtly compete in the annual budget process, and most are not subject to reauthorization. As a result, policymakers have few opportunities to make explicit comparisons or trade-offs between tax expenditures and federal spending programs. The growing revenues forgone through tax expenditures reduce the resources available to fund other programs or reduce the deficit and force tax rates to be higher to obtain a given amount of revenue.

The three options discussed in this report may help increase attention paid to tax expenditures and reduce their revenue losses where appropriate. First, greater scrutiny could be achieved with little or no change in congressional processes and jurisdictions by strengthening or extending techniques currently used to control tax expenditures. Ceilings and floors on eligibility, better highlighting of information, or setting a schedule for periodic review of some tax expenditures are some possibilities under this option. If controlling tax expenditures through the current framework is considered insufficient, Congress could change its processes to exert more control over them.

The second option is for Congress to further integrate tax expenditures into the budget process. One feasible approach would be for Congress to decide whether savings in tax expenditures are desirable and, if so, to set in annual budget resolutions specific savings targets. Savings could be enforced through existing reconciliation processes.

A third option is to integrate reviews of tax expenditures with functionally related outlay programs, which could make the government's overall funding effort more efficient. Such integrated reviews could be done by the executive or legislative branches, or both.

Under the Government Performance and Results Act of 1993 (GPRA), the Office of Management and Budget (OMB) plans to report information on program goals and key indicators for both outlays and tax expenditures. In January 1994, OMB designated 53 performance measurement pilot projects to begin in 1994. Implementation of GPRA provides a promising opportunity to increase the usefulness and visibility of outcome-oriented performance data.

GAO'S ANALYSIS

Tax expenditures can be a useful part of federal policy. But in some cases tax expenditures may not be the most effective, efficient, or equitable approach for providing government subsidies. For example, it might be less expensive for the federal government to provide assistance to state and local governments through direct payments than through tax-exempt bonds. Because tax expenditures represent a significant part of the total federal effort to reallocate resources, choosing the best methods for achieving objectives, including the most effective tax expenditure designs, could have significant results. (See pp. 23–32).

Tax expenditures have been growing but are difficult to measure

GAO primarily used Joint Committee on Taxation (JCT) estimates to analyze the size and growth of tax expenditures. According to these data, tax expenditures totaled about $400 billion in 1993. Their average annual percent increase in real terms for the period from 1974 to 1993 was about 4 percent, which compares to an average annual real increase for gross domestic product of about 2.5 percent. Tax expenditures are expected to continue growing; however, the rate of growth is uncertain.

As experts note, tax expenditure revenue loss estimates are not as informative as the revenue estimates made for proposed changes to the tax code. Whereas revenue estimates incorporate the changes in taxpayer behavior that are anticipated to occur as a result of the change, tax expenditure revenue loss estimates do not incorporate any behavioral effects. Furthermore, summing tax expenditure revenue losses ignores interaction effects among tax code provisions. Because of interactions with other parts of the tax code, the revenue loss from the elimination of several tax expenditures together may be greater or smaller than the sum of the revenue losses for each tax expenditure measured alone. Nevertheless, GAO believes tax expenditure revenue loss totals represent a useful gauge of the general magnitude of government subsidies carried out through the tax code.

When trends in these totals are looked at, however, care must be taken to consider the possible underlying causes. Aggregate tax expenditure magnitudes are affected by changes in tax rates, in economic activity, and in the number of tax preferences. An overall growth in aggregate tax expenditures may be due to rapid growth of a few tax expenditures—and some point to the rapid growth of health-related expenditures as a current example. However, no process currently prompts Congress to address these trends and decide whether they warrant policymaking actions.

JCT and the Department of the Treasury devote limited resources to estimating tax expenditure revenue losses because decisions are not based routinely on this information. GAO did not attempt to verify either JCT's or Treasury's tax expenditure estimates. (See pp. 33–38.)

Processes do not highlight tax expenditures for policymakers

Despite their significance, existing tax expenditures do not compete overtly in the annual budget process. Under budget processes, new tax expenditures must be funded as they are created. However, except for a few that are subject to reauthorization, existing tax expenditures, like most entitlement programs, can grow without congressional review. These tax expenditures are indirectly controlled primarily to the extent that revenue targets allocated to the tax committees under the budget process create pressure to decrease their growth. Although tax expenditures are listed separately in the president's budget each year, the lists are not used for making tax expenditure allocations or for comparisons with outlay programs. As a result, policymakers have few opportunities to make explicit comparisons or trade-offs between tax expenditures and federal spending programs. (See pp. 30–32.)

Options for greater scrutiny

Increased congressional review of or control over tax expenditures could be achieved under three general options, each consisting of several alternative approaches:

Option 1: This option involves methods currently within the purview of congressional tax-writing committees. It includes ''program'' reviews of individual tax expenditures that may lead to the redesign or elimination of some that are deemed inefficient or outmoded. Currently available control techniques include placing ceilings or floors on eligibility for tax expenditure benefits, structuring tax expenditures as credits rather than exclusion or deductions, limiting the value of itemized deductions to the lowest marginal tax rate, and limiting the value of deductions and exclusions for high-income taxpayers. To promote debate on tax expenditures, additional information on them could also be highlighted using current processes. For instance, they could be merged into budget presentations with related outlay programs. The methods currently used to review and control tax expenditures also could be used in conjunction with the following two options that would alter somewhat the existing congressional procedures for overseeing tax expenditures. (See pp. 39–56.)

Option 2: This option involves further integrating tax expenditures into budget rules. This could limit existing tax expenditures and encourage closer reviews of performance. One approach to further integration that GAO examined—placing an aggregate cap on forgone revenue—probably would not work because technical problems would be difficult to overcome. A second approach—in the form of a tax expenditure savings target—is feasible. Under this approach, in years that it wishes, Congress could specify a fixed amount of reduction in forgone revenue from tax expenditures in the budget resolution, which would be enforced through existing reconciliation processes. To promote greater public accountability, Congress could be prompted to explain in the annual budget resolution the reasons for its decision to either adopt or not adopt a savings target.

Definitional and measurement problems, which are exacerbated by an aggregate cap, could be lessened substantially under a savings target. Technical problems would be reduced because—as is now the case in reconciliation—revenue estimates are required only for the subset of tax expenditure provisions under consideration. However, requiring a specific amount of base broadening through the budget process would involve more actors in tax policymaking, especially with respect to expanding the authority of the budget committees. (See pp. 57–70.)

Option 3: Joint reviews of federal spending programs and related tax expenditures could be adopted to improve coordination and reduce overlap or duplication among outlay and tax expenditure programs. Joint reviews could be done in both the legislative and executive branches. Jointreview of spending programs and related tax expenditures could be accomplished by having program committees hold joint hearings with tax committees. More formally, Congress could adopt sequential jurisdiction for tax expenditure subsidy ''programs'' or establish joint committees in functional areas. Because fewer jurisdictional hurdles would arise, the executive branch annual budget preparation process may offer a more expeditious opportunity to implement such reviews. (See pp. 71–92.)

Recent legislation promises better tax expenditure information

According to the Senate Committee on Governmental Affairs report on GPRA, OMB is expected to describe a framework for undertaking periodic analyses of the effects of tax expenditures in achieving performance goals in a May 1, 1997, report to the President and Congress. GPRA thus presents an opportunity to develop better information about tax expenditure performance and to use that information to stimulate discussion and oversight as well as to make determinations as to how the government can best achieve its objectives, OMB indicates that initial discussions have been held on developing output measures for key tax expenditures and that reviews or related tax expenditures and outlays will be done in the future. (See pp. 90–92.)

RECOMMENDATION TO CONGRESSIONAL COMMITTEES

GAO recommends that the tax-writing committees explore, within the existing framework, opportunities to exercise more scrutiny over indirect ''spending'' through tax expenditures.

MATTERS FOR CONGRESSIONAL CONSIDERATION

Should Congress wish to view tax expenditure efforts in a broader context of the allocation of federal resources, it could consider the options of further integrating them into the budget process or instituting some form of integrated functional reviews.

AGENCY RECOMMENDATIONS

GAO makes several recommendations to the Director of the Office of Management and Budget intended to encourage a more informed debate about tax expenditures among executive and legislative policymakers and to stimulate joint review within the executive branch of tax expenditures and related spending programs. These recommendations should result in more informed decisions, by Congress and by the public, about the most appropriate means of achieving federal objectives. GAO envisions that in carrying out these recommendations, OMB would consult as appropriate with the Department of the Treasury and other federal agencies.

AGENCY COMMENTS

In written comments on a draft of this report, OMB and Treasury's Office of Tax Analysis (OTA) expressed support for expanded federal review of tax expenditures by the executive branch or Congress. More specifically, OMB agreed, with certain caveats, that GAO's recommendations to it were reasonable and indicated that the recommendations were consistent with efforts OMB has already begun. Regarding the three options for improved oversight of tax expenditures, OMB agreed that improved information on tax expenditures was desirable and that integrated comparisons of outlay programs and related tax expenditures may provide useful insights. In its recently announced reorganization, OMB promised to undertake joint reviews of related spending and tax expenditure programs during upcoming budget cycles.

OMB and Treasury were concerned that the integration of tax expenditures into the

budget process might not produce better outcomes than current processes. Treasury also expressed reservations about whether joint reviews of related spending and tax expenditure programs would provide the benefits anticipated.

OMB and Treasury's comments are discussed at the end of chapter 6. (See pp. 99–108.) OMB also suggested a number of useful technical changes, which were included.

OMB also obtained reactions on its draft report from JCT, the Congressional Budget Office, and two individuals knowledgeable about the issues discussed in the report. These organizations and individuals made observations on the report message, which are discussed at the end of chapter 6, and offered technical suggestions, which were included as appropriate.

Mr. FEINGOLD. Mr. President, my particular thanks to the senior Senator from Minnesota, who is doing a wonderful job of raising this issue of tax expenditures. I have enjoyed, both here in the U.S. Senate and especially back in the Wisconsin State Senate, just trying to point out when you spend money on a tax loophole and give people a special tax break, that is spending, too. It is taking the hard-earned tax dollar of the American people, putting it into a package and sending it out just to a few people. It is an awful lot like a spending program.

Our point here today is that often it does not get treated that way. It gets treated like somehow it is just a tax break for everybody, which, of course, it is not. If we are going to solve the Federal deficit and really have a balanced budget amendment, the Senator from Minnesota and I are saying this obviously has to be on the table. This has to be considered, too.

So I am very pleased to join with the Senator from Minnesota in offering this motion which is designed to put the Senate on record, insisting that when we get around to actually trying to balance the Federal budget we have to subject these tax expenditures—many of them inappropriate tax loopholes—to the same kind of scrutiny we will use to examine direct spending programs.

I feel I need to respond to the comments of the Senator from Washington, who spoke earlier today. He suggested all the Senator from Minnesota and I were doing was proposing an amendment designed to inhibit the balanced budget amendment itself. That is just not the case. I think those watching, everybody involved in this, should know that is really an unfortunate argument since the mechanism we are using, a motion to refer, is the very same mechanism that the majority leader used to get himself on record on Social Security. It does not delay the process at all. It just is a statement about the fact that certain things ought to be considered when we balance the budget.

It strikes me as a little bit unfair to attack the motives of those behind this amendment. There is no possibility that this will upend the balanced budget amendment. Whether it has the votes or not, even though I like this amendment a lot I do not think the Senator from Minnesota or I have any belief at all this will stop the balanced budget amendment. It is just another attempt to have some honesty and some candor with the American people about what is going on here. And, in particular, to identify where the money is, why we have such a huge Federal deficit. One of the big reasons is tax loopholes that have not been covered, that have not been fixed, and that cost us a fortune.

Mr. President, no one should mistake the difficult job that lies ahead in seeking to achieve a balanced budget, with or without a constitutional amendment.

The Congressional Budget Office has already told us, using current baselines, that between 1996 and 2002, Congress will have to enact some combination of spending cuts and revenue increases totaling more than $1 trillion to achieve a balanced budget.

There is strong sentiment, which I share, that we need to cut Federal spending, and that much of the deficit reduction achieved over the next several years will be as a result of cut backs in direct spending programs.

That will happen. I am very enthusiastic about being part of that process, as I have been for the last 2 years—identifying specific programs that do not make sense anymore and that can and should be eliminated. That is very important to this process. But I also believe it is vitally important that in looking for ways to reduce the Federal deficit and bring the Federal budget into balance that we subject tax expenditures to the same kind of scrutiny applied to direct spending programs. That sounds simple, but in the land of the lobbyist inside the beltway of D.C., it is not so simple. Tax expenditures, tax loopholes get treated very differently. They are special. They are off the table. They are protected.

Tax expenditures generally refer to preferential Tax Code provisions which give special treatment to specific industries or provide tax subsidies to consumers of particular products.

Last year, the General Accounting Office issued a report, ''Tax Policy: Tax Expenditures Deserve More Scrutiny,'' which focused upon the need to subject tax expenditures to the same type of scrutiny applied to direct spending programs.

The GAO report noted that most tax expenditures are not subject to reauthorization or any type of systematic review. Once they are in, they are in. They have a life of their own. They have immortality, in effect, in a way that spending programs do not. Once enacted these provisions are enshrined in the Tax Code and they are very, very difficult to dislodge.

GAO noted many were originally enacted to address economic conditions that at the time were important. But many of the economic conditions that these tax expenditures were meant to address just do not exist anymore. But they keep on going, like the Energizer tax expenditures—it does not matter. They can be completely irrelevant. Once they are in the Tax Code they are there and you are paying for it. We are all paying for these in higher taxes—or, at this point, in higher deficits and higher payment on interest to pay for those deficits.

For example, the GAO found of the 124 tax expenditures identified by the Joint Tax Committee in 1993, about half were enacted before 1950 something that the Senator from Minnesota has pointed out very persuasively. A lot of these are real old. They were not just enacted in the last 2 or 3 years. For example some of the tax allowances available to specific industries to recover certain costs of acquiring mineral deposits were enacted during World War I. Without an expiration date there is just very little impetus and no real trigger to review whether these provisions still make sense.

It reminds me a lot of some of the programs we have talked about and both parties seem willing to eliminate, such as the helium program. I have authored a bill to eliminate the old helium program that had to do with providing helium for blimps. It is an old program from the earlier part of the century. The President said we should get rid of it. Republicans in the other body say we should get rid of it. Those are held up to scrutiny, those are held up to ridicule sometimes, as the wool and mohair program, the Tea Testing Board, the search for extraterrestrial intelligence—these get held up in the light of the day. Everybody laughs at them. They are prime time because they are spending programs. But if it is the same kind of thing for special interests in the Tax Code nobody talks about them. It is a nice, quiet thing to sweep under the rug and make the American people pay a ton of money to keep these tax expenditures going. Let me give a couple of examples.

Since 1943, the Tax Code has allowed U.S. civilian employees who work abroad certain special allowances for things like housing and education, travel, and special cost-of-living allowances. As a result, employees who receive a large part of their incomes through these allowances rather than through direct salaries receive preferential treatment—a better deal than the rest of the American people.

I became aware of these special allowances when I was involved in trying to accomplish another cut last session which we did achieve, a substantial spending cut in direct spending in overseas broadcasts. We found out in the last Congress that to curb some of the excessive salaries and allowances paid to employees of Radio Free Europe and Radio Liberty, to the Board of International Broadcasting, would involve dealing with one of these tax expenditures. As the Senator from Minnesota has said, some of these exemptions may be justifiable. However, I do know they can be abused and manipulated to

get around salary caps that Congress has put in place for all the other Federal agencies. For these folks there is a special deal. It gets no review.

Another example, Citizens for Tax Justice noted in a recent report that interest income earned by foreign nationals on loans to American companies or the U.S. Government was exempted from the U.S. tax since 1984. In other words each of us pays taxes on our interest income but a foreign national does not pay any U.S. tax on that income, according to the Citizen's for Tax Justice. And this is again an unfair deal, in my view. When this exemption was passed a decade ago maybe there was some justification for it. But we ought to have some kind of review of this type of tax preference to see if it is still appropriate. Has it had some beneficial impact in terms of inducing foreign nationals to make loans to U.S. entities? Maybe so. Or is it just a windfall that is stuck in the Tax Code and that we cannot get rid of? We need to ask whether in today's international climate our foreign investment decisions are made more on projections regarding political and economic stability or on these kind of breaks.

A third example, and the Senator from Minnesota alluded to this.

Since 1916, the gas and oil industry has had special expensing rules for exploration and development costs.

A compendium of background material on individual tax expenditure provisions that was compiled by the Senate Budget Committee last December described these provisions as having ''very little, if any, economic justification.''

This report goes on to say that many economists believe that these provisions are a ''costly and inefficient way to increase oil and gas output and enhance energy security.''

Again, Mr. President, we are not raising this example alone because we have reached a final conclusion as to the merits of this special tax preference that is provided to one industry; rather, a tax preference established in 1916 simply ought to be carefully reconsidered in 1995 and thereafter, and the burden, Mr. President, should be on the proponents of the special preference to justify it because, by having this special preference, we all have to pay more.

If tax expenditures were subjected to reauthorization and sunset rules like direct spending programs, they might not fare as well as they do today.

Mr. President, I see the Senator from Minnesota is interested in speaking again. Let me just add a few other quick comments.

There are other cases. I just mentioned some larger items. Although the revenue loss to the Treasury over time is actually significant, it does not look like so much in any particular year. The Joint Tax Committee only lists preferential Tax Code provisions that have a projected total revenue loss of over $50 million or more in a 5-year period.

So these are regarded as small tax court provisions and again, even though they amount to quite a bit over time, they escape scrutiny year after year in the budget process. In contrast, you can be sure, Mr. President, that a direct spending program that would cost $10 million per year for 5 years would certainly be subject to review by both an authorizing committee and the Appropriations Committee on a regular basis.

But to try to put it simply, what the Senator from Minnesota and I are talking about is this: He said, if you have the political clout and the influence to stick a special tax exemption in the House Ways and Means Committee or in the Finance Committee in the Senate, you are all set. That thing is in there forever. It is protected. It is not talked about. It is not considered spending. It is not considered part of the deficit. It is not considered part of the debt. It is not considered part of the burden on our children and grandchildren. But it is money. It is real money. But if you are an older person who wants a meal at an elderly nutrition site, or a child who is in Head Start, or somebody who wants to see an Amtrak train in your State so people can get to work without polluting the environment, you are scrutinized. You have to defend and stand and undergo the tremendous pressure that this deficit has created, and, in part, that deficit is because of these tax loopholes.

Mr. President, to conclude, there are a number of reasons why tax expenditures should be subjected to the same scrutiny as direct spending programs. First, it is an equity issue. When some taxpayers receive special preference, the burden shifts to those who do not have lobbyists to win special breaks to pick up the difference. Giving special tax breaks to some industry means other industries will have the higher tax rates to get the same revenue. It also means the taxpayers with similar income and expenses end up having to pay different rates of taxes depending on whether they engage in the tax subsidization activity. Many tax expenditures make sense, and they accomplish important policy goals. But it is important that all such expenditures receive regular review, and they ought to be measured against each other, perhaps a more important policy goal.

So to conclude, Mr. President, the Senator from Washington says it is a confession of failure to attack the balanced budget amendment. This is a continued attempt to try to level with the American people just as the right-to-know amendment was. They talk about middle-class tax cuts. This is a huge pot of money that we need to balance the budget. It should be on the table. And the amendment of the Senator from Minnesota would put the Senate on record that we are not going to hold this immune while everyone else has to suffer.

I thank the Chair.

Mr. WELLSTONE. Mr. President, I thank the Senator from Wisconsin. I want to respond to some of his comments. But I would like to ask how much time remains.

The PRESIDING OFFICER. The Senator has 14½ minutes remaining.

Mr. WELLSTONE. I say to my friend from Utah that I would assume that he and others might want to respond to our amendment.

The PRESIDING OFFICER. The Senator from you Utah has 10 minutes.

Mr. HATCH. Mr. President, I yield such time as he may need to the Senator from Minnesota.

Mr. GRAMS. Thank you very much. Mr. President, I ask unanimous consent to engage in a colloquy with the distinguished chairman of the Judiciary Committee, Senator HATCH.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. GRAMS. First, I would like to extend my thanks to the distinguished colleague from Utah for bringing the balanced budget amendment to the floor for a full debate and vote because I believe, more than any other legislation, passage of the balanced budget amendment means keeping the promises that we made to the American people last November.

I also want to congratulate the chairman of the Judiciary Committee for his efforts to bring this legislation to the floor.

I also want to thank the American voters for sending a clear message that they expect and that they also deserve fiscal responsibility from Congress, and that they expect it now.

It is my understanding, however, that, like me, the distinguished Senator from Utah also supports the three-fifths vote, or the supermajority, amending the Constitution to make it a little more responsible in rating taxes. Is that correct?

Mr. HATCH. There are a lot of us who would like to do that. On the other hand, a constitutional majority would provide for it here, a supermajority tax limiting device as well. But there are a lot of those who would like to have the three-fifths vote.

Mr. GRAMS. When we are talking about the balanced budget amendment, I think the goal that we have is to make sure that the Government lives within its own means, or not being able to spend more dollars than it can take in. So I would like to believe that the balanced budget amendment is an attempt to reduce really the growth or irresponsible spending of the Federal Government rather than as a device or an excuse sometime in the future to raise taxes to cover these debts.

Mr. HATCH. I think the Senator makes a very good point.

Mr. GRAMS. I also believe it should be more difficult for Congress to be able to raise taxes or take tax dollars from hard-working Americans and to

make it harder for them to spend their hard-earned tax dollars. I also believe that the Federal Government has a budget deficit because spending is too high, not that taxes are too low. Does the Senator from Utah agree with me on that?

Mr. HATCH. Boy, do I ever. I certainly do. I think that is one of the reasons for this balanced budget amendment.

Mr. GRAMS. Is the Senator from Utah aware that in the country there are nine States that have a supermajority vote in order for their legislators to raise taxes? In those States, a portion of personal income has decreased on average by about 2-percent. So it does have the effect of not being able to raise—or reduce—the amount of taxes. Across the country, if you applied that 2 percent formula, you would save about $30 billion a year in taxes for hard-working Americans. That sounds like a good scenario.

Mr. HATCH. I think it does. I am a firm believer that the right tax rate reduction, especially marginal tax rate reductions, actually leads to more revenues as it increases more savings, investment, creation of jobs, and people working and people paying into the system.

Mr. GRAMS. Because of the sentiments expressed by the Senator from Utah and by thousands of Minnesotans that I have met over the last 2 years, I introduced Senate Joint Resolution 22, a balanced budget amendment which requires a three-fifths supermajority vote to increase taxes. Because I believe that Congress must pass the balanced budget amendment this month and because I do not want the taxpayer protection clause to be used as a cynical device to derail passage of the balanced budget amendment, I have decided not to offer this legislation as a substitute to the legislation currently pending on the floor. But as the Speaker of the House of Representatives has scheduled a vote for a taxpayer protection amendment to the Constitution on April 15 of next year, I believe that the Senate should take a similar step in scheduling a similar vote for next year.

Would the Senator from Utah agree with that?

Mr. HATCH. I would have no problem with that, if that is what the majority leader decides to do.

Mr. GRAMS. For that reason, I will be introducing a constitutional amendment requiring a three-fifths supermajority vote to increase taxes as separate legislation shortly in the Senate. I hope that the distinguished Senator from Utah will support this measure and also help us get it to the floor for a vote.

Mr. HATCH. I commend the Senator for being willing to stand up on the three-fifths vote and be against further tax increases on an already burdened populace.

Mr. GRAMS. I ask the chairman of the Judiciary Committee if he would be willing to hold hearings of this legislation yet later this year.

Mr. HATCH. I would be willing to do so. I think they are worthy of hearings because so many people in the House, and the Senator from Minnesota, feels so strongly about it. I would be willing to hold a hearing at least.

Mr. GRAMS. I thank the Senator for his assurance that we will have a hearing and also a markup on my legislation to protect taxpayers from higher taxes. I thank him for his efforts on behalf of all taxpayers, our children and grandchildren, to bring the balanced budget amendment to the floor of the Senate for a vote. I urge my colleagues to pass this measure without further delay.

I yield the floor.

Mr. HATCH. I thank the distinguished Senator from Minnesota and I appreciate his leadership in this area.

Mr. President, How much time remains?

The PRESIDING OFFICER. There are 5 minutes remaining.

Mr. HATCH. If I may say a few words about the suggestion of the distinguished Senator from Minnesota and the Senator from Wisconsin. The Senators from Minnesota and Wisconsin, I believe, continue to confuse the distinction between a debate of constitutional language and principle and a debate of implementing legislation. We are here to affirm the principle of Government that we should not spend excessively and should not leave excessive debt for our children. But this motion does not deal with the timeless principles of Government of broad application. It deals with a subsection of our tax policy.

I, once again, invite my dear colleagues to bring this and similar ideas back during the budget debate, or the debate over the implementing legislation, which we are going to have to go through following passage of the balanced budget amendment. That would be the appropriate time to do that. Self-declared opponents of the balanced budget amendment continue their attempt to shift this debate from the appropriate focus on constitutional principles to an inappropriate focus on the details of tax policy or some other minutia of implementation.

My attitude is, let us do first things first. I think we have to table this motion and pass the balanced budget amendment, and then let us face these problems that they are sincerely raising on the implementing legislation and do what has to be done. If we can, that will be the way to do it.

I reserve the remainder of my time.

Mr. WELLSTONE addressed the Chair.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. WELLSTONE. Mr. President, first of all, let me just say I appreciate the colloquy. What we are trying to focus on at the moment is how we are going to cut $1.481 trillion, between now and the year 2002. That is the credibility gap.

I came on the floor earlier, several weeks ago, with an amendment that came right from the State of Minnesota, where the State senate unanimously—the house of delegates was three votes short of unanimous—and the Republican Governor all signed a resolution saying: Before you send the balanced budget amendment to Minnesota, Wisconsin, or any State, please specify where the cuts are going to take place, and how it will affect our States. Let us do the planning. What kinds of people are going to be affected by this? Step up to the plate and tell us what you are going to do.

I still do not hear any of my colleagues on the other side or, for that matter, on this side, that are for this balanced budget amendment specifying how in fact we are going to reach this goal.

But, Mr. President, this amendment today is identical to the majority leader's motion to refer. It does not have any real connection to the balanced budget amendment in terms of any conditionality at all. We are simply saying, given the focus on balancing the budget and on deficit reduction, do not take all of these tax expenditures—$420 billion worth—off the table. The motion is very general. It does not target specific tax breaks because we do not think that would be appropriate on a constitutional amendment. The Senator from Wisconsin made that clear and I have made it clear. We simply want to express the sense of the Senate that tax expenditures will undergo the same scrutiny that all other spending goes through. We do not eliminate any expenditures. We do not specify what should be eliminated. We leave that to another day, when we get to the specifics of the budget and the budget reconciliation process.

This is a statement of principle today, that as we continue this budget debate in the Congress and in future Congresses, we intend to subject these $420 billion worth of tax expenditures—all too many of them tax dodges—to much closer scrutiny than in the past.

My colleague from Utah wants to separate out this notion, this principle, from a debate on balancing the budget. You cannot. This is a basic standard of fairness. I think in many ways this amendment really is a litmus test, because what people in Minnesota and around the country are saying is we want to know where the cuts are going to take place.

People are for the balanced budget amendment in the abstract, but when you get into specifics and people hear about draconian cuts, cuts in Medicare, Medicaid, higher education, people say, ''Wait a minute.'' Even if we all understand that we need to continue to invest in people and communities, but we also need to continue down the path of deficit reduction, what we are saying is that the Senate go on record saying we should evaluate these tax expenditures,

all of these different expenditures, some of which may be necessary but many of which, some say in the General Accounting Office, are outdated, inefficient, unnecessary—and I add, about the huge dodges.

Why should regular Minnesotans be asked to pay more in taxes, be asked to sacrifice? I have not heard anybody on the other side—my colleague from Minnesota came out, but there was no response to this amendment. Nor have I really heard a response from my colleague from Utah. Should the Senate go on record that as we evaluate how we are going to reduce the deficit and balance the budget, that we are going to call upon all Americans to be part of the sacrifice? Large corporations, large financial institutions, the wealthiest of the wealthy people in our country, are we not going to ask them to be part of the sacrifice?

I will tell you something, Mr. President. I think the Senate ought to go on record that each and every citizen and each and every interest, all interests, ought to be asked to be a part of the sacrifice. Everybody should be asked to sacrifice. There should be some standard of fairness. That is one of the reasons I have so much trouble with the last 2 weeks of this debate. We are asked to vote for a balanced budget amendment without specifying what you are going to do.

If I thought there was some standard of fairness, if I was not so sure that there are just going to be cuts that are going to affect the most vulnerable citizens, if I was not sure about what this is going to do to higher education and health care, if I really thought we were going to go after $420 billion worth of tax expenditures and put that on the table, and that we were also going to scrutinize the Pentagon budget and we were going to cut where we should cut, that is exactly the path I want to go down. That is what this amendment says. Subject these expenditures to the same scrutiny that we are putting a whole lot of other programs and expenditures under.

How much time do I have, I ask the Chair?

The PRESIDING OFFICER. The Senator has 7½ minutes remaining.

Mr. WELLSTONE. I yield the floor to the Senator from Wisconsin.

Mr. FEINGOLD. I ask the Senator to yield for a question.

Mr. WELLSTONE. I am pleased to.

Mr. FEINGOLD. Mr. President, I ask the Senator from Minnesota if he noticed in his State the same thing I have in my State in recent weeks: That there is a heightened level of anxiety around our States about what is going to happen when we balance this budget.

I am hearing people who are concerned about the elderly nutrition program, people that are concerned about what is going to happen with the Corporation for Public Broadcasting. So far, there does not seem to be much talk about the so-called tax loopholes as a way to solve the problem. That is one of the reasons I want to bring this up. I am wondering whether the Senator is experiencing this sort of discrepancy between direct spending programs versus not talking about the tax loopholes.

Mr. WELLSTONE. Mr. President, I would say to my colleague, just this past Saturday, I was in southwest Minnesota in a meeting with a group of citizens that are really worried that Pioneer Public Television—which, in the rural area, is so important; it is a pool of information; economic development, citizenship—is going to be eliminated. They are very worried about that for very good reasons. Certainly when I meet with the elderly or I meet with children or advocates for children, people who work in schools and universities, everybody was very worried about this.

What people say to me in cafes is, ''Look, we understand that we have to continue down the path of deficit reduction; we have to be fiscally responsible. We also know that there are crying needs in our community. We want to make sure children have opportunity, that we have to invest in education in our communities. We know it is not done by waving a magic wand, but there has to be some standard of fairness.''

That is what I think we are talking about here today. Absolutely.

I would say to my colleague, I would be interested in his response. Let me just put a question to him.

I really fell like if we are not willing to go on record today on this motion to refer, which just puts the Senate on record as saying we should just look at tax expenditures and consider whether they should be part of what should be cut. We see cynicism in people in Wisconsin and Minnesota who will say, ''Yeah, of course they will vote against this. Unlike those folks, we don't have the big bucks. We do not lobby everybody. Who do they represent? They don't represent us.''

I think we have to consider these tax expenditures to have credibility.

I will ask the Senator from Wisconsin what his view is about it.

Mr. FEINGOLD. That is exactly my concern. We are out here talking about the big picture, in terms of we have to balance the budget, we are talking about direct spending programs, but we have an obligation to talk about everything that is spent out here.

I find in Wisconsin, and I am sure you do in Minnesota, that people do not know about some of these oil and gas deals. They do not know, necessarily, that foreign nationals get the special deals on tax breaks. We talk about it. We do a heck of a job in telling people about where this item of pork—you know, the Lawrence Welk issue, the steamboat issue—and we should, and we made some progress on this.

But back home people are being prevented from finding out—because we will not talk about it—that there is worse stuff a lot of times stuck in the Ways and Means Committee and in the Finance Committee that never comes up to public scrutiny.

That is why it is particularly unfair, when these other programs are threatened that really help people and they may have to take some cuts, that they are on the chopping block and the American people are not even told the truth. No one is telling the people about the tax loopholes; in effect, a conspiracy not to talk about it.

I think that is a very serious injustice to the people that you have described.

Mr. WELLSTONE. Mr. President, might I interrupt my colleague to ask him a question?

Mr. FEINGOLD. Yes.

Mr. WELLSTONE. Is not also true that there is a very direct correlation—and, unfortunately, it is a hidden correlation, unless we are willing to be accountable and open and honest about this—between our failure to even look at—which is all we are asking for today—these tax expenditures and the kinds of cuts that are going to take place in some of these programs that are so important to people? And, in addition, is it not also true that regular taxpayers end up paying more?

Mr. FEINGOLD. Exactly.

If I may respond to the Senator from Minnesota, let us just think about, if you happen to be a supporter of the balanced budget amendment, your goal out of all of this is, of course, is that the States would ratify the balanced budget amendment. What do the supporters of the balanced budget amendment think is going to happen back in our home States when the people that are concerned about these programs find out the following: when they find out that defense spending is going up; when they find out that we are going to give out a big tax break across the board to everybody in the country; when they find out we would not even talk about tax loopholes?

It is not going to take too long before some of those State legislatures figure out, ''Wait a minute. What is this coming out of?''

It is coming out of the local programs and the tax dollars, the property taxes, of hard-working people of places like Minnesota and Wisconsin.

So I would think you would be concerned that not laying it out for the American people and putting tax expenditures off the table—as this, in effect, does if we do not put it in the sense of the Senate—I would think you would be concerned and I think the Senator from Minnesota is right on target.

Mr. WELLSTONE. I would say to my colleague, if I was a proponent of this constitutional amendment to balance the budget, which I am not, I would vote for this amendment.

Mr. FEINGOLD. Right.

Mr. WELLSTONE. Because once people understand that some of the programs that have been most important

to them and their communities, be it Medicare, be it Medicaid, be it Pell grants, be it nutrition programs for children, be it veterans' programs, you name it—are going to be cut and cut deeply—but the Pentagon budget is going up; and, you have all of these loopholes which are flowing disproportionately to large corporations and financial institutions in America with all the clout, without their being asked to sacrifice at all, there is going to be a huge amount of anger.

And I would say to my colleague, that is why I think the Senate must go on record today on this.

I would say to my colleague from Wisconsin we have a little under a minute left. I would be pleased if he would just conclude for us. It has been a joy working with him and I hope we get a good strong vote.

Mr. FEINGOLD. I thank the Senator from Minnesota. We will visit this subject again many times, both of us, and I know we will have support from others.

But what it really comes down to, this is not an attempt to delay on the balanced budget amendment. What we are doing here is to try to point out there are certain special interests that are being protected by tax expenditures and that those tax expenditures should be on the table. And, in large part, this is true because these tax expenditures have been a big part of the reason why this mess was created in the first place; one of the big reasons we have this deficit.

So why in the world should not that be on the table with all the other things?

That is our message and that is why we would urge the adoption of this motion to refer.

Mr. HATCH addressed the Chair.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I am prepared to yield back my time, if the distinguished Senators are prepared to yield back their time.

Mr. WELLSTONE. I thank my colleague from Utah. I am prepared to yield back my time.

The PRESIDING OFFICER. All time is yielded back.

Mr. HATCH. Mr. President, I move to table the motion and ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There appears to be a sufficient second

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Utah to table the motion of the Senator from Minnesota [Mr. WELLSTONE]. The yeas and nays have been ordered and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. LOTT. I announce that the Senator from Kansas [Mrs. KASSEBAUM] is necessarily absent.

The PRESIDING OFFICER (Mr. ASHCROFT). Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 59, nays 40, as follows:

[Rollcall Vote No. 70 Leg.]

YEAS—59

Abraham	Frist	Mikulski
Ashcroft	Gorton	Murkowski
Bennett	Gramm	Nickles
Bond	Grams	Packwood
Brown	Grassley	Pressler
Bryan	Gregg	Reid
Burns	Hatch	Roth
Campbell	Hatfield	Santorum
Chafee	Heflin	Shelby
Coats	Helms	Simon
Cochran	Hutchison	Simpson
Cohen	Inhofe	Smith
Coverdell	Jeffords	Snowe
Craig	Kempthorne	Specter
D'Amato	Kyl	Stevens
DeWine	Lott	Thomas
Dole	Lugar	Thompson
Domenici	Mack	Thurmond
Faircloth	McCain	Warner
Feinstein	McConnell	

NAYS—40

Akaka	Feingold	Levin
Baucus	Ford	Lieberman
Biden	Glenn	Moseley-Braun
Bingaman	Graham	Moynihan
Boxer	Harkin	Murray
Bradley	Hollings	Nunn
Breaux	Inouye	Pell
Bumpers	Johnston	Pryor
Byrd	Kennedy	Robb
Conrad	Kerrey	Rockefeller
Daschle	Kerry	Sarbanes
Dodd	Kohl	Wellstone
Dorgan	Lautenberg	
Exon	Leahy	

NOT VOTING—1

Kassebaum

So the motion was rejected.

MOTION INTENDED TO BE MADE

Mr. BUMPERS. Mr. President, I ask unanimous consent that the text of a motion to refer House Joint Resolution 1 to the Budget Committee, which I intend to make, be printed in the RECORD for the information of Senators.

