

The Balanced Budget Veto A New Mechanism to Limit Federal Spending

by Anthony W. Hawks

Executive Summary

The return to large federal deficits after a brief period of surpluses shows that it is very difficult to enforce fiscal discipline within the current budget process. Strong tax revenue growth and falling defense spending during the 1990s resulted in a balanced budget in fiscal year 1998 for the first time in 29 years. But budget balance did not last long because Congress has opened the floodgates to rapid defense and nondefense spending increases in recent years. The war on terrorism has given Congress and the administration political cover to further increase the budget and side-step needed spending tradeoffs.

Large deficits may renew interest in budget process reforms to restrain spending. Indeed, in its latest budget the Bush administration proposed creating a new statutory line item veto that would be linked to deficit reduction. In the 1980s and 1990s, there were repeated efforts to impose greater discipline on the budget process by enacting both a line item veto and a balanced budget amendment to the Constitution. A balanced budget amendment with a supermajority requirement to protect against tax increases would be an effective restraint, but it has so far failed to gain the

needed political support. Meanwhile, a statutory line item veto was passed in 1996 but was subsequently struck down by the Supreme Court.

This study discusses lessons learned from those past reform efforts and proposes a new “balanced budget veto” mechanism. Under this mechanism, the president would be empowered with an item reduction veto only during sessions of Congress following fiscal years with budget deficits. The item reduction veto would provide the president with a tool to cut spending when Congress has failed to do so.

Such a veto power, however, would not enshrine balanced budgets as constitutional doctrine. Instead, it would provide Congress an incentive to curb deficits and regain budgetary power that has been temporarily bestowed on the president. Congress would be institutionally penalized for not limiting spending, and presidents would have a bias against raising taxes so as not to lose their veto power.

Congress and the administration need to focus on institutional reforms to mend the broken budget process. They should consider adopting a balanced budget veto as a new tool to encourage fiscal responsibility through spending restraint.

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Introduction

Falling defense spending and the economic boom of the 1990s helped create the first balanced federal budget in 29 years in fiscal year 1998.¹ Unfortunately, the balanced budget did not last long, and surpluses have now flipped to annual deficits of more than \$400 billion.² New national security spending seems to have caused both Congress and the administration to open the spending floodgates to a wide range of defense and nondefense budget increases.³

To curb spending and ensure that large deficits do not once again become the norm, a new institutional restraint is needed. Historically, fiscal conservatives have sought restraint from a line item veto or balanced budget amendment (BBA) to the Constitution. Those proposals have so far failed because they have been ill-defined or technically flawed, and because they offered no assurance that spending would be constrained. Moreover, supporters have not overcome the political and constitutional objections that such proposals would weaken the congressional “power of the purse” and permanently shift budgetary control to the president or the federal courts.

A BBA combined with a supermajority voting requirement to protect against tax increases would be a valuable constraint. But so far such a reform has not gained enough political support for passage. The traditional line item veto may be a useful means of cutting spending, but the president could also use it as a threat to veto spending to gain support for his own spending increases. The balanced budget veto (BBV)⁴ would integrate the two concepts so that the line item veto would become a self-executing means for enforcing budget balance in a manner that favors spending restraint.

This study examines past efforts to enact a balance budget amendment to the Constitution and efforts to provide the president with a line item veto. The technical and political problems with those reform efforts are discussed, and an alternative, the BBV, is pre-

sented. A model constitutional amendment is provided with a discussion of the purpose and functioning of the proposed new mechanism. The final part of the paper discusses possible objections to the BBV. Appendix A presents one version of the balanced budget amendment that Congress has considered a number of times. Appendix B provides a summary of state-level executive veto powers.

The Balanced Budget Veto

The BBV is a novel form of line item veto that would eliminate what has always been the fatal flaw in any balanced budget mandate—the lack of an effective enforcement mechanism that favors spending cuts over tax increases. The BBV is not the simple adoption of a line item veto and BBA simultaneously. Rather, the line item veto would be directed at the specific goal of balancing the budget by making its use conditional on the budget being unbalanced. In other words, the president would be able to exercise a line item veto only when Congress failed to balance the budget. A bright-line test would be used to determine if a fiscal year ended with a deficit, and when it did, the president would be empowered with line item veto authority throughout the next annual session of Congress.

For practical and technical reasons that will be discussed, the veto power itself would be a power to reduce specific monetary amounts rather than a true “item” veto. The veto power would not enshrine balanced budgets as constitutional doctrine. Instead, it would create an incentive for Congress to curb federal deficits as soon as possible to regain the spending prerogatives that a BBV would otherwise bestow on the president. In effect, Congress would be institutionally and politically penalized for not balancing the budget. The resulting transfer of power to the president would act as an institutional counterweight and fiscal control mechanism lacking in current balanced budget proposals.

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Congress failed to balance the budget. The president would be expected to use this enhanced power to cut spending or face criticism from Congress and the public that would view costly presidential initiatives as cynical attempts to retain the veto power. Most important, in the best tradition of our constitutional system of checks and balances, the president's veto authority would be protected from encroachment by Congress in the modern era of "omnibus" spending bills, while Congress could curb any abuse of the line item veto by balancing the budget on its own.

Whither the Balanced Budget Amendment?

Before discussing how the balanced budget veto would work, it is useful to examine why prior attempts at passing a balanced budget amendment or a line item veto have failed. The campaign to adopt a BBA is particularly instructive, having nearly succeeded in 1995, when supporters achieved passage in the House of Representatives but failed by a single vote in the Senate.⁵

The first BBA was proposed in 1936 as a per capita limit on the public debt.⁶ Since then, numerous constitutional mandates to prohibit deficit spending have been proposed in Congress. But it was not until 1992 that a bipartisan consensus in both chambers was reached, resulting in companion legislation (S.J. Res. 1 and H.J. Res. 1) that was subsequently introduced in the 104th Congress and collectively recognized as the balanced budget amendment.⁷

The BBA failed to gain the requisite two-thirds majority vote when first brought up for a vote in the House in the 102d Congress (June 1992) and again in the Senate during the 103d Congress (March 1994).⁸ Once Republicans gained control of both chambers following the watershed 1994 elections, the BBA finally had a realistic chance of passage. As part of the Contract with America, the BBA quickly passed in the House by a 300-to-132 margin on January 26, 1995.⁹ That vote set the stage

for a month-long debate in the Senate, where Sen. Robert Byrd (D-W.Va.) succeeded in garnering 34 votes in opposition and defeating the proposal by a single vote.¹⁰

That vote represented the high-water mark for BBA support. When called up again for a reconsideration vote in June 1996, the proposal fell three votes short.¹¹ When Sen. Orrin Hatch (R-Utah) reintroduced the BBA in the 105th Congress, he held two hearings and engaged the Senate in a month-long floor debate, but the BBA again fell one vote short.¹² On the House side, a hearing was held in February 1997, but the companion legislation, H.J. Res. 1, was never voted out of committee. Once a budget surplus was achieved in FY98, the BBA lost momentum. Consequently, no floor vote has occurred since March 1997 in either the House or the Senate.¹³

Despite expert testimony from a variety of sources, rigorous debate among legislators, and a decade-long search for the most effective constitutional language, the BBA was able to offer only the rhetorical requirement of a balanced federal budget. It contained no enforcement mechanism, and, instead of making spending increases politically painful, it relied on supermajority voting requirements to create the threat of budget deadlock. In so doing, however, it made legislation to increase revenue easier to enact (by a "constitutional majority" of the whole number of each House) than legislation to authorize deficit spending (by a three-fifths supermajority), thereby creating a constitutional cover for higher taxes to support increased spending. At the same time, it raised the specter of unlimited presidential impoundment power and threatened to embroil the federal judiciary in political fights over tax and spending legislation. For the reasons discussed below, the balanced budget veto avoids all of those pitfalls.

Beyond Rhetoric

The requirement of a balanced budget is set forth in the first sentence of the balanced budget amendment, which states that "total outlays for any fiscal year shall not exceed total receipts for that fiscal year." Even the

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strongest supporters of the BBA understand, however, that a balanced budget is not always the best policy. That is why the BBA has never included an outright ban on federal deficits (e.g., by repealing the Borrowing Clause in Art. I, § 8 of the Constitution). Instead, to avoid the danger of turning the Constitution into an economic straitjacket, several escape clauses had to be built into the amendment.

First, Congress itself could authorize deficit spending and an increase in the public debt by a three-fifths roll call vote of the whole number of each chamber, thereby establishing a constitutional presumption favoring a balanced budget based on a supermajority voting requirement. By their very nature, however, supermajority requirements also create the potential for minority bloc vetoes that undermine the principle of majority rule and increase the likelihood of budget stalemates. The result would have been that, until a balanced budget was finally achieved, both the president and the majority in Congress, whether Republican or Democratic, would have needed to placate a 40 percent minority to keep the government operating.

Second, supporters of a balanced budget amendment recognized that some type of “national emergency” exception would be needed for times of real crisis. The problem became how to create such an exception without permitting Congress to declare an “emergency” every year at budget time. The compromise incorporated into the BBA was to restrict “emergencies” to military conflicts resulting in either a formal declaration of war or “an imminent and serious military threat to national security.” That compromise, however, left out any escape clause for economic downturns (other than the general three-fifths voting requirement) when temporary deficits from tax cuts benefits might be justified to help revive the economy. Although Senator Hatch was able to win floor votes during both the 1995 and 1997 Senate debates to prevent economic emergency provisions from being added to the amendment, concern about this issue undoubtedly hindered his ability to obtain the requisite two-thirds majority vote.¹⁴

Even if the BBA had passed with only the three-fifths vote and military threat exceptions, recent events have demonstrated that the amendment would have been a feeble constraint in the post-September 11, 2001, spending environment. The key resolutions considered by the 107th Congress in the wake of 9/11—H.J. Res. 61/S.J. Res. 22 (condemning the terrorist attacks) and H.J. Res. 64/S.J. Res. 23 (authorizing military force)—were both enacted into law by virtually unanimous votes.¹⁵ If the BBA had been in force, Congress likely would have waived the balanced budget requirement under sec. 5 of the amendment because the country was “engaged in military conflict which causes an imminent and serious military threat to national security.” A waiver would have likely continued as long as the “war on terrorism,” which could be many years.

Phantom Enforcement

Amending the country’s fundamental charter is a solemn act at any time. Amendments must be workable and have a clear means of enforcement. As Prohibition showed, putting false promises into the Constitution can lead to widespread cynicism and disrespect for the law. Thus, it is troubling that, when pressed on exactly how a BBA would be enforced, proponents have argued that either (1) no enforcement problem exists because members of Congress would honor their constitutional oaths to balance the budget or (2) a three-fifths vote to raise the debt ceiling would force a balanced budget to avoid default on the national debt. Both hopes are unrealistic.

When it favorably reported the BBA to the full Senate in 1995 and 1997, the majority of the Senate Judiciary Committee prefaced its discussion of the enforcement issue by insisting:

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.¹⁶

However, fidelity to a constitutional oath is not a self-executing mechanism because it would not necessarily create the agreement needed on how to balance the budget. The more likely scenario is that lawmakers would claim to have honored their individual constitutional oaths by voting against government programs that they had never liked, yet fail to reach majority agreement on the overall legislation needed to balance the budget. One can imagine both sides of the debate claiming that the other side was flouting its constitutional responsibilities, with the political process providing no resolution. The new amendment would then become a dead letter.

Perhaps sensing that their "fidelity" argument was not particularly strong, supporters of the BBA fell back on another supposedly self-enforcing concept—the requirement in sec. 2 of the amendment that any increase in the limit on the public debt be approved by a three-fifths vote of the whole number of each house.¹⁷ One of the more enthusiastic supporters of this idea was former attorney general William Barr, who testified in January 1995:

The core of the amendment is section 2. That is the enforcement, and that is a very tough enforcement provision because section 2 says you can't increase the debt without a three-fifths vote. Now that is a stone wall.

Let us take the courts off the face of the Earth. That provision is going to work. I do not know of any instance in our constitutional history where the Congress of the United States or the

political branches have directly violated a provision such as a three-fifths vote provision. I think everyone here knows Congress will respect that three-fifths vote on increasing the public debt.

There is another practical reality. If Congress tries to borrow money around that provision, who is going to lend Congress the money? There is not one investor in the United States that is going to buy Federal paper if it has been issued in violation of the Constitution of the United States. So the real key provision is section 2 . . . that is the enforcement provision, and it is a self-enforcement provision.¹⁸

Supporters of the BBA believed that threats of a government shutdown due to an inability to borrow additional funds would forge political agreement where mere fidelity to the Constitution would not. Less than one year later, however, the idea of using the debt ceiling to enforce a balanced budget was shattered by the budget battles and resulting government shutdowns in November and December 1995. The political beating that Republicans suffered as a result of those shutdowns makes similar confrontations over the debt ceiling unlikely in the foreseeable future, so that even a three-fifths voting requirement would not prevent routine increases in the debt ceiling limit. Moreover, even as the larger political battles were being waged, the notion that money could not be borrowed "around" the statutory debt limit was itself being debunked, as the Clinton administration managed to incur \$139 billion in additional debt that would normally have been subject to the debt ceiling limit.¹⁹

The lack of an effective enforcement mechanism in the text of the BBA led many critics to voice concern about the potential assertion of implied enforcement powers by the president (through impoundment) or the federal judiciary (through court orders to raise taxes or cut spending, or both). Like Congress, the president takes an oath to uphold the

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Constitution and could interpret any BBA as an implied repeal of current statutory restrictions on presidential impoundment. Congress could then be faced with an unprecedented assertion of presidential power to impound appropriated funds whenever it appeared that government outlays would exceed receipts in violation of the BBA. Similarly, absent express language limiting judicial review, activist federal courts could decide that they were required by the BBA to enjoin deficit spending, declare budget-busting laws unconstitutional, or even order tax increases to achieve a balanced budget.

