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Senate Committee on the Judiciary
On S. J. Res. 6,
A Balanced Budget Constitutional Amendment

March 16, 2016

Senator Grassley, members of the Committee. Thank you for inviting me to appear before your Committee today to testify on this very important subject. As some of you may recall, I have been before this Committee or one of its Subcommittees on two prior occasions, and my testimony today is very much a repeat of what I said before. The reason for making the same points is that the very serious problem of whether this amendment would actually be able to produce a balanced budget, or whether it is little more than empty rhetoric, was present in both 1996 and 2011 when I testified, and it remains there today in S. J. Res. 6.

There are many problems with the concept of enshrining a balanced budget in the Constitution, but I want to speak about only one today: enforcement of the requirement in Section 1 that "Total outlays for any fiscal year shall not exceed total receipts for that fiscal year" unless the requirement is waived by two-thirds of each House. Other provisions of S. J. Res. 6 operate in a way to make them self-enforcing, but that is not true of Section 1. As discussed below, there is no reason to think that Congress or the President will actually produce spending and revenue laws that will result in a balanced budget, and if they fail, how will the mandate be enforced? If the answer is, turn the matter over to federal judges, as I show below, that will not create a balanced budget and is at least as likely to make it worse.

In my current position at George Washington University Law School, I teach both civil procedure and constitutional law this academic year. I have taught at various law schools, mainly on a part-time basis for over thirty years, but my principal work relevant to my testimony today occurred when I was at the Public Citizen Litigation Group, where I was involved in almost all of the major separation of powers cases that reached the Supreme Court from the early 1980s to 2000. It is that experience that is the primary basis of my testimony today.

Almost 20 years ago, when I first testified in the Senate on this subject, I made three points, all of which are true today: (1) it is up to Congress to include within any balanced budget amendment its decision on the role of judicial review, because this is not an area where leaving it for the courts to decide whether there shall be judicial review is an acceptable answer; (2) if the amendment does not expressly provide for judicial review, it is virtually certain that the Supreme Court will hold that no one has standing to sue for alleged violations of the amendment and that at least the remedial aspects of any challenge would involve a political question, making the case unreviewable for that reason also. If that is the result, the amendment, which is being sold as an elixir for all our budgetary ills, will be virtually toothless. (3) Finally, if the amendment did expressly provide for judicial review, the courts are a wholly inappropriate entity to resolve the kind of questions that must be faced, and remedies ordered, in order to create a balanced budget for a given fiscal year. I will discuss each point in turn.

1. Don't Leave Judicial Review to the Courts.

Assuming that some version of a balanced budget constitutional amendment became law, it is inevitable that there will be claims that the laws enacted by Congress

produce a budget that violates the Constitution. Either those claims would be subject to judicial review, or they would be "resolved" by the same political process that produced those laws that created the unbalanced budget. Because this is an amendment to the Constitution, Congress could explicitly provide, as does Senator Mike Lee (R. Utah) in S. J. Res. 5, section 6, that "Any Member of Congress shall have standing and a cause of action to seek judicial enforcement of this article, when authorized to do so by a petition signed by one third of the Members of either House of Congress." I applaud Senator Lee for his willingness to make a clear choice on the issue of judicial review, which is not provided for in S. J. Res 6. Arguably, S. J. Res. 6 contemplates some judicial review because Section 8 provides that "No court of the United States or of any State shall order any increase in revenue to enforce this article." Similarly, while S. J. Res. 18 does not include a specific provision on judicial review, Section 7 implicitly recognizes that there will be judicial review when it provides that "No court of the United States or of any State shall enforce this article by ordering any reduction in the Social Security or Medicare benefits authorized by law, including any benefits provided from the Federal Old-Age and Survivors Insurance Trust Fund, the Federal Disability Insurance Trust Fund, or any fund that is a successor to either such fund," with certain exceptions.