There being no objection, the text was ordered to be printed in the RECORD, as follows:

Proposed motion to be made by Mr. BUMPERS:

I move to refer House Joint Resolution 1 to the Budget Committee with instructions to report back forthwith House Joint Resolution 1 and issue a report, at the earliest possible date, which shall include the following:

''SECTION 1. PROHIBITION ON BUDGET RESOLUTIONS THAT FAIL TO SET FORTH A BALANCED BUDGET.—Section 301 of the Congressional Budget Act of 1974 is amended by inserting at the end thereof the following new subsection:

''(j) CONGRESSIONAL ENFORCEMENT OF A BALANCED BUDGET.—Beginning in 2001, it shall not be in order to consider any concurrent resolution on the budget (or amendment, motion, or conference report thereon) that sets forth a level of outlays for fiscal year 2002 or any subsequent fiscal year that exceeds the level of revenues for that fiscal year.''

''SEC. 2. POINT OF ORDER AGAINST BUDGET RESOLUTIONS THAT FAIL TO SET FORTH A BALANCED BUDGET.—Add the following new section immediately following Section 904 of the Congressional Budget Act of 1974:

''SEC. . Section 301(j) may be waived (A) in any fiscal year by an affirmative vote of three-fifths of the whole number of each House; (B) in any fiscal year in which a declaration of war is in effect; or (C) in 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.''

Mr. DOLE. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. JOHNSTON. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. JOHNSTON. Mr. President, I yield to the Senator from Idaho.

Mr. CRAIG. I thank the Senator from Louisiana for yielding.

He is about to lay down an amendment that is a very important amendment to this issue that I think both sides are very concerned about and want ample time to debate. I would like to see if we could not arrive at a unanimous consent agreement here. Is it acceptable to the Senator from Louisiana if we look at 4 hours equally divided?

Mr. JOHNSTON. Mr. President, that is acceptable.

Mr. CRAIG. I hope that if we can get a unanimous consent on that, we would both try to yield back as much as possible of the unused time and so encourage our colleagues.

Mr. JOHNSTON. Certainly. Mr. President, there is no intent at all to delay. All amendments are important. But this is one that I hope will pass and that my colleagues on the other side of the aisle will accede to. But in any event, we will yield back to the extent we do not use the time.

Mr. CRAIG. Mr. President, I then ask unanimous consent for 4 hours equally divided on the Johnston amendment, prior to a motion to table, and that no amendments to the Johnston amendment be in order.

Mr. JOHNSTON. Mr. President, I certainly do not plan any second-degree amendments. I do not see any of my colleagues who do. So that would be suitable.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. CRAIG. I thank my colleague.

Mr. BYRD. Will the Senator yield?

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. BYRD. I ask unanimous consent that upon the disposition of the amendment by Mr. JOHNSTON, I be recognized to call up an amendment. If this request is not agreed to, I will be here and seek recognition in my own right. I make that request.

The PRESIDING OFFICER. Is there objection to the request?

Without objection, it is so ordered.

Mr. JOHNSTON. Mr. President, will the Senator withhold that for just a

minute and let me talk to him about that?

Mr. CRAIG. Mr. President, I note the absence of a quorum.

The PRESIDING OFFICER. Does the Senator from West Virginia yield the floor?

Mr. JOHNSTON addressed the Chair.

Mr. BYRD. Was my request agreed to?

The PRESIDING OFFICER. The Senator from Louisiana.

Mr. JOHNSTON. Does the Senator have a unanimous-consent request?

Mr. BYRD. That upon the disposition of the amendment that is being offered by Mr. JOHNSTON, I be recognized to call up an amendment.

Mr. CRAIG. Mr. President, reserving the right to object——

The PRESIDING OFFICER. Is there objection?

Mr. CRAIG. And I will not object, would the Senator from West Virginia mind discussing with us at this time the amendment he plans to offer following this amendment?

Mr. BYRD. I stated to the Senator in private what it was.

Mr. CRAIG. Would the Senator mind for the RECORD saying so?

Mr. BYRD. I will say so when I get ready.

Mr. CRAIG. I see. Let me say for the RECORD, because I do not want to object to proceedings here, the three-fourths amendment in section 1, it is my understanding the Senator from West Virginia plans to offer an amendment to it?

Mr. BYRD. It is, but I have not reached the point yet that I feel I am under obligation to announce what my amendment does before I call it up.

Mr. CRAIG. Mr. President, this is not an issue here. The Senator knows the rules of the Senate as do I, and certainly he is not under that obligation. I was only asking for a courtesy.

Mr. BYRD. I told the Senator in private out of courtesy.

The PRESIDING OFFICER. Is there objection to the request?

Without objection, it is so ordered.

Mr. JOHNSTON addressed the Chair.

The PRESIDING OFFICER. The Senator from Louisiana.

AMENDMENT NO. 272

(Purpose: To provide that no court shall have the power to order relief pursuant to any case or controversy arising under the balanced budget constitutional amendment, except as provided in implementing legislation)

Mr. JOHNSTON. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report the amendment.

The legislative clerk read as follows:

The Senator from Louisiana [Mr. JOHNSTON], for himself, Mr. BUMPERS, Mr. LEVIN, Mrs. BOXER, and Mr. PRYOR, proposes an amendment numbered 272.

Mr. JOHNSTON. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

At the end of Section 6, add the following: ''No court shall have the power to order relief pursuant to any case or controversy arising under this article, except as may be specifically authorized in implementing legislation pursuant to this section.''

Mr. JOHNSTON. Mr. President, this amendment is very simple. It is essentially the 1994 Danforth amendment which was adopted by this body without dissent.

What it says is that no court shall have the power to order relief pursuant to any case or controversy arising under this article except as may be specifically authorized in implementing legislation pursuant to this section—no court jurisdiction unless specifically authorized by the Congress. That is virtually identical to the amendment which was adopted last year.

Why do we propose this? On January 31, we had an extended debate here on the question of whether or not this amendment is enforceable, and if so, how it is enforceable. I opined that the way it would be likely enforced would be to have the Supreme Court order an income tax surcharge, because the Court is particularly ill qualified to make choices between various spending programs, to choose between the B–2 bomber and the F/A–18, or to choose between Social Security and Medicare, or to determine what the effects of these budget cuts would be. The thing they would be able to do is to order an income tax surcharge. It would not change any of the rules. It would simply say you add on to the present income tax, using those rules, a surcharge, which they would order the Treasury to collect.

In response to that argument, I had an extended colloquy with my friend from Utah, Mr. HATCH. Mr. HATCH stated that he did not see any way the courts would find standing or justiciability, that only the Congress had power to enforce this amendment. Mr. HATCH made very clear that it is the intent of the majority party that this amendment not be enforceable by the courts.

I then asked, ''If that is the intent, why did you not spell it out as we did in the Danforth amendment the previous year?''

To that, Mr. HATCH replied, in effect, that, ''Frankly, there are those on the other side who I think will argue the courts ought to have some control. We just want to avoid that particular argument.''

So in effect what we have is an intentional ambiguity fashioned in order to appeal to both sides of this argument. There are some who think the courts ought to be involved. There are some who think the courts should not be involved. Mr. HATCH thinks the courts are not involved. So, therefore, it is left intentionally ambiguous.

Mr. President, I would first like to submit to my colleagues that this is not at all clear. As a matter of fact, I believe the majority legal opinion would be that jurisdiction does lie. Quoting from a Harvard Law Review article of May 1983, they state:

Doctrinal analysis demonstrates, however, that taxpayers probably would have standing to challenge alleged violation of either the deficit spending prohibition or the tax limitation provision.

Harvard Law Review says when you analyze all the cases, they probably would have standing.

Assistant Attorney General Dellinger testified before the committee. Assistant Attorney General Walter Dellinger stated as follows:

Moreover, it is possible that courts would hold that either taxpayers or other litigants would have standing to adjudicate various aspects of the budget process under the balanced budget amendment. Even if taxpayers and Members of Congress were not granted standing, a criminal defendant prosecuted or sentenced under an omnibus crime bill that improved tax enforcement or authorized fines or forfeitures could argue that the bill ''increased revenues'' within the meaning of section 4.

Or take the distinguished professor, Harvard law professor Laurence Tribe. Mr. Tribe says:

So that one way or another, Members of Congress, a House of Congress, someone who has been cut off from a program, a taxpayer—these people will be able to go to court. No question about it.

I have a whole folder of cases and experts who say that taxpayers could go to court, that there would be jurisdiction in the courts, that it would be enforceable. Others say it is a question to be determined by the courts.

Suffice it to say, in my judgment, no one can seriously rise to his feet on the floor of this Senate and say that this is a clear question; that what Mr. HATCH says is correct, that is, that there is clearly no standing or jurisdiction to enforce this amendment. It simply is not so. As I have just quoted from Professor Tribe, from Professor Dellinger—Professor Fried says the same thing—Harvard Law Review—on and on. It is not clear what the limits of court jurisdiction would be.

I ask my colleagues this question, which is a fundamental question. Is there advantage in ambiguity? Is there some reason that we in this U.S. Senate, understanding the ambiguity of court jurisdiction, would want to leave it ambiguous? I think the answer is—which Mr. HATCH gave—that some of our people think they ought to have jurisdiction and some think they should not have jurisdiction so, therefore, we leave it ambiguous and hope to get the votes of both sides.

I submit that as a political matter on the floor of this Senate that is likely to do you more harm than good. There are some on this side of the Senate who, just as recently as 10 minutes ago, said the outcome of the Johnston amendment will influence their vote on this matter. There may be some on the other side of the aisle who feel differently.

I suggest if it is a political calculation that my friends on the other side of the aisle who are supporting this amendment check with their Members and see how many you lose by making clear the most fundamental question in this amendment. Are there really people in this Senate who would vote against the amendment because you cleared up an ambiguity? I do not believe so. But there may be some on this side of the aisle who recognize the pernicious, difficult effect of this amendment—no less authority than former Solicitor General, Judge Robert Bork, said the following, in a 1983 article:

> 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 question would at least be 4 years out of date and lawsuits involving the next 3 fiscal years would be slowly climbing toward the Supreme Court.

Judge Bork is giving nothing but common sense. Everything the Federal Government would do would be subject to litigation. And, as Judge Bork says, thousands of lawsuits matriculating their way up to the Supreme Court, inconsistent results, and in the meantime what happens to this country? There would be bond issues which are subject to doubt. What attorney would issue an opinion on a bond issue that was clouded by a Supreme Court or by a district court case? There are so many other things that this Congress does with respect to issuing debts, making contracts—all would be unclear because we would not know what the jurisdiction of the court was.

To those who say that the court needs to be involved, I say the Congress, under this amendment, has that power. To the extent that Congress specifically gives to the court the power to get involved in the balanced budget amendment, we have the ability to do so. And we may wish to do so. We may, for example, wish to limit them to declaratory judgments. We might wish to limit them to interpreting the words of the Constitution, determining what an outlay is, what a receipt is, et cetera. We may want to give them injunctive power. We may want to limit their ability to raise taxes. In fact, on the Republican side of this aisle, there is a lot of feeling against raising any taxes, whether by Congress—there was one amendment proposed which required 60 votes to raise taxes, as part of this amendment. But you would give that power to an unelected court.

So the power to raise taxes is clearly, Mr. President, something that ought to be cleared up. Or, on the other hand, we may wish to say that the Supreme Court has original jurisdiction for the purpose of considering the balanced budget amendment. In other words, we may think that the matter is so important and it requires such expeditious relief, considering the uncertainties in the bond market, the uncertainties in contractual rights, that we need to expedite that consideration by providing that original jurisdiction in the Supreme Court. The Congress under this amendment would have that power. We would be able to define those limits, provide for that expediency, and provide whatever jurisdiction or limits on that jurisdiction that we wish under this amendment.

Mr. President, I ask why not do that? Why not clear up that American ambiguity? Why not make this constitutional amendment so far as we can free from litigation?

Mr. President, I ask my colleague from Idaho, for whom I have great respect and affection, first of all, if he agrees with me that this is a matter which is at least ambiguous and that the weight of authority is probably on the side of saying the court has jurisdiction. Would my colleague agree with that statement?

Mr. KEMPTHORNE. Mr. President, in response to the Senator, I too have great respect for the Senator from Louisiana and admire the fact that he is bringing this sort of discussion to this issue. But really I would defer from responding to that because I think the chairman of the Judiciary Committee would be more appropriate who is grounded in this field and aspect of it to respond to you so you get the meaningful dialogue and exchange that really this issue merits.

Mr. JOHNSTON. Will the Senator agree with me that, if it is a matter of ambiguity—and we will let Senator HATCH respond to that—then it ought to be an ambiguity that could be cleared up?

Mr. KEMPTHORNE. I think when you have ambiguity, I do not know why we would want to proceed down the road of solidifying ambiguity.

Mr. JOHNSTON. I thank the Senator. In his usual candor, he I think reinforces the point.

Mr. President, I see my friend from Utah coming onto the floor. I wonder if I could engage with him in a colloquy on this matter.

I thank my friend from Utah. My question was this: I had just quoted from the Harvard Law Review a number of professors who have stated that in their view there would be standing, justiciability and the matter would be handled by the court, although there are doubts about the limits about it. Will the Senator from Utah agree with me that it is at least a matter of ambiguity as to what the jurisdiction of the court would be?

Mr. HATCH. I really do not agree. I really do not think that you can find standing across the board. I do not think you can find standing. There may be some isolated cases where a person's peculiar interests have been affected. I cannot think of any right offhand. But I am certainly not ruling that out. But I really do not think you can find all three of those conditions to exist with regard to the balanced budget amendment. I will be happy to address that in greater detail when it comes my time to say a few words about it.

Mr. JOHNSTON. Did the Senator have an opportunity to hear me quote Assistant Attorney General Walter Dellinger who said that it is possible that the courts would hold that either taxpayers or other litigants would have standing to adjudicate various aspects of the budget process?

Mr. HATCH. I was there when he said that and he backpedaled off that in the middle of the hearings and had to admit that there is not much basis for that statement. I might add that was in the face of a former Attorney General and a whole raft of other witnesses who said that just is not true.

Mr. JOHNSTON. What Attorney General?

Mr. HATCH. Attorney General Barr was there.

Mr. JOHNSTON. You understand Attorney General Barr, to quote Attorney General Barr:

> I do believe Congress should consider including language in the amendment that would expressly limit judicial review to actions for declaratory judgments. If, however, such a provision would prove to be politically unpopular, I believe for the reasons detailed in my written statement that Congress can safely pass the amendment in its current form without undue concern that the courts will entertain large numbers of suits challenging Congress' actions under the amendment or that, even if the courts do entertain some suits, they will order intrusive injunctive remedies.

General Barr says we ought to clear up the ambiguity because according to him, he says they—I mean the obverse. He says they will not entertain large numbers of suits. I do not know what large numbers are to him, and I do not know what intrusive injunctive remedies are.

Mr. HATCH. If the Senator will yield, I was there. He did say that as a political matter, if it helps you to pass a bill and dispose of amendments, that you might want to put a provision in with regard to declaratory judgments. We did that when we lost the last amendment. He said it is just a matter of political judgment. His opinion was that you are not going to——

Mr. JOHNSTON. I just quoted his opinion.

Mr. HATCH. No. No. That is what he said, not in his written statement. He was making a point in front of the committee that, if politically that helps you to pass the balanced budget amendment, you could live with that type of a provision. But his main points were that he did not see any reason to involve courts in the amendment either way.

Mr. JOHNSTON. If the Senator will yield.

Mr. HATCH. I will be happy to yield.

Mr. JOHNSTON. I am quoting Attorney General Barr in a written answer to a posthearing statement in which he says ''I do believe''—do believe—''Congress should consider including language in the amendment that would

expressly limit judicial review to actions for declaratory judgment.''

Mr. HATCH. Right. That is what we did in last year's debate.

Mr. JOHNSTON. In the Danforth amendment.

Mr. HATCH. But that has nothing to do withstanding, nothing to do with justiciability. The fact of the matter is——

Mr. JOHNSTON. Of course it does.

Mr. HATCH. Let me make my point. Declaratory relief in the eyes of many—and I think most authorities—can be as intrusive as injunctive relief. Take Justice Frankfurter in *Coalgrave* v. *Green*, 328 U.S. 549, page 552, a 1946 case, and he opined that declaratory relief should not be granted in situations where injunctions are inappropriate.

Mr. JOHNSTON. If the Senator will yield——

Mr. HATCH. If I could just finish, maybe I can help clarify. Let me finish. I only have two more comments to make.

Thus declaratory relief would be limited by the standing political questions of separation of powers doctrines.

Finally, the amendment of the distinguished Senator from Louisiana would be construed, if it passes, to grant the courts broad declaratory relief despite the standing in the political question of doctrine,and I might add the separation of powers doctrine. We think that is a mistake.

Mr. JOHNSTON. If I may correct the Senator at that point, my amendment precludes any judicial order of relief, except to the extent expressly authorized by the Congress and, unlike the Danforth amendment, does not include declaratory relief.

What I was saying about Judge Barr was that Judge Barr says you ought to limit this at least to declaratory relief, but he goes on to point out that it is probable that you would have some suits entertained. The distinguished Harvard law professor, Laurence Tribe, says:

> So that one way or another, Members of Congress, a House of Congress, someone who has been cut off from a program, a taxpayer, these people will be able to go to court; no question about it.

We could go on here quoting from cases, quoting from other experts. I have not come across any expert who says it is clear that there is no jurisdiction, not one. I would welcome that statement.

Mr. HATCH. The fact that we leave it open says there may be jurisdictions. It does not mean the courts will grant it. I do not think they will. Let me read——

Mr. JOHNSTON. Wait. We are on my time now. Let me make my point first, and the Senator may respond. There is not one expert—not one—that I have come across who says the matter of justiciability, the matter of standing, or the matter of being a political question, which are the three bases on which my friend from Utah relied in our January 31 debate, not one expert says that that is a clear question. On the other hand, Professor Tribe says it is clear they would have standing. Mr. Dellinger says he believes they would have standing. Judge Barr says you ought to limit that because there may be some lawsuits and they may order some judicial relief, and no one that I can find disagrees with that.

What I am saying is that it is at best an ambiguity—at best—and a probability of court jurisdiction, a probability of court intrusiveness here. How can my friend from Utah say it is not a matter of ambiguity in the face of the Harvard Law Review and distinguished professors, including his own, who say otherwise?

Mr. HATCH. Because there is little or no chance that is going to happen. Let me, if I can, just go back to the written remarks——

Mr. JOHNSTON. Can the Senator give me one single expert who agrees with him?

Mr. HATCH. I am going to give it to you right now. Let me just go back—if you want to enshrine the word ambiguity, I am not going to do that for you. I can say that I cannot rule out that there might be some oddball case where somebody might have standing. I cannot rule that out. But I do believe we can rule it out on the basis of just reasonability that some oddball is not going to have an oddball case that affects everybody in the country because they are not going to be able to meet those three requirements.

Here is what General Barr said in his written comments: ''In my view, though it is always difficult to predict the course of future constitutional law development''—from that standpoint, I have to grant the point that who knows whether some crackpots who occasionally do get to the courts, if we believe that is what is going to happen to the Supreme Court, who knows, you cannot say that anything is absolute in this world. Here is what he said:

> In my view, though it is always difficult to predict the course of future constitutional law development, the courts' role in enforcing the balanced budget amendment will be quite limiting.

I see 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 risks 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.

Then he says:

> I believe there are three basic constraints that will tend to prevent the courts from becoming unduly involved in the budgetary process. One, the limitation on the power of the Federal courts contained in article III of the Constitution, primarily the requirement of standing; two, the deference the courts will owe to Congress, both under existing constitutional doctrines and particularly under section 6 of the amendment itself, which expressly confers enforcement responsibility on Congress; and three, the limits on judicial remedies running against coordinate branches of Government, both that the courts have imposed upon themselves and that in appropriate circumstances Congress may impose on the courts.

When the Senator cites Laurence Tribe of Harvard to me and Walter Dellinger of Duke, they are both ardent advocates against the balanced budget amendment.

Mr. JOHNSTON. Let us quote from Mr. Barr, who says in that same statement on page 8:

> But I would be the last to say that the standing doctrine is an ironclad shield against judicial activism. The doctrine is malleable and it has been manipulated by the courts in the past.

The one expert that my friend from Utah quotes to say that this matter is clear himself says it is unclear, and he says you cannot predict what the court will do, and himself urges that you limit the jurisdiction of the court. That is what he says.

I ask my friend, why do we not clear it up?

Mr. HATCH. Because we do not have to. Even though he says that there is no absolute in the law, because you can always find, or you may find in the future, some judicial activist who will ignore what the law says, we do have all kinds of checks and balances in this country, not just the courts, but in the other branches of Government as well. Even in the courts we have checks and balances. That is why we have nine Justices on the Supreme Court. What he is saying is there is little or no likelihood that anybody is going to be able to go to court and meet those three requisites under current law or under the law as he envisions it to be.

If you ask him, well, assuming that there are no absolutes, and you want to be absolutely sure that the courts can never intrude, what would you do? Naturally, he would say I think you can have declaratory judgment relief if you want to write that into the amendment. We do not want to do that.

Mr. JOHNSTON. What harm does it do, to clear up this matter, to say that there is no jurisdiction, no power for the courts to grant judicial relief except to the extent we authorize it in the Congress; what harm does it do?

Mr. HATCH. I think the harm is that if the Senator writes the courts out of the Constitution, or out of this balanced budget amendment, he will be writing people out that we cannot foresee at this time—I do not know—who may have some legitimate, particularized injury to themselves that will enable them to have standing and a right to sue. That is a far cry from giving a broad, generalized right to the public at large.

Mr. JOHNSTON. Does the Senator understand what he just said? He has just been saying that this matter is clear that there is no jurisdiction, but

we better not say there is no jurisdiction because there are some people we cannot foresee who may have jurisdiction and may want to sue, and the courts ought to be enforcing their rights.

Mr. HATCH. There is a difference between a general right to sue for all citizens and a particularized injury to one individual which I cannot foresee right now. I do not believe there are any instances I can come up with, but there may be.

Let me give you an illustration. Suppose Congress—this is not to say this is going to happen—but suppose Congress passes legislation cutting spending programs only to Jewish people. That will not happen, but let us give that as a bizarre illustration.In this case, should they not have a right to sue?

Mr. JOHNSTON. Well, now, tell me, would the court's power to order relief be limited or could the court say you have not balanced the budget and therefore we order an income tax surcharge?

Mr. HATCH. I do not think the court can do that.

Mr. JOHNSTON. Where does my friend find such limitations on the court's power? If somebody has standing to sue, then they have standing to ask for whatever relief is appropriate.

Mr. HATCH. We deal with judicial restraints, judicial powers, every day in our lives. And one of the reasons why the law develops year after year after year is because of ingenious people who find ways to develop it.

All I am saying is this: We do not want to take away anybody's rights that may develop sometime in the future. We do not want a generalized right to sue and we do not believe anybody can make a good case that they will have that right.

I do not think Professor Tribe did it or Walter Dellinger did it in front of the committee.

Mr. JOHNSTON. Do you know what Robert Bork said?

Mr. HATCH. And on the courts raising taxes, it is a question of redressability. You know, it is a separation of powers of doctrine.

Mr. JOHNSTON. Judge Bork says:

> The result would be hundreds, it not thousands, of lawsuits around the country, many of them on inconsistent theories and providing inconsistent results.

Mr. HATCH. And Judge Bork has very good reason to feel that way with the way he was treated. His legal contentions are based on overexaggerated fears of judicial activists. Actually, the post-Warren Supreme Court has tightened the standing and justiciability doctrines to such a degree that balanced budget enforcement suits would probably be dismissed on those grounds alone.

And I cite the Lujan versus the Defenders of Wildlife case in 1992.

In fact, Bork admits——

Mr. JOHNSTON. If I may interrupt—and I do not like to interrupt.

Mr. HATCH. If I may just finish.

Mr. JOHNSTON. Are we proceeding on my time?

Mr. HATCH. I will be happy to make this response on my time.

Mr. JOHNSTON. Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. SANTORUM). The Senator from Utah.

Mr. HATCH. In fact, to make my case a little more clear, Bork admits, on page 2 of the letter he wrote, that standing would probably be denied. That is what most real constitutional experts would say. The substance of the legal argument is to speculate on the consequences of what if courts assumed jurisdiction. Well, what if courts decided to raise taxes? What if they decide to send armies to war? What if judicial activists decide to do anything that is outside of their jurisdiction and their range? I suspect we could conjure up any kind of a scare tactic, any kind of bizarre situation.

What we have to rely on is what is the law. And it is very tough under current law and under the laws that existed for a long time, to come up with standing, with the requisites to meet the standing, justiciability, and the political question doctrine and some separation of powers doctrine in order to do what the distinguished Senator is suggesting Tribe and Dellinger say can be done.

Mr. Dellinger back-pedaled quite a bit at that hearing. We did not have a lot of time to question him, and if we had, I think he would have back-pedaled a lot more. Neither Tribe nor Dellinger are supporters of the balanced budget amendment.

And I have found, as the excellent lawyers they are, and they are really excellent lawyers, that they can come up, as law professors—and both of these are law professors, although Dellinger, Professor Dellinger, and I do not mean to denigrate him; Professor Dellinger is now down at the Justice Department—both of them can come up with alternatives on everything.

Mr. JOHNSTON. Mr. Barr is a supporter.

Mr. HATCH. No, Mr. Barr is not a supporter. I listened to the testimony, and in speculating about it and hypothesizing about it, he says, ''Well, if you want to do this, you can do it.'' But Barr basically says you should not have to do it; the law is such that you should not have to do it.

And Bork is just saying it because he fears judicial activists. Bork is saying that, you know, well, his comments are based on what I consider to be, and I think many others, exaggerated fears of judicial activists.

Mr. JOHNSTON. You do understand that Mr. Barr said:

> I do believe Congress should consider including language in the amendment that would expressly limit judicial review.

Mr. HATCH. I was there. I believe I was there when he said it.

Mr. JOHNSTON. No, this was in the posthearing answer to written questions. That is the last word from Mr. Barr.

Mr. HATCH. I am aware.

Mr. JOHNSTON. Did he ever back up on that?

Mr. HATCH. I think if Mr. Barr, if General Barr, was asked what his opinion is, he would say, ''Don't clutter up the Constitution.'' Because every time you add a provision like this into to, every time you add that kind of provision or any kind of provision, you have a whole myriad of problems that arise from there.

Now we have people in both bodies who want the courts involved. We have people who do not want the courts involved. I think there is little or no likelihood that the courts are going to be involved on this amendment as it is written.

Mr. JOHNSTON. Is that not the real answer; that some of your Members are for it and some are against it, and you want to please both sides, so you leave it ambiguous?

Mr. HATCH. First of all, I do not think it is really ambiguous. Nothing is absolute, so I guess you can claim ambiguity on any proposition you make.

Mr. JOHNSTON. I just read to you the most distinguished professors in the country, including Mr. Bork, and you have not one single expert, not one, who supports your position. Name me one. I mean, you do not like Judge Bork; you do not like——

Mr. HATCH. I love Judge Bork. And I do not disregard Professor Tribe and Professor Dellinger.

What I am saying is this: The Senator is partially correct. We are dealing here with a constitutional amendment of general application. We are dealing with one of the most difficult debates in the history of the country. We are dealing with consensus problems. We are dealing with Republicans and Democrats. We are dealing with 38 years of trying to get this to the floor—38 years; really, better than 200 years of getting the House to vote on this. Thirty-eight years of trying to get it to the floor, nineteen years in my life of trying to do it, having brought it to the floor in 1982, where we passed it in the Senate without that language, having brought it three other times to the floor, and this is the fourth time, and trying to bring people together who have a mixture of viewpoints.

We are doing the best we can. Now, can we satisfy everybody's urge, including Professor Tribe's or Professor Dellinger's? Can we satisfy everybody's demand or desire for their own wording in this amendment? Can we satisfy those who do not want the courts involved in this to the exclusion of those who do? There are not many who do, but there are some who do.

Or do we do what we have to do, and that is, get a consensus on this matter and fight for it as hard as we can and do the best we can? Well, that is what we are doing.

Mr. JOHNSTON. If I could ask my colleague at that point, I disagree not just with the legal calculus, but with the political calculus, as well.

The Danforth amendment was virtually identical to this amendment and was passed without opposition. Is there really opposition on your side? Are there Senators who on your side would say, I will not support this amendment unless it has the right of the courts to order relief?

Mr. HATCH. I believe there are. I believe there are some on your side. In fact, I think there are as many, if not more, on your side.

So what I am saying is we are trying to do the art of the doable here. Personally, I do not like courts involved—in certain aspects of this, I would not want them involved at all—and I do not believe they will be, or I would be arguing for the Senator's position. I might add that some do like the courts involved in some of these areas, but I do not know many who do.

But let me just say that what we are trying to do is bring Senators together and reach a 67-vote total. We are one or two votes away from that. Some think we are there, but I do not ever count that until the final vote. We are one or two votes away from being there. And we are trying to keep the amendment intact.

And keep in mind, we have 300 people in the House of Representatives who voted for this amendment. If we add anything to it, it has to go back to them.

These are considerations the distinguished Senator from Illinois and I have to meet.

Now, as I recall, just to name two experts, Griffin Bell, former Attorney General of the United States, upholds this position. Professor Van Alstein, from Duke, who was Walter Dellinger's partner down there, upholds this position, as far as I know.

Mr. JOHNSTON. Who say this is a matter that has no ambiguity.

Mr. HATCH. Who say there is little or no likelihood that people can generally sue on behalf of all Senators under this amendment.

Mr. JOHNSTON. There is a huge amount of difference between ''little likelihood'' and ''clear.''

See, the difference is that we would have this litigation going through the courts. As Judge Bork said, thousands of cases with inconsistent results. Bond issues, contracts, subject to lack of clarity.

It is not too much to say that the capital markets of this country could, during the pending litigation, be put into complete chaos.

Mr. HATCH. I think those are scare tactics myself. Let me say a few things, and maybe I can clarify to a degree.

Mr. President, the balanced budget amendment is a fine-tuned law. It manages to strike the delicate balance between reviewability by the courts and the limitations on the courts' ability to interfere with congressional authority.

I wholeheartedly agree with the former Attorney General William B. Barr, who stated that if House Joint Resolution 1 is ratified there is,

> * * * little risk that the amendment will become the basis for judicial micromanagement 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.

In other words, we can correct any problem that does arise. ''On balance,'' he goes on to say, ''whatever remote risk there may be the court will play an overtly intrusive role in forcing the amendment, that risk is, in my opinion, vastly outweighed by the benefits of such amendment.''

In regard to Congress' power to restrain the courts, which I think is an important point, I think the Senator from Louisiana does the Senate a service in raising the issue.

In order to resist the ambition of the courts, the framers gave to the Congress in article III of the Constitution the authority to limit the jurisdiction of the courts, the type of remedies the courts may remedy, if Congress truly fears certain courts may decide to ignore the law and the precedence. If Congress finds it necessary, through implementing legislation, it may forbid courts the use of their injunctive powers already. And the Congress has done that from time to time.

Or Congress could create an exclusive cause of action or tribunal which carefully limits power satisfactory for Congress to deal with the balanced budget components or complaints.

But Congress should not, as the distinguished Senator from Louisiana proposes, cut off all judicial review. I believe that House Joint Resolution 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 issues in question.

At the same time, this balanced budget amendment does not undermine the courts' equally fundamental obligation, as first stated in Marbury versus Madison, to say what the law is. After all, while I am confident that courts will not be able to interfere with our budgetary prerogatives, I am frank enough to say I cannot predict every conceivable lawsuit—nobody can—which might arise under this amendment and which does not implicate these budgetary prerogatives.

A litigant in such a narrow circumstance, if he or she can demonstrate standing, ought to be heard. They ought to have their case heard. It is simply wrong to assume that Congress would just sit by in the unlikely event that a court would commit some overreaching end. Believe me, Congress knows how to defend itself. Congress knows how to restrict the jurisdiction of courts or limit the scope of judicial remedies where the courts get completely out of line as they would have to be in this situation.

I do not think it is necessary. Lower courts by and large, and really almost always, follow precedent. The precepts of separation of powers and the political question doctrine effectively limit the ability of courts to interfere in the budgetary process. Nevertheless, if necessary, a shield against judicial interference is section 6 of House Joint Resolution 1, the constitutional amendment itself. Under this section Congress may adopt statutory remedies and mechanisms for any purported budgetary shortfall such as sequestration, rescission, or the establishment of a contingency. Pursuant to section 6, it is clear that Congress if it finds it necessary, could limit the type of remedies the court may grant or limit the courts' jurisdiction in some other manner to proscribe judicial overreaching. This is not at all a new device nor is it at all a new constitutional device. Congress has adopted such limitations in other circumstances pursuant to its article III authority.

In fact, Congress may also limit standing, judicial review, particular special tribunals with limited authority to grant relief. Such a tribunal was set up recently as the Reagan administration needed a special claims tribunal to settle claims on Iranian assets. Beyond which, in the virtually impossible scenario where these safeguards fail, Congress can take whatever action it must to moot any case in which a risk of judicial overreaching becomes something real.

Now, these standing, separation of powers, and political question issues are restraints. I might add, there is a distinction between remedies court can give and the ability to bring relief. Courts cannot interfere with the budgetary process. It is a political question. It would violate the separation of powers doctrine.

These three restraints—these are basic constraints—prevent the courts from interfering in the budgetary process.

Mr. JOHNSTON. Mr. President, will the Senator yield?

Mr. HATCH. If I could finish this, I would like it to be uninterrupted. Then I would be happy to yield.

First, limitations on Federal courts contained in article III of the Constitution, primarily the doctrine of standing. That is not one.

Second, the deference the courts owe to Congress under both the political question doctrine and section 6 of the amendment itself, which confers enforcement authority in Congress—not in the courts, in Congress—specifically. I think a court would really have to overreach and overreach badly to try to go around that.

Third, the limits on judicial remedies which can be imposed on a coordinate

branch of government; in this case, the legislative branch.

These are limitations on remedies self-imposed by courts and that, in appropriate circumstances, may be imposed on the courts by Congress. These limitations such as the doctrine of separation of powers prohibits courts from raising taxes—that is a power exclusively delegated to Congress by the Constitution—and it is not altered in any way, shape or form by the balanced budget amendment that we are offering here today.

Consequently, contrary to the contention of the opponents of the balanced budget amendment, separation-of-power concerns further the purpose of the amendment in that it assures that the burden to balance the budget falls squarely on the shoulders of Congress, which is consistent, as I see it, with the Framers of the Constitution that all budgetary matters be placed in the hands of Congress.

Concerning the doctrine of standing, it is beyond dispute that to succeed in any lawsuit, a litigant must further demonstrate the standing to sue. To demonstrate article III standing, a litigant at a minimum must meet three requirements: No. 1, injury, in fact, that the litigant suffered some concrete and particularized injury.

No. 2, traceability —that the concrete injury, not only is the injury in fact because the litigants suffer some concrete or particularized injury, but traceability means that the concrete injury was both caused by and is traceable to the unlawful conduct.

And No. 3, redressability—that the relief sought will redress the alleged injury.

That is a large hurdle for a litigant to demonstrate that injury in fact requirement. That is something more concrete than a generalized grievance and burden shared by all citizens and taxpayers.

I do not know anybody who is an authority on this subject who would disagree with that. They might not like that, but that is what the law is. Even in the vastly improbable case where an injury in fact was established, a litigant would find it nearly impossible to establish the traceability and redressability requirement of the article III standing test. After all, there will be hundreds and hundreds of Federal spending programs even after Federal spending is brought under control.

Furthermore, because the Congress would have numerous options to achieve balanced budget compliance, there would be no legitimate basis for a court to nullify or modify a specific spending measure objected to by the litigant.

Now as to the redressability problem, this requirement would be difficult to meet because courts are wary of becoming involved in the budget process. They always have been, which they admit is legislative in nature, and separation of powers concerns will prevent courts from specifying adjustments of any Federal program or expenditures.

Thus, for this reason, Missouri versus Jenkins, the 1990 case that is often cited, where the Supreme Court upheld a district court's power to order a local school district to levy taxes to support a desegregation plan is inapposite. Plainly put, the Jenkins case is not applicable to the balanced budget amendment because section 1 of the 14th amendment, from which the judiciary derives its power to rule against the States in equal protection claims, does not apply to the Federal Government and because the separation of powers doctrine prevents judicial encroachments on Congress' bailiwick. Courts simply will not have the authority to order Congress to raise taxes. It is just that simple. And anybody who argues the Jenkins case just does not understand its 14th amendment implications.

Now on the political question, and these are important points, and I apologize to my colleague for making him wait until I make these points but I think they need to be made in order, and then, of course, I will be glad to discuss it with him.

The well-established political question doctrine and justiciability doctrine will mandate that the courts give the greatest deference to congressional budgetary measures, particularly since section 6 of House Joint Resolution 1 explicitly confers on Congress the responsibility of enforcing the amendment, and the amendment allows Congress to ''rely on estimates of outlays and receipts.''

Under these circumstances, it is extremely and all but unlikely that a court will substitute its judgment for that of Congress. I just cannot conceive of it, other than some future country that does not abide by its laws.