Supporters of the balanced budget amendment deny that there are such implied enforcement powers, especially by the courts, and trot out esoteric legal doctrines involving Article III “standing,” “political questions,” and limits on judicial remedies.²⁰ It is significant, however, that during the 1995 Senate debate, the floor managers capitulated on only 1 of 65 proposed floor amendments, namely, the amendment offered by Sen. Sam Nunn (D-Ga.) to limit judicial remedies to declaratory judgments or such remedies as Congress might authorize in any enforcement legislation.²¹ Despite that concession, sponsors of the BBA have always argued against any interpretation that might result in greater impoundment powers for the president or judicial involvement in budget decisions.²² Still, the Nunn amendment highlighted the dilemma for supporters of the BBA that, if the president or the judiciary stepped in to break a congressional deadlock caused by the supermajority voting requirements, the president or judiciary would almost certainly use enforcement powers that the amendment’s sponsors have opposed.

Constitutionalizing Bigger Government

Worse than a toothless balanced budget amendment would be an amendment that encouraged Congress to raise taxes under the guise of balancing the budget. To their credit, BBA sponsors have long been aware of that problem, which they addressed in sec. 4 of the amendment by requiring a “majority of the whole number of each House by a roll call

vote” to enact tax increases. Such “constitutional majorities” are better than the simple majorities currently needed to increase taxes. But that was not what was promised in the 1994 Contract with America, which called for a BBA that contained a three-fifths supermajority to raise taxes. As noted, in 1992 a bicameral and bipartisan consensus on the BBA had been reached that contained the constitutional majority language rather than a three-fifths supermajority provision for raising taxes. When that issue was put to a vote on the House floor in January 1995, the consensus version won, although not without first paying homage to the Contract with America. This result came about through a series of amendments, whereby the three-fifths supermajority provision was first adopted by a vote of less than a two-thirds (253 to 173)²³ and then replaced with the constitutional majority language that garnered the necessary two-thirds vote required for eventual passage.²⁴

The result was a BBA that required a 60 percent supermajority to borrow money but only a 50 percent (plus 1) majority to raise taxes, thus providing constitutional cover for voting in favor of tax hikes if both houses failed to reach the higher voting threshold for borrowing. Of course, Congress always has the option of cutting spending with simple majority votes. But experience in recent decades indicates that despite Congress having that power, the budget usually has a large deficit. What is needed is an extra protection against undisciplined spending growth, which brings us to the line item veto.

The Pseudo-Line Item Veto

Just as support for the balanced budget amendment was reaching its apex in March 1995, the line item veto was given new life with its inclusion in the Contract with America.²⁵ Supporters of the line item veto believed that it was politically impossible to follow state legislatures in adopting a line item veto by constitutional amendment; thus the Contract with America version proposed only a legisla-

tive line item veto.²⁶ That approach was adopted in the Line Item Veto Act of 1996.²⁷

The Line Item Veto Act

To be sure, a statutory line item veto is better than none at all. If, for example, President Clinton's limited cancellations by the veto in 1997 had been allowed to take effect, it would have resulted in a savings of \$2 billion over five years.²⁸ Further, a legislative line item veto can be more effective in some respects than a constitutional item veto because it could be crafted to "reach" into appropriations bills to cancel specific items of spending, and also permit the cancellation of special interest tax benefits.²⁹ The Line Item Veto Act accomplished both goals, but its language would be unsuitable in a constitutional amendment.³⁰

Indeed, the textual complexity of the Line Item Veto Act underscores why state item veto provisions cannot be simply transplanted to the federal Constitution. The only reason true "item" vetoes are possible at the state level is that appropriations bills are actually itemized by state legislatures. When bills are presented by state legislatures, the spending provisions are typically small enough for the governor to selectively veto discrete parts and sign the remainder into law.³¹

The federal budget process, however, would preclude similar action by the president. Appropriations are typically designated in spending bills by lump-sum accounts, which may contain dozens or even hundreds of individual items that are identified only in accompanying conference or standing committee reports and other nonstatutory sources. Where Congress deviates from this practice (e.g., by "earmarking" funds for specific projects), the executive branch often opposes it because lump-sum funding is the most effective way to manage program expenditures.³² Not surprisingly, federal agencies prefer having discretion to shift funds within larger appropriated accounts to address new conditions and circumstances as they arise. Thus, for a true item veto there would need to be more earmarking so that discrete items could be identified for veto,

but the very practice of earmarking would hinder the flexibility needed by agencies to fulfill their missions.

Prior to 1974 presidents were able to escape this dilemma to the extent that they were willing to defy congressional sensibilities by impounding appropriated funds. Such impoundments had always been contentious, but their constitutionality had not been resolved.³³ Congress effectively dispelled the issue by enacting the Impoundment Control Act of 1974, which formally authorized temporary spending deferrals.³⁴ More important, the act prevented the president from permanently rescinding or canceling budget authority without subsequent express approval of Congress. With no president having taken action to challenge the constitutionality of the ICA, it was left to the Republican class of 1994 to advance a legislative means—the line item veto—that would allow the president to end-run the ICA.³⁵ In devising a statutory item veto, the 104th Congress considered two very different options: enhanced rescission (favored by the House) and separate enrollment (favored by the Senate). Ultimately, Congress endorsed the unconstitutional approach of enhanced rescission over the impractical alternative of separate enrollment.

With separate enrollment, the same degree of itemized detail that is found in an accompanying committee report would be included as statutory language in each spending or tax bill. Once the appropriation or authorization measure passed both houses in the same form, the secretary of the Senate or the clerk of the House of Representatives (depending on where the measure originated) would be directed to "disaggregate" the items in the bill so that each item could be treated as a discrete bill with separate bill numbers prior to presentation to the president.

Given the modern practice of passing gargantuan "omnibus" bills, the notion that the president would sign thousands of bills, each one section or one paragraph long, seems unlikely, but that was the form in which the Line Item Veto Act originally passed the Senate.³⁶ But separate enrollment was dropped in conference in favor of the House bill, which

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endorsed the enhanced rescission approach. That approach was struck down by the Supreme Court as unconstitutional in June 1998 in *Clinton v. City of New York*.³⁷ Because the current Bush administration has repeatedly advocated that Congress “correct the constitutional flaw” in the 1996 Line Item Veto Act, a closer look at the *Clinton* case is warranted.³⁸

The Line Item Veto Case

The presidential cancellations challenged in *Clinton* involved (1) a direct spending provision in the Balanced Budget Act of 1997 that waived the government’s right to recoup as much as \$2.6 billion in Medicaid funding from New York City and (2) a limited tax benefit in the Taxpayer Relief Act of 1997 permitting certain food refiners and processors in Idaho to defer recognition of capital gain on stock sales to eligible farm cooperatives. The fundamental issue in *Clinton* was whether the cancellations were tantamount to a presidential repeal or amendment of duly enacted statutes. If so, then the cancellations violated either the Presentment Clause (because no amending or repeal legislation was passed by both houses and presented to the president) or the separation of powers doctrine (by impermissibly transferring legislative power to the executive branch), or both.³⁹

A Supreme Court majority found a violation of the Presentment Clause and deemed it unnecessary to address the separation of powers issue. However, in their dissents, Justices Scalia and Breyer refused to characterize the cancellations as statutory amendments or repeals in the first instance. For the dissenters, the cancellations were simply exercises of discretionary authority already granted under the Line Item Veto Act. As Justice Scalia put it:

There is not a dime’s worth of difference between Congress’s authorizing the President to cancel a spending item, and Congress’s authorizing money to be spent on a particular item at the President’s discretion. And the latter has been done since the Founding of the Nation.⁴⁰

But that would be true only if the cancellation power were included in the law containing the appropriations, direct spending, or limited tax benefits being cancelled. Where Justices Scalia and Breyer went wrong was in conflating the authorizing law (the Line Item Veto Act) with the laws being affected by the cancellations (the Balanced Budget Act and Taxpayer Relief Act).

Justice Scalia started to draw this distinction when he recognized that Art. I, § 7 “obviously prevents the President from canceling a law that Congress has not authorized him to cancel.” Scalia then asserted:

It was certainly arguable, as an original matter, that Art. I, § 7 also prevents the President from canceling a law which itself authorizes the President to cancel it. But as the Court acknowledges, that argument has long since been made and rejected.⁴¹

The flaw in Justice Scalia’s logic is that the argument that he claimed “has long since been made and rejected” is not the argument put forth by the *Clinton* majority. That is because the Line Item Veto Act was not “a law which itself authorizes the President to cancel it” (i.e., the Line Item Veto Act itself) but rather a law that purports to authorize the president to cancel *other* subsequent laws. Conversely, the laws being affected by the cancellations in *Clinton*—the Balanced Budget Act and Taxpayer Relief Act—were not laws that themselves authorized the president to cancel anything.

The precedent cited by Justice Scalia involved the exercise of discretion within a single statute, not one statute authorizing cancellations in a later statute.⁴² Moreover, there is an important distinction between discretionary impoundments, which have been recognized and accepted since the nation’s founding, and impoundments of nondiscretionary spending, which have long been controversial and are now prohibited by the ICA.⁴³

An early example of a discretionary impoundment occurred in 1803 when Thomas Jefferson impounded \$50,000 for navy gun-

boats on the Mississippi River.⁴⁴ The gunboats were funded by a statute that appropriated \$50,000 to build gunboats “not exceeding fifteen” in number. When the gunboats became unnecessary following the Louisiana Purchase, President Jefferson notified Congress that the money would remain unexpended because the “favorable and peaceable turn of affairs on the Mississippi rendered an immediate execution of that law unnecessary.”⁴⁵ Such action was consistent with the Presentment Clause because Congress had authorized the president to build fewer than 15 gunboats if circumstances permitted. By contrast, policy or nondiscretionary impoundments are the functional equivalents of absolute vetoes since Congress is never given an opportunity to override them.

Similarly, in the case relied upon most heavily by the government and cited in both dissents, *Field v. Clark*,⁴⁶ the Court upheld the constitutionality of the Trade Act of 1890, which contained a reciprocity provision that empowered the president to suspend import duty exemptions for certain commodities if trade with the exporting country was “reciprocally unequal and unreasonable.”⁴⁷ The Presentment Clause was not implicated in *Field* because the cancellation power (viz., the power to cancel import duty exemptions from nonreciprocal countries of origin) was restricted to the 1890 Trade Act itself and did not apply to any subsequent legislation. The majority opinion explicitly pointed out this distinction, but neither dissent squarely addressed it.⁴⁸

Instead, the dissenters offered up a red herring by suggesting that the presence of “Line Item Veto” in the statute’s title had “succeeded in faking out the Supreme Court” and that, if the statute had simply “authorized the President to ‘decline to spend’ any item of spending contained in the Balanced Budget Act of 1997, there is not the slightest doubt that authorization would have been constitutional.”⁴⁹ To the contrary, only if the Line Item Veto Act had authorized the president to “decline to spend” appropriations in the Line Item Veto Act itself would its constitutionality likely have been upheld. A statute authorizing the president to “decline to spend” monies not

yet appropriated would likely have met the same fate as the Line Item Veto Act.

In cases such as *Field* or Justice Scalia’s “decline to spend” hypothetical, the president is not being granted a new legislative power (e.g., to amend or repeal) but rather is executing a stated policy embodied in the law itself, namely, to suspend exemptions for X, Y, or Z or to spend no more than \$X. The Line Item Veto Act was qualitatively different because it empowered the president (subject to override in a disapproval bill) to execute policies different from the ones embodied in the final texts of either the Balanced Budget Act or the Taxpayer Relief Act. That distinction is critical because laws have temporal standing under the Constitution, whereby subsequent statutes can amend or repeal prior ones, but prior statutes cannot nullify, in whole or in part, subsequent ones. The Presentment Clause secures this temporal standing, not only by requiring that subsequent repeal or amending legislation be presented to the president, but also by mandating that such legislation first “shall have passed” both houses of Congress.⁵⁰ The Line Item Veto Act was objectionable because it violated this rule of temporal standing.⁵¹

As a consequence, it was irrelevant that the Line Item Veto Act was itself being faithfully executed by President Clinton’s cancellations. The statutes that were not being faithfully executed were the Balanced Budget Act and the Taxpayer Relief Act because in those laws Congress had not empowered the president to effect any cancellations, and the earlier Line Item Veto Act did not take precedence over the two subsequent statutes. Only the Constitution takes precedence over future statutes, just as only the Constitution can bind future Congresses. Hence the Court majority properly concluded that any change in how the president determines the final text of a statute “must come . . . through the amendment procedures set forth in Article V of the Constitution.”⁵²

Searching for Alternatives

Despite losing a statutory tool that should have helped curb wasteful govern-

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ment spending, advocates of limited government should welcome the *Clinton* ruling because it demonstrated an unwillingness to distort the original constitutional framework just to create a new, albeit desirable, power in the presidency. Fidelity to the Constitution demands no less. However, as a result of the *Clinton* decision there are no attractive alternatives for enacting a modified form of statutory line item veto, even if a new consensus was reached in Congress to voluntarily cede power once again to the president.

The notion of separate enrollment remains a possibility, but even if it were not so cumbersome, its constitutionality is suspect.⁵³ Another possibility would be to rewrite the line item veto to spell out the procedure to be followed with presidential cancellations but then make actual cancellations conditional on future bills that expressly authorize the president to cancel provisions that are found only in the authorizing bill itself. Such an authorizing bill, for example, could include language to the effect that “this Act authorizes the President to cancel provisions of this Act in accordance with . . . [whatever procedural statutory line item veto had already been enacted].” Properly crafted, such a statutory veto would be consistent with the *Field* line of cases and avoid the Presentment Clause issue because the president would no longer be “chang[ing] the text of duly enacted statutes” but simply exercising the cancellation discretion contained in the authorizing bill in accordance with whatever procedure was set up in the revised line item veto legislation. Even if the Presentment Clause were satisfied, however, there would be no guarantee that such a revised line item veto would satisfy the separation of power concerns articulated in Justice Kennedy’s concurring opinion.⁵⁴

Notwithstanding those obstacles, President George W. Bush has repeatedly called on Congress to “restore the President’s line item veto authority.”⁵⁵ In the FY04 budget, the administration proposes a line item veto that supposedly “would correct the constitutional flaw in the 1996 Act.”⁵⁶ However, the administration does not explain how the “flaw” would

be corrected, except to suggest that any new line item veto would be “linked to deficit reduction.”⁵⁷ The proposal would apparently authorize the president to “reject new appropriations, new mandatory spending, or limited grants of tax benefits (to 100 or fewer beneficiaries) whenever the President determines the spending or tax benefits are not essential Government priorities,” with all resulting savings being “used for deficit reduction.”⁵⁸

That suggestion is reminiscent of the government’s argument in *Clinton* that the disputed cancellations were not really a “repeal” of the cancelled provisions because the cancelled items “retain real, legal budgetary effect” through the act’s “lockbox” feature to ensure that any savings from the cancellations would be used to reduce the federal deficit.⁵⁹ The Court flatly rejected that argument, and it is unlikely that the same argument would sway anyone a second time around.

