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THE BALANCED-BUDGET CONSTITUTIONAL AMENDMENT

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

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S.J. Res. 1]

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

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I. PURPOSE

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

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

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

And

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

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

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

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

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

[*Federalist* No. 51.]

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

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

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

However, in the late twentieth century, these constitutional processes, what Madison termed "auxiliary precautions," have failed to limit the voracious appetite of Congress to legislate into every area of private concern, to invade the traditional bailiwick of the States, and, consequently, to spend and spend to fund these measures until the Federal Government has become functionally insolvent and the economy placed in jeopardy. As more than 200 economists told the Congress in an open letter:

We have lost the moral sense of fiscal responsibility that served to make formal constitutional restraints unnecessary. We cannot legislate a change in political morality; we can put formal constitutional constraints in place.

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

II. LEGISLATIVE HISTORY

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

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

The same principal sponsors reintroduced S.J. Res. 126 in the 97th Congress as S.J. Res. 58. During the early part of 1981, the

Subcommittee held 4 additional days of hearings. On May 6, 1981, the Subcommittee voted 4 to 0 to report out the amendment, but only after adopting an amendment in the nature of a substitute offered by Senator Hatch. On May 19, 1981, the full Committee on the Judiciary favorably reported S.J. Res. 58 by an 11-to-5 vote.

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

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

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

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

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

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

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

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

Shortly thereafter, following a successful discharge petition effort, the House of Representatives considered H.J. Res. 268, the House counterpart to S.J. Res. 183, on July 17, 1990. The House fell seven votes short of the two-thirds majority required to approve the constitutional amendment, with a vote of 279 to 150. S.J. Res. 183 did not come before the full Senate for consideration in the 101st Congress.

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

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

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

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

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

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

On July 22, 1993, the Senate Committee on the Judiciary approved S.J. Res. 41 by a vote of 15 to 3.

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

On January 4, 1995, S.J. Res. 1 was introduced in the 104th Congress as the first joint resolution of the new Congress by Senate Majority Leader Robert Dole, on behalf of the primary sponsors Senator Orrin G. Hatch, the new Chairman of the Judiciary Committee, and Senator Paul Simon. The measure was again virtually identical to the bicameral consensus proposal forged during the summer of 1992. Thirty-nine Senators joined Senators Dole, Hatch, and Simon as original cosponsors.

On January 5, 1995, Senator Hatch convened and chaired the first full Committee hearings of the Senate Judiciary Committee in the 104th Congress to consider S.J. Res. 1.

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

On January 26, 1995, the U.S. House of Representatives voted 300 to 132 in favor of H.J. Res. 1, the Balanced-Budget Amendment. This marked the first time in the history of the Republic that the House passed the Balanced-Budget Amendment.

On January 30, 1995, the Senate began debate on an identical measure, S.J. Res. 1, the Balanced-Budget Amendment. The floor debate lasted until March 2, 1995. On March 2 the Senate voted 65 to 35, failing to approve the amendment. The actual support for the amendment was 66 to 34, but Senator Dole changed his vote to no in order to preserve his right to call up the Balanced-Budget Amendment for reconsideration. Thus, the Senate fell a mere one vote short of sending the Balanced-Budget Amendment to the States for ratification.

On June 4, 1996, Senator Dole exercised his right to call the amendment up for a reconsideration vote. The vote occurred on June 6, 1996, and once again the amendment was narrowly defeated, 64 to 35. The Balanced-Budget Amendment lost two votes due to the replacement of Senator Packwood by Senator Wyden and by Senator Exon switching sides. Senator Pell was not available and thus did not vote on June 6.

In the current Congress, on January 17, 1997, Senator Hatch convened and chaired the Judiciary Committee for its first hearing of the 105th Congress to consider the Balanced-Budget Amendment. Those testifying included Hon. Robert E. Rubin, Secretary of the Treasury; Hon. James C. Miller III, former Director of the Office of Management and Budget; Dr. Martin A. Regalia, U.S. Chamber of Commerce; Martin J. Dannenfels, Jr., Family Research Council; James D. Davidson, National Taxpayers Union; Robert Greenstein, Center on Budget and Policy Priorities.

On January 21, 1997, the Balanced-Budget Amendment was introduced by Senator Hatch in the Senate and once again designated S.J. Res. 1. Joining Senator Hatch as original cosponsors were 61 other Senators: Senators Lott, Thurmond, Craig, Nickles, Domenici, Stevens, Roth, Bryan, Kohl, Grassley, Graham, Specter, Baucus, Thompson, Breaux, Kyl, Moseley-Braun, DeWine, Robb, Abraham, Ashcroft, Sessions, D'Amato, Helms, Lugar, Chafee,

McCain, Jeffords, Warner, Coverdell, Cochran, Hutchison, Mack, Gramm, Snowe, Allard, Brownback, Collins, Enzi, Hagel, Hutchinson, Roberts, Smith of Oregon, Bennett, Bond, Burns, Campbell, Coats, Faircloth, Frist, Gorton, Grams, Gregg, Inhofe, Kempthorne, McConnell, Murkowski, Santorum, Shelby, Smith of New Hampshire, and Thomas.

On January 22, 1997, Senator Hatch convened and chaired the Judiciary Committee for a second hearing on the Balanced-Budget Amendment. In addition to Senators Craig, Lautenberg, Graham, Conrad, Bryan, and Dorgan those testifying included Hon. Paul Simon, former U.S. Senator; Hon. Stuart Gerson, former Acting Attorney General; David Malpass, Bear Stearns & Company; Alan B. Morrison, Public Citizen, and Gene Lehrmann, American Association of Retired Persons.

On January 30, 1997, the Judiciary Committee approved S.J. Res. 1 by a vote of 13 to 5.

III. DISCUSSION

Washington has not balanced the Federal budget since 1969. As a result, our national debt currently stands at over \$5.3 trillion. This debt—which translates into \$20,000 for every American—has contributed to the increased economic pressure straining older Americans, families, and local communities. Just as one would do with an out-of-control credit-card shopper, America needs to limit Washington's access to credit and force it to confront the budget problems it has disregarded for too long. Hundreds of economists agree that Washington has lost its moral sense of fiscal responsibility and, while we cannot legislate a change in political morality, Congress can put a formal constitutional restraint into place by passing the Balanced-Budget Amendment.

Opponents argue that Washington must maintain the budget flexibility to deficit spend in times of emergency. However, the Balanced-Budget Amendment recognizes this prospect, allowing for the approval of deficits in times of real need by a three-fifths vote of Congress. Furthermore, nothing in the Balanced-Budget Amendment prevents Washington from maintaining a rainy day fund for contingencies. Meanwhile, the Balanced-Budget Amendment will help save worthy programs like Social Security by strengthening the economy, reducing interest rates and inflation (which helps those on fixed incomes), and ensuring the Government will have the money needed to pay Social Security when its obligations come due.

Still others suggest that since Washington seems interested in passing a statutory balanced-budget plan for the year 2002, America does not need a constitutional amendment. Yet, since 1978, Americans have been sold no fewer than five statutory balanced-budget remedies, including the Gramm-Rudman law. None have worked. And even if Washington does reach agreement on a plan, will we really see a balanced budget in 2002, 2003, 2004, 2005, and every year after that without constitutional pressure?

The fact is that the Balanced-Budget Amendment will force Washington to do what needs to be done: determine our long-term spending priorities; address projected deficits in important programs; shift power back to the States, local communities, and fami-

lies; and provide incentives for savings and investment. By forcing Washington to address these problems and kick its credit-card shopping addiction, the Balanced-Budget Amendment will make the economy more stable, in the process, improve the economic prospects for all Americans—our older Americans, our families, and our future generations.

Dangers of a budget deficit

Influenced by individuals such as Adam Smith, David Hume, and David Ricardo, the drafters of the Constitution and their immediate successors at the helm of the new Government strongly feared the effects of public debt. The taxing and borrowing provisions of the new Constitution reflected a need of the new Republic to establish credit and governmental notes and negotiable instruments that would spur commerce.

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

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

Once that unwritten rule was broken, Pandora's Box was opened. In 1929, Federal expenditures of \$3 billion represented just 3 percent of GNP. By 1950, the Federal share had risen to 16 percent of GDP or about \$43 billion. For fiscal year 1996, Federal Government spending of about \$1.6 trillion commanded nearly 23 percent of GDP.

To illustrate this growth in another way, the first \$100 billion budget in the history of the Nation occurred as recently as fiscal year 1962, more than 179 years after the founding of the Republic. The first \$200 billion budget, however, followed only 9 years later in fiscal year 1971. The first \$300 billion budget occurred 4 years later in fiscal year 1975; the first \$400 billion budget 2 years later in fiscal year 1977; the first \$500 billion budget in fiscal year 1979; the first \$600 billion budget in fiscal year 1981; the first \$700 billion budget in fiscal year 1982; the first \$800 billion budget in fiscal year 1983; the first \$900 billion budget in fiscal year 1985; and the first \$1 trillion budget in fiscal year 1987. The budget for fiscal year 1996 was about \$1.6 trillion.

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

In spite of these dangers, during the past three decades the Federal Government has run deficits in all but a single year. The deficits have come during good times, and they have come during bad times. They have come from Presidents who have pledged themselves to balanced budgets, and they have come from Presidents whose fiscal priorities were elsewhere. They have come from Presidents of both parties. Once Congress began to engage in deficit

spending it started down the path of sacrificing the long-term health of the economy for short-term gain.

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

Interest on national debt

Gross interest on the national debt is now the second largest expenditure in the entire budget—higher than defense spending. Interest payments are the fastest growing item in the budget. Up from \$75 billion in fiscal year 1980, this year the Federal Government will spend an estimated \$248 billion on interest, an increase of well over 300 percent.

Every day, the Government throws away over \$670 million on interest payments. None of this money goes toward education, health care, or the battle against drugs and crime. Spending more and more on interest leaves fewer and fewer resources to spend on the goods and services needed to address other, serious problems facing the Nation.

The money for these payments comes out of the pockets of taxpayers, primarily middle-income families. These same families are also burdened by the high interest rates that the deficit sustains. Furthermore, these payments are going increasingly overseas, to wealthy investors in other countries. Over 17 percent of the gross Federal debt is now held by foreign interests. That is a 28-percent increase in our reliance on foreign creditors since 1992.

Statutory efforts

Critics of the Balanced-Budget Amendment argue that Congress does not need a constitutional amendment to balance the budget; they aver that Congress can achieve that goal statutorily, right now, without waiting to ratify a constitutional amendment. Technically, these arguments are, of course, correct. The Balanced-Budget Amendment provides no new authority to cut spending or raise revenues. However, as outlined above, recent efforts have shown that Congress simply does not have the will to balance the budget for 1 year, much less keep it balanced.

The Federal Government has not run a budget surplus in over 25 years; the last one was in 1969. And that is the only time in almost 40 years that we have achieved a balanced budget. Enacting responsible budgets is not easy. While a spending program often has a particular constituency that strongly supports it, the general interest in restricting spending is diffuse.

Previous statutory efforts to balance the budget have failed because it is too easy for Congress simply to reverse course and rescind its previous declarations. Since 1979 it has been amply proven that statutory efforts are vulnerable to a change of heart or a weakening of resolve. Deficit reduction targets in such legislation can be continually changed, and the legislation can be several years in operation before the budget must be balanced. An amendment to the Constitution forces the Government to live within its means. S.J. Res. 1 requires a balanced budget by 2002 or 2 years after the amendment is ratified by the States, whichever is latest.

Implementation and enforcement

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

The amendment contemplates that Congress will execute its responsibilities under the amendment through the exercise of its currently existing authority. The Constitution already empowers Congress with such authority. Section 8 of article I grants Congress the power “[t]o make all Laws which shall be necessary and proper * * *.” Furthermore, Members of Congress are required by article VI generally to “support this Constitution” while the President is required by article II, section 1, clause 7, to “preserve, protect, and defend the Constitution”.

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

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

Judicial enforcement and Presidential impoundment

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

[L]ittle 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.

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

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

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

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

Congress to “rely on estimates of outlays and receipts.” See *Baker v. Carr*, 369 U.S. 186, 217 (1962). Under these circumstances, it is unlikely that a court would substitute its judgment for that of Congress.

The Committee believes that the “taxpayer” standing case, *Flast v. Cohen*, 392 U.S. 83 (1968), also is not applicable to enforcement of the Balanced-Budget Amendment. First, the *Flast* case has been limited by the Supreme Court to establishment-clause cases. See *Valley Forge Christian College*, 454 U.S. at 480. Second, by its terms, *Flast* is limited to cases challenging legislation promulgated under Congress’ constitutional “tax and spend” powers when the expenditure of the tax was made for an illicit purpose. Sections 1 and 2 of S.J. Res. 1, limit Congress’ borrowing power and the amendment contains no restriction on the purposes of the expenditures. Finally, in subsequent cases, the Supreme Court has reaffirmed the need for a litigant to demonstrate particularized injury, thus casting doubt on the vitality of *Flast*. See *Lujan*, 112 S. Ct. at 2136. The Committee also believes that there would be no so-called “congressional” standing because Members of Congress would not be able to demonstrate that they were harmed by any dilution or nullification of their vote and that under the doctrine of “equitable discretion,” Members would not be able to show that substantial relief could not otherwise be obtained from fellow legislators through the enactment, repeal, or amendment of a statute. See *Melcher v. Open Market Comm.*, 836 F.2d 561, 563 (D.C. Cir. 1987).

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

Finally, it is not the intent of the Committee to grant the President any impoundment authority under S.J. Res. 1. In fact, up to the end of the fiscal year, the President has nothing to impound because Congress in the amendment has the power to ratify or to specify the amount of deficit spending that may occur in that fiscal year. In any event, under section 6 of the amendment, Congress can specify exactly what type of enforcement mechanism it wants and the President, as Chief Executive, is dutybound to enforce that particular congressional scheme to the exclusion of impoundment. See *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 542 (1838) (The President must enforce any mandated—as opposed to discretionary—congressional spending measure pursuant to his duty to faithfully execute the law pursuant to article II, section 3 of the Constitution). The *Kendall* case was given new vitality in the 1970’s, when lower Federal courts, as a matter of statutory construction, rejected attempts by President Nixon to impound funds

where Congress did not give the President discretion to withhold funding. For example, *State Highway Commission v. Volpe*, 479 F.2d 1099 (8th Cir. 1973).

Under section 6 of the amendment, as stated, Congress must mandate exactly what type of enforcement mechanism it wants, whether it be sequestration, rescission, the establishment of a contingency (or rainy day) fund, or some other mechanism. The President, as Chief Executive, is dutybound under the Constitution to faithfully enforce a particular requisite congressional scheme to the exclusion of any hypothetical impoundment power.

Currently, the only explicit delegated budgetary power the President now possesses is the line-item veto. Unless Congress grants the President further powers, the limited line-item veto authority, which is subject to congressional override, is the only power the President has to assure a balanced budget in a hypothetical situation where Congress refuses to balance the budget. The Committee believes that the President is dutybound by his oath to faithfully execute the laws to enforce the congressional scheme or powers delegated to him. Consequently, unless Congress grants the President impoundment power, the President, as a practical matter, will not be able to impound funds under this amendment.

Social Security and the Balanced-Budget Amendment

Opponents of S.J. Res. 1 have raised the specter that the Balanced-Budget Amendment may cause the Federal Old-Age and Survivors Insurance and Disability Insurance Trust Funds (Social Security Trust Funds or Trust Funds) to be “raided” because the amounts of the present-day surplus will be included in budget calculations. They therefore argue that the Social Security Program should be exempted from the requirements of the Balanced-Budget Amendment. The Committee believes that these contentions are erroneous for various reasons.

Simply counting the surplus does necessarily not mean that the actual surplus will be used to balance the budget. Nor does it mean that benefits will be cut. Indeed, the United States has a unified budget, and obligations such as Social Security benefits by law are paid out of general Treasury, regardless of whether the trust fund runs a surplus or not. Furthermore, Congress by statute has created “firewalls” that protect the trust funds from budgetary congressional rescission or Presidential sequestration. Additional protection is not necessary. In fact, not including or exempting the present day surplus in budgetary calculations, the Committee believes, will both harm the future viability of the trust funds and require more cuts than necessary in other Federal programs. Finally, contrary to the critics contention that passage of the Balanced-Budget Amendment will harm social security, the Committee believes that passage and implementation of S.J. Res. 1, with the Social Security Program subject to its requirements, are necessary for the feasibility of Social Security and for a balanced budget and a healthy economy.

Why the Balanced-Budget Amendment is good for Social Security

Indeed, those worried about the future of the Social Security Trust Funds should support the Balanced-Budget Amendment. This is no better illustrated than by the testimony the Committee received from Robert J. Myers, who has worked for the Social Security Administration in many capacities over the last four decades, including as Chief Actuary and Deputy Commissioner. Testifying on behalf of the proposed Balanced-Budget Amendment in 1995, Mr. Myers told the Committee that, "the most serious threat to Social Security is the Government's fiscal irresponsibility." Mr. Myers suggested our current profligacy will result either in the Government raiding the trust fund or printing money, either of which will reduce the real value of the trust funds.

If the country should ever decide to monetize the debt, that is, simply print more money to cover its interest payments, the resulting inflation would hit hardest those living on fixed incomes. Although the Federal Reserve Board would probably attempt to avoid this result, seniors would bear a large part of the burden if this option is chosen. If inflation returns in any other form because of our debt burden, seniors would again be hit.

Additionally, the money in the Social Security Trust Funds is invested in Government bonds. The trust funds' reserves are in large degree only a claim on the general Treasury funds, with no capital to back up that claim. If the country ever defaults on its debts, the Social Security Trust Funds would suffer.

For this reason alone, Social Security recipients, both current and future, and those who are concerned about them, should strongly support the Balanced-Budget Amendment. The Committee believes that this Nation must get our entire fiscal house in order for the sake of older Americans, families, children, and grandchildren.

An exemption will not prevent cuts to Social Security and would create a "loophole" to any balanced budget

The motivation for exempting Social Security from the Balanced-Budget Amendment is to ensure that Social Security benefits will not be cut. The Committee understands this concern, but believes it to be misplaced. Passage of S.J. Res. 1 does not in any way mean Social Security benefits will be reduced. It only requires Congress to choose among competing programs in allocating budget cuts. There is every reason to believe the power of the electorate will continue to ensure that Social Security will compete very well.