Moreover, despite the argument of some opponents of the balanced budget amendment, the taxpayer standing case, Flast versus Cohen, in 1968, is not applicable to enforcement of the balanced budget amendment. The Flast case has been limited by the Supreme Court to establishment clause cases. Also, Flast is, by its own terms, limited to challenging cases for an illicit purpose.

I also believe there would be no so-called congressional standing for Members of Congress to commence actions under the balanced budget amendment because Members of Congress would not be able to demonstrate that they were harmed in fact by any dilution or nullification of their vote, and because 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 enforcement or amendment of a statute, it is hardly likely that Members of Congress would have standing to challenge actions under the balanced budget amendment. Highly unlikely.

Mr. President, I believe it is clear that the enforcement concerns about the balanced budget amendment do not amount to a hill of beans. The fear of the demon of judicial interference is exorcised by the reality of over a century of constitutional doctrines to prevent unelected courts from interfering with the power of the democratically elected branch of Government and to bestow Congress with the means to protect its prerogatives.

I think that even though you can always say there are ambiguities in the law, there always are. That does not negate the fact that this balanced budget amendment does not need to be amended to take care of something that is the most highly unlikely set of occurrences that could happen.

I will be happy to interchange with my friend from Louisiana.

Mr. JOHNSTON. Mr. President, I thank my colleague for yielding. On this question of justiciability and standing, the Senator is, I believe, familiar with the fact that many States have balanced budget amendments and there is a plethora of litigation in which State courts have taken jurisdiction.

In New York, in the 1977 fiscal crisis where they had a loan of $250 million, the court declared that that was permissible; took jurisdiction.

In the State of Georgia, a lease by development authority, the question whether that constituted indebtedness under that State's constitution.

In Wisconsin, whether a lease-purchase agreement constituted indebtedness.

In 1981 in Illinois, the legislature closed the schools early in pursuit of the balanced budget amendment of that State. The court took jurisdiction and, by the way, they said it was permissible but they took jurisdiction and made the decision.

In California, the employees' retirement system challenged the action of the State legislature which, in turn, passed fiscal emergency legislation to suspend funding to the State employees' retirement system, and the court took jurisdiction in that case and was able to order. They do so all across the country.

In my State, the courts specifically have stated they have jurisdiction. In the face of all of these State courts, in the face of Judge Bork, Attorney General Dellinger, in the face of Laurence Tribe of the Harvard Law Review and all of these others who say you probably would have standing, jurisdiction, justiciability, how it can be said—and I ask my colleague—how it can be said that there is no standing justiciability or that this is a political question escapes me.

Does the Senator desire to respond to that, or may I make one other point? Is he ready to respond to that? I see my colleague from Utah is not here.

Mr. BROWN. The distinguished Senator from Louisiana may want to go

ahead and complete his points before we respond.

Mr. JOHNSTON. The Senator from Utah also said the Congress would have the power if there were courts who began to meddle in this, accepted jurisdiction, that the Congress would then have the power, I guess by getting 60 votes to overcome a filibuster, in order to limit that jurisdiction of a case already started.

I just wonder at what point the Congress would feel constrained to act. Would it be after the district court had issued an injunction, after the court of appeals had ordered taxes increased or after the Supreme Court had acted? Why do we not fix that in advance so the court will not exercise this jurisdiction, will not exercise that power, except to the extent that the Congress specifically authorizes it? That is my question, and then I will yield to my friend from Michigan.

Mr. BROWN. Mr. President, the distinguished Senator from Louisiana has raised some concerns. My hope is that I can offer at least some comments that will be helpful to a portion of his concerns.

The issue of whether or not this provides ''a plethora of litigation''—I think those are the words that were stated—is a fair question to ask, and I think it is reasonable to bring it before the body. I asked that question specifically of the Assistant Attorney General when he came before the Judiciary Committee.

The point of the administration was that this could lead to a flood of litigation. I noted that a large number of our States, the vast majority of our States have similar balanced budget amendments. The one in Colorado is, of course, very strict, much stricter than this. This is the softest form of a balanced budget amendment that I know of. I think Americans that watch this debate will be shocked to find how weak a version it is because it can be waived by simply 60 votes.

However, the allegation that this would lead to a large amount of litigation already is a question that has been faced by this country because the vast majority of our States have constitutional amendments that require a balanced budget, and they are much tougher than anything we are talking about.

I asked the Assistant Attorney General to name for me the cases that he was worried about, this flood of litigation. He could not name one single case. Mr. President, let me repeat that because the Attorney General who had made that allegation was unable to name a single solitary case. And when pressed on it, he came up with the name of several cases that, indeed, involved States but did not involve the balanced budget amendment that those States had.

Now, what is the fact? Colorado has a balanced budget amendment. The last litigation we had——

Mr. JOHNSTON. Will the Senator yield on the question of what the Attorney General said?

Mr. BROWN. I would be happy to yield to my friend from Louisiana.

Mr. JOHNSTON. Quoting from Mr. Dellinger, Assistant Attorney General Dellinger's testimony on page 137 of the hearings, he stated as follows:

There is as yet nothing in this amendment proposal that would preclude the courts of getting involved in issues of taxation. Recall Missouri v. Jenkins from 1990, where the Supreme Court held that while a Federal district court had abused its discretion in directly imposing a tax increase to fund a school desegregation program, that the modifications made in that case by the Court of Appeals satisfied equitable and constitutional principles.

If we have an amendment that for the first time constitutionalizes the taxing and spending process and creates a constitutional mandate which the courts are sworn on oath to uphold, there is simply no way that we can rule out the possibility that tax increases or spending cuts would be ordered by the judiciary.

The Senator asked what was the case Mr. Dellinger was concerned about. That is it—taxing being ordered by the courts or spending cuts being ordered by the courts. That is page 137 of last year's hearing.

Mr. President, I ask unanimous consent that I be allowed to place in the RECORD at this point Mr. Dellinger's testimony.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

EXCERPT FROM HEARING ON SENATE JOINT RESOLUTION 41—BALANCED BUDGET AMENDMENT

Mr. DELLINGER. Mr. Chairman, thank you.

Two hundred and seven years ago this summer, the framers of the Constitution met in Philadelphia. Their goal, as one of the founders put it, was to design a system of government that would ensure the grandeur and importance of America until time shall be no more.

The coming together of the American Colonies into a single Nation was more difficult than we can easily now imagine. John Adams wrote home from the Continental Congress in 1775 to the remarkable Abigail Adams, and he spoke of 50 gentlemen meeting together, all strangers, not acquainted with each others' ideas, views, language, designs. We are, he said, timid, skittish, jealous.

They came as representatives of legislative democracies that had some independence from England and had engaged in self-government, in many instances, for more than a century. They took enormous risk to create, in that summer of 1787, between the first day, May 25, and the last day, September 17, 1787, a system of government that has lasted longer and served better as a foundation for free government than any other constitution yet written.

It was the government designed to create a great republic, the kind of republic that John Marshall could then imagine as a young Chief Justice; where, from the St. Croix to the Gulf of Mexico, revenue was to be collected and expended, armies are to be marched and supported. To this end, Marshall wrote, all the sword and the purse, all the external relations and no inconsiderable portion of the industry of the Nation are entrusted to this Government.

This Government, under this system of government, as you know as the great historian of this body, the Senate, has provided an extraordinary basis for the achievement of the grandeur and importance of the American Nation.

I think we are considering today an amendment to that document that poses great risk. For that amendment is profoundly anticonstitutional, not unconstitutional—no amendment ratified in due course could rightly be called unconstitutional—but anti- constitutional in the sense that it goes against the basic spirit, the basic essence of some of the most profound aspects of the Constitution.

The Constitution, as written by the framers, did not constrain choices, It, rather, empowers the people to enact choices, except in those few instances, such as the freedom of speech and the press and of religion, that are ruled out of bounds altogether. Thisamendment is inconsistent with that goal, by seeking to shackle government.

It is a Constitution in which the principle of majority rule is so fundamental, so essential, that it literally goes without saying. There is no need even to mention that decisions are made by majority rule. And yet, here is an amendment that would, for the first time, allow 40 percent to hold hostage a majority of the Government with respect to a matter—the passage of a budget—that must be done.

We have, and will hear in the judiciary subcommittee today and yesterday, discussions to the fact that there are other supermajority provisions of the Constitution—and so, there are. But notice how different this proposal is. Each of the other supermajority provisions of the Constitution—the ratification of treaties, conviction of a President on charges of impeachment, the override of a veto, the expulsion of a Member or proposing an amendment to the Constitution—each of those calls for a supermajority in circumstances in which the default, the status quo, is perfectly acceptable and can remain if no action is taken.

If we do not propose a constitutional amendment because there is no supermajority, the Constitution we have remains as it is. We can go without a treaty. We can decline to impeach a President. We can decline to override the President's veto. But we must pass a budget. There is no underlying status quo of no budget that is acceptable. So that, in this unusual event, we would distort and challenge the basic notion of majority rule.

Some have noted that, indeed—and you would know this better than I—such a provision could, in fact, worsen budget deficits. I would certainly defer to your judgment, Mr. Chairman, on this, but I could easily imagine circumstances in which a majority and a minority leader thought it a lot more difficult to assemble 50 votes for a stringent budget vastly increasing taxes and cutting cherished programs than it would be to outbid each other to assemble 60 votes, where, if you achieve 60 votes through a bidding war, there is simply no limit on how large the deficit may be under this amendment.

So, you have this odd distortion between the votes necessary to pass a budget and one which could work in quite unexpected ways.

But those, Mr. Chairman, are just introductory remarks to what I think is the central concern that would be appropriate for the Department of Justice to represent to you today. And that is the implications of this amendment for the basic structure of our constitutional government and to the status of our Constitution as positive law.

Yesterday, one of the thoughtful supporters of this amendment described it as a necessary, quote, mechanism of discipline for our budget situations. And yet, the very flaw of this proposal is that it has no mechanism. And it is that absence of a mechanism of enforcement that makes this amendment such a threat to our basic constitutional values.

The central problem is that this proposed amendment promises a balanced budget without providing any mechanism for accomplishing that goal. It simply declares that outlays shall not exceed expenditures, without ever explaining how this desirable state of affairs shall come about, and without specifying who among our Government officials shall be empowered to ensure that the amendment is not violated or, if violated, the Nation is brought into compliance.

Some have said that Congress will feel duty bound to comply with the requirements of this constitutional amendment. And I agree that each Member of Congress would properly consider himself or herself individually bound to comply with the amendment. The difficulty is that the amendment does not provide any mechanism by which those individual Members of Congress can coordinate their separate constitutional obligation to support a balanced budget.

Each Member of the Senate and House might conscientiously set about to comply with the amendment. One Senator might vote to cut military spending; another to reduce retirement or other entitlement benefits; a third to raise taxes. Each would have been faithful to his or her oath of office. But each of the measures may fail to gain a majority support and, therefore, the amendment would not be, and the requirements of the amendment would not be, met.

Or, of course, Congress might simply, by 55 votes, pass an amendment that does not, in fact, produce a situation in which outlays do not exceed receipts.

What are we then left with? What would the senior advisors to the President tell the President would be the case if this amendment to the Constitution of the United States was not being complied with by the functioning and processes of Government?

I think we would certainly expect a vast array of litigation to ensure. One of the first matters to be litigated would be whether the President was obligated or entitled to make his own unilateral cuts in budget or otherwise, unilaterally, to raise revenues. This would be a very difficult question. I would imagine that different courts would resolve the issue differently.

Some would say that the President alone would be in a position simply to order a cut, even where the law required otherwise, because now he had the higher obligation to ensure that the Constitution was complied with.

Others would argue that it would be extraordinary to infer from the silence of this amendment such a sweeping and radical change in the allocation authority among the branches of Government. And yet, the issue would be resolved by judges and courts.

Surely the most alarming aspect of the amendment is that by constitutionalizing the budget process, the amendment appears to mandate an extraordinary expansion of judicial authority. Both State and Federal judges may well be required to make fundamental decisions about taxing and spending—issues that they clearly lack the institutional capacity to resolve in any remotely satisfactory manner.

One would hope that the judiciary would consider these questions political and beyond their scope. This political question doctrine, simply put, is the doctrine that is designed to restrain the judiciary from inappropriate interference in the business of the other branches of Government.

On its face, that basic doctrine would appear to constrain the court's review of a balanced budget amendment. And yet, the most recent decisions of the Supreme Court suggest that the court would be prepared to resolve questions that might once have been considered political.

We have the example of *United States* v. *Munoz-Flores* from 1990, in which the court adjudicated a claim that an assessment was unconstitutional because it failed to comply with the provision that it originate in the House of Representatives.

I would have thought before *Munoz-Flores* that the court would decline to adjudicate and would accept the authentication of Congress. And I would have been wrong.

In 1992, the court considered the congressional resolution of how one goes about apportioning the last seat for the House of Representatives, what formula to choose when Congress decides which State gets that last 435th seat in Congress. The losing State challenged—Montana—the Department of Commerce. And I would have assumed that the court would have considered this, too, a political question, left for the final resolution of the Congress. And, again, I was wrong in that assumption. Because the court did go to the merits, did consider it judiciable, and did pass judgment on this question.

So I think that however wise or unwise it may be for the courts to be involved in these issues—and I tend to think it is unwise—it is nonetheless the case that no one can provide any assurances that once this amendment constitutionalizes the budget process the court will not consider itself obligated to resolve issues that arise under that amendment.

Let me mention, for example, one that I noted just last evening where I could readily imagine a justiciable case where the party has standing and a declaration invalidating a major act of Congress, if this amendment were law today.

Section 4 of Senate Joint Resolution 41 provides that no bill to increase revenue shall become law—no bill shall become law if it increases revenue—unless approved by a majority of the whole number of each House on a rollcall vote. It is often the case that there are major pieces of legislation, like the crime bill, that contain provisions which a litigant might later argue, increase revenue, by providing more effective enforcement mechanisms, by providing forfeiture provisions.

A criminal defendant would surely have standing, prosecuted or sentenced under omnibus crime legislation, to say that this bill contains a provision which would increase revenues, and, therefore, it falls under section 4 of this amendment and is unconstitutional unless Congress had been alert to ensure that its approval was by a majority of the whole number of each House on a rollcall vote. Once you constitutionalize an area you take the resolution of critical questions, critical concerns, out of the hands of the elected representatives of the people and leave them in the hands of courts that now would be under a mandate to resolve these issues.

There are others who might have standing. Taxpayers, to be sure. I have never, myself, fully been reconciled to *Flast* v. *Cohen*, but it remains the law. Many of the provisions of this amendment appear to be an express or specific limitation on the tax against spending power which would generate standing in taxpayers to litigate. Certainly, if the President took action to cut benefits, if he, say, cut Social Security across the board by 9 percent in order to comply with the amendment, a beneficiary would challenge the President's authority to do that, and that issue would wind up in litigation.

There is as yet nothing in this amendment proposal that would preclude the courts of getting involved in issues of taxation. Recall *Missouri* v. *Jenkins* from 1990, where the Supreme Court held that while a Federal district court had abused its discretion in directly imposing a tax increase to fund a school desegregation program, that the modifications made in that case by the Court of Appeals satisfied equitable and constitutional principles. Those modifications included leaving the details of the mandate to increase taxes to State authorities, while nonetheless imposing a mandate that must have been met.

If we have an amendment that for the first time constitutionalizes the taxing and spending process and creates a constitutional mandate which the courts are sworn on oath to uphold, there is simply no way that we can rule out the possibility that tax increases or spending cuts would be ordered by the judiciary. And I think we would all agree that that is a profound change in our constitutional system.

I believe it was in the 48th Federalist that Madison assured those who were about to vote on whether to ratify or reject the proposed Constitution, Madison assured them that the legislative department alone has access to the pockets of the people. That is a theme which is carried forward by Justice Anthony Kennedy in his dissent in *Missouri* v. *Jenkins*, where he writes of how jarring it is to our constitutional system to have unelected life tenure judges involved in the process of taxation. Justice Kennedy wrote, ''It is not surprising that imposition of taxes by an authority so insulated from public comment and control can lead to deep feelings of frustration, powerlessness, and anger on the part of taxpaying citizens.'' We would not, I think—you would not want lightly to have put out a provision that so radically restructured the fundamental nature of our constitutional system in the face of such limited discussion about how these enforcement mechanisms would work.

Chairman BYRD. Mr. Dellinger, what was the vote in that case? The Supreme Court vote?

Mr. DELLINGER. I believe it was five to four. But I have not checked the vote. I believe it was five to four. I am seeing one of your very helpful staff members nodding behind you and assuring me. So it is a very close case, and I think the constitutional proposition set forth in section 1 would provide for many justices a more sound basis for being engaged in taxing and spending, where it says total outlays for any fiscal year shall not exceed total receipts. This is no longer part of the Pledge of Allegiance or a Fourth of July speech. We are talking about making this a part of the Constitution of the United States of America.

Mr. BROWN. I thank my friend for raising that point, and it proves precisely the point that I want to make. That case was not based on a balanced budget amendment. That case was based on the 14th amendment.

I might mention that the constitutional amendment before this body does not repeal the 14th amendment. The 14th amendment is in the Constitution. The cases are going to come up about the 14th amendment all the time. That was the whole point. The Assistant Attorney General had brought this specter of floods of litigation and his prime example was one

that dealt not with the balanced budget amendment but dealt with the 14th amendment.

Mr. JOHNSTON. He was saying that under the balanced budget amendment they would have the authority, that nothing would prevent the same authority exercised as in Missouri versus Jenkins.

Mr. BROWN. I think the point here is that the case he cited to express his concern was one that did not deal with the balanced budget amendment, and there are many of them that exist across the country.

Mr. JOHNSTON. No, but it dealt with the power of Federal courts to order taxation, which was what his concern was, which is what my concern is, and my amendment would prevent that. And why not do that?

Mr. BROWN. Let me suggest, the Senator's amendment deals not with the 14th amendment. It deals with appeals to courts and deals with appeals to courts on this amendment.

Now, the question is clearly this: Is the passage of a balanced budget amendment going to lead to a flood of litigation? When the Assistant Attorney General was asked to name a case, one case where you have had appeals to the courts and litigation in the courts about the numerous balanced budget amendments around the country, he was unable to name a single solitary case.

Now, Mr. President, those cases do exist. Colorado has had a constitutional amendment for a balanced budget in its constitution for over 100 years. We have had litigation on it. And the last litigation in Colorado on our balanced budget amendment was in 1933. It dealt with a peripheral case.

Now, this flood of litigation that the Assistant Attorney General is forecasting has not reared its head in the State of Colorado for over a half century, not a single case in over a half century. And the one that came up literally 60 years ago was one that did not deal directly with the issue of the balanced budget. It dealt with a peripheral issue.

Mr. JOHNSTON. Perhaps my friend did not hear the cases which I cited from around the country where courts have gotten involved in this. Looking to my own State of Louisiana, for example, in 1987, the court of appeals case, just to quote briefly, says:

> Defendants contend that there exists no justiciable issues in this case because the courts should not ''step in and substitute their judgment for that of the legislature and executive branches'' in the budget process. We disagree. The determination of whether the legislature has acted within rather than outside its constitutional authority must rest with the judicial branch of government.

That is from *Bruno* v. *Edwards,* 517 So. 2d 818, a 1987 case. It is all over the country that this is done. I do not know what they have done in Colorado. They have done it in my State. They have done it in New York. They have done it in Georgia. They have done it in Wisconsin, California. All across the country they have taken balanced budget amendments, and there has been standing found and the courts have found those issues to be justiciable and indeed in a 14th-amendment case, Missouri versus Jenkins they ordered up taxes.

Mr. BROWN. Let me reclaim my time, if I could.

Mr. President, the statement that I made was not that it is impossible that you would ever have litigation. That certainly has never been my position, and it is not now. And if the Senator's point is that it is possible that you could have litigation over this question, I would certainly indicate to him I think he is right. It is possible you could have litigation come up.

What we are dealing with here, though, is a question of whether or not this is going to engender a flood of litigation, a plethora of litigation, as has been indicated. That simply is not an accurate statement if you look at what has happened in the States of our country. It is simply inaccurate, and the proof—I have given proof in my State. We have not had a case in 60 years, and the one we did have 60 years ago dealt with a side issue.

Now, the Missouri versus Jenkins case that was referred to was a State action, and it dealt with the 14th amendment. It was not a balanced budget amendment case. So you can raise all sorts of specters, but let me suggest a test for all of these. Many Members honestly and sincerely think it is a mistake to have a limitation on spending. That is a difference between men and women of good spirit. While I am one who thinks the record shows that this country is not going to survive without a change in the way we appropriate money, while I am one who believes that some control on spending is essential to this Nation providing leadership in a world economy in the next century, I recognize that people of good spirit and good intentions may not share that view.

But when the question is put, if this amendment is passed will people who currently oppose the amendment to the Constitution then vote in favor of the constitutional amendment, my understanding is that they will not. I think you have to ask yourself, is this amendment put forward to improve the constitutional amendment to balance the budget? I believe that is the intent of the Senator from Louisiana. It is a sincere effort to deal with a problem of excessive court involvement. I know he is sincere about that. I think the purpose of his amendment is, indeed, to improve this constitutional amendment.

Mr. JOHNSTON. Will the Senator yield briefly on that point?

Mr. BROWN. I will in just a moment.

I think it is important to note that there does not appear to be anyone who is coming forward and saying look, if this amendment is adopted, we are willing to sign on and agree with you; limitations are important.

I yield to the distinguished Senator.

Mr. JOHNSTON. Mr. President, I just want to point out, right before this debate started there were, I believe, two Members who are undecided, on our side, who said in my presence right here that this amendment may determine how they vote. They will have to speak for themselves.

I will tell my colleague privately who they were. I do not think I should use their names. They can speak for themselves. My question is, are there those on your side of the aisle whose votes you lose by making clear the jurisdiction of the court? My guess is you do not, because this is almost identical to the Danforth amendment which was passed in the last Congress without objection.

Mr. BROWN. That is a fair and appropriate question. I suspect I have a responsibility to check on that.

Mr. President, I wonder if the Senator from Louisiana would be willing to respond to a question of mine?

Mr. JOHNSTON. Certainly.

Mr. BROWN. I guess the question that occurs to me is, would it be the Senator's intent, if this constitutional amendment is passed and if Congress refuses to abide by that constitutional amendment, to preclude any enforcement of it through the courts?

Mr. JOHNSTON. No. As a matter of fact, the amendment very specifically allows the Congress to implement the—to authorize judicial relief. But only to the extent that Congress specifically authorizes it.

As I mentioned, the Congress may well want to, for example, say the court shall have declaratory relief; may be able to cut spending but not raise taxes; or you may want to have direct jurisdiction in the Supreme Court—original jurisdiction there, so as to expedite the hearings. There are all kinds of things we may want to do that would help clear up, for example, what happens in the bond market while these cases are moving through ever so slowly from all around the country. We ought to be able to deal with that in congressional legislation. I not only do not preclude that, I specifically authorize it in this amendment.

The difference between that and the way we are now is it is unclear whether or not the courts have that inherent authority. If the Congress does not act, then it is my belief, along with Laurence Tribe and Robert Bork and Professor Dellinger, et cetera, that they would probably have that jurisdiction. I say: Make it clear.

Mr. BROWN. At least my understanding is that Congress does have the ability to deal with that now.

Mr. JOHNSTON. The Congress does have the ability under, I believe it is section 5—section 6, to do that. That is clear.

However, upon failure to act by the Congress, then the courts would probably have this jurisdiction anyway. The difference between section 6 of the amendment as presently stated and

under my amendment, my amendment says that unless Congress specifically acts, there is no jurisdiction in the court. Whereas section 6 says the Congress may act, but in the meantime it is unclear what the authority of the courts is.

Mr. BROWN. I wonder if the Senator has thought about spelling out in his amendment the kinds of appeals that he would have in mind? I think part of the concern as we look at the amendment is the concern that this could well end up sabotaging the balanced budget amendment, in that if the Senator spelled out the kinds of appeals he had in mind, it might go a long way toward generating support on it.

Mr. JOHNSTON. What Senator HATCH has stated is that the court would have no jurisdiction. He says that is clear. I think it is demonstrably unclear.

I think the question of how you spell out the jurisdiction and remedies ought really to take up some serious time of the Judiciary Committee: Bring in the legal experts, talk about whether you want to limit it to injunctive relief, whether you want to limit the power to enact taxes. All of those are very close and difficult legal questions that I think take a lot of thought, which are beyond my ability to spell out.

I think you can spell out the broad constitutional terms right here. The court shall or shall not have power. But we would preserve that power of the Congress to do that. The real question is: Should the court have the power to order taxes, provide injunctive relief, make decisions, declaratory judgments, if the Congress does not specifically authorize it?

I believe the answer to that is no. And that is why this amendment clears that up and makes it unambiguous.

Mr. BROWN. I might say, Mr. President, at least my understanding, and the Senator may want to correct me if he feels I have misphrased it, my understanding is Senator HATCH's view is that the courts could not interfere with the budgetary process but that Senator HATCH does feel the courts should be able to give some limited relief.

I think that may be a different way of describing the Senator's position. Obviously, Senator HATCH is quite able to describe his own position.

Mr. JOHNSTON. My description of Senator HATCH's position is that he would like to have it both ways to satisfy those who think there ought to be court relief and to satisfy those who think there should not be court relief, because he has some of those voting for the amendment. I understand the position of my friend, Senator HATCH, which is he wants to pass the amendment, and that is fine.

I have called into question the political calculus that says you lose votes by passing this amendment. I think you endanger, politically, this amendment by not clearing up this fundamental question.

Mr. BROWN. Let me say I am shocked to hear that any Member of the Senate would want to have it both ways. I cannot imagine—it seems unprecedented—that any august Member of this body would take that position.

Mr. JOHNSTON. One wants it this way and one wants it that way. You can sort of be all things to all people by saying: Well, it is clearly a settled question there is no standing to sue, so therefore the court will not get involved. But, on the other hand, there may be some cases that will need to come to the court, where the court will need to order some relief.

The classic, to me, was Attorney General Barr, who said—this is really rich. First of all, he said:

> I do believe the Congress should consider including language in the amendment that would expressly limit judicial review to actions for declaratory judgment.

Then he goes on to say:

> If, however, such a position would prove to be politically unpopular, I believe, for the reasons detailed in my written statement, that Congress can safely pass the amendment in its current form without undue concern that the courts will entertain large numbers of suits challenging Congress' action on the amendment or that, even if the courts do entertain some suits, they will order intrusive injunctive remedies.

I mean, he says well, they are probably not going to do it. If they do, there will not be many. And even if they do a few, they will not order intrusive injunctive relief.

What is intrusive? I would think Missouri versus Jenkins—if they got their foot in the door, and Solicitor General Barr says they might have some suits, having their foot in the door it does not take many orders of the Supreme Court increasing taxes to be pretty intrusive to the American people.

Mr. BROWN. I thank the Senator for his comments. I, of course, am shocked that any Member would try and have it both ways as we go forward.

But let me suggest——

Mr. LEVIN. While the Senator is expressing his shock, I wonder if he will yield for additional comment?

Mr. BROWN. No, I will not yield. Let me finish my statement, and then I will be glad to yield to the Senator.

It is quite clear there is a distinction between remedies that the courts can give and their ability to bring relief. That is well established. I do not think anyone questions it. The courts cannot interfere with the budgetary process because it is a political question. I think that is well established. It would violate the separation of powers. Those are quite clear. The real question I think you get down to with this is do you want to find a way to wiggle out from even the very, very modest levels of discipline that this constitutional amendment would bring?

My belief is that it is quite clear that the courts cannot get involved with a political question, that the talk about a 14th amendment case as applying here when it has not found that kind of action with regard to any of the balanced budget amendments that appear in any of the States is to raise a red herring. I do not mean it is not brought up in good faith. I share the view that the Missouri versus Jenkins case was not decided correctly. But it does not apply to the balanced budget amendments. It dealt with the 14th amendment.

Let me just say one other thing. Any American that honestly believes that we can continue on the way we have been I think is kidding themselves. Any American that can look at the last quarter-century in which we have not balanced the budget one single solitary time and think that we are going to solve this without changing the system is kidding themselves. Whether Democrat, Republican, liberal or conservative, you are driving this train off a cliff. You are taking the future of this Nation, the future of our children and running it off a cliff.

There may be Members who come to this floor and say, look. We can solve this thing. Just let us continue on the way we are, and say it sincerely. But I do not think it is true. I do not think you can look at what has happened and decide in any other spectrum that we have a train wreck ready to happen, that we are unable to help ourselves, that we have to have some discipline.

The question I think that is fairly asked is, is this the right remedy? The American people ought to look at the States that have constitutional amendments that require a balanced budget. In Colorado we have had the constitutional mandate to balance the budget for over 100 years. Of those over 100 years it has been balanced every single year. It has been balanced in good years and it has been balanced in bad years. It has been balanced when we have had a Republican administration and when we have had a Democratic administration. It has been balanced when we have had a Democratic legislature, and it has been balanced when we have had a Republican legislature, and it has been balanced because they had to do it. If you had not required them to do it, I guarantee it would not have gotten done.

In the last 25 years, we have not had a single, solitary year, not one, where you have had a balanced budget. I do not think there is anybody in this Chamber—or at least not very many—who would come to the floor and say we have done a good job setting priorities. If anybody is comfortable with a program to subsidize tobacco at the same time you have a program to urge people not to use it, I want them to come forth and tell me about it. That is ludicrous. Whether you are from a tobacco State or not, to subsidize a crop that you turn around and urge people not to use and bill the taxpayers for both ends of it is stupid. That is what we are doing.

We have a foreign assistance program that buys weapons for one country to

counter the weapons we bought for another country which were given to counter the weapons we bought for the other country to begin with. That is nuts. We have refused to set priorities. That is just plain ludicrous.

We have a farm program that results in people growing crops on land that are better suited to other crops. Does that make any sense at all? We literally grow crops on ground that would never be used for that purposes if you did not have a program like that. That is the silliest thing I ever heard of. And we continue to do it.

If you think those examples are out of place, look at the rest of the way we spend our money. Does anybody believe that the Tea Tasting Board is a good idea? The National Jute Association or the International Jute Association? There is not one of these, there is not 10 of these, there is not 1,000 of these. There are thousands and thousands and thousands, and the reason they exist is we have not set priorities.

The facts are these: We have not balanced the budget once in 25 years. We have not balanced it when we have had a recession and we have not balanced it when we have had a boom.

The President who says we can solve this without a balanced budget amendment sent us a budget the other day. The estimates I believe are inaccurate. But even if you accept the estimates, which incidentally include a suggestion that we are not going to have a recession in the next 5 years—and, if anybody wants to make a bet on that one, I would be glad to take their money—even with assumptions that you are not going to have a recession again, even with the assumptions that the rate of inflation is going to have less of an impact on increasing spending than it will on raising revenues. Let me be specific about that.

They assume a rate of inflation that will increase revenue at a higher rate than you will increase the cost of programs. One level of inflation, and they assume that you are going to have a higher level of inflation for increasing revenue than you will have for increasing programs. It would be laughable if it were not so serious. Even with assumptions that by anybody's definition are creative, even with assumptions that say we are not going to have any new spending programs—and we have not had a Congress when you did not have new spending programs that I can recall—even with wild assumptions, even with no new programs, even with no emergencies, even with no waivers for the budget, the deficit continues on for a level of a couple hundred billion dollars. And CBO says that it is going to go up to above $400 billion by 10 years out.

That is from the person who says we can solve this legislatively. It is nonsense. It is nonsense. To say no to a balanced budget amendment to the Constitution is to say no to our future, to gut this constitutional amendment from ever being able to be enforced is a travesty in this Member's view.

Mr. JOHNSTON. Will the Senator yield?

Mr. BROWN. If we are going to deal with this issue, we need an alternative. I have to tell you I think this balanced budget amendment that is before this body is far too weak. Colorado says you have to have a balanced budget. And we balanced it. This says you have to have a balanced budget unless 60 percent of Members vote to waive it. It is the softest, weakest, most ineffective balanced budget amendment I have seen. There may be others in the States that are weaker than this. But I do not know about them.

This very, very, very modest form of discipline apparently is too much for people who believe that the future of our country is on uncontrolled spending. But let me tell you, Mr. President. This issue is a lot more important than Colorado or Louisiana or Michigan. This issue goes to the very heart of the future of this Nation and the future of the men and women who have their children and their grandchildren who are going to be raised in this country.

This issue is a question of whether or not we are able to control the waste that has given us the biggest national deficit in the history of this country or the history of any country in the history of the world.

Mr. JOHNSTON. Will the Senator yield at that point?

Mr. BROWN. Let me finish my statement, if I could, because it seems to me we are overlooking the real problem. The real problem here is an appetite by this Congress for uncontrolled spending. The real problem here is an unwillingness to live by any limitation.

Mr. President, I want to relate a fact to the Members in this body, because I think every one of them knows it and shares it. I came to Congress in 1981. We passed a budget, and the budget was not balanced. But what it said is the next year out it is going to be balanced. We are not balanced this year. But give us another year, and we will have it balanced. We had a plan to get there. We had limitations on spending, and projected tax revenue. What happened? What happened was this: Congress appropriated more money than they had allowed for in their own budget. They waived their own Budget Act. The fact was our estimates were overblown, and we exceeded our own spending limits. You would say, OK. That is one year out of one. That is not too bad. But what happened the next year? The next year we adopted a budget with the phony estimates in it. And that is exactly what they were. They were phony, and they were Reagan estimates, and I called them phony at the time. We adopted a budget with phony estimates in it, and Congress exceeded its own spending budget again. And everybody said next year. The next year we adopted a budget, and it said after a couple or 3 years we are going to get down to a balanced budget. It had phony estimates in it, and Congress exceeded the amount that they allowed themselves to spend.

Mr. President, that has happened every single, solitary year. It happened in 1981, it happened in 1982, and it happened in 1983 and 1984, it happened in 1985, 1986, and 1987, 1988, 1989, 1990, 1991, 1992, 1993, and 1994. Does anyone honestly believe it is not going to happen again and again and again? If you do not believe it look at the President's budget. Look at the assumptions that are in the President's budget. Come to this floor and honestly tell me you think we are on the right path.

The simple facts are these: We are hoodwinking America. We have passed budgets every time in the last 15 years, and every time those budgets were not realistic, and every time those budgets were not followed and they are not going to be followed.

We are debating an amendment that says we are going to eliminate the Court's ability to have any discipline here. It does not surprise me that this Congress does not want to have discipline over spending. But if anybody cares about the future of their kids and grandkids and what this country stands for, then they had better figure out a way to bring discipline to this place and figure out a way to have accurate estimates, better figure out a way to have us change our ways, because the reality is that this is shameful. The reality is that we have taken the future of the strongest, greatest Nation on the face of the Earth and we have thrown it in the trash because people did not have the courage and the willingness to stand up and eliminate wasteful spending and set priorities.

I do not know how many people watch Presidential trips, but I can tell you it happens both in Democratic and Republican administrations. You have so many people that go with the President on trips, and it is shameful. Anyone who looks at the way Congress spends its money has to be shocked. Do you really need elevator operators on automatic elevators? Are Members really unable to push the buttons themselves? Do you really need a staff that is nine times bigger than any other country in the world has for its deliberative body? Incidentally, that is what our staff is, said the Congressional Research Service the last time they did a study on it. Does anybody believe we need 1,100 police officers on Capitol Hill? I mean, that is two, 2½ for every Member of Congress.

Mr. President, this Congress is out of control. We desperately need controls. We desperately need discipline. To adopt an amendment that eliminates our ability to have this measure enforced, I think, turns a blind eye to the problem the American people have. I do not know whether this constitutional amendment is going to pass, but I will tell you one thing, the American people are not going to watch their future thrown down the drain.

This is a lot more important than Democrats or Republicans, a lot more important than party. It deals with the future of our country and of our children. I do not think anybody who believes you can continue on with the kind of abuse we have had for this system is looking at the world right. I have listened to the debate on the floor. I hear Members come to the floor say, goodness, the problem is not with Congress. The Congress' budgets have been less than what the President has asked for. That is right, but it is not accurate. The truth is, yes, the budgets Congress has passed have not been as large as what the Executive—sometimes—has asked for, but left unsaid in that is the fact that Congress has appropriated more than either they budgeted or what the President asked for in budgeting.

To say that and describe the problem in that way simply misleads people. Congress has not been responsible when it has come to our budget. Yes, we have adopted budgets that look good at the time, but we did it with phony estimates and we turned around and ignored them.

Mr. JOHNSTON. Will the Senator yield?

Mr. BROWN. I think the point of all of this—and then I will yield—is simply this: If we are looking for an answer to this problem that avoids discipline, that avoids controls, that avoids limits, we are going to fail.

I yield the floor.

Mr. JOHNSTON. Will the Senator yield for a question?

Mr. BROWN. I am glad to yield.

Mr. JOHNSTON. My colleague made a powerful speech—and I really mean that—for a balanced budget. But I do not understand him to be saying that the court ought to be the one to order a balanced budget, to order a tax increase, or to order spending cuts; am I correct in that?

Mr. BROWN. Well, my belief is that political questions will not come out of the jurisdiction of the court. It seems to me there is an area for court jurisdiction here—enforcement.

