Testimony before the U.S. Senate Judiciary Committee

Hearing on "Preventing America's Looming Fiscal Crisis: the Need for a Balanced Budget Amendment to the Constitution"

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Chairman Grassley, Ranking Member Leahy, and distinguished members of the Committee, thank you for this opportunity to discuss the possibility of adding a Balanced Budget Amendment ("BBA") to the Constitution with an eye to preventing a fiscal crisis in America.

As you know, numerous BBAs have been proposed in recent years, with varying degrees of support in Congress and in the states. I will compare some of the more recent proposals momentarily, but first I would like to address some general concerns that have been raised about BBAs in the past, many of which will likely come up at today's hearing.

I. Enforcement and Hard Choices

Perhaps the greatest concern about BBAs from a constitutional-design perspective is enforcement, whether through judicial review or otherwise. Here the experience of the states is instructive. Nearly all the states have constitutional balanced-budget requirements, debt limits, or both. While the political high ground set by these constitutional requirements has arguably led the states to keep their fiscal houses in better order than the federal government has managed, the reality is that compliance has been partial and unreliable. For example, the backbone of most state constitutional balanced-budget or debt-limit requirements consists of a fiscal-year limit based on revenue and spending estimates. Like any economic forecast by a governmental body, those estimates are subject to substantial error and political manipulation. When this happens, bad forecasts enable the adoption or continuation of fiscal policies that are not in reality likely to generate a balanced budget—other than perhaps on paper through accounting gimmicks.

The fairly routine discovery of the inaccuracy of state budget projections in turn creates significant political and legal pressure to find ways to evade constitutional balanced-budget or debt-limit requirements. Such pressure is often accommodated by members of the state judiciary in rulings that interpret key terms used in the relevant provisions—such as the definition of debt itself—in novel ways that allows state budgets to bypass constitutional limits, such as (1) the short-term nonpayment of obligations; (2) the issuance of special-fund debt; (3) so-called moral-obligation no-recourse bonding (which still has an implicit guarantee); and (4) the incurrence of liabilities. Over the years, these judicial twistifications have enabled state governments or their special funds, instrumentalities, and political subdivisions to engage in as much borrowing as the political and financial market will bear through (1) delaying payment of obligations into the next fiscal year through budget "rollovers"; (2) the sale of state assets through sale-leaseback schemes; (3) the "floating" of warrants or outright issuance of IOUs; (4) the diversion of receipts meant for pension or other programs involving incurred liabilities or quasi-trust fund obligations; and (5) the creation of special purpose instrumentalities to handle borrowing for what would otherwise be debt-limited general fund expenditures.

There is every reason to believe the federal government itself would face similar compliance problems should it adopt a constitutional balanced-budget or debt-limit requirement that did not compensate for these evasion tactics. In fact, the federal government's constitutional power to coin money and its close relationship to the fiat-money Federal Reserve banking system creates an additional evasion risk, one foretold by reports of Obama Administration officials having floated the minting of a trillion-dollar platinum coin to repay the federal debt. Unlike in the states, it would be possible for the federal government to simply coin or print the money it needs to balance the budget, or engage in other monetary policy manipulations with similar effect. A well-designed federal BBA or debt-limit requirement must counteract this possibility.

Indeed, these evasion tactics underscore that a constitutional amendment requiring the national government to establish a balanced budget does not easily call to mind an enforcement mechanism. Unlike some other constitutional amendments, such as the Fourteenth, it would not necessarily help enforcement for a BBA to include a provision giving Congress or the president authority to enforce the amendment—given that Congress and the president are the ones who would be tempted to violate it. Nevertheless, there are examples of constitutional provisions that are enforced by Congress and the president against themselves. For example, the Emoluments Clause, which opinions of Attorneys General and Comptrollers General have interpreted and enforced and under which Congress has exercised its consent power by enacting the Foreign Gifts and Decorations Act. I discuss self-enforcing constitutional provisions below, but suffice it to say that the judiciary need not be involved for a constitutional amendment to be effective.