The Committee feels compelled to note that, ironically, the proposed exemption from the Balanced-Budget Amendment does nothing to respond to the concern that benefits will be reduced. Nothing in the exemption would protect Social Security recipients from either benefit cuts or tax increases.

Exempting Social Security would create an emphatic incentive either: (1) to run a deficit in the Social Security Trust Funds to offset revenue increases elsewhere in the budget, or (2) to redefine spending programs as "Social Security" and pay for them through what could become a giant loophole in any attempt to balance the budget.

With the constitutional loophole proposed by this exemption in place, there would be an almost irresistible inducement for future Congresses to redefine unrelated programs as Social Security. Exempting Social Security would in essence create two budgets. One budget would be under the aegis of the Balanced-Budget Amendment, and would be required to be balanced. The other, containing Social Security, would be allowed to run deficits.

This is almost certainly to create a powerful incentive for Congress to include high cost welfare programs as part of Social Security. The inclusion of these programs into Social Security could deny the trust funds of its surplus and leave it insolvent. The Committee maintains that the argument for exempting Social Security from the Balanced-Budget Amendment must be rejected.

The experience in the States

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

Response to President Clinton

President Clinton's letter to Senator Daschle, dated January 28, 1997, concerning opposition to the balanced-budget constitutional amendment, contained misconceptions that the Committee feels are necessary to address.

The primary thrust of the letter is the contention that the Social Security Program will be harmed if it is included within the scope of S.J. Res. 1. The Committee believes that the contents of the letter supporting that position will unduly frighten our senior citizens. There is nothing to suggest that Social Security will be harmed by its inclusion within the Balanced-Budget Amendment. In fact, proposals to exclude Social Security from S.J. Res. 1 would have a far greater chance of harming Social Security.

The President states in his letter that in the event of a budget impasse, he could stop disbursements of Social Security checks and that the courts would reduce benefits. He also alleges that no statutory program could protect Social Security because a balanced-budget amendment would override such statutes.

However, case law and sound jurisprudence support the view that the President may not impound any entitlement funds or any mandatory disbursements. This has been settled as a matter of law since the 19th century Supreme Court decision in *Kendall v. United States*. The Balanced-Budget Amendment does not grant the President any new enforcement powers. Indeed section 6 of S.J. Res. 1 confers upon Congress plenary power to enforce the amendment. Once implementing legislation is passed that remedies situa-

tions where a budget is not balanced at the end of the year, the President is dutybound by his oath of office to enforce the congressional procedure to the exclusion of all others.

Moreover, the existing statutes which protect Social Security Trust Funds through the procedures known as “firewalls,” will still be in place. While it is of course true that constitutional provisions trump conflicting statutory provisions, the Committee sees nothing in the text of S.J. Res. 1 inconsistent with such firewall protections. Thus, the Committee believes they would remain in force.

With regard to the issue of judicial review, the Committee notes that courts will be bound by past precedent and the political question, standing, justiciability, and separation-of-powers doctrines from interfering in the budget process. Thus, the claim that the courts will stop Social Security checks from flowing lacks legal support.

The Committee also notes that the President’s budgets have consistently included the Social Security surpluses. Indeed, Treasury Secretary Rubin’s testimony before the Committee indicated that he agreed with this practice and would continue it in the future.

The Committee recognizes that in the coming decades Social Security will go into debt. Since the trust fund contains Government securities, the key question for the future health of the Social Security Program is whether the Federal Government will be able to honor the notes held by the trust fund. The Committee firmly believes that the fiscal responsibility that will come as a result of passing the Balanced-Budget Amendment is the most important step that can be taken toward guaranteeing the ability of the Government to repay those debts.

The best protection for Social Security is passing and ratifying S.J. Res. 1. This would create the needed discipline to balance the budget. Payments on debt interest will be substantially reduced. The chance for Government default will be significantly diminished. The economy will grow at a brisker pace. And repayment of Social Security obligations will be assured.

Conclusion

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

IV. VOTES OF THE COMMITTEE

Pursuant to paragraph 7 of rule XXVI of the Standing Rules of the Senate, each committee is to announce the results of rollcall votes taken in any meeting of the Committee on any measure or amendment. The Senate Judiciary Committee, with a quorum present, met on Thursday, January 30, 1997, at 10 a.m., to mark up S.J. Res. 1. The following rollcall votes occurred on amendments proposed thereto:

¹ Senator Kohl does not necessarily agree with all statements in the majority views.

(1) The Feinstein substitute amendment to exempt Social Security and capital budgets, and suspend the balanced-budget rule during recession. The amendment was rejected: 8 yeas to 9 nays.

Yeas	Nays
Leahy	Thurmond (proxy)
Kennedy	Grassley (proxy)
Biden (proxy)	Thompson (proxy)
Kohl (proxy)	Kyl (proxy)
Feinstein	DeWine
Feingold (proxy)	Ashcroft
Durbin	Abraham
Torricelli	Sessions
	Hatch

(2) The Torricelli amendment to exempt capital expenditures and Social Security and suspend the balanced-budget rule during recession. The amendment was rejected: 8 yeas to 9 nays.

Yeas	Nays
Leahy	Thurmond (proxy)
Kennedy	Grassley
Biden (proxy)	Thompson (proxy)
Kohl (proxy)	Kyl (proxy)
Feinstein (proxy)	DeWine
Feingold	Ashcroft
Durbin	Abraham
Torricelli	Sessions (proxy)
	Hatch

(3) The Leahy amendment on the debt limit. The amendment was rejected: 8 yeas to 9 nays.

Yeas	Nays
Leahy	Thurmond (proxy)
Kennedy	Grassley
Biden (proxy)	Thompson (proxy)
Kohl (proxy)	Kyl
Feinstein (proxy)	DeWine (proxy)
Feingold	Ashcroft
Durbin	Abraham
Torricelli (proxy)	Sessions
	Hatch

(4) The Kennedy amendment to exempt Social Security. The amendment was rejected: 9 yeas to 9 nays.

Yeas	Nays
Specter (proxy)	Thurmond (proxy)
Leahy	Grassley
Kennedy	Thompson (proxy)
Biden (proxy)	Kyl
Kohl (proxy)	DeWine (proxy)
Feinstein (proxy)	Ashcroft
Feingold	Abraham
Durbin	Sessions
Torricelli (proxy)	Hatch

(5) The Durbin amendment on taxes. The amendment was rejected: 8 yeas to 9 nays.

Yeas	Nays
Leahy (proxy)	Thurmond (proxy)
Kennedy	Grassley
Biden (proxy)	Thompson
Kohl (proxy)	Kyl (proxy)
Feinstein (proxy)	DeWine
Feingold	Ashcroft
Durbin	Abraham
Torricelli (proxy)	Sessions
	Hatch

(6) The Feingold amendment on ratification. The amendment was rejected: 6 yeas to 9 nays.

Yeas	Nays
Leahy (proxy)	Thurmond (proxy)
Kennedy	Grassley
Kohl (proxy)	Thompson
Feingold	Kyl
Durbin	DeWine
Torricelli	Ashcroft
	Abraham
	Sessions
	Hatch

(7) Motion to favorably report S.J. Res. 1. The motion was adopted: 13 yeas to 5 nays.

Yeas	Nays
Thurmond (proxy)	Leahy
Grassley	Kennedy
Specter (proxy)	Feinstein
Thompson	Feingold
Kyl	Durbin
DeWine	
Ashcroft	
Abraham	
Sessions	
Biden (proxy)	
Kohl (proxy)	
Torricelli	
Hatch	

V. TEXT OF S.J. RES. 1

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

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of the several

States within 7 years after its submission to the States for ratification:

“ARTICLE—

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

“Section 2. The limit on the debt of the United States held by the public shall not be increased, unless three-fifths of the whole number of each House shall provide by law for such an increase by a rollcall vote.

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

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

“Section 5. The Congress may waive the provisions of this article for any fiscal year in which a declaration of war is in effect. The provisions of this article may be waived for any fiscal year in which the United States is engaged in military conflict which causes an imminent and serious military threat to national security and is so declared by a joint resolution, adopted by a majority of the whole number of each House, which becomes law.

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

“Section 7. Total receipts shall include all receipts of the United States Government except those derived from borrowing. Total outlays shall include all outlays of the United States Government except for those for repayment of debt principal.

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

VI. SECTION-BY-SECTION ANALYSIS

Section 1

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

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

Section 1 also contains an exception; the balanced budget requirement applies “* * * unless three-fifths of the whole number

of each House of Congress shall provide by law for a specific excess of outlays over receipts by a rollcall vote.” This provision preserves Congress’ flexibility and capacity to respond to economic crises without sacrificing accountability.

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

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

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

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

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

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

“* * * *by a rollcall vote.*” specifies what is already implicit. A rollcall vote will be required to ensure that the required three-fifths vote has been recorded. The Committee makes this provision explicit in order to emphasize accountability in the approval of any deficit.

Section 2

Section 2 provides that “The limit on the debt of the United States held by the public shall not be increased, unless three-fifths of the whole number of each House shall provide by law for such an increase by a rollcall vote.” Section 2 works in tandem with section 1 to enforce the balanced-budget requirement.

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

Votes to suspend the balanced-budget requirement under section 1 and to raise the debt-ceiling under section 2 need not be made separately. [The Committee recognizes that, in certain cases, both

decisions could be approved together, in one piece of legislation, by the same, three-fifths vote.]

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

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

Section 3

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

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

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

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

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

Section 4

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

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

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

Section 5

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

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

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

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

“* * * *for any fiscal year* * * * *is in effect.*” is intended, in the first sentence of this section, to require a separate waiver of the provisions of the amendment each year. Congress may not adopt a waiver resolution which applies to more than one fiscal year. Rather, Congress must annually adopt a separate waiver for the fiscal year at issue.

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

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

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

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

“* * * *imminent and serious military threat to national security* * * *” is intended to define those situations in which Congress, in

order to respond to urgent national security crises with additional outlays for the defense of the Nation, needs more flexibility than the three-fifths vote requirement in section 1 would provide.

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

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

Section 6

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

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

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

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

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

Section 7

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

“* * * total receipts * * *” is intended to include all moneys received by the Treasury of the United States, either directly or indirectly through Federal or quasi-Federal agencies created under the

authority of acts of Congress, except those derived from borrowing. In present usage, "receipts" is intended to be synonymous with the definition of "budget receipts", which are not meant to include off-setting collections or refunds.

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

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

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

Section 8

This section states that the amendment will take effect some specified time after it is adopted, so as to allow Congress a period to consider and adopt the necessary procedures to implement the amendment, and to begin the process of balancing the budget.

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

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

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

VII. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, January 30, 1997.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S.J. Res. 1, a joint resolution proposing an amendment to the Constitution of the United States to require a balanced budget.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is James Horney.

Sincerely,

JUNE E. O'NEILL, DIRECTOR.

Enclosure.

S.J. RES. 1—A JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE
CONSTITUTION OF THE UNITED STATES TO REQUIRE A BALANCED
BUDGET

*As ordered reported without amendment by the Senate Committee
on the Judiciary on January 30, 1997*

S.J. Res. 1 would propose an amendment to the Constitution to require that the Congress, each year, adopt a budget in which total outlays of the United States do not exceed total receipts, unless the Congress approves a specific excess of outlays over receipts by a three-fifths vote in each House. The proposed budget submitted by the President would have to be balanced as well. The amendment also would require a three-fifths vote in each House to raise the limit on Federal debt held by the public and a simple majority on a rollcall vote in each House to increase revenue. Such provisions could be waived for any fiscal year in which a declaration of war is in effect or in which the United States is engaged in military conflict that causes an imminent and serious military threat to national security. The amendment would have to be ratified by three-fourths of the States within 7 years of its submission for ratification, and would take effect beginning with fiscal year 2002 or the second fiscal year after its ratification, whichever is later.

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

CBO projects that the deficit will be \$188 billion in fiscal year 2002 if there are no changes in current policies (and assuming that discretionary spending grows at the rate of inflation after 1988). CBO estimates, however, that policy savings totalling \$154 billion in 2002 (including associated debt service effects) would balance the budget in that year. The additional \$34 billion in deficit reduction—the so-called fiscal dividend—would come from favorable changes in the economy induced by balancing the budget.

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

S.J. Res. 1 contains no intergovernmental or private sector mandates as defined in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4) and would not directly affect the budgets of State, local, or tribal governments. However, steps to reduce the deficit to meet the requirements of this amendment could include cuts in Federal grants to these governments, a smaller Federal contribution for shared programs or projects, and/or increased demands on State, local, and tribal governments to compensate for reductions in Federal programs.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are James Horney (for Federal costs), who can be reached at 226-2880, Leo Lex (for State and local costs), who can be reached at 225-3220, and Matthew Eyles (for the private-sector costs), who can be reached at 226-2649. This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

VIII. REGULATORY IMPACT STATEMENT

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

IX. ADDITIONAL VIEWS OF SENATOR CHARLES E. GRASSLEY

I am submitting additional views to the Committee Report on S.J. Res. 1 because I want to highlight the significant flaws of the amendments offered in Committee to abandon the unified budget by taking social security “off budget.” In my view, these amendments would harm the social security program and force unconscionably deep cuts in many of America’s most vital social programs.

For many years, under Democratic and Republican Presidents and with Republicans or Democrats in control of Congress, social security has been included in a unified budget. The unified budget has historically served to protect social security as well as many other important government programs.

Now, however, Congress is being asked to abandon this tried-and-true approach to the federal budget. I can see no reason for this radical change, although there are many reasons to believe that abandoning the protective shield of the unified budget would have devastating consequences. It is beyond dispute that should Congress scrap the unified budget and exempt social security, truly draconian cuts in important social programs would be absolutely necessary to balance the budget. In fact, according to the most recent figures, 295 billion dollars in cuts would have to occur in order to achieve balance.

In the spirit of “truth in budgeting,” I challenge the supporters of scrapping the unified budget to identify what programs will be cut and how large those cuts will be. Prior to the 104th Congress, those who supported a balanced budget were repeatedly asked to provide details of how a balanced budget would be achieved. I believe the same standard should apply to those who propose exempting social security.

When it comes to facing up to the difficult issue of suggesting such deep cuts, it may be some of those who support abandoning the unified budget will also abandon a balanced budget.

Importantly, scrapping the unified budget will harm the social security program. While the social security program is currently generating surpluses, that situation will not continue. By 2018, the Social Security trust fund will be in deficit-spending mode. By 2029, the trust fund will be insolvent. In that year, the deficit attributable to Social Security will be \$647 billion.

In the spirit of “truth in budgeting,” I believe that the proponents of abandoning the unified budget should explain to the American people how they would save social security once the protective shield of the unified budget has been removed.

In 1986 and 1990, Congress passed two pieces of legislation which moved social security off-budget. I supported this legislation because we were creating broad, general categories for programs to

fit into. Social Security would have been included in the category of mandatory spending. Automatic cuts would have been triggered in the program if our spending plans were not achieving the goals set. As has been pointed out, social security has earmarked revenues and is intended to pay for itself. I believed then, and I believe now, that automatic cuts should not be made to social security as long as it is paying for itself.

Under the umbrella of a constitutional amendment, it is unwise and potentially dangerous to exempt social security. How programs like Social Security, with a dedicated revenue stream, are treated in a unified budget is an issue which will be the subject of implementing legislation.

In conclusion, I agree with Mr. Robert Myers, the former Chief Actuary for the Social Security program. He testified before the Judiciary Committee on January 5, 1995 that a balanced federal budget is the best way to protect social security. There are too many unanswered questions associated with exempting social security from the unified budget through a constitutional amendment. Until Congress and the American people have real answers to those questions, Congress should not cavalierly move to scrap the unified budget which has worked so well for so long.

CHUCK GRASSLEY.

X. ADDITIONAL VIEWS OF MR. KYL

Each Member of the U.S. Senate has a different idea of what the ideal balanced-budget amendment should look like. Some may not want any constitutional constraint at all.

Some of us who support S.J. Res. 1 believe a better version of the amendment would not only require a balanced budget, it would limit Federal spending or Congress' ability to raise taxes. I sponsored alternatives to S.J. Res. 1 that include such limits: the Balanced Budget/Spending-Limitation Amendment (S.J. Res. 8), and the Tax Limitation Amendment (S.J. Res. 9).

A balanced budget is critically important. But it is also important *how* balance is achieved and *at what level* of taxing and spending. Congress could conceivably double Federal spending to \$3 trillion and try to raise taxes to match in order to achieve a balanced budget. But that is not what American families, whose budgets are already stretched to the limit because of high taxes, expect out of a balanced-budget amendment. Such an oppressive tax burden would certainly push the economy into severe recession which, in turn, would eliminate the revenues necessary to fund the Government and maintain a balanced budget.

The Balanced-Budget Amendment should not become anyone's excuse for raising taxes. But neither should a spending or tax limit become anyone's excuse for opposing a constitutional requirement for a balanced budget. The mountain of debt our Government is passing on to future generations is growing too large to miss yet another opportunity to send a balanced-budget amendment—with or without a tax or spending limit—to the States for ratification. I will support S.J. Res. 1, but I also intend to press for the prompt consideration of a tax or spending limit as the essential next step after the Senate has completed action on the Balanced-Budget Amendment.

I have long advocated a spending limit as the best approach. Modeled after an initiative that won the support of 78 percent of Arizona voters in 1978, the Balanced Budget/Spending-Limitation Amendment would require a balanced budget and limit spending to 19 percent of Gross Domestic Product (GDP), which is roughly the level of revenue the Federal Government has collected for the last 40 years. That is, revenues have remained relatively constant at 19 percent of GDP despite tax rate increases and tax cuts, despite recessions and expansions, and despite fiscal policies pursued by Presidents of both political parties. This suggests that the economy has already established an effective limit on how great a tax burden it will bear.

The benefit of writing a spending limitation into the Balanced-Budget Amendment is that it will preclude futile attempts by Congress to balance the budget by raising taxes. Raising taxes will merely impede economic growth and harm the Nation's standard of

living. A spending limitation provides Congress with the guiding principle that there is really only one way to balance the budget: by limiting spending to no more than the level of tax revenues that the economy has historically been willing to bear.