Mr. JOHNSTON. But is the Senator familiar with the fact that, in 1982, two former attorneys general, Senators GORTON and Rudman, offered an amendment of the same import of my amendment today, and that although it was defeated, 12 Republicans who are still serving in the Senate voted for the amendment, including Senators CHAFEE, COHEN, DOLE, GORTON, HATFIELD, KASSEBAUM, LUGAR, MURKOWSKI, PRESSLER, ROTH, SPECTER, and STEVENS—that list includes some of the best lawyers in the Senate—and the point is, on this question of whether the courts ought to have jurisdiction—I think my friend would agree with me—is one that really merits some very serious thought; would the Senator not think?

Mr. BROWN. I certainly agree. In terms of the other Members the distinguished Senator mentioned, I would leave it to them to defend their votes. I have enough trouble defending my own.

Mr. JOHNSTON. Has the Senator voted on this question before?

Mr. BROWN. I would be glad to check the record and let the Senator know.

Mr. JOHNSTON. I would not think the Senator made the mistake of voting against this kind of amendment before. I do not believe he has, because it was passed in the last Congress, without objection. The Danforth amendment was passed in the last Congress, without objection. It truly has been a bipartisan amendment, where Senators on both sides have seen the real need to limit the intrusiveness of the courts. The power of the courts, once granted, can extend to raising taxes, as well as cutting budgets, and they are not elected. They do not represent the people and they should not be able to do it, except to the extent that we in the Congress give them the power to do it.

I hope the Senator will come to my point of view. That has nothing to do with whether you are for this balanced budget amendment or not—just as those Republican Senators who voted in 1982 for the Rudman-Gorton amendment were supporters of the balanced budget amendment but wanted to limit the intrusive powers of the courts to get involved in this matter.

Mr. BROWN. Let me suggest to my friend that while 1982 was not a long time ago, it was before the Lujan case, which occurred in 1992 and which, obviously, affects thinking in this area. Clearly, these Members will be able to speak for themselves and defend it as they wish. We have other requests for time, so I will yield the floor.

Mr. LEVIN. Will the Senator from Colorado yield for a question?

Mr. BROWN. Our time is limited. I will yield the floor, and I know the Senator will be recognized in due course by the Chair.

Mr. JOHNSTON. Mr. President, I yield 10 minutes to the Senator from Michigan.

Mr. LEVIN. I wonder if the Senator from Colorado will respond to some questions that I have of him on my time now. One of the things which the Senator from Colorado epitomizes is honesty and straightforwardness, and he, with great feeling, I think, expressed the view of all of the Members of this body, which is that we should not kid ourselves, that we ought to be honest. Honesty is something which he has reflected throughout his career, and I admire him for what he says, what he believes, what he feels and what he represents.

The Senator has made some statements about the balanced budget amendment and how it is, in some respects, quite weak and not self-enforcing which, frankly, I happen to share, but that is not the purpose of my question. The purpose of my question goes to the Johnston amendment and whether or not we should be honest as to whether or not the courts are going to be able to enforce the balanced budget amendment in the absence of legislation, pursuant to section 6.

The Johnston amendment makes it very clear that we are able to authorize the court, if we adopt enforcement and implementation legislation, pursuant to section 6, to do whatever we authorize that court to do. But in the absence of implementation legislation, setting forth the authority of the court, the question is, honestly, what is the intention of this amendment? There is ambiguity, and if we are looking for honesty—and I believe we all are—we should clarify that issue. There is no reason to write a constitutional amendment which is ambiguous at the heart of the amendment which is: How is it going to be enforced? That is the heart of it. We can make all of the great statements we want about balancing the budget, and we have during the early 1980's.

But the key to a constitutional amendment is how it is going to be enforced. The key to this constitutional amendment, as has been said over and over again by the sponsors, to section 6 which is the implementing legislation, implementing legislation which would be required of a future Congress.

I have problems with laying this on the doorstep of a future Congress, because I think we ought to adopt implementing legislation. I do not think we ought to kick this can down the road up to 7 years. But that is a different speech. That goes to the question of just how effective this is as a budget balancing tool.

My question of my friend from Colorado goes to the intent of the sponsors of this amendment as to court enforcement, and I have two questions. First, is it the intent, is it his understanding of the intent, that Members of Congress would have standing to file suit to enforce this constitutional amendment?

Mr. BROWN. Well, the Senator is asking for a legal interpretation. I would be glad to supply that and I will supply it for both the Senator and for the RECORD.

Let me say I think it is worthwhile noting here that none of the amendments to the Constitution—and, as you know, we have a number—have included the language as suggested by the distinguished Senator from Louisiana. What is being suggested is different from what we have done with any other constitutional amendment.

Second, we did have a proposal last year, I understand, that did limit appeals to declaratory judgments. That is the first time I am aware of—the distinguished Senators may wish to correct me—it is the first time I am aware of that you have had that added to a proposed amendment to the Constitution.

Finally, let me suggest, I think it is section 2 of this amendment that deals with the question of whether or not those questions are left open or vague or unanswered. At least I think a fair

reading of that section indicates that there is real guidance within the amendment itself.

Mr. LEVIN. Specifically in section 2, what is the Senator referring to?

Mr. BROWN. Let me get that section for you.

Section 2 reads as follows:

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 rollcall vote.

That, at least as I read the constitutional amendment, is where the real discipline of this matter is.

Mr. LEVIN. My friend from Colorado points to something which has also been pointed to by other sponsors of this legislation, which is section 2. But is it not true that section 2, in terms of that particular type of debt limit, requires Congress to act?

Mr. BROWN. Sure.

Mr. LEVIN. So that even section 2 depends upon implementation by Congress of a limit on the publicly held debt; is that correct?

Mr. BROWN. I think the value of this, I say to my friend, is that while you are looking for a device that controls this and avoids ways for people to wiggle out of it, by focusing on what people borrow, we think that may be the single most effective enforcement device there can be.

Mr. LEVIN. But my friend from Colorado is not responding to my question, which is: Is it not true that there is no current debt limit, as defined in section 2, which is a debt limit on the publicly held debt and, in order to establish such a debt limit, legislation would have to be passed?

So again, it depends on a future Congress to establish a limit on the so-called publicly held debt, a limit which has not heretofore been established by statute; is that correct?

Mr. BROWN. I think the Senator makes a valid point. There is no question that future Congresses obviously have to be involved in this decision, whether it is the discipline or whether it is the definition.

Mr. LEVIN. The discipline which my friend refers to again depends on future Congress acting.

I ask unanimous consent that a letter from the Attorney General to me stating exactly that be now printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

U.S. DEPARTMENT OF JUSTICE,
Washington, DC, February 14, 1995.

Hon. CARL LEVIN,
U.S. Senate, Washington, DC.

DEAR SENATOR LEVIN: This responds to your letter to the Attorney General of February 14, 1995, concerning the proposed Balanced Budget Amendment to the Constitution. In that letter you asked whether legislation setting a ''limit on the debt of the United States held by the public'' would have to be passed before Section 2 would have any force. Section 2 states that any increase in the limit on such debt must be passed by a three-fifths rollcoll vote of the whole number of each House of Congress.

We have consulted the Office of Management and Budget, which has advised us that there is at present no statutory limit on the ''debt of the United States held by the public,'' the type of debt described in Section 2. Rather, there is a limit on the ''public debt,'' which includes debt held by the public and certain other debt, such as debt held by the Social Security Trust Fund. Unless and until Congress passes legislation establishing a limit on the type of debt described in the amendment, the strictures against increasing this debt limit would have no effect.

Please do not hesitate to contact this Office if we can be of assistance on this or any other matter.

Sincerely,

SHEILA ANTHONY,
Assistant Attorney General.

Mr. LEVIN. Because over and over again we have heard that section 2 is the discipline. In fact, section 2 is only operative if a future Congress establishes something called a limit on publicly held debt—publicly held debt.

Mr. BROWN. I would beg to differ with my friend. I think the language of section 2 is quite clear, not vague. ''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 rollcall vote.'' Obviously, it involves the Congress in several extents. One, of course, is the waiver should they vote—-

Mr. LEVIN. If I could interrupt my friend again. That is not the point I am making. Any increase in that debt would have to be voted by 60 percent of the Senate. That is clear in the language. But the establishment of the limit itself would have to be, in the first instance, created by the Congress, because there is no such limit at the moment. Would the Senator from Colorado agree with that?

Mr. BROWN. I think the Senator is right to point out that defining what the terms ''debt of the United States held by the public'' is indeed something that requires it.

But I would point out—-

Mr. LEVIN. It requires Congress to act; is that correct?

Mr. BROWN. Yes. Indeed, I think the Senator is correct. But I would point out on that that if that is the Senator's concern, let me suggest I think the words of that section are very clear. I do not mean to suggest to the Senator that creative minds that abound in this Congress and our courts could not find a way to misinterpret that. But I suspect that even the most creative minds would be pressed to find that language vague or unreasonable.

Mr. LEVIN. I think it would be quite simple, actually, to have an argument as to what is meant by that term.

Now to get back to my question. Is it the intent of the Senator from Colorado that a Member of Congress would have standing to file suits to enforce this constitutional provision?

Mr. BROWN. That is an appropriate legal question. I would be glad to supply the Senator a legal memo to that effect, and I would be glad to put it in the RECORD.

Mr. LEVIN. In that case, I will ask a second question. I think these are critical questions and I think we should get answers to them from the sponsors.

Is it the intent of the Senator from Colorado that a court could invalidate an individual appropriation or a tax act?

Mr. BROWN. Let me speak in reference to section 2. It seems to me, at least in regard to section 2, the device here that I think is so helpful, at least I like it very much, is that it limits Congress' ability to continue to borrow money in that regard and that indeed does have an impact on one's ability to fund new programs.

The PRESIDING OFFICER. The time yielded to the Senator from Michigan has expired.

Mr. LEVIN. Mr. President, I wonder if the Senator from Louisiana would yield me 5 additional minutes?

Mr. JOHNSTON. I so yield.

Mr. LEVIN. My question to the Senator from Colorado is: Is it the intention under this amendment that courts could invalidate the individual appropriations or tax acts? The Senator from Colorado repeatedly said that it is not the intention of the Congress, it is not the intention of this balanced budget amendment to have courts interfering with the budgetary process. That is what the Senator from Colorado has represented. It is not the intention of this amendment to have courts interfere in the budgetary process?

My question is: Is it the intention of the sponsors or of the Senator from Colorado that a court could invalidate an individual appropriations or a tax act?

Mr. BROWN. I am sorry.

Mr. LEVIN. Does the Senator wish me to repeat the question?

Mr. BROWN. Would you please?

Mr. LEVIN. Is it the intention of the sponsors or the Senator from Colorado that a court could invalidate an individual appropriations or tax act?

Mr. BROWN. It strikes me that the beauty of section 2 is that it places the limit on the amount we can borrow, which places then back in the hands of Congress the discretion as to what we fund and the limit discipline it places on us is our limit to add to the debt. So at least my impression would be Congress would retain the ability to make a decision as to where their limited funds would be allocated.

Mr. LEVIN. Let me ask my friend from Illinois, because I do not think that is responsive to the question.

The Senator from Illinois is on the floor. Is it the intention of the sponsors of this amendment that the court, without further authority under section 6, would have the power to invalidate an individual appropriation or a tax act?

Mr. SIMON addressed the Chair.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. SIMON. Mr. President, in response, my instinct is that unless there was a blatant violation of the intent of this amendment, the courts would not get involved. We are not dealing with something like the 14th amendment where it is somewhat amorphous.

Mr. LEVIN. The words ''blatant violation'' are all that have to be alleged in a suit brought in a court to then allow the invalidation of an appropriation or tax act.

Is that what the Senator from Illinois is saying?

Mr. SIMON. Mr. President, the answer is we can imagine all kinds of scenarios. But the reality is that we want to handle this ourselves. We do not want the courts to get involved. If some future Congress were just to blatantly say, ''We will ignore the Constitution,'' then the courts might get involved.

The courts have only been involved in a tax matter in the Jenkins case in Kansas City where we have a different constitutional principle involved.

In this amendment we are not talking about very precise things, but about a self-enforcing mechanism.

Mr. LEVIN. Mr. President, since we are on my time, I say to the Senator from Illinois, I think the Senator from Pennsylvania wants to comment.

Let me tell Members what the reason is that I am pressing folks on this. The key sponsor of this legislation in the House, Representative SCHAEFER of Colorado, who is the lead sponsor of Schaefer-Stenholm, had the language that we are debating now. He said the following: ''A Member of Congress or an appropriate administration official probably would have standing to file suit challenging legislation that subverted the amendment.''

I want to read all three of these comments of Representative SCHAEFER and contrast this to the assurances that the Senator from Utah, I think in good conscience, gave as to his intention that there is no standing to sue on the part of Members of Congress, that the courts will not be able to intervene. And yet the sponsor on the House side states a very, very different intent, which is the reason we should adopt the Johnston amendment, because there is not only ambiguity among law professors, there are differences between sponsors on this side and sponsors on the House side.

The second statement of Representative SCHAEFER: ''The courts * * * could invalidate an individual appropriation or tax act.'' Think about that. Here we are told there is no intention for courts to be involved in the budgetary process. The principal sponsor on the House side says under this amendment a court could invalidate an individual appropriation or tax act. If that is not meddling in the budgetary process, I do not know what it is.

Finally—I think my time is run out. I yield the floor.

I ask unanimous consent that a copy of the statements of Representative SCHAEFER, along with the accompanying letters, be inserted in the RECORD at this time.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. SENATE,
Washington, DC, February 14, 1995.

Hon. JANET RENO,
Attorney General of the United States, Washington, DC.

DEAR MADAM ATTORNEY GENERAL: Enclosed is a copy of the proposed Constitutional Amendment relative to the balanced budget. My question is the following:

The Committee Report states (p. 8) that the amendment is ''self-enforcing'' because of Section 2, which requires a three-fifths vote to increase ''[t]he limit on the debt of the United States held by the public.'' Is Section 2 self-enforcing, or must Congress act pursuant to Section 6 to adopt enforcement and implementation legislation for this provision to be legally enforceable?

I would appreciate your very prompt reply, given the fact that we are debating this amendment at the current time.

Thank you.

Sincerely,

CARL LEVIN.

U.S. DEPARTMENT OF JUSTICE,
Washington, DC, February 14, 1995.

Hon. CARL LEVIN,
U.S. Senate, Washington, DC.

DEAR SENATOR LEVIN: This responds to your letter to the Attorney General of February 14, 1995, concerning the proposed Balanced Budget Amendment to the Constitution. In that letter you asked whether legislation setting a ''limit on the debt of the United States held by the public'' would have to be passed before Section 2 would have any force. Section 2 states that any increase in the limit on such debt must be passed by a three-fifths rollcall vote of the whole number of each House of Congress.

We have consulted the Office of Management and Budget, which has advised us that there is at present no statutory limit on the ''debt of the United States held by the public,'' the type of debt described in Section 2. Rather, there is a limit on the ''public debt,'' which includes debt held by the public and certain other debt, such as debt held by the Social Security Trust Fund. Unless and until Congress passes legislation establishing a limit on the type of debt described in the amendment, the strictures against increasing this debt limit would have no effect.

Please do not hesitate to contact this Office if we can be of assistance on this or any other matter.

Sincerely,

SHEILA ANTHONY,
Assistant Attorney General.

STATEMENTS OF REPRESENTATIVE DAN SCHAEFER, LEAD SPONSOR OF THE SCHAEFER-STENHOLM SUBSTITUTE TO HOUSE JOINT RESOLUTION 1

A member of Congress or an appropriate Administration official probably would have standing to file suit challenging legislation that subverted the amendment.

* * * * *

The courts could make only a limited range of decisions on a limited number of issues. They could invalidate an individual appropriation or tax Act. They could rule as to whether a given Act of Congress or action by the Executive violated the requirements of this amendment.

* * * * *

. . . no role for the courts is foreseen beyond that of making a determination as to whether an Act of Congress . . . is unconstitutional and a court order not to execute such Act. . . .

Mr. JOHNSTON. Mr. President, I yield 15 minutes to the Senator from Wisconsin.

Mr. FEINGOLD. Mr. President, I rise in strong support of the amendment offered by the distinguished Senator from Louisiana which would make it clear that the balanced budget amendment cannot be used to turn over to the judicial system the responsibilities of managing the fiscal obligations and priorities of the United States.

The amendment of the Senator from Louisiana would make clear we do not intend that unelected judges would assume the power to set tax rates or impound Social Security checks of elderly citizens in order to comply with the constitutional mandate that is created through the balanced budget amendment.

Mr. President, there is probably no more significant amendment that will be offered during this entire debate on the balanced budget amendment. It goes to the very heart and structure of our system of government which we established over two centuries ago.

Unless the Johnston amendment is adopted, the constitutional amendment we are debating could be construed to authorize Federal and State courts to intervene into the most political decisions now made by elected officials, including decisions about levying taxes and spending the revenues raised on national priorities that are established through our democratic process.

Instead, Mr. President, individuals appointed, not elected, to lifetime judicial seats could become intimately involved in these matters. The independent judiciary, of course, is as important to our system as any other element, one of the most important. We do intend that our judges be free from partisan pressures. We intend that they make decisions based upon the law, not upon opinion polls or election returns.

That structure is also based on something else, Mr. President. It is based upon the assumption that those courts with unelected leadership will not be given the responsibility for actions which are intended and reserved for elected officials, those in the legislative and executive branches.

If the balanced budget amendment is added to the Constitution without an amendment which clarifies and limits the potential role of the courts in establishing fiscal priorities for the Federal Government, we will have suddenly opened the door to one of the most radical restructurings of our system at any time in our history.

I assume in the last Congress, Mr. President, concerns about this issue led

to the adoption of the so-called Danforth amendment which specifically restricted the role of the courts in enforcement of the balanced budget amendment to the issuance only of declaratory judgments. We do not have that here in this amendment now. We do not have that restriction. Indeed, some of the most stalwart proponents of the amendment have conceded that without clear limitations, either in the amendment itself or the implementing legislation, the judiciary could become intimately involved in actually directing compliance with the balanced budget amendment.

Now, of course, the response to these concerns has uniformly been, ''Do not worry about the details; we will fix it later.'' That is what we are told about all of our amendments. Repeatedly it is asserted that this issue can be addressed simply by implementing legislation.

Now, the Judiciary Committee report accompanying Senate Joint Resolution 1 suggests that the silence of the amendment on the issue of judicial review is somehow a good thing, a virtue, asserting that through this silence the authors have refused to establish a 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.

The proponent goes on to say to the extent that we do have any judicial intrusion, it can be reigned in later on by having implementing legislation.

Mr. President, that is the classic sidestepping of critical decisions that has engendered public disdain for this body and for elected officials in general. It is irresponsible and an abdication of our most awesome duties to have failed to address this issue in a forthright and honest manner.

The role of the courts in enforcement of this amendment ought to be resolved now, not sometime later. This is when we send it out to the States, not later.

Mr. President, this entire debate over the balanced budget amendment has become somewhat troubling. We seem to be rushing the proposal through to meet an arbitrary deadline that was originally set up as a campaigning proposition. There has been little serious debate over the words of the proposed constitutional amendment. We are constantly diverted from any real discussion of the problems that should be addressed before this language is placed in the Constitution to a generalized discussion of Federal deficits and their impact on the national economy.

Mr. President, I suggest that for a moment we set aside these generalities and focus on the language of the balanced budget amendment that we are considering, and specifically the role of the courts. I strongly urge the supporters of the amendment to consider the Johnston amendment on the merits and not just vote it down again because of some prearranged agreement to defeat any and all amendments. That is not appropriate when we are talking about the most fundamental issue of the separation of powers that this country is founded upon. It is not appropriate, not in the U.S. Senate.

This is a constitutional amendment we are debating and we may well be sending on to the States. We better take the time to ensure that we have not created unintended consequences by careless wording of the amendment.

Mr. President, the ratification of the balanced budget amendment without the Johnston amendment will result in judicial involvement in its implementation. I think that is virtually without question.

The Constitution of the United States has been amended only 27 times in over 2 centuries. Ten of those amendments comprise the Bill of Rights. Three others, the 13th, 14th, and 15th, arose out of the Civil War.

Our Founding Fathers made it difficult to amend our great national charter, and rightly so.

A constitution is designed to endure for the ages, not merely reflect the passing issues of the day.

Once altered, it is very difficult to change.

For example, the 18th amendment, Prohibition, was ratified in 1919. It was a mistake. It inserted government into the private lives of citizens. It was widely flaunted and bred disrespect for the law. It was not repealed until 1933 by the 21st amendment. It took 14 years to undo that error.

An amendment to the Constitution is not like any ordinary legislative matter that we can change next year when we find out that it does not work exactly as intended.

The Constitution is not something we can tinker with and adjust from one Congress to the next.

If the 104th Congress is intent upon adding the balanced budget amendment to the Constitution of the United States, then we better do it right.

We better take the time to ensure that we have not created unintended consequences by careless wording of the amendment.

Let us not allow legitimate frustrations over the Federal deficit inadvertently lead to a radical restructuring of our entire system of governance.

Mr. President, that ratification of the balanced budget amendment without the Johnston amendment will result in judicial involvement in its implementation is virtually without question.

Legal scholars from left to right agree that the balanced budget constitutional amendment will force the courts into potentially endless litigation over its enforcement.

Former Solicitor General and Federal Judge Robert Bork said,

> The result . . . would likely be hundreds, if not thousands, of lawsuits around the country, many of them on inconsistent theories and providing inconsistent results.

Kathleen Sullivan, professor of law at Stanford University similarly observed,

> . . . enforcement of the Balanced Budget Amendment would inevitably wind up on the doorsteps of the state and federal courts, and ultimately at the Supreme Court.

She further testified,

> . . . the possibilities for litigation over balanced budget compliance are staggering. Judges [might be asked] to enforce balanced budgets either by enjoining excess spending or by ordering tax increases, the latter possibility no mere phantom after recent decisions by the Supreme Court upholding . . . federal judicial power to require the levy of a tax.

Yale University professor of law, Burke Marshall, had this to say:

> I have little doubt that the courts ultimately would, however reluctantly, exercise the power of judicial review over such questions as the meaning of the language [used in the Amendment].

Although some may hope that the dictates of the amendment would be self-enforcing and self-policing by the Congress, there is little basis for such speculation. There is a virtual endless list of situations where litigation is likely to result from efforts to interpret or enforce the amendment.

Courts will be asked to interpret the language of the amendment, including such questions as what constitutes total outlays and total revenues. These terms are not self-evident and are not likely to be self-evident to future generations.

Litigation will surely ensue to determine what activities are or are not covered by the amendment.

Almost unbelievably, the Judiciary Committee report, for example, makes the remarkable observation that the electrical power program of one quasi-public entity, the Tennessee Valley Authority, would not be covered by the amendment since its operations are entirely the responsibility of the electric ratepayers. Not only is the naming of this one agency remarkable, it clearly opens the door to many other quasi-public entities seeking similar status. As the author of legislation introduced on January 4, S. 43, to terminate some of the public funding of TVA programs and develop privatization plans for this entity, because I wanted to identify and show where I would create the balanced budget. I am both intrigued and perplexed by the decision to specifically exempt the Tennessee Valley Authority as a part of this balanced budget amendment process that supposedly is neutral as to what would and would not be included.

Courts will be asked to hear challenges to the executive branch efforts to carry out the constitutional mandates. For example, if outlays exceed revenues in any fiscal year, the President could argue on constitutional grounds that it is necessary to impound funds and take other actions unilaterally to meet the requirements of balanced budget amendment. As

Presidents test these powers, surely those affected will seek judicial review.

For example, during the 1970's there was substantial litigation over the Presidential assertion of impoundment authority. Roughly 80 cases were decided by the courts on impoundment questions, generally against the broad interpretation of such power advanced by the Nixon administration. Passage of the Impoundment Control Act of 1974 brought that litigation to rest.

Yet, backed by a new constitutional balanced budget amendment, many believe that the President would have not only the authority to impound appropriated funds, but would have an obligation to do so under the constitutional mandate.

Surely, individuals whose retirement checks are withheld or Federal employees whose salaries are reduced by executive fiat would very likely have standing to sue under this amendment.

Louis Fisher of the Congressional Research Services noted in testimony to the Senate Appropriations Committee that the experience in the States indicates that courts could well be asked to monitor spending, taxing, and indebtedness actions.

Mr. Fisher observed, ''If state actions are a guide, judges will not be shy about tackling budgetary and fiscal questions, no matter how complex.''

Former Solicitor General Charles Fried also testified before the Appropriations Committee that ''[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.''

Cases will also arise when Members of Congress seek to challenge the actions of the executive branch.

One of my former professors, Prof. Archibald Cox, observed, ''There is * * * substantial likelihood that the Federal courts will be drawn in by congressional suits.''

The Supreme Court has recently assumed that either House has standing to sue to enjoin action rendering its vote ineffectual, Burke versus Barnes (1987).

Thus, if the President impounded funds appropriated by Congress on the grounds that anticipated revenues had fallen short of projections, either House might challenge such action and, again, as the Senator from Louisiana so well points out, we have the strong likelihood of the courts being involved. Although the question of when individual Members of Congress might have standing to pursue such actions remains open, the standing of Congress itself to assert its prerogatives seems clearly established.

Finally, there are strong arguments to be made that individual taxpayers could have standing to bring suit to challenge a failure to enforce the amendment.

Harvard Law Prof. Archibald Cox observed in his testimony before the Appropriations Committee last year that if the Supreme Court's formulation of standing in Flast versus Cohen, the seminal taxpayer standing case, is taken at face value, a Federal taxpayer would surely have standing to challenge an expenditure under the proposed amendment upon the allegation that it had resulted or would result in a violation of the specific limitation imposed by section 1 of the amendment.

Certainly, taxpayer suits in the State courts are well-known, and the amendment does not restrict litigation to the Federal court system. Absent a provision placing exclusive jurisdiction in the Federal court system, the issue of State court litigation remains a viable option.

This nightmare of litigation will likely have three major results.

First, it will insert judges into policymaking functions that are unprecedented, for which they have no experience or judicially manageable standards to guide their decisions. That courts would take on such tasks as levying taxes is not mere speculation; the 1990 decision of the Supreme Court in Missouri versus Jenkins, upholding a district court decision directing a local school district to levy a tax in order to support a target school required in a desegregation order makes it clear that this is a very real possibility.

Second, it would entail a radical and fundamental transformation of roles assigned to the different branches of government in this country.

As Nicholas Katzenbach testified,

> * * * to open up even the possibility that judges appointed for life might end up making the most fundamental of all political decision is not only an unprecedented shift of constitutional roles and responsibilities but one that should be totally unacceptable in a democratic society.

Third, and equally important, this shift in power to the judiciary could do incalculable damage to the judiciary itself. As Federal courts take on the task of enjoining the expenditure of funds appropriated by Congress or requiring the levy of specific taxes, the backlash toward judicial fiats could be enormous. Ultimately, the very effectiveness of the courts in preserving constitutional rights and liberties of citizens could be undermined.

The answer to these concerns which has been made by the opponents of this amendment has been singularly unsatisfactory. Repeatedly, we are told, ''we will deal with the problem in the implementing legislation.''

Well, Mr. President, the short answer is what if Congress fails to agree on implementing legislation?

What if the President vetoes any implementing legislation passed by Congress and Congress lacks the two-thirds majority needed to override such a veto?

Is there any serious doubt that the judicial branch has the ability to enforce a constitutional mandate even in the absence of implementing legislation?

It is hornbook law that the Federal courts have the duty to enforce constitutional requirements.

There is no implementing legislation for the first amendment, or the fourth amendment or the sixth amendment. The power of the courts to enforce the constitution arises from the constitution itself, as was held in Marbury versus Madison, very early in our country's history.

As Assistant Attorney General and former Duke Law School Professor Walter Dellinger testified before the Senate Judiciary Committee last month,

> Section 6 of the Balanced Budget Amendment does give Congress affirmative authority to legislate implementing legislation. But unless that authority is deemed exclusive, it does not oust the courts of jurisdiction to act without any implementing legislation, just as the courts are able to act under section 1 of the 14th Amendment.

Mr. President, before I conclude, let me address one last argument, the political question argument, advanced by proponents of the amendment who belive that judicial intervention into the budget process is not likely to follow ratification of the amendment. The proponents argue that the courts are likely to use the political question doctrine to duck deeper involvement into budgetary decision making. The constitutional scholars, pointed out before the committee that the questions which are likely to arise under the balanced budget amendment simply do not meet the criteria established under Baker versus Carr (1962), which lays out the political question doctrine. Moreover, recent cases have suggested a narrowing of the political question doctrine.

In light of the legislative history of this amendment and the presumption by both proponents and opponents that the courts will have some powers to hear cases involving its implementation, there is little likelihood that the political question doctrine will shield the amendment from judicial review.

Mr. President, in the Federalist No. 78, Alexander Hamilton warned that ''there is no liberty, if the power of judging be not separated from the legislative and executive powers.''

If the Johnston amendment is not adopted, we run the grave risk of creating precisely the kind of peril against which Hamilton warned: and the peril is allowing unelected judges to decide policy questions that have heretofore been dealt with by the legislative and executive branches of our Government.

To embark in that direction is the height of foolishness.

Those on the other side of this debate who call themselves conservatives ought to be among the first to cosponsor and applaud the amendment of the Senator from Louisiana.

Why leave this important issue of whether unelected judges should have

the authority to make economic decisions unresolved?

Why would the Senate abdicate its responsibility? I have authored a lot of amendments here, Mr. President. I may have more. I care about them all—middle-class tax cut, tax expenditures, issues having to do with how this amendment is set up. I would happily drop all those amendments if we could just solve this fundamental problem and if we could just resolve, through the Johnston amendment, the question of whether we are going to turn over this Government to the unelected judges or whether we are going to maintain our right and our responsibility to uphold the Constitution and deal with budgetary matters.

Mr. President, there is no question, of any amendment, this is the one that should be adopted.

Mr. SANTORUM. Will the Senator from Wisconsin yield?

The PRESIDING OFFICER. Will the Senator yield to the Senator from Pennsylvania? Who yields time?

Mr. SANTORUM. Does the Senator have time left?

The PRESIDING OFFICER. The Senator has 2 minutes left.

Mr. SANTORUM. Will the Senator yield for a question?

Mr. FEINGOLD. I yield for a question.

Mr. SANTORUM. The question I have is, given everything the Senator says will happen—all these suits occurring, et cetera—is there not specific authority in section 6 of this amendment for Congress to pass implementing legislation wherein we can specifically limit the ability of taxpayers, Members of Congress and others to sue on this amendment? Is that not the ability of the Congress to do even prior to maybe even ratification by the States? Could we not have legislation moving through the process to do that?

Mr. FEINGOLD. Surely there is a possibility we could try to pass that language and that would help. What I am suggesting here is, under the balanced budget amendment and under the inherent powers of the court to enforce the balanced budget amendment, that that may well be overridden by the power of the courts to take those suits and these folks would have standing.

Mr. SANTORUM. I did not understand, what would be overridden by the courts, our implementing legislation?

Mr. FEINGOLD. I am suggesting that simply barring those particular lawsuits, or attempting to, may not be consistent with the court's ruling of his inherent powers in this situation.

Mr. SANTORUM. The Senator is suggesting the Congress cannot limit suits? That is not within our ability to redress to the courts——

Mr. FEINGOLD. I am suggesting in the situation where the budget is not balanced, where there is a problem with the entire balanced budget amendment and the balancing of the budget, that the courts are going to have a certain amount of inherent power to enforce the amendment. I do not deny Congress certainly has some power.

Mr. SANTORUM. Could we not limit them to simply declaratory judgment? Is the Senator saying the courts could go beyond that even though Congress limits them to simply declaratory judgment?

Mr. FEINGOLD. Is that the Senator's intent?

Mr. SANTORUM. If we did that in the implementing legislation, to limit them to declaratory judgment, is the Senator suggesting the courts can ignore that?

Mr. FEINGOLD. I am suggesting it is possible that subsequently the U.S. Supreme Court could rule that the balanced budget amendment, that would derogate from the balanced budget amendment and take away the power of the people to have a balanced budget by taking away the right to enforce it. If you do not include in the constitutional amendment itself, if you do not specify in the Constitution that statutory provision cannot necessarily be interpreted by the U.S. Supreme Court to derogate to the balanced budget amendment. I am not convinced of that at all.

Mr. SANTORUM. I can read to the Senator, if he would like, example after example—I would like to submit it for the RECORD—of where the Congress has specifically limited the powers of the courts dealing with these kinds of matters.

Mr. FEINGOLD. That is under the current Constitution; this is under a new Constitution, one with a balanced budget amendment in it. The courts do not currently have a balanced budget amendment to deal with.

What I am suggesting is, if you have a balanced budget amendment, and later on you decide that you want to have a statute, it is not certain that the court would rule that that limitation——

Mr. SANTORUM. Does not——

The PRESIDING OFFICER. The Senator's time has expired.

Mr. SANTORUM addressed the Chair.

The PRESIDING OFFICER. Who yields time?

Mr. FEINGOLD. It may be unconstitutional.

Mr. SANTORUM. Mr. President, I would like to yield myself some time to address this issue.

Section 6 of the constitutional amendment which we are discussing, the balanced budget amendment, specifically states that Congress has the ability to pass implementing legislation. In that legislation we can limit the authority of the courts——

Mr. FEINGOLD. Will the Senator yield for a question?

Mr. SANTORUM. To address this question.

Mr. JOHNSTON. Will the Senator yield?

Mr. SANTORUM. Even assuming the worst case, assuming that the sky will fall down——

Mr. FEINGOLD. Will the Senator yield for a question?

Mr. SANTORUM. We have the ability here in this Chamber and across the aisle to deal with this issue, and in fact I suspect that as we do pass implementing legislation, which I am sure we will, we will be back on this floor and I think that is the arena for this discussion as to what the appropriate remedies should be.

Mr. FEINGOLD. Will the Senator yield for a question?

Mr. SANTORUM. I will be happy to yield for a question.

Mr. FEINGOLD. I would ask the Senator's reaction to the statement of Solicitor General Freed with regard to this issue where he said that if Congress attempted to pass legislation pursuant to section 6 to eliminate Federal court jurisdiction of questions arising in the balanced budget constitutional amendment, that limitation itself might very well be unconstitutional.

That is my point. You may want to pass legislation afterwards. You may hope that the court will accept it. But there is no certainty whatsoever that the court will not say, I am sorry. This is merely a statute. And my question is, how does the Senator react to the question?

Mr. SANTORUM. I disagree. It has been law in this country for as far as I know. The only situation where that could be a problem is if all due process, all other court access is denied. If we provide for some court access, which I am sure we will, if we provide for some court access, then I think it is very clear that they will not have other recourse—as long as we provide an avenue to the courts. We have the power to do that, to direct what avenue they take.

If we say in the implementing legislation that there will be no access, I think the Senator might have a point. But I do not think we are going to do that. But I think that is a discussion for another day, not to insert in the Constitution in this amendment a complete prohibition of all court activity because I think that overreaches.

Mr. JOHNSTON. Will the Senator yield?

Mr. FEINGOLD. Will the Senator yield for a further question?

Mr. SANTORUM. I will briefly yield and then I wish to respond to the Senator from Michigan.

Mr. JOHNSTON. I think the Senator brings up an important and close point and that is whether the phrasing in section 6, where Congress shall enforce and implement the article, whether a denial of jurisdiction, a denial of all remedies would be considered to be enforcing and implementing. This same kind of language is in section 5 of the 14th amendment. I am quite familiar with this because I had an amendment here which I passed twice in the Senate, invoked cloture twice on it, to

limit busing under the 14th amendment, and the question was addressed by the then Attorney General as to whether that limitation was implementing the 14th amendment, and the decision of the Attorney General was not altogether satisfactory. Suffice it to say, there would be a real question as to whether that would be implementing and enforcing if you denied all jurisdiction. But it seems to me that is not the important——

Mr. SANTORUM. If I can take my time back, I would agree with the Senator that I think we could run into problems if we denied every access to the courts. I am suggesting that I do not believe that will be the case. I think there will be some sort of relief provided for in the implementing legislation. And if we did not, I think we would have some sort of constitutional question. But I am saying that is an issue we should bring to the floor and discuss, but we should not do a complete ban on any kind of redress to the courts. I think it is unwise just from a policy perspective. But I think it does not have a place in the Constitution as far as I am concerned.

Mr. JOHNSTON. If the Senator will yield just for one statement——

Mr. SANTORUM. Yes.

Mr. JOHNSTON. Which is that under my amendment we do not prohibit the Congress from acting. To the contrary, we say that the court shall have no jurisdiction except to the extent that Congress specifically acts. So we allow that. We contemplate it. We encourage it. And Congress ought to act. On that the Senator and I agree.

The question is if Congress does not act, what is the inherent power of the Court? And we wish to make it clear that they have no inherent power except to the extent we give it to them.

Mr. SANTORUM. All I would suggest is that implementing legislation certainly must follow. It is a certainty that it will follow this legislation, and I think we will provide, I know we will provide some remedies therein to provide for redress of this grievance with respect to the question that the Senator from Michigan brought up. It is a good question. The question is whether a citizen or someone would have standing to bring here.

Standing is one issue. Whether they would be successful is another issue. Standing is the first hurdle that someone must pass.