Alternatively, the administration may be endorsing Justice Scalia’s derisive suggestion that the Line Item Veto Act would never have been struck down if it had simply used the phrase “decline to spend” instead of “cancel.” If so, then the administration has misread the majority opinion. Any statute that permitted the president to “decline to spend” monies enacted in *future* appropriations would be struck down for the same reason as the Line Item Veto Act. Any such statute would be nothing more than a guise for allowing the president to repeal portions of future appropriation laws without a repeal statute being properly passed by both houses and submitted to the president in accordance with the Presentment Clause.

In any event, President Bush’s “decline to spend” recommendation is a pale imitation of the item veto power that he enjoyed as governor of Texas.⁶⁰ And although the recommendation has been included in each of the last three budgets, the administration has not sent up a specific legislative proposal, and no member of Congress has sponsored legislation to implement such a proposal.⁶¹ But a constitutional fight needs to be fought to balance the

budget by cutting spending. The focus of this fight should be the balanced budget veto.

Belling the Budget Cat

It is commonplace to say that Congress can balance the budget whenever it wishes, simply by demonstrating the political will to do so.⁶² True enough, but it also brings to mind Aesop's fable about belling the cat. Like so many mice, members of Congress enthusiastically agree that belling the cat (i.e., balancing the budget) is a great idea but then slink away at the thought of actually doing it. Indeed, support for a balanced budget amendment derives in large part from the belief that only a constitutional mandate can force Congress to discipline itself.

The flaw in this belief was pointed out years ago by Sen. Robert Byrd (D-W.Va.), long-time chairman or ranking member of the Senate Appropriations Committee and perhaps the most formidable opponent of both the BBA and the line item veto. In an op-ed piece in 1993, written shortly after the Senate Judiciary Committee reported a version of the BBA to the full Senate,⁶³ Senator Byrd criticized the wishful thinking that underlay the BBA, arguing that you cannot legislate political courage:

Saying it [i.e., that the budget should be balanced] will not make it happen, even if it is the Constitution that says it. . . . The bottom line is courage. I do not see how a constitutional amendment will give us politicians any more spine that we now have.⁶⁴

Senator Byrd's point is telling and deserves a direct response. Except in rare cases, courts do not enforce our laws directly; rather they enforce the penalties for violating those laws. By failing to include any penalty in the BBA, its proponents rendered the amendment still-born and unenforceable. The response to Senator Byrd then is that members of Congress will make the hard choices needed to

balance the budget only when a penalty exists that makes it more painful not to balance the budget.

Because Congress is a political institution, the penalty for failing to balance the budget should be political in nature. One would like to think that the electoral process would be sufficient to exact such political pain, but experience has shown that voters do not effectively pressure Congress to limit spending, regardless of their support for a balanced budget in the abstract. The alternative is an institutional penalty consistent with the Constitution's separation of powers framework for ensuring that our branches of government keep each other in check. In that sense, you can legislate the political will to limit spending by strengthening checks and balances so that Congress suffers an institutional penalty when it fails to balance the budget.

An institution-wide penalty is also appropriate because no single member of Congress can be held responsible for failing to balance the federal budget. Since the blame for deficits falls on Congress as an institution, any penalty for failing to balance the budget should attach to Congress as a whole. But how should Congress be collectively punished? The answer lies in recognizing that Congress is a political institution. The penalty for failing to balance the budget must therefore be political, not judicial, in nature. It must entail a loss of political power for all members of Congress across both parties and the entire ideological spectrum.

Indeed, to be effective, the penalty should (1) affect Congress as a whole, so that all members have an institutional stake in achieving a balanced budget; (2) be nonpartisan to gain enough support from both parties to enact a balanced budget; (3) threaten a substantial political loss so that each member's desire to avoid the sanction will outweigh fear of political retribution from constituents opposing a balanced budget; and (4) be self-executing, so that the need for judicial enforcement is rare and annual budgeting does not become embroiled in perpetual

Support for a balanced budget amendment derives in large part from the belief that only a constitutional mandate can force Congress to discipline itself.

A model amendment to the Constitution is offered here in six sections.

litigation. The balanced budget veto achieves all four of those goals.

A Model Balanced Budget Veto Amendment: How Would It Work?

To illustrate how a BBV would work, a model amendment to the Constitution is offered here in six sections with a section-by-section analysis.

The Balanced Budget Veto Amendment

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States that authorizes the President to separately approve, reduce, or disapprove any monetary amounts in any legislation unless the budget of the United States was balanced for the preceding fiscal year.

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 when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission to the States for ratification:

ARTICLE —

SECTION 1. For purposes of this article, the budget of the United States for any given fiscal year shall be deemed unbalanced whenever the total amount of the debt of the United States held by the public at the close of such fiscal year is greater than the total amount of the debt of the United States held by the public at the close of the preceding fiscal year.

SECTION 2. If the budget of the United States is unbalanced for any given fiscal year, the President may separately approve, reduce, or disapprove any monetary amounts in any legislation that appropriates or authorizes

the appropriation of any money drawn from the Treasury, other than money for the legislative and judicial branches of the United States Government, and which is presented to the President during the next annual session of Congress.

SECTION 3. Any legislation that the President approves with changes pursuant to section 2 of this article shall become law as modified. The President shall return with objections those portions of the legislation containing reduced or disapproved monetary amounts to the House where such legislation originated, which may then, in the manner prescribed under section 7 of Article I for bills disapproved by the President, separately reconsider those reduced or disapproved monetary amounts.

SECTION 4. The Congress shall have the power to implement this article by appropriate legislation.

SECTION 5. This article shall take effect on the first day of the next annual session of Congress following its ratification.

SECTION 6. This article shall be inoperative unless it shall have been ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by Congress.

Discussion of Section 1

To determine whether particular spending bills would be subject to the BBV, a bright-line test is needed to establish when the federal budget is “unbalanced.” This raises the issue of defining exactly what is meant by “unbalanced,” which has been an important issue for supporters of the BBA in the past. Balanced budget amendments have usually focused on whether the fiscal year has ended with a deficit, which is an excess of “total outlays” over “total receipts.” By contrast, the model amendment focuses on whether the public debt of the United States (debt held by the public) has increased or decreased during a fiscal year.

There is not a dollar-for-dollar equivalency between the unified budget deficit (or surplus) and the increase (or decrease) in debt

held by the public during a year. In most years, changes in debt held by the public will approximate the deficit or surplus, but discrepancies can arise from various accounting factors. For example, federal credit-financing activities, such as loans to students and small business, require the disbursement of monies in anticipation of later repayment. Such outlays are not initially counted in the budget; only the estimated subsidy costs are included. As a result of such accounting procedures, changes in debt held by the public will not track deficits and surpluses precisely.

For BBAs based on measuring the deficit or surplus, the terms “total receipts” and “total outlays” must be defined as encompassing all receipts and outlays of the government, except those related to borrowing and repayment of debt principal.⁶⁵ This broader definition is needed to eliminate any notion that there could be “off-budget” receipts and outlays when computing a deficit, balance, or surplus. Otherwise it becomes easy for Congress to artificially inflate or lower “deficits” by manipulating what is officially counted in the budget.

The prime example here is Social Security, which, as a result of laws passed in 1983,⁶⁶ 1985,⁶⁷ and 1990,⁶⁸ is labeled “off-budget” in official budget documents even though it is within the unified budget totals.⁶⁹ Social Security—like all government programs—has an impact on the economy no matter how it is treated in the budget. Thus, it should be constrained like all other programs by a constitutional mandate for a balanced budget, which will be especially important once Social Security itself begins generating deficits in the next decade.

The logic of incorporating Social Security within the BBA’s definition of total receipts and total outlays has caused resistance by those wanting to protect its “off-budget” status. When the BBA has been brought up for votes, opponents have voiced fears about cuts to Social Security because its off-budget status would supposedly be threatened.⁷⁰ Under the model amendment, if debt held by the public has increased during a fiscal year, then the bud-

get would be considered unbalanced, regardless of whether Social Security is considered off-budget or on-budget. The model amendment neutralizes the Social Security issue because opponents of a balanced budget veto would not want to exempt Social Security because that would make it that much harder to cancel the president’s veto power by balancing just the non-Social Security portion of the budget.

Changing the budget balance focus to debt held by the public elevates substance over form. Whereas definitions of “receipts” and “outlays” in the BBA raise issues of off-budget and on-budget accounting, debt held by the public puts the focus on the impact of federal debt on the economy. The growing burden of public debt poses a long-term threat to the nation’s economic health, and it is this threat that the BBV is designed to counteract.

The concept of debt held by the public is defined similarly by the Treasury, the General Accounting Office, and the Congressional Budget Office.⁷¹ There are already constitutional and statutory requirements for reporting debt held by the public to Congress on an annual basis.⁷² But to minimize any definitional disputes, Congress could establish in the legislative history that the current meaning of “debt held by the public” is intended to be controlling. The key here is not so much the specifics of how debt held by the public is defined, but that the definition be followed on a consistent basis, so that valid comparisons can be made from one fiscal year to the next. If issues arise that the current meaning does not explicitly address (e.g., the proper treatment of debt issued by new quasi-governmental entities), Congress should be authorized, consistent with the current meaning, to clarify any gray areas of definition. The model amendment allows for this possibility by granting Congress (under sec. 4) the power to implement changes by appropriate legislation. The Supreme Court, however, would remain the final arbiter of the constitutional meaning of “debt held by the public” to prevent Congress from manipulating the term (e.g., by eliminating debt held by

Social Security should be constrained like all other programs by a constitutional mandate for a balanced budget

Once it is determined that a fiscal year has ended unbalanced, the BBV power would take effect with the next annual session of Congress.

foreign governments from the definition to make it appear that debt held by the public was decreasing).

It is unlikely, however, that Congress would stray too far from the current definition, and the president would surely veto any attempt to deny or cancel the BBV power with an unreasonable definition. To preserve the reduction veto power, the president would be strongly motivated to insist that all debt held by the public be fully and accurately counted. Consequently, if Congress tried to redefine “debt held by the public,” the president would likely pressure Congress to make certain that any definitional changes accorded with the recommendation of nonpartisan accounting and budget authorities.

Discussion of Section 2

Timing and Certification. Sec. 2 establishes the scope and timing of the BBV. Once it is determined that a fiscal year has ended unbalanced (as defined in sec. 1), the BBV power would take effect with the next annual session of Congress. This determination would be made by a single calculation at the close of each fiscal year and prior to the start of the next annual session. Suppose, for example, that the model amendment had been in effect for FY02. Since debt held by the public increased in that year, President Bush could have started exercising the BBV when Congress reconvened on January 3, 2003.⁷³ The president would then have retained this veto power throughout the entire first session of the 108th Congress, at which time the veto power would end unless it was determined that FY03 had also ended without budget balance. In that event, the veto power would continue throughout the second session of the 108th Congress.

As part of any implementing legislation, Congress could designate one or more qualified persons to certify on the first day of each annual session of Congress whether and by how much the debt held by the public increased during the fiscal year that had just ended. The logical choices for this task would be (1) the secretary of the Treasury, who is already required to report this information to Congress at the beginning of each annual session, and (2) the comptroller general of the United States, who is responsible for monitoring presidential compliance with the rescission and deferred spending provisions of the Impoundment Control Act of 1974,⁷⁴ and who must submit an annual audited financial statement of the federal government no later than March 31 each year.⁷⁵

In recent GAO-audited financial statements, for example, debt held by the public decreased in each fiscal year from FY98 through FY01.⁷⁶ Accordingly, under the model amendment, none of those fiscal years would have been considered unbalanced and the president would have been denied use of the BBV. As noted, however, since debt held by the public increased in FY02, the president would have been empowered to exercise the BBV beginning with the 108th Congress, as shown in Figure 1.

The advantage of this approach is that, unlike the BBA, which would involve budget mandates based on unreliable tax and spending estimates, the BBV would create legal consequences based on a concrete measurable event—whether debt held by the public decreased or not in a completed fiscal year. That approach would avoid disputes over whether budget projections by the Congressional Budget Office or the Office of Management and Budget were more accurate. The BBV would be contingent on the

Figure 1
Balanced Budget Veto Timeline

	107th Congress		107th Congress		108th Congress
FY2000 ends →	1st Session →	FY2001 ends →	2nd Session →	FY2002 ends →	1st Session
Balanced →	No BBV →	Balanced →	No BBV →	Unbalanced →	BBV

government's actual fiscal performance, which the GAO verifies at the close of each fiscal year.

Procedure aside, this section of the model amendment raises three substantive issues relating to (1) the inclusion of a reduction veto or spending cut power, (2) the application and limitation of this power to "monetary amounts" (rather than "items") of discretionary spending, and (3) the exclusion of appropriations for the legislative and judicial branches. Each of these issues is discussed in turn.