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

A tax limit is the next best approach. Like the BBSLA, the Tax-Limitation Amendment (TLA) has its roots in initiatives started at the State level. A tax limit was approved by 72 percent of Arizona voters in 1992. Nevadans approved a similar limit last year with 70 percent of the vote, as did 69 percent of Florida voters. In all, 14 States have imposed some form of tax limitation on their State governments. The Federal TLA would require a two-thirds vote of each House of Congress to approve tax increases. It would make an important addition to the Constitution, whether or not the Balanced-Budget Amendment is approved. But, it is particularly important if the Balanced-Budget Amendment does become part of the Constitution so that a constitutional requirement for a balanced budget does not become an excuse to raise taxes.

Although a balanced-budget amendment with a spending or tax limitation is preferable, the time has come to ensure that we at least have a constitutional requirement for a balanced budget. I support S.J. Res. 1.

JON KYL.

XI. ADDITIONAL VIEWS OF MR. ABRAHAM

No issue is more important to the health of this Nation and the security of future generations than passing a Constitutional amendment requiring balanced Federal budgets. The Federal budget has been in deficit for 28 straight years, while total Federal borrowing is now over \$5 trillion. A child born today faces almost \$200,000 in additional taxes just to service the interest on this debt. Nevertheless, the Balanced-Budget Amendment remains extremely contentious in the Senate, as evidenced by a number of amendments offered in the Judiciary Committee which would either undermine the enforcement provisions of the amendment or make it impossible for future Congresses to comply with its provisions. While I had the opportunity to address several of these amendments during the markup, I wanted to take this opportunity to focus on the issue of exempting Social Security from the Balanced-Budget Amendment.

Of the six amendments offered during markup, three contained provisions designed to exempt the Social Security System from calculations of Federal revenues and outlays. And while these amendments differed slightly in detail, they had in common two devastating flaws. First, they each would mandate massive spending cuts to education, health care, and the environment and/or major tax increases on hard-working American families. Second, none of these amendments does anything to protect future Social Security benefits or help ensure that Federal debt obligations to Social Security will be repaid. In fact, by mandating draconian spending cuts and tax increases, these amendments may actually harm future generations of seniors and damage the Social Security System they supposedly protect.

First, consider the massive spending cuts and tax increases made necessary by these various amendments. In 2002 alone, Congress would have to first balance the unified budget, and then save an additional \$104 billion to balance the budget exempting Social Security. Over the years 2002 to 2007, these amendments would require that Congress either cut spending, raise taxes, or both, by an additional \$706 billion.

To put that in perspective, the discretionary spending savings from last year's budget resolution—which were described as draconian—were only \$291 billion. The Medicare savings from last year's budget resolution were only \$158 billion. And the projected revenues from the 1993 Clinton tax increase were only \$241 billion. The Torricelli and Kennedy amendments would require that Congress cut spending and raise taxes more than all three combined!

On the other hand, by delaying the exemption of the Social Security System from budget calculations by 1 year, the Feinstein amendment will require Congress to balance the unified budget in 2002, and then save an additional \$109 billion to offset the Social

Security surplus in 2003. In total, the Feinstein amendment will require additional savings of \$602 billion between 2003 and 2007.

What does this mean to Federal spending? Between 2003 and 2007, Congress is projected to spend \$118 billion on veterans benefits, \$160 billion on food stamps, \$59 billion on child nutrition, \$25 billion on farm supports, \$140 billion on the earned income credit, \$21 billion on student loans, and \$16 billion on veterans' pensions—all told, \$539 billion. We would have to eliminate all those programs and more to comply with the Feinstein amendment.

If Congress chooses to raise taxes instead of cutting spending, then income taxes would have to be raised by 12 percent higher than they are today. That means raising the 15 percent bracket to 17 percent, the 28 percent bracket to 31 percent, and the 39.6 percent bracket to 44 percent. For the average taxpayer in Michigan, that means an additional \$672 per year in income taxes.

These levels of spending cuts and tax increases are clearly unworkable, which means the adoption of any of these three amendments would kill any chance the Balanced-Budget Amendment has to be ratified.

Second, none of these amendments does anything to protect Social Security benefits from future Congresses or ensure that the treasury bonds held by Social Security will be repurchased. Under Federal law, assets of the Social Security trust funds are required to be invested in special bonds issued by the Treasury Department. Neither the Kennedy, the Feinstein, nor the Torricelli amendments change this law or make Social Security payments a priority over other Federal accounts.

Nor do any of these amendments protect Social Security benefits for future retirees. These benefits are established under law, and are subject to change by future Congresses. These amendments do nothing to ensure that these benefits will not be altered in future years.

Finally, as was pointed out during the markup, the Social Security System is currently under funded and, beginning around the year 2029, will be able to fund only 75 percent of the benefits promised to future retirees. Neither the Kennedy, the Feinstein, nor the Torricelli amendments will do anything to relieve this imbalance. In fact, by making Social Security a constitutional issue, these amendments may impede reforms to the Social Security System that would help protect future benefits.

For these reasons and others, I opposed the Feinstein, Torricelli, and Kennedy amendments.

SPENCER ABRAHAM.

XII. MINORITY VIEWS OF MESSRS. LEAHY, KENNEDY, AND FEINGOLD

I. THIS PROPOSED CONSTITUTIONAL AMENDMENT IS NEITHER NECESSARY NOR JUSTIFIED

The real question this year is not whether to reduce the deficit, but by how much and what cuts to make in order to bring the budget into balance. That is the real work that lies before us.

While “enacting responsible budgets is not easy,” that is the task in which this Congress should be engaged. This proposed constitutional amendment does not reduce the deficit by a single dollar or move us one inch closer to achieving those goals. Rather, it is a political exercise.

Congress working with the President can do the job. Hard choices and bipartisan cooperation are what are needed. The majority’s report admits: “Congress has the ability to balance the federal budget.” The majority report concedes:

Critics of the balanced budget amendment argue that Congress does not need a constitutional amendment to balance the budget; Congress can achieve that goal statutorily, right now, without waiting to ratify a constitutional amendment. Technically, *these arguments are, of course, correct. The balanced budget amendment provides no new authority to cut spending or raise revenues.* (Emphasis added.)

Thus, this proposed constitutional amendment fails the standard contained in article V of the Constitution: It is not “necessary”.

We cannot legislate political courage and responsibility. No amendment to the Constitution can supply the people’s representatives with these essential attributes. Indeed, the majority report concludes that the ultimate enforcement mechanism that will lead to balancing the budget is the electorate’s power to vote. This proposed constitutional amendment would undercut, rather than enhance, our democratic principles of majority rule and separation of powers. It would lead to a loss of political accountability to the electorate.

Political courage has been an essential ingredient that has helped us achieve remarkable deficit reduction over the past four years—recent history that the majority report ignores. We have succeeded in reducing the deficit every year of the past four. We have cut the deficit by more than 60 percent while pursuing sound economic and strong fiscal policies. Now we need to stay the course and work in a bipartisan way to make further progress. We should now be focusing our energies on the strenuous tasks of building a working consensus on budget priorities and achieving agreement on how to balance the budget.

This crusade for an illusory quick-fix by constitutional amendment only makes that job more difficult. Reconsideration of a constitutional amendment on the budget distracts from the real task at hand. That is one of the lessons of the past decade.

The first time the Senate passed a constitutional amendment on budgeting was in 1982. It was no coincidence that simultaneously the Reagan Administration was in the process of creating record deficits. Presidents Reagan and Bush, and many who supported their budgets and fiscal policies, talked about the need for a constitutional amendment to balance the budget while voting for Reaganomics that tripled our national debt and quadrupled the deficit. Their legacy is record deficits of over \$221 billion in 1986, \$269 billion in 1991 and \$290 billion in 1992—all from an inherited deficit of less than \$74 billion in 1980. The 12 years of Reagan-Bush budgets—with a Republican-controlled Senate for much of that time—ballooned the nation's debt by amounts exceeding those attributable to all prior Presidents combined.

Without the annual interest on the Reagan-Bush debt, our budgets over the last few years would already be in balance. The burden of Reagan-Bush deficits inflicted on the decade of the 90's will not be lessened by more talk about a constitutional amendment.

Historically, the Federal Government has run surpluses and deficits. The last surplus was recorded, ironically, in 1969 and arose from the budget of the outgoing Johnson Administration, even with its expansive Great Society programs. The only year in our more than 200-year history in which the federal budget "balanced" in the way that this proposed constitutional amendment would require—in which a year's expenditures matched that year's receipts—was 1952.

The majority report confuses our nation's history and ignores our current progress toward balance. It mixes concern about the expansion of federal spending and the national debt with the annual budget process and our common desire to reduce the deficit.

Our Constitution has served as a charter for freedom and allowed economic and fiscal policies that have contributed to our economic prosperity. Let us not through this proposed constitutional amendment turn that fundamental charter of our free, democratic government into a mandate requiring adherence to the disastrous economic theories of the 1930's.

This proposed constitutional amendment is opposed by 1,060 economists, including 11 Nobel Laureates in economics, because, in their words: "It is unsound and unnecessary." These economists advise that the proposed amendment, "mandates perverse actions in the face of recessions," "would prevent federal borrowing to finance expenditures for infrastructure, education, research and development, environmental protection, and other investment vital to the nation's future well-being," and that it "is not needed to balance the budget."

According to these economists: "The measured deficit has fallen dramatically in recent years, from \$290 billion in 1992 to \$107 billion in 1996, to some 1.3 percent of gross domestic product, a smaller proportion than that of any other major nation." They "condemn"

the proposed constitutional amendment and warn against putting the nation “in an economic strait-jacket.”¹

Let us not be distracted from the true means to deficit reduction: Let us proceed to consider and adopt a budget and deficit reduction package consistent with the progress made since 1993. As Treasury Secretary Robert Rubin testified before the Committee on January 17, 1997: “[P]olitically, historically, and economically, the forces are in place to balance the budget. We are not far apart. Now we need to get the job done.”

Let us not sacrifice the Constitution or our nation’s fiscal policies to a siren song but turn to the work needed to continue reducing the deficit without sacrificing our nation’s commitments to seniors, veterans, education, the environment, public infrastructure and our fundamental constitutional principles. There is no need for a constitutional amendment to achieve our goals.

A. The last four years establish a remarkable record of deficit reduction

The President and Congress have shown over the past four years that we can make progress undoing the mistakes of the deficit-building 1980’s without this proposed amendment to the Constitution. We succeeded in reducing the deficit each of the last four years, for the first time since the Truman Administration. Over the last four years we have cut the deficit while pursuing sound economic and strong fiscal policies.

In 1993, we started down this road to concerted, consistent deficit reduction without a single Republican vote in the Congress for the President’s budget. Over the last four years we have succeeded in reducing the deficit by 63 percent. When President Clinton took office, the deficit was at its highest point ever—\$290 billion. Today, the deficit is at its lowest dollar figure since 1981—\$107 billion—and at its lowest point as a percentage of the economy since 1974.

In his testimony to the Committee, Robert Greenstein of the Center on Budget and Policy Priorities notes that over the past 10 years the deficit has actually declined 70 percent as a percentage of Gross Domestic Product—from 5.1 percent in 1986 to 1.4 percent in 1996.² As a percentage of Gross Domestic Product our deficit is now at the lowest level of any major industrialized nation in the world.³

This remarkable record of deficit reduction is an accomplishment of Clinton Administration policies that have restored fiscal sanity while keeping the economy strong. The results of the recent election are testimony to the American people’s recognition of these facts.

In 1980, the annual interest on the national debt was \$75 billion. This year’s interest on the national debt is more than three times that amount—\$248 billion. We are still paying the price for the

¹Letter from 1,060 economists, including 11 Nobel Laureates, titled “Economists Oppose A Balanced Budget Amendment,” released January 30, 1997.

²January 17, 1997 Judiciary Committee Hearing, written statement of Robert Greenstein, at 13.

³“The important measure of the debt, however, is not its absolute size, but its size relative to the country’s Gross Domestic Product, just as the size of a mortgage that a family can safely carry is determined by that family’s income.” John Steele Gordon, *Hamilton’s Blessing*, Walker Publishing 1997, p.197.

failed fiscal and economic policies of the last decade. Were it not for the interest on the \$2.462 trillion debt rung up in the Reagan-Bush years, our budgets over the last several years would already have been in balance. The rest of the budget, including entitlements, is already balanced.

The majority report regrettably ignores our progress over the last several years. It should acknowledge that the daily amount paid by the Federal Government on interest payments has declined by \$130 million a day—from \$800 million a day in the 1995 report to \$670 million a day in this year’s version. That reference is as close as the majority report comes to recognizing the deficit reduction progress that has been achieved over the last four years while keeping the economy strong. These interest payments and the national debt remain too high and must be reduced further, of course, but the proposed constitutional amendment is likely to delay actions that can make a real difference.

B. A balanced budget can be enacted this year

Treasury Secretary Robert E. Rubin testified as the first witness at this year’s Judiciary Committee hearings. He described the irrefutable progress that has been made in reducing deficits over the last several years—progress that even James C. Miller, former Reagan OMB Director, and David R. Malpass, former Republican staff of the Senate Budget Committee, had to acknowledge.⁴ Secretary Rubin observed:

Last year, both the Administration and the Congress proposed budgets that would eliminate the deficit by 2002 and both are expected to do so again this year.

Not only has the atmosphere in Washington changed, but there is also a new enforcing factor at work which is the emergence of global markets that are highly sensitive to a nation’s degree of fiscal responsibility. A nation that does not address fiscal matters will be severely punished by markets with high interest rates that could impair or even severely impair its economy.

The sum total is that politically, historically and economically, the forces are in place to balance the budget. We are not far apart. Now we need to get the job done.
* * *

[I] have a deep commitment to the importance of deficit reduction and fiscal discipline to our nation’s economic health, and I believe that we can put in place balanced budget legislation this year.⁵

In his recent letter to Minority Leader Daschle, the President of the United States wrote:

Like you, I am profoundly committed to balancing the budget. With your help and that of the bipartisan leader-

⁴“The deficit has been going down pretty quickly right now and that’s impressive and it has been noted in the financial markets.” January 22, 1997 Judiciary Committee Hearing Transcript, testimony of David R. Malpass, at 105.

⁵January 17, 1997 Judiciary Committee Hearing, written statement of Robert E. Rubin, Secretary of the Treasury, at 1,6.

ship, I believe that a historic budget agreement that achieves balance by 2002 is within reach this year.⁶

The measure of our changed circumstances from two and four years ago is that together Congress and the President can and should enact balanced budget legislation this year. In light of all we have experienced and accomplished in the last four years, there is no basis today for seriously contending that a constitutional amendment is needed as the only way to achieve a balanced budget.

C. The proposed constitutional amendment does not reduce the debt or affect the deficit.

The proposed constitutional amendment will not cut a single penny from the federal budget or deficit. By its terms, S.J. Res. 1 cannot, even if passed and ratified, become effective before 2002—five years and at least two federal election cycles from now. The Congressional Budget Office cannot estimate the budgetary impact of the amendment because that “depends on when it takes effect and the extent to which the Congress would exercise the discretion provided by the amendment to approve deficits.”⁷

Two years ago Senator Mark Hatfield’s decisive vote against a constitutional amendment on budgeting was a contemporary profile in courage. Senator Hatfield had wisdom gained from his years as a public servant, invaluable insights gained during the seminal set of hearings on this matter held by the Appropriations Committee under Senator Byrd in 1994 and extraordinary personal fortitude. He was put to the test and not only survived, but emerged as a powerful example for us all.

In May 1995, after being attacked for his vote of conscience, Senator Hatfield offered the following observations about balancing the federal budget:

I believe that a balanced budget can come only through leadership and compromise. This compromise must come from each one of us. More importantly, it must come from those we represent. In the end, there is no easy answer. If there is a political will to create a balanced budget, we will create one, and if there is will to avoid one, we will avoid it.⁸

In June 1995, he elaborated:

Mr. President, I support balancing the Federal budget, and I will do all that I can as the chairman of the Appropriations Committee during my last year in the Senate to see that it is done. What I cannot do is support a constitutional promise to the people of this country that its elected representatives will balance the Federal budget. Congress and the President can and should, with the support of the public, balance the budget.⁹

⁶Letter from President Clinton to Hon. Thomas Daschle, January 28, 1997.

⁷January 30, 1997 Cost Estimate of S.J. Res. 1 by The Congressional Budget Office.

⁸141 Cong. Rec. S6878 (May 18, 1995).

⁹142 Cong. Rec. S5888 (June 6, 1995).

By our Senate oath of office we each commit to “support and defend the Constitution of the United States.” We owe to our constituents our best judgment on matters of this importance. We owe to our children and future generations the protections of separation of powers and checks and balances from our Constitution that have served us so well. These foundations of our democracy ought not be diminished for political expediency.

There is no secret about how to reduce the budget deficit. The majority report acknowledges that Congress already has all the constitutional power necessary to take the necessary steps. A vote for a constitutional amendment on budgeting is no substitute for making the tough decisions necessary to balance the budget.

Too often in the past, those who have voted for such constitutional amendments have used those votes as an excuse to push the hard decisions off into the future. Having voted for such a constitutional amendment, representatives may be tempted to say that they did what they could: They “assured” a balanced budget—of course, it will then be up to the Constitution and future Congresses to take the actions necessary to achieve the balance.

Moreover, there will be some who will want to wait to see whether the necessary number of States ratify the proposed amendment over a seven-year period. There will be some who will wait to consider implementing legislation until after that ratification process has concluded, just as proponents have refused to propose implementing legislation in conjunction with the constitutional amendment. When will Congress finally turn back to the funding questions that will be required to achieve balance?

Let Congress abandon this high-profile, high-risk sideshow and get right to the main event. We can continue to lower the deficit now and achieve a balanced budget. On January 30, 1997, the day of the Judiciary Committee markup, the Washington Post’s lead editorial was titled “No to a Bad Amendment.” The editorial observes:

The right way to get the deficit down is to cast the votes to do so now, not lay the burden on some future Congress that may not be able to meet it. Members know that. This is a fake show of strength and abuse of the Constitution whose effect would be to harm the system of government it purports to help.

The time and resources devoted to reconsidering a constitutional amendment on the budget each year distract from the real task at hand. That is one of the lessons of the past decade, let us not repeat those mistakes and pursue what the Los Angeles Times correctly calls “irresponsible governance, fiscally reckless and a false political star.”¹⁰

Far from establishing “legislative accountability,” this proposed constitutional amendment is a prescription for unaccountability. It leaves to future Congresses the hard decisions we should be making now. It provides a framework for continuing the burdens of the fiscal irresponsibility of the 1980’s on our children and grandchildren. It is precisely the bumper sticker politics that has been

¹⁰January 31, 1997, Los Angeles Times Editorial, titled “Balanced Budget Plan: Looks, 10; Workability, 0.”

used too often by those willing to settle for short-term, short-sighted political gain at the expense of sound fiscal and economic policy making.

