

**Testimony before the Commission of the Compact for a Balanced Budget  
Panel 2: The Balanced Budget Compact and Article V of the Constitution  
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**“How the Compact for America Approach Strengthens the Article V Process”**

Chairman Rakestraw, Commissioners Treadwell and Snowden, thank you for this opportunity to discuss how using an interstate compact to add a Balanced Budget Amendment (“BBA”) to the Constitution complies with the Article V amendment process and indeed reinforces other constitutional and legal enforcement mechanisms.

As a member of the Compact for America’s (“CFA”) council of scholars, I’m an ardent support of the compact approach to Article V constitutional change. This method makes the path to state-initiated reform quicker, easier, and more legally certain. It allows states to agree in advance to everything they control in the amendment process in a single bill passed once by their legislatures. It allows Congress to fulfill its entire role in the amendment process in a single resolution passed once. When time is of the essence and the country is in peril, this approach would allow constitutional change to occur within one legislative year. I know of no other Article V approach that does this with the certainty, efficiency, and safety offered by a compact.

Above all, I believe the compact approach minimizes the risk of litigation, because only this method of constitutional amendment requires that state legislatures and Congress agree on all aspects of the process up front. It’s also important that the compact is able to address each and every one of the concerns that have been raised over the past 30 years by the Eagle Forum and other organizations that fear so-called runaway conventions (irrationally, in my view).

I liken the BBA that’s the payload in the Compact for a Balanced Budget (“CBB”) vehicle to Congress’s tying itself to the mast: unpleasant but necessary for our national survival. The reason why it’s necessary is because Congress isn’t composed of angels. And because, as James Madison wrote in *Federalist 51*, men aren’t angels, we need all sorts of structural limits on the very government that we’ve empowered to secure and protect our liberties. If you think about it, all we really need in terms of amendments that would check government power and save our economy is to add to the end of *every* constitutional provision, “And we mean it.” If we didn’t have all the unconstitutional parts of government—the unauthorized federal programs and expenditures—then we wouldn’t have a problem with unbalanced budgets.

Now, unlike the continuous brinkmanship spurred by the statutory debt limit, the CBB is designed to force Washington to prepare a budget that makes the case for more debt long before the midnight hour arrives. It requires the president to start designating impoundments when spending exceeds 98% of the debt limit and requires Congress to override those impoundments within 30 days with alternative cuts if it disagrees. By forcing both the executive and legislative branches to show their cards long in advance of the debt limit, this compact-turned-BBA ensures that no game of chicken holds the country hostage. Because our debt problem is primarily a spending problem, the CBB would also require a two-thirds vote of both houses of Congress for any general tax increase. The proposed amendment would thereby ensure that any new tax burden assumed to pay down the debt would make our tax code flatter, fairer, and far more

conducive to economic growth—which is the best way to prevent both debt spending and tax increases in the long run. The CBB could permanently and structurally bridge future fiscal cliffs with a principled compromise that has been poll-tested to get at least 38 states on-board.

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My testimony proceeds in four parts: First, I will first address general concerns over the enforcement of BBAs generally, looking foremost at state experiences. Second, I will explain the advantages of the CBB as a matter of structural fiscal policy and legal enforcement. Third, I will discuss how the compact approach meshes with and reinforces the Article V amendment process. Fourth, I will respond to concerns regarding judicial review in the BBA context.

## **I. Enforcement and Hard Choices**

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

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

There is every reason to believe the federal government itself would face similar compliance problems should it adopt a constitutional balanced-budget or debt-limit requirement that did not compensate for these evasion tactics. In fact, the federal government’s constitutional power to coin money and its close relationship to the fiat-money Federal Reserve banking system creates an additional evasion risk, one foretold by reports of Obama Administration officials having floated the minting of a trillion-dollar platinum coin to repay the federal debt. Unlike in

the states, it would be possible for the federal government to simply coin or print the money it needs to balance the budget, or engage in other monetary policy manipulations with similar effect. A well-designed federal BBA or debt-limit requirement must counteract this possibility.

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

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

## II. Compact for a Balanced Budget

Last year, Rep. Paul Gosar introduced House Concurrent Resolution 26,<sup>1</sup> which would refer the CFA's BBA proposal<sup>2</sup> to state legislatures for ratification if it is proposed by an amendment convention organized by the CBB under Article V of the Constitution.<sup>3</sup> The BBA advanced by H. Con. Res. 26 is in line with other, more traditional BBAs introduced in recent years: for example, it includes a constitutional debt limit and restrictions on raising taxes. But the proposal is unique in two respects. First, as a concurrent resolution, the passage of H. Con. Res. 26 only requires simple majorities, rather than the two-thirds passage threshold faced by direct congressional amendment proposals. Second, it would deter the evasions that threaten the foregoing amendment proposals, and would create a series of internal incentives that minimize the need for judicial enforcement by codifying a five-point plan for fixing the national debt.<sup>4</sup>

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<sup>1</sup> H.R. Con. Res. 26, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-concurrent-resolution/26/text>.

<sup>2</sup> *The Balanced Budget Amendment, Compact for America*, [http://media.wix.com/ugd/e48202\\_0468889115a94eeda2b0a9104f8989e6.pdf](http://media.wix.com/ugd/e48202_0468889115a94eeda2b0a9104f8989e6.pdf) (last visited May 19, 2016).

<sup>3</sup> *The Legislation Package, Compact for America*, [http://media.wix.com/ugd/e48202\\_80700b495b9e4327a98d15d32d139d50.pdf](http://media.wix.com/ugd/e48202_80700b495b9e4327a98d15d32d139d50.pdf) (last visited May 19, 2016).