Just as "War is too important to be left to the generals," the issue of whether there should be judicial review of claims that a violation of the balanced budget constitutional amendment has occurred is too important to be left to the courts. As I explain below, thrusting the courts into budget battles is to me, and I believe to most others who have given the matter any serious thought, a terrible idea. At the very least, it is very strong medicine. But if that is what the sponsors think is needed, they should have the courage

to say so. On the other hand, if the cure of judicial control of the federal budget is seen as worse than the ills of an unbalanced budget, Congress should make that clear in the amendment itself. If that option is taken, then the amendment will probably end up being little more than empty rhetoric, to be followed when it is convenient, and ignored when it is not. Meanwhile, serious efforts to bring our spending more in line with our revenues will be put on the back burner while Congress relies on the hope that the balanced budget amendment will do its job.

The choice between these two alternatives is important not primarily for the courts that will be asked to decide claims of unbalanced budgets, but for Members of Congress who are being asked to vote on the amendment and, if it achieves two-thirds in both Houses, the States that will be asked to ratify it. Judicial review or no judicial review is not a peripheral matter, but one for which every responsible Member of both Houses should insist on knowing the answer before voting on the amendment. The gulf between courts running the federal budget on the one hand, and a balanced budget constitutional amendment with no teeth on the other, is not a mere detail that can be worked out later, but goes to the essence of whether to support such an amendment.

Some have suggested that the President will enforce the amendment if the courts do not. That hope seems ill-advised for several reasons. First, one of the major congressional criticisms of President Obama (and of some of his predecessors) is that Presidents have exercised *too much power*, but allowing the President to fix an unbalanced budget would represent a major give-away of authority by Congress. Such a give-away would be unwise because all Presidents have their favorite programs and are unlikely to cut-back on them, choosing instead different programs that others support.

Second, the Supreme Court held unconstitutional the Line-Item Veto Act in which Congress expressly authorized the President not to spend certain items in future laws enacted by Congress. *Clinton v. City of New York,* 524 U.S. 417 (1998). That significantly narrows the possibilities by which a President might be constitutionally able to effect reductions in spending that might be needed to balance a budget. Under that ruling, the President may make such reductions only in laws in which Congress gives the President that power in the spending bills themselves. It might be possible to authorize the President to make spending cuts on his own if the amendment itself expressly granted him that power, but no bill that I have seen does that. Third, there is no reason to believe that Congress, no matter which party is in control of both Houses and the Presidency, will turn over the political job of balancing the budget to the President alone. It is equally hard to imagine Congress even agreeing on the areas and general parameters in which the President can refuse to spend appropriated funds, when Congress cannot agree on how to actually balance the budget. Finally, while it is possible that Congress could constitutionally delegate to the President the power to *increase* some taxes within some limits in some circumstances, it is almost impossible to believe that Congress would actually give the President that power, let alone give him sufficient authority to cure a serious budget deficit through increasing taxes. Indeed, as noted above, Section 8 of S. J. Res. 6 forbids courts from ordering "an increase in revenue" to balance the budget, hardly a sign that Congress is ready to give the President that authority.

2. Silence Will Mean No Judicial Review.

To be sure, if a balanced budget amendment specifically stated that taxpayers or Members of Congress may sue to enforce it, the courts would follow that direction. But

without a clear direction, in my opinion no one would be able to sue to stop a violation if the amendment becomes law- no matter how egregious or intentional it is. Article III of the Constitution limits federal courts to deciding what are denominated as "cases or controversies," which requires much more than that the plaintiff has sued the defendant over a disagreement about whether the defendant is acting in a manner permitted by the Constitution. Embedded in that phrase are the doctrines known as standing, ripeness, mootness, and political question to mention the four that bear on possible judicial review of claims that a budget enacted by Congress violates the balanced budget amendment. For purposes of the discussion in this section and the final one, I will assume for simplicity purposes (and counter to all known experiences with how Congress has enacted recent budgets) that Congress (a) enacts laws covering all expenses and revenues for the forthcoming fiscal year, (b) passes them all before that year begins, and (c) makes no changes as the fiscal year proceeds. Should Congress act as it has in recent years and pass multiple continuing resolutions, not enact all the laws necessary to constitute the federal budget until six months or more into the fiscal year, and enact many significant supplemental appropriations, judicial review would even more difficult to conduct, let alone to provide meaningful relief if a violation were found.