II. SOCIAL SECURITY AND MEDICARE ARE THREATENED UNDER THIS PROPOSED CONSTITUTIONAL AMENDMENT

The Social Security program is America's contract with its senior citizens. If S.J. Res. 1 is adopted as part of the Constitution of the United States, that contract may be broken irrevocably.

Despite the good intentions of the proponents of S.J. Res. 1 to keep Social Security solvent, once it is part of a constitutionally-mandated budget balancing act, Social Security becomes just another government program and is on the chopping block with everything else. When asked directly whether the proposed constitutional amendment would protect Social Security, the Chairman of the Judiciary Committee responded that under the proposed constitutional amendment: "*Social Security would have to fight its way, just like every other program and it has the easiest of all arguments to fight its way.*"¹¹

The majority views assert that this proposed constitutional amendment on budgeting reported by the Committee will protect Social Security. At least half the members of the Judiciary Committee disagree. When Senator Kennedy's amendment to protect Social Security was accorded an up or down vote at the Committee's January 30 markup it failed on a 9-9 tie vote. On this one vote a member of the majority party was willing to buck Republican discipline and vote to preserve, protect and defend our long-standing commitment to those entitled to Social Security. Further, four members of the Committee who support and voted for S.J. Res. 1 on final passage joined Senator Kennedy in his effort to protect seniors and honor our commitments to them and future generations.

A. Congress's actions since 1983 to protect Social Security from overall budget cuts would be cast aside by S.J. Res. 1

The Social Security Amendments of 1983 required Social Security to be placed off-budget within 10 years. That protective legislation passed the Senate 58-14 with a strong bipartisan majority. In fact, Congress accelerated this process. Rather than wait 10 years, the Balanced Budget and Emergency Deficit Control Act of 1985, commonly known as "Gramm-Rudman-Hollings," placed Social Security "off budget" beginning in 1986. This means that the congressional budget resolution in 1985 was the last time that Social Security was included in the federal budgets that Congress approves each year.

Gramm-Rudman-Hollings permitted across-the-board spending cuts ("sequestration") when budgetary goals are not achieved. By its actions placing Social Security off budget, Congress explicitly and intentionally exempted Social Security from the sequestration process. Gramm-Rudman-Hollings—with its protections for Social Security—passed the Senate 61-31 with a strong bipartisan majority.

¹¹ January 30, 1997 Judiciary Committee Transcript, at 107 (emphasis added).

The Budget Enforcement Act of 1990 reinforced earlier protections by placing Social Security even more clearly off budget. Section 13301 of that Act is unequivocal on this point and deserves reading in full. It states:

SEC. 13301. OFF-BUDGET STATUS OF OASDI TRUST FUNDS.

(a) EXCLUSION OF SOCIAL SECURITY FROM ALL BUDGETS.—Notwithstanding any other provision of law, the receipts and disbursements of the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund shall not be counted as new budget authority, outlays, receipts, or deficit or surplus for purposes of—

- (1) the budget of the United States Government as submitted by the President,
- (2) the congressional budget, or
- (3) the Balanced Budget and Emergency Deficit Control Act of 1985.

(b) EXCLUSION OF SOCIAL SECURITY FROM CONGRESSIONAL BUDGET.—Section 301(a) of the Congressional Budget Act of 1974 is amended by adding at the end the following: “The concurrent resolution shall not include the outlays and revenue totals of the old age, survivors, and disability insurance program established under title II of the Social Security Act of the related provisions of the Internal Revenue Code of 1986 in the surplus or deficit totals required by this subsection or in any other surplus or deficit totals required by this title.”

This bill, too, passed the Senate 54–45 with the bipartisan support of 35 Democrats and 19 Republicans.

The proposed constitutional amendment turns its back on these many years of bipartisan progress in protecting Social Security from the ebb and flow of efforts to eliminate the deficit. We believe that our senior citizens deserve better.

B. Under this proposed constitutional amendment, Social Security and Medicare checks could be stopped

When the government overestimates revenues for an upcoming year, or underestimates expenses, or something changes in the course of the year to influence either, the budget goes out of balance and, under S.J. Res. 1, the government is out of money. The amendment’s mandates would turn continued expenditures into constitutional violations of law. If this proposed constitutional amendment were enshrined in the Constitution, it could force the federal government to stop making payments for any number of obligations, including payment of Social Security checks, until the budget imbalance can be corrected.

Treasury Secretary Rubin warned the Committee of this great risk, when he testified:

“[T]he amendment poses immense enforcement problems that might well lead to the involvement of the courts in budget decisions, unprecedented impoundment powers for the President or the temporary cessation of all federal pay-

ments. Any of these options could disrupt Social Security and Medicare payments.”¹²

Further, if the President and Congress reached a budget impasse under the proposed constitutional amendment, Secretary Rubin cautioned that:

Some proponents have suggested that under these circumstances, the President would stop issuing checks, including those for Social Security benefits. Alternatively, judges might become deeply involved in determining whether Social Security or Medicare checks would be stopped.¹³

This would be a disaster for senior citizens on fixed incomes who live on Social Security and Medicare from check to check. When they miss a check, they will not have the funds to pay the rent or meet the mortgage, buy groceries, pay their utility bills, heat their homes, pay for medical care or needed pharmaceutical drugs or meet other expenses.

C. Assertions that current law and court precedent will protect Social Security and Medicare under this proposed constitutional amendment are pure fiction

Former Reagan Administration budget official James C. Miller III, argued before the Judiciary Committee on January 17, 1997, that Social Security would be protected from the same cuts as other programs, even if Social Security is not exempted from this proposed constitutional amendment.

Dr. Miller asserted:

[T]he courts have concluded that up front are the debt-holders and second in line are entitlements, specifically those for which there are trust funds—Social Security, et al.¹⁴

However, when members of the Judiciary Committee queried the Congressional Research Service, the Social Security Administration, and the Treasury Department, they got a different answer. None of those offices could identify an established hierarchy of payment such as Dr. Miller described.

In fact, the Treasury Department believes that while the President has some discretion to set such priorities, establishing a hierarchy of priorities among various federal payment obligations or simply preferring one obligation over another would inevitably result in legal challenges the outcome of which is at best uncertain.

In other words, there is no legal assurance that Social Security would be protected under the proposed constitutional amendment. Even if a particular President sought to protect Social Security as an exercise of presidential discretion, there would be no assurance that the next President or the President in 2008 or beyond would continue that policy. The same is true for the Medicare Trust Fund.

¹² January 17, 1997 Judiciary Committee Hearing, written statement of Hon. Robert E. Rubin, at 2.

¹³ January 17, 1997 Judiciary Committee Hearing, written testimony of Hon. Robert E. Rubin, at 5. See also Reps. Dan Schaefer and Charles Stenholm, materials titled “Cosponsor the Balanced Budget Amendment,” November 18, 1996.

¹⁴ January 17, 1997 Judiciary Committee Hearing Transcript, at 94.

President Clinton understands the dilemma that the Social Security system would face if Social Security is not protected under this proposed constitutional amendment. In his recent letter to Senator Daschle, he stated:

I am very concerned that Senate Joint Resolution 1, the constitutional amendment to balance the budget, could pose grave risks to the Social Security System. In the event of an impasse in which the budget requirements can neither be waived nor met, disbursements or unelected judges could reduce benefits to comply with this constitutional mandate. No subsequent implementing legislation could protect Social Security with certainty because a constitutional amendment overrides statutory law.¹⁵

D. Congress can balance the budget while protecting Social Security—but not under this proposed constitutional amendment

The 1983 bipartisan Social Security Commission headed by Alan Greenspan recommending converting the Social Security system from a pure “pay-as-you-go” program to one that builds up surpluses to pay for the future retirement of the baby boom generation. The Greenspan Commission recommended taking Social Security off budget in order to meet this goal without subjecting the program to the vicissitudes of federal budgeting for other programs.

Congress concurred with the Greenspan Commission’s recommendations in passing the Social Security Amendments of 1983. Just as families save for their retirements, the Social Security program currently is building up surpluses while baby boomers are still working in order to be able to afford their retirements in the next century.

This proposed constitutional amendment, however, enshrines forever in the Constitution the use of Social Security surpluses to mask deficits in other programs. Passing this proposed constitutional amendment, which does not exempt the Social Security trust fund, does more. It encourages, even necessitates, Congress, the President and the courts using Social Security as a way to comply with the amendment. When the trust fund begins to shrink after the year 2020, this proposed constitutional amendment would add pressure on the government to cut Social Security rather than risk constitutional violation. Instead, we ought to be working on ways to honor our commitments and ensure the long-term solvency of Social Security.

A recent analysis from the Center for Budget and Policy Priorities is telling. It says:

The Leadership version [of S.J. Res. 1] would be virtually certain to precipitate a massive crisis in Social Security about 20 years from now, even if legislation has been passed in the meantime putting Social Security in long-term actuarial balance. To help pay the benefits of the baby boom generation, the nation would face an excruciating choice at that time between much deeper cuts in Social Security benefits than were needed to make Social Secu-

¹⁵ Letter from President Clinton to Hon. Thomas Daschle, January 28, 1997.

rity solvent and much larger increase in payroll taxes than would otherwise be required. There would be only one other alternative—to finance Social Security deficits in those years not by drawing down the Social Security surplus but by raising other taxes substantially or slashing the rest of government severely. As a result, the government might fail to provide adequately for other basic services, potentially including the national defense.¹⁶

We all know that steps must be taken—and will be taken—to ensure the solvency of the Social Security system. However, the measures undertaken must make sense for Social Security and America's seniors without interference from the rest of the budget. Our commitments to our seniors should not become just another negotiable piece of an overall federal budget, along with every other activity of our federal government.

E. This proposed constitutional amendment would imperil the Medicare System

The Medicare Trust Funds were created to ensure the basic health needs of our nation's elderly while reducing the financial hardship that medical expenses impose. One cannot overstate the importance of this system to elderly Americans, particularly those who are poor. For over 30 years, Medicare has been a lifeline to senior citizens, sustained public and non-profit hospitals that serve our poorest communities, pioneered incentive methods of paying health care providers, and served as a model of administrative efficiency.

In 1997, 38 million Americans will rely on Medicare for a range of services including, hospital, hospice, nursing facility, home health care and physician services. The vast majority of Medicare funds will go to older Americans with annual incomes below \$25,000, two-thirds for those with incomes below \$15,000.

Yet, despite the basic protections that Medicare provides, the average Medicare beneficiary must spend 21 percent of his or her income on out-of-pocket medical expenses. Without Medicare, many of these elderly Americans would not be able to afford health care, but working in partnership with the Social Security Trust Fund, Medicare ensures a basic standard of living.

Clearly, the benefits of the Medicare System are numerous and too important to be unprotected should Congress, a President, or the courts implement cuts to balance the budget as required by this proposed constitutional amendment. Without any protection, Medicare will have to compete with other programs to maintain appropriate Federal government support. The Medicare System should not have to fend for itself in a Darwinian survival-of-the-fittest contest, particularly because history indicates that Medicare may be the loser.

The debate during the 104th Congress is instructive. During the 104th Congress, the Republican leadership proposed cutting \$270 billion from the Medicare System. If those cuts had become law, Medicare premiums would have doubled from \$553 annually in

¹⁶Center on Budget and Policy Priorities, "The Balanced Budget Amendment and Social Security," January 28, 1997, p. 2.

1995 to \$1,068 annually in 2002. Deductibles would have doubled from \$100 to \$210, the eligibility age would have been raised to 67 years of age, and every elderly couple would have paid an additional \$2,400 over the seven years of the proposed Republican budget plan.

If this proposed constitutional amendment becomes law, similar proposals might become law in the name of balancing the budget, with its supporters professing that “the Constitution made me do it.”

It should also be noted that while the Republican-led Congress proposed these cuts in the Medicare System—the equivalent of a \$900 benefit cut for senior citizens—they also proposed a \$20,000 tax cut for people making \$350,000 annually. This is what could happen if this proposed constitutional amendment is adopted. As the measure threatens arbitrary cuts in the Medicare System, section 4 of S.J. Res. 1 protects corporate welfare and tax loopholes for the wealthy. During debate on S.J. Res. 1 before the Judiciary Committee, Senator Durbin offered an amendment that would have made it more difficult to create tax loopholes. The Durbin amendment was defeated by one vote.

The Senate continues to show a propensity for cutting benefits for the elderly poor and preserving benefits for the wealthy. That is not a track record on which senior citizens can rely if S. J. Res. 1 becomes law. In the event of an impasse on the budget, Members of Congress who want to reduce the Medicare system could withhold the votes necessary to waive the balanced budget requirement or raise the debt ceiling unless cuts were made in the Medicare Trust Funds.

In the circumstances of a budget stalemate, if both Houses of Congress have failed to waive the balanced budget requirement or raise the debt limit, the proposed constitutional amendment may allow unelected judges to order across-the-board cuts to programs, including the Medicare Trust Funds.

If the President and Congress reached such a budget impasse, Treasury Secretary Rubin warned:

Some proponents have suggested that under these circumstances, the President would stop issuing checks, including those for Social Security benefits. Alternatively, judges might become deeply involved in determining whether Social Security or Medicare checks would be stopped.¹⁷

Enactment of the proposed constitutional amendment poses a clear and present danger to the very lifeline that so many senior citizens depend for health care. Year after year, Americans pay into the Medicare System, trusting that those benefits will provide for their health care in their senior years. The promise of those benefits cannot be breached.

¹⁷January 17, 1997 Judiciary Committee Hearing, written testimony of Hon. Robert E. Rubin, at 5. See also Reps. Dan Schaefer and Charles Stenholm, materials titled “Cosponsor the Balanced Budget Amendment,” November 18, 1996.

III. THE PROPOSED CONSTITUTIONAL AMENDMENT PROHIBITS CAPITAL BUDGETING

As Senator Torricelli so forcefully pointed out during the Judiciary Committee deliberations on S.J. Res. 1, we as a nation are suffering from a capital investment crisis.¹⁸ In 1965, more than 6 percent of our federal expenditures were invested in infrastructure such as roads, bridges, ports and mass transit systems. By 1992, that share of capital investment had fallen by more than half to about 3 percent of our federal budget and this year it will approach barely 2 percent.

At the same time as our infrastructure funding has been shrinking, our nation's needs have continued to grow. The result is that we are becoming a nation in disrepair. For instance, more than a quarter of a million miles of roads need repair and more than 25 percent of our bridges have exceeded their life span.

This failure to maintain adequate infrastructure is hurting our competitiveness in the global economy. We are competing against other countries with the foresight to repair their roads and bridges, modernize their transit systems, maintain their ports, build new schools and make the investments in telecommunications infrastructure that are the keys to success in today's global competition. The United States is dead last among the G-7 nations in public infrastructure investment as a percentage of Gross Domestic Product.

We must reverse this trend and make the long-term investments needed to support a strong economy.

A. The proposed constitutional amendment prohibits exempting capital expenditures from the balanced-budget calculations

As was true with regard to the Social Security Trust Fund, sections 1 and 7 of the proposed constitutional amendment prohibit capital budgeting. All expenditures, whether the equivalent of operating expenses or capital investments, are tallied the same for purposes of this proposed constitutional amendment. The sponsors and proponents of this measure refuse to permit any exception and future Congresses will be forever barred from solving our infrastructure crisis by creating a capital budget for long-term investments.

The majority report is silent on this important subject. The Committee's hearings in 1995 established an extensive record in support of maintaining a separate capital budget. Herbert Stein, of the American Enterprise Institute and former economic adviser to President Nixon, Edward V. Regan, of the Jerome Levy Economics Institute and former New York State Controller, and Dr. Fred Bergsten, on behalf of the bipartisan Competitiveness Policy Council and former Assistant Secretary of the Treasury during the Carter Administration, differed on the wisdom of enacting a constitutional amendment on the budget but all agreed on one thing: if such an amendment were to be considered it should separate capital investments for any annual balance requirement.¹⁹

Nonetheless, when the Committee had the opportunity to consider amendments that would have allowed for a separate budget

¹⁸ January 30, 1997 Judiciary Committee Markup of S.J. Res. 1 Transcript at 79-83.

¹⁹ In their testimony before the Judiciary Committee on January 5, 1995 and in response to written questions from Senator Biden, they each strongly supported a separate capital budget.

for capital investments, it rejected them. This was a principal thrust of the Torricelli substitute and an important aspect of the Feinstein substitute.

Senator Torricelli offered a substitute constitutional amendment to establish a federal capital budget for “only investments in physical infrastructure that provide long-term economic benefits.” Senator Feinstein offered a substitute that permitted Congress to “enact and implement a separate capital budget for those major capital improvements which require multi-year funding.” She would have left further definition to implementing legislation, in the “spirit” of S.J. Res. 1. Even that possibility was flatly rejected by the majority and their “no amendments” approach to consideration of this proposed constitutional amendment. By a mere one-vote margin the Committee defeated both the Torricelli and Feinstein amendments—both were rejected by 8 to 9 votes with all Republican members who voted, voting against capital budgeting.

This inflexibility is one of the principal objections of the more than 1,000 economists who oppose S.J. Res. 1.²⁰ It is also one of the reasons President Clinton opposes this constitutional amendment on budgeting. As the President so clearly stated:

We must give future generations the freedom to formulate the federal budget in ways they deem most appropriate. For example, some believe that the federal government should do what many state governments do: adopt a balanced operating budget and a separate capital budget. Under this constitutional balanced budget proposal, the government would be precluded from doing so.²¹

During the Committee’s January 17 hearing, Robert Greenstein of the Center on Budget and Policy Priorities explained:

What families do when they balance their budget is families say that all of their income, including money they borrow, equals all the cash they pay out. Families borrow money when they purchase a house through a mortgage, when they buy a car, and especially when they send a child to college. If families had to operate on the basis that this amendment does, they would have to pay for all of college education out of the current year’s income, all of the entire cost of a home, not the down payment, the whole thing, out of the current year’s income. Nobody operates that way.²²

The actions of Thomas Jefferson as President, as opposed to his oft-quoted ruminations about the evils of public debt, are also instructive but ignored by the majority. In 1803, President Jefferson had the United States borrow \$15 million, in 1803 dollars, by selling bonds to finance the Louisiana Purchase. That amount approximates more than \$225 billion in 1993 dollars and exceeds every

²⁰ Letter from 1,060 economists, including 11 Nobel Laureates, titled “Economists Oppose A Balanced Budget Amendment,” released January 30, 1997.