A further concern that has been expressed is that a BBA would dictate fiscal policy by requiring Congress or the president to choose among various federal programs to cut. Perhaps the more persuasive concern is that the president may impound funds to keep Congress in line with the amendment's requirements. The question in that situation would be which funds to impound and whether any programs would be beyond the president's impoundment authority, be that authority implied or explicit. But these concerns are no different from those that every American family faces each month. A BBA would not dictate fiscal policy. It would merely require the legislative and executive branches to acknowledge what is already reality: that the United States does not have an unlimited supply of funds for federal programs. A BBA would very much require the government to decide which programs are the most important and which ones should be let go in order to keep a balanced budget, but that is its very purpose. In other words, forcing hard choices is a feature, not a bug.

II. Evaluating Proposed BBAs

Turning to the proposed BBAs, it's important first to emphasize that *any* constitutional balanced-budget requirement would set a political high ground that favors more prudent fiscal policy because it would signal that the government shouldn't behave as if its resources are unlimited. As we have seen in the states, such political anchoring can have a healthy effect on fiscal policy even where the underlying constitutional provision is susceptible to significant evasion. Accordingly, all the current BBA proposals would likely be net public-policy positives compared to the status quo. I've always taken an "all of the above" position in that regard, even though of course political resources are as limited as economic ones, so legislators and citizens need to weigh each proposal's advantages before deciding how to allocate their finite political capital. Moreover, it's important to see if we can improve on state designs so that the federal BBA indeed has more teeth and serves more than simply to create a better political culture.

From that perspective, I would like first to discuss Senator Hatch's BBA, then various other legislative offerings. Senator Hatch's very good proposal[1] is similar to Senator Udall's 2011 proposed BBA,[2] which had the support of 20 Democrats and one Republican two Congresses ago. One of the advantages of Senator Hatch's proposal is thus that it has this familiar language and inertia. The correlative disadvantage, however, is that this BBA was essentially tried previously and rejected. Another drawback is that Senator Hatch's version also includes an 18%-of-GDP cap on spending, which is based on maintaining a consistent definition and measurement of GDP for reliable enforcement. The problem is that we have seen many definitional changes to GDP in recent years, and there is good reason to believe that the political pressure to manipulate the definition of GDP will increase if it is the foundation of a spending limit. Also, the accurate measurement of GDP requires an inflation-adjusted measurement, which, of course, depends on inflation measurement, which we have also been subject to definitional manipulation over the years.

Other concerns with Senator Hatch's proposal include that the budget-balancing is based on each individual fiscal year, making it less stable than multiyear proposals. Further, the amendment's provision for the president's sending a proposed budget to Congress would risk giving the president more authority beyond his veto power when the Constitution gives Congress primacy in budgeting; there is no need to do so, because the president's budget-proposal power can be limited by statute, as it currently is under Title 31 of the U.S. Code. Further, the war-and-military-conflict exceptions open the amendment to abuse by unnecessarily creating perverse incentives insofar as the very body the amendment seeks to constrain must be trusted to refrain from invoking these exceptions. Our experience with state constitutional BBAs and debt limits indicates that the reliance on estimates also creates a potential for abuse and evasion. Indeed, it appears that the amendment is not designed to deter the possibility of the minting and deposit of that trillion-dollar coin, nor the less-exotic evasion tactics used to circumvent state BBAs.

There are also some language issues in the Hatch proposal. The term "fiscal year" itself is a statutory construction not currently in the Constitution. The constitutionally undefined word "outlays" should be replaced with "expenditures" for consistency with the rest of the Constitution, or a definition should be supplied. "Repayment of debt principal" in Section 9 should be replaced with "payment of debt" because debts are paid, not repaid, and paying debt is already limited to the principal. In short, Senator Hatch's proposed BBA isn't perfect but, as I said before, it represents a significant improvement over the status quo. If the choice is *this* BBA or nothing—or if addressing my concerns would entail a loss of political support—I have no reservations whatsoever in choosing this BBA.