The first and most difficult hurdle to surmount is lack of standing, a situation that has become much worse since I first appeared before the full Committee. The principal problem is caused by the Supreme Court decision in *Raines v. Byrd*, 521 U.S. 811 (1997), in which the Court held unconstitutional a provision contained in the Line-Item Veto Act that gave Members of Congress standing to challenge the constitutionality of the Line-Item Veto. The clear message of that opinion is that the Court believes that Members of

Congress have no business asking the federal courts to overturn laws with which they disagree, even when their claim is that the law being challenged violates the Constitution, including rights given to Members under the Constitution. As Senator Lee recognizes, if Congress wants Members to have standing, it must say so in the amendment itself.

Nor are taxpayers able to obtain standing, unless the amendment specifically authorizes them to do so. The Court has always been very clear that the federal courts generally may not entertain suits by taxpayers alleging that particular spending violates the Constitution. *Frothingham v. Mellon,* 262 U.S. 447 (1923). In 1968 in *Flast v. Cohen,* 392 U.S. 83, the Court created an exception for taxpayer standing for laws authorizing spending alleged to be in violation of the Establishment Clause. But in recent years it has made clear that the exception applies only to Establishment Clause cases, *DaimlerChrysler Corp v. Cuno,* 547 U.S. 332 (2006) (rejecting taxpayer standing under Commerce Clause), and it has narrowed the circumstances in which even that kind of challenge may be made by taxpayers. *Arizona Christian School Tuition Organization v. Winn,* 563 U.S. 125 (2011); *Hein v. Freedom from Religion Foundation, Inc.,* 551 U.S. 587 (2007).

Standing is only the first hurdle that must be surmounted. The Court must also find that the challenge is ripe, which means in this context that the Court is sufficiently certain that an alleged violation will occur that it should step in to determine the legality of the conduct at issue. *Ohio Forestry Association, Inc. v. Sierra Club,* 523 U.S. 726 (1998); *National Park Hospitality Association v. Department of Interior,* 538 U.S. 803, 811 (2003) (raising ripeness *sua sponte*). The federal courts will (rightly) be extremely reluctant to wade into these budget battles and thus will want to be sure that there is

likely to be a violation before agreeing to decide the merits. But budgets are inherently uncertain in their impact, depending on such factors as whether revenue targets are met, whether the demand for entitlements is higher or lower than anticipated, whether discretionary spending is fully realized, and whether an existing war winds down or a new one starts, each with great uncertainties accompanying them. Thus, it will be far from clear on October 1st of a given fiscal year whether a duly enacted budget will or will not be in balance, assuming that the question is reasonably close, as it is likely to be in at least some years. Unless Congress makes it clear, either in the amendment or perhaps by subsequent legislation, that the courts should resolve all doubts in favor of finding claims ripe, the courts are likely to be very reluctant to consider the merits even for claims by persons who are expressly given standing in the amendment.

Third, there is the political question doctrine and its admonition for courts not to become involved in cases in which there are no manageable standards for judges to apply. *Baker v. Carr*, 369 U.S. 186 (1962). The main problem for the courts will be at the remedy stage: what programs may they cut and by how much, assuming that they cannot order tax increases to close the gap? If there was ever a question for which the courts were ill-suited, it is surely this one. Therefore, unless the amendment surmounts this problem as well, the Supreme Court will almost certainly declare this area out of bounds for the federal courts. *See also Nixon v. United States*, 506 U.S. 224 (1993)(question of whether procedures used by Senate to impeach federal judge constitutes a "trial" within Article I, section 3, clause 6 of the Constitution held to be political question).

