



The New BBA Con-Con Threat

A Balanced Budget Amendment Article V convention would be a threat to the Constitution because of its inherent power to be a runaway convention, and the tendency of a BBA to move our nation from a republic to a democracy.

by Larry Greenley

[President Wilson] began to speak of a flexible or fluid constitution in contradistinction to a rigid one. He thought that constitutions changed without the text being altered, and cited our own as an example.

— Recorded by Colonel E.M. House, November 7, 1914, *The Intimate Papers of Colonel House*, 1926

Constitutionalists have long criticized the widely held viewpoint that we have a “living Constitution,” one that must be interpreted in ever-changing ways in response to changing political opinions. The above quote from 1914 shows that progressive Democratic President Woodrow Wilson already believed

in a “living Constitution” a century ago. Since they first met in 1911, House had become Wilson’s closest advisor. Wilson had even made this surprisingly over-the-top comment: “Mr. House is my second personality. He is my independent self. His thoughts and mine are one.”

A little over a month earlier, on September 28, 1914, Wilson had expressed a similar thought about the Constitution to his trusted confidant, Colonel House: “[Wilson] thinks our form of government can be changed by personal leadership.” However, this time House had expressed his viewpoint, saying: “But I thought the Constitution should be altered, for no matter how great a leader a man was, I could see situations that would block him unless the Constitution was modified.”

This was a very astute assessment by Colonel House. Sure enough, here we are

a century later with a federal government raging out of control owing to the widespread disregard for the Constitution’s original meaning by elected officials over the past century or more. And sure enough, as predicted by Colonel House, a rising bloc of conservatives is attempting to use the Constitution to rein in the federal government.

However, there is a prominent split in conservative ranks over how to use the Constitution to accomplish this. On one hand there are The John Birch Society and many other constitutionalist organizations and individuals who advocate reining in the federal government by working to educate and inform sufficient numbers of voters so that enough representatives will be nominated and elected who will vote to bring the federal government back into compliance with the Constitution. Of course, this is a very hard task and would take many years of hard work by grassroots activists under sound educational leadership.

Still, the creation of an informed electorate appears to be the only way to ensure that our elected officials really honor their oaths to support and defend our Constitution, or any revised constitution produced by one or more Article V conventions for that matter.

On the other hand, there are a large number of organizations that advocate reining in the federal government by changing the Constitution via one or more Article V conventions (aka constitutional conventions, Con-Cons, conventions of the states, etc.). In our situation where the three branches of the federal government — executive, legislative, and judicial — are already routinely failing to adhere to the Constitution, merely changing an already ignored Constitution without creating the informed electorate to enforce it doesn’t provide much hope.

In “The Solution Is the Constitution, Not Article V” published in *THE NEW AMERICAN*, March 9, 2015 (available at TheNewAmerican.com), this author presented three arguments against calling an Article V constitutional convention regardless of the claimed purpose: The Constitution is not the problem; all Article V conventions would have the inherent power to be runaway conventions; and an Article V convention would enable powerful special interests to revise the Constitution in their favor.



Here you have evidence for one of the main reasons why a BBA would be inadequate for reining in our out-of-compliance-with-the-Constitution government. From the beginning, the BBA movement has only sought to constrain the size and growth of the federal government in general.

Please see that article for more information regarding the details of the arguments.

In this article we focus on the long-standing initiative to propose a Balanced Budget Amendment (BBA) via an Article V convention. And we will maintain not only that a BBA Con-Con is a bad idea because all Con-Cons are a bad idea, but also that a BBA Con-Con is a bad idea because a BBA is a bad idea in itself.

The Resurgent BBA Con-Con Drive

The previous high-water mark of 32 state applications for a constitutional convention to propose a Balanced Budget Amendment in 1983 is being approached again, as 27 states are now on record as applying to Congress for such a convention.

Back in 1983, Missouri became the 32nd state to apply for a BBA Article V convention. Which meant that advocates needed only two more state applications to reach the 34 (two-thirds) states required by Article V.