²¹ Letter from President Clinton to Hon. Thomas Daschle, January 28, 1997.

²² January 17, 1997 Judiciary Committee Hearing Transcript at 152.

federal budget deficit except for the final two years of the Bush Administration.²³

Was President Jefferson wrong to invest in the Louisiana Territory that provided this country with 15 States? Of course not. But had the provisions of S.J. Res. 1 been included in the Constitution, our nation's westward expansion might well have ended at the Mississippi River.

Under this proposed constitutional amendment, the failure to permit a capital budget would have severe consequences by discouraging long-term investment and ignoring our infrastructure crisis. Just as a budget deficit unfairly harms future generations so, too, does the failure to differentiate capital investments from operating and consumption expenditures. The inevitable result will be less investment in our country's future, pressure to operate through inefficient leasing practices and gimmickry.

B. The experience in the States supports a capital budget for long-term investments

Sound accounting practices like capital budgeting appear to the majority only as loopholes and gimmicks. Thus, the majority supporting S.J. Res. 1 reject the experience of the States. The majority report refuses even to acknowledge in its abbreviated allusion to the experience in the States that State balanced budget provisions "have proven to be workable" precisely because so many States differentiate between operating and capital expenditures.

The majority ignores the fact that 42 States, most cities and businesses exclude from their balanced budget requirements capital, enterprise or trust funds that are financed primarily by borrowing rather than by current revenue.²⁴ Moreover, most States with balanced-budget requirements use capital funds that finance major capital projects by issuing long-term debt.²⁵

The nation's leading economists agree that a capital budget is an essential part of the State experience with balanced-budget requirements and that the omission of a capital budget in this proposed constitutional amendment is a major flaw. These economists note:

Unlike many state constitutions, which permit borrowing to finance capital expenditures, the proposed federal amendment makes no distinction between capital investments and current outlays. * * * The amendment would prevent federal borrowing to finance expenditures for infrastructure, education, research and development, environmental protection, and other investments vital to the nation's future well-being."²⁶

The majority wishes to have it both ways when it comes to the experience in the States. Either the States' balanced budget con-

²³ See Dear Colleague Letter from Hon. Larry Craig, Hon. Paul Simon, Hon. Robert Smith and Hon. Charles Stenholm, titled "What did Thomas Jefferson get for \$225 billion?", March 15, 1994.

²⁴ National Association of State Budget Officers, *Budget Process in the States*, 1992, p.16.

²⁵ General Accounting Office Report, "Balanced Budget Requirements: State Experiences and Implications for the Federal Government," March 1993, p. 19.

²⁶ Letter from 1,060 economists, including 11 Nobel Laureates, titled "Economists Oppose A Balanced Budget Amendment," released January 30, 1997.

stitutional experiences are instructive for the Federal Government or they are not. If instructive, then the lesson is that any balanced budget constitutional requirement should include a provision to allow for long-term investments.

State and local governments spread the cost of long-term capital investments over time. By contrast, this proposed constitutional amendment prohibits this kind of common sense accounting.

C. The proposed constitutional amendment prohibits the use of a "rainy day" fund

Section 6 of this constitutional measure states: "The Congress shall enforce and implement this article by appropriate legislation, *which may rely on estimates of outlays and receipts.*" (emphasis added).

What happens when these estimates of outlays and receipts fail to come true during the fiscal year? As is usually the case each year, Congress is wrong on its economic forecasts. For example, in June 1995 the Congress adopted a budget resolution that anticipated a deficit of \$170 billion in the 1996 fiscal year. In August 1995, the Congressional Budget Office anticipated a deficit of \$189 billion for the 1996 fiscal year. But the deficit for the 1996 fiscal year was actually \$107 billion.

In response to the usual budget forecast corrections, several of the majority's witnesses recommended to the Committee that S.J. Res. 1, should be amended to allow the Federal Government to establish a "rainy day" fund or stabilization fund. This fund would adjust to budget shortfalls or overruns during the fiscal year.

For example, James Miller, the former Director of the Office of Management and Budget during the Reagan Administration, testified:

I would urge you to consider incorporating a "rainy day fund." Thus, if one year revenues fell short (or outlays ran over), you could dip into this fund without violating the balanced budget requirement.²⁷

If the experience in the states is instructive, which the majority seems to believe is the case in their report, then a rainy day fund is a necessity for any balanced-budget requirement. According to the American Legislative Exchange Council, 45 states have budget stabilization funds or "rainy day funds" to respond to unanticipated shortfalls in revenue or over runs in outlays.²⁸

The majority, however, ignores the advice of its own witnesses and the experience in the States, and prohibits the use of a "rainy day fund" under this proposed constitutional amendment.

²⁷ January 17, 1997 Judiciary Committee Hearing, written statement of Dr. James Miller, III, p.3. See also Response by Dr. Martin Regalia, Vice President for Economic Policy and the Chief Economist for the U.S. Chamber of Commerce, to written questions from Senator Leahy, where he testified: "The government could build in a cushion by budgeting a so-called 'rainy-day' fund into the budget process each year."

²⁸ See Response of Dr. James Miller, III, to written questions with attached chart on State Budget Stabilization Funds by the American Legislative Exchange Council, January 22, 1997.

IV. THE PROPOSED CONSTITUTIONAL AMENDMENT WOULD INCREASE
THE RISKS OF GOVERNMENT SHUTDOWN AND DEFAULT

Section 2 of the proposed constitutional amendment provides: “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.”

We believe this supermajority vote requirement would recklessly endanger our economy and our democracy. The supermajority vote requirement vastly raises the stakes and risks to taxpayers and all citizens of a government shutdown and default. Instead of a simple majority in the House and Senate, this proposed constitutional amendment would raise the bar to a supermajority vote in both legislative bodies.

We do not need to theorize or speculate about the costs and risks. The nation got a reminder just a year ago. After the longest government shutdown in history and a debt limit crisis that went on for months as part of a planned, partisan “train wreck” intended to extort policy changes from the President, we now know just how great these default risks would be to our economy and the public interest.

The House-led effort was ultimately unsuccessful as the President held his ground and the American people rallied to his defense of their interests and values. But it was only through the extraordinary efforts of our Secretary of the Treasury that this country avoided falling into default and forever tarnishing our nation’s creditworthiness and reputation. The Committee was fortunate to have him appear and testify regarding the dangers of default and the deepening danger of placing a supermajority requirement on future increases to the statutory debt ceiling.

It was in light of these very real dangers that the Secretary testified in characteristically calm, thoughtful and measured phrases that this proposed constitutional amendment on the budget “is a threat to our economic health” and “would subject the nation to unacceptable economic risks in perpetuity.”

A. The supermajority vote requirement to raise the debt limit raises risks for the nation’s financial stability and creditworthiness

Treasury Secretary Rubin, based on his 26 years of financial experience on Wall Street and his 4 years in the Administration, warned the Committee in his testimony that default could throw our economy into chaos. His testimony should be a sobering reminder to us about the implications of taking such a precipitous step. He noted:

Our creditworthiness is an invaluable national asset that should not be subject to question for any reason. Default on payment of our debt would undermine our credibility with respect to meeting financial commitments, and that in turn, in my judgment, would have adverse effects for decades to come, especially when our reputation is not healthy. Moreover, a failure to pay interest on our debt could raise the cost of borrowing not only for the Government, but for private sector borrowers, from companies to homeowners making payments on an adjustable mortgage.

Furthermore, if we are not able to meet our obligations, the issue does not stop simply with failure to meet the obligations of our debt, but could also prevent us from providing military pay, from making payments to recipients of Social Security, or to those who depend on Medicare and Medicaid. The risk of any of these events happening must not be increased.

Finally, the history of debt limits shows that raising the statutory debt limit is never an easy process. We all remember the enormous difficulties that surrounded this issue in 1995 and 1996, when it took us roughly 8 or 9 months to get from the beginning of the process to final resolution of the debt limit issue that we were then dealing with. A requirement for a supermajority vote in both Houses could make this far harder and increase the leverage of a minority.²⁹

The Secretary went on to note the following in response to questions from Senator Leahy:

Standard and Poors and Moody's, at the time of the difficulties with respect to the debt limit in 1995 and 1996 issued reports in which they expressed great concern about the possibility that some in responsible positions were even countenancing the possibility of default. I think it is a very, very serious issue and I think the risk of default is increased measurably under the balanced budget amendment.³⁰

Alan Greenspan, Chairman of the Federal Reserve, similarly had warned in 1995 that "a failure to make timely payment of interest and principal on our obligations for the first time would put a cloud over our securities that would not dissipate for many years." And he warned, "Breaking our word would have serious long-term consequences."³¹

Moreover, a default would waste billions of taxpayer dollars and devastate the lives of millions of Americans. The nonpartisan Congressional Budget Office has concluded:

The government has never defaulted on its principal and interest payments, nor has it failed to honor its other checks. However, even a temporary default—that is, a few days' delay in the government's ability to meet its obligations—could have serious repercussions in the financial markets. Those repercussions include a permanent increase in federal borrowing costs.* * *³²

It is irresponsible to risk permanently increasing our federal borrowing costs through political brinkmanship.³³

²⁹ January 17, 1997 Judiciary Committee Hearing Transcript at 18–19.

³⁰ January 17, 1997 Judiciary Committee Hearing Transcript at 68.

³¹ Letter from Hon. Alan Greenspan to Hon. Alfonse D'Amato, November 8, 1995.

³² Congressional Budget Office, *The Economic and Budget Outlook: An Update*, August 1995, p. 48.

³³ Nonetheless, some have made a practice out of such standoffs. "While we were shepherding Gramm-Rudman-Hollings through Congress, we were also drawn into a crisis created by Congress' refusal to increase the legal ceiling on the national debt. * * * Toward the middle of November, however, all avenues were exhausted except the sale of gold at Fort Know, which President Reagan adamantly opposed. Thus, a default on U.S. government securities—the first ever

Just as the government shutdowns over the last two years cost money, so too an ideological, political, regional or other minority of only 175 House members or 41 Senators could, pursuant to the proposed constitutional amendment, overreach in a manner that would permanently mar the creditworthiness of the United States, raise its borrowing costs and complicate the chances of reaching balance.

Moreover, the repercussions of a default would reach far beyond the government's borrowing costs. A default would raise mortgage rates for homeowners, car loan rates for consumers and capital costs for businesses borrowing to expand and create new jobs.

B. The amendment's supermajority vote requirements invite political blackmail and gridlock

The three-fifths supermajority votes to raise the debt limit and to have outlays exceed receipts in a given year invite political blackmail and brinkmanship. Forty percent plus one in either the House or the Senate could hold the debt ceiling or the budget hostage to their demands.

The House sponsors of this proposed constitutional amendment have acknowledged this folly. In a November 1996 paper on the balanced budget amendment, Representatives Schaefer and Stenholm wrote that their amendment would have the effect of "lowering the 'blackmail threshold * * * from 50 percent plus one in either body to 40 percent plus one. * * *'"³⁴

As Robert Greenstein of The Center on Budget and Policy Priorities testified, the amendment's supermajority requirements would permit minority factions to extort pork barrel projects or extreme legislation as their price for avoiding a government shutdown and default and such demands would not have to be limited to budgetary matters.

In light of the increased risks of a government default, shutdown and political blackmail, inherent in the use of these supermajority requirements as "the primary enforcement mechanism of S.J. Res. 1," the majority meekly suggests only "that Congress will execute its responsibilities under the amendment." Thus proponents are in the position of arguing that every minority faction in both Houses should be trusted with increased power and the ability to shutdown the government or force a default. They are willing to ignore history at our peril.

Senator Sarbanes instructed the Senate two years ago with respect to an historic example that demonstrates the folly of supermajority vote requirements on tough issues.³⁵

In the summer of 1941, the Congress was confronted with extending the time of service for members of the armed services who had been drafted the year before. With the prospect of war increasing, President Roosevelt, in a special message to Capitol Hill, asked Congress to declare a national emergency that would allow the Army to extend the service of these draftees. With Speaker Sam

in two hundred years—seemed not only feasible but, to many high officials, likely. The results would have been tragic." Dr. James C. Miller III, "Fix the U.S. Budget!" Hoover Institution Press 1994, p. 36-37

³⁴Reps. Dan Schaefer and Charles Stenholm, materials titled "Cosponsor the Balanced Budget Amendment," November 18, 1996.

³⁵141 Cong. Rec. S2778-2785 (February 16, 1995).

Rayburn twisting arms in the well of the House of Representatives, the House passed the measure regarding the draft for World War II by just one vote, 203 to 202. It then passed the Senate by a vote of 45 to 30.

The nation was a few short months away from its entry into World War II, but neither the House nor the Senate vote would have met the supermajority requirement in this amendment. Even after the President has declared a national emergency, Congress could not muster a supermajority vote in either body.

Actual declarations of war, matters on which unanimity of purpose would seem essential, have hardly been matters on which a supermajority was attainable.

In 1812 Congress declared war on Great Britain by margins of 79 to 49 in the House and only 19 to 13 in the Senate. New England was strongly opposed. Then Congress adjourned without raising taxes or other revenue to pay for the war effort and the results were disastrous. Efforts to finance the efforts through the sale of \$16 million of loan certificates to the public in March 1813 were unsuccessful and the Government of the United States, in the midst of a declared war with Great Britain, was virtually broke until the intervention of Stephen Girard and John Jacob Astor.³⁶

Nor should we forget the history of the repeal of the Civil War tax in 1872. Representatives of seven northeastern states, plus California, who collectively paid 70 percent of the income tax, voted 61–14 not to renew the tax. Meanwhile fourteen mostly southern and western states, which had paid only 11 percent of the tax, voted 61–5 in favor. Support of the income tax, in other words, was almost perfectly inversely correlated with its local impact.³⁷ It surely could not have been repealed if a 40 percent minority could have blocked that action.

The Congress has been less than successful on numerous occasions in developing even a simple majority in support of a budget plan. In 1947 and 1949 the Congress failed to reach agreement and produce a resolution.³⁸ Likewise, in the last several years the Republican majority controlling Congress has shown itself unwilling to do the work necessary to reach agreement on appropriations bills and left the Government to continuing resolutions.

Also on point is Congress's long history of problems passing any debt limit increase. Since 1983, the Treasury Department has been forced to take some action, such as delaying Treasury bill auctions or investments in trust funds, 15 times in the last 15 years because Congress failed to increase the debt limit in a timely manner.

Raising the debt limit is a tough vote. Raising the bar for congressional action serves to "lower the blackmail threshold" and recklessly endangers our democratic process and our economy.

Just two years ago, 165 Republican Members of the House of Representatives pledged to refuse to vote for raising the debt limit, unless President Clinton accepted their balanced budget plan. The Speaker of the House, Newt Gingrich, went along with this ultimatum, by declaring "I am with them * * * I do not care what the price is." As a result of this blackmail politics, the American people

³⁶ John Steele Gordon, "Hamilton's Blessing," Walker Publishing 1997, p.47–53.

³⁷ Id. at 83.

³⁸ Id. at 51-52.

suffered through two government shutdowns for a total of 27 days. Fortunately, the President stood up to this blackmail and the American public convinced a majority in Congress to act responsibly.

Supermajority requirements only increase the leverage and embolden those factions that would use these tactics, again. A consequence under this proposed constitutional amendment would be to permanently empower minority factions to insist on their agenda or no agenda to the detriment of democratic principles, effective government and the nation's economic well-being. As Treasury Secretary Rubin, Robert Greenstein and Alan Morrison all observed during their testimony before the Committee, this is one of the most dangerous features of the proposed constitutional amendment.

On January 24, 1997, the New York Times published a column by Anthony Lewis, entitled "Gingrich's Revenge," in which he discusses the proposed constitutional amendment, its supermajority requirements and its risks to the nation:

The possibility of a crisis over the debt ceiling is only one provision of many in the proposed amendment that alarm [economists] and other critics. The amendment would effectively end majority rule in Congress, giving minorities new blocking powers and assuring stalemate again and again.

The Republican leaders who are pushing the amendment must be aware of those dangers. They have to be going ahead, then, either because they are in the iron grip of ideology or because they see a chance for partisan point-scoring. Neither reason justifies endangering the system that has enabled this country to survive and prosper over 200 years.

During the Judiciary Committee's markup, Senators Leahy, Feinstein and Torricelli each offered amendments to S.J. Res. 1 that would have deleted the supermajority requirement in the proposed constitutional amendment for raising the debt limit. Each of these amendments were defeated on identical 8 to 9 votes, with all Republican members who voted voting against.

The consequences of a government default and shutdown are too serious to risk a supermajority vote requirement. We should honor the fundamental principle of majority rule, a principal that has been enshrined in our Constitution for more than 200 years.

C. The proposed constitutional amendment undermines majority rule

The proposed constitutional amendment's supermajority voting requirements are inconsistent with the principle of majority rule upon which our constitutional democracy rests. Requiring a supermajority to enact ordinary legislation is unprecedented, dangerous

and in the words of Charles Fried, former Solicitor General in the Reagan Administration, “profoundly undemocratic.”³⁹

In essence, we are being asked to subject our ability to govern ourselves as a nation to the tyranny of a minority on economic and other policy matters. Rather than setting the stage for the consensus and cooperation we need to confront our fiscal problems, the proposed amendment would direct us toward institutional gridlock and increased opportunities for brinkmanship.

Charles Fried cautioned that these requirements would give each recalcitrant member of Congress a potent lever to extract advantages from the majority, with the perverse result that spending, and perhaps deficits, would be increased rather than decreased.⁴⁰ Walter Dellinger, the current Solicitor General, as well as other eminent constitutional scholars, have concurred in this assessment.⁴¹

For small States, the supermajority voting requirements in the balanced budget amendment could be particularly devastating. In the House, only 175 votes would be necessary to defeat any appropriations bill that might result in a fiscal year deficit. This means that concerted action by the representatives of as few as six States—California, New York, Texas, Florida, Illinois and Pennsylvania, with a total of 177 representatives—could thwart the requirement of a three-fifths vote to waive the requirement of a balanced budget or increase the debt ceiling. This results in a virtual veto power to a very small number of populous States.⁴²

We should not hold our policy making hostage to House or Senate minorities.⁴³ Instead of hamstringing Congress with supermajority requirements, we should be seeking ways to increase our ability to take action to reduce the deficit and to deal with a fast-changing and increasingly global economy. To require economic policy making to be subject to minority rule pursuant to constitutional mandate is to proceed in precisely the wrong direction.