<sup>4</sup> See Nick Dranias, *Introducing "Article V 2.0": The Compact for a Balanced Budget*, (Heartland Inst. Policy Study No. 134, 2014), [https://www.heartland.org/sites/default/files/06-26-14\\_dranias\\_article\\_v\\_compact\\_complete.pdf](https://www.heartland.org/sites/default/files/06-26-14_dranias_article_v_compact_complete.pdf).

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

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

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

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

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

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

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

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

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

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

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

### **III. The Compact's Safeguards and the Article V Amendment Process**

The Compact for a Balanced Budget fully structures, codifies and regulates the state-initiated constitutional amendment process under Article V to ensure that the process efficiently, safely, and exclusively advances a specific BBA proposal—much like a ballot measure directed

to state legislators, governors, and Congress. I have counted 17 safeguards that ensure that the compact method of activating the Article V amendment process is fully constitutional and that the CBB won't be abused in considering and implementing the BBA.

Safeguard #1: Overwhelming Political Will. The CBB ensures that the convention for proposing the BBA will be organized only if 38 states join the compact, only if Congress calls the convention in accordance with the Compact, and only if the convention is organized within one year of the effective date of the convention call. This ensures that nothing happens until a supermajority of states and a majority of federal representatives line up and manifest overwhelming, contemporaneous political will behind its rules and limited BBA agenda in advance. Deviating from the Compact would be political suicide for anyone who tried.

Safeguard #2: Convention Processes and Logistics Are Fully Codified and Regulated. The Compact specifies the convention location, agenda, committee structure, and rules; codifying them to ensure the Compact advances solely the BBA it specifies.

Safeguard #3: The CBB is Constitutionally Protected Binding State and Federal Law. The CBB has the status of state law and also that of a binding contract among member states, the obligations of which are guaranteed under Supreme Court's interpretation of the Constitution's Contracts Clause. Even if courts incorrectly rule that Congress has power over the logistics of an Article V convention, the CBB's rules and limited agenda will obtain the status of federal procedural law because the convention isn't organized until Congress calls it in accordance with the underlying compact. Any deviation from that compact will be illegal and unconstitutional unless proponents of the deviation succeed in overturning centuries-old legal precedent.

Safeguard #4: Political Ambition of Aspiring Governors. As a default setting, the CBB designates sitting governors as the sole delegates for member states and requires governor-delegates attending the convention to take a temporary leave of absence from their gubernatorial office while at the convention, leaving their likely political rivals in charge of the state and able to direct efforts to enforce the CBB as needed.

Safeguard #5: Convention Can't Proceed Unless Agenda Limited to BBA. The CBB instructs member-state delegates to vote into place its rules and limited BBA agenda as the first order of business or else they automatically forfeit their representative authority.

Safeguard #6: Nullification of Unauthorized Delegate and Member-State Actions. The CBB voids any action by member states or delegates that deviates from its rules and agenda.

Safeguard #7: Automatic Recall of Rogue Delegates. The CBB automatically terminates and recalls any member-state delegate who deviates from its rules and agenda.

Safeguard #8: Automatic Disqualification of Rogue States. The CBB automatically disqualifies the vote of any member state whose delegates deviate from its rules and agenda.

Safeguard #9: State Legislatures Can Recall Rogue Delegates. The CBB empowers state legislatures to recall delegates for good cause.

Safeguard #10: Time-Limited Convention. The CBB limits the convention to a single 24-hour session.

Safeguard #11: Prohibition on Advancing Unauthorized Proposals. The CBB prohibits every member state and all of its residents from materially advancing any unauthorized proposal.

Safeguard #12: Nullification of Unauthorized Convention Proposals. The CBB deems void any convention activity or proposal that deviates from its limited BBA agenda and rules.

Safeguard #13: Prohibition on Ratification of Unauthorized Proposals. The CBB bars every member state from ratifying any convention proposal other than the BBA it specifies.

Safeguard #14: Mandatory Compact Enforcement by State Attorneys General. The CBB empowers and requires attorneys general in all member states to secure an injunction to enforce its terms if the CBB is violated. Delegates who violate the CBB thus serve up a political opportunity on a silver platter.

Safeguard #15: Competent Venue Selected for Compact Litigation. The CBB requires all litigation to take place in the U.S. Court of Appeals for the Fifth Circuit or in Texas state courts.

Safeguard #16: Commission Intervention. The CBB empowers an interstate commission populated by the states to relocate the convention upon request of the Convention Chair if the convention deviates from the terms of the CBB.

Safeguard #17: Sunset. The CBB self-repeals on April 12, 2021, ensuring that the political will and policy judgments it manifests remain contemporaneous to the organization of any Article V convention.

In short, the CBB provides a safe, legal, and efficient way to navigate the oft-burdensome Article V amendment process.

#### **IV. Whither Judicial Review?**

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

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

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

While we can quibble with the modern application of the political-question doctrine—and other practices that limit judicial review or unduly defer to the political branches—those cases that are non-justiciable don't foreclose the people from having any recourse when they

disagree with the actions of Congress or the president. Instead, the foundation of our republican form of government—elections through well-regulated procedures—provides the necessary recourse. Because Americans believe in the rule of law and expect their elected officials to do the same, a Congress or president who openly violated the Constitution would not last long in office and would be replaced by those who assured the citizenry that they would uphold the law.

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

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

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

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

Finally, my favorite *Onion* article of all time underscores the fact that there is no judicial precedent regarding the Third Amendment—though some lawyers have been creative in their complaints against government agencies—and yet we in Northern Virginia aren't concerned that the Pentagon will commandeer our spare bedrooms when barracks are renovated.<sup>5</sup>

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

## Conclusion

There are no legal or structural reasons why a BBA achieved through a compact process could not harness Article V to become a successful and celebrated part of our Constitution.

Thank you for your time. I welcome your questions.

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