Reduction Veto Power. One practical objection to an item veto at the federal level is the general absence of "items" in spending legislation.⁷⁷ Unlike state legislatures, which are often governed by detailed constitutional requirements regarding the form and style of spending bills, the federal government traditionally appropriates in broad spending accounts. For example, military construction appropriations for FY02 were divided into 20 spending accounts, such as "Military Construction, Army," which allocated \$1,778,256,000 for "acquisition, construction, installation, and equipment of temporary or permanent public works, military installations, facilities, and real property for the Army."⁷⁸ The items that make up this \$1.78 billion are identified only in the accompanying conference report, which lists hundreds of separate construction projects by individual state—none of which is subject to a presidential veto because the report itself is never presented to the president for approval.⁷⁹

Under the line item veto found in most states and in various federal proposals, the president would be handicapped. For example, H. J. Res. 23 in the 107th Congress would have authorized the president to "disapprove any item of appropriation in any bill."⁸⁰ Yet a conference report is not a "bill"; thus the president would be limited to vetoing discrete items only in the legislation itself. State supreme courts have defined an "item" as an "indivisible sum of money dedicated to a stated purpose."⁸¹ Under that definition, the only items subject to veto would be lump-sum totals such as "Military Construction, Army."

Fortunately, this feature of federal appropriation bills is not insurmountable, as the

Line Item Veto Act of 1996 attempted to show. In that act, Congress spelled out in detail how the president could cancel "in whole—any dollar amount of discretionary budget authority" that was either (1) specified in an appropriation act, accompanying conference report, or "governing committee report" or (2) provided for in an appropriation act but allocated by another statute such as an authorization law.⁸² In either case, while the cancellation affected only a dollar amount "in whole," the practical result was to reduce a lump-sum appropriation by the "whole" dollar amount being cancelled.⁸³ In theory, Congress could put similarly detailed language in a constitutional amendment, but no member has thus far offered such a proposal.⁸⁴ Moreover, there is a much simpler solution, which is to grant a reduction veto power similar to the veto power currently found in 10 states.⁸⁵ This would allow the president to "reach" into a conference or committee report and reduce the lump-sum appropriation by an amount equal to the total amount of objectionable spending items identified in such reports.

Monetary Amounts of Discretionary Spending. Closely related to the reduction veto power is the restriction of such power to the "monetary amounts" found in discretionary appropriation or authorization bills. This approach is also similar to the Line Item Veto Act, which empowered the president to cancel "any dollar amount" of discretionary spending. The logic of replacing "item" with "monetary amounts" is a function of the reduction power itself in that, while "items" can be deleted, it is the dollar figures within an item that are being reduced.

On the other hand, the model amendment does not, as the Line Item Veto Act did, attempt to extend the veto power to "items of new direct spending" (i.e., new entitlements) or "limited tax benefits." This is partly for simplicity, given that the verbiage needed to define "items of new direct spending" and "limited tax benefits" would be inappropriate for a constitutional amendment. It is also because neither of the two omitted categories

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would normally contain “monetary amounts” that the president could “separately approve, reduce, or disapprove.” In *Clinton*, for example, the two cancellations challenged were (1) sec. 4722(c) of the Balanced Budget Act of 1997, which increased federal spending by treating certain New York medical provider taxes as Medicaid matching funds that did not have to be refunded to the federal government, and (2) sec. 968 of the Taxpayer Relief Act of 1997, which allowed gains on the sale of stock in certain farm processing facilities to be deferred. In neither case did the cancelled provisions contain “monetary amounts” that could be stricken or reduced.⁸⁶

More significant, there is no need to bring entitlement spending within the scope of the BBV because the key to reducing federal deficits will derive from a congressional desire to reclaim that body’s budget prerogatives. What had been a major objection to the line item veto’s supposedly unfair focus on discretionary spending is now one of the BBV’s greatest strengths: the veto power *should* focus on discretionary spending because that is the spending that is most dear to members of Congress. Entitlement spending would be controlled indirectly—the more the president vetoes pork-barrel spending for members’ districts, the more disciplined Congress will become in reducing entitlement spending to balance the budget.

Legislative and Judicial Appropriations. Last, sec. 2 of the model amendment explicitly protects legislative and judicial branch appropriations from the reduction veto. This is a matter of both political prudence and constitutional principle.⁸⁷ From a practical perspective, exempting legislative and judicial appropriations would clearly make it much more palatable to members of Congress to endorse the BBV. From a structural standpoint, this would avoid potential conflicts with provisions of the Constitution that assign duties and prerogatives to the other two branches. (A veto that reduced the salaries of members of Congress or Art. III judges, for example, would conflict with Art. I, § 6, cl. 2 and Art. I, § 1, respectively). Similarly, exempting legislative

and judicial appropriations up front would obviate any disputes over whether the president was preventing Congress and the courts from discharging their constitutional duties.

Even if these political and structural considerations were not significant, granting the president itemized control over the internal funding of the other two branches would be an affront to the separation of powers doctrine, particularly where the judiciary is concerned. The legislative branch could at least defend itself by balancing the budget, whereas the judiciary would have no recourse against punitive or vengeful vetoes by a president. The purpose of separation of powers is not only to diffuse government power but also to enable each branch to fend off aggrandizement by the other two, thereby protecting against centralized power in any one branch. Exempting legislative and judicial funding from the BBV is necessary to preclude such aggrandizement by the president.

Discussion of Section 3

The first sentence in sec. 3 states explicitly what would otherwise be implied, namely, that legislation containing reduced or disapproved monetary amounts, but otherwise approved by the president, would become law as modified in the reduced or remaining amounts. The revised portions of the bill would then be returned with the president’s objections to Congress where they would then be reconsidered in the manner that vetoed legislation is reconsidered now under Art. I, § 7. This procedure would be straightforward as far as it goes, but it also raises an issue that has been given little attention in past congressional hearings on the line item veto: whether the vetoed items (or, in the case of the model amendment, the reduced or disapproved monetary amounts) are to be reconsidered *separately* or in a single bill.

That procedural issue is substantively important because it is likely to be more difficult for Congress to achieve the consensus necessary to override the president on a series of separate reconsideration votes than on a single vote affecting all of the vetoed provi-

sions. The two line item veto proposals that were introduced in the 107th Congress, H.J. Res. 23 and H.J. Res. 24, do not explicitly address this issue and appear to diverge in their approaches. H.J. Res. 23 followed the practice of past line item veto proposals and most states (including President Bush's home state of Texas) in providing that Congress may "reconsider any item disapproved" in the manner prescribed in Art. I, § 7.⁸⁸ This language would suggest that each item be reconsidered separately but does not compel such a procedure. Similarly, H.J. Res. 24 stated that a disapproved "dollar amount of discretionary budget authority . . . item of new direct spending, or . . . tax benefit" would be "treated in the same manner as a bill" under Art. I, § 7. H.J. Res. 24 was clearly an attempt to mirror the Line Item Veto Act, but the procedure followed in the act was not separate reconsideration of each cancelled item. Rather, the Line Item Veto Act required the reconsideration of each presidential cancellation message, which in turn had to address the entire law affected by a cancellation, even if the message contained a multitude of cancelled provisions.⁸⁹

The model amendment opts for separate reconsideration rather than the single bill approach of the Line Item Veto Act precisely because few members of Congress would want to go on record each time a vetoed pork-barrel project was reconsidered. Such a public record would not only make it more difficult to override the veto; it would also discourage members of Congress from larding up spending bills with pork-barrel projects in the first place. For similar reasons, the model amendment requires the same two-thirds override vote that governs presidential vetoes generally. Although a simple majority override could apply to reduced or disapproved monetary amounts, the BBV can better achieve its central purpose of compelling Congress to balance the federal budget if overrides are rare.⁹⁰

Discussion of Sections 4–6

The remaining sections of the model amendment are essentially procedural and noncontroversial. Sec. 4 is a standard provi-

sion granting Congress the power to enact implementing legislation. Such implementing legislation might be necessary, for example, to clarify what government liabilities constitute debt held by the public, to designate the official or officials responsible for certifying whether debt held by the public has increased or decreased, and to spell out the certification procedures that must be followed.

Further, there is a subtle difference between the model amendment and comparable language found in the BBA and the Thirteenth, Fourteenth, Fifteenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments to the Constitution. Where the model amendment uses the phrase "power to implement," the cited constitutional amendments use "power to enforce," and the BBA combines the two approaches in the single phrase "Congress shall enforce and implement . . . by appropriate legislation." The reason for this difference is that the model amendment does not contain any sort of prescription or mandate that would require enforcement by appropriate legislation. Whereas, for example, the BBA mandates that "total outlays" not exceed "total receipts" absent a three-fifths vote, the model amendment does not proscribe or mandate any action. It simply produces legal consequences (i.e., making the reduction veto power available to the president) in the event of an established fact (i.e., certification of an unbalanced budget at the end of a fiscal year).

Sec. 5 of the model amendment designates an effective date—the first day of the next annual session of Congress following ratification. Since the model amendment can take effect as soon as a calculation of debt held by the public is made for the current or most recent fiscal year, no transition period is needed. Thus, if ratification occurred in June, the certifying official would wait until after the fiscal year ended on September 30 to calculate and certify whether debt held by the public increased or decreased during that fiscal year. If ratification occurred in late December, then the requisite calculation could be completed prior to ratification and

The Line Item Veto Act required the reconsideration of each presidential cancellation message, which in turn had to address the entire law affected.

The proper balance between Congress and the president over the constitutional “power of the purse” has been debated since the founding of the Republic.

the proper certification submitted to Congress on the first day of the next annual session in January.⁹¹

Finally, the model amendment includes a seven-year ratification period similar to those of the Eighteenth, Twentieth, Twenty-First, and Twenty-Second Amendments. This seven-year limitation is probably unneeded because ratification would likely be uncontroversial at the state level once Congress had given its approval. Since more than three-fourths of the states already have some form of line item veto or balanced budget requirement, or both, it is hard to see why they would deny a similar veto or requirement at the federal level. Nonetheless, a seven-year limitation has been added to eliminate any opposition on this point.

Overcoming Objections to a Balanced Budget Veto

Proposed constitutional amendments must, of course, overcome any political opposition to their approval in Congress and the states. In this regard, the experience of the failed balanced budget amendment offers some valuable lessons for countering possible opposition to a balanced budget veto. These lessons can be summarized as follows: first, establish the proposal’s general suitability as a formal amendment to the Constitution; second, eliminate any technical objections to the amendment’s text or structure; and third, address and rebut Congress’s real (i.e., political) objections to the proposed amendment.

Suitability Objections

In 1999 the nonpartisan group Citizens for the Constitution published a set of eight guidelines, titled “Great and Extraordinary Occasions: Developing Guidelines for Constitutional Change,” which it hoped would frame future discussions about amending the Constitution.⁹² The focus of those guidelines is, not the substance of any particular proposed amendment, but the broader concern expressed by James Madison in *Federalist No. 49* that frequent amendments would “deprive the government of

that veneration which time bestows on everything, and without which perhaps the wisest and freest government would not possess the requisite stability.”⁹³ Some of the guidelines are inapposite to the model amendment being proposed here, but together they furnish a commonsense, if somewhat formalistic, framework for assessing whether any legislative proposal, regardless of subject matter, is a suitable candidate for permanent constitutional status.

1. Does the Proposed Amendment Address Matters That Are of More Than Immediate Concern and That Are Likely to Be Recognized As Being of Abiding Importance by Subsequent Generations? The proper balance between Congress and the president over the constitutional “power of the purse” has been debated since the founding of the Republic and will likely remain an issue of “abiding importance [to] subsequent generations.” Certainly, the bipartisan call for a line item veto by each of the last four presidents and the consistent inability of Congress (regardless of which party is in the majority) to rein in federal spending amply show that this issue is not fleeting in nature.

It is further important to note that the BBV does not turn the Constitution into any sort of economic straitjacket. The Founders designed a Constitution that focused on government structure (separation of powers, checks and balances, enumerated powers or ends) and individual rights, but not substantive policy, whether economic or otherwise. The hazard of trying to create short-term policy is best shown by the dismal failure of the Eighteenth Amendment banning alcohol sales.

Unlike proposals that require a balanced budget, the BBV does not mandate a specific budget result; instead it creates a mechanism that is flexible enough to permit Congress to cope with genuine military or economic crises, yet strong enough to compel a balanced budget in the absence of such crises. It does not dictate a balanced budget but simply declares what the constitutional effect of an unbalanced budget would be, namely, the authorization of a presidential reduction veto.

Under this constitutional scheme, a new set of checks and balances would effectively

be created: congressional spending would be checked by the president's reduction veto power, and abuse of this power would be balanced by Congress's ability to cancel the power with a budget surplus. In this way, our constitutional system of checks and balances as it relates to the "power of the purse" would be strengthened for future generations.

2. Does the Proposed Amendment Make Our System More Politically Responsive or Protect Individual Rights? The BBV does not affect individual rights, but the public interest broadly construed would certainly be advanced by this proposal. At present, voters who are disenchanted by profligate federal spending have virtually no electoral outlet for their frustration. Members of Congress can always blame the "system" or shift responsibility to the opposing political party, and those members who are powerful enough to commandeer pork-barrel projects are more likely to be rewarded at the polls for steering taxpayer monies into their particular states or districts. With a BBV, voters who take fiscal restraint seriously can hold a specific politician—the president—accountable if the reduction veto power is not used vigorously to lower the overall monetary amounts in spending bills, and the president in turn will be more responsive to those voters.

3. Are There Significant Practical or Legal Obstacles to the Achievement of the Objectives of the Proposed Amendment by Other Means? The primary objectives of the BBV are two: (1) to restore the president's ability to exercise a meaningful veto over spending legislation in the modern era of last-minute omnibus appropriations bills and (2) to create an enforcement mechanism that favors spending cuts over tax increases for balancing the federal budget. The first objective, by its very nature, requires a constitutional amendment, particularly in light of *Clinton*, which established the impropriety and futility of creating a line item veto by statute. The legal and practical obstacles to achieving the second objective are more complex but equally insurmountable without a constitutional amendment.

