



Chairman Charles E. Grassley
U.S. Senate Committee on the Judiciary
Washington, DC 20510-6275

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Transmitted by Email

Dear Senator Grassley,

Thank you for having invited me to testify before the Judiciary Committee at your March 16 hearing on the need for a Balanced Budget Amendment (“BBA”) to the Constitution. I write to respond to your supplemental written question regarding my testimony:

Mr. Shapiro, your testimony mentioned self-enforcing constitutional provisions that do not require judicial involvement to be effective. Can you please expand on that notion and explain why a federal balanced budget amendment would be enforced without the courts making budgetary policy?

Response: Although the courts are involved in enforcing numerous constitutional provisions, many are followed without judicial enforcement, while for most others judicial review is a backstop in unusual circumstances. Accordingly, self-enforcement should be considered as a complement to judicial review, not an either/or proposition.

Now, as it happens, most self-enforcing provisions involve the government’s basic operations (as would a BBA). For instance, courts have not been involved in making elections happen on the day set by Congress, or in enforcing age requirements for congressional office, or in impeachment proceedings, or in the annual occurrence of the State of the Union address.

To cite a current example, courts aren’t involved in disputes between the president and Senate in appointing Supreme Court justices. As you’re well aware, President Obama has made a nomination and would like his nominee confirmed. But however much his political supporters accuse the Senate of not “doing its job,” nobody has run to the courts to enforce that peculiar view of “advice and consent.” The conflict will be resolved by the people, at the ballot box—not the judiciary. The Supreme-Court-vacancy battle also demonstrates the main reason that self-enforcing provisions work: Like the American people, executive and legislative branch officers have a deep respect for the Constitution—even if they at times disagree about what it requires.

All of this would hold true for a BBA. Having ratified such an amendment, the people would not stand for their elected officials’ immediately disregarding it. The president would propose a budget that at least came close to meeting its requirements—or face impeachment—and the relevant congressional committees would make sure that the budget respects the BBA. Even if Congress and the president colluded to violate the amendment, the problem could be resolved at the polls rather than in the courts. America would have fallen very far indeed if its people allowed their representatives to openly disregard the Constitution.

Cordially,

A handwritten signature in black ink, appearing to read "Ilya Shapiro".

Ilya Shapiro