Our Founders wisely rejected requiring supermajorities to enact legislation. The constitutional exceptions to majority rule can be counted on one hand. Each is justified by the need to protect our democracy, not to weaken it.⁴⁴

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

As Professor Kathleen Sullivan of Stanford University has pointed out:

³⁹Balanced Budget Amendment—S.J. Res. 41: Hearings Before the Senate Comm. on Appropriations, 103rd Cong., 2d Sess. At 85 (1994) (hereinafter “1994 Appropriations Committee Hearings”).

⁴⁰Id. at 85, 88.

⁴¹Id. at 134.

⁴²Id. at 202 (testimony of Professor Burke Marshall, Yale University).

⁴³Alternatively, in the Senate the combination of representatives from 21 of the smallest States representing approximately only 11.2% of the nation’s population could block any action. Thus, it would encourage unholy alliances and splintering regional combination in order to exact tribute on parochial matters.

⁴⁴The exceptions, each of which requires a two-thirds vote are to override a Presidential veto (Art. I, sect. 3); impeach a federal officeholder (Art. I, sect. 3); approve treaties made by the President (Art. II, sect. 2); expel a Member from either House (Art. I, sect. 5); and amend the Constitution. Only the first and last require a two-thirds vote of each House.

In Federalist 58 * * * James Madison argued that if “more than a majority” were required for legislative decision, then “in all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principles of free government would be reversed. It would be no longer the majority that would rule: the power would be transferred to the minority.” *In other words, according to Madison, requiring a supermajority to pass ordinary legislation turns democracy on its head.*⁴⁵

Charles Fried recognized that the proposed supermajority requirements are “against the spirit and genius of our Constitution, which is a charter for democracy; that is, for majority rule.”⁴⁶

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

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

We do not trust you to be as prudent with respect to your children and the deficit burdens that you might impose on them. We think that you are likely to support all this taxing and spending, taxing and spending, and we do not trust politics to cure that.

Now, I think the American people are a good deal smarter than that and capable of taking serious consideration of the issues posed by the deficit, debating them in the crucible of politics, which is the normal forum for fiscal debates to take place, and to fight the tendencies to leave to tomorrow burdens of debt because everyone can understand that concept. * * *⁴⁷

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

This proposal for constitutional supermajority requirements has already spawned a series of look-alike proposals for constitutional amendments addressing revenue measures and there will undoubtedly be more. Indeed, even within the proposed constitutional amendment there is in section 4 an additional extra-majority provision.

It was this provision that Senator Durbin sought to amend before the Committee in order to ensure that its provisions looked both ways. The thrust of his amendment was that if these requirements

⁴⁵ 1994 Appropriations Committee Hearings at 184–85 (emphasis added).

⁴⁶ *Id.* at 84.

⁴⁷ *Id.* at 187–88.

are to govern revenue increase, let them also govern corporate welfare and revenue loss due to tax breaks. The Republican majority defeated the Durbin amendment 8 to 9 with every Republican who voted, voted against it.

Political accountability to the public at the polls has powered our representative democracy for over two centuries. Even the majority must concede that is the ultimate mechanism to lead to a balanced budget. Let us overcome the narrow partisan barriers to deficit reduction rather than enact constitutional impediments that will irretrievably alter cherished principles of our democracy.

Majority rule, in Congress and at the ballot box, has been the central rule of our representative democracy for over two centuries. It should not be tossed aside because some Members of Congress would rather engage in the bumper sticker politics of supporting a constitutional amendment than make the tough decisions and cast the tough votes needed to balance the budget.

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

V. THE PROPOSED CONSTITUTIONAL AMENDMENT IS UNSOUND ECONOMIC POLICY

That this proposed constitutional amendment on budgeting is unsound economic policy is a view shared by more than 1,000 of the nation's most respected economists, including at least 11 Nobel Laureates, as well as present and former government officials, including the former Chair of President Nixon's Council of Economic Advisors, the current and former Federal Reserve Board Chairmen, former Democrat and Republican Directors of the Congressional Budget Office, the former Republican Governor and Senator from Connecticut and the former Republican Senator from Oregon, just retired.

A. *The proposed amendment would hamper the government's ability to cope with economic downturns.*

Economists and financial experts agree that this proposed balanced budget constitutional amendment will strait-jacket the economy in hard times. It will hamstring the adjustment mechanisms that have been developed since the Great Depression to preserve jobs and restore the economy after a downturn.

If the economy takes a downturn and Americans are losing their jobs—as happened in the early 1990's—this proposed constitutional amendment makes it more difficult for our government to respond to the needs of working families.

As Treasury Secretary Rubin testified before this Committee:

A balanced budget amendment would subject the Nation to unacceptable economic risks in perpetuity * * * A balanced budget amendment could turn slowdowns into recessions, and recessions into more severe recessions or even depressions.⁴⁸

⁴⁸January 17, 1997 Judiciary Committee Hearing Transcript at p. 15.

His judgment was reinforced by the testimony of Robert Greenstein of The Center for Budget and Policy Priorities who testified:

In years when growth is sluggish, revenues rise more slowly while costs for programs like unemployment insurance increase. As a result, the deficit widens. Under a balanced budget amendment, more deficit reduction thus would be required in periods of slow growth than in times of rapid growth.

This is precisely the opposite of what should be done to stabilize the economy and avert recessions. The constitutional amendment consequently risks making recessions more frequent and deeper. In the period from 1930 to 1933, for example, Congress repeatedly cut federal spending and raised taxes, trying to offset the decline in revenues that occurred after the great crash of 1929. Yet those spending cuts and tax increases removed purchasing power from the economy and helped make the downturn deeper; they occurred at exactly the wrong time in the business cycle.

This is why a balanced budget requirement is called “pro-cyclical.” It exacerbates the natural business cycle of growth and recession. It also is why most economists who favor tough deficit reduction measures strongly oppose a constitutional balanced budget amendment.

Thus, the 1,060 economists and 11 Nobel Laureates who are opposing the proposed constitutional amendment condemn it because the amendment “mandates perverse actions in the face of recessions.”

We are deeply concerned about the impact that a balanced budget amendment will have on jobs for working families during times of recession. The following exchange between Senator Kennedy and Secretary Rubin may help illustrate the danger:

Senator KENNEDY. [W]e have not been very effective over the period of certainly this century in understanding when a recession was going to take place or when we were going to get downturns. We have not had that capacity or capability under Republicans or Democrats.

As I understand it, what you are saying is that if you put this measure into effect as a constitutional amendment, what its impact would be, again, in terms of working families—the cycle that might be developed—is that it would put a straightjacket on the economy. What may be a small tip in terms of a temporary recession may become something that would be much more serious. Could you just elaborate on that point, please?

Secretary RUBIN. Senator, I spent 26 years on Wall Street with a major investment banking firm and during that entire time I was responsible for major trading operations, global trading operations, and a lot of what I did was to work with other people to try to make judgments about what economic conditions were likely to be.

I think what you said is exactly right. You recognize recessions quite a bit after they have started. Predicting eco-

conomic circumstances is well nigh impossible, in my judgment, at least with any degree of reliability. And under those circumstances, you can be well into an economic downturn before you realize you have to deal with it, and I think that is one of the very serious problems that the balanced budget amendment creates, as you have suggested.

Senator KENNEDY. That you, Mr. Secretary, and that, translated, for most Americans would mean a loss of jobs, increasing unemployment.

As Secretary Rubin explained, the so-called automatic stabilizers in our economy would be ineffective under this proposed constitutional amendment. These are mechanisms that have been developed over the last 50 years to reduce the extremes of the “boom-and-bust” cycles. They are intended to prevent another Great Depression and have proven effective over time.

Secretary Rubin testified that: “[W]ithout automatic stabilizers, the Treasury Department has estimated that unemployment in 1992 that resulted from the 1990 recession might have hit 9 percent instead of 7.7 percent, *which would have been in excess of 1 million jobs lost.*”⁴⁹

The preamble to the Constitution and its stated purpose to “promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity” ought not be overridden by a constitutional amendment that would deny jobs to hundreds of thousands—if not millions—of working families in hard times.

Federal Reserve Chairman Alan Greenspan recently reiterated his opposition to the proposed constitutional amendment during questioning by Senator Lautenberg during his testimony before the Senate Budget Committee. He urged the Senate Budget Committee continue to eliminate the deficit, but he joined Secretary Rubin and our nation’s leading economists in the conclusion that this proposed constitutional amendment places too many constraints on our economy.⁵⁰

The escape hatch allowing a waiver of its provisions by a supermajority vote of three-fifths of both Houses of Congress is small comfort to America’s working families. Many national recessions start out in different regions of the country. For example, the most recent recession hit New England first. What if citizens of New England, who have fewer Members of the House of Representatives than other regions of the country, needed help, but could not get Senators and Representatives from other States, which were still experiencing good times, to waive a constitutional balanced budget requirement to help protect their livelihoods?

Professor Robert Eisner of Northwestern University and past president of the American Economic Association understood the economic problems under this proposed constitutional amendment when he recently wrote:

⁴⁹ Judiciary Committee Hearing, written statement of Hon. Robert E. Rubin, January 17, 1997, p. 3 (emphasis added).

⁵⁰ Testimony of Hon. Alan Greenspan, Senate Committee on the Budget, Hearing on the State of the U.S. Economy and Economic Outlook, January 21, 1997.

One need only recall the near-collapses, in recent years, of the economies in New England, California and Texas. Who would bail them out if their own tax revenues again declined and there were surges of claims for unemployment benefits, food stamps and general assistance?⁵¹

Although the Committee majority outlines the dangers of a budget deficit, their report fails to address how the proposed amendment will provide for the flexibility needed in economic downturns without holding working families and hard hit regions hostage to a supermajority vote in Congress.

B. The proposed constitutional amendment would hamper the government's ability to respond to emergencies and natural disasters

The proposed constitutional amendment can no more prevent a recession than it can an earthquake, but it will restrict our ability to deal with the effects of both.

A natural disaster, such as a large-scale flood, earthquake or fire, could require the Federal Government to expend large sums to assist the victims and begin to rebuild the ravaged area. The proposed constitutional amendment would make these kinds of sudden emergency expenditures impossible because they would cause an unauthorized increase in the deficit. Humanitarian efforts could and would be held hostage while the requisite supermajorities were rounded up in each House of Congress. A minority in either House could block such efforts altogether or extort other pay backs.

In recent years, the Federal Government has been called on to give critical aid to supplement State and local efforts to protect the public health and safety in response to major disasters and emergencies. Much of this aid has been paid for by supplemental appropriations because of the unexpected nature of major disasters and emergencies.

From fiscal years 1989 to 1995 Congress had to appropriate supplemental major disaster and emergency relief in every year but one. For example, in 1992, Congress passed an emergency supplemental appropriation over \$4 billion to help victims of the Los Angeles riots, the Chicago floods and Hurricane Andrew. In 1993, Congress passed an emergency supplemental appropriation of \$2 billion to help victims of the Midwest floods. In 1994, Congress passed an emergency supplemental appropriation of more than \$4 billion to help victims of the Los Angeles earthquake.

Relief for major disasters and emergencies must be flexible. Usually, a swift response from the Federal Government is needed to aid local relief efforts. Disaster and emergency relief by constitutional mandate is a prescription for gridlock, not swift action. When your state is hit by a major disaster or emergency, do you want critical federal assistance to hang on the whims of 41 Senators or 175 Representatives?

Our Founders rejected requirements of supermajorities. We should look to their sound reasons for rejecting supermajority requirements before we impose on our most vulnerable and neediest

⁵¹ Editorial by Robert Eisner, titled "Balanced Budget: Bad Economics," the Wall Street Journal, January 22, 1997.

citizens a three-fifths supermajority requirement to provide them federal relief from major disasters and emergencies.

Alexander Hamilton painted an alarming picture in Federalist Paper Number 22 of the consequences of the “poison” of supermajority requirements. Hamilton said that supermajority requirements serve “to destroy the energy of the government, and to substitute the pleasure, caprice, or artifices of an insignificant, turbulent, or corrupt junto to the regular deliberations and decisions of a respectable majority.”

These supermajority requirements are a recipe for increased gridlock, not more efficient action. As Hamilton noted long ago: “Hence, tedious delays; continual negotiation and intrigue; contemptible compromises of the public good.”

Such supermajority requirements reflect a basic distrust not just of Congress, but of the electorate itself. We reject that notion.

We fear that a supermajority requirement will lead to some in Congress playing politics with critical relief from disasters and emergencies. Even with today’s simple majority requirement for supplemental appropriations for disaster and emergency relief, we see the potential for partisan politics.

In the last Congress a multi-billion dollar disaster aid package for California was caught in the budget wars between President Clinton and House Republicans. The House Republican leadership delayed action on a request from the President for supplemental appropriations for emergency relief for victims of the California floods and Los Angeles earthquake.⁵² Fortunately, public outcry forced the House Republicans to relent. That political gamesmanship happened with only a simple majority requirement for supplemental appropriations for disaster and emergency relief. Think what would happen if Congress had to clear a supermajority hurdle to pass disaster and emergency relief.

VI. THE PROPOSED CONSTITUTIONAL AMENDMENT WILL RESULT IN SHIFTING BURDENS ONTO STATE AND LOCAL GOVERNMENTS

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

Governor Michael O. Leavitt, of Utah, testified in 1995 that consideration of the proposed amendment and of its likely effect on the States are linked, that “the two topics cannot be separated.”⁵³ Nevertheless, the Committee majority simply ignore this important dimension of the debate. State and local governments should not be left holding the bag and having to raise their taxes so that the Federal Government can appear to pare its deficit.

⁵² See Wall Street Journal, “Budget Wars Pose Threat to Disaster Aid for California,” Feb. 10, 1995, at A 10.

⁵³ 1995 Judiciary Committee Hearings at 3 (statement of Honorable Michael O. Leavitt).

Efforts to reduce the federal deficit over the last several years have not been without significant impact on State and local government. We are just beginning to sort out the impact of welfare and immigration law changes passed in the 104th Congress. State and local officials are petitioning for changes in order to better be able to absorb the impact of the diminished federal role and contribution towards shared responsibilities.

Can anyone honestly contend that this proposed constitutional amendment on budgeting will not likely shift burdens to State and local government? We need only remember our recent history: In the 1980's, tax reductions for the wealthy and a bloated defense budget resulted in burgeoning deficits and massive reductions in the amounts of Federal grants and assistance to the States. The Senate Committee on Governmental Affairs has reported that Federal aid to State and local governments fell sharply in the 1980's. Indeed, during those years, Federal funds went from 18.6% of State and local revenues to only 13.2%, a drop of almost one-third.⁵⁴

In order to meet the critical needs that were left unmet by these Federal reductions, local and State property and other taxes had to be increased in many States across the country. If the proposed constitutional amendment were ratified, we would likely enter another period in which State and local taxes were significantly increased to pay for the shifts in the cost burdens. State and local government would be left to catch those who fall through a shredded Federal "safety net" of nutrition, housing, education and medical care programs.

As Governor Roy Romer, of Colorado, cautioned in his testimony before the Constitution Subcommittee in 1995: "Before we take on that kind of burden [from the proposed constitutional amendment], the people of Colorado need to understand the impact such a burden will have on their daily lives."⁵⁵

This is the ultimate budget gimmick—passing the buck to the States. Reduction of the Federal deficit should not be financed by unfairly increasing the burdens on other jurisdictions and requiring our partners in State and local government to pay for the profligate budgetary practices of the Federal government. Most importantly, working people can afford tax increases no more easily because they are imposed by State and local authorities, rather than by the Federal government.

Governors, local authorities and the people of every State are correctly concerned about the potential "double whammy" of S.J. Res. 1: increased shifting of responsibility from the Federal Government to State and local governments, at the same time that direct Federal assistance is being reduced or terminated. Mayor Jeffrey N. Wennberg, of Rutland, Vermont, testifying in 1995 on behalf of the National League of Cities, warned that "[a]ny balanced budget amendment would almost certainly increase unfunded mandates on

⁵⁴ S. Rep. No. 104-1, at 7-8.

⁵⁵ Hearings on Balanced Budget/Unfunded Mandates before the Senate Judiciary Subcommittee on the Constitution, 103rd Cong., 2nd Sess. (January 3, 1995) (Statement of Honorable Roy Romer at 2).

cities and towns as well as decrease what little Federal assistance currently remains to fund existing mandates.”⁵⁶

To the extent the proposed constitutional amendment did not shift unfunded mandates to the States, it could well result in the emergency of unmet needs were the Federal Government to abandon involvement or responsibility for certain aspects of education, housing, home heating, medical care and nutrition.

The needs will still exist, but they will simply not be addressed by federal efforts. As Governor Roy Romer testified:

[T]he Governors are concerned that attempts to balance the Federal budget will come at the cost of states and localities. I appreciate that we may see a Federal provision protecting state and local governments from new unfunded mandates. But this will not protect us from having to pick up the cost of programs, such as child care, mass transit and education, that were previously supported with Federal funds.”⁵⁷

During his testimony this year before the Judiciary Committee, Jim Miller, a former OMB Director, raised another specter for State and local government. He testified:

[A Balanced Budget Constitutional Amendment] would lead to increased efforts by Congress and the President to seek other means of expanding government. I’m particularly concerned about the tendency to substitute regulation and mandates for direct spending programs. * * * [I] believe other safeguards should be enacted—in particular a “regulatory budget.”⁵⁸

Thus, Dr. Miller foresees the possibility that the proposed constitutional amendment will lead to expanding federal regulatory efforts to achieve the essential purposes of programs that the Federal Government is unable to fund directly or even indirectly.