After that, the BBA Con-Con movement hit a dry spell in the years from 1983 to 1988, with no new applications. Then, during the period 1988 to 2014, 15 states rescinded (canceled) their Con-Con applications, reducing the number of states with “live” BBA Con-Con applications to 17.

However, from 2011 to 2015 eight states that had formerly rescinded their applications, reapplied for a BBA Article V convention, which when combined with Ohio and Michigan making their initial BBA convention applications in 2013 and 2014 respectively, makes a new total of 27 states with “live” BBA Con-Con applications as of September 2015. That means that proponents of a BBA Con-Con need only seven more states to get to the 34 required for calling a constitutional convention.

The 23 states that don’t currently have a “live” BBA Con-Con application are Arizona, California, Connecticut, Hawaii, Idaho, Illinois, Kentucky, Maine, Massachusetts,

Minnesota, Montana, Nevada, New Jersey, New York, Oklahoma, Oregon, Rhode Island, South Carolina, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

Of course, most of the liberal states among these 23 will not be approving BBA Article V convention applications anytime soon; however, within the 23 states listed above, there are 13 states that are being especially targeted by BBA Con-Con advocates. They are Arizona, Idaho, Kentucky, Maine, Minnesota, Montana, Oklahoma, South Carolina, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. (See map below.)

History of the BBA Con-Con Movement

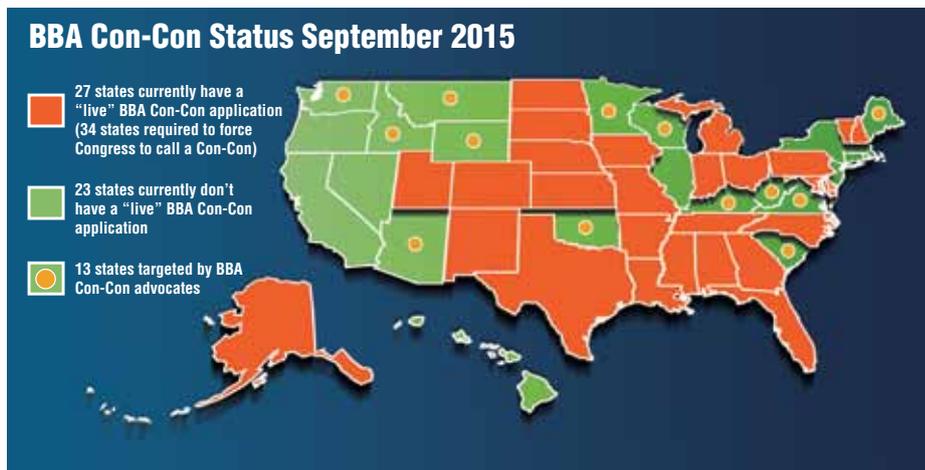
First, let’s review a bit of historical background. Far from being a “new idea,” bills proposing a Balanced Budget Amendment began to be introduced in Congress at least as far back as the 1930s. Then in 1969, a new group was formed that has played an important role in promoting the BBA concept. Here’s how University of Akron professor David E. Kyvig described this new group in his Fall/Winter 1995 *Akron Law Review* article, “Refining or Resisting Modern Government? The Balanced Budget Amendment to the U.S. Constitution”:

In 1969 a group of libertarians, unhappy with recent developments in particular but philosophically opposed to government in general, formed the National Taxpayers Union.... The Union embraced a balanced budget amendment as a means of shrinking the federal government.

In the above quote, Professor Kyvig reveals something very important about the National Taxpayers Union (NTU). He characterizes it as “a group of libertarians ... philosophically opposed to government in general.” And he added that they “embraced a balanced budget amendment as a means of shrinking the federal government.” Then, as now, BBA promoters failed to address the key factor *causing* the unbalanced spending they proposed to solve. That factor, of course, is unconstitutional spending.