The dismal history of statutory attempts by Congress to impose fiscal discipline on itself over the last 30 years is well-known and need only be summarized here. Beginning with the Congressional Budget and Impoundment Control Act of 1974, Congress instituted a reconciliation process for bringing spending into conformity with the overall policies adopted in the annual budget resolution.⁹⁴ In practice, the success of this process has depended on the voluntary compliance of individual committees and their willingness to abide by the budget targets established by Congress as a whole. At the same time, the 1974 act eliminated what had been the most successful check on spending, presidential impoundment, for which it substituted a more or less impotent rescission authority.

Having failed to achieve the fiscal discipline envisioned by the 1974 act, Congress enacted a series of "Byrd Amendments" in 1978, 1980, and 1982, which mandated that "total budget outlays of the federal government shall not exceed its receipts" beginning in FY81.⁹⁵ In the course of events, this statutory requirement was simply ignored. The Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings) came next; in it Congress attempted to enforce deficit targets by means of sequestration or across-the-board cuts.⁹⁶ When it became clear that Congress would neither meet the targets nor abide by sequestration, the targets were revised in 1987 and then abandoned in 1990, when Congress enacted the Budget Enforcement Act and created caps on discretionary spending and a "pay-as-you-go" requirement for direct spending.⁹⁷

In the end, none of those statutory mechanisms compelled a balanced budget, but they did show how easily Congress could abandon its own rules. From a public choice perspective, that history of failure is not surprising. One of the insights of public choice theory is that growth of government has been fueled by the alignment of the interests of seekers of government-conferred benefits and of politicians who try to satisfy their constituents'

A new set of checks and balances would effectively be created: congressional spending would be checked by the president's reduction veto power.

It is the systemic bias in favor of deficit spending that has prompted Nobel laureate James M. Buchanan and others to advocate incorporation of an explicit balanced budget restraint in the Constitution.

“persistent demands for an increased flow of public-spending benefits along with reduced levels of taxation.”⁹⁸ Spending programs involve concentrated benefits for special interests but diffuse costs to the general public, especially when spending costs are covered by borrowing. It is this systemic bias in favor of deficit spending that has prompted Nobel laureate James M. Buchanan and others to advocate incorporation of an explicit balanced budget restraint in the Constitution.⁹⁹

Suppose, however, that those interests were not aligned because rent seekers made balancing the budget more difficult (and hence made it more difficult to cancel the president’s BBV power). In that event, rent-seeking requests would generate at least a measure of resistance within Congress, since they would threaten the institutional and political power of Congress vis-à-vis the president. In this sense, the BBV can be seen as a partial solution to the modern pervasiveness of rent seeking because it would create a concentrated cost for Congress as an institution (the weakening of its “power of the purse”) whenever members voted to placate their constituents or supporters by increasing discretionary spending, creating new entitlements, or enacting limited tax benefits that make budget balance more difficult.

4. Is the Proposed Amendment Consistent with Related Constitutional Doctrine That the Amendment Leaves Intact? Related constitutional doctrine in this instance refers to the president’s general veto power and that aspect of the separation of powers doctrine that recognizes a significant, albeit limited, legislative role for the president. The BBV is consistent with this doctrine, but it clearly would not leave the president’s legislative role unaffected. Rather, the BBV would be restoring the place that the Founders intended the president’s qualified veto power to have under the Constitution.¹⁰⁰ As President Bush lamented in his first budget message to Congress in February 2001, the usual practice of “logrolling”¹⁰¹ among members of Congress, particularly at the end of congressional sessions, often leaves the president “with an all or

nothing proposition . . . either [to] sign the entire appropriations bill with special interest projects or veto the entire bill and invite a potential government shutdown.”¹⁰² This explains why recent presidents of both political parties have consistently sought the item veto power. Critics of the proposal would no doubt argue that any type of line item veto shifts the balance of power too much in favor of the president. But given the unrestricted ability of Congress to annul the BBV power by balancing the federal budget on its own, this criticism loses whatever force or merit it might otherwise have.

5. Does the Proposed Amendment Embody Enforceable, and Not Purely Aspirational, Standards? Anyone who has followed congressional hearings or floor debates on proposed balanced budget amendments over the years would probably conclude that the search for an enforceable balanced budget mechanism is a long shot, especially given the futile experience of the BBA, whose supporters were never able to answer satisfactorily how or by whom a balanced budget would be enforced.¹⁰³ Whereas the BBA requires but cannot enforce a balanced budget, the BBV enforces but does not require a budget balance.

In that sense, the BBV is not simply enforceable but self-executing because it entails only certification that debt held by the public increased over the course of the prior fiscal year. Instead of *mandating* that Congress take affirmative steps to balance the budget, which immediately creates all sorts of difficult compliance issues, the BBV would impose a constitutional penalty for failing to balance the budget. As soon as the requisite certification is completed, Congress and the president would know whether the reduction veto power could be used and for precisely how long.

The fact that the model amendment would be self-executing, however, does not mean that members of Congress would then automatically proceed to balance the budget. They might prefer to accept the consequences of allowing the president to exercise the reduction veto, at least for some limited period. Still, the BBV would create a penalty

in terms of losing power to the president that members of Congress would likely fear more than simple voter concern about an unbalanced budget.

This last point is perhaps best illustrated by an oft-told story of Frank Church, the late senator from Idaho. Once a supporter of President Johnson's Vietnam policies, Senator Church switched positions and announced his opposition to the Vietnam War in a speech that quoted the writings of Walter Lippmann. Shortly thereafter, Senator Church met President Johnson in a White House receiving line and reminded the president of the importance of a particular Idaho program that would soon cross the president's desk. President Johnson's response was a derisive, "Why don't you go ask Walter Lippmann for it?"¹⁰⁴ It is precisely this fear of presidential retribution that would spur Congress to make balanced budgets the rule rather than the exception and to do so sooner rather than later.

Moreover, while a traditional line item veto might encourage members of Congress to pad spending bills with items of secondary importance, knowing that the president would have to take any political heat in vetoing them, a similar strategy with the BBV would be self-defeating because it would be too easy for the president to call their bluff. By leaving in such padded inconsequential spending, the president would make it more difficult for Congress to balance the budget and reclaim its spending prerogatives. At the same time, it would become easier for the president to exert greater leverage over Congress by vetoing or threatening to veto those items that Congress really cared about.

Similarly, logrolling would be undermined because those members who feared that the president would be more likely to veto *their* parochial projects would be less likely to support passage of pork-barrel legislation for other members. From the viewpoint of those members who are disfavored by the president, extra spending for other members would simply postpone the time when Congress could nullify the BBV. Thus, if a Republican president selectively vetoed projects supported by a

senior Democrat on one of the appropriations committees, that Democrat would likely oppose parochial spending on behalf of other members (both Democrats and Republicans). Conversely, junior members of Congress would refuse to support the projects of senior members if only the senior members were benefiting from the selective exercise of the reduction veto power. The president, in effect, could divide and conquer unless a majority of members was working toward a balanced budget.

In any case, the president would be negotiating from strength by being able to threaten the "stick" (e.g., cutting a member's project) instead of having to rely primarily on a "carrot" (e.g., offering more spending for the member's district). With a BBV, any president who wanted to cut overall spending levels could leave unaffected the smaller spending projects, which members often care about most, in exchange for substantial cuts in larger projects or structural changes in entitlement programs. Congress would be more likely to support such cuts because balancing the budget would now work to Congress's institutional advantage. On the other hand, if the president's agenda was likely to increase the deficit, then Congress would scrutinize that agenda closely. In the end, Congress would want to control its own fiscal destiny, and the best way for members to prevent the president from promoting the administration's priorities at their expense would be to limit spending in first place.

6–8. *Have Proponents of the Proposed Amendment Attempted to Think Through and Articulate the Consequences of Their Proposal, Including Ways in Which the Amendment Would Interact with Other Constitutional Provisions? Has There Been Full and Fair Debate on the Merits of the Proposed Amendment? Has Congress Provided for a Nonextendable Deadline for Ratification by the States so as to Ensure That There Is a Contemporaneous Consensus by Congress and the States That the Proposed Amendment Is Desirable?* This study attempts to thoroughly analyze how a BBV would actually work. But given the novelty of the proposal, a full and fair debate is still needed and certainly welcomed. As for having

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a nonextendable ratification deadline, the standard seven-year limitation period has been added to remove any skepticism about the existence of a “contemporaneous consensus,” even though ratification by the states is unlikely to be controversial.

Technical Objections

An important lesson from both the BBA debate and the exercise of line item vetoes by state governors is that, no matter how good these ideas are in theory, they will fail to win sufficient support if the proposal is technically flawed or has unresolved practical issues regarding implementation or enforcement. For the BBA, unresolved issues include (1) the use of estimates to determine total receipts and total outlays; (2) the treatment of “off-budget” programs, such as Social Security, and government-sponsored enterprises, such as the Federal National Mortgage Association; (3) the triggering of waivers in times of war, national security threats, and nonmilitary emergencies; (4) implied impoundment or rescission powers the president would have to “faithfully execute” under the new law to ensure that outlays did not exceed receipts; and (5) the role the judiciary would have in the areas of constitutional interpretation and enforcement.¹⁰⁵

Similarly, state experience with line item vetoes is neither simple nor consistent, given the range of veto powers exercised by governors and the lack of any coherent doctrinal approach among state supreme courts on this issue. Part of this inconsistency is due to the different natures of the veto provisions themselves, specifically, whether the item veto authority derives from a standard item veto (limiting the veto to an item in its entirety), an item reduction veto (allowing itemized spending levels to be reduced), a partial veto (authorizing the governor to veto “parts” of an appropriation bill), or an amendatory veto (empowering the governor to condition approval on the adoption of specific changes). Even among states with a standard item veto, court rulings conflict on such matters as (1) the extent to which item vetoes are restricted to appropriations bills and what

constitutes an “appropriation” and whether legislatures can evade the item veto by funding programs through other means; (2) the extent to which governors can veto conditions, limitations, or contingencies placed on appropriations and what constitutes an “item” in those circumstances, and whether such vetoes preserve, destroy, or distort the legislative will or internal consistency of the statute in question; and (3) the extent to which legislatures can alter traditional forms of drafting legislation to frustrate the governor by combining different items into lump-sum appropriations.¹⁰⁶

The model amendment was crafted to avoid all of those various technical complications. It does not rely on budget estimates. It eliminates the off-budget versus on-budget distinction. It uses a well-defined and precise measurement to trigger the use of the veto power. And it precludes any issue of implied presidential impoundment or rescission power because the model amendment contains no mandate that the president would have to “faithfully execute.” Finally, Congress can avert any disputes over the BBV simply by invalidating the veto power altogether with a balanced budget.

Further, unlike the BBA, a BBV offers a flexible way of dealing with military or economic emergencies. Rather than having to invoke some extraordinary waiver provision, Congress could still appropriate any necessary funds by majority vote, but it would then have a compelling political and institutional incentive to end federal deficits quickly and thereby regain its power of the purse. At no point would a minority be able to dictate budget policy, nor could a majority evade hard choices by resorting to repeated waivers.

Perhaps most important, the judiciary would not become entangled in the budget process and, indeed, would only become involved in a dispute between the political branches in the unlikely event that they disagreed over whether the proper certification was being made. There would be a bright-line test to establish when the BBV can be used, and since the power being invoked is a reduc-

tion veto over monetary amounts only, there would be no litigation over the meaning of an “item” or whether the president could strike language that conditions or accompanies the monetary amounts in question.¹⁰⁷ The president could exercise the BBV with little or no risk that courts would have to intervene, either to interpret the model amendment or to resolve disputes with Congress over how the reduction veto power is being used.

Even if a lawsuit arose, few court decisions would be needed to resolve any conflicts, particularly since a BBV amendment would likely be accompanied by a comprehensive legislative history. State courts, in contrast, frequently have little legislative history to guide them, and drafters of the various state constitutions generally followed prior enactments in other states, making little effort to improve the textual language to address the types of interpretation problems that typically result in litigation. While resorting to the courts is generally undesirable, it is not unworkable and would readily lead to a definitive set of interpretative rules.

Political Objections

The most potent objection to the BBV, or indeed any type of item or reduction veto, is political. It is the fear that the president will employ veto power as a partisan tool to punish political enemies and extort votes from reluctant legislators. As illustrated by the encounter related above between Senator Church and President Johnson, it is a genuine fear that cannot be dismissed by supporters of a line item veto. Such a veto would be not an artificial constraint but a very real shift in budgetary power. The president would have greater sway, not just over spending levels, but over spending priorities and legislative policy generally. While the intended purpose of a line item veto might be to curtail wasteful spending, there is no guarantee as to how the president would use this power, and it is no answer to say that courts would, or should, intervene to limit the president’s use of veto threats to win approval of costly presidential initiatives.

What is certain about an item or reduction veto is that it would fundamentally change the

way a president negotiates with Congress. Armed with this enhanced veto power, the president could bypass the congressional leadership to exert direct pressure on individual members whose particular district projects are at stake. Conversely, congressional leaders and committee chairs would not only have the greatest incentive to balance the budget and restore the status quo ante, but they would also be in the best position to accomplish that goal because they are the ones with the greatest influence over spending legislation.

Rather than deny or denigrate this fear as overblown or implausible, the BBV turns what would otherwise be its greatest flaw, use of the item veto power as a political weapon, into its principal virtue. For it is precisely this political threat that offers the best chance of pressuring Congress into balancing the budget. Instead of trying to downplay the inevitable shift in political power that a reduction veto would trigger, the BBV embraces that shift. The end result would be a political dynamic that strongly favors balanced budgets and a quick end to deficit spending that would otherwise be necessary in times of military conflict, economic recession, or other national emergency.

It might be objected that a BBV undermines the Constitution by distorting its separation of powers framework. In this view, any reduction in appropriated monetary amounts would allow the president to change legislation without rejecting it and, in effect, approve funding bills that a majority of Congress might otherwise have opposed. This argument, however, assumes that Congress was intended to have unchallenged spending power, no matter how irresponsibly it was exercised, subject only to a general veto power that Congress can eviscerate through last-minute omnibus spending legislation.