Turning now to the other BBAs that have been proposed, I'll next address Senator Lee's proposal,[3] which has some of the same issues as Senator Hatch's, including the use of the constitutionally undefined words "outlays" and "repayment of debt principal," the 18% of GDP rule, and reliance upon fiscal estimates. Additionally, Senator Lee's proposal suffers from the problem that it bases its overriding majorities on the whole number of House members, which could cause problems in a true emergency. I should note that Senator Lee's Section 6—authorizing and restricting judicial enforcement—is probably an improvement on Senator Hatch's, though such a judicial-review provision could also be added through legislation, provided that the BBA specifies that Congress has enforcement power.

[1] S.J. Res. 6, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/senate-joint-resolution/6/text.
[2] S.J. Res. 24, 112th Cong. (2011), https://www.congress.gov/bill/112th-congress/senate-joint-resolution/24/text.
[3] S.J. Res. 2, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/senate-joint-resolution/2/text.

Senator Shelby's proposal[4] has some of these same issues, but also I'm skeptical of whether near-immediate implementation is realistic or even desirable.

Senator Donnelly's proposal[5] has some of these same issues as well, although it does not include the GDP-based cap that the others do. Also, Section 4's suspension rules for recessions and periods of high unemployment are problematic because of the difficulties in, and various means of, measuring GDP and defining "unemployment." And Section 6's exemption of Social Security and Medicare Part A from enforcement mechanisms belongs in statute rather than the Constitution—insofar as they risk constitutionalizing a statutory regime, which would likely be hard to justify when considering other meritorious statutory programs. Likewise, Section 7's list of statutory programs does not belong in the Constitution.

Switching to proposals coming from the House, Rep. Brat's proposal[6] is the BBA most consistent with the language of the Constitution. It expresses general principles rather than mechanisms for the three basic elements of BBAs: the balance rule, the emergency valve, and the implementation legislation or transition. The concision of this proposal carries with it the benefit of leaving maximum flexibility to Congress to determine how to implement the balanced budget, and Congress has 10 years to do so. Nevertheless, those qualities that make the proposal bipartisan and uncontroversial also fail to furnish adequate incentives for implementation.

Rep. Amash's proposal[7] is similarly concise. It is unique in that it balances the budget over the business cycle by limiting spending to the average revenue of the previous three years, adjusted for inflation and population. Like other BBAs, it provides for an emergency override with a two-thirds majority of Congress. It has a 10-year implementation period with specific benchmarks each year. This proposal is more specific than the Constitution generally is, but it does still leave room for flexibility while providing structure. Still, the reliance upon measures that are subject to definitional manipulation and the lack of built-in incentives for compliance suggest that the proposal could be better designed.

III. Compact for a Balanced Budget

Finally, I'd like to bring to the Committee's attention House Concurrent Resolution 26,[8] which resolves to refer the Compact for America ("CFA") BBA proposal[9] to state legislatures for ratification if it is proposed by the convention for proposing amendments organized by the Compact for a Balanced Budget under Article V of the U.S. Constitution.[10] (Full disclosure: I'm a member of the CFA's council of scholars.) The BBA advanced by H. Con. Res. 26 is more in line with the Senate proposals, with their greater detail than those in the House. Like Senator Hatch's proposal, it includes a constitutional debt limit and restrictions on raising taxes. But the proposal is unique in two respects. First, as a concurrent resolution, the passage of H. Con. Res. 26 only requires simple majorities, rather than the two-thirds passage threshold faced by direct