Finally, there is likely to be a serious problem of mootness under cases such as *Burke v. Barnes*, 479 U.S. 361 (1987). What can or should the courts do if they find a violation, but the fiscal year is over, and the money has all been spent? Can they order the recipients (of salaries, social security benefits, Medicare payments, payments under Government contracts etc) to "pay back" the excess? Or can they order Congress to rectify the balance in the next year's budget, which would almost certainly trigger a new lawsuit? To be sure, the courts will not dismiss as moot claims that are capable of repetition, yet evade review because the duration of the violation is so limited that the courts can not decide its legality before it has ceased. *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (abortion case brought by doctor). While a court may be willing to say that there are likely to be budget deficits in the future, the current doctrine requires that the future problems must involve the same parties and that the legal issues be the same or very similar to those at issue in the present case, *Weinstein v. Bradford*, 423 U.S. 147 (1975). That will be very difficult to satisfy in the context of an ever-shifting set of budget debates and a different set of facts relating to the budget each year. Again, if the amendment directs the federal courts not to be troubled by mootness issues, they will find a way to create some kind of remedy. But unless there is a clear direction to disregard problems of mootness, the courts are likely to dismiss the challenges on this ground once the fiscal year has concluded, or perhaps once it becomes clear that there is no longer any viable remedy for the violation that the court has found.

3. Litigation May Be Worse Than No Judicial Review.

As the foregoing discussion makes clear, there are a series of basic problems surrounding the use of the courts to remedy violations of a balanced budget amendment.

Assuming that they can be surmounted, the actual litigation over whether there has been a violation, and what to do about it, are also fraught with difficulties that should give great pause to any Member who cares about maintaining the limited role of the federal courts, which will ultimately mean the Supreme Court. Let me explore just a few to give the Committee the flavor of what is likely to transpire.

First, there are the very substantial issues of uncertainties in almost every part of the budget. Budgets are built on assumptions which may turn out to be too high, too low, or about right. It is often unclear what those assumptions are, beyond the fact that the Congressional Budget Office has "scored" them, and that score is used to provide the numbers for the budget. It is possible that Congress will enact a budget that, on its face, is in violation of the amendment, but it is more likely that Congress will purport to balance the budget, but use very favorable assumptions or even wishful thinking. Suppose Congress, through the CBO or otherwise through its committees, estimates that corporate income taxes will produce $200 billion in revenue, and the challengers dispute that number. Will they get discovery of CBO and the committees to see what assumptions they made and whether their numbers add up? Will that mean examining their work papers and/or taking depositions of those in charge of the estimates, including both staff and Members? Presumably the challengers will have experts of their own, and they will have to produce reports and then be deposed. Meanwhile, the U.S. economy will not be standing still and doing exactly what Congress predicted. Presumably that reality – whichever way it affects corporate tax receipts – will have to be factored into the process, and probably more than once. The court will then be faced with the question of

whether it is constitutional to pass a budget that is in balance as enacted (assuming good faith estimates), but becomes unbalanced afterwards – and vice versa.

Of course, corporate tax receipts are only one item in the budget, and so there are likely to be multiple challenges to the many different items from the many different agencies whose expenses and income comprise the entire budget. Thus, the questions raised in the prior paragraph have the potential for being repeated scores of times for all of the major agencies of the Federal Government, and all at the same time and perhaps in multiple forums.