Mayor Wennberg predicted in 1995 that “[t]he pressure to order state and local spending will grow geometrically under a balanced budget amendment unless an equally powerful restriction on [unfunded Federal] mandates is enacted.”⁵⁹ In the absence of constitutional protection against unfunded Federal mandates, Governor Howard Dean of Vermont, then the Chairman of the National Governors Association, described “a vote for such a balanced budget amendment as a vote to raise state and local taxes.”⁶⁰

In light of these concerns, it would be irresponsible for Congress to propose a constitutional amendment before it has determined how the requirements of the amendment will be implemented, how the States will be affected, how our partnership with State and local government will be altered, and what kinds of additional re-

⁵⁶H.J. Res. 1: Hearings before the House Judiciary Subcommittee on the Constitution, 104th Cong., 1st Sess. (1995) (statement of Honorable Jeffrey N. Wennberg at 5) (hereinafter “House Judiciary Hearings”).

⁵⁷Senate Judiciary Subcommittee Hearings (statement of Honorable Roy Romer at 2).

⁵⁸January 17, 1997 Judiciary Committee Hearing, written statement of Dr. James Miller, III, at 3.

⁵⁹House Judiciary Hearings, (statement of Honorable Jeffrey N. Wennberg at 1).

⁶⁰Governor Howard Dean, “Trickle-Down Tax Increase,” Washington Post, January 19, 1995, at A 25.

sponsibilities and financial burdens State and local governments will be called upon to meet.

We will serve our State and local governments, and ultimately our constituents, by not considering and not assembling the information necessary for them to consider the likely impact at the State and local level of ratification of the proposed constitutional amendment.

Before they consider such an amendment, they have a right to know how we in the Congress intend to meet our obligations to eliminate Federal deficits under this constitutional amendment, given that the manner by which we do so will likely affect their responsibilities and increase their burdens for many years to come. And they have a right to know what additional responsibilities ratification of this constitutional amendment would likely impose on them.

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

As James Madison wrote in *The Federalist* No. 48, “the legislative department alone has access to the pockets of the people.” Our Constitution now gives Congress the primary authority, and responsibility, with regard to the raising and expenditure of outlays. The proposed amendment would dramatically alter the allocation of powers set forth in article I, sections 7, 8 and 9.

It risks casting the federal and state courts in the role of federal budget czars deciding in myriad cases whether the Federal budget is impermissibly out of balance, and where it is, forbidding spending and ordering what remedies it deems appropriate for the constitutional violations occasioned by circumstances in which outlays exceeding revenues in any year without supermajority approval of the Congress.

A. The amendment would result in budgetary issues being taken to the courts

Although the proponents of the proposed constitutional amendment have left it silent with regard to the role of the courts in its interpretation, implementation and enforcement, that silence is deafening.

Section 1 of the amendment contains a flat prohibition on “total outlays” exceeding “total receipts” in any fiscal year, except as expressly authorized by a supermajority in each House of Congress. Having embedded this mandate in the Constitution, this proposed constitutional amendment invites the courts to become actively involved in determining when this constitutional command is being violated and how such violations are to be remedied.

In the memorable words of Chief Justice Marshall: “It is, emphatically, the province and duty of the judicial department, to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). Since that historic decision, the Supreme Court has had the preeminent role in articulating the scope and meaning of our Constitution. The majority report concedes the “fundamental obligation” of the courts to “say what the law is.”

If the proposed constitutional amendment on budgeting were ratified, the fulfillment of this role by the Supreme Court, and

other courts, could require them to address complex budgetary issues that courts are ill-suited to resolve. As de Tocqueville wrote more than 148 years ago: “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”⁶¹ If the proposed constitutional amendment were ratified, several of its provisions would give rise to cases and controversies that the courts would be called upon to resolve.

Supporters of the proposed constitutional amendment, in fact, desire judicial involvement and enforcement of its terms. The representative from the U.S. Chamber of Commerce testified before the Judiciary Committee:

[T]here is a legitimate and necessary role for the courts in ensuring compliance with the amendment. Congress could potentially circumvent balanced budget amendment requirements through unrealistic revenue estimates, emergency designations, off-budget accounts, unfunded mandates, and other gimmickry. It is our view that the need to proscribe judicial policy making can be reconciled with a constructive role for the courts in maintaining the integrity of the balanced budget requirement.⁶²

In response to questions from Senator Leahy, the representative of the National Taxpayers Union, another advocate for the proposed constitutional amendment on budgeting in spite of its potential to lead to tax increases in order to achieve balance, observed: “We oppose denying judicial review authority, and believe that it would be more difficult to enforce the provisions of S.J. Res. 1 if Congress were to add such language to the Balanced Budget Amendment.”⁶³

The representative of the Family Research Council opposed adding express language on the role of the courts, noting that they “would not object to language that would prevent judges from raising taxes” and observed:

Under our system of government, each branch has certain limited means to require legal compliance by one of the other branches. The use of this legal authority is somewhat dependent on the political will of each branch to exercise their proper authority. Each branch of government will have its prerogatives to enforce the amendment, subject to appropriate checks and balances.⁶⁴

Similarly, in 1995, in response to questions from Senator Leahy, the U.S. Chamber of Commerce noted: “The BBA would be policed by the same balance of powers that the Framers so carefully crafted in the Constitution. Thus, excesses by the Congress would be controlled by both the executive and judicial branches.”⁶⁵

The former government attorneys who support the proposed constitutional amendment and have been called to testify before the

⁶¹Alexis de Tocqueville, “Democracy in America,” pt. I, ch. 16 (1848).

⁶²January 17, 1997 Judiciary Committee Hearing, written statement of Dr. Martin A. Regalia, at 12–13.

⁶³Response of James D. Davidson to written questions from Senator Leahy, January 22, 1997.

⁶⁴Response of Martin J. Dannenfels, Jr. to written questions from Senator Leahy, January 22, 1997.

⁶⁵Response of Dr. Martin A. Regalia to written questions from Senator Leahy, January 9, 1995.

Committee over the last several years on the problem of defining the judicial role have been unanimous about only one thing: Court involvement is not prohibited by the amendment.

Stuart M. Gerson, a former Acting Attorney General, and William Barr, the official he replaced at the end of the Bush Administration, differed in what they regarded as the principal dangers posed by judicial intervention and in how they would seek to reduce the risks of courts involvement, but they did not say and could not say that the courts would not be involved in interpreting, implementing and enforcing the proposed constitutional amendment were it to be ratified.

Mr. Gerson testified he thought judicial intervention would be "limited in scope" but conceded that our constitutional law "does not remove the courts from the picture entirely where there is manifest abuse or disregard of unequivocal legal pronouncements." He noted, in his written statement, that "there is a category of case—that involving whether objective statutory terms have been satisfied—which always has been cognizable and will remain so under the Balanced Budget Amendment" and, in his oral presentation, that "in those few cases where a cognizable departure from the specific terms of the amendment can be shown, courts, indeed, must intervene."

He went on, in response to questioning from Senator Torricelli, to concede that standing for certain individuals and members of Congress is possible under this amendment:

So, the answer to your question is that I think that the standing of individuals and members of Congress is very limited. I do concede—that there is a category of cases as to which I would not deny jurisdiction to the courts to make certain that the Constitution was being enforced.⁶⁶

When asked by Senator Torricelli, as an example, whether the Senate sponsors of the proposed constitutional amendment on budgeting would have standing before a federal court to bring a suit to compel compliance with its terms, Mr. Gerson said:

In fact, I think that situation is the most likely situation in which Congressional standing, which has never before been recognized, might be recognized and I say so in my prepared testimony. * * * That is the one situation that even Judge Bork in the D.C. Circuit recognized might allow Congressional standing.⁶⁷

⁶⁶January 22, 1997 Judiciary Committee Hearing Transcript, at 98.

⁶⁷January 22, 1997 Judiciary Committee Hearing Transcript, at 99. See, e.g., *Burke v. Barnes*, 479 U.S. 361 (1987); *Coleman v. Miller*, 307 U.S. 433, 438 (1939)(Kansas state senators had standing to protest lack of effect of votes for ratification of proposed Child Labor Amendment, which ratification had been rescinded by subsequent act of the legislature); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974); cf. *Spence v. Clinton*, 942 F. Supp. 32, 37 (D.D.C. 1996)("it is foreseeable that the congressional plaintiffs might yet be able to climb the requisite high wall of congressional standing"). A prominent House sponsor of the amendment was quoted by Senator Nunn last Congress as saying that "a member of Congress or an appropriate administration official probably would have standing to file suit challenging legislation that subverted the amendment" and that "courts * * * could invalidate an individual appropriation or tax Act: and could "rule as to whether a given Act of Congress or action by the Executive violated the requirements of the amendment." 140 Cong. Rec. S1823-34 (Feb. 24, 1995)(Senator Nunn quoting Representative Schaefer).

The other expert witness who testified before the Judiciary Committee on questions of law and judicial review was Alan B. Morrison of the Public Citizen Litigation Group. He observed:

[I]n the absence of a clear statement of the contrary in the Amendment itself, it is likely that parties who claimed that, for example, the requirements for revenue increases in Section 4 had not been satisfied, could show sufficient injury to meet the case or controversy requirement in Article III of the Constitution. The same is true for those objecting to a Presidential impoundment.⁶⁸

In his written testimony, Mr. Morrison proceeds over the course of 10 pages to sketch a few of the many questions raised by the proposed constitutional amendment that could find their way before a court for interpretation, implementation or enforcement. His testimony concluded with the following exchange:

Mr. MORRISON: Senator, you will note that Section 1 of S.J. Res. 1 is not put in terms of the Congress shall enact and the President shall sign into law. It's put in absolute terms—total outlays for any fiscal year shall not exceed.

It seems to me that is a very unusual kind of constitutional command and that despite what the courts have done in other cases, no person sitting at this table or any place else in this country can accurately predict what the courts will do, which is the reason why I say it is so important that the Congress, in the first instance, assume responsibility, take it on, of saying what they want about judicial review and that would be enforced in the courts.

Senator LEAHY: I think what you are going to end up with, the way it is now, it's going to be glory days for constitutional lawyers and courts under this. I mean they would have a field day.⁶⁹

Written testimony was received by the Judiciary Committee from the Department of Justice. In that statement, the current head of the Office of Legal Counsel indicated that “primary concern of the Department of Justice is how a balanced budget amendment would be enforced—an issue that none of the proposed amendments thus far has adequately addressed.” The statement continues:

If a balanced budget amendment were to be enforced by the courts, it could restructure the balance of power between the branches of government and could empower unelected judges to raise taxes or cut spending—fundamental policy decisions that judges are ill-equipped to make.⁷⁰

The Department of Justice testimony on judicial enforcement included citation to court decisions in which judicial doctrines regard-

⁶⁸ January 22, 1997 Judiciary Committee Hearing, written statement of Alan B. Morrison, at 7–8.

⁶⁹ January 22, 1997 Judiciary Committee Hearing Transcript, at 127–128.

⁷⁰ January 22, 1997 Judiciary Committee Hearing, written statement of Dawn E. Johnsen, Acting Assistant Attorney General, at 2.

ing standing and political questions were no barrier to court involvement.⁷¹

The Department of Justice testimony also referred to prior statements by a former Solicitor General for President Nixon and federal judge, Robert H. Bork, and another former Solicitor General for President Bush and Harvard law professor, Charles Fried. Both men have observed that judicial self-restraint, based on doctrines of standing and political questions, did not overcome the possibilities of significant litigation over interpretation, implementation and enforcement of the proposed constitutional amendment on budgeting.

The Department of Justice has not varied much from that of Robert H. Bork, 10 years ago:

In the end, there is a range of views about the extent to which courts would involve themselves in issues arising under the balanced budget amendment. Former Solicitor General Bork believes that there “would likely be hundreds, if not thousands, of lawsuits around the country” challenging various aspects of the amendment. Similarly, Professor Archibald Cox of Harvard Law School believes that “there is a substantial chance, even a strong probability, that * * * federal courts all over the country would be drawn into its interpretation and enforcement,” and former Solicitor General Charles Fried has testified that, “the amendment would surely precipitate us into subtle and intricate legal questions, and the litigation that would ensue would be gruesome, intrusive, and not at all edifying.” Other commentators, such as former Attorney General William Barr, believe that the political question and standing doctrines likely would persuade courts to intervene in relatively few situations, but that “[w]here the judicial power can properly be invoked, it will most likely be reserved to address serious and clear cut violations.”

Former Attorney General Barr may well be right that courts would be reluctant to get involved in most balanced budget cases. However, none of the commentators, included General Barr himself, believes that the amendment would bar courts from at least occasional intrusion into the budget process. Accordingly, whether we would face an “avalanche” of litigation or fewer cases alleging “serious and clear cut violations,” a broad consensus exists that the amendment creates the potential for the involvement of courts in questions that are inappropriate for judicial resolution.⁷²

The majority report does nothing to resolve this problem. It concedes that the text of the proposed constitutional amendment on

⁷¹Recent cases suggest a narrowing of the political question doctrine. See, e.g., *United States v. Munoz-Flores*, 495 U.S. 385 (1990); *Department of Commerce v. Montana*, 503 U.S. 442 (1992); see also *Bruneau v. Edward*, 517 So. 2d 818, 824 (La. Ct. App. 1987)(refusal of state court to stay out of question arising under balanced budget amendment on political question grounds because “determination of whether the Legislature has acted within, rather than outside, its constitutional authority must rest with the judicial branch of government”).

⁷²January 22, 1997 Judiciary Committee Hearing, written statement of Dawn E. Johnsen, Acting Assistant Attorney General, at 9-10.

budgeting is silent with respect to judicial review, contending that silence “strikes the right balance.”

Mr. Morrison is correct to challenge the Congress to say what it intends and what it means in the text of the proposed constitutional amendment itself. Instead, the majority is leaving to the courts themselves the determination of the challenges arising under the proposed amendment and its implementation and what they will hear and determine. They are to be guided by the vagaries of general, judicially-created doctrines of justiciability.

The majority report also suggest that Congress may revisit this issue later through implementing legislation. Not only would such subsequent implementing legislation require agreement in both Houses and signature by the President or a supermajority override of a presidential veto, but even if ultimately enacted, it may not be able to restrict constitutionally-derived judicial power and responsibility and may itself be overridden by the commands of Article III and this proposed 28th amendment. Former Solicitor General Charles Fried has testified that a subsequent legislative effort to limit judicial power, “itself might very well be unconstitutional.”⁷³

Further, as Mr. Barr pointed out in 1995, the state courts are not limited by the federal requirement of “case or controversy” and its attendant justiciability doctrines:

Before moving on, I should 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 plaintiff would not satisfy the requirements for standing in federal court.⁷⁴

Although Mr. Gerson’s written statement included the same point, almost verbatim, the proposed constitutional amendment and majority report are conveniently silent on this significant dimension of the judicial review problem. Nowhere do the proponents of this constitutional amendment confront the problem of uncontrolled judicial review by states courts that has been articulated by their own witnesses on judicial review, who conclude that “the state court in such a circumstance would have the authority to render a binding legal judgment.”

The majority’s dilemma may mirror that admitted by Mr. Barr at the 1995 hearings: Having acknowledged the concern that courts might order taxes raised as in *Missouri v. Jenkins*, Mr. Barr was asked by Senator Biden whether the proposed constitutional amendment ought not be revised to include an express limitation

⁷³ 1994 Appropriations Committee Hearings at 84.

⁷⁴ January 5, 1995 Judiciary Committee Hearings, S. Hrg. 104–506, at 127.

on court power and their authority to order certain types of remedies, Mr. Barr responded:

If I were a Senator, I would put it in the amendment. But if I felt that would mean the amendment would not pass because it would generate these arguments, oh, gee, this is sort of like Eastern Europe, then I would without hesitation support the amendment as written * * * ⁷⁵

The majority is refusing to confront the possibility of state court involvement and the possibility that courts in different states might reach inconsistent determinations or order contradictory remedies because it is difficult, its discussion solution might offend, its solution might cost them a vote or two. This is no way to amend the Constitution. Such ambiguity and conscious disregard of potential problems deserves the process, the proposed amendment, the American people and, possibly, the generations to come who will suffer under its unintended consequences.

In court challenges in which a constitutional violation was found by the court to exist, the question of appropriate remedy will loom large. Indeed, it is the possibility of judicially-imposed remedies to ensure compliance with the proposed constitutional amendment's command for balance each fiscal year that has raised the most concern historically as Congress considers this matter.

In 1994, Senator Danforth of Missouri successfully modified the proposed constitutional amendment on budgeting. He sought to restrict judicial involvement to issuing declaratory judgments unless Congress specifically authorized another form of relief through implementing legislation and his amendment was accepted by the floor manager.

In 1995, the Senate likewise modified the proposed constitutional amendment when the floor manager adopted an amendment proffered by Senator Nunn of Georgia on judicial review. The Nunn amendment called for restricting the judicial power of the United States to matters specifically authorized by implementing legislation.

Neither the Danforth nor the Nunn language nor anything like them was included in S.J. Res. 1. Indeed, in spite of these past attempts to limit judicial remedial authority in the proposed constitutional amendment and the only successful floor modifications to its text since 1993, the majority now rejects all such efforts. Instead, the majority chooses to remain silent on the many important issues surrounding judicial involvement in the interpretation, implementation and enforcement of the proposed constitutional amendment.

The majority report tries to dismiss *Missouri v. Jenkins*, 496 U.S. 33 (1990), and the dangers it portends for this proposed constitutional amendment in a single sentence. In that case, the United States Supreme Court upheld the power of a Federal District Court Judge in Kansas City, Missouri, to order tax increases in order to improve the public schools. The Supreme Court upheld a District Court order that a local school district levy taxes to raise funds to comply with the Court's order to remedy unconstitutional school segregation.

⁷⁵ January 5, 1995 Judiciary Committee Hearings, S. Hrg. 104-506, at 131.

This case has spawned concern about what is sometimes referred to as “judicial taxation” and the Judiciary Committee has held hearings on the issue and on suggested legislation in the area in the last several years. Senator Danforth cited this case in the course of offering his amendment in 1994:

So after the case of Missouri versus Jenkins, decided by the Supreme Court, it is clear that under certain circumstances, the Federal courts have assumed the power to impose taxes. And my concern was that Missouri versus Jenkins could be the model for some future action by the Federal courts.⁷⁶

The authority of the Federal courts to remedy constitutional violations is broad, as was demonstrated in *Missouri v. Jenkins*, 495 U.S. 33 (1990). In suits where a constitutional violation of the proposed budgeting amendment were found, courts would be left to make similar remedial decisions.