[4] S.J. Res. 9, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/senate-joint-resolution/9/text.
[5] S.J. Res. 18, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/senate-joint-resolution/18/text.
[6] H.J. Res. 55, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-joint-resolution/55/text.
[7] H.J. Res. 54, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-joint-resolution/54/text.
[8] H.R. Con. Res. 26, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-concurrent-resolution/26/text.
[9] *The Balanced Budget Amendment*, Compact for America, http://media.wix.com/ugd/e48202_0468889115a94eeda2b0a9104f8989e6.pdf (last visited Mar. 14, 2016).
[10] *The Legislation Package*, Compact for America, http://media.wix.com/ugd/e48202_80700b495b9e4327a98d15d32d139d50.pdf (last visited Mar. 14, 2016).

congressional amendment proposals. Second, it would deter the evasions that threaten the foregoing amendment proposals, and would create a series of internal incentives that minimize the need for judicial enforcement by codifying a five-point plan for fixing the national debt.[11]

First, the CFA BBA would ensure the federal government cannot spend more than tax revenue brought in at any point in time, with the sole exception of borrowing under a fixed-debt limit. "Total outlays" is expressly defined as "total expenditures."

Second, the CFA proposal imposes a limit on the amount of federal debt. Section 2 of the proposed amendment states, "Outstanding debt shall not exceed authorized debt, which initially shall be an amount equal to 105 percent of the outstanding debt on the effective date of this article." In other words, if there were $20 trillion of outstanding debt at the time of ratification, the federal government's line of credit will be fixed initially at $21 trillion. The additional $1 trillion cushion would provide approximately 18 to 24 months of borrowing capacity based on current annual deficit rates ($500 to $650 billion per year). This cushion would give Congress a transition period during which to develop a proposal to address the national debt crisis.

Third, by compelling spending impoundments when 98 percent of the debt limit is reached, the CFA BBA would ensure that Washington is forced to reduce spending long before borrowing reaches its debt limit, preventing any default on obligations. Here's how this part, Section 4, would work: Assuming the constitutional debt limit were $21 trillion, this provision would be triggered when borrowing reached $20.58 trillion. At current yearly deficits, the president would be required to start designating spending delays approximately seven to ten months before reaching the constitutional debt limit. This provision would start a serious fiscal discussion with plenty of time in which to develop a plan to fix the national debt.

It is important to underscore that the foregoing provision does not increase presidential power; it *regulates* presidential power by requiring the president to use his or her existing impoundment power when borrowing reaches 98 percent of a constitutional debt limit—as opposed to waiting until the midnight hour. It also checks and balances the president's ability to abuse the impoundment power by empowering simple majorities of Congress to override impoundments within 30 days without having to repeal the underlying appropriations, which is currently the only way Congress can respond to abusive presidential impoundments. With this proposed amendment in place, it would be easy to know who is responsible for any impoundment that is enforced. And if neither the president nor Congress acts, spending will be limited to tax receipts as soon as the debt limit is reached—in effect resulting in an across-the-board sequester. The threat of a massive, automatic sequester resulting from inaction would give the president a strong incentive to designate and enforce the required impoundments.

Fourth, if new revenue streams are needed to avoid borrowing beyond the debt limit, the amendment would ensure that all possible spending cuts are considered first. It does this by requiring abusive tax measures—new or increased sales or income taxes—to secure supermajority approval from each house of Congress. It reserves the current simple majority rule for new or increased taxes only for completely replacing the income tax with a non-VAT sales tax ("fair tax" reform), repealing existing taxation loopholes ("flat tax" reform), and increasing tariffs, fines, or fees (the Constitution's original primary source of federal revenues). Any push for new revenue through these narrow channels would generate special-interest pushback, providing strong incentives for spending cuts before taxes are raised.

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[11] *See* Nick Dranias, *Introducing "Article V 2.0": The Compact for a Balanced Budget*, (Heartland Inst. Policy Study No. 134, 2014), https://www.heartland.org/sites/default/files/06-26-14_dranias_article_v_compact_complete.pdf.

Fifth, if borrowing past the debt limit proved truly necessary, the CFA BBA eliminates the conflict of interest involved in Congress having the power to increase its credit unilaterally. Instead, the amendment would give the states and people the power to impose oversight by requiring a majority of state legislatures to approve any increase in the federal debt limit within 60 days of a congressional proposal of a single-subject measure to that effect.