Here you have evidence for one of the main reasons why a BBA would be inadequate for reining in our out-of-compliance-with-the-Constitution government. From the beginning, the BBA movement has only sought to constrain the size and growth of the federal government in general. The BBA movement has never been about bringing the federal government back into compliance with the enumerated powers granted to Congress in Article I, Section 8, and with the other powers granted to the three branches of the federal government scattered throughout the Constitution.

Then, according to Professor Kyvig, in 1975 Lewis Uhler founded the National Tax Limitation Committee (NTLC), which within a few years had enlisted prominent economists Milton Friedman and William





AP Images

EPA Administrator Michael Leavitt addresses members of ALEC in 2004. ALEC has been the most prominent organization behind the BBA Article V convention movement.

Niskanen in the cause. As with the NTU, the NTLC promoted a BBA as a way to limit the growth of the federal government in general. Once again, bringing the federal government back into compliance with the powers granted to it by the Constitution was never in the picture.

The NTLC website makes this crystal clear in its mission statement: "To provide national leadership to achieve the optimal size and functions of government and promote candidates and initiatives that support these goals."

There's not a mention of the Constitution in the NTLC mission statement.

We've been discussing two of the most important groups (NTU and NTLC) behind convincing Congress to propose a BBA. Since Congress has never proposed a BBA, these two groups have also vigorously supported getting 34 states to apply to Congress for a convention to propose a BBA. However, the most prominent organization behind the BBA Article V convention movement over the past several decades has been the American Legislative Exchange Council (ALEC).

According to its website, ALEC was formed more than 40 years ago when a small number of state legislators and policy advocates met "who shared a common belief in limited government, free markets, federalism, and individual liberty." Although sharing a belief in "limited government, free markets, federalism, and individual liberty" is a good thing, what's lacking from ALEC's approach is any commitment

to bringing the government back into compliance with the Constitution.

In a letter to ALEC members, dated June 27, 1978, ALEC chairman Louis "Woody" Jenkins proudly pointed out that ALEC and the NTLC had cosponsored the National Conference on Tax Limitation and Fiscal Responsibility in May that year.

Already a year earlier ALEC had sent out its first volume of "Suggested State Legislation," which included its "Balanced Federal Budget Petition." This petition was intended as model legislation for states to use to apply to Congress to call an Article V convention for the sole purpose of proposing a BBA.

In the October 1984 issue of its publication, *First Reading*, ALEC provided its own history of the "Balanced Budget Amendment Constitutional Convention" (ALEC's own words). ALEC's use of the term "Constitutional Convention" to refer to what they now refer to as an Article V convention is quite interesting. In recent years most of the Article V convention proponents have dropped the "constitutional convention" terminology and now vehemently criticize their opponents for even daring to use this term in this context.

According to ALEC, the idea of a BBA Article V convention can be traced back to the early days of ALEC's formation in 1975. Early that year, Georgia Representative John Linder became interested in working to get the states to apply for a constitutional convention to propose a BBA. He contacted Lewis Uhler of the NTLC about

this and was referred to ALEC, which was just being organized at the time.

Linder then drafted a model state resolution calling for a "Constitutional Convention on a Balanced Federal Budget" (there's that term again), which was then sent to 27 state legislative contacts on an ALEC contacts list. According to ALEC's 1984 article, this led to many states applying for a BBA constitutional convention, which eventually led to 32 of the necessary 34 states applying to Congress by 1983. The article ends by saying that the enlistment of most of the 32 states was "due to the efforts of ALEC members in the states."

It's always hard to prove a negative, such as making a statement that BBA Article V convention proponents rarely mention restoring the federal government's adherence to the specific powers granted to it by the Constitution. However, this author's review of the history of the BBA constitutional convention movement and a review of their current statements and arguments reveals that such a restoration is not their goal. Instead these proponents talk in terms of general goals, such as "to stop runaway spending," to stop "deficit spending," to stop "out of control spending," "to rein in our debt and revive our economy," "to limit Congress' ability to drive our nation into further economic decay," etc. They have been making these exