

1 STATEMENT OF ILYA SHAPIRO, SENIOR FELLOW IN  
2 CONSTITUTIONAL STUDIES, AND EDITOR-IN-CHIEF OF THE  
3 CATO SUPREME COURT REVIEW, CATO INSTITUTE,  
4 WASHINGTON, D.C.

5 Mr. Shapiro. Senator Cornyn and distinguished members  
6 of the Committee, thanks for this opportunity to discuss  
7 structural issues attending a balanced budget amendment,  
8 which I liken to Congress tying itself to the mast--  
9 unpleasant, but sometimes necessary. And the reason why it  
10 is necessary is because, as Steve alluded, Congress is not  
11 composed of angels. In fact, I feel I am so tied to this  
12 vision of Madison Federalist 51 that my license plate, as  
13 Senator Lee knows, in my car is FED 51. I am not ~~sort of~~ <sup>an</sup>  
14 FBI agent, as some people think when I drive down the  
15 street. And because men are not angels who are in the  
16 Government, we need to have all sorts of structural  
17 provisions to protect people from the Government once we  
18 empower it to secure our liberties.

19 I mean, really, when we are talking about  
20 constitutional amendments, all we really need is to add at  
21 the end of every provision, "And we mean it." If we  
22 actually enforce <sup>the</sup> Constitution as written, if we did not <sup>d</sup>  
23 have the unconstitutional parts of what the Government is  
24 involved in, then there would be no problem with balanced  
25 budgets or much of anything else with the Government.

1 Unfortunately, we do not live in that world.

2 Now, perhaps the greatest concern with BBAs from a  
3 constitutional design perspective is enforcement, as Alan  
4 said. Here the States' experience is instructive. While  
5 the political mark set by these provisions has, arguably,  
6 led States to keep their fiscal houses in better order than  
7 the Federal Government, in reality compliance has been  
8 unreliable.

9 For example, routine discovery of inaccurate or  
10 manipulated projections creates pressure to evade legal  
11 limits, and such pressure is often accommodated by State  
12 judges who interpret key terms used in the relevant  
13 provisions in novel ways that allow budgets to bypass  
14 constitutional limits. Judicial twistification have thus S  
15 enabled States to engage in as much borrowing as markets  
16 will bear. And there is every reason to believe that the  
17 Federal Government would face similar problems. Indeed, the  
18 power to coin money and the Federal Reserve banking system  
19 creates<sup>g</sup> an additional risk, one foretold by officials having J  
20 floated the minting of a trillion-dollar platinum coin to  
21 repay the debt. Unlike in the States, the Feds can engage  
22 in monetary policy manipulations.

23 These tactics underscore that a BBA does not easily  
24 call to mind an enforcement mechanism. Still, even beyond  
25 judicial review, which is necessary, I think, there are

1 examples of constitutional provisions enforced by Congress  
2 or the President against themselves. For example, the  
3 Emoluments Clause--there are actually two Emoluments Clauses  
4 in the Constitution; they both work in this example. The  
5 one about gifts (:) Attorney General opinions have interpreted (:)  
6 and Congress eventually enacted the Foreign Gifts and  
7 Decorations Act, without any further litigation. Courts  
8 simply need not be involved for laws to be effective.

9 A further concern is that a BBA would dictate fiscal  
10 policy by requiring Congress or the President to choose  
11 among various programs to cut. One question would be  
12 whether any programs would be beyond the President's  
13 impoundment authority. But these concerns are no different  
14 from those every family faces each month. A BBA would  
15 merely require the political branches to acknowledge  
16 reality: The United States does not have infinite funds. A  
17 BBA's very purpose is to require Government to prioritize,  
18 and so forcing hard choices is a feature, not a bug.

19 Turning to existing proposals, it is important first to  
20 emphasize that any BBA would favor more prudent fiscal  
21 policy because it signals that the Government should not  
22 behave as if its resources are unlimited. Accordingly, all  
23 proposed BBAs would be an improvement, which is why I take  
24 an "all of the above" sort of position. From that  
25 perspective, Senator Hatch's proposal is very good. It is

1 not perfect, as I detail in my written opinion, in my  
2 written testimony, but it is much better than the status  
3 quo, and it is supported by all 54 Republicans, as far as I  
4 know. So when you add in the 20 Democrats who supported  
5 Senator Udall's similar BBA 5 years ago, you are really  
6 getting somewhere.

7 Senator Lee's proposal has similar features, and as  
8 Alan mentioned, his Section 6 authorizing and restricting  
9 judicial review improves on Senator Hatch's, although such a  
10 provision could also be added by further implementing  
11 legislation.

12 Moving to the House, Representative Brat's BBA is  
13 consistent with past constitutional language. It expresses  
14 general principles rather than mechanisms for the three  
15 basic elements that BBAs need: the balance rule, the  
16 emergency valve, and the transition. And the concision of  
17 this proposal gives Congress maximum flexibility.  
18 Representative Amash's proposal is similarly concise.

19 I should add that in 2011, 261 House Members voted for  
20 a BBA proposed by Representative Goodlatte, and when you add  
21 in other House cosponsors for other bills, that brings us <sup>^</sup> to  
22 right about ~~to~~ <sup>^</sup> where we need. So this is certainly possible <sup>9/10 to be</sup>  
23 in the House, not just the Senate.

24 I should also mention House Concurrent Resolution 26  
25 which refers the Compact for America BBA to the States for

1 ratification if proposed by an Article V convention. And I  
2 should disclose that I am a member of the CFA's council of  
3 scholars. This proposal has other unique features.

4 And, finally, despite the drafting issues inherent in  
5 passing a BBA, I have to underscore that concerns about  
6 judicial review need not be a barrier. Americans generally  
7 have a great deal of respect for the rule of law. People  
8 may disagree with some Supreme Court decisions, but they  
9 argue for exceptions or amendments or an overruling--not a  
10 complete flouting of the law. There is simply no reason for  
11 concern that a BBA will be unenforceable other than the  
12 extent to which any constitutional provision is ignored.

13 I will leave economics to the others, but there are no  
14 legal reasons <sup>by</sup> ~~by~~ a BBA could not become a successful part of  
15 our Constitution. for  
which

16 Thanks for your time. I welcome your questions.

17 [The prepared statement of Mr. Shapiro follows:]

1           Senator Cornyn. Thank you very much.

2           I will start. We will do a 5-minute round of  
3 questions. Maybe we can do a couple rounds if it works out.

4           I just want to express my own sense of frustration at  
5 where we are. As you know, the debt has nearly doubled--I  
6 think you mentioned that, Mr. Moore--under the current  
7 administration, and if it actually would stimulate the  
8 economy and create economic growth, it would have worked.  
9 But as you pointed out, it has not.

10          But I worry that--I cannot think of many other options  
11 other than legislation, a balanced budget amendment that  
12 emanates from Congress, or an Article V convention of the  
13 States. Are there any other options available to us that  
14 any of the witnesses can offer? I do not think there are.  
15 Mr. Greenstein?

16          Mr. Greenstein. We did have a period, as a number of  
17 you will recall, where Congress did act. We had--in two  
18 cases bipartisan, in one case one party--major deficit  
19 reduction agreements in 1990, 1993, and 1997, and the  
20 combination of the three contributed to our actually having  
21 balanced budgets at the end of the 1990s. So Congress was  
22 able to do it in the 1990s.

23          Senator Cornyn. Theoretically, I agree with that. But  
24 I want to just ask Mr. Shapiro, I know that among the  
25 options that are available that were provided for in the

1 Constitution itself is a constitutional convention actually  
2 initiated by the States. Now, I have heard some people  
3 express a thought of horror that that would occur. But, of  
4 course, the ultimate break on that would be two-thirds--or,  
5 excuse me, three-quarters of the States required to ratify  
6 any constitutional convention. But I am just worried that  
7 as this problem gets bigger and bigger and bigger and people  
8 get more and more frustrated by the lack of action here,  
9 they could well take it out of our hands, couldn't they, Mr.  
10 Shapiro?

11 Mr. Shapiro. Well, yes, I think that is correct, and I  
12 think that would be a healthy development for States and the  
13 people to take back power from Washington in various ways.

14 I just want to correct you on one thing. It is an  
15 amendments convention, not a constitutional convention. We  
16 are not--unless the States want to, I suppose--rewriting the  
17 Constitution full stop, but certainly Article V provides for  
18 ways for the States to demand that Congress propose for  
19 ratification certain amendments, and there are different  
20 ways of doing that, different ways the rules and the  
21 delegates and the convention rules could be written.

22 In our history, none of the constitutional amendments  
23 have been passed through a State-initiated process, ~~but that~~  
24 ~~is because~~ in many cases States did initiate these sorts of *although*  
25 amendment processes. But once there was a critical mass,

1 Congress decided that it needed to get ahead of this and so  
2 ended up proposing it itself.

3 I think the same thing would happen here with either  
4 the Compact for America or--by the way, I am "all of the  
5 above" on this well--with a convention of the States or BBA  
6 Task Force. I think they all run on kind of parallel and  
7 separate tracks. Eventually, I think, if enough States got  
8 behind it, Congress' hand would be forced.

9 Senator Cornyn.. Well, I happen to agree with that. I  
10 think you might refer to that as the in terrorem effect of  
11 an Article V convention that would force the hand of  
12 Congress finally to act. But it seems to me that it is  
13 incumbent on those who disagree with the current legislative  
14 proposals, who disagree with Congress passing a joint  
15 resolution to amend the Constitution with a balanced budget  
16 amendment, and who disagree with an Article V convention to  
17 amend the Constitution, you are exactly correct. Then there  
18 ought to be--it ought to be incumbent upon them to make some  
19 counterproposal. And I just want to--some of the common  
20 responses that you hear, Dr. Holtz-Eakin, is: Why can't we  
21 just raise taxes on millionaires and billionaires? Why  
22 won't that fix our problem?

23 Mr. Holtz-Eakin. We do not have enough millionaires  
24 and billionaires. If you look at the end of the budget  
25 window, for example, the deficit is going to be \$1 trillion.