Using the time-tested idea of dividing power between the states and the federal government, and balancing ambition against ambition, requiring a referendum of the states on any increase in a fixed constitutional debt limit would minimize the abusive use of debt, compared to the status quo. It would become substantially more difficult to increase debt if both Congress and simple majorities of the states were necessary to do so. Two hurdles are better than one. The fact that states rely on federal funding does not mean debt spending would increase relative to the status quo, because states are far less dependent on federal *borrowing* than the federal government itself is. Moreover, any *quid pro quo* trade of debt approval for appropriations would prevent any increase in the debt limit from having legal effect and would render void any debt thereby incurred.

By requiring a nationwide debate in 50 state capitols over any increase in the constitutional debt limit it establishes, the proposed amendment would shine more light on national debt policy and give the American people a greater chance to stop needless increases in the debt limit. And by requiring state approval within 60 days, the proposed amendment establishes a strong default position disfavoring any increase in the federal debt limit.

Note that the proposed amendment doesn't include any emergency spending or borrowing loopholes because of the flexibility provided by this state referendum process. Once the Compact's BBA is in place, all Congress would need to do is pay down its debt during good times—and then it would enjoy a huge line of credit that could cover any war or emergency. If additional borrowing beyond the initial debt limit were somehow truly necessary, there would be plenty of time for Congress to ask the states to approve a debt-limit increase. Current tax cash flow is adequate to allow for dramatic increases in discrete spending priorities; by redirecting available funds, Congress could increase military expenditures without additional borrowing.

Finally, this strict cash-flow-based "pay-as-you-go" spending limit coupled to a strict full-faith-and-credit debt limit cannot be circumvented by inaccurate budget projections or delays in payments of amounts due ("rollovers"). Likewise, moral obligation or non-recourse borrowing could not supply additional funds for spending beyond the constitutional limit because the definition of "debt" in Section 6 of the proposed amendment limits approved borrowing to proceeds from full-faith-and-credit obligations. And the definition of "total receipts" to which "total expenditures" are limited excludes "proceeds from [the federal government's] issuance or incurrence of debt or any type of liability." This ensures that the pay-as-you-go expenditure limit can't be increased by raiding trust funds, engaging in sale-leaseback schemes, or even direct-depositing trillion-dollar coins. The expenditure limit would be forever fixed based on available cash from taxes (or the equivalent) and approved borrowing. The proceeds from evasive tactics would not count as receipts affecting the expenditure limits, thus frustrating such gamesmanship.

Four states (Alaska, Georgia, Mississippi, and North Dakota) have already agreed to ratify the CFA's BBA proposal by joining the Compact for a Balanced Budget, and the passage of H. Con. Res. 26 would ensure that the proposal is the sole focus of a 24-hour Article V convention if this compact is joined by another 34 states. It provides a viable alternative amendment proposal to consider among those already introduced in Congress.

IV. Whither Judicial Review?

Finally, despite the variety of drafting issues inherent in developing and passing a BBA, I must underscore that concerns about judicial review need not be a barrier to such an amendment. There are many working provisions in the Constitution that don't involve judicial review.

As an initial matter, Americans generally have a great deal of respect for the rule of law. People may disagree with some Supreme Court decisions, but they argue for exceptions or constitutional amendments or a court decision overruling the disfavored one—not for a complete flouting of the law. The same is true of elected and appointed officials. While I defer to nobody in criticizing Congress and the president for acting in ways that exceed their lawful authority, it's hard to argue that these institutions *purposely* act in an unconstitutional manner. (It's another matter that some members of Congress abdicate their responsibility to consider the constitutionality of proposed legislation, or that executive officers advance shockingly broad theories of their own power—but those are issues for another hearing.) This remains the case even when courts are not there to enforce the law through judicial review.