With respect to that question, there is a three-part test that is used, that has been used for quite some time, and number one, the citizen must show injury in fact. I think that is a very high hurdle, for one individual to show a personal injury due to the fact that we have an unbalanced budget, and in fact we have cases that are very clear on that: Frothingham versus Mellon, a very old Supreme Court case still in effect, a 1923 case, says that allegations that amount to generalized grievance are not justiciable.

That to me is a pretty clear indication that you have a high burden upon just the first leg of this three-part test to cover.

No. 2, you have to show that one particular piece of legislation caused the unbalancing. Well, which one caused the unbalancing? How do you go about attacking that one as the one that did it? I think that also raises a very difficult question.

And finally—and we have talked about this briefly—whether it is a redressable grievance. What can the Court do to solve this problem? And you run into the political question doctrine and a whole lot of other things about whether the Court can reach over into article I and impose taxes under a balanced budget amendment. I think that is a very tall order, for the courts to say that they have that kind of power in that branch of the Government when it is very clear that article I says that Congress has the power to tax and to spend.

Mr. LEVIN. Will the Senator allow a response to that?

Mr. SANTORUM. I promised the Senator from Illinois I would yield him some time, so I will yield to the Senator from Illinois 5 minutes.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. SIMON. I thank the Chair.

Let me just make a few observations. First—and I do not question the sincerity of my colleague from Louisiana at all on this; I know he is sincere—some who attack this are going to attack it no matter what. One former Member of this body was attacking this because the courts were going to intervene, and then we adopted the Danforth amendment, and he attacked it because it was toothless and it was unenforceable. It is kind of a no-win situation for some of the opponents.

Second, in terms of a precedent for what you are talking about, court intervention, the only real precedent is the Jenkins case in Missouri where you are dealing with individual rights and something that is not real clear. Here you are talking about an institutional situation where we can precisely measure what has happened. I think on balance the risk is very small. And I would quote from former Attorney General Barr.

> I see little risk that the amendment will become the basis for judicial micro- management 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 [vastly outweighed] by the benefits of such an amendment.

We clearly have the ability to determine who has standing. Now, obviously—and I heard my friend from Michigan, Senator LEVIN, quote Congressman SCHAEFER. I differ with Congressman SCHAEFER in terms of what our implementing legislation should be, and I think the majority in the House and Senate will.

I think standing ought to be limited to, perhaps, 10 Senators, 30 House Members, 3 Governors—something along that line—and limited solely to the Federal courts. I think we can pass something like that so there is not going to be, in any event, just a huge amount of litigation even if you try stretching your imagination.

I point out, also, we can avoid all of this by building small surpluses, as Alan Greenspan, Fred Bergsten, and other economists have recommended that we do. If we do not have surpluses, if we have a situation, with a 60 percent vote, we can have a deficit. And it takes a 60 percent vote to add to the debt. These are very precise measurements. We are not talking about individual rights where there may be strong disagreements.

I point out also, and my colleague from Colorado, Senator BROWN, pointed this out in committee when we had the hearing, that States have somewhat similar provisions, 48 of the 50 States, in their State constitutions. There has been almost no litigation on this. So the history of States suggests this will not happen. Senator BROWN mentioned in the history of Colorado's provision, there has been no litigation on this question.

Does that mean the courts cannot ever get involved? The answer is, if we blatantly ignore the Constitution, then there is a narrow window for the courts to get involved. That window, I think, should remain open. I do not think we should close that window. I think it is unlikely that will ever be a problem. But who knows who will be in Congress 50 years from now? Some Congress may decide we just want to ignore the Constitution. I cannot imagine that, but it is possible.

In that kind of case, the courts can intervene. But I think the history of State provisions, the provision that says the Congress shall enforce and implement this article by appropriate legislation, makes it very clear we are not going to have a massive amount of litigation.

I thank my colleague for yielding the time.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Will the Senator from Louisiana yield me some additional time?

The PRESIDING OFFICER. Does the Senator from Louisiana yield?

Mr. JOHNSTON. Mr. President, who has the floor?

The PRESIDING OFFICER. You have the floor.

Mr. JOHNSTON. Mr. President, I have been speaking to my colleagues on the other side of the aisle, particularly Senators BROWN and GORTON. I believe we have an agreement as to at least what we could agree to. If my colleagues on this side of the aisle would have no objection to this language,

then I will propose to modify my amendment accordingly.

The language is a combination of language originally proposed by Senator GORTON back in 1982, and with the Brown suggestion about section 2. It would read as follows. I am not asking at this point to modify the amendment, but I would like to discuss it before I do.

The judicial power of the United States shall not extend to any case or controversy arising under this article except for section 2 hereof or as may be specifically authorized in implementing legislation pursuant to this section.

Section 2, my colleagues will recall, as Senator BROWN talked about, 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.

As Senator BROWN pointed out, that is a powerful way to enforce the amendment. That would be exempted from the—in other words, the court would have jurisdiction under section 2, but otherwise would not have jurisdiction—would not—the judicial power would not extend, except as specifically authorized by Congress.

Mr. LEVIN. I wonder if the Senator from Louisiana will yield for a question, a clarification, on this?

Mr. JOHNSTON. Yes, of course.

Mr. LEVIN. As far as I am concerned, any clarification is an improvement because we now, as the Senator so eloquently pointed out, have an ambiguity which is unacceptable in a provision. Whether people favor the provision otherwise or oppose it otherwise, we ought to seek clarity in what we are doing.

As I understand the language the Senator has just read, it would say that basically a court could enforce the section 2 limit on the debt. That limit on the debt held by the public would still have to be defined by Congress, since there is no existing statute that sets that debt held by the public, and that is confirmed by letter from the Attorney General which I put in the RECORD.

Mr. JOHNSTON. I believe that is also in the committee report. They say the debt is a creature of legislation and would be subject to that definition by Congress.

Mr. LEVIN. But my question of the Senator from Louisiana is this. Is the Senator saying that, in the event that the Congress did not adopt a limit on the debt of the United States held by the public—and there is no such statutory limit now, the statutory limit now is on the debt, not just the debt which is held by the public which is part of the national debt—if the Congress did not set such a limit as provided for in section 2, that this language that the Senator just read would authorize a court to legislate that limit?

Mr. JOHNSTON. No. No. The court would have—the judicial power of the United States would extend to that case or controversy, however it arose and whatever remedies the court would feel were appropriate. We do not know what remedies those might be.

Mr. GORTON. Will the Senator yield?

Mr. LEVIN. I am wondering though, if I could clarify this question. Is it the intention of this language—and I think it is important that language be before this body for more than a few minutes so people can study it. This is a critical question. My good friend from Washington has been deeply involved in this question over many, many versions of the constitutional amendment and is really an expert on the subject. So I think this language should be before the body for more than a few minutes.

My question, however, is: Is it intended that a court could order a specific limit on the debt ''held by the public,'' in the event that Congress did not adopt a statute defining such a publicly held——

Mr. JOHNSTON. There is a limit on the debt now.

Mr. LEVIN. That is the importance of the letter from the Attorney General. With the permission of my friend from Louisiana, I would like to read it. It is a short letter.

DEAR SENATOR LEVIN: This responds to your letter to the Attorney General of February 14, 1995, concerning the proposed Balanced Budget Amendment to the Constitution. In that letter you asked whether legislation setting a ''limit on the debt of the United States held by the public'' would have to be passed before Section 2 would have any force. Section 2 states that any increase in the limit on such debt must be passed by a three-fifths rollcall vote of the whole number of each House of Congress.

We have consulted the Office of Management and Budget, which has advised us that there is at present no statutory limit on the ''debt of the United States held by the public,'' the type of debt described in Section 2. Rather, there is a limit on the ''public debt,'' which includes debt held by the public and certain other debt, such as debt held by the Social Security Trust Fund. Unless and until Congress passes legislation establishing a limit on the type of debt described in the amendment, the strictures against increasing this debt limit would have no effect.

I cannot say it any more clearly than the Attorney General of the United States. There is no statutory limit on the ''debt of the United States held by the public'' in current law. It would require a future Congress to establish such a new kind of debt limit, which would exclude debt held, for instance, by the Social Security Administration.

My question, then, is whether or not it is the intention of the framers of this new language that a court could order a Congress, or adopt itself, language which would define ''debt of the United States held by the public,'' since there is no such debt in current law?

Mr. GORTON. Will the Senator yield?

Mr. JOHNSTON. This amendment has the judicial power of the United States to extend to that case or controversy. I can imagine the number of things the court could do. The court can do what they want to because they are omnipotent. They can say that the public debt, as presently set by limit, was meant to be the same thing as this. But from my standpoint, if the Senator from Colorado and the Senator from Washington would like to redefine that term in light of this letter, that would be suitable with me. But I would say that it is improbable that a court would be able itself to set a limit on the public debt.

Mr. GORTON. Will the Senator yield?

Mr. JOHNSTON. Yes, of course.

Mr. GORTON. The answer the Senator from Louisiana has given to the Senator from Michigan is accurate insofar as it goes. But I think the more fundamental answer to the Senator from Michigan is that this particular part of the proposed revision does not change the basic balanced budget amendment with respect to section 2 at all. Right now the thrust of the argument of the question raised by the Senator from Michigan is just as valid in the present unamended form to the balanced budget amendment as it would be if this modification were passed. This Senator, as each of the Senators knows, was greatly disturbed by this particular question of judicial review 13 years ago, in 1982, and proposed an amendment to essentially cause these questions to be political questions at that time.

This Senator is very sympathetic with the direction of the amendment Senator JOHNSTON has put forward and would prefer that it be phrased slightly differently, but, nonetheless, I feel that I do not wish to expand the judicial power of the United States to writing budget for the United States. When I proposed that, without the exception for section 2, the Senator from Colorado and others expressed to me a deep concern about a form of violation of the Constitution that I think will never take place. Their comments were directed at our comments, which would simply defy the plain requirements of section 2 and pass a debt limit increase with 55 percent of the votes in the Senate or 55 percent of the votes in the House and just simply flat out ignore the Constitution. They wished to see to it that the courts would have jurisdiction to prevent that blatant violation of the Constitution. I do not believe that it is even remotely conceivable that would ever happen.

The reason I sympathize with the general direction of what the Senator from Louisiana wants to do, what I fear is going to happen under this constitutional amendment is that Congress is going to pass a budget and the President is going to sign a budget, under the same circumstances which happens today, that is invalid according to the estimates by the CBO and the like and that someone or some group will have standing to go into court and say, ''No; the CBO estimates

are wrong. We have to get the estimates,'' and that some court which desires to get into this business is going to say, ''Yes, you are right. Your estimates are better than Congress,'' and order the rewriting of a budget. I do not believe anyone, I say to the Senator from Michigan, who was asked this question, believes we are going to get cases under section 2. But, in any event, we are not going to get any more cases under section 2 with this revised amendment than we will get without any amendment at all.

Mr. LEVIN. Will the Senator from Washington yield? I thank him for his clarification. As I understand it, it would be his intention as one of the coauthors of this language, I gather, that the Senator from Louisiana has described, that the jurisdiction is referred to the court, pursuant to section 2, to enforce the 60-vote requirement in that amendment, not to define words that a legislature or Congress would ordinarily be required to define.

Mr. GORTON. Clearly, any controversy arising under section 2 would in fact be justiciable under the modification of the draft working with the Senator from Colorado and the Senator from Louisiana. But the point is that it is true with the original balanced budget amendment, we are not changing that by proposing this. This modification, just as Senator JOHNSTON's original amendment limits the jurisdiction of the courts of the United States, modifies it in this fashion. It does not do it quite as much because it does not limit it with respect to section 2. It just limits with respect to the other section, but nothing, in my view, given the Supreme Court, by this modification that is not there in the present form of the balanced budget amendment that we have been debating for 3 weeks.

Mr. JOHNSTON. Will the Senator yield?

Mr. GORTON. Technically the Senator from Louisiana has the floor.

The PRESIDING OFFICER (Mr. THOMAS). The Senator from Louisiana.

Mr. JOHNSTON. I agree with the Senator from Washington. Moreover, there is a legislative limit today on the debt of the United States. So Congress must act, plus act every year to increase the debt. They may act to increase the debt as defined by statute now. But, if you can do that, chances are you will be able to do it to increase it pursuant to the terms of this constitutional amendment.

Mr. GORTON. Yes. As I understand, that was in the letter from the Attorney General. I must say it sounds like chopped logic to me. We have a statute under the deficit now which uses words slightly different from those of section 2 in House Joint Resolution 1.

Mr. LEVIN. It is slightly different. If the Senator will yield, the question is whether or not to include debt held by the Social Security Administration. That is not a slight difference.

Mr. GORTON. I am convinced that the simplest of all implementing legislation for this kind of constitutional amendment, should it become part of the Constitution, will define the debt in a way which is totally consistent with section 2. So as a practical matter, I do not think such a case of controversy will ever arise.

Mr. LEVIN. I wonder if I could ask the Senator from Louisiana this question, the same question, now that we have the letter from the Attorney General. It is the intent, as I understand it, that under the languages which you read that the court could enforce the requirement of 60 votes, and that is the principal purpose of the language.

Mr. JOHNSTON. I do not mean to be evasive. I am just saying that the judicial power of the United States would extend to cases and controversies arising under section 2. The court can do what it thinks is proper, if it finds standing, if it finds there is a justiciable question and it extends to such powers as the court thinks are proper.

Mr. GORTON. Will the Senator yield for just a moment?

Mr. JOHNSTON. Yes.

Mr. GORTON. Since what the Senator from Louisiana has read is in the handwriting of the Senator from Washington, the answer of the Senator from Washington to the Senator from Michigan is yes.

Mr. JOHNSTON. Mr. President, I yield the floor.

If no other Senator is seeking recognition, I suggest the absence of a quorum and ask unanimous consent that it be equally divided.

Mr. THOMPSON. If the Senator will withhold, I will address a question to the Senator from Washington. It has to do with the purpose of this language which I have heard and have not had a chance to read. As I understand it, this would deprive the courts of jurisdiction except with regard to section 2.

Mr. GORTON. The amendment that is before the body now, the amendment of the Senator from Louisiana, does not deprive the court of jurisdiction. The court has no jurisdiction at the present time on a constitutional amendment. It says, in essence, that the court will not have jurisdiction over cases arising out of the balanced budget amendment, except with respect to its enabling legislation. That is the proposal of the Senator from Louisiana.

While this modification has some slight language differences from his original point, its only substantive change in the proposal before the body right now is to allow the court to deal with cases and controversies arising under section 2. The purpose of it, I may say—since while I was the draftsman, I am not the person who thought it up—the purpose of it was to deal with the sincere concerns of the Senator from Colorado, Mr. BROWN, that Congress, without such jurisdiction, literally could define the plain language of section 2 and pass a debt limit increase by less than a 60-percent supermajority vote.

As I have said, I cannot conceive of Members of Congress so blatantly violating their oaths of office under such circumstances. As a consequence, I was perfectly willing to go along with the Senator from Colorado because I do not think any such case or controversy will ever arise. But the purpose is to carve out from the general exemption—which is Senator Johnston's amendment—section 2.

Mr. THOMPSON. So while there is an exemption under the Senator's amendment with regard to enabling legislation, this exemption would apply to part of the language of the constitutional amendment.

Mr. GORTON. Yes, plus enabling legislation.

Mr. THOMPSON. Yes, and that is section 2. Does the Senator consider that if such amended language was agreed to, that might obviate the argument that the courts did not have jurisdiction with regard to section 2? In other words, as I heard the debate here a short time ago, I think very strong arguments were made with regard to the amendment itself, the totality of the amendment, that there were serious questions with regard to the justiciable issue regarding political questions and all of that, with regard to the amendment in totality, including section 2.

I wonder whether or not, if such language were agreed to, this would be an open invitation to the courts that in fact we are inviting you to take on anything that could be a part of section 2 and might in fact go against the intent of the proponents of the amendment of the Senator from Louisiana?

Mr. GORTON. I say to the Senator from Tennessee that he is a shrewd reader of legislative constitutional language, because I think in this case he is precisely correct. The paradox, in my opinion, this year, last year, and in 1982, when we debated this subject, is that those who have opposed adding this kind of judicial review section to a balanced budget amendment have made two totally inconsistent, opposite arguments against including such a section. One is that the courts would never take cases or controversies under this. They do not have any such jurisdiction, and they would not exercise any such jurisdiction. The other argument is that we certainly want the courts to enforce it if Congress violates these constitutional provisions.

I did not understand those arguments in 1982; I did not understand them in 1986; I did not understand them last year; and I do not understand them now. I think those who oppose adding something like the Johnston amendment at least ought to pick one side of that argument or the other. If their sole reason for not wishing to add something like the Johnston amendment is that it is unnecessary because the courts will never, under any circumstances, deal with a case or controversy arising under the balanced

budget amendment, then under those circumstances, we have actually created a cause of action by this particular modification with respect to section 2. I think that is the utter logical conclusion.

My own view on the subject is that the fundamental argument is flawed. I am convinced that the courts would in fact exercise jurisdiction under cases or controversies arising under this entire amendment. There is no way in the world we can guarantee that the Supreme Court next year, much less 100 years from now, is not going to decide it wants to write a budget and override our estimate.

My deep concern is not a case or controversy that is going to arise under section 2 as to whether we have invalidly increased the debt limit, or many other sections here; I believe that the history of the Federal courts of the United States clearly indicates that we will be faced very soon—maybe in the first budget that passes after this constitutional amendment becomes a part of the Constitution—with a Congress and a President who have passed what they consider to be a balanced budget, using Congressional Budget Office estimates of revenues, for example, and Joint Tax Committee estimates of receipts, and that some individual withstanding will sue and say the Congressional Budget Office estimates are off, they are phony, this is Congress' own creation, they have fixed the figures, and we think there is a much better estimate of expenditures and those expenditures are a lot higher than the Congressional Budget Office has said and we, therefore, order the Congress either to use our estimates, the estimates of the court, to rewrite the budget, or we will impose a 5-percent surcharge on the income tax this year to bring it into balance.

It is that kind of judicial activism, in my opinion, which has plagued the United States in many respects for the last 50 years, with courts running prisons and school systems and shelters for the homeless and the like, and acting in a legislative fashion. And for anybody, particularly somebody conservative, to state with assurance that the courts will not involve themselves in this field I just think is a faulty argument.

If the argument, on the other hand, is the courts ought to be in this field, I can see someone arguing that they like judicial activism and want courts involved in this field. I just disagree with them. If I thought the courts were going to be in this field, I would not want anything to do with the balanced budget amendment, of which I am a cosponsor and a very, very strong supporter. Under those cases, they would probably rather have it in section 2 than not to have it at all. Personally, I would prefer we not have it at all. Personally, I also want to get something accomplished here, and I do not think this exception for section 2, in my view, is ever going to come up at all.

Mr. JOHNSTON. Will the Senator yield?

Mr. GORTON. The answer to the question of the Senator from Tennessee is that he is absolutely right. It settles that first argument with respect to section 2 and makes it invalid.

The PRESIDING OFFICER. The Senator from Tennessee controls the time.

Mr. JOHNSTON. Who has the time?

The PRESIDING OFFICER. The Senator from Tennessee.

Mr. JOHNSTON. Will the Senator yield?

Mr. THOMPSON. Yes.

Mr. JOHNSTON. I wonder if the Senator would not agree with me that section 2 involves, really, a yes or no proposition—that is, that the limit on the debt of the U.S. public shall not be increased except by a three-fifths vote. It is subject only really to a yes or no proposition. That is, you either had the three-fifths or you did not have it. It does not get into all the fiscal questions that might flow from that; rather, it is a yes or no proposition.

So I wonder if the Senator from Washington does not agree that really about all the court could do on that is say, yes or no, you did or you did not, and if you did not, it is not valid and the President could not sign it anyway if it violates the Constitution.

Mr. GORTON. That is certainly the thrust of what the Senator from Colorado was himself concerned with.

Again, it is very important, as the Senator from Michigan said, when we deal with the Constitution that we be as clear as we possibly can in what we say. And it is certainly possible, in the absence of any statute on this subject, that a case or controversy could arise under other provisions in section 2. But, as I said, the first thing we will do will be to make the slight definitional changes that are necessary to use the phrase in this Constitution and the debt limit legislation which we have at the present time.

So, as a practical matter, I think the only time the question would ever come up is the way the Senator from Louisiana states it.

Mr. THOMPSON. Mr. President, I share the concern of both the Senator from Louisiana and the Senator from Washington concerning judicial activism. As the Senator from Washington puts it, on one hand, he is concerned about it, and, on the other, he is concerned about the notion that the courts should indeed be involved.

I think there is probably a middle ground here that many people are struggling with. I think a very good case can be made for the proposition that, indeed, it is unlikely—I am talking about under the original amendment—that it is unlikely that the court would involve itself in the detailed budgeting process of the Congress of the United States.

Now, can anybody say that will not happen with certainty? Absolutely not. We all know that it can happen. It is a possibility.

The question is: What is the likelihood? It has never been done before. You look at what has happened on the State level. You look at what has happened on the Federal level.

I remember the lawsuit against President Nixon back in 1974. The court dealt with a little different situation there, but they were dealing with the powers of the executive branch. If you read that case, you will see how reluctant the Supreme Court is to get into the operations of and put limitations on the power of the other branches of Government.

That case came down requiring the President to give up his tapes, but in doing so really they raised the threshold very substantially as far as any future similar actions against a President. You had to have eyewitnesses in that case, eyewitnesses, in effect, saying the President was involved in criminal activity or very possibly could have been. So they decided against the President in that case. But by their language, they were struggling mightily with it and it had to be very fact specific and it had to be an egregious case by that language for them to step into the affairs of the President of the United States.

I think in all probability that is the way it will be with Congress. My own guess is—and I assume that is all we can acknowledge, that is basically all we are doing here—my own guess is that, absent some egregious case that the Senator from Washington says he does not think will ever happen, and I agree, but absent some very egregious case where the Congress of the United States just blatantly and openly disregards the Constitution, I do not think the Supreme Court would involve itself, even the Supreme Court as we know it today, which too often gets into too many things, as we all know.

I think many of us simply share the concern that if there is no enforcing mechanism at all, if there is no possibility, if we foreclose any possibility under any circumstances that the court cannot decide this, that a future Congress would use that and circumvent the intent of the balanced budget amendment.

So it gets back to how badly do you think our fiscal crisis is; how badly do we need this balanced budget amendment? And I think pretty badly.

We have heard the debate here for many, many days. We are headed down the wrong road at breakneck speed. We are bankrupting the next generation by any objective standard. By any bipartisan analysis that has been made of it, we are in serious, serious circumstances here and we are kind of fiddling around here while Rome is burning and missing the central point that we better keep in mind, and that is we better get our fiscal house in order.

The balanced budget amendment, without being cluttered with a lot of controversial amendments designed

primarily by some to kill it and not to improve the amendment so that they could support it, instead of doing that, we ought to refocus and pass the balanced budget amendment.

I intend at this stage of the game to say, let us pass it without this amendment.

I yield back the remainder of my time.

The PRESIDING OFFICER. Who yields time?

AMENDMENT NO. 272, AS MODIFIED

Mr. JOHNSTON. Mr. President, we have had this discussion.

At this point, I wish to modify my amendment by inserting, in lieu of the present language, the following language, which I send to the desk.

The PRESIDING OFFICER. The Senator has that right, and the amendment is so modified.

The amendment, as modified, reads as follows:

At the end of Section 6, add the following: ''The judicial power of the United States shall not extend to any case or controversy arising under this article except for section 2 hereof, or as may be specifically authorized in implementing legislation pursuant to this section.''

Mr. LEVIN. Will the Senator yield for two additional questions?

Mr. JOHNSTON. Yes.

Mr. LEVIN. One of the questions I think it would be valuable for us to perk a bit so that others, including members of the Judiciary Committee, could look at the language is a very important change—again, whether you favor or oppose the amendment on other grounds, it is important that we clarify the amendment, and the Senator from Louisiana has done very, very important work in achieving this clarification. I would like to pursue it because there is still some ambiguity.

I have two questions. One is the judicial power of the United States refers to Federal courts. State courts also implement the Constitution and enforce the Constitution. I am wondering whether or not it is the intention of this language that State as well as Federal courts would be prohibited from enforcing this provision except as specifically authorized in implementation legislation? Is that the intent of the authors of this language?

Mr. JOHNSTON. It is not the intent of this language to give State courts the power. I do not believe they would have the power to order a tax increase or give a declaratory judgment or cut a Federal program. I believe that that judicial power adheres only in the United States.

Mr. GORTON. Will the Senator yield?

Mr. JOHNSTON. Yes.

Mr. GORTON. I have to say to the Senator from Michigan, the Constitution of the United States, as it is presently formulated, or formulated here, makes no statements with respect to the jurisdiction of State courts. In a very real sense, State courts interpret the Constitution, but State courts cannot order the Congress of the United States to do anything. They have no such jurisdiction.

So, just as is in the rest of the Constitution, the balanced budget amendment and the debt limit legislation are silent as to the jurisdiction of State courts, which is exactly what they are ought to be.

Mr. LEVIN. As I understand it, however, it is the intent of the Senator from Louisiana that, to the extent that this gives any authority at all under section 2 or otherwise, that section 2 authority exclusively goes to the Federal courts.

Mr. JOHNSTON. That is correct.

Mr. GORTON. The phrase in the Constitution, of course, is the judicial power of the United States. That is the Federal Government.

Mr. LEVIN. My question is, the language here as it authorizes section 2 implementation refers only to Federal courts.

Mr. GORTON. Yes.

Mr. JOHNSTON. Yes.

Mr. LEVIN. The other question relates to a question I have asked the sponsors of the legislation. I sent them a whole list of questions as to the enforcement provisions under section 6, because it raises a whole question as to whether or not there is an enforcement mechanism for this constitutional amendment or whether or not it is just a statement of intent and then has no teeth in it. But that is a different issue for a different argument.

My question, though, is this.

The PRESIDING OFFICER. The time is controlled by the Senator from Louisiana.

Mr. JOHNSTON. Could we answer the questions on the other side's time, because I think we are about to run out?

Mr. LEVIN. Will the Senator from Washington yield for this question?

Mr. GORTON. Yes.

The PRESIDING OFFICER. The Senator from Louisiana controls the time.

Mr. JOHNSTON. Mr. President, I yield the floor.

Mr. LEVIN. Mr. President, will the Senator from Washington——

The PRESIDING OFFICER. The time is expired. Who yields time?

Mr. LEVIN. Would the Senator from Washington ask for a minute or two of time in order to respond to the question of the Senator from Michigan?

Mr. GORTON. The Senator does not have time.

Mr. SANTORUM. Mr. President, I say to the Senator from Michigan, we have a limited amount of time remaining, and we have speakers that we have to accommodate.

Mr. LEVIN. Mr. President, I ask unanimous consent that the questions which I forwarded to the Senators from Utah and Illinois, including section 17 be inserted in the RECORD and specifically any response to section 17 that is obtained today be inserted in the RECORD at this time.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

BALANCED BUDGET AMENDMENT QUESTIONS

1. What exactly is the definition of receipts? For example, do receipts include the receipts from Postal Service stamp sales and TVA power sales? Do they include Medicare premium payments? Do they include the receipts of government corporations and quasi-federal agencies which deposit money in non-Treasury accounts? Who will make this determination?

2. What exactly is the definition of outlays? For example, do outlays include federal loans and federally-guaranteed loans? Do they include spending by government corporations and quasi-federal agencies which pay for their activities out of user fees instead of out of Treasury accounts? Who will make this determination?

3. Will estimates or actual levels be used for receipts and outlays? In an instance in which the OMB and the CBO disagree with each other on what outlays or receipts are, how will the dispute be resolved so that it can be determined whether or not outlays exceed receipts?

4. Who will determine whether a bill is 'a bill to increase revenues?' For example, what happens if OMB says the bill is revenue neutral, and CBO says the bill will result in a net increase in revenues? Whose estimate will prevail? How will the dispute be resolved?

5. At what point will it be determined that outlays will in fact exceed receipts, triggering remedial action? August 1? September 15? Who will make that determination—OMB or CBO?

6. At whatever point it is determined that outlays do or will exceed receipts, will automatic spending cuts or tax increases be triggered? When would that happen, and who would be responsible for making it happen? Will cuts affect all programs equally across-the-board, or will certain programs be exempt?

7. Would it violate the language of the amendment if Congress passes, with less than 60% of the votes, a budget resolution that is not balanced?

8. Would it violate the language of the amendment if Congress passes, with less than 60% of the votes, a bill to increase spending from some base level without off-setting spending cuts or revenue increases? would it matter whether this was the last appropriations bill of the year, and would result total appropriations exceeding expected receipts? If not, how will we ensure that Congress does not increase spending without paying for it?

9. Would it violate the language of the amendment if Congress passes, with less than 60% of the votes, a bill to cut taxes without off-setting spending cuts or revenue increases? If not, how will we ensure that Congress does not cut taxes without paying for it?

10. What happens if Congress passes a budget resolution which is in balance, and enacts appropriations bills on the basis of that resolution, but part way through the year it appears that outlays will exceed receipts? Would Congress be required to vote separately on whether to authorize or eliminate the excess, even though it voted for budget and appropriation bills in the belief that the budget would be balanced? What mechanism would be created to ensure that such a bill would be considered?

11. At what point during the fiscal year would Congress be required to vote to authorize an excess of outlays or to eliminate that excess? What would happen if Congress did not approve either such measure?

12. Would the amendment be enforced through sequestration or impoundment? If so, when and how would that action take place?

13. What happens if Congress approves a specific excess of outlays over receipts by the required three-fifths vote of each House, but the projection turns out to be wrong—the deficit is greater than expected. Would a second vote be required to approve the revised estimate of the deficit? Who determines the dollar amount of excess that Congress will vote on in each case? Who determines that the estimated excess was wrong? How often would such determinations be made, and such votes be required? Who determines when the votes must take place?

14. The resolution requires that three-fifths of each House vote to approve an excess ''by law''. Does this mean that the President must sign a bill to approve an excess? What happens if three-fifths of the Members of each House approve a deficit, but the President vetoes the bill? On the other hand, what happens if Congress passes a reconciliation bill to balance the budget and the President vetoes it and there are insufficient votes to override the veto? For example, what if Congress votes to increase taxes to eliminate the deficit and the President says he prefers spending cuts and vetoes the bill. If there are insufficient votes to override the veto, who has violated the Constitution—the Congress or the President?

15. Could Congress shift receipts or outlays from one year to another to meet balanced budget requirements? For example, could paydays for government employees be put off a few days into the next fiscal year to achieve a balance between receipts and outlays? What mechanisms will prevent this type of abuse?

16. Section 2 of the resolution provides that ''the limit on the debt of the United States held by the public shall not be increased'' without a three-fifths vote. What is the current statutory ''limit on the debt of the United States held by the public'', if any? If there is currently no such limit, how will such a limit be established?

17. What does the debt of the United States held by the public include? Specifically, does it include the debt of wholly-owned government corporations (like the Commodity Credit Corporation and the Overseas Private Investment Corporation)? Does it include the debt of mixed-ownership government corporations (like Amtrak and the Federal Deposit Insurance Corporation)? Does it include loans guaranteed by the federal government, such as guaranteed student loans, guaranteed agriculture and export loans, or Mexican loan guarantees? If not, could additional government corporations and quasi-governmental agencies be created to conduct federal programs off-budget to evade the amendment? Could new government guaranteed lending programs replace government spending? How would this be prevented?

18. May the President transmit a proposed budget which is not in balance in addition to his balanced budget proposal? May the President transmit a balanced budget, but recommends against its adoption? Can he submit the balanced budget at any time before the fiscal year begins?

19. The Committee report states that the words ''bill to increase revenue'' covers ''those measures whose intended and anticipated effect will be to increase revenues to the Federal Government.'' Does this mean net revenue? Over what period of time would this be judged?

Would the revenue provision apply to a bill that increases revenues for three years and reduces revenues for the following three years, with a net change of zero over the six-year period? What happens if the amendment is repealed after three years, because it would result in a deficit?

Would a bill to increase the capital gains tax be exempt, since many argue would have the effect of reducing revenue in at least the early years after enactment?

20. Does ''revenue'' include fees? How do we tell the difference between a revenue measure increasing fees and a spending measure decreasing outlays by requiring users to pay for services provided to them instead of funding the services out of tax revenues?

What about a bill to raise the federal share of receipts from concessions in our national parks?

What if the bill simply required regular competition for national park concessions? Would that be a bill to increase revenue, since it would have the ''intended and anticipated effect'' of increasing the federal share?

21. Does revenue include tariffs? Would a trade measure which authorizes use of retaliatory tariffs in certain cases be considered a ''revenue measure'', since it would arguably have the ''intended and anticipated effect'' of increasing revenues? Who will make this determination?

22. Does revenue include civil and criminal penalties? Would a bill that establishes a new civil or criminal penalty be considered a ''revenue'' measure? How about a bill that indexes certain penalties for inflation? How about a measure to toughen enforcement of criminal or civil penalties? Would a bill to tighten enforcement of the tax laws or provide more personnel to the IRS be covered, since it would have the ''intended and anticipated effect'' of increasing revenues? Who will decide what is covered by this provision?

23. Would a statute that requires a new, lower measure for inflation, be considered a bill to increase revenue, since by slowing the adjustment of tax brackets it would have the ''intended and anticipated effect'' of increasing taxes? Would the elimination of a special, targeted tax break be covered by this provision? Would it cover a bill authorizing the sale of buildings or land?

24. Sponsors of the amendment have said that the social security trust funds will be protected in implementing legislation and that the budget will not be balanced at the expense of the States. How will this result be ensured?

25. The term ''fiscal year'' is not defined in the amendment. The report indicates that Congress has the power to define the term ''fiscal year.'' Does this mean that Congress could change the effective date of the amendment by legislation, passed by majority vote, which changes the statutory time at which a fiscal year begins and ends?

Mr. SANTORUM. Mr. President, I wanted to make a comment about the practical effect that the amendment of the Senator from Louisiana will have on the process once the balanced budget amendment passes.

I think this may be the serious constitutional infirmities that this amendment could have, and when I say ''constitutional infirmities,'' what I believe the Senator's amendment will do is, by denying access, by denying access to the courts in this constitutional amendment, in a sense what we are doing is modifying the fifth amendment due process clause. You are saying we have no redress to this act—none—until Congress acts.

Now, I think the practical effect of that will be—and I think we are seeing within this body a lot of support for the courts keeping hands off, not reaching in—so what may happen, what I think there is high probability of happening, is we will leave that alone. We, in fact, will not implement. We will not provide. There is no requirement for Members to do so. There is no reason for the Senate now to provide access when, in fact, we have stated constitutionally they have no access.

On the other side, if we do not have the Johnston amendment in place, it is incumbent upon Members to act because I think the Senator is right, we have left a big open question here. Now, it is our duty to define what avenues the court will have to address this constitutional amendment.

I think what we have done here is take the Congress off the hook of having to come back, look at this question, debate it, find out specifically what areas we are going to deal with or provide for the citizenry, for Members of Congress, to address this issue in the courts.

By this amendment we will, in fact, foreclose that discussion. I believe that discussion will not occur, or if it does occur, will not prevail, that we will feel most comfortable leaving the courts completely out of it. It has been passed in the constitutional amendment. There will be no reason for Members to come here because we have taken care of this issue.

If we leave it open, the issue will arise again. And I believe the Senator is absolutely right. There is such a question here. We will be driven to provide specifically for that kind of redress in the court.

I think not only do we have a limitation of the due process clause of the 5th amendment as a result of the amendment of the Senator from Louisiana, which I think is a red flag, No. 1. No. 2, we have in a sense decided this issue now maybe for a long period of time and eliminated any prospect of judicial review for this legislation.

I do not think we are prepared to do that. I think we are prepared, at least what I hope most Members are prepared to do, is say, ''Let's leave this question open for us to go and then provide specific redresses in the implementing legislation to deal with this question. Let's be precise about it. Let's be limited about it but have a full and open discussion about it, not foreclose and slam the door for any possibilities of judicial overview,'' whatever limited amount it may be.

Mr. JOHNSTON. Mr. President, will the Senator yield?

Mr. SANTORUM. Very briefly.

Mr. JOHNSTON. What appropriate role would the Senator think the courts ought to have?

Mr. SANTORUM. Mr. President, I think that is a discussion that we need to have. I think that is a discussion that has to be talked about far beyond the few hours of debate we have here on the Senate floor. We need to look at whether we should limit it to declaratory judgment or whether we should grant injunctive relief. All those kind of avenues. Who should we give standing to move these suits forward. All of those discussions, the particulars, need

to be dealt with in the implementing legislation.

If we pass the amendment of the Senator from Louisiana, I do not believe we will get there. I do not believe we get there because we have already settled the issue and the courts do not have a role.

Mr. JOHNSTON. We say the courts do have a role to the extent we specify.

Mr. SANTORUM. But there is no incentive as a result of your amendment to specify. We have now kept them out of our affairs. There is no reason for Members to come back and give them access, where, if we did not pass the amendment, it would be a broad open question as to what extent they could get involved.

It could be incumbent upon the Senate to protect our own viability as a body, for the Senate to specifically chart out where they would. I think any kind of implementing legislation—I think the Senator from Wisconsin was right on this. If we, through implementing legislation, said they have no access, I think we would have constitutional problems with that. We would have to provide some sort of limited access for suit. Your amendment does not do that.