It was just such an argument that led past presidents to assert an inherent impoundment power that effectively allowed them to “veto” appropriations while at the same time depriving Congress of the opportunity to override and forcing members to pass a second law reaffirming the original appropriation. Such a power is hardly consistent with

An item or reduction veto would fundamentally change the way a president negotiates with Congress.

The BBV creates a new and stronger set of checks and balances on how the power of the purse is exercised.

the design and structure of the Constitution, whereas the BBV reinforces an established constitutional role that has always been assigned to the president.

Similarly, while the Constitution allocates and limits enumerated powers, there are few instances in which Congress or the president is required to act. In no case does the Constitution mandate what decision is to be reached, and the BBA was objectionable partly because it attempted to change that salutary aspect of the Constitution. In contrast, the BBV does not mandate a specific result or, like Prohibition, raise false hopes about its enforceability. Instead, it creates a new and stronger set of checks and balances on how the power of the purse is exercised, and thus is faithful to the Constitution as originally conceived. Given that Congress has shown itself incapable of the self-discipline needed to balance the budget without the assistance of a booming economy, it is reasonable to ask how the Constitution itself might provide such discipline. The historical and best answer has always been to use the offsetting power of a competing branch of government, which in this circumstance means shifting legislative power to the president on a temporary basis, while allowing Congress to regain that power as soon as the budget is balanced. This is precisely what the BBV would accomplish.

A final political objection derives from how the federal budget would be balanced, and it arises with any type of balanced budget requirement. This objection relates to the concern that Congress will rely primarily on tax increases rather than spending cuts to balance the budget. That concern permeated the 1995 debate when House Republicans attempted to honor their Contract with America commitment to a three-fifths supermajority voting requirement for raising revenue. As soon as House Republicans began backing away from this commitment, political support for the BBA among pro-growth conservatives waned considerably.¹⁰⁸ Indeed, their real fear during the debate over the BBA was, not that Congress would raise taxes to actually comply with a balanced budget mandate, but that the

BBA would be an excuse for raising taxes continuously in an upward spiral.

The BBV cannot guarantee that Congress will shun tax increases as a means for balancing the budget, but it would create a strong presidential bias against any tax increase legislation that tries to raise revenue to make it easier for Congress to revoke the reduction veto power. To the contrary, the president would have an incentive to keep tax revenue low and place the onus of balancing the budget on spending cuts, which historically have been more difficult for Congress to accept. Only if higher revenues were generated by a growing economy—as was the case in the late 1990s—would the president receive political benefits that outweighed any institutional loss of the reduction veto power.

More broadly, one would expect the BBV to temper the president's enthusiasm for fully balancing the budget if the budget was near balance. While the president would be more likely to eschew tax increases, support for spending cuts might also wane as the budget approached balance. From the president's perspective, it would not matter whether the deficit in a given fiscal year was large or small—in either case, the BBV would be available for use. Thus, one might reasonably worry that the president would attempt to maintain some level of deficit spending each year in order to hold onto the reduction veto power. Similarly, one can envision administration officials proffering inflated revenue figures to justify increased federal spending under the guise of a balanced budget for the coming fiscal year.

In short, the president and Congress would have opposing institutional incentives regarding the actual achievement of a balanced budget. The net effect of those opposing incentives is unclear, but several factors weigh against presidential abuse of the budget process simply to maintain small deficits. First, once the president has the reduction veto power, the public will expect to see it used, and the president would more likely be held politically accountable for not balancing the budget. Similarly, rival presidential candidates

will be especially critical of any failure to veto egregious or expensive pork-barrel projects. Under political pressure to veto congressional pork, the president would also be less likely to invite charges of hypocrisy by requesting presidential pork. At the same time, there would be political advantages to showing that the president is effectively wielding this veto power and not just paying lip service to the goal of a balanced budget.

Congress could also intensify political accountability by enacting a statute that required the president either to submit a balanced budget each year or, alternatively, to submit a proposed budget that acknowledges a deficit but includes a list of possible spending reductions to eliminate the deficit and an explanation of why the president is not recommending them in the current budget. Presidential support for such a statute could be exacted as a quid pro quo for congressional support of a BBV amendment, and the two proposals could then be adopted contemporaneously.

Even if the president were inclined to manipulate the budget process to ensure a small deficit each year, there is nothing that the executive branch can do unilaterally to achieve that end. It can propose, justify, and defend budget deficits, but ultimately Congress must approve them. It can proffer budget figures and forecasts aimed at persuading Congress to act in ways that will increase the likelihood of a deficit, but Congress will surely be more skeptical of a president with reduction veto power. The president can unilaterally exercise the veto, but in that event the action is self-correcting because the veto by its very nature will diminish a budget deficit. Similarly, the president could *threaten* reduction vetoes to obtain support for costly initiatives, but that tactic is likely to prove self-defeating since the threat itself will spur Congress either to reject the initiative or to find other ways of balancing the budget.

Although consistently running large deficits might bring adverse political consequences to a president armed with the reduction veto power, small deficits pose the least challenge for a Congress intent on revoking

the BBV. In the first instance a growing economy might solve the problem for Congress by generating more tax revenue than an administration was expecting. Absent such revenue, the spending cuts needed to close a small deficit may be palatable enough for Congress to make on its own. Last, any fear that a small deficit might remain at the end of a fiscal year is all the more incentive for Congress to seek, not just a balanced budget, but a modest surplus “cushion” each year.

From President Bush’s perspective, advocating a BBV would be a “win-win” situation. Since near-term ratification of the model amendment would occur during a time of deficit spending, he would benefit from the enhanced reduction veto power until the budget was balanced by economic growth or legislative action. Congress might well be less prone to support expensive military engagements or domestic initiatives, but a majority vote is still all that would be needed to approve a presidential spending request.

An intriguing impact of a BBV would occur in the area of tax legislation. As noted, the president would have an institutional incentive to oppose tax increases, but would the converse also be true? Would Congress have an institutional incentive to oppose tax cuts? The answer would depend on the nature of the tax cuts and on whether Congress thought that proposed cuts would generate stronger growth in the long term. A BBV could well create an incentive for Congress to pursue pro-growth policies, not just in tax legislation, but in such areas as regulatory reform and free trade. As budget experience in late 1990s illustrated, the best antidote for budget deficits is a strongly growing economy. Thus, under a BBV, Congress would look for policies to grow revenues by expanding the economy.

Under a BBV, neither party in Congress would be disadvantaged in favor of the other, and both parties would have to make tough spending tradeoffs to protect their collective power of the purse. Most important, members of Congress would have a new incentive to pursue pro-growth policies as a good way to balance federal budgets over the long term.

There would be political advantages to showing that the president is effectively wielding this veto power.

A balanced budget veto may be just the tool that President Bush and fiscal conservatives in Congress are looking for to control spending and reduce the deficit.

Conclusion

President Bush has repeatedly called on Congress to “restore the President’s line item veto authority,” an authority that should be “linked to deficit reduction.”¹⁰⁹ A balanced budget veto may be just the tool that President Bush and fiscal conservatives in Congress are looking for to control spending and reduce the deficit. A balanced budget veto would not only solve the enforcement problem that has bedeviled the design of a balanced budget amendment; it would also avoid the rigidity of a BBA that might serve as an excuse for Congress to raise taxes.

A BBV would create a presidential bias against raising taxes to eliminate deficits and would force Congress into a Hobson’s choice of either pursuing spending cuts itself or acquiescing to the president’s use of a veto to cut spending. That prospect would undermine the traditional political calculus of support for increased spending aimed at narrow groups of constituents. By imposing a political penalty on Congress as an institution, the BBV would encourage the two parties to work together to cut low-priority spending. The president’s veto power would be automatically restored when needed, but Congress would retain ultimate budgetary control because it would always have the power to cut spending and balance the budget on its own.

Appendix A: The Balanced Budget Amendment

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 when rati-

fied by the legislatures of three-fourths of the several States within seven years after the date of its submission to the States for ratification:

ARTICLE —

SECTION 1. Total outlays for any fiscal year shall not exceed total receipts for that fiscal year, unless three-fifths of the whole number of each House of Congress shall provide by law for a specific excess of outlays over receipts by a roll call 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 roll call 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 revenues shall become law unless approved by a majority of the whole number of each House by a roll call 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 ____ or with the second fiscal year beginning after its ratification, whichever is later.

Appendix B: State Constitutional Veto Chart

State Constitutional Provision	General Veto Only	Partial Veto*	Item Veto	Reduction Veto	Amendatory Veto
Alabama Const. Art. V (Executive Department)					
§§ 125 and 126			X		X
Alaska Const. Art. II, § 15			X	X	
Arizona Const. Art. 5 (Executive Department), § 7			X		
Arkansas Const. Art. 6 (Executive Department), § 17			X		
**California Const. Art. 4 (Legislative), § 10(e)			X	X	
**Colorado Const. Art. IV (Executive Department), § 12			X		
**Connecticut Const. Art. 4 (Executive Department), § 16			X		
Delaware Const. Art. III, § 18			X		
District of Columbia Self- Government and Governmental Reorganization Act, Title IV (District Charter), § 404(f)			X		
Florida Const. Art. 3, § 8(a)			X		
Georgia Const. Art. 3 (Legislative Branch), § 5, ¶ 13(e)			X		
Hawaii Const. Art. III (Legislature) § 16			X	X	
**Idaho Const. Art. IV (Executive Department), § 11			X		
Illinois Const. Art. 4 (Legislature), §§ 9(d), 9(e)			X	X	X
Indiana Const. Art. 5 (Executive), § 14	X				
Iowa Const. Art. 3 (Legislative Department), § 16			X		
Kansas Const. Art. 2, § 14(b)			X		
Kentucky Const. (Executive Department), § 88			X		
Louisiana Const. Art. 4 (Executive Branch), § 5(G)			X		
Maine Const. Art. 4, Pt. 3 (Legislative Power), § 2	X				
Maryland Const. Art. II, § 17			X		
Massachusetts Const. Amend. Art. §§ 5, 54			X	X	X
Michigan Const. Art. V, § 19			X		
**Minnesota Const. Art. 4 (Legislative Department), § 23			X		
Mississippi Const. Art. 4 (Legislative Department), § 73		X			
**Missouri Const. Art. 4 (Executive Department), § 26			X	X	
Montana Const. Art. VI (The Executive), §§ 10(2), 10(5)			X		X

Continued

State Constitutional Provision	General Veto Only	Partial Veto*	Item Veto	Reduction Veto	Amendatory Veto
**Nebraska Const. Art. IV (Executive), § 15			X	X	
Nevada Const. Art. 4 (Legislative Department), § 35	X				
New Hampshire Const. Pt. 2, Art. 44	X				
**New Jersey Const. Art. 5 (Executive), § 1, ¶ 14(f), ¶ 15			X	X	X
New Mexico Const. Art. IV (Legislative Department), § 22		X	X		
**New York Const. Art. 4 (Executive), § 7			X		
North Carolina			No Veto Power		
**North Dakota Const. Art. V (Executive Branch), § 10		X	X		
Ohio Const. Art. II (Legislative), § 16			X		
Oklahoma Const. Art. 6 (Executive Department), § 12			X		
Oregon Const. Art. V, § 15a			X		
Pennsylvania Const. Art. 4 (The Executive), § 16			X		
Rhode Island Const. Art. 9 (The Executive Power), § 14	X				
South Carolina Const. Art. IV (Executive Department), § 21		X	X		
South Dakota Const. Art. IV (Executive Department), § 4			X		X
Tennessee Const. Art. 3 (Executive Department), § 18			X	X	
**Texas Const. Art. 4 (Executive Department), § 14			X		
Utah Const. Art. VII (Executive Department), § 8			X		
Vermont Const. Ch. II, § 11	X				
Virginia Const. Art. V (Executive), § 6(b)(iii), § 6(c)(iii), § (d)			X		X
Washington Const. Art. 3 (The Executive), § 12		X	X		
West Virginia Const. Art. VI, § 51, Subsection D(11)			X	X	
Wisconsin Const. Art. 5 (Executive), § 10		X			
**Wyoming Const. Art. 4 (Executive Department), § 9		X	X		

*A partial veto is similar to, but broader than, a standard item veto. A partial veto typically authorizes a governor to veto parts or sections of an appropriations bill that may contain one or more individual spending items.

**These designated states all have express requirements that vetoed or reduced items be separately reconsidered by the legislature.