Moreover, the Supreme Court has developed an entire doctrine—the political-question doctrine—addressing "non-justiciable" cases that should be subject to review only in the political realm. In *Marbury v. Madison* itself, for instance, the Court noted that executive acts could only be examined politically "where the heads of departments are the political or confidential agents of the Executive, merely to execute the will of the President, or rather to act in cases in which the Executive possesses a constitutional or legal discretion." The *Marbury* Court distinguished situations "when the Legislature proceeds to impose on that officer other duties" such that "the rights of individuals are dependent on the performance of those acts." Likewise, in *The Prize Cases* (1863), the Court stated, "the character of belligerents is a question to be decided *by him* [the President], and this Court must be governed by the decisions and acts of the political department." The Court further held: "The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure under the circumstances peculiar to the case."

While we can quibble with the modern application of the political-question doctrine—and other practices that limit judicial review or unduly defer to the political branches—those cases that are non-justiciable don't foreclose the people from having any recourse when they disagree with the actions of Congress or the president. Instead, the foundation of our republican form of government—elections through well-regulated procedures—provides the necessary recourse. Because Americans believe in the rule of law and expect their elected officials to do the same, a Congress or president who openly violated the Constitution would not last long in office and would be replaced by those who assured the citizenry that they would uphold the law.

Indeed, the instances where the Supreme Court has clearly established that the judiciary won't get involved include the political-removal remedy of impeachment. The Constitution gives the House the power to impeach and the Senate the power to try impeachments. Invoking the political-question doctrine, the Court in *Nixon v. U.S.* (1993) unanimously ruled that the Senate's power to try impeachments meant that it also had the authority to determine how to conduct such trials. Accordingly, a former federal officer who had been removed by impeachment could not seek further judicial review of his case. But even an impeached official isn't without recourse: If Congress seriously abused its impeachment authority, the people could respond by electing new representatives who could even write retroactive rules that would reverse the previous Congress.

Beyond the political-question doctrine, there are a number of constitutional provisions that simply do not lend themselves to judicial review. People elected to the House, Senate, and presidency have long held to their 2-, 6-, and 4-year terms, respectively, without courts getting involved. The president annually delivers the State of the Union address without the courts having to remind him that the Constitution requires him to do so—and indeed, the president could (and, in my view, should) go back to submitting a written report, with no judicial consequence whatsoever.

The Seventeenth Amendment's direct election of senators occurs without judicial review. The Constitution's provisions about Congress's meeting annually, and when exactly—both under Article I and the Twentieth Amendment—have been observed without judicial involvement. So has the Twenty-Second Amendment's presidential term limit and the Twenty-Third Amendment's provision for electors from the District of Columbia.

Even constitutional provisions that may tempt Congress and the president to violate them have been enforced without judicial review. For instance, the Constitution's prohibition on religious tests for holding office is simply obeyed. Likewise, the Constitution's prohibition on receiving payments from the states or other countries while holding a position in Congress or while president has been enforced through legal opinions by legislative and executive counsel.

Finally, my favorite *Onion* article of all time underscores the fact that there is no judicial precedent regarding the Third Amendment—though some lawyers have been creative in their complaints against government agencies—and yet we in Northern Virginia aren't concerned that the Pentagon will commandeer our spare bedrooms when barracks are renovated.[12]

There is simply no particular reason to be concerned that a BBA will be unenforceable, other than to the extent that *any* constitutional provision is ignored or unenforced.

Conclusion

There are advantages and disadvantages to various provisions that may be included in a Balanced Budget Amendment—as well as details of craftsmanship to refine—but these are the normal parts of the legislative and even constitutional process. There are no legal or structural reasons why a BBA could not become a successful and celebrated part of our Constitution.

Thank you for your time. I welcome your questions.

[12] *Third Amendment Rights Group Celebrates Another Successful Year*, The Onion (Oct. 5, 2007), http://www.theonion.com/article/third-amendment-rights-group-celebrates-another-su-2296.