That gets to the next major problem: time and timing. Unlike some constitutional challenges, such as those testing the Affordable Care Act, in which the issues were purely legal and no discovery was required, these cases would be very fact dependent, requiring both discovery and in all likelihood a trial, presumably before a judge not a jury. In reality, it will be much more like a greatly expanded version of the challenge to the Bipartisan Campaign Act of 2002, which produced a massive record on issues that were ultimately legal and not factual in nature. *McConnell v. FEC,* 540 U.S. 93 (2003). Assuming that a challenge was filed shortly after the fiscal year began (itself a quite optimistic assumption since the plaintiffs would have to figure out which parts of the budget were most likely to be challengeable), and assuming that there were no legal motions made by the Government that would slow things down (another highly dubious assumption), massive discovery, with its own set of disputes and motions, would ensue, and have to be resolved for each separate area of dispute. This would mean that Government attorneys and budget experts to back them up would have to be assigned almost full-time on the case, if it were to be decided in time to provide meaningful relief.

That would also mean that one judge would be doing little else besides this case (unless the case was assigned to a three judge court – to avoid an appeal to the court of appeals – in which event three judges would be doing that). Then would come the trial, after which the parties would have to file briefs keyed to the trial record, and the judge or judges would have to reach a decision, explaining whether they found a violation or not and on what basis. And, of course, there would be an appeal by whichever side lost, ultimately ending up in the Supreme Court, which would be expected to sort out this ever-changing controversy – all before the end of the fiscal year on September 30th – only to be repeated again the next year.

And I have not even mentioned the difficulty of finding an appropriate remedy, assuming the decision came early enough in the fiscal year to give the court some options – another highly dubious assumption, but one that is essential for there to be meaningful judicial review. For example, would the remedy have to relate to the violation? Thus, suppose that the corporate tax receipts were found by the court to be only $150 billion instead of $200 billion; must the remedy be directed at corporate taxes so that they would have to be raised by the shortfall to balance the budget? Sticking only to corporate taxes, there are many ways to make up $50 billion – would the judge get to decide how to do it or would there be some formula? Several of the resolutions would forbid raising taxes as a remedy for a violation, but the Democrats are not likely to agree to such a limitation, and it is hard to see how Congress will get the two-thirds votes in both Houses with no (or virtually no) Democrats supporting it, let alone find 38 States that will ratify that version of the amendment.

Moving away from the tax area, suppose that the Defense Department's actual expenses were found to be likely to be $250 billion larger than anticipated. That budget is comprised of many sub-budgets, at least one for each service. How would the short-fall be allocated among the Armed Services or between materials and personnel within each? Or could the cuts be taken from EPA or the Department of Justice, even if the estimates for those agencies were not challenged or were found to be accurate? And if so, how would the judges decide which areas to cut and in which amounts or proportions? This does not even take into account the fact that by the time that a court has decided that a violation has occurred, and in what amount, and for what categories of expenses or revenues, most of the money that might be cut will have already been spent. It would be bad enough for any agency to lose 10% of its annual budget spread out over 12 months, but the more likely scenario is that the agencies would have to absorb that 10 percent cut in a period of three months or less, which would mean that their spending for that time period would be reduced by about 50%.

I could go on, but I hope you have seen my point already. As someone who has brought many constitutional challenges in federal court, and defended others, the idea of litigating the issue of whether the budget passed by Congress for a given fiscal year is in balance, as required by a balanced budget constitutional amendment, is almost unthinkable. Do you really want to turn over the job of assuring that our financial house is in order to federal judges who have no expertise in budget matters and no mandate to pick and choose among areas of the budget for massive cuts or perhaps tax increases? If Congress is serous about balancing the budget, a constitutional amendment is the wrong way to do it, and enacting such an amendment will impede the hard work required to

bring our deficits under control. In 1997 the Senate came within one vote of sending a balanced budget amendment to the States, but that failure did not prevent Congress from balancing the budget in subsequent years the old-fashioned way: by imposing sufficient taxes to cover controlled spending, without using gimmicks like a constitutional amendment, enforced by the federal courts, to do so. The Balanced Budget Amendment was a bad idea in 1997, and it remains one today. The Senate should vote it down and get back to the real work of controlling our deficits.

Thank you and I stand ready to respond to your questions or supply any additional information that you may request.