Notes

1. The last federal surplus had occurred in FY69, when President Johnson followed the recommendation of a bipartisan commission to report a unified federal budget, which for the first time allowed a president to mask deficits in the non-Social Security portion of the budget with Social Security surpluses. See James V. Saturno, "A Balanced Budget Constitutional Amendment: Background and Congressional Options," Congressional Research Service Report no. 97-379, March 20, 1997, p. 4.
2. *Mid-Session Review, Budget of the United States Government, Fiscal Year 2004* (Washington: Government Printing Office, July 2003).
3. A telling example was the Farm Security and Rural Investment Act of 2002, Public Law 107-171, 116 Stat. 134, May 13, 2002, which provided large-scale agriculture subsidies and reversed some of the pro-market initiatives of the Federal Agriculture Improvement and Reform Act of 1996 (also known as the "Freedom to Farm Act"). Just three months before signing Public Law 107-171, President Bush justified the increased farm subsidies in a speech before the National Cattlemen's Beef Association by saying that "it's in our national security interests that we be able to feed ourselves." See "Bush Calls Farm Subsidies a National Security Issue," *Washington Post*, February 9, 2002, p. A4.
4. This moniker is the author's own.
5. For an entertaining account of this single vote defeat, see Peter Carlson, "Balancing Act: How the Senate Busted the Budget Amendment," *Washington Post Magazine*, April 2, 1995.
6. It is just as well that the 1936 proposal was never adopted. It attempted to limit the public debt in peacetime to \$20 billion based on the 1930 census, then once that limit was reached it required any appropriation to "be covered by a tax in full." See H.J. Res. 579, 74th Cong., 2d sess. (introduced May 4, 1936, by Rep. Harold Knutson). See generally S. Rept. 105-3, 105th Cong., 1st sess., February 3, 1997, pp. 3-7.
7. Unless otherwise stated, all references to the balanced budget amendment, or BBA, are to the text of S.J. Res. 1. For a comprehensive legislative history of the balanced budget amendment, see S. Rept. 105-3, 105th Cong., 1st sess., February 3, 1997, pp. 3-7.
8. 138 *Cong. Rec.* H4670-71 (roll call vote no. 187: 280 yeas to 153 nays), June 11, 1992; and 140 *Cong. Rec.* S2158 (roll call vote no. 48: 63 yeas to 37 nays), March 1, 1994.
9. 141 *Cong. Rec.* H772 (roll call vote no. 51: 300 yeas to 132 nays), January 26, 1995.
10. 141 *Cong. Rec.* S3314 (roll call vote no. 98: 65 yeas to 35 nays), March 2, 1995. Actual support for the amendment was 66 to 34, but Sen. Robert Dole (R-Kans.) formally voted "nay" as a parliamentary tactic to preserve his right to call up the proposal for reconsideration.
11. 142 *Cong. Rec.* S5903 (roll call vote no. 158: 64 yeas to 35 nays), June 6, 1996.
12. 143 *Cong. Rec.* S1920-21 (roll call vote no. 24: 66 yeas to 34 nays), March 4, 1997.
13. Perhaps less daunted in the House, Rep. Ernest Istook (R-Okla.) reintroduced the BBA in the 107th Congress as H.J. Res. 86 on April 11, 2002, and again in the 108th Congress as H.J. Res. 22 on February 13, 2002. The House Judiciary Subcommittee on the Constitution held a March 6, 2003, hearing on H.J. Res. 22 but has taken no further action to date on the proposed amendment.
14. 141 *Cong. Rec.* S3275-76 (roll call vote no. 86: 61 yeas to 39 nays to table amendment), February 28, 1995; and 143 *Cong. Rec.* S1181 (roll call vote no. 7: 64 yeas to 35 nays to table amendment), February 10, 1997.
15. The only dissenting member of Congress was Rep. Barbara Lee (D-Calif.), who voted against H.J. Res. 64 on the grounds that it was too open-ended in its authorization of military action. The president ultimately signed S.J. Res. 22 and S.J. Res. 23 into law on September 18, 2001, as Public Law 107-39, 115 Stat. 222, and Public Law 107-40, 115 Stat. 224, respectively.
16. See S. Rept. 104-5, 104th Cong., 1st sess., January 24, 1995, p. 9; and S. Rept. 105-3, 105th Cong., 1st sess., February 3, 1997, p. 10.
17. *Ibid.*, pp. 8, 10.
18. William Barr, Statement at Hearing on "The Balanced-Budget Amendment" (S.J. Res. 1) before the Committee on the Judiciary of the United States Senate, 104th Cong., 1st sess., January 5, 1995, pp. 121-22.
19. See General Accounting Office, "Debt Ceiling: Analysis of Actions during the 1995-1996 Crisis," GAO/AIMD-96-130, August 1996, pp. 2, 36. The existing debt ceiling, set by Congress at \$4.9 trillion in August 1993, was reached on November 15, 1995, when Secretary of the Treasury Robert Rubin declared a debt issuance suspension period. The resulting debt ceiling crisis lasted until March 29, 1996, when Congress raised the ceiling to \$5.5 tril-

lion. During the interim, to raise funds necessary to honor authorized government obligations, the Clinton administration issued Treasury securities to government trust funds without counting them toward the debt ceiling.

20. See S. Rept. 105-3, 105th Cong., 1st sess. at 10-13, February 3, 1997.

21. 141 *Cong. Rec.* S3276 (roll call vote no. 87: 92 yeas to 8 nays), February 28, 1995. By 1997 Senator Nunn had retired, and a similar amendment by Sen. Edward Kennedy (D-Mass.) to limit enforcement authority to Congress was defeated by a 61-to-39 vote. 143 *Cong. Rec.* S1721 (roll call vote no. 20: 61 yeas to 39 nays to table amendment), February 27, 1997.

22. See William Barr, Statement at Hearing on "The Balanced-Budget Amendment" (S.J. Res. 1) before the Committee on the Judiciary of the United States Senate, 104th Cong., 1st sess., January 5, 1995, pp. 121-22. Since the BBV does not raise issues of judicial enforcement and implied presidential impoundment powers, the merits of these arguments will not be addressed here. The fervor with which BBA supporters make these arguments, however, suggests that perhaps they do "protest too much."

23. 141 *Cong. Rec.* H713 (roll call vote no. 41: 253 yeas to 173 nays), January 26, 1995.

24. 141 *Cong. Rec.* H770 (roll call vote no. 49: 293 yeas to 139 nays), January 26, 1995.

25. Although the BBA and line item veto would later be taken up as separate legislative items, the two concepts were combined in the Contract with America as a single bill titled "The Fiscal Responsibility Act," listed as the first of 10 bills that Republican House members promised to vote on during the first 100 days of their hoped-for new majority.

26. Forty-three states and the District of Columbia currently have some version of constitutional line item veto. See Appendix B.

27. Public Law 104-130, 110 Stat. 1200, codified at 2 U.S.C.A. §§ 691 et seq., January 1, 1997.

28. See Stephen Moore, Cato Institute, Statement at Hearing on "Item Veto Constitutional Amendment," before the Subcommittee on the Constitution of the Committee on the Judiciary of the U.S. House of Representatives, 106th Cong., 2d sess., March 23, 2000, pp. 38-39. See also Virginia McMurtry, "Item Veto and Expanded Impoundment Proposals," Congressional Research Service Issue Brief no. IB89148, August 15, 2002, pp. 9-10. President Clinton exercised his new veto

power on 11 occasions between August 11 and December 2, 1997, to cancel 80 spending projects and two limited tax provisions. Of these 82 cancellations, Congress eventually overrode 38 cancellations relating to military construction. The remainder were nullified by the U.S. Supreme Court in *Clinton v. New York City*, 524 U.S. 417 (1998).

29. The Line Item Veto Act required 5 sections, 13 subsections, and more than 400 words of text to define a "limited tax benefit."

30. The Line Item Veto Act as a whole consisted of 182 paragraphs, and more than 5,800 words.

31. No state permits its governor to veto tax benefits on an itemized basis, although seven states (Alabama, Illinois, Massachusetts, Montana, New Jersey, South Dakota, and Virginia) authorize an "amendatory" veto that allows the governor to return legislation, including tax bills, with recommended changes.

32. See Office of Management and Budget, *A Blueprint for New Beginnings: A Responsible Budget for America's Priorities, FY2002* (Washington: Government Printing Office, February 28, 2001), p. 171. OMB identified 6,000 earmarks or unrequested projects in the Consolidated Appropriations Act for Fiscal Year 2001, Public Law 106-554, December 21, 2000.

33. The Supreme Court ruled early on that the president cannot refuse to spend monies that Congress has specifically ordered be spent. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 9 L.Ed. 1181 (1838). Still, a number of presidents, most prominently President Nixon, have claimed a constitutional right to impound appropriated funds as long as the statute in question does not explicitly require the expenditure, even if the statute is silent as to whether the expenditure is discretionary. The Supreme Court might have reached this issue in *Train v. City of New York*, 420 U.S. 35 (1975), but the administration in that case claimed only that the environmental statute in question did in fact give the president discretionary spending authority. The Court unanimously rejected this position, holding as a matter of statutory interpretation that the expenditures were required, but did not go further and address what authority, if any, the president might have had to impound funds that are neither explicitly mandatory nor clearly discretionary.

34. The ICA was enacted as Title X of the Congressional Budget and Impoundment Control Act of 1974, Public Law 93-344, 88 Stat. 297, codified at 31 U.S.C.A. §§ 681-88, July 12, 1974. Whether the ICA itself is an unconstitutional infringement of some inherent or reserved presidential impound-

ment power remains an open question.

35. The Line Item Veto Act formally amended the ICA to allow the president to exercise “enhanced rescission authority” to cancel certain appropriations, spending entitlements, and narrowly defined tax benefits.

36. The separate enrollment approach was adopted in the Senate as the Dole Amendment to S. 4. See 141 *Cong. Rec.* S4484 (roll call vote no. 115: 69 yeas to 29 nays), March 23, 1995.

37. *Clinton*.

38. See Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2004: Analytical Perspectives* (Washington: Government Printing Office, February 3, 2003), p. 318. The administration’s proposal was previously put forth in its budget documents for FY02 and FY03, as discussed further in the text below.

39. The fact that cancellations would occur only after a bill was presented to and signed by the president does not mean that all the requirements of the Presentment Clause have been met. The logical premise here is that only new legislation can repeal or amend existing statutes, and it is this new legislation that must be passed by both houses and presented to the president for signature.

40. *Clinton* at 466 (Scalia, J., dissenting) (emphasis in original).

41. *Ibid.* at 464 (Scalia, J., dissenting) (emphasis in original).

42. *Clinton* at 464, 466–68 (Scalia, J., dissenting). See also pp. 477–78, 488–95 (Breyer, J., dissenting). Justice Breyer made the same mistake when he analogized to trust instruments that permit alternative powers of appointments. In his example, a trustee who selects one alternative would render the remaining powers of appointment inoperative even though the trust instrument itself was not being repealed or amended. This is a flawed analogy because only one trust instrument was authorizing the power of appointment. The analogy breaks down if two trust instruments are involved, created at different times or even by different persons, and one were to argue that the first trust instrument empowered the second trustee to exercise a power of appointment in a second trust instrument that itself did not authorize the second trustee to do anything.

43. In addition to discretionary impoundments, routine impoundments or “apportionments” are permitted under the Anti-Deficiency Acts (31 U.S.C.A. §§ 1511–19) for reasons of administra-

tive efficiency, as are deferrals of expenditures under the Impoundment Control Act of 1974.

44. *Clinton* at 467 (Scalia, J., dissenting).

45. *Ibid.* (quoting 13 *Annals of Cong.* 14 (1803)).

46. *Field v. Clark*, 143 U.S. 649 (1892).

47. *Ibid.* at 680.

48. Thus, according to the majority, “the critical difference between [the Line Item Veto Act] and all of its predecessors . . . is that unlike any of them, this Act gives the president the unilateral power to change the text of duly enacted statutes.” *Clinton* at 446–47. In a similar vein, the majority had earlier noted that *Field* was distinguishable, in part, because the power to suspend import duty exemptions was being granted pursuant to a “policy that Congress had embodied in the [Tariff Act].” *Ibid.* at 444

49. *Clinton* at 468–69 (Scalia, J., dissenting). A more precise analogy would have distinguished “decline to spend” items of appropriations from both “decline to approve” items of new direct spending and “decline to grant” new limited tax benefits, since these latter types of items are not being “spent” by the executive branch. More broadly, Justice Scalia seems to be suggesting a “decline to execute” hypothetical, although he may have avoided that phrase because it raises the paradoxical question of whether a president has “faithfully executed” a law in accordance with Art. II, § 3 by “declining to execute” portions of that very law.

50. U.S. Const. Art. I, § 7, cl. 2.

51. Indeed, one could argue that disrupting this temporal standing was the main advantage of the Line Item Veto Act because it obviated the need to give the president discretion to cancel or “decline to spend” each and every time an appropriations bill or tax legislation was passed. The sponsors of the Line Item Veto Act undoubtedly realized that this was a battle that could likely be won only once, not each time a bill was considered.

52. *Clinton* at 449.

53. U.S. Const. Art. I, § 7, cl. 2. See also L. Tribe, *American Constitutional Law* (New York: Foundation Press, 2000), p. 742 n. 43. It is at least arguable that the Presentment Clause requires that the president be presented with the exact “Bill which shall have passed the House of Representatives and Senate,” not thousands of truncated bills that conform, but are not identical, to the actual bill voted on by the two houses.

54. *Clinton* at 449–53.

55. See Office of Management and Budget, *A Blueprint for New Beginnings*, p. 171.

56. See Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2004: Analytical Perspectives*, p. 318.

57. Ibid.

58. Ibid.

59. *Clinton* at 440–41.

60. Tex. Const., Art. 4 (Executive Department), § 14.

61. See Office of Management and Budget, *A Blueprint for New Beginnings*, pp.171, 175; Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2003: Analytical Perspectives*, February 4, 2002, p. 285; and Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2004: Analytical Perspectives*, p. 318.

62. Sponsors of the balanced budget amendment conceded as much in their majority report, which read as follows: “Critics of the Balanced-Budget Amendment argue that Congress does not need a constitutional amendment to balance the budget; Congress can achieve that goal statutorily right now, without waiting to ratify a constitutional amendment. Technically, *these arguments are, of course, correct*. The Balanced-Budget Amendment provides no new authority to cut spending or raise revenues. However, 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.” S. Rept. 105-3 at 9, 105th Cong., 1st sess., February 3, 1997 (emphasis added).

63. The Senate Judiciary Committee reported S.J. Res. 41 on October 21, 1993, and the Senate began its consideration of the measure under a unanimous consent agreement on February 22, 1994. Floor debate continued on February 23–25, 28, and March 1, 1994, when the Senate failed to give the necessary two-thirds approval (63 to 37) after first incorporating into S.J. Res. 41 (by unanimous consent) language proposed by Sen. John Danforth (R-Mo.) to limit judicial enforcement and then rejecting an amendment by Sen. Harry Reid (D-Nev.) to exempt Social Security and capital expenditures and suspend enforcement during economic recessions. See 140 *Cong. Rec.* S2089 (roll call vote no. 47: 22 yeas to 78 nays), and S2158 (roll call vote no. 48: 63 yeas to 37 nays), March 1, 1994.

64. Robert C. Byrd, “A Hollow and Dangerous Promise,” *Washington Post*, October 31, 1993, p. C7.

65. See, e.g., S.J. Res. 1, sec. 7. If borrowing and

repayment of debt principal were not excluded, then “total receipts” by definition would always equal “total outlays.” For a table showing the relationship between changes in debt held by the public and budget balance, see Congressional Budget Office, “The Budget and Economic Outlook: Fiscal Years 2004–2013,” January 2003, p. 17.