I think you run into very severe limitation on the due process clause. We are telling every citizen of this country that you cannot redress your Government through a constitutional amendment. I think that is a real problem. I think that is one of the reasons I would be opposed to it.

The second is, I think it forecloses any future discussion on this matter. I would be happy at this point to yield the floor.

Mr. HATCH addressed the Chair.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I understand the hullabaloo is about the modification of the amendment of the Senator from Louisiana applying only to section 2, because the claim is the budgetary language is different from the constitutional amendment language.

To me, that is such a trivialization of the debate that it is not funny. If we have 67 people who will pass this amendment, we are certainly going to have 51 votes to change any budgetary language we have to in the implementing legislation.

Why should we get into a big scholastic—and by ''scholastic,'' we will call it scholasticism — how-many-angels-stand- on-head-of-a-pin argument in the debate over the constitutional amendment over that issue?

Now, if Members of Congress believe that the issue of standing and the separation of powers and political question are not well defined by the courts and well defined by better than a century of law on this subject, then I can see where they might want to support the distinguished Senator from Louisiana and his amendment here.

The law is so well defined and it is so clear in those areas. I think we made the case earlier in the day that it is clear that I do not need to repeat it again at this particular point. I am hoping all Senators will vote against this amendment. It is a mischievous amendment. It is offered to try to scuttle the balanced budget amendment, knowing that there can always be made some argument about any term in any balanced budget amendment or any amendment to the Constitution that others might agree or disagree on.

What we are talking about here is an amendment passed by 300 Members of the House of Representatives, the two-thirds-plus vote, for the first time in history. In my opinion, we simply cannot amend it further because of that historic vote and the fact that it is a bipartisan consensus amendment by Democrats and Republicans that will work. These frightful occurrences are not going to occur and everybody knows it.

The whole purpose of this amendment is, of course, to try to amend this constitutional amendment which puts Members through the whole process again. Now the original amendment of the distinguished Senator from Louisiana said, ''No court shall have the power to issue relief pursuant to any case or controversy arising out of this article except as may be specifically authorized in implementing legislation pursuant to this section.''

The modification, as I understand it, would add on to section 6 the following:

> The judicial power of the United States shall not extend to any case or controversy arising out of this article except for section 2 hereof, or as may be specifically authorized in implementing legislation pursuant to this section.

We do not need to have litigation for section 2. We do not need to have litigation for any aspect of it. I think under the rules of law that have existed for well upward of a century, this is a false issue, and we should vote to table this particular amendment. I hope our Senators will do that.

I yield the floor.

Mr. JOHNSTON addressed the Chair.

The PRESIDING OFFICER. The Senator from Louisiana.

Mr. JOHNSTON. Mr. President, I am indebted to the distinguished Senator from Washington [Mr. GORTON] and the distinguished Senator from Colorado [Mr. BROWN] for helping work out this modification which I think achieves very well the purposes that most Senators want to achieve on this floor, which is to ensure that the real biting enforcement and sanction of section 2 is preserved in this amendment so that, as the Senator from Colorado said, section 2 is the real guts of the enforcement and that remains here with the power of the court to enforce it.

But other than that, Mr. President, this amendment will provide that the courts may not raise taxes and may not substitute their judgment for that of the U.S. Congress.

It is to me an amazing circularity of logic that the opponents of the amendment as modified have. They say, on the one hand, this is absolutely clear, we know there is no standing to sue, we know there is no justiciable question; this is a political question which the courts cannot get into. But, on the other hand, there may be some cases where some people will need to go to court and enforce this. But, on the other hand, it is absolutely clear. But, on the other hand, if we pass this amendment, the Congress will never act because then it will be clear.

Well, Mr. President, it either is clear or it is not clear, and we know what the real answer to that question is: It is intentionally ambiguous, and in that ambiguity, we have mischief, because while what Judge Bork says is thousands of cases matriculating up through the district courts and the courts of appeal of this country, while we are waiting for those to be decided, the capital markets of this country, the bond markets, the very fiscal essence of the country will be held in limbo while the court decides such arcane questions as whether this is a political question, whether there is standing to sue, or whether it is a justiciable issue.

We have the power to decide that issue now, to make it clear and unambiguous, which is, the courts do not have authority, except to the extent we give them authority.

Mr. President, we have between now and 2002—2002—to act to implement this article. Section 6 says:

> The Congress shall enforce and implement this article by appropriate legislation.

If this Senate and this Congress can pass a constitutional amendment by a two-thirds vote, by 67 votes, surely it could pass simple implementing legislation which requires only a simple majority. Why would Congress ignore section 6, ignore its duty when it takes only a majority vote, when we feel so strongly today that we are giving a two-thirds vote to the constitutional amendment? It does not make sense, and it does not add up.

If any Member believes, as I believe, that what the courts would really do if they took jurisdiction is order a tax increase and then maybe say, ''Congress, this will go into effect 60 days from now or 4 months from now unless you act''—I think that is what they would do because that is the only thing they have expertise to do. They do not have the expertise to cut budgets, to decide between competing claims in a budget, but they sure do know how to order an income tax increase, because it takes no expertise. This amendment would prevent that; it would deprive the courts of the ability to meddle in this constitutional duty, which is properly the Congress', except to the extent that we authorize them to do so.

Mr. President, it clears up an intentional ambiguity. It loses no votes. I believe this gets votes for this amendment, and it certainly makes a better

amendment. I hope my colleagues will go along with it.

I yield the floor.

Mr. HATCH. Mr. President, I would be interested in whether it will get the vote of the distinguished Senator from Louisiana if this amendment passes.

Mr. JOHNSTON. Mr. President, I can tell the Senator from Utah what my concern is about this amendment. There was a Treasury study which showed that my State was more heavily impacted than any other State. It made certain assumptions. It made the assumptions that defense would not be cut, as the contract calls for; that Social Security would not be cut, as everyone promised. It was a nationwide study, and it determined, as I recall, the cuts to Louisiana were something like $3 to $4 billion.

Mr. HATCH. May I ask the Senator to comment on his time?

Mr. JOHNSTON. Until I know what makes up the cuts, I cannot vote for the amendment.

Mr. HATCH. Mr. President, we have been through that argument already, and that is, we have never been able to tell where the cuts are up to now. Until we get this into the Constitution, we never will. That is why we have to get it in the Constitution.

This is a bigger issue than any of our individual States. All of us are concerned about our States, all of us are concerned about what cuts or tax increases, but all of us need to be concerned about the future of this Nation, the future of our children and our grandchildren.

We have a Federal Government that is running away from us; it is out of control. We can debate these things forever. But under the Johnston amendment, allowing suits under section 2 may allow the courts to relax the standing rules that they have. It would be the exact opposite of what everybody in this body would like to see happen. It would be an indication to them we want them to relax standing rules. Presently, courts will not allow standing to give relief that interferes with budgetary processes, and I do not know anybody who would rebut that statement.

Ironically, the Johnston amendment may allow the very thing he fears. I frankly do not know why anybody would want to vote for it who understands the implications of it, but let me just summarize our position on this.

Senator Johnston's amendment would deny all judicial review to enforce the balanced budget amendment, except for section 2 which may give an indication to the courts that they should relax the standing requirements which means even more litigation all over this society, more than ever before, and there would be no way you could stop it.

I believe it is an overreaction to a problem that simply does not exist, and to apply what happens in States—and there have not been many suits in States—to apply that to this just is inapposite.

The ghost that haunts opponents of the balanced budget amendment is that the judiciary will usurp Congress' power delegated to it by the Constitution over spending, borrowing, and taxing matters.

Mr. JOHNSTON. Would——

Mr. HATCH. I do not have enough time or I would yield.

That horrible phantom will place the budgetary process under judicial receivership, through its equitable powers, cut spending programs, and even order the raising of taxes, they say. But the apparition is simply make believe; it is a bad dream. The courts simply do not have the authority to usurp Congress' role in the budgetary process.

That unfounded phobia has its antidote in the time-honored precept of standing and the political question and separation of powers doctrines. As I said, these jurisprudential doctrines stand as impenetrable barriers to the courts commandeering of the democratic process.

Besides, it is just wrong to think that Congress cannot and will not protect its institutional prerogatives. The framers of the Constitution designed a constitutional system whereby each branch of government would have the power to check the zeal of the other branches. In James Madison's words in the Federalist No. 51:

> [T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.

Frankly, I find it utterly inconceivable, as a practical matter, that the chairmen of congressional Appropriations, Budget, and Finance Committees and subcommittees, and Congress as a whole, will stand idly by if some district court judge somewhere exceeds his or her authority and allows a case implicating this institution's budget and tax and spending prerogatives to proceed. Why, it defies belief that these Senators like MARK HATFIELD, ROBERT BYRD, PETE DOMENICI, JIM EXON, and leaders like ROBERT DOLE and TOM DASCHLE, and their counterparts in the other body, or any of us, would allow a court to tamper with congressional prerogatives. Congress would do what it would have to do and moot any such case which even hinted at success. Does anyone doubt this?

Moreover, to resist the ambition of the courts, the framers gave to Congress in article III of the Constitution the authority to limit the jurisdiction of the courts and the type of remedies the courts may render. If Congress truly fears certain courts may decide to ignore law and precedent, Congress—if it finds it necessary—may, through implementing legislation pursuant to section 6 of House Joint Resolution 1, forbid courts the use of their injunctive powers altogether. Or, Congress could create an exclusive cause of action or tribunal with carefully limited powers, satisfactory to Congress, to deal with balanced budget complaints.

But Congress should not, as the distinguished Senator from Louisiana proposes, cutoff all judicial review. I believe that House Joint Resolution 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. At the same time, this balanced budget amendment does not undermine the court's equally fundamental obligation, as first stated in *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803), to ''say what the law is'' in those cases where standing exists and the separation of powers and political question doctrines do not bar the courts from proceeding. After all, while I am confident that courts will not be able to interfere with our budgetary prerogatives, I am frank to say I cannot predict every conceivable lawsuit which might arise under this amendment, and which does not implicate these budgetary prerogatives. A litigant, in such narrow circumstances, if he or she can demonstrate standing, ought to be able to have their case heard.

JUDICIAL ENFORCEMENT

Nonetheless, I must underscore that keeping open the courthouse door to a litigant who is not seeking to interfere with the spending and taxing powers ofCongress, does not license the judiciary to interfere with budgetary decisions. Because this issue is of great importance to my colleagues, I would like at some length to address the concern of some that under the balanced budget amendment courts will become superlegislatures. Indeed, opponents march out a veritable judicial parade of horribles where courts strike down spending measures, put the budgetary process under judicial receivership, and like Charles I of England, raise taxes without the consent of the people's representatives. All of this is a gross exaggeration. This parade has no permit.

I whole-heartedly agree with former Attorney General William P. Barr who stated that if House Joint Resolution 1 is ratified there is ''little risk that the amendment will become the basis for judicial micromanagement 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.''

STANDING, SEPARATION OF POWERS, AND POLITICAL QUESTIONS

There exists three basic constraints which prevent the courts from interfering in the budgetary process: First, limitations on Federal courts contained in article III of the Constitution, primarily the doctrine of standing, particularly as enunciated by the Supreme Court in *Lujan* v. *Defenders of Wildlife,* 112 S.Ct. 2130 (1992); Second, 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; third, the limits on judicial remedies which can be imposed on a coordinate branch of government—in this case, of course, the legislative branch. These are limitations on remedies that are self-imposed by courts and that, in appropriate circumstances, may be imposed on the courts by Congress. These limitations, such as the doctrine of separation of powers, prohibit courts from raising taxes, a power exclusively delegated to Congress by the Constitution and not altered by the balanced budget amendment. Consequently, contrary to the contention of opponents of the balanced budget amendment, separation of power concerns further the purpose of the amendment in that it assures that the burden to balance the budget falls squarely on the shoulders of Congress—which is consistent with the intent of the framers of the Constitution that all budgetary matters be placed in the hands of Congress.

Concerning the doctrine of standing, it is beyond dispute that to succeed in any lawsuit, a litigant must first demonstrate standing to sue. To demonstrate article III standing, a litigant at a minimum must meet three requirements: First, injury in fact—that the litigant suffered some concrete and particularized injury; second, traceability—that the concrete injury was both caused by and is traceable to the unlawful conduct; and third, redressibility—that the relief sought will redress the alleged injury. This is the test enunciated by the Supreme Court in the fairly recent and seminal case of *Lujan* v. *Defenders of Wildlife,* 112 S.Ct. 2130, 2136 (1992). [See, e.g., *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 the injury-in-fact requirement, that is, something more concrete than a generalized grievance and burden shared by all citizens and taxpayers. I want to emphasize that this is hardly a new concept. See *Frothingham* v. *Mellon,* 262 U.S. 447, 487 (1923). Furthermore, courts are not going to overrule this doctrine since standing has been held to be an Article III requirement. See *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41 n.22 (1976).

Even in the vastly improbable case where an injury in fact was established, a litigant would find it nearly 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. After all, there will be hundreds and hundreds of Federal spending programs even after Federal spending is brought under control. Furthermore, because the Congress would have numerous options to achieve balanced budget compliance, there would be no legitimate basis for a court to nullify or modify a 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 a district court's power to order a local school district to levy taxes to support a desegregation plan, is inapposite because it is a 14th amendment case not involving, as the Court noted, ''an instance of one branch of the Federal Government invading the province of another.'' [Jenkins at 67.] Plainly put, the Jenkins case is not applicable to the balanced budget amendment because section 1 of the 14th amendment—from which the judiciary derives its power to rule against the States in equal protection claims—does not apply to the Federal Government and because the separation of powers doctrine prevents judicial encroachments on Congress' bailiwick. 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 House Joint Resolution 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 extremely unlikely that a court would substitute its judgment for that of Congress.

Moreover, despite the argument of some opponents of the balanced budget amendment, the taxpayer standing case, *Flast* v. *Cohen,* 392 U.S. 83 (1968), 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. This has been made clear by the Supreme Court in *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 House Joint Resolution 1, limit Congress' borrowing power and the amendment contains no restriction on the purposes of the expenditures. Finally, in subsequent cases, particularly the Lujan case, 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.]

I also believe that there would be no so-called congressional standing for Members of Congress to commence actions under the balanced budget amendment. Although the Supreme Court has never addressed the question of congressional standing, the D.C. circuit has recognized congressional standing, but only in the following circumstances: First, the traditional standing tests of the Supreme Court are met, second, there must be a deprivation within the zone of interest protected by the Constitution or a statute—generally, the right to vote on a given issue or the protection of the efficacy of a vote, and third, substantial relief cannot be obtained from fellow legislators through the enactment, repeal, or amendment of a statute—the so-called equitable discretion doctrine. See *Melcher* v. *Open Market Comm.*, 836 F.2d 561 (D.C. Cir 1987); *Riegle* v. *Federal Open Market Committee,* 656 F.2d 873 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981). Because Members of Congress would not be able to demonstrate that they were harmed in fact by any dilution or nullification of their vote—and because 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—it is hardly likely that Members of Congress would have standing to challenge actions under the balanced budget amendment.

THE FOURTEENTH AMENDMENT AND THE BALANCED BUDGET AMENDMENT

Furthermore, some of my colleagues contend that because section 6 of House Joint Resolution 1, the section that mandates that Congress enforce the amendment through implementing legislation, is similar to section 5 of the 14th amendment, which permits Congress to enforce that amendment, courts will also be able to enforce the balanced budget amendment to the extent courts enforce the 14th amendment.

This analogy is misleading. First, courts may only enforce an amendment when legislation or executive actions violate the amendment or when Congress creates a cause of action to enforce the amendment. An example of the latter is 42 U.S.C., section 1983, the 1871 Civil Rights Act that implements section 1 of the 14th amendment. Of

course, Congress has not created, and need not create, an analogous cause of action under section 6 of the balanced budget amendment, so there is no direct judicial enforcement provision in existence similar to section 1983.

Second, as to the judicial nullification of legislation or executive action that is allegedly inconsistent with a constitutional amendment, the case-or-controversy provision of article III requires that a litigant demonstrate standing. As I have stated at great length already during this debate, it is very improbable that a litigant could demonstrate standing under the balanced budget amendment—that the litigant could demonstrate a particularized injury, different from the generalized harm facing any citizen or taxpayer. Contrast this with cases under the 14th amendment where standing was found because a litigant could demonstrate a particular, individualized, and concrete harm, as in the one man, one vote case. See *Reynolds* v. *Sims*, 369 U.S. 186 (1962).

Third, in this circumstance, as I previously explained, under the separation of powers doctrine, courts will not entertain a suit where they cannot supply relief to the litigant. *Lujan* v. *Defenders of Wildlife*, 112 S.Ct. 2130 (1992). The Constitution under article I delegates to Congress taxing, spending, and borrowing powers. These are plenary powers that exclusively and historically have been recognized as belonging to Congress. The balanced budget amendment does not alter this. Courts, consequently, will be loathe to interfere with Congress' budgetary powers. It is simply an exaggeration to contend that courts will place the budgetary process under receivership or cut spending programs.

Fourth, as I also explained, the political question doctrine will deter courts from enforcing the balanced budget amendment. Budgetary matters—such as where to cut programs or how to raise revenues—are prototypically a political matter best left to the political branches of government to resolve. Courts, under the political question doctrine, will leave these matters to Congress.

CONGRESS' POWER TO RESTRAIN THE COURTS

Finally, it is simply wrong to assume that Congress would just sit by in the unlikely event that a court would commit some overreaching act. Believe me, Congress knows how to defend itself. Congress knows how to restrict the jurisdiction of courts or limit the scope of judicial remedies. But I do not think this necessary. Lower courts follow precedents, and the precepts of standing, separation of powers, and the political question doctrine, effectively limit the ability of courts to interfere in the budgetary process.

Nevertheless, if necessary, a shield against judicial interference is section 6 of House Joint Resolution 1 itself. Under this section, Congress may 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, it is clear that Congress, if it finds it necessary, could limit the type of remedies a court may grant or limit courts' jurisdiction in some other manner to proscribe judicial overreaching. This is nothing new. Congress has adopted such limitations in other circumstances pursuant to its article III authority. Here are a few: First, the Norris-LaGuardia Act, [29 U.S.C. §§101–115], where the courts were denied the use of injunctive powers to restrain labor disputes; Second, the Federal Tax Injunction Act, [28 U.S.C. sec. 2283], which contains a prohibition on Federal courts from enjoining state court proceedings; and third, the tax Injunction Act, [26 U.S.C. sec 7421(a)], where Federal courts were prohibited from enjoining the collection of taxes.

In fact, Congress may also limit judicial review of particular special tribunals with limited authority to grant relief. For instance, the Supreme Court in *Yakus* v. *United States*, [319 U.S. 182 (1943)], upheld the constitutionality of a special emergency court of appeals vested with exclusive authority to determine the validity of claims under the World War II Emergency Price Control Act. In more recent times, the Supreme Court, in *Dames & Moore* v. *Reagan*, [453 U.S. 654 (1981)], upheld the legality of the Iranian-United States Claims Tribunal as the exclusive forum to settle claims to Iranian assets.

Beyond which, as I have mentioned earlier, in the virtually impossible scenario where these safeguards fail, Congress can take whatever action it must to moot any case in which a risk of judicial overreaching becomes real.

Mr. President, I believe it is clear that the enforcement concerns about the balanced budget amendment do not amount to a hill of beans. The fear of the demon of judicial interference is exorcised by the reality of over a century of constitutional doctrines that prevent unelected courts from interfering with the power of the democratic branch of government and that bestow Congress with the means to protect its prerogatives.

Mr. President, it is very clear. I do not think we should amend this amendment, certainly not with the language the distinguished Senator from Louisiana has brought forth here, which will lead us to more litigation than ever before in worse ways than ever before, and a reduction in the amount of Congress' power that currently exists, especially when we can easily change it in the implementing legislation without any problems.

I suggest the absence of a quorum.

Mr. JOHNSTON addressed the Chair.

Mr. HATCH. I withhold.

The PRESIDING OFFICER. The Senator from Louisiana.

Mr. JOHNSTON. Mr. President, I yield myself 1 minute, just simply to reply to the argument that somehow this language would do away with the requirement for standing.

Mr. President, all this language says is that the judicial power of the United States shall not extend to a case in controversy under this article except for section 2.

Now, I invite a comparison with the present language of the Constitution which says:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made.

Now, under the language of the Constitution which says the judicial power shall extend to cases, controversies, et cetera, the court has required standing. It is the same language that we have in this amendment. Whatever requirement the court will find for standing under this amendment is the same language that inheres under the Constitution. And so, Mr. President, there is no expansion of standing under section 2 under our amendment.

Now, Mr. President, I would yield 2 minutes to the distinguished Senator from Washington.

Mr. GORTON addressed the Chair.

The PRESIDING OFFICER. The Senator from Washington.

Mr. GORTON. It seems to me the argument of my distinguished colleague from Utah comes down to a very simple set of inconsistent propositions. Proposition No. 1, courts are not going to get involved in enforcing this amendment. Proposition No. 2, we ought to have the courts involved in enforcing this amendment.

I just simply do not believe that Members can have it both ways. If, in fact, courts are going to stay out by reason of standing or other various doctrines which are not themselves contained in the Constitution, then it certainly does no harm to see to it that that is the result.

If, in fact, it is the proposition of the proponents of this constitutional amendment, some of the proponents because I am one of them, that courts should be involved, then it seems to me they are doing something in this field that almost without exception they deprecate in other fields. Judicial activism should not be invited into the process of writing budgets of the United States. That is a legislative and executive function.

The reason for the amendment is that the Senator from Louisiana, together with this Senator, wants to make certain that this remains solely a function of Congress and of the executive branch of Government. And all Members who feel that the courts may very well be too active today in many social and political issues should vote in favor of the amendment.

Mr. JOHNSTON. Mr. President, I yield 2 minutes to the Senator from Arkansas.

The PRESIDING OFFICER. The Senator from Arkansas.

Mr. PRYOR. Mr. President, I thank the Chair and I thank the Senator from Louisiana for yielding 2 minutes to me.

Mr. President, very quickly, I want to commend my friend from Louisiana, Senator JOHNSTON, for offering this amendment this afternoon. I truly believe that this is one of the most important amendments and one of the most critical decisions that we will make during the debate on the proposed amendment to the Constitution of the United States to have and to require a balanced budget.

Mr. President, I want to make two quick points. First, I think if the amendment of the Senator from Louisiana is defeated by this body this afternoon, two things are going to happen. I think the first thing is that this is going to be seen by the courts as an actual invitation to come forward and start implementing the balanced budget to the Constitution of the United States, assuming that two-thirds of the Senators agree and that three-fourths of the States support the balanced budget amendment.

The second thing, Mr. President, I say in all due respect, that I think is going to happen, is that the courts will look at the defeat of the Johnston amendment that we are now considering and are about to vote on, as having established legislative intent—should we defeat this amendment. And I only assume that the courts would ultimately declare that the Senate had decided, through the process of establishing legislative intent, that the courts would be the proper implementing authority to implement the balanced budget clause of the Constitution of the United States; the balanced budget amendment of the Constitution of the United States.

So I see two very bad things coming as a result, Mr. President.

If I could have 1 additional minute, Mr. President?

I thank my friend from Louisiana.

The PRESIDING OFFICER. The Senator may proceed.

Mr. PRYOR. I see two very bad things happening if we turn down the Johnston amendment. I think the Johnston amendment is sound. I think if you could take a poll of the country today and ask the people if they want the courts to implement a balanced budget amendment to the Constitution of the United States, if they want an unelected lifetime appointed Federal district judge from wherever to raise the taxes necessary to implement a balanced budget amendment to the Constitution, or in the Constitution, most people would say no. I say that if we fail to support, this afternoon, the very fine, clarifying amendment offered by the Senator from Louisiana, there could be a disastrous effect.

The PRESIDING OFFICER. The time of the Senator has expired.

Who yields time?

Mr. JOHNSTON. Mr. President, how much time remains on each side?

The PRESIDING OFFICER. The Senator from Louisiana has 17 minutes. The Senator from Utah has 11½ minutes.

Mr. JOHNSTON. Mr. President, I yield 4 minutes to the Senator from Michigan.

The PRESIDING OFFICER. The Senator from Michigan has 4 minutes.

Mr. LEVIN. Mr. President, I commend the Senator from Louisiana and the Senator from Washington. These are two Senators who have different positions on the underlying amendment but who have come in very strong agreement on the need to clarify an ambiguity. Whatever side of the issue we are on, the underlying issue, we cannot in good conscience essentially leave a critical ambiguity in the Constitution as to how it is going to be enforced and whether or not the courts are going to be able to enforce this document.

The Senator from Utah, in whom I have a great deal of confidence and trust as a person of honor, says that it is very clear the courts cannot interfere with the budgetary process. And that is his intent. When he says it, as he has a number of times, I accept this as being his intent.

The difficulty is the lead sponsor of this language in the House seems to have a very different intent. So we are caught in an ambiguity. The ambiguity is not just between law professors. The ambiguity is between the language of the sponsor of this amendment that is before us in the House and the lead sponsor in the Senate, on the very important questions of standing to sue and what a court can do.

Representative SCHAEFER, in a formal answer for the RECORD—not a casual comment but a formal answer for the RECORD—he says the courts could invalidate individual appropriation or tax acts. I read this earlier this afternoon. I had it blown up so we could all see exactly what it is that he has said. ''The courts could make only a limited range of decisions on a limited number of issues.''

What are they? ''They could invalidate an individual appropriation or tax act. They could rule as to whether a given act of Congress or action by the executive violated the requirements of this amendment.'' Perhaps he describes that as a limited range of decisions but surely that is a major intrusion in the budgetary processes of the U.S. Government.

I wish the intention were clear. I wish it were clear for the sake of a constitutional amendment which may be adopted.

For many other reasons I hope it will not be. I am one of those who opposes it for a number of reasons. But whatever side of the constitutional amendment issue we are on, it is incumbent on us to have language which is clear as to the heart of the matter, which is the enforcement of it. Over and over again we have stated the intention to balance the budget. The heart of the matter is can it be enforced and, if so, how will it be enforced? What is the mechanism to enforce it? The Johnston amendment clarifies the question of whether courts will take over legislative functions, such as individual appropriation acts or tax acts.

This is not a casual comment by one person who is voting for the amendment in the other body. This is a formal statement for the RECORD—one of many, by the way, which differs from the sponsors here—for instance on questions of standing. It is——

Mr. JOHNSTON. Will the Senator yield at that point?

Mr. LEVIN. I will be happy to yield.

Mr. JOHNSTON. Does it not follow, if you have the power to invalidate a tax act, that you also have a power to order a tax?

The PRESIDING OFFICER. The Senator's 4 minutes have expired.

Mr. JOHNSTON. I yield 2 additional minutes.

The PRESIDING OFFICER. The Senator may proceed for 2 additional minutes.

Mr. LEVIN. I think that may well follow. But if you can invalidate an appropriation act or a tax act you are deep in the budgetary process.

Representative SCHAEFER has said that a Member of Congress, ''probably would have standing to file suit.'' That is a formal answer to a formal question, ''probably would have standing.''

Mr. HATCH. Will the Senator yield?

Mr. LEVIN. I will be happy to if I have time.

Mr. HATCH. Just one sentence. Congressman SCHAEFER, as sincere as he was, is not a lawyer. His life's work has been in public relations. He was simply wrong. I do not see anybody—I do not know anybody who would argue that they can invalidate individual appropriations or tax acts. He may have been very sincere making that statement. He was simply wrong.

Mr. LEVIN. I believe the Senator from Idaho put the exact same answers in the RECORD on this side, in the CONGRESSIONAL RECORD.

This is not a casual answer in a colloquy during a debate. These are formal answers, the questions and answers for the RECORD by the chief sponsor of the constitutional amendment that we are voting on. This was not something he threw off on his way to a press conference. This is formal. I am reading the CONGRESSIONAL RECORD in the House, on page 8754 here, and I am reading it precisely. It is—this is a long document of questions and answers for the RECORD.

The courts could invalidate an individual appropriation or tax act.

On the question of standing, if we could get the other quote up here on the question of standing—this is what Representative SCHAEFER said.

A Member of Congress or an appropriate administration official probably would have standing to file suit.

The Senator from Utah—and I take his word. I know—it is not his intent.

When he looks me in the eye and he tells me what his intent is, no question, I accept it. I know him well. But it is very different from what Representative SCHAEFER, who is the prime sponsor of this amendment, is telling us.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. LEVIN. May I have one minute? I am out of time. I do not know if the Senator from Utah wants to ask me a question.

The PRESIDING OFFICER. Who seeks time?

Mr. HATCH. If I could. I do not know Representative SCHAEFER very well. But I do know his experience in these matters is somewhat limited. The fact that somebody puts something in the RECORD, albeit as sponsor of the amendment—this amendment has been around a long time. He was cosponsor of it. That does not mean he, or anyone else, wrote it.

But let us just talk in terms of what is really involved here.

The contention, for instance, that the balanced budget amendment would allow Federal courts to offer the raising of taxes is absolutely without merit. It is based on a misunderstanding of the case of Missouri versus Jenkins, which was a 14th amendment case.

In that case the Supreme Court in essence approved, by a 5-to-4 vote, a lower court remedial order directing State or county political subdivisions to raise taxes to support a court-ordered school desegregation order. The lower court had previously found that the school district had engaged in intentional segregation, in violation of the 14th amendment's equal protection clause.

The concern that the balanced budget amendment would allow a Federal court to order Congress to raise taxes to reduce the deficit is plainly without merit. Why? Because Jenkins is a 14th amendment case. Under the 14th amendment jurisprudence, Federal courts may perhaps issue this type of remedial relief to force the equal protection clause against the States, but certainly not against Congress, a coequal branch of Government. The 14th amendment, of course, does not apply to the Federal Government.

No. 2, separation-of-powers concerns would prohibit the judiciary from interfering with the budgetary, taxing, borrowing, and spending powers that are exclusively delegated to Congress by the Constitution.

And, three, Congress simply cannot be made a party-defendant. To order taxes to be raised, Congress would have to be named a defendant. Presumably, suits to enforce the balanced budget amendment would arise when an official or an agency of the executive branch seeks to enforce or administer a statute whose funding is in question in light of the amendment. In the case of Riegle versus Federal Open Market Committee, the court noted that ''when a plaintiff alleges injury by unconstitutional actions taken pursuant to a statute, his proper defendants are those acting under the law * * * and not the legislature which enacted the statute.''

So, I respect Congressman SCHAEFER, but he just simply is wrong on those statements, and the law says he is wrong.

Mr. President, let me just switch for a minute. I ask unanimous consent that Senator BIDEN be recognized to offer an amendment on capital budgeting following the disposition of Senator Johnston's amendment and Senator BYRD be recognized to offer an amendment following the disposition of Senator Biden's amendment. I also ask unanimous consent that there be a time limit on the Biden amendment prior to a motion to table as follows: 90 minutes under Senator BIDEN's control, 20 minutes under Senator HATCH's control; and, that at the conclusion or yielding of time, the majority leader or his designee be recognized to offer a motion to table the Biden amendment and that no other amendments be in order prior to the motion to table.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HATCH. Mr. President, I suggest the absence of a quorum and ask that it not be charged to either side.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

The legislative clerk proceeded to call the roll.

Mr. JOHNSTON. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. JOHNSTON. Mr. President, I yield to the distinguished Senator from Pennsylvania 5 minutes.

How much time do I have left?

The PRESIDING OFFICER. Eleven minutes 7 seconds.

The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I had asked the distinguished Senator from Louisiana to yield me time because the manager of the bill, the distinguished Senator from Utah, asked me if I could get time. I have not made up my mind yet on the matter, but I wanted to express my concerns about the pending issue's repealability and have some ideas from the manager as to where the issue stood.

While this floor debate has been in process, the Judiciary Committee has been meeting in the Antitrust Subcommittee on the baseball issue. The pending amendment makes it plain that there will not be Federal court jurisdiction, that the judicial power of the United States shall not extend in any case or controversy arising under this article except section 2 here, which may be specifically authorized in implementing legislation pursuant to this section.But I inquire of the Senator from Louisiana what the exception for section 2 refers to.

Mr. JOHNSTON. 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 for that.

Mr. SPECTER. I thank my colleague. That is very limited exception. There is no jurisdiction. The issue of jurisdiction concerns me greatly. Earlier this year, I argued a case at the Supreme Court of the United States involving the Base Closure Commission. The issue was whether Federal courts had jurisdiction of the matter. I had the occasion to do very extensive research on the jurisdictional question. It is my view that there ought not to be jurisdiction in the Federal courts on the compliance with the constitutional amendment. This is a duty on the Congress.

There is the possibility of extensive litigation, and we ought to make our position clear on that in one way or another.

If I may have the attention of the Senator from Utah. I understand the concerns the Senator from Utah has in not wanting to have amendments added to the bill because that subjects the issue to conference, but the question I have of the managers of the measure is what is the import of the absence of this amendment? Will there be jurisdiction of the Federal courts, I first inquire of my colleague from Utah?

Mr. HATCH. Well, first of all, it is not just the concern about going to conference, it is a concern about the House wanting to pass the balanced budget again with this amendment in it. We are not sure where everybody is there. Second, if we do go to conference, we are not sure we can hold on to it. Even so, third, the amendment now, as modified, says, ''The judicial power of the United States shall not extend to any case or controversy arising under this article except for section 2 hereof.'' That has now been put into the amendment, which worries us.

If section 2 is opened up for litigation, then the courts may take that as an implication that we will permit their lessening of the standing requirements and other requirements. So we think that makes it even worse and that would create even more litigation than the Senator is talking about.

Last but not least, we are very concerned that if you cut off litigation rights for cases, which I personally cannot conceive of at this point, but as the distinguished Senator from Pennsylvania understands, with his experience in the law, there may be real rights that may have to be brought in the courts for particularized injuries to individuals. Those are the reasons.

Mr. SPECTER. I ask my colleague from Utah, if the language exception as to section 2 were removed, would the amendment be agreeable?

Mr. HATCH. No, it still would not be because of the other reasons. It still

would not be agreeable because we believe it is a false issue.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. JOHNSTON. Does the Senator wish another minute?

Mr. SPECTER. It depends on how long Senator HATCH's answer is.

Mr. HATCH. It will be at least a minute. We do not believe that we have to fear the courts in this matter, because of the principle of standing, and the doctrines of justiciability, the political question and separation of powers.

Mr. SPECTER. Well, if I may have 30 seconds more, is it the view of my colleague from Utah, the manager of the measure, that there would be no Federal jurisdiction, no jurisdiction in the Federal courts even without this amendment?

Mr. HATCH. I am not sure I understand the question.

Mr. SPECTER. Well, if this amendment is defeated, could the U.S. courts entertain jurisdiction in a suit that is brought challenging the following or compliance with the constitutional amendment for a balanced budget?

Mr. HATCH. Only if the court is extremely activist and not willing to follow the law.

Mr. SPECTER. Only if the court is——

Mr. HATCH. There may be jurisdiction, but there will not be any standing. That is the difference. It would take a very activist judge, who I think would be slapped down very quickly.

Mr. SPECTER. If you are going to rely on standing, the vagaries of that issue, or a defense that may be advanced to stop somebody from going into court, that is very perilous ground. I think it is advisable for this body to face the jurisdictional issue squarely. I think we ought to say whether or not we wish the Federal courts to have jurisdiction over compliance with the constitutional amendment for a balanced budget.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. JOHNSTON. Mr. President, the Senator from Pennsylvania, who has one of the best legal minds in this body, has put his finger directly on the question. It is not clear whether there would be standing, justiciability, or whether it would be a political question. But the majority of the opinions I have seen indicate that there would be such standing. The Harvard Law Review demonstrates, however, that taxpayers probably would have standing to challenge. Professor Tribe, Judge Bork, and on and on, Mr. President. The better view is that there probably is standing that the courts would interfere, but it is not clear and it ought to be cleared up. That is what this amendment does.

Mr. President, how much time remains?

The PRESIDING OFFICER (Mr. CRAIG). The Senator from Louisiana has 4½ minutes. The Senator from Utah has 7½ minutes.

Mr. HATCH. Can I ask the date of that law review article?

Mr. JOHNSTON. Harvard Law Review, 1983.

Mr. HATCH. That preceded the Lujan case. The law review articles precede that case and are not applicable.

Mr. President, I suggest the absence of a quorum and ask that it not be charged to either side.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. JOHNSTON. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. JEFFORDS). Without objection, it is so ordered.

Mr. GRASSLEY. Mr. President, I oppose the Johnston amendment because it is unnecessary and based on false premises. Under the constitutional balanced budget amendment before us, the Congress will have the authority to enforce the balanced budget amendment. All issues regarding the implementation and enforcement of the amendment will be resolved through implementing legislation.

A constitutional amendment necessarily is limited to general principles. It cannot spell out all issues that could arise under that amendment. Many constitutional amendments provide that Congress can enforce the provision through appropriate legislation. House Joint Resolution 1 follows in that tradition.

I agree that any litigation that might be brought under this amendment should be resolved expeditiously. But the amendment offered by the Senator from Louisiana is not necessary to achieve that result. Congress can set the appropriate jurisdiction of the Federal courts. Congress can pass implementing legislation that provides for Federal court actions only. And it can provide for expedited review of lower court decisions and set forth the available relief.

