



November 29, 2011

Hon. Richard Durbin
Chairman, Senate Judiciary Committee
Subcommittee on the Constitution, Civil
Rights and Human Rights
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Durbin:

To assist the Subcommittee in its consideration of the issues to be presented at its November 30, 2011 hearing on “A Balanced Budget Amendment: The Perils of Constitutionalizing the Budget Debate,” we write to briefly chronicle why a Balanced Budget Amendment would be a stark departure from our Constitution’s scheme of government created more than two centuries ago. The proposals for a Balanced Budget Amendment pending before the 112th Congress vary greatly in their particulars, but share the same general defect: they are inconsistent with the founding generation’s vision of an agile, responsive, and effective federal government with broad powers to protect national security and solve national problems. Out of sync with the fundamental principles underlying our constitutional order for the last 224 years, the proposed Amendments would tie Congress’ hands and disable our national government from properly responding to serious national problems. We face a high duty when amending the Constitution: to match the Framers’ maturity and foresight. A Balanced Budget Amendment flunks this test.

Congress’s express powers to raise and spend money for the general welfare are at the heart of our Constitution. It is no accident that the first two enumerated powers that Article I, Section 8 of the Constitution vests in Congress – even before the commerce power – are “[t]o lay and collect Taxes . . . to pay the Debts and provide for the common Defense and general Welfare of the United States” and “[t]o borrow money on the credit of the United States.”¹ The Constitution’s broad textual grant of power was a direct response to the failed Articles of Confederation, which imposed crippling restrictions on Congress’ power to borrow and tax. These restrictions had plagued the Revolutionary War effort and made a deep and lasting impression on George Washington and other war veterans. As General Washington wrote to Alexander Hamilton in 1783, if broad powers were not conferred on the federal government, “the blood we have spilt, in the course of an eight years’ war, will avail us nothing.”²

Although Congress under the Articles could nominally borrow money to serve the common good, it was entirely reliant on the states to finance these efforts. Congress could not

¹ U.S. CONST., ART. I, § 8.

² See 1 WORKS OF ALEXANDER HAMILTON 342 (John Hamilton ed. 1850).

borrow or appropriate funds without nine votes from the states – a two-thirds supermajority. Centralized revenue was necessary, but revenue-raising measures had to pass the even higher threshold of unanimity. Indeed, as Professor Akhil Amar writes, New York’s veto of the revenue plan to pay the war debts in 1786 was “the last straw, confirming the imbecility of the Confederation and the practical impossibility of reforming the Articles from within.”³ In response to the failure of the Articles, our Constitution “form[s] a more perfect Union,”⁴ predicated upon the promise of effective government, including the express powers to borrow and tax for the general welfare.

History vindicates the Founders’ wisdom in giving Congress ample tools to respond to national crises and problems, including by borrowing money and contracting a debt. Debt helped fund the War for Independence, complete the Louisiana Purchase, and preserve the Union during the Civil War. Debt not only helped us weather the Great Depression, but it also gave us the tools we needed to emerge victorious from two world wars. In short, because of the Founders’ wisdom in giving Congress broad, express constitutional powers to borrow and tax, our country has grown, prospered, and survived to become the great nation it is today. Proposals to amend the Constitution to require a balanced budget fly in the face of both the Framers’ carefully crafted constitutional design and our experience of living under the Constitution for more than two centuries.

Moreover, in creating a supermajority requirement, the sponsors of Balanced Budget Amendment proposals do violence to another central tenet of the Framers’ project: the need for majority rule. The Framers of the Constitution made majority rule the default rule for our democratic government. As Thomas Jefferson wrote, majority rule “is the natural law of every assembly of men, whose numbers are not fixed by another law.”⁵ The Constitution specifies a handful of departures from this default rule, but each exception warrants a particular justification that is consistent with the Constitution’s democratic structure. Nowhere does our Constitution burden a substantive enumerated congressional power with the leaden weight of a supermajority.

Finally, in a Constitution filled with broad principles of governance, a Balanced Budget Amendment would be fundamentally out of place and could not be enforced without a massive transfer of budgetary authority from Congress to the courts. Lawsuits would abound, and courts would be forced into an activist, political role. As Robert Bork noted in opposing a Balanced Budget Amendment more than three decades ago, “[b]y the time the Supreme Court straightened the whole matter out, the budget in question would be at least four years out of date and lawsuits involving the next three fiscal years would be slowly climbing towards the Supreme Court.”⁶ The nation’s budget would be in a perpetual state of doubt, and the courts would be thrust into the task of formulating budgetary policy in the process of devising a remedy for an unconstitutional budget, activity far outside the judicial ken. The result would be judicial activism run amok.

³ See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 312 n.* (2005)

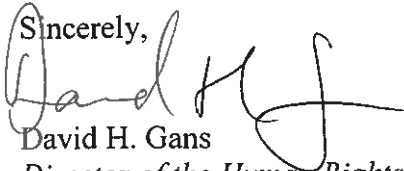
⁴ U.S. CONST., preamble.

⁵ See *THE JEFFERSON CYCLOPEDIA: A COMPREHENSIVE COLLECTION OF THE VIEWS OF THOMAS JEFFERSON* 525, 735 (John P. Foley ed. 1900).

⁶ Robert Bork, *On Constitutional Economics*, AM. ENT. INST. J. ON GOV’T & SOC’Y 14, 18 (Sept-Oct 1983).

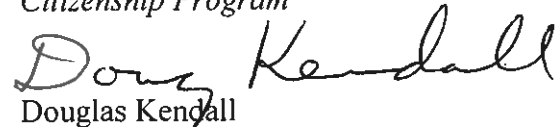
We thank the Subcommittee for providing a forum to discuss these significant issues, which are of great consequence to every American and particularly to those of us who work to secure the Constitution's promise of effective government of, by, and for the people.

Sincerely,



David H. Gans

*Director of the Human Rights, Civil Rights and
Citizenship Program*



Douglas Kendall

Founder and President

CONSTITUTIONAL ACCOUNTABILITY CENTER

cc: Members of the Senate Judiciary Committee,
Subcommittee on the Constitution, Civil
Rights and Human Rights