66. See sec. 346(a)(1) of the Social Security Amendments of 1983, Public Law 98-21, codified at 42 U.S.C.A. § 911.

67. See sec. 261 of the Balanced Budget and Emergency Deficit Control Act of 1985, Title II of Public Law 99-177 (also known as Gramm-Rudman-Hollings), codified at 42 U.S.C.A. § 911.

68. See sec. 13301(a) of the Budget Enforcement Act of 1990, Title XIII of Public Law 101-508, codified at 2 U.S.C.A. § 632 note.

69. See generally David Stuart Koitz, “Social Security and the Federal Budget: What Does Social Security’s Being Off Budget Mean?” Congressional Research Service Report no. 98-422, August 29, 2001.

70. In conjunction with the Social Security debate, a similar dispute would arise over whether capital expenditures should be included in any balanced budget mandate. If state practice were followed, balanced budget requirements would apply only to operating funds, so as not to hamper the government’s ability to borrow for infrastructure and other capital investment projects. On the other hand, states use other mechanisms to control their long-term capital spending, such as constitutional debt limitations. Good faith disagreements might also arise over the proper budgetary treatment of new programs, where it is unclear whether the program is fundamentally governmental in nature. President Clinton’s 1994 health care legislation, for example, proposed regional health care alliances under the aegis of, but not operated by, the federal government. The question arose as to whether the premium payments required by these alliances should be designated as government “receipts” for budgetary purposes. This accounting question quickly took on an important political dimension because, if premium payments were designated as government “receipts,” political opponents could disparage the president’s health care alliances as a major tax increase. The Congressional Budget Office ultimately concluded “that the financial transactions of the health alliances should be included in the federal government’s accounts and that the premium payments should be shown as governmental receipts,” but the CBO further recommended that those transactions be shown separately in the budget, following the current practice for Social Security. See Congressional

Budget Office, "A CBO Study: An Analysis of the Administration's Health Proposal," February 1994, pp. 41, 44. Under the Model Amendment proposed here, such questions would be resolved by whether new debt must be issued to the public to finance the capital expenditure or new quasi-governmental program.

71. See Public Law 107-99, 116 Stat. 734, codified at 31 U.S.C.A. § 3101, June 28, 2002. See also the Bureau of the Public Debt website, Frequently Asked Question no. 3.2, www.publicdebt.treas.gov/opd/opdfaq.htm; GAO, "A Glossary of Terms Used in the Federal Budget Process (Exposure Draft)," January 1993, p. 38; and CBO, "Glossary of Budgetary and Economic Terms," www.cbo.gov. The statutory public debt limit is currently set at \$7.384 trillion. The Treasury Department's Bureau of Public Debt defines "debt held by the public" as "all Federal debt held by individuals, corporations, state or local governments, and other entities outside of the Federal Government, less Federal Financing Bank securities." GAO defines the term as "that part of the gross federal debt held outside of the federal government. This includes any federal debt held by individuals, corporations, state or local governments, the Federal Reserve System, and foreign government and central banks. Debt held by government trust funds, revolving funds, and special funds is excluded from debt held by the public. Debt held by the public is distinct from public debt or Treasury debt." The CBO definition simply states that "debt held by the public" is "federal debt held by nonfederal investors, including the Federal Reserve System."

72. See U.S. Const., Art. I, § 9, cl. 7. The Constitution decrees that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." To implement this mandate, the secretary of the Treasury is statutorily required to submit, on the first day of each regular session of Congress, a statement of public receipts and expenditures for the prior fiscal year, as well as a report on the federal government's contingent and unfunded liabilities and a financial statement that the GAO must audit. See 31 U.S.C.A. § 331.

73. See Department of the Treasury, Bureau of the Public Debt, Table I, "Summary of Treasury Securities Outstanding," September 30, 2002, www.publicdebt.treas.gov/opd/opds092002.htm. In its unaudited monthly statement for September 2002, the Bureau of the Public Debt states that the total outstanding "debt held by the public" as of September 30, 2002, was \$3,553,180,000,000, or approximately \$233,400,000,000 greater than the outstanding "debt held by the public" at the beginning of FY02.

74. The statutory provisions that authorize and

limit the president's rescission and deferred spending powers are set forth at 2 U.S.C.A. §§ 681-84. The procedures for implementing these powers are detailed in 2 U.S.C.A. § 685, which requires that any rescission and deferral messages to Congress also be delivered to the comptroller general. 2 U.S.C.A. § 685(b). Upon finding a violation of these provisions, the comptroller general must report such violation to Congress and is further empowered to bring an enforcement action in the United States District Court for the District of Columbia. 2 U.S.C.A. §§ 686-87.

75. See 31 U.S.C.A. § 331(e)(1). The implementing legislation would also need to specify whether the certification is to be based on audited figures and, if so, when the audit would occur. If the current GAO audit date of March 31 were maintained, then the implementing legislation would further need to establish a preliminary certification based on unaudited figures and a final certification after the audit was completed. In the rare event that an audit changed the result of the certification from a "balanced" to an "unbalanced" budget (or vice versa), then the power to exercise a BBV might end or take effect after the start of the congressional session.

76. See GAO, *Financial Report of the United States Government 2001* (Washington: Government Printing Office, 2002), p. 11.

77. See, for example, Louis Fisher, senior specialist in separation of powers, Congressional Research Service, Statement at Hearing on "Item Veto Constitutional Amendment" (H.J. Res. 9) before the Subcommittee on the Constitution of the Committee on the Judiciary of the United States House of Representatives, 106th Cong., 2d sess., March 23, 2000, pp. 19, 25.

78. See Public Law 107-64, 115 Stat. 474, November 5, 2001.

79. See H. Conf. Rep. 107-246, October 16, 2001, pp. 1-2.

80. H.J. Res. 23, 107th Cong., 1st sess., sponsored by Rep. Phil English (R-Pa.), February 28, 2001. This language is similar to the line item veto that President Bush exercised as governor of Texas and the item vetoes found in at least 34 other states. Representative English has not yet reintroduced this proposal in the 108th Congress. See Appendix B.

81. *Commonwealth of Virginia v. Dodson*, 176 Va. 281, 296, 11 S.E.2d 120, 127 (1940). Accord *University of Connecticut Chapter AAUP v. Governor*, 200 Conn. 386, 392, 512 A.2d 152, 156 (1986); and *Inter Faculty Organization v. Carlson*, 478 N.W.2d 192, 195 (Minn. 1991). In *Juan Bengzon v. Secretary of Justice &*

Insular Auditor, 299 U.S. 410 (1937), the United States Supreme Court overturned an attempted “item” veto by the governor-general of the Philippines after determining that “an item of an appropriation bill obviously means an item which in itself is a specific appropriation of money, not some general provision of law which happens to be put into an appropriation bill.” *Ibid.* at 414–15.

82. 2 U.S.C.A. § 691e(7)(A)(i)–(iii).

83. One example was President Clinton’s cancellation of \$287 million in budget authority from the 1998 Military Construction Appropriations Act. See Congressional Budget Office, “CBO Memorandum: The Line Item Veto Act after One Year,” April 1998.

84. Rep. Robert E. Andrews (D-N. J.) introduced H.J. Res. 24 on March 1, 2001, in the 107th Congress, which authorizes the president to disapprove “in whole any dollar amount of discretionary budget authority, any item of new direct spending, or any tax benefit” without attempting to define any of those terms.

85. The 10 states with a reduction veto are Alaska, California, Hawaii, Illinois, Massachusetts, Missouri, Nebraska, New Jersey, Tennessee, and West Virginia. See Appendix B.

86. The texts of sec. 4722(c) and sec. 968 are set forth in *Clinton* at 422 n. 2 and 424 n. 4, respectively.

87. It is also a departure from state practice. Hawaii has the only state constitution that expressly exempts legislative and judicial appropriations from a governor’s line item veto. See Appendix B.

88. At least 12 states—California, Colorado, Connecticut, Idaho, Minnesota, Missouri, Nebraska, New Jersey, New York, North Dakota, Texas, and Wyoming—expressly require separate reconsideration of each item or part that has been vetoed or reduced. See Appendix B.

89. 2 U.S.C.A. § 691a(a).

90. See Alan J. Dixon, “The Case for the Line-Item Veto,” *Journal of Law, Ethics & Public Policy* 1 (1985): 208, reprinted in Hearing on “The Line-Item Veto” (S. J. Res. 14, 23, and 31) before the Subcommittee on the Constitution of the Committee on the Judiciary of the United States Senate, 101st Cong., 1st sess., April 11, 1989, pp. 21, 22. During the 1980s and early 1990s, Sen. Alan J. Dixon (D-Ill.) was a prominent advocate of a line item veto with a simple majority override.

91. A monthly accounting of debt held by the public is published by the Treasury Department’s

Bureau of the Public Debt at www.publicdebt.treas.gov/bpd/bpdhome.htm.

92. See Ronald Weich, Statement at Hearing on “Item Veto Constitutional Amendment” (H. J. Res. 9) before the Subcommittee on the Constitution of the Committee on the Judiciary of the House of Representatives, 106th Cong., 2d sess., March 23, 2000, pp. 30–37. Citizens for the Constitution is now part of the Constitution Project at Georgetown University Law Center. The guidelines themselves are available at the Constitution Project’s website, www.constitutionproject.org/cai/guidelines/index.html.

93. Alexander Hamilton et al., *The Federalist Papers*, ed. Clinton Rossiter (New York: NAL-Dutton, 1961), no. 49, p. 314.

94. Public Law 93-344, 88 Stat. 297, codified at 2 U.S.C. §§ 601 et seq., July 12, 1974.

95. This legislation, which mandated a balanced budget for FY81 was initially sponsored by Sen. Harry F. Byrd Jr. as an amendment to the Bretton Woods Agreements Act of 1978, Public Law 95-435, § 7, 92 Stat. 1053, formerly codified at 31 U.S.C. § 27, October 10, 1978. By 1980 the mandatory language of the 1978 amendment had been watered down to state only that “Congress reaffirms its commitment” to a balanced budget in FY1981. Public Law 96-389, § 3, 94 Stat. 1553, also formerly codified at 31 U.S.C. § 27, October 7, 1990. Ultimately, the reference to FY81 was deleted in 1982, so that under current law Congress perpetually “reaffirms its commitment” to a balanced federal budget each and every year. Public Law 97-258, § 1103, 96 Stat. 908, codified at 31 U.S.C. § 1103, September 13, 1982.

96. See Title II, Part C of Public Law 99-177, 99 Stat. 1038, December 12, 1985 (formerly codified at 2 U.S.C. §§ 901 et seq.). Insofar as the legislation vested sequestration power in the comptroller general, an officer of Congress, it was declared unconstitutional in *Bowsher v. Synar*, 478 U.S. 714 (1986) as a violation of the separation of powers doctrine. The law was amended in 1987 to reflect that ruling.

97. See Title XIII of the Omnibus Budget Reconciliation Act of 1990, Public Law 101-508, 104 Stat. 1388-573, currently codified at 2 U.S.C. § 900 et seq., November 5, 1990.

98. James M. Buchanan and Richard E. Wagner, *Democracy in Deficit: The Political Legacy of Lord Keynes* (Indianapolis, Ind.: Liberty Fund, 2000), p. 182.

99. *Ibid.*, pp. 180–93. Compare with Glen O. Robinson, “Public Choice Speculations on the Item Veto,” *Virginia Law Review* 74 (1988): 420, which iden-

tifies the item veto as being “only marginally useful in curtailing private goods legislation.”

100. See Judith A. Best, “The Item Veto: Would the Founders Approve?” *Presidential Studies Quarterly* 14 (1984): 183.

101. “Logrolling” refers generally to legislative vote trading for the purpose of enacting disparate projects or items, which would not likely pass on their individual merits, by combining them into a single bill that can gain majority support.

102. OMB, *A Blueprint for New Beginnings*, p. 175. Recent illustrations of this “all or nothing proposition” are the four omnibus bills enacted at the end of each of the 1998, 1999, and 2000 congressional sessions and the beginning of the 2003 session: the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Public Law 105-277, 112 Stat. 2681, October 21, 1998; the Consolidated Appropriations Act, 2000, Public Law 106-113, 113 Stat. 1501, November 29, 1999; the Consolidated Appropriations Act, 2001, Public Law 106-554, 114 Stat. 2763, December 21, 2000; and the Consolidated Appropriations Resolution, 2003, Public Law 108-7, February 20, 2003.

103. See generally James V. Saturno and Richard G. Forgette, “The Balanced Budget Amendment: How Would It Be Enforced?” *Public Budgeting and*

Finance 18, no. 1 (Spring 1998): 35–53.

104. Mark O. Hatfield, Statement at Hearing on “The Line-Item Veto” (S. J. Res. 14, 23, and 31) before the Subcommittee on the Constitution of the Committee on the Judiciary of the United States Senate, 101st Cong., 1st sess., April 11, 1989, pp. 208–9.

105. See generally James V. Saturno, “A Balanced Budget Constitutional Amendment: Background and Congressional Options,” CRS report no. 97-379, March 20, 1997, pp. 37–50.

106. See generally Louis Fisher and Neal Devins, “How Successfully Can the States’ Item Veto Be Transferred to the President?” *Georgetown Law Journal* 75 (October 1986): 168–78, reprinted in Hearing on “The Line-Item Veto” (S.J. Res. 14, 23, and 31), before the Subcommittee on the Constitution of the Committee on the Judiciary of the United States Senate, 101st Cong., 1st sess., April 11, 1989, pp. 102–40; and Fisher, Statement, pp. 23–26.

107. Thus, the president could reduce, say, “\$25,000,000 per annum” to “\$20,000,000 per annum,” but could not delete the words “per annum.”

108. See, for example, “Balancing Act,” *Wall Street Journal*, editorial, January 18, 1995.

109. See OMB, *A Blueprint for New Beginnings*, p. 171.

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