However, Congress cannot adopt the suggestion of the Senator from Louisiana that Congress could give the Supreme Court original jurisdiction to hear a case under the balanced budget amendment. The Supreme Court ruled in Marbury versus Madison that Congress cannot expand the original jurisdiction of the Supreme Court.

Only litigants with standing to challenge governmental action under the amendment would be able to file a lawsuit under the requirements of article III. Some few individuals might have standing. Even these individuals, however, would not be able to require a judicial resolution of their cases if the Court concludes that the case raises a political question.

Under the political question doctrine, courts will not decide cases raising issues that appropriately fall within the authority of the other two branches. For example, the Constitution guarantees a Republican form of government.

But the courts have refused to issue decisions in cases raising that constitutional provision because its enforcement appropriately lies within the authority of the political branches. Similarly, courts have refused to intervene in challenges to the President's authority over foreign affairs.

Many of the questions raised under this amendment would also be political ones that courts would not rule on.

All the supporters of the balanced budget amendment are concerned with the idea of courts potentially making tax and spending decisions. We intend that courts not do that. And we will pass implementing legislation to address the process by which any litigation can be brought. There is no need to preclude judicial enforcement pending the enactment of that implementing legislation.

Mr. CRAIG. Mr. President, I rise in opposition to the Johnston amendment.

I am not a lawyer, but legal and constitutional experts I trust and respect have convinced me that the supposed problem with judicial review is, at best, no problem at all; and, at worst, it is a red herring that may give some Senators an excuse to vote no on the BBA.

I start with Senator HATCH, an outstanding constitutional lawyer. If there were a risk of judicial intrusion into legislative matters, he would be the down here arguing for an amendment to restrict the power of the courts.

I am convinced that there is no risk of improper court action. Otherwise, I would be the first Senator down here supporting a limit on judicial review.

I am persuaded by the testimony of former Attorney General William Barr. To summarize what he said:

There is a remote risk of judicial micromanagement; if judicial intrusion arose, Congress could correct it by statute;

The remote, correctable risk was far outweighed by the need for, and the benefits of the balanced budget amendment;

There would rarely—if ever—be standing to sue;

The Constitution, the balanced budget amendment itself, and long-established judicial and constitutional doctrines all require the courts to pay great deference to Congress' handling of legislative business, especially when Congress acts affirmatively to establish statutory processes to enforce and implement the amendment.

Former Attorney General Griffin Bell, a Democrat from the Carter administration appeared before the Judiciary Committee this year to strongly endorse the balanced budget amendment.

In a 1992 memo to Representative L.F. PAYNE on this subject, the Lincoln Legal Foundation said this:

(T)here is virtually no danger that the constitutional balanced budget amendment . . . would cede the power of the purse to a runaway judiciary. To the contrary, it would eliminate certain authorities that courts currently have to order the disbursement of federal funds without appropriations.

Last year, in testimony, attorney John C. Armor told the Judiciary Committee:

The balanced budget amendment a suitable addition to the Constitution;

Limited judicial review was appropriate;

Congress is already empowered in the Constitution to limit judicial intrusion appropriately through statute.

Finally, I refer to an excellent brief memo by the U.S. Chamber of Commerce that summarizes how judicial action will be limited appropriately.

I am tired of opponents to the balanced budget amendment citing the Missouri v. Jenkins case.

I agree that Missouri v. Jenkins was decided wrongly; but that case has nothing to do with the legal or constitutional considerations around this amendment.

That was a case of Federal preemption. That was a case of the Federal courts enforcing Federal law on a local school district.

Let us look at our Constitution:

Article I says, ''All legislative powers herein granted shall be vested in a Congress of the United States * * *''

Raising taxes is a legislative power.

Writing budgets and setting priorities is a legislative power.

Article III says: ''* * * the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.''

Let us look at the amendment itself:

Section 6 says Congress will enforce and implemented the BBA;

Section 6, by expressly allowing good faith reliance on reasonable estimates, allows Congress reasonable flexibility and reduces the likelihood of second-guessing by the courts;

Section 2, by subjecting Congress to 3/5 votes on the limit on debt held by the public, makes the amendment essentially self-enforcing and locates that self-enforcement squarely in Congress.

No other amendment to the Constitution removes the courts from the process of enforcement.

In fact, the very, very slight chance that some case may come before the courts is a good thing; it will motivate Congress to make sure we comply with the amendment and stay out of court. It will reassure American people that the same branches of Government that built up a $4.7 trillion debt, will at least have the legality of their actions subject to fair and impartial interpretation.

At the same time, judicial involvement will be limited to, in the words of Marbury versus Madison, ''saying what the law is.'' They may strike down a piece of budget legislation—we may be told to go back and start over. They may rule whether an action by the President is or is not contrary to the amendment.

It does not mean the courts can write a budget or raise taxes. But interpreting the law is the job of the courts. Congress can enact reasonable limitations on judicial review. All of which is appropriate, limited, and balanced.

As Senator BROWN has pointed out, the experience of the States with that flood of lawsuits has never materialized.

Finally, as Senator SIMON has said, if we balance the budget, if we run small surpluses, if we take care to vote on the issues the amendment says to vote on, we will never be hauled into court.

I ask unanimous consent that the various documents that I have just referred to be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

STATEMENT OF WILLIAM P. BARR, SENATE COMMITTEE ON THE JUDICIARY, HEARINGS ON THE BALANCED BUDGET AMENDMENT, JANUARY 5, 1995

Mr. Chairman and distinguished members of the Committee: I am honored to have been invited today to testify on the Balanced Budget Amendment.

You have asked me to discuss whether judicial enforcement of the Amendment would result in undue interference by the federal courts in the budget process.

In my view, though it is always difficult to predict the course of future constitutional law development, the courts' role in enforcing the Balanced Budget Amendment will be quite limited. I see little risk that the Amendment will become the basis for judicial micromanagement 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.

I believe there are three basic constraints that will tend to prevent the courts from becoming unduly involved in the budgetary process: (1) the limitations on the power of federal courts contained in Article III of the Constitution—primarily the requirement of standing; (2) the deference courts would owe to Congress, both under existing constitutional doctrines, and particularly under section 6 of the amendment itself, which expressly confers enforcement responsibility on Congress; and (3) the limits on judicial remedies running against coordinate branches of government, both that the courts have imposed upon themselves and that, in appropriate circumstances, Congress may impose on the courts.

I will discuss each of these constraints in turn. Before I do, however, let me note that my remarks will focus on sections 1 and 2 of the Amendment. It is these provisions that would create new limits on Congress' power to borrow and to expend borrowed funds, and those new limits may potentially give rise to new opportunities for courts to intrude themselves into the budgetary process in ways they currently cannot. Section 4 of the Amendment, in contrast, presents no such new opportunity or risk for judicial interference in the budgetary process. Section 4 merely adds further procedural requirements for the passage of revenue bills, and courts today already may entertain claims that revenue bills (either taxes or user fees) do not comply with clear constitutional procedures.

I. ARTICLE III LIMITATIONS

Article III of the Constitution confines the jurisdiction of the federal courts to ''Cases'' or ''Controversies.'' As an essential part of this case-or-controversy limitation, any plaintiff who hopes to invoke the judicial power of the federal courts must demonstrate sufficient ''standing.''

Although the Court has not been completely consistent is defining this doctrine, its fundamental principles remain clear. At an irreducible minimum, a plaintiff must show three things to satisfy the standing requirement: (1) ''injury in fact''—that he personally has suffered some concrete and particularized injury; (2) ''traceability''—that the particularized injury was caused by, and is fairly traceable to, the allegedly illegal conduct; and (3) ''redressibility''—that the relief sought will likely redress the plaintiff's injury. *E.g., 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); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41 (1976).

Basically, we can anticipate two kinds of court challenges relating to sections 1 and 2 of the Balanced Budget Amendment: (1) a claim that a particular budgetary action (such as a spending or borrowing measure) violates the Amendment or its implementing statutes by ''unbalancing'' the budget or by exceeding the applicable debt limit, or (2) a claim that one of the implementing mechanisms enacted by Congress pursuant to section 6 of the Amendment is itself in violation of section 1 or 2. In either case, I believe, few plaintiffs would be able to establish the requisite standing to invoke federal court review.

The ''injury in fact'' requirement alone would be an imposing hurdle. It is fundamental that, to establish ''injury in fact,'' a plaintiff cannot rely on generalized grievances and burdens shared by all citizens and taxpayers, but rather must be able to show a particularized injury that he has distinctively sustained. No private citizen or group would have standing to obtain judicial enforcement of the Amendment solely by virtue of their status as a citizen or taxpayer. Their supposed injury—the burden of deficit spending and increased debt—is shared by all taxpayers and is precisely the kind of ''generalized grievance'' to which the judicial power does not extend. As the Supreme Court recently reiterated: ''As an ordinary matter, suits premised on federal taxpayer status are not cognizable in the federal courts because a taxpayer's 'interest in the moneys of the Treasury . . . is shared with millions of others, is comparatively minute and indeterminable; and the effect upon future taxation, or any payments out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for [judicial intervention].''' *Asarco, Inc. v. Kadish*, 490 U.S. 605, 613 (1989) (quoting *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923)).

Moreover, even in the case where a plaintiff could establish ''injury in fact''—by showing, for example, that a specific budgetary action causes particularized and distinct harm to him—it would still be difficult for that plaintiff to satisfy the remaining two elements of Article III standing—the traceability and redressibility requirements. Given the myriad components of any budget, most plaintiffs would be unable to show that the putatively illegal conduct—the

unbalancing of the budget or the breaking of the debt ceiling—was ''caused'' by, and hence is fairly traceable to, the particular spending measure that has allegedly harmed them. Moreover, a plaintiff would be hard put to demonstrate redressibility because the political branches would have numerous ways to achieve compliance with the Amendment—other than by eliminating the specific measure harming the plaintiff. There would thus be no legitimate basis for a court to single out and strike down the specific spending measure to which the plaintiff objects.

I should for a moment address the case of *Flast v. Cohen,* 392 U.S. 83 (1968), where the Supreme Court, 27 years ago, allowed a taxpayer to mount an Establishment Clause challenge against federal aid to parochial schools. *Flast* is the only instance where the Court has departed from its rigorous restriction on taxpayer standing. *Flast* plainly has no application to the present context and would not authorize general taxpayer standing to seek judicial enforcement of the Balanced Budget Amendment. First, the Court has never identified any constitutional restriction on the powers of Congress other than the Establishment Clause that might support an exception to the general prohibition on taxpayer standing. Moreover, by its terms, *Flast* is limited to cases challenging congressional action taken under its tax-and-spending power (Art. I, Sec. 8, Cl. 1 of the Constitution) when the expenditure of tax revenue is made for an illicit purpose. In contrast, sections 1 and 2 of the Balanced Budget Amendment limit Congress' *borrowing* power (a separate power, enumerated in Art. I, Sec. 8, Cl. 2) and contains no restriction on the purposes of congressional expenditures. The Court has expressly declined to extend *Flast* beyond the exercise of Congress' power under Art. I, Sec. 8, Cl. 1 to other fiscal provisions. *See, e.g., Valley Forge Christian College,* 454 U.S. at 480. And finally, in subsequent cases, the Supreme Court has consistently reaffirmed to need for *all* plaintiffs to demonstrate particularized injury, thus casting doubt on the continued vitality of *Flast.* I cannot see the Court resurrecting and extending *Flast* in the context of the Balanced Budget Amendment.

There remains the question whether, by virtue of their office, Members of Congress can establish standing where a private citizen could not. The Supreme Court has never recognized congressional standing, and forceful arguments have been advanced against it. *See Barnes v. Kline,* 759 F.2d 21, 41–51 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated as moot sub nom. Burke v. Barnes,* 479 U.S. 361 (1987). Those lower courts that have allowed congressional standing have limited it in ways that would greatly restrict its use in efforts to enforce the Balanced Budget Amendment. First, Members must demonstrate that they have suffered injury in fact by dilution or nullification of their congressional voting power. In addition, Members must still satisfy the other requirements of Article III standing, including the traceability and redressibility requirements. And finally, under the doctrine of ''equitable discretion,'' recognized by the D.C. Circuit, Members must show that substantial relief could not otherwise be obtained from fellow legislators through the enactment, repeal or amendment of a statute. *See Melcher v. Federal Open Market Comm.,* 836 F.2d 561, 563 (D.C. Cir. 1987).

Even if the legitimacy of congressional standing, in principle, were ultimately accepted by the Supreme Court, I would expect that doctrine would have narrow application in the context of the Balanced Budget Amendment. Even if a circumstance arose where a Member could meet the first two requirements, it seems that, absent a serious and clear abuse, the equitable discretion doctrine would militate strongly against allowing congressional standing. This is not like the Pocket Veto cases where the Executive has allegedly ''nullified'' a Member's vote; here it is Congress itself that is taking the challenged action. If the doctrine of ''equitable discretion'' has any force, it should apply to limit judicial actions by individual Members who wish to challenge enforcement of the Congress' own budgetary decisions, since the real grievance of the congressional plaintiffs in such a case would be the failure to persuade their fellow legislators of the correctness of their point of view. *See Moore v. United States House of Representatives,* 733 F.2d 946, 956 (D.C. Cir. 1984), *cert. denied,* 469 U.S. 1106 (1985); *Riegle v. Federal Open Market Comm.,* 656 F.2d 873, 881 (D.C. Cir.), *cert. denied,* 464 U.S. 1082 (1981).

It is obvious from this discussion that I view Article III's standing requirement as a principal safeguard against undue judicial activism in this area. But I would be the last to say that the standing doctrine is an ironclad shield against judicial activism. The doctrine is malleable and it has been manipulated by the courts in the past. There is a clear trend, however, toward narrowing the parameters of constitutional standing. *See Lujan v. Defenders of Wildlife, supra; Valley Forge Christian College, supra.* Furthermore, we can anticipate that the congressional budgetary process is not likely to be a field where the courts would be eager to stretch the doctrine. The federal budget and the public debt limits do not typically implicate sensitive individual rights, and thus there may be less temptation for courts to apply the standing requirements more loosely. In addition, courts are not expert at fathoming the ins and outs of budgetary arcana, and there is no reason to think they would be so inclined to enter that thicket as to manipulate standing principles to do so. Nevertheless, the possibility remains. One way to minimize the risk of such judicial activism is for Congress to take care in the wording of any particular statutes that are enacted in implementing the Amendment so as not to give rise to colorable claims of standing or private rights of action.

Before moving on, I should also point out for the Committee one area that I believe does hold some potential for mischief and that Congress may wish to address. That is the area of state court review. The constraints of Article III do not, of course, apply to state courts, which are courts of general jurisdiction. State courts are not bound by the ''case or controversy'' requirement or the other justiciability principles, even when deciding issues of federal law, including the interpretation of the Federal Constitution. *Asarco, Inc.,* 490 U.S. at 617. Accordingly, it is possible that a state court could entertain a challenge to a federal statute under the Balanced Budget Amendment despite the fact that the plaintiffs would not satisfy the requirements for standing in federal court. Absent an applicable provision in federal law for exclusive jurisdiction in the federal courts, the state court in such a circumstance would have the authority to render a binding legal judgment. *Ibid.* The only avenue for federal review would be by certiorari to the Supreme Court, which has held that it may exercise its discretionary jurisdiction in such cases ''if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for * * * review, where the requisites of a case or controversy are also met.'' *Id.* at 623–24.

To avoid the possibility that a federal statute or the federal budgetary process itself might be entangled in such a state court challenge, I would suggest that Congress include a provision for exclusive federal jurisdiction in any implementing legislation enacted pursuant to section 6 of the Amendment. Such a provision should be carefully worded so as not to create inadvertently any implied right of judicial review in federal court and so as not to affect any of the otherwise applicable limitations on justiciability discussed in this statement.

II. JUDICIAL DEFERENCE

Let me now turn to the second factor that will constrain judicial overreaching. In those cases where standing is established and the court proceeds to review the merits of a claim under the Balanced Budget Amendment, there is no reason to believe that the court would readily second-guess decisions made by the political branches. On the contrary, following long-established doctrine, as well as the Amendment's own explicit dictates, a reviewing court is likely to accord the utmost deference to the choices made by Congress in carrying out its responsibilities under the Amendment.

This judicial deference would be strongest in cases challenging the implementing mechanisms adopted by Congress. The Balanced Budget Amendment, in essence, mandates certain results (balanced budgets and capped debt) and leaves it to Congress to put in place mechanisms to achieve those results. It is well-established that where the Constitution requires a certain ''end,'' Congress will be given the widest latitude in selecting ''means'' to achieve that end. Thus, for example, the courts have accorded broad deference to Congress in its selection of appropriate enforcement mechanisms under section 5 of the Fourteenth Amendment. *See Katzenbach v. Morgan,* 384 U.S. 641 (1966). And in the context of the apportionment process, where the Constitution mandates in fairly precise terms that Representatives shall be apportioned among the several States ''according to their respective Numbers'' (Art. I, Sec. 2, Cl. 3), the Supreme Court has deferred to Congress' choice of the method for apportionment, even though a State adversely affected could demonstrate that another method might yield a more accurate result. *See U.S. Dep't of Commerce v. Montana,* 112 S. Ct. 1415, 1429 (1992).

The need for deference would be even more compelling in cases under the Balanced Budget Amendment, since the language of the Amendment explicitly confers on Congress, in mandatory terms, the responsibility for implementing the Amendment and specifically allows Congress in so doing to ''rely on *estimates* of outlays and receipts'' (emphasis added). Unless the implementing and enforcement provisions adopted by Congress are plainly incompatible with the Amendment, it is unlikely a court would substitute its judgment for choices made by Congress.

Even in challenges to specific budgetary actions—for example, a claim that a particular spending measure threatens to unbalanced the budget—the courts would tend to defer to the judgments of the political branches, except where a constitutional violation is clear. Not only do courts start with the general presumption that Congress has acted constitutionally, *see Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 729 (1984), but that general rule of deference is substantially reinforced by the Amendment's explicit assignment of implementation responsibility to Congress in section 6, including the express recognition that Congress may rely on estimates—a process

that inherently involves discretionary and expert judgments. It is precisely when reviewing these kinds of technical fiscal issues—matters uniquely within the province and expertise of the political branches—where the courts are most inclined to defer to the sound judgment of the Congress and the Executive.

In sum, then, even where the courts reach the merits of a claim under the Balanced Budget Amendment, we are far more likely to see deference to Congress than heavy-handed second-guessing by the courts. This is not to say that courts will ignore clear instances of abuse; however, it is precisely in such cases—in which the violations are not arguable but palpable—where judicial intervention is most appropriate.

II. LIMITATIONS ON JUDICIAL REMEDIES

For the reason outlined above, I am confident the courts will entertain very few suits challenging congressional actions under the Balanced Budget Amendment, and that, when and if they do, the courts will be inclined to defer to the judgments of Congress and the Executive in the budget area. Assuming, however, that a court might entertain such a suit and might declare a particular budgetary action unconstitutional as a violation of the Amendment, there are still further judicial constraints making it unlikely a court will order intrusive remedies in such a case. As I see it, these constraints fall into two categories: prudential considerations that will limit a court's exercise of its remedial powers and limitations created by section 6 of the Amendment itself.

First, courts are appropriately wary of becoming too deeply involved in superintending decisions and processes that are essentially legislative in character, and for that reason, any court—most certainly the Supreme Court—will hesitate to impose remedies that could embroil it in the supervision of the budgetary process. Indeed, in the context of the Balanced Budget Amendment, the choice of any specific remedy—for example, an order specifying a particular adjustment of expenditures to bring the federal budget back into compliance with the Amendment—would invariably require the court to displace Congress by making a policy decision that is inherently legislative and therefore inappropriate for the courts. I believe it far more likely that a court faced with a violation of the Amendment would take the less intrusive route of simply declaring the particular action at issue unconstitutional and leaving it to Congress to choose the appropriate remedy.

There are plenty of cases in which the Supreme Court has followed this route. For example, in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the Court declared the composition of the Federal Election Commission unconstitutional as a violation of the Appointments Clause, but stayed the Court's judgment to ''afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms'' that would remedy the violation. *Id.* at 143. And recently, in *Harper* v. *Virginia Dept. of Taxation*, 113 S. Ct. 2510 (1993), where the Court refused to order refund of the amounts improperly collected and held instead that the fashioning of an appropriate remedy was properly left to state authorities. *See id.* 2519–20.

Even in cases where there has been a proven violation of the Fourteenth Amendment, the Court has required the same respect for a legislature's ability to devise remedies involving the exercise of the legislature's taxing authority. In *Missouri* v. *Jenkins*, 495 U.S. 33 (1990), the Court confirmed that ''the imposition of a tax increase by a federal court,'' even as a remedy for racial segregation by a state school district, must be ''an extraordinary event.'' *Id.* at 51. ''In assuming for itself the fundamental and delicate power of taxation,'' the Court held, ''the District Court not only intruded on local authority but circumvented it altogether. Before taking such a drastic step the District Court was obliged to assure itself that no permissible alternative would have accomplished the required task.'' *Ibid.* According to the Court, ''the very complexity of the problems of financing and managing a * * * public school system suggests that * * * the legislature's efforts to tackle the problems should be entitled to respect'' and that ''local officials should at least have the opportunity to devise their own solutions to these problems.'' *Id.* at 52 (internal quotation marks removed). The Court in *Jenkins* upheld the district court's power to order a local school district to levy its own taxes because such a levy was the only means by which the school district could raise funds adequate to comply with the court's desegration order. *See id.* at 55–58. That could never be the case with any potential violation of the Balanced Budget Amendment, which imposes a cap on spending and the public debt, rather than an obligation to raise revenues. There will always be a myriad of policy choices available to Congress for avoiding infringement of the budget cap.

Jenkins is also readily distinguishable from the context of the Balanced Budget Amendment on the ground that *Jenkins* did not involve ''an instance of one branch of the Federal Government invading the province of another,'' but instead involved a court order ''that brings the weight of federal authority upon a local government and a State.'' *Id.* at 67 (Kennedy, J., concurring in part and concurring in the judgment). The distinction is critical because under Article I, Section 1, ''[a]ll legislative Powers'' granted under the Federal Constitution are vested in Congress, and the enumeration of legislative powers begins by providing that ''[t]he Congress shall have Power To lay and collect Taxes'' (Art. I, Sec. 8, Cl. 1). Based on these provisions, the Court has stated that ''[t]axation is a legislative function, and Congress * * * is the sole organ for levying taxes.'' *National Cable Television Ass'n* v. *United States*, 415 U.S.C. 336, 340 (1974). *See Missouri* v. *Jenkins*, 495 U.S. at 67 (Kennedy, J.).

A second source of limitations on the courts' exercise of their remedial powers is found in the Amendment itself. Under section 6, which provides that ''[t]he Congress shall enforce and implement this article by appropriate legislation,'' Congress will have the authority to adopt remedies for any purported violation of the Amendment. Congress, for example, could provide for correcting a threatened budget imbalance or overspending through sequestration, rescission or other devices. In addition, section 6 logically gives Congress the power to limit the types of remedies that might be ordered by a court. This power is consistent with Article III's delegation of authority to Congress to define and limit the jurisdiction of the federal courts, and would allow Congress, for example, to deny courts the ability to order injunctive relief for violations of the Amendment. Congress has adopted such limitations in other contexts. *See, e.g.*, Norris-LaGuardia Act, 29 U.S.C. §§101–115 (prohibiting courts from entering injunctions in labor disputes); Federal Anti-Injunction Act, 28 U.S.C. §2283 (prohibiting federal courts from enjoining state court proceedings); Tax Injunction Act, 26 U.S.C. §7421(a) (prohibiting suits to restrain the assessment or collection of taxes).

These powers given to Congress will compound the courts' self-imposed prudential concerns, with the result that the courts will be even more hesitant to order intrusive remedies for ostensible violations of the Amendment. Courts regularly defer to remedies that have been crafted by Congress. This deference is shown even in cases involving the vindication of individual rights. The Supreme Court, for example, has held that Congress may adopt procedures limiting the remedies available in so-called *Bivens* actions, which are actions brought against federal officials for the violation of an individual's constitutional rights. *See Bush v. Lucas*, 462 U.S. 367, 388–90 (1983). Similarly, in devising a judge-made remedy for violations of the Fifth Amendment privilege against self-incrimination in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court recognized that ''Congress and the States are free to develop their own safeguards'' to redress violations of the privilege and that such alternative remedies woud be respected by the courts. *See id.* at 490. Moreover, even if Congress does not exercise the authority granted to it under section 6, the courts will undoubtedly be aware of Congress' ability to limit the relief that courts may grant, and this awareness in and of itself will likely check any tendency on the part of the courts to develop their own creative remedies for violation of the balanced budget requirement.

IV. THE AMENDMENT'S EFFICACY

Some have suggested that the federal courts' limited role in enforcing the Balanced Budget Amendment makes the Amendment a ''paper tiger.'' Their premise is that, unless the courts are there to coerce compliance at every turn, the political banches will flout their constitutional responsibilities. These critics do not argue for a greater role for the courts so much as they dismiss the Amendment as a feckless exercise. In my view, this critique is mistaken: it is based on a distorted view of the Constitution and ignores the practical experience of over two centuries.

First, of course, the point is not that the courts will never be there; it is that we need not fear an avalanche of litigation, with the courts regularly reviewing fiscal decisions and effectively usurping the proper functions of the political branches. Where the judicial power can properly be invoked, it will most likely be reserved to address serious and clearcut violations.

More importantly, Members of Congress and Presidents seek to conform their actions to constitutional norms, not because of external threats of judicial coercion, but primarily because of their own difelity to constitutional prinicples. After all, it is not only judges who must take an oath of allegiance to the Constitution. Just as the vast majority of citizens obey the law because they wanted to—not because they fear the police—so too those who serve in the political branches feel constrained by constitutional requirements and strive to obey them, whether backed by judicial sanction or not. Congress, for example, has dutifully provided for a census every ten years since the 1790s, as required by the Constitution, without court order. Even in an area as unreviewable and murky as the War Powers, the political branches strive to comply with constitutional norms. And the Senate has always administered responsibly its sole power to try cases of impeachment, without allowing such trials to degenerate into Kangaroo courts, even though the exercise of that power is not subject to the check of judicial review. *See Nixon v. United States*, 113 S. Ct. 732 (1993). As Judge Williams put it in the *Nixon* case:

''If the Senate should ever be ready to abdicate its responsibilities to schoolchildren, or, moved by Caligula's appointment of his horse as senator, to an elephant from the National Zoo, the republic will have sunk to

depths from which no court could rescue it. And if the senators try to ignore the clear requirement of a two-thirds vote for conviction, they will have to contend with public outrage that will ultimately impose its sanction at the ballot box. Absent judicial review, the Senate takes sole responsibility for its impeachment procedures as a full-fledged constitutional actor, just as the framers intended.'' *Nixon v. United States*, 938 F.2d 239, 246 (D.C. Cir. 1991) (footnote omitted), *aff'd*, 113 S. Ct. 732 (1993).

For over 200 years, day after day, the business of government has gone forward in prescribed channels, with judicial enforcement the exception, not the rule. The Balanced Budget Amendment will be effective without judges hovering at Congress' elbow; the Congress will carry it out and it will achieve its intended results.

Finally, we can rest assured that the Amendment will be policed through the most effective enforcement mechanism of all—the watchfulness and wrath of the American people. After all, the requirements of the Balanced Budget Amendment are not like those of the Appointments Clause or the Emoluments, Clause, which could be violated with virtually no political fallout. Rather, they touch upon one of the core political concerns of the people. Does anyone seriously maintain that Congress could thumb its nose at a constitutional balanced budget requirement with impunity? Or play fast-and-loose with it and escape political retribution? It is precisely in areas like this, where the political check is so potent, that we can safely trust in its efficacy.

Thank you, Mr. Chairman.

STATEMENT OF GRIFFIN B. BELL, SENATE JUDICIARY COMMITTEE, BALANCED BUDGET AMENDMENT TO THE CONSTITUTION, JANUARY 5, 1995

The missing element in our constitutional system is the absence of a provision requiring a balanced budget, provided reasonable safeguards are in place to protect the national defense and to assure the national interest in the event of a depression.

Almost all the states have a balanced budget requirement in their respective State Constitutions. This is the safeguard which assures State financing only for services which are within the states' abilities to pay.

The federal government completely controls the money machine in the sense that it can borrow funds without limit. There is no inherent self-discipline built into the system. The only limit on federal spending is in the collective will of the Congress and the President. The federal debt is now so high that the country is, in effect, under normal rules, in bankruptcy. But the federal government does not have to declare bankruptcy. It can continue to borrow money to pay the interest on the debt and to continue to borrow money over and above the principal amount already owed. We long ago began using Social Security taxes as a part of the general fund to support this debt load, contrary to the belief of most Americans that Social Security taxes were being put into a trust fund for their future needs.

Without a constitutional restraint, there is no hope whatever of paying off the present debt, much less for stopping the creation of additional debt. We should be thankful for today's low interest rates, else we would have a greater economic crisis on our hands.

In the famous letters between Lord McCaulay of England and Henry Stevens Randall, the first Jefferson biographer, and in particularly the letter dated May 23, 1857, Lord McCaulay expressed concerns about the lack of controls on the fisc.

He said, and I quote: ''I seriously apprehend that you will, in [a] season of adversity . . . do things which will prevent prosperity from returning; that you will act like people who [would], in a year of scarcity, devour all the seed corn, and thus make the next year a year, not of scarcity, but of absolute famine. There will be, I fear, spoilation. The spoilation will increase the distress. The distress will produce fresh spoilation. There is nothing to stop you. Your Constitution is all sail and no anchor.''

McCaulay was correct. Without a constitutional amendment requiring a balanced budget, our Constitution truly is all sail and no anchor. The lack of an anchor has placed our country in the peril that it is now in because of our monstrous and increasing debt and ever escalating entitlements.

I have never heard anyone suggest that we begin to pay off our debt. It would not be out of reason to set the debt aside and retire it on a sinking fund basis, just as is done with state and municipal bonds at the present time. The debt could be gradually reduced once the budget is balanced by including a payment on the principal of the debt, thus reducing interest payments which make up a large part of our federal budget.

In this way, we would pay the debt of our own generation, rather than transferring it to our children and grandchildren.

The other example of lack of discipline on the part of our law makers is the cost-of-living index and its impact on the debt. The cost-of-living index is a self-fulfilling prophecy for annual inflation, particularly when the cost-of-living index seems to produce a figure which is always higher as to most people than actual inflation. The Congress can revamp the cost-of-living index to make it the same or less than the actual rate of inflation. This alone would go a long way toward bringing the budget in balance over a few years.

There is something sinister about basing entitlements of all kinds on an automatic cost-of-living index, particularly when the index is higher than the actual inflation. This is a giveaway scheme of the worst sort and exceeds any reasonable basis of governing.

Thus, a combination of a balanced budget amendment to our Constitution, with savings on interest over time and with a gradual reduction in debt principal, coupled with an adjustment of the cost-of-living index will restore fiscal sanity to our government.

We must begin to speak in plain English when referring to our debt. It will not do to speak of mere reductions in the deficits as savings.

THE LINCOLN LEGAL FOUNDATION,
Chicago, IL, June 5, 1992.

Hon. L.F. PAYNE,
House of Representatives,
Washington, DC.

DEAR MR. PAYNE: On behalf of the Lincoln Legal Foundation, let me extend my thanks to you for providing this opportunity to comment on the proposed Balanced Budget Amendment outlined in H.J. Res. 290. We at the Foundation take pride in serving as advocates for the broad public interest in defending liberty, free enterprise, and the separation of powers. It is in this capacity that we have undertaken our evaluation of the proposed Amendment.

We have confined our remarks to the prospects for judicial enforcement of the Balanced Budget Amendment. Critics have charged that the Amendment will unleash an avalanche of litigation, thereby paving the way for the micro-management of budgetary policy by the federal judiciary. As defenders of the Madisonian system of checks and balances, we at the Foundation take such charges seriously and have scrutinized them in light of the relevant case law.

We begin with a brief overview of standing doctrine and its impact on the justiciability of the proposed Amendment. We then consider the political question doctrine and the barriers it creates to judicial review. We conclude with our recommendations for refining and implementing the Amendment.

I. STANDING UNDER THE BALANCED BUDGET AMENDMENT

Standing refers to a plaintiff's interest in the issue being litigated. Generally speaking, in order to have standing a plaintiff must have a direct, individualized interest in the outcome of the controversy at hand. Persons airing generalized grievances, common to the public at large, invariably lack standing.

Limitations on standing stem from two sources. Article III Section II of the Constitution restricts the jurisdiction of the federal judiciary to ''cases'' and ''controversies.'' As a result, only plaintiffs with a personal stake in the outcome of a particular case have standing to litigate. The general prohibition against advisory opinions also can be traced to Article III.

In addition to Article III restrictions, federal courts have outlined certain ''prudential'' restrictions on standing, premised on non-constitutional policy judgments regarding the proper role of the judiciary Unlike Article III restrictions on standing, prudential restrictions may be altered or overridden by Congress.

Standing requirements under the proposed Balanced Budget Amendment will vary according to the type of litigant. Potential litigants fall into three categories: (1) Members of Congress, (2) Aggrieved Persons (*e.g.* persons whose government benefits are reduced or eliminated by operation of the Amendment), and (3) Taxpayers.

A. Members of Congress

The federal courts by and large have denied standing to members of Congress to litigate issues relating to their role as legislators.[1] Only when an executive action has deprived members of their constitutional right to vote on a legislative matter has standing been granted.[2]

Footnotes at end of letter.

Accordingly, Members of Congress are unlikely to have standing under the proposed Balanced Budget Amendment, unless they can claim to have been disenfranchised in their legislative capacity. Assuming that Congress does not ignore the procedural requirements set forth in the Amendment, the potential for such disenfranchisement seems remote.

B. Aggrieved persons

Standing also seems doubtful for persons whose government benefits or other payments from the Treasury are affected by the Balanced Budget Amendment. In order to attain standing, such persons must meet the following Article III requirements: (1) They must have sustained an actual or threatened injury; (2) Their injury must be traceable to the governmental action in question; and (3) The federal courts must be capable of redressing the injury.[3]

Assuming a plaintiff could meet the first two requirements, he still must show that the federal courts are capable of dispensing a remedy. Judicial relief could take the form of either a declaratory judgment or an injunction. A declaratory judgment, stating that Congress has acted in an unconstitutional manner, would do little to redress the plaintiff's injury. On the other hand, injunctive relief could pose a serious threat to the separation of powers.

For example, an injunction ordering Congress to reinstate funding for a particular program would substantially infringe upon

Congress's legislative authority. Similarly, an injunction ordering all government agencies to reduce their expenditures by a uniform percentage - would undermine the independence of the Executive Branch. It is unlikely that the present Supreme Court would uphold a remedy that so blatantly exceeds the scope of judicial authority outlined in Article III.

C. Taxpayers

Taxpayers may have a better chance of attaining standing under the proposed Balanced Budget Amendment. Traditionally, the federal courts refused to recognize taxpayer standing. However, in 1968 the Warren Court held in *Flast* v. *Cohen* that a taxpayer plaintiff does have standing to challenge Congress's taxing and spending decisions if the plaintiff can establish a logical nexus between his status as a taxpayer and his legal claim.[4]

The logical nexus text consists of two distinct elements. First, the plaintiff must demonstrate that the congressional action in question was taken pursuant to the Taxing and Spending Clause of Article I Section 8 of the Constitution. Second, the plaintiff must show that the statute in question violates a specific constitutional restraint on Congress's taxing and spending power.[5]

Taxpayers suing under the proposed Balanced Budget Amendment probably could meet both prongs of the logical nexus test.[6] In order to satisfy the first prong, potential litigants would have to tailor their complaint to challenge the unconstitutional enactment of a law by Congress (e.g. an appropriations bill), not the unconstitutional execution of a law by the Executive. Litigants could satisfy the second prong by demonstrating that the statute in question violates the Balanced Budget Amendment, an express restriction on Congress's taxing and spending power.

Even if a taxpayer satisfies *Flast*'s logical nexus test, more recent opinions like *Valley Forge* suggest that the Supreme Court also would expect taxpayer plaintiffs to fulfill the Article III standing requirements. In other words, in order to have standing, a taxpayer would have to demonstrate that he has sustained an actual or threatened injury traceable to a specific congressional action.

In theory, a taxpayer could claim that excess spending in violation of the Balanced Budget Amendment will harm him by undermining the national economy or by increasing the national debt. However, a majority of the Supreme Court probably would find the connection between the excess spending and the alleged injuries too tenuous to grant standing. As a result, standing would be limited to taxpayers with concrete injuries, stemming directly from the congressional action in question.

II. THE AMENDMENT AND THE POLITICAL QUESTION DOCTRINE

Even if a litigant attained standing under the proposed Balanced Budget Amendment, a federal court could refuse to hear the case on the grounds that it raises a political question. The leading case with respect to political questions remains *Baker* v. *Carr*.[7] In *Baker*, the Supreme court held that the constitutionality of a state legislative apportionment scheme did not raise a political question. In doing so, the Court identified a number of contexts in which political questions may arise.