In light of the deliberate omission of limiting language like that previously included by Senator Danforth and Senator Nunn, the proposed constitutional amendment is more likely to be construed to authorize courts to enjoin spending, order taxes or issue a negative injunction maintaining the status. That will appear to be the intention of Congress. The absence of any limitations on the power of the judiciary to review and remedy violations supports the interpretation that S.J. Res. 1 is intended to authorize the courts to engage in judicial review without the limitations those amendments included.

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

Adopting this proposed constitutional amendment would create precisely the peril warned against by Hamilton, because it would invite unelected judges to decide funding policy questions and exercise powers heretofore largely reserved to the legislative and executive branches. It would be a mistake of historic proportions.

This is a constitutional amendment that is being proposed. In other settings in which constitutional rights are being vindicated, when legislation enacted by Congress did not provide an effective remedy, the courts have created judicial ones. See, e.g., *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980). Thus, if Congress were to adopt enforcement legislation that failed to provide an effective remedy for violations, the courts might proceed on their own authority as required to fulfil their constitutional duties.

These questions will not go away and cannot be ignored. They point to another fatal flaw in proposing to conduct our nation’s economic and budgetary functions by means of a simply-sounding con-

⁷⁶ Proposed Constitutional Amendments to Balance the Federal Budget—103rd Congress, Budget Committee Print, S. Prt. 103-112, at 1511 (February 28, 1994).

stitutional declaration. A recent editorial in the Burlington Free Press said it more succinctly: “Amending the Constitution to require a balanced budget would be like using a sledgehammer to nail a picket in a fence.”

B. The proposed constitutional amendment would allow the President broad powers to prevent outlays from exceeding receipts in a fiscal year

The proposed constitutional amendment on budgeting would allow the President vast authority to deal with, and possibly even to impound, funds obligated by Congress. The circumstances that would prevail after ratification of the proposed constitutional amendment on budgeting will not have previously existed. The President will have a lot to do with determining how the President’s constitutional duties under Article II, section 3, to “take care that the Laws be faithfully executed,” and Article II, section 7, to “preserve, protect and defend the Constitution” will be fulfilled.

Section 1 of the proposed constitutional amendment commands that “[t]otal outlays for any fiscal year shall not exceed total receipts for that fiscal year, unless three-fifths of the whole number of each House of Congress shall provide by law for a specific excess of outlays over receipts by a rollcall vote.” In any fiscal year in which it becomes apparent that in the absence of congressional action, “total outlays” will exceed “total receipts,” the President would determine how best to proceed and might well proceed as if required by the Constitution and the oath of office it prescribes to act to prevent the unauthorized deficit.

This common sense reading of the proposed constitutional amendment is shared by a broad range of highly-regarded legal scholars. Then Assistant Attorney General (now Solicitor General) Walter Dellinger testified in 1995 before the Judiciary Committee that the proposed constitutional amendment would authorize the President to impound funds to insure that outlays do not exceed receipts.

Similarly, Harvard University Law School Professor Charles Fried, who served as Solicitor General during the Reagan Administration, testified that in a year when actual revenues fell below projections and a bigger-than-authorized deficit occurred, section 1 “would offer a President ample warrant to impound appropriated funds.”⁷⁷ Others who share this view include former Attorney General Nicholas deB. Katzenbach,⁷⁸ Stanford University Law School Professor Kathleen Sullivan,⁷⁹ Yale University Law School Professor Burke Marshall,⁸⁰ and Harvard University Law School Professor Laurence H. Tribe.

This year the Secretary of the Treasury reenforced this prospect when he noted in his testimony before the Committee:

Some proponents have suggested that under these circumstances, the President would stop issuing checks, in-

⁷⁷ 1994 Appropriations Committee Hearings at 86.

⁷⁸ 1994 Appropriations Committee Hearings at 166 (“the proposed amendment provides a powerful constitutional argument for a Presidential right to impound grounded in the language of section 1 * * *”).

⁷⁹ 1994 Appropriations Committee Hearings at 182.

⁸⁰ 1994 Appropriations Committee Hearings at 204-05.

cluding those for Social Security benefits. * * * The President might also impound funds of his choosing. * * * All of these potential outcomes are extremely undesirable.⁸¹

The impoundment power that would be conferred on the President by the proposed constitutional amendment is far broader than the presidential line-item veto authority granted to the President last year. As Assistant Attorney General Dellinger testified in 1995, the impoundment authority implied within the proposed constitutional amendment might allow a President to order across-the-board cuts in all Federal programs, target specific programs for abolition, or target expenditures intended for particular States or regions for impoundment.⁸² He testified that he would advise the President that he not only had the right, but the “constitutional obligation” to prevent the violation of a constitutional mandate against budgetary imbalance.

The text of the proposed constitutional amendment does not address these matters. The majority report says that is not the intent of the Committee to grant the President any impoundment authority and suggests that “up to the end of the fiscal year, the President has nothing to impound because Congress in the amendment has the power to ratify or to specify the amount of deficit spending that may occur in that fiscal year.” The majority report, thus, assumes there can never be an unauthorized deficit, because Congress always has a theoretical possibility of stepping in before the last minute ending the fiscal year and ratify whatever deficit has occurred. Under this construction, the proposed constitutional amendment is a cruel joke.

Moreover, nothing in the proposed constitutional amendment prevents the Executive from acting to implement its terms. A President may not be willing to withhold based on a theoretical possibility of what the President knows or has reason to believe will not occur. Indeed, a President may choose not to risk having all of the expenditures undertaken by the Federal government for a portion of a fiscal year declared to have been expended in violation of the Constitution. It is more likely that a President, sworn to preserve, protect and defend the Constitution, would not view the Executive as powerless to prevent such a result.

Key House sponsors of the proposed constitutional amendment circulated materials on the role of the Executive that add context to the majority report’s isolated declaration of intent and are consistent with this view of continuing involvement by the Executive in the implementation of the proscriptions contained within the proposed constitutional amendment. Representatives Schaefer and Stenholm acknowledge that the proposed constitutional amendment is intended to create “an ongoing obligation to monitor outlays and receipts” and to require the President “at the point at which the government ‘runs out of money,’ to stop issuing checks.”⁸³

⁸¹ January 17, 1997 Judiciary Committee Hearing Transcript, written statement of Hon. Robert E. Rubin, at 5.

⁸² 1995 Judiciary Committee Hearings at 100.

⁸³ Reps. Dan Schaefer and Charles Stenholm, materials titled “Cosponsor the Balanced Budget Amendment,” November 18, 1996.

We also have experience to instruct us. This Administration's senior advisers have testified both in 1995 and in 1997 that their advice would be to terminate or delay expenditures if the proposed constitutional amendment is ratified and a budget impasse arose.⁸⁴

James Miller, former OMB Director under President Reagan, echoed that advice. He revealed legal advice from the Office of Legal Counsel of the Department of Justice that without congressional mandated spending priorities, the President could apply across-the-board reductions in outlays. Finally, he furnished a legal memorandum on presidential authority to forestall default on the public debt that was coauthored by a former Assistant Attorney General and head of the Office of Legal Counsel during the Reagan Administration that asserts "the President has inherent constitutional authority to choose which nondeferrable obligations to pay in the absence of a statute specifying a priority."⁸⁵

A Memorandum to the Attorney General dated October 21, 1995, that is now publicly available, reinforces these lines of reasoning:

Although this Office has consistently taken the position that as a general matter the President does not possess inherent authority to impound funds, we have carved out an exception to the general rule for the situation in which the President faces a debt ceiling and does not have any other feasible method of raising funds. We have said that in such a situation, because the President would be faced with conflicting statutory demands, to comply with the direction to spend yet not exceed the debt limit, he would be justified in refusing to spend obligated funds. See Memorandum from William H. Rehnquist, Assistant Attorney General, Re: Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools (December 1, 1969). We believe that the President's power to reconcile conflicting laws according to his best judgment could be derived from his ultimate power as Chief Executive "to take Care that the Laws be faithfully executed."

The OLC Memorandum concludes:

Finally, at some point, after all other options have been considered, consideration should be given to a program of deferral of obligations and expenditures by the President. Such a program would provoke considerable public controversy, perhaps a constitutional confrontation with Congress, and most certainly would be subjected to legal challenge. On the last point, although we have not had an opportunity to arrive at a definitive conclusion, we believe a strong argument can be made both on statutory grounds and on the basis of his inherent authority, that the President would have the power to engage in such a program.

Similar analysis and reliance on inherent Executive authority could be expected to arise should the proposed constitutional amendment be ratified and the President faced with circumstances

⁸⁴ See testimony and written statement of Hon. Robert E. Rubin at January 17, 1997 Judiciary Committee Hearing.

⁸⁵ Response from Dr. James C. Miller, III, to written questions with attached legal memorandum from Charles J. Cooper and Michael A. Carvin (dated October 18, 1995), January 22, 1997.

in which the legislative and executive branches are in gridlock over budgetary or spending matters or it appears to the President that the prediction for a balance between expenditures and revenues in any fiscal year is tilting toward deficit.

The majority report alternatively comments that Congress could specify in implementing legislation how it wanted the President to proceed in a budgetary or debt limit crisis. Reliance of subsequent implementing legislation is risky, at best. Such legislation would be subject to Presidential veto and the need for a supermajority override in both Houses. Moreover, such legislation would have to be comprehensive enough to foresee and control all possible future contingencies to be effective.

Further, the President's obligation to faithfully execute the laws is independent of Congress's. That duty is not "limited to the enforcement of acts of Congress * * * according to their express terms, * * * it include[s] the rights, duties and obligations growing out of the Constitution itself, * * * and all the protection implied by the nature of the government under the Constitution[.]" In *re Neagle*, 135 U.S. 1, 64 (1890). If an unconstitutional deficit were occurring, Congress could not constitutionally stop the President from seeking to prevent it.⁸⁶

Finally, the majority places substantial reliance on the 159-year old case of *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 542 (1838). Unfortunately, that case can as easily be read to support presidential impoundment authority under the proposed constitutional amendment on budgeting as against. In that case, Congress had ordered the Postmaster General to pay the claimant whatever sum an outside arbitrator determined was the appropriate settlement. When the Postmaster General paid a smaller amount, the Supreme Court held that the Postmaster General could be ordered to comply with the congressional directive. The Court ruled that the President, and those under his supervision, did not possess inherent authority to impound funds that Congress had ordered to be spent: "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution and entirely inadmissible." *Id.* at 611.

If the proposed constitutional amendment were ratified and became a part of the Constitution, the President's obligation to execute the laws would arguably have a constitutional fulcrum from which to leverage. The President could argue that when the constitutional duty to ensure fiscal year balance came into conflict with a statutory obligation to expend authorized, appropriated or obligated funds, the constitutional responsibility had to be given priority as predicated on superior authority.

The proposed constitutional amendment's mandate to ensure budget balance for each fiscal year specifies no role or limitation on the power of the President. The majority report concedes that implementation and enforcement will necessarily involve the Executive Branch beyond the President's obligation pursuant to section

⁸⁶See 1994 Appropriations Committee Hearings at 182 (testimony of Professor Kathleen Sullivan) ("this amendment if enacted would, of course, be constitutional law, fundamental law. It would trump [the Impoundment Control Act of 1974] or any other statute designed to umpire disputes between the President and Congress * * *").

3 to have transmitted to the Congress a proposed budget prior to each fiscal year in which total outlays do not exceed total revenues. It notes:

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

If this proposed constitutional amendment were to become the supreme law of the land, some future President may well choose to enforce its terms, in the absence of binding limitations in implementing authority, to make greater use of Executive Branch discretion and authority than this Congress has taken the time to consider.

This fundamental shift in the allocation of power and authority among the federal branches is neither wise nor necessary. It risks despotism at the very times when despots are most likely to arise and in which our fundamental guarantees of liberty and individual freedoms has been the checks and balances that the branches of our federal government exert over each other.

CONCLUSION

Our constitutional protections of separation of powers and majority rule should not be sacrificed to enact this unnecessary and unworkable proposed constitutional amendment on budgeting.

PATRICK J. LEAHY.
EDWARD M. KENNEDY.
RUSSELL D. FEINGOLD.

XIII. ADDITIONAL VIEWS OF MR. TORRICELLI

I have no inherent opposition to the concept of amending the constitution of the United States to require a balanced budget. Indeed, I have voted for the resolution that this Committee reported on three other occasions. The Majority of States require a balanced budget and indeed the continental Congress of the United States considered a similar requirement over 200 years ago. I do however believe that it is incumbent upon all of us to make every effort possible to seek to ensure that what is enshrined in the Constitution is a feasible, effective document that will accomplish the goals we have established.

Although I believe the Amendment that was reported by this Committee could be improved upon, I nonetheless voted to favorably report it so that the full Senate may have the opportunity to consider and vote on this important issue. I will, however, continue to seek and to work with all Senators to improve it.

In committee I offered a substitute to address what I consider to be several flaws within the legislation. While the Balanced Budget Amendment before this committee would address the debt crisis we are in, it seems to operate in the belief that we have no other principal problems. Nothing could be further from the truth. The United States does find itself with a considerable and mounting national debt. After some two-hundred years, the compact among the generations has been broken. There was an informal, but never the less, almost certain understanding, the United States Government would borrow in times of war and depression to overcome those national ills but return almost immediately to a surplus status and begin paying the principal on the accumulated debt.

Succeeding generations kept this promise. It is almost now certainly broken. It is however important to put in context, that as we deal with amending the constitution of the United States, the deficit crisis has at least subsided. The United States Government has had a declining annual national deficit for four successive years. The debt of the United States government as a percent of national revenues has fallen considerably so that it now is the smallest among each of the major western democracies. Indeed the debt of the United States government is a percentage both of our economy and government revenues is the smallest in nearly forty years. Over the last four years we have reduced the deficit by 63% so that today it stands at its lowest point since 1981. Due simply because of the leadership of the Clinton Administration the debt crisis is subsiding, does not mean that it is not important. We must continue our progress, but we must do so in a manner that ensures that we will make the necessary investments in capital infrastructure and that will protect the integrity of the Social Security Trust Funds.

My difficulty is that this Amendment does not deal with the debt crisis of the United States Government in context of other national problems. As I suggested, while the United States does have a debt crisis it also has several other important economic crises.

First among them in my judgement is the mounting investment crisis in the United States. This perils our quality of life and our national economic strength. It is best illustrated by the failure of the United States government itself to maintain current investment levels. In 1965, the United States government invested 6.3 percent of its revenues in the development of infrastructure. By 1992, that investment had declined to 3 percent of federal revenues, the lowest of any industrialized democracy in the world. The United States currently has one quarter million miles of highway systems in gross disrepair. 25 percent of all the bridges in the nation need to be rebuilt. The ports of our nation that provided for our national security and upon which our standard of living and dominance in international trade were built are total disrepair. Indeed, in the port of New York, once the worlds most mighty source of international trade cargo now off loads in the ocean onto garbage floats, as if the United States was a third world nation, unable to have our exports or our imports enter our own greatest city. The estimated costs of repair total over \$1 billion. The economic cost if we don't is estimated at 43,000 jobs and \$7.6 billion in lost commerce.

This year the United States will spend less than 1% of its GDP on investment in our national infrastructure. While Japan, genuinely dealing in the midst of an economic crisis, will be able to invest six percent of their revenues for maintaining an infrastructure for the future. The United States is dead last among the G-7 nations in public infrastructure investment as a percentage of GDP.

Germany has now approved 130 billion dollar expenditure for the high speed rails. France this year has announced a \$4 billion project for a single high-speed rail line. As our competitors prepare their infrastructure for the 21st century we are failing to meet that challenge.

Under our current system of budgeting and under the balanced budget amendment, that you have proposed and I have voted for on other occasions, the adding of an employee at the Department of Commerce and the adding of a mile of new railroad or road are all considered of equal economic value. The General Accounting Office through the years has urged us to change this system. Capital expenditures cannot be equated with simple consumption by the United States government.

The alternative I have offered provides for a capital budget. This would allow the United States government to do what at least 34 other states, almost all of our major economic competitors and virtually every major business enterprise in the United States does—distinguish between investments and consumption. In my own state of New Jersey, each and every year a capital planning commission meets to receive the budget of our governor and determine whether or not budget items deal with long term investments or constitute simply consumption. In the long history of the constitution of my state, and to my knowledge that of every other state in

the nation there has not been a case where any governor, Democrat or Republican, has been found to have abused that power.

The alternative I have offered would additionally address several other matters I am concerned about mainly, the integrity of the Social Security Trust Fund and the requirement of a three-fifths supermajority to raise the debt ceiling. The arguments surrounding these points have been persuasively presented in the Minority report.

One additional concern is in ensuring that this Amendment provides the Congress the flexibility to deal with military and economic emergencies in a timely and sufficient manner. I believe not simply bad judgement but even dangerous to provide in the United States Constitution that there is a chance of misinterpretation or delay in the United States dealing with an international military emergency or a domestic economic emergency. It is known to us all that in 1941 this government by a single vote reauthorized the draft provision to the selective service of the United States government. That success but evident lack of will was almost certainly factored by the Axis powers in gauging how the United States would respond to international aggression. It would be an extraordinary disservice to this country if any future adversaries contemplating aggression against us or one of our allies were able to factor our response on the ability of the United States government to borrow funds to meet the crisis and whether this Congress would in a timely fashion or indeed eventually under any scenario be potentially unable to borrow or conduct expenditure to deal with that emergency. Indeed, I remind the Committee that in the years proceeding the second world war massive expenditures were made without a national emergency or without a declaration of war and which the United States was not engaged in hostilities.

The United States must have the budget flexibility that if we are threatened by international circumstances and certainly if there is a declaration of war, that we have the full power to defend these United States. Additionally, I believe if we have learned anything from our economic experience in the 20th century, we have come to learn much about the business cycle and about the occasional recessions and even depressions of our capitalist systems. We have also learned about the need to utilize the full resources of this government to reverse these cycles through both the fiscal and monetary powers of the United States government.

This outlines my concerns regarding S.J. Res. 1. I have voted to report this bill simply because I believe it is incumbent that the Senate take up and address this issue. I also believe it is incumbent upon the majority to work with us in the minority and not to pass a balanced budget amendment simply because it can be passed but to pass one that is in the best interest of this nation and those who have elected us to represent them.

As this bill goes to the floor of the Senate, I will continue to work with Senators from both sides of the aisle to address the concerns I have raised and to improve upon the legislation that has been reported by this Committee.

XIV. CHANGES IN EXISTING LAW

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