Foremost among these are situations in which the text of the Constitution expressly commits the resolution of a particular issue to a coordinate branch of government. The Judicial Branch will refrain from adjudicating an issue in such circumstances. However, this textual constraint would not preclude judicial review of the proposed Balanced Budget Amendment, since H.J. Res. 290 does not assign responsibility for enforcing the Amendment to either the President or the Congress.

The *Baker* court also identified the following prudential consideration in deciding whether to invoke the political question doctrine as a bar to judicial review:[8]

(A) Is there a lack of discernable or manageable judicial standards for resolving the issue?

(B) Can the court resolve the issue without making an initial policy determination that falls outside the scope of judicial authority?

(C) Can the court resolve the issue without expressing a lack of respect for the coordinate branches of government?

(D) Will judicial intervention result in multifarious pronouncements on the same issue from different branches of government?

Each of these considerations creates an impediment to judicial review of the proposed Balanced Budget Amendment. In particular, courts may find the fiscal subject matter of the Amendment difficult to administer. For example, what happens if ''estimated receipts'' fall short of projections halfway through a fiscal year? On what data and accounting methods would the courts be expected to rely? Given the lack of concrete standards, apparently rudimentary determinations (e.g. When do ''total outlays'' exceed ''estimated receipts''?) may prove beyond the competence of the judiciary.

Moreover, the potential judicial remedies for violations of the Amendment may undermine the separation of powers. As discussed above, various forms of injunctive relief almost certainly would infringe upon the prerogatives of Congress and the Executive Branch. Given the Supreme Court's structuralistic adherence to the separation of powers doctrine in cases like *I.N.S.* v. *Chadha*[9] and *Bowsher* v. *Synar*,[10] it is almost impossible to imagine a majority of the justices on the present, or a future, Court jumping at the opportunity to become embroiled in a partisan wrangle over the size and scope of the federal budget. Instead, one would expect the Court to make every effort to avoid such an intrusion.

III. CONCLUSIONS

The constraints imposed by standing requirements and the political question doctrine by no means preclude judicial review of the Balanced Budget Amendment. Nevertheless, they do place substantial barriers to litigation. In light of these impediments, the Foundation believes that the prospects for a flood of new litigation and the specter of budgeting by judicial fiat have been greatly exaggerated.

The Amendment proposed in H.J. Res. 290 would clearly invite judicial review of any spending or taxing legislation purportedly enacted in violation of the formal requirements (e.g. a supermajority for increasing the debt limit, a full majority on recorded for a tax increase) set forth in the text. This is no different from the *status quo*, for even now we would expect a court to strike down an act that was somehow enrolled on the statute books without having properly cleared the requisite legislative process of votes, presentment, and the like.

What the Amendment would not do is to confer upon the judiciary an authority to substitute its own judgment as to the accuracy of the revenue estimates, the needfulness of taxes, or the prudence of a debt limit. The courts would merely police the formal aspects of the work of the political branches: Did they enact a law devoted solely to an estimate of receipts? Are all outlays held below that estimate? Were measures passed by requisite majorities voting, when required, on the record?

Sections 2 and 4 of the proposed amendment clearly invite only limited judicial scrutiny of this kind, and then only of the process, and not of the substance, by which the political branches have acted?

Section 3 seems to be purely hortatory, and probably provides no predicate at all for judicial action. Whatever the political ramifications of a failure on the part of a President to propose a balanced budget in any given year may be, there appear to be no legal implications whatsoever. No act of lawmaking depends in any constitutional sense upon the President's compliance with this requirement, let alone upon the substance that any such proposal may contain.[11]

Section 1 is the crucial text, then, but even here the boundaries of justiciability would be tightly limited. A purported enactment might be struck down by the courts if it provided for outlays of funds in excess of the level of estimated receipts established for the year in the annual estimates law, or if it called for such an excessive outlay without having been passed on a roll-call vote by the required super-majority, or if it attempted to avoid the balanced budget limit applicable to the fiscal year of its enactment by purporting to be within the limits of receipts estimated for another year, past or future.

But there is no basis in the text of Section 1 for a court to pick and choose among congressional spending decisions on any basis. That is, the proposed amendment would confer no authority on the judiciary to choose which appropriations would be satisfied from the Treasury and which would not, but only to say that once outlays had reached the level established in the estimates law then the officials of the Treasury must cease disbursing any additional funds.

Because Section 6 of the proposed amendment would define ''total outlays'' to ''include all outlays of the United States Government except for those for repayment of debt principal,'' the amendment would abolish permanent indefinite appropriations, revolving funds, and the funds, such as the Judgment Fund, from which they are disbursed.[12] This would decisively prevent the courts from invading the Federal fisc in the guise of damages awards against the United States Government. Upon effectuation of this amendment, damages awards against the Government in all cases (except for repayment of debt principal) would have to be part of the outlays voted each year by Congress, and the current congressional practice of waiving the sovereign immunity of the United States on a blanket basis in the adjudication of various kinds of damages against the Government would have to end.

In short, it is our view that there is virtually no danger that the constitutional balanced budget amendment contemplated by H.J. Res. 290 would cede the power of the purse to a runaway judiciary. To the contrary, it would eliminate certain authorities that courts currently have to order the disbursement of Federal funds without appropriations. If ratified and made part of the Constitution, the balanced budget amendment would return responsibility and accountability for all Federal outlays squarely to the Congress.

Sincerely yours,

JOSEPH A. MORRIS,
President and General Counsel.[13]

FOOTNOTES

[1] *Harrison* v. *Bush*, 553 F.2d 19 (D.C. Cir. 1977) (standing denied to a senator seeking declaratory and injunctive relief against the CIA for its allegedly unlawful activities).

[2] *Kennedy* v. *Sampson*, 511 F.2d 430 (D.C. Cir. 1974) (standing granted to a senator challenging the constitutionality of the President's pocket veto).

[3] See, e.g., *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); and *Allen* v. *Wright*, 468 U.S. 737 (1984).

[4] *Flast* v. *Cohen*, 392 U.S. 83 (1968).

[5] *Valley Forge Christian College* v. *Citizens United for the Separation of Church and State*, 454 U.S. 464 (1982) (standing denied because an executive agency's sale of surplus federal land to a religious college was not an exercise of Congress's taxing and spending power).

[6] See Note, *Article III Problems in Enforcing the Balanced Budget Amendment*, 83 Columbia L. Rev. 1064, 1079–80 (1982).

[7] 369 U.S. 186 (1962).

[8] *Baker* v. *Carr*, 369 U.S. at 217.

[9] 462 U.S. 919 (1983) (legislative veto held unconstitutional for violating the Bicameralism and Presentment Clauses of Article I Section 7).

[10] 478 U.S. 714 (1986) (Gramm-Rudman Deficit Reduction Act violated the separation of powers by placing responsibility for executive decisions in the hands of an officer who is subject to control and removal by Congress).

[11] Section 3 would confer constitutional dignity upon a practice that has evolved on an extraconstitutional basis in this century, the submission of a Presidential budget each year. The practical and political wisdom of the practice is debatable, as is the wisdom of the contents of any particular budget. But the practice, even with the constitutional sanction that H.J. Res. 290 would give it, in no way derogates from the responsibility of Congress to account for the power of the purse or from the procedural rules adopted by the Framers for safeguarding the separation of powers respecting the fisc, such as the requirement that bills for raising revenue originate in the House of Representatives. The President would now have a constitutional duty to propose an annual balanced budget, but his submission would be only a proposal, and the existing groundrules of Articles I and II would continue to define the procedures by which laws are made and the separation of powers maintained.

[11] It is our view that this would also abolish other permanent indefinite appropriations arrangements and revolving funds as they now stand, including those for the Social Security, Medicare, and Civil Service Retirement Systems. They all involve ''outlays'' within the comprehensive meaning of Section 6, and so would all require affirmative congressional action for each year's disbursements. Congress could continue to provide that outlays be made on formulaic bases (e.g., as ''formula payments''), but they would be subject to the total annual ceiling on outlays and mere qualification of an individual to receive a payment would no longer automatically work to raise the spending limit.

[13] I would like to thank Charles H. Bjork, a third-year law student at Northwestern University and a student intern at The Lincoln Legal Foundation, for his invaluable assistance in the preparation of this analysis.

Testimony of John C. Armor, Esq., Before the Constitution Subcommittee of the Senate Judiciary Committee, February 16, 1994

It is always a privilege to testify before a Committee of Congress, but especially so today on this subject before this Subcommittee. The reason is that after almost two decades of effort, the Balanced Budget Amendment to the Constitution now seems on the cusp of success before the Senate, and the BBA is the focus of this hearing. I am not here today on behalf of a client, but on my own.

I am John Armor, a constitutional lawyer who practices before the Supreme Court, a former Professor of Political Science, and author of several books and many articles, usually on political science or constitutional law. Most germane to today's hearing, I have testified for 17½ years now before committees of state legislatures, and occasionally before Congressional Committees, on legal aspects of the BBA.

I will address three subjects, two of them briefly because others will cover them in far more detail, and one at some length, because others are unlikely to address it and it is most important now as the Amendment seems close to passage. The subjects are: the need for the BBA, the appropriateness of constitutional provisions which are economic in nature, and the problems and solutions on the questions of judicial review under the BBA.

The need for the balanced budget amendment

All but one of the 50 states have some form of balanced budget provisions in their laws. Forty-seven have provisions in their constitutions; two have statutory provisions (ones that they abide by, contrary to some statutory solutions which Congress has tried, beginning in 1974); and one state, Vermont, has no such provision. The exception proves the rule; Vermont is not known as a hotbed of wild spending, promoted by representatives of the tour bus and maple syrup industries.

In all the other states, the operation of their various balanced budget provisions demonstrate anew the importance of institutional restraints to guide legislative behavior. Madison, Hamilton and Jay put the issue most succinctly in *The Federalist* over 200 years ago in arguing for adoption of the Constitution. At that time, only the House of Representatives was popularly elected. Writing about the House, they said it would, ''balance the willingness to spend against the reluctance to tax.''

There is a great deal of political and constitutional wisdom in that short phrase, that Congress (no longer just the House) should ''balance the willingness to spend against the reluctance to tax.'' That is exactly what the balanced budget amendments in the states accomplish for them. Legislators are free to vote for whatever programs they believe are in the interest of their constituents. But, at the same time, they are obligated to impose the taxes to pay for those programs.

Therefore, state legislators every year, or every two years in Kentucky, create two sets of priorities. First are priorities among spending programs—those at the bottom of the list will not be approved, even through in the abstract they might seem to be good ideas. Second are priorities among taxation plans. The ones which are the least desirable and most likely to provoke strong opposition will not be approved, even though in the abstract they could raise substantial funds for worthwhile programs.

In short, legislators become mindful of what the great French Minister, Tallyrand, is credited with saying, ''The art of taxation is like plucking a goose, the object is to get the most feathers with the least amount of hissing.''

This balancing act between what legislators might want to spend, and what taxes they are willing to impose, all things considered, is continuous in the states. The same balancing act used to be carried out annually by Congress. For 150 years we operated under an unwritten constitutional standard. Spending would not exceed taxes except during time of war or during national emergencies amounting to what we now call ''recessions'' or ''depressions.'' Once the emergency was over, taxes would be used to pay down the public debt to zero, or close to it.

We abandoned this standard fifty years ago. The ''willingness to spend'' was disconnected from the ''reluctance to tax'' in a process that has accelerated in recent years of massive deficit spending every year, not just during wars or emergencies. There is no reason to blame any particular President or Congress. With $4 trillion in known debt, and more than that amount in unfunded, future commitments, there is ample blame for all parties concerned. Ending that process and restoring the connection between taxing and spending is the central purpose of the BBA.

A major argument advanced against the BBA is that there will be attempts to avoid or evade its provisions, no matter how carefully they are drafted. That is absolutely true. History has shown dozens of examples at the state level where creative bookkeeping has been used to bail out state governments which are strapped for funds but find necessary choices among spending on one side and taxation on the other, politically impossible. Sometimes, judicial enforcement applied at the state level.

I urge you not to confuse the question of whether the BBA will work perfectly, with the question of whether it will work substantially. Consider the magnificent guarantees in the First Amendment—freedom of religion, of speech, of the press, and of political activity. Every one of those has been repeatedly assaulted by various laws and ordinances at the federal, state and local level, right from the beginnings of the Republic. There were many individual failures. We once had laws under which newspaper editors were jailed for printing their opinions, until Jefferson became President. We once had established churches supported directly by state funds, until well into the 19th century.

I could run a long list of occasional failures of the First Amendment in all four of its areas of protection. The proper question about the First Amendment is not whether many interests, many times, on many issues, sought to violate it. It is whether the nation is much the better because it has the First Amendment. By analogy, this is also the proper question to ask about the BBA. Will it provide benefits to the nation for the foreseeable future? If you answer that question yes, then you should support it.

One last point. We have the example of another unwritten constitutional provision that we lived by for 150 years. Once it was broken, however, we wrote it into the Constitution. George Washington was responsible for the fact that no limits on Presidential terms were placed in the Constitution. But, he was also the creator of the tradition that Presidents voluntarily leave office after serving two terms. Once that tradition was abrogated by FDR, we placed it in the Constitution as the 22nd Amendment.

The same can apply to the Balanced Budget Amendment. Now that the tradition has been abrogated, it can be written into the language of the Constitution.

Appropriateness of economic provisions in the constitution

The claim has often been made that the Constitution is intended for broad and lofty purposes, that provisions for economic programs have no place in that document. This slogan sounds like it might have merit; it has superficial appeal. However, as soon as one delves into the Constitution, it is clear the Framers included ''economic'' provisions, whenever and wherever they considered them appropriate as a matter of public policy.

Article I, Section 2, chose to forbid taxes other than per capita. We chose to reverse that decision by the 16th Amendment which permitted income taxes. Article I, Section 8, contains many ''economic'' clauses: the Commerce Clause, gives Congress the power to regulate interstate commerce and bars the states from taxing or regulating it. (This clause created the first ''common market'' among sovereign entities in the history of the world. It was magnificently successful.) Clauses 1 and 4, provide the right to borrow money and the regulation of the value of money, with a prohibition against the states minting their own money. (Many states were printing their own money, prior to the adoption of the Constitution. Some just ran the presses and devalued their currency exactly asCongress did with paper money during the American Revolution, giving rise to the phrase, ''not worth a Continental.'')

Article VI, clause 1, is also economic, providing that all debts contracted under the

Confederation would remain ''valid against the United States.'' Preserving the nation's reputation as well as its financial stability were reasons for this clause, which was hotly debated at the Philadelphia Convention of 1787.

My favorite clause to demonstrate the point is the one invented by Dr. Benjamin Franklin as a result of his experiences in Europe, given to James Madison, and inserted in the Constitution with almost no discussion. Franklin had observed that inventions and books were freely copied in Europe, thereby denying those who had created them both the benefits of their labors and the incentives to create more. To solve that problem, Franklin invented clause 7, to secure ''for limited Times to Authors and Inventors exclusive Right to their respective Writings and Discoveries.''

There is no question that this is an ''economic'' provision. Given the two century experience of the United States leading the world in discoveries, inventions and intellectual property, there is little doubt this clause in the Constitution lies at the heart of the American economic success story.

So, I suggest that whenever anyone claims that economic provisions do not belong in the Constitution, the reply should be to cite these and other provisions and reject that claim out of hand. The question is not whether economic provisions belong in the Constitution; it is whether the Balanced Budget Amendment is a wise policy at this time in our history, to be written into the Constitution.

JUDICIAL REVIEW OF THE BALANCED BUDGET AMENDMENT

The subject of judicial review of the BBA has hardly been addressed in the continuing public debate over the BBA. When there was little chance that the Amendment would be adopted any time soon, there was little reason to discuss this particular consequence. The situation having changed, it is now time to address this in detail.

Where the Constitution and applicable statutes are silent about judicial review, it is left to the Supreme Court to decide whether judicial review exists, and if so, what remedies may the courts apply for any violations. Not only can the Court set its own standards, it is also free to reverse them. Witness *Baker v. Carr*, 369 US 186 (1962). Until that case, the courts had refused to take up the ''political questions'' of mal-apportioned state legislatures. In *Baker*, it reversed itself, the consequence was 30 years and counting of court orders that legislatures, city and county councils reapportion themselves.

You could bet either, or both, of these results, if you remain silent on the subject of judicial review of the BBA.

This discussion is based on five assumptions about the results that this Committee, the whole Senate, and the whole Congress may have in mind about judicial review of the BBA. If any of my assumptions are incorrect, I trust I will promptly stand corrected. The assumptions are:

1. There should be judicial review of the Balanced Budget Amendment.

2. It should be brought about by a single set of responsible parties.

3. Enforcement should be extremely swift.

4. Courts should not be involved in choosing between different government programs in enforcing the Amendment. All such policy judgments should be left to Congress.

5. Courts should be prohibited from enforcing the BBA by judicial imposition of new taxes.

Under both Article III, Section I, and under the enabling clause that has been added to the BBA. Congress has the power by legislation to remove, create, or shape the Supreme Court's jurisdiction for review of the BBA. This is a process well known to this Subcommittee; its heritage traces back to the Judiciary Act of 1789. Only the original jurisdiction of the Court as declared in Article III, clause 2 is outside this statutory authority of Congress.

So, you can pass a statute which states what the judicial review of the BBA shall be, and what remedies can be applied. By making those exclusive, you can rule out any other forms of judicial review or remedies. The process of judicial review of the BBA and remedies applied will then be exactly what you say it should be—no more, no less.

To assure only one case, brought by responsible parties, you could provide that any six Senators, or any 25 Representatives, or any three Governors, could bring an action in the Supreme Court if they felt that the BBA had been violated, or was about to be violated if no budget was passed by the first day of the new fiscal year. On the filing of the case, all other Senators, Representatives and Governors would be informed and would be welcome to join the case on either side as they deemed fit.

You do not want thousands of citizens represented by thousands of tin horn lawyers, rushing into courts across the nation to bring their disparate cases to enforce the BBA. By this mechanism you can prevent that. The minimum numbers of Senators, Representatives or Governors to bring the action should be a significant number but a minority, similar to provisions in the Rules of both Houses that protect the interests of minorities, but not necessarily minorities of one.

Placing the case in the Supreme Court, plus providing that the Court must hear the case in 30 days and issue its decision not more than 15 days thereafter, would assure expeditious consideration. The Court would be free, as it has in many of the previous 200 original jurisdiction cases, to appoint Special Masters for fact-finding purposes, with their conclusions subject to challenge before the whole Court.

In order to prevent either judicially-ordered taxes or Court selection between competing programs and public policies, the remedies from the Court could be restricted as follows: (A) The Court could determine only that the budget was, or was not, in balance, and (B) the exact dollar amount of the projected year's income, assuming there is no declaration of war, and Congress has not acted by the supra-majority to remove the budget from the scope of the Amendment. (C) The Court could then order only an across-the-board cut in all programs *without exception* in the percentage required. In other words, if the Court found that the budget was out of balance by 3.4%, its only remedy would be to order a 3.4% cut in *all* programs.

This point is extremely important. Having spent 17 years talking with Members of Congress and with members of state legislators on the subject of the BBA, I believe there is an overwhelming feeling that the Supreme Court should not be involved in choosing between closing down an Air Force base or cutting Aunt Tilly's social security check. That sort of policy judgment should always be made by elected representatives of the people in each level of government.

Once the Court had ordered an across-the-board cut, Congress would then have 20 days to act by statute to adjust the cuts on a policy basis, making greater cuts in some programs, less in others, by staying within the total dollar amount declared by the Court. If Congress fails to act, or if it acts but violates the Amendment a second time, then the Court-ordered across-the-board cuts would be final for that fiscal year.

Congress should have one bite at the apple to make those policy judgments between competing programs, after a declaration of violation of the BBA. But, it should be only one bite, otherwise, every budget could be wrapped up in eternal litigation, every year.

Lastly, what happens if Congress fails to pass a budget by the first day of the fiscal year? Then the Court should have the power to examine the taxes then in effect, and determine the dollar amount that those taxes would raise in the coming year. The amount would be the cap. All programs would be presumed to continue at their current levels of funding (exactly what Congressitself does in Continuing Resolutions). The Court would determine whether that did, or did not, result in balance. Again, Congress would have 20 days to make policy-based adjustments.

I am deliberately not trying to write or offer precise language. You and your staff are far better able to do that. However, approaches such as those outlined could accomplish all the basic purposes that are covered in the assumptions, stated above.

One last point about when such statutory provisions should be passed. Most of my time on this subject over the last 17 years has been spent with state legislators, both in hearings and often in far-reaching, challenging conversations about ramifications of the BBA. If you intend to establish by statute the parameters of judicial review and remedies, you should pass that statute at the same time you pass the BBA and send it out for ratification.

Some of the more far-sighted state legislators are engaging in the same process you are, asking themselves what might the Supreme Court do, or not do, to enforce the BBA. They are especially concerned with two areas—judicially-imposed taxes, and judicially-made choices between different policies and programs. If you pass the statute now, or very soon after you promulgate the BBA for ratification, you will satisfy state legislators, first, that judicial review will occur, and second, that judicial enforcement will not get into either of these areas of grave concern.

If you do not pass such a statute within a few months of promulgating the Amendment, you will engender serious concerns among the state legislators about whether you will ultimately do that, and if so, what provisions you will choose to include. Recalling that ratification requires the approval of 38 state legislatures, or ratifying conventions elected in 38 states under the other Article V method, you will endanger the ratification of the BBA if you do not provide review statute so state legislators can read it side by side with the text of your BBA.

There may be other aspects of enabling legislation that you may want, but do not choose to address until and unless the states ratify the Balanced Budget Amendment. Your own considerations and reflections, together with the responses of the states as they ratify, might be valuable in writing that legislation. However, on judicial review itself, I strongly urge you to consider, write and pass that legislation as soon as possible, once you decide to pass the BBA itself.

CONCLUSION

You have 200 years of history at the state and local level about the importance of making the tough decisions about taxing and spending, about ''balancing the willingness to spend against the reluctance to tax.'' You also have 150 years of experience here in Congress on the same point. If that satisfies you that the nation needs the BBA in the Constitution, now is the time to act.

You should not be reluctant to act on the grounds that this is an ''economic'' provision. The Constitution has many other provisions intended to effect the economy of the United States, ones which in the fullness of world history have been proven to be basic in the organization of any competent national economy. Consider the fact that Dr. Franklin's invention of the Patents and Trademark clause has become regional through NAFTA, and may shortly become global through GATT. Economic provisions belong in our Constitution, provided they are the right ones for the nation at the right time in our history-whether the year is 1787 or 1994.

Lastly, you should be concerned with judicial enforcement of the Balanced Budget Amendment. If it is correct to place the Amendment in the Constitution, it is also correct to guarantee both that if will be enforced, and to prevent forms of enforcement that would undercut the essential purposes of Congress, namely decisions on taxation and on competing public policies. Fortunately, the Constitution gives Congress the power to shape judicial enforcement to accomplish both purposes.

I welcome your questions on this complex subject with complex ramifications.

[From the U.S. Chamber of Commerce, Washington, DC]

BALANCED BUDGET AMENDMENT: THE ROLE OF THE COURTS

Some lawmakers and commentators have raised questions about the enforcement of a Balanced Budget Amendment to the U.S. Constitution. A primary concern is that Congressional efforts to meet the balanced budget requirement would be challenged in the courts, and the judiciary would be thrust into a non-judicial role of weighing policy demands, slashing programs and increasing taxes.

On the other hand, there is a legitimate and necessary role for the courts in ensuring compliance with the amendment. Congress could potentially circumvent balanced budget requirements through unrealistic revenue estimates, emergency designations, off-budget accounts, unfunded mandates, and other gimmickry. Certainly, the track record of the institution under the spending targets of Gramm-Rudman-Hollings and other statutory provisions is no cause for optimism.

It is our view that the need to proscribe judicial policymaking can be reconciled with a constructive role for the courts in maintaining the integrity of the balanced budget requirement. Congress is expected to address technical issues such as accounting standards, budget procedures and judicial enforcement in followup implementing legislation. By drawing on the existing legal principles of ''mootness,'' ''standing'' and ''nonjudiciability,'' implementing legislation can define an appropriate role for the courts in making the amendment work. The net effect can be to prevent judicial assumption of legislative functions such as selecting program cuts, while allowing the courts to police a framework of accounting standards and budget procedures.

TRADITIONAL LIMITS ON JUDICIAL INTERVENTION

In general, the courts have shown an unwillingness to interject themselves into the fray of budgetary politics. The New Jersey Superior Court observed that ''it is a rare case . . . in which the judiciary has any proper constitutional role in making budget allocation decisions.''[1] The judiciary has remained clear of most budget controversies through the principles of ''mootness'' and ''standing,'' as well as the ''political question'' doctrine.

A case is considered moot, and can be rejected by the court, if the matter in controversy is no longer current. In *Bishop* v. *Governor,* 281 Md. 521 (1977), taxpayers and Maryland legislators claimed that the governor's proposed budget violated the state's balanced budget law, because $95 million was contingent upon enactment of separate federal and state legislation. The Maryland Court of Appeals dismissed the case as moot because by that time the separate legislation had been approved, and the relevant fiscal year had elapsed. Mootness will be a factor in many potential challenges to Congressional action under a federal Balanced Budget Amendment, particularly those based on unplanned expenditures or flawed revenue estimates which become apparent near the end of the fiscal year.

The doctrine of standing limits judicial access to parties who can shoe a direct injury over and above that incurred by the general public. The logic is that the grievances of the public (or substantial segments thereof) are the proper domain of the legislature.[2] The U.S. Supreme Court has generally held that status as a taxpayer does not confer standing to a challenge federal actions[3], and has barred taxpayer challenges of budget and revenue policies in the absence of special injuries to the plaintiffs.[4] A state cannot sue the federal government on behalf of its citizens,[5] and it is doubtful that Members of Congress have standing to challenge federal actions in court.[6]

The political question doctrine is a related principle that the courts should remain out of such matters which the Constitution has committed to another branch of government. The U.S. Supreme Court has held that a ''political question'' exists when a case would require ''nonjudicial discretion.''[7] This would be the case with many budgetary controversies, such as the choice to cur particular programs, which by their nature require ideological choices and the balancing of competing needs. In theory, at least, Congress brings to this task a ''full knowledge of political, social and economic conditions...,'' as well as the legitimacy of elected representation.[8] The New Jersey Supreme Court recognized this in a case where local governments challenged funding decisions made by the governor and legislature, holding that the allocation of state funds among competing constituent groups was a political question, to be decided by the legislature and not the judiciary.[9] The Michigan Supreme Court has likewise held that program cutting decisions are a non-judicial function.[10]

A ROLE FOR THE COURTS

The courts have asserted jurisdiction over politically tinged controversies where they find ''discoverable and manageable standards'' for resolving them. In *Baker* v. *Carr,* the U.S. Supreme Court reasoned that objective criteria guide judicial decisonmaking and limit the opportunity for overreaching. In the balanced budget context, the ''discoverable and manageable standards'' principle can help demarcate lines between impermissible judicial policymaking, and the needed enforcement of accounting rules and budget procedures.

In all likelihood, a strong framework of accounting guidelines will emerge from implementing legislation. The Senate Judiciary Committee has interpreted Section 6 of the bill to impose ''a positive obligation on the part of Congress to enact appropriate legislation'' regarding this complex issue.[11] Judiciary Committee staff on both the House and Senate side have indicated their intention that implementing legislation embrace stringent accounting standards that will minimize the potential for litigation. Should legitimate questions arise concerning the methods by which Congress ''balances'' the budget, these standards will also provide objective criteria which meet constitutional standards for judicial intervention.

The implementing package is also likely to establish guidelines for judicial involvement defining what issues are judiciable and which parties have standing to challenge Congressional decisions. Where Congress has defined standing within the relevant statue, the courts have generally deferred to this request for judicial input, and entertained suitable cases.[12] This approach has the advantage of defining appropriate controversies and plaintiffs more precisely. In the Balanced Budget context, the right to raise particular arguments could be delegated to specific public officials. State budget officers, for example, could be given standing to contest unfunded federal mandates.

We are satisfied that such enforcement procedures, coupled with budget process and accounting guidelines, will operate against a backdrop of traditional legal principles to rationally limit judicial action. The effect should be to prevent judicial overreaching into legislative functions while providing a check on Congressional attempts to evade the requirements of the BBA through procedural and numerical gimmickry.

FOOTNOTES

1. *Board of Education f. Kean,* 457 A.2d 59 (N.J. 1982).
2. *Flast v. Cohen,* 392 U.S. 83 (1968), (Harlan, J., dissenting).
3. *Massachusetts v. Mellon,* 262 U.S. 447 (1923). The courts have allowed taxpayer claims that public funds were used to support an unconstitutional purpose. The two important decisions in this area are both establishment of religion cases. *Flast v. Cohen,* 392 U.S. 83 (1968); *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464 (1982).
4. *United States v. Richardson,* 418 U.S. 166 (1974) (plaintiffs challenged a statute allowing the CIA to avoid public reporting of its budget); *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976) (plaintiffs challenged a Revenue Ruling granting favorable tax treatment to certain hospitals as inconsistent with the Internal Revenue Code).
5. *South Carolina v. Katzenbach,* 383 U.S. 301 (1966).
6. *Goldwater v. Carter,* 444 U.S. 996 (1979).
7. *Baker v. Carr,* 369 U.S. 186 (1962).
8. *Id.*
9. *Camden v. Byrne,* 82 N.J. 133 (1980).
10. *Michigan Assn. of Countries v. Dept. of Management and Budget,* 418 Mich. 667 (1984).
11. *S. Rpt. 103–163,* 103rd Congress, 1st Session (1993).
12. Nowak, John E. et al, Constitutional Law, West Publishing Co. (1983), p. 87. In Lujan v. Defenders of Wildlife, 112 Sup. Ct. 2130 (1992), the Court voided a citizen suit under the Endangered Species Act, holding that Congress' power to define standing by statute is limited by Article III of the Constitution. The decision implied that citizen suit provisions must be carefully articulated and supported by clear legislative goals.

Mr. LAUTENBERG. Mr. President, I am going to vote against the motion to table the Johnston amendment.

Mr. President, in my view, courts should not be allowed to enforce the balanced budget amendment by raising taxes, cutting benefits, or otherwise involving themselves in Federal budgetary policy. We live in a democracy. And the power to tax and spend should be granted only to those who are accountable to the public.

Our Nation was founded on the principle of no taxation without representation. It is not time to turn back now.

Unfortunately, Mr. President, unless amended, the balanced budget amendment to the Constitution that is before us today threatens to give the courts unlimited power to raise taxes and cut

[1] Footnotes at end of article.

spending when necessary to ensure a balanced budget. The Johnston amendment would ensure that this power could be exercised only if explicitly authorized by the Congress.

Frankly, Mr. President, I do not even think that Congress should be allowed to give courts the power to increase taxes as a means of enforcing this constitutional amendment. Decisions about taxing and spending should be made by elected officials, and those officials should not be allowed to avoid accountability for those decisions by delegating that power to the judiciary.

So, Mr. President, I seriously considered voting to table the Johnston amendment because it does not go far enough to limit judicial power, and I suspect that some of my colleagues will vote to table the Johnston amendment on that basis. However, I have decided to vote against the motion to table since, although the Johnston amendment does not go far enough, it at least would put some limits on the judiciary's taxing and spending powers under the proposed constitutional amendment.

Mr. JOHNSTON. Mr. President, I believe I am prepared to summarize in 1 minute and I will yield back the balance. Mr. President, I yield myself 1 minute.

Mr. President, this amendment as worked out with the distinguished Senator from Washington [Mr. GORTON] and the distinguished Senator from Colorado [Mr. BROWN] deprives the courts of judicial power to raise taxes, to cut budgets, to be involved in fiscal affairs of this Congress except to the extent that the Congress specifically authorizes that in authorizing legislation.

It is the duty of Congress to implement and enforce this article by authorizing legislation. Section 6 so states, and there is also an exemption made for section 2. That is, the judicial power of the courts can extend to the enforcement of section 2 which in return requires 60 votes to raise the debt of the United States.

Mr. President, this is exactly what the sponsors of this constitutional amendment have said the amendment does. They have stated that the courts may not enforce this amendment. This makes it clear that the courts may not enforce the amendment except in the case of section 2 or unless the Congress specifically authorizes them to do so.

Mr. President, it is unthinkable to have the kind of ambiguity in the Constitution of the United States that is inherent in this amendment unless the Johnston amendment is agreed to.

I urge my colleagues to adopt this amendment.

I believe we are ready to yield back the balance of our time.

Mr. HATCH. Mr. President, I am prepared to yield back the balance of my time.

The PRESIDING OFFICER. All time has expired.

Mr. DOLE. Mr. President, I move to table the Johnston amendment, and I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on agreeing to the motion to lay on the table the amendment (No. 272), as modified, of the Senator from Louisiana.

The clerk will call the roll.

The bill clerk called the roll.

Mr. LOTT. I announce that the Senator from Kansas [Mrs. KASSEBAUM] is necessarily absent.

The PRESIDING OFFICER (Mr. THOMPSON). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 52, nays 47, as follows:

[Rollcall Vote No. 71 Leg.]

YEAS—52

Abraham	Grams	Murkowski
Ashcroft	Grassley	Nickles
Bennett	Gregg	Packwood
Burns	Harkin	Pressler
Campbell	Hatch	Reid
Chafee	Hatfield	Robb
Coats	Heflin	Santorum
Cochran	Helms	Shelby
Cohen	Inhofe	Simon
Coverdell	Kempthorne	Simpson
Craig	Kohl	Smith
D'Amato	Kyl	Snowe
Dole	Lott	Thomas
Domenici	Lugar	Thompson
Faircloth	Mack	Thurmond
Frist	McCain	Warner
Graham	McConnell	
Gramm	Moseley-Braun	

NAYS—47

Akaka	Dorgan	Leahy
Baucus	Exon	Levin
Biden	Feingold	Lieberman
Bingaman	Feinstein	Mikulski
Bond	Ford	Moynihan
Boxer	Glenn	Murray
Bradley	Gorton	Nunn
Breaux	Hollings	Pell
Brown	Hutchison	Pryor
Bryan	Inouye	Rockefeller
Bumpers	Jeffords	Roth
Byrd	Johnston	Sarbanes
Conrad	Kennedy	Specter
Daschle	Kerrey	Stevens
DeWine	Kerry	Wellstone
Dodd	Lautenberg	

NOT VOTING—1

Kassebaum

So the motion to lay on the table the amendment (No. 272), as modified, was agreed to.

Mr. DOLE. Mr. President, I move to reconsider the vote.

Mr. HATCH. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. BUMPERS addressed the Chair.

The PRESIDING OFFICER. The Senator from Arkansas.

IWO JIMA

Mr. BUMPERS. Mr. President, could we have order?

Mr. President, I ask unanimous consent that I be allowed to proceed for 5 minutes to deliver a eulogy honoring those men who died and who were wounded and who participated in the battle of Iwo Jima, 50 years ago.

The PRESIDING OFFICER. Is there objection?

Mrs. BOXER. The Senate is not in order, Mr. President.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BUMPERS. Mr. President, 50 years ago, I was stationed at Marine Corps Air Station, Cherry Point, NC, while serving as a radio operator having achieved the rank of sergeant. That was on February 19, 1945. I listened with rapt attention, along with my fellow marines, to radio reports of a massive marine assault on an obscure Pacific island called Iwo Jima. Though at that time, I doubt whether any one of us could pinpoint that island on a map——

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senate will be in order.

The Senator may proceed.

Mr. BUMPERS. The name Iwo Jima would soon take its place along such hallowed names as Bunker Hill, Gettysburg, Belleau Wood, Normandy, and Tarawa Atoll. As a vast naval armada moved closer to the shores of Iwo Jima, the commanders who would soon send their young marines into battle prepared messages to be read shortly before H-hour on board all ships of the invasion fleet. Maj. Gen. Clifton B. Cates, commanding the 4th Marine Division, reminded his marines of their recent victory on Tinian in the Mariana Islands, where the division's ''perfectly executed amphibious operation'' resulted in the capture of the island in 9 days, ''with a minimum of casualties to our unit, and with heavy losses to the enemy.'' Similarly, Maj. Gen. Keller E. Rockey, commanding the 5th Marine Division, searched for the proper words to exhort his men. Unable to draw upon past glories, as his division would fight together as a unit for the first time on Iwo Jima, Rockey reminded his men that the ''time has now come for us to take our place in the battle line.'' Noting that ''the hopes and prayers of our people go with us,'' he assured his marines that ''we will not fail.'' The upcoming 36-day battle on Iwo Jima would fully justify the confidence which Generals Cates and Rockey placed in their marines.

One of the most visible and poignant memorials in this citycommemorates the flag raising on Mt. Suribachi, the Iwo Jima Memorial, 4 days after the landing, but the battle would rage for 32 more days.

Mrs. BOXER. Mr. President, the Senate is not in order.

The PRESIDING OFFICER. The Senate will be in order.

The Senator from Arkansas may proceed.

Mr. BUMPERS. The Iwo Jima Memorial is a fitting tribute to the 5,391 men killed, 17,370 men wounded, and the 60,000 men in that total force. But it is a tragedy that there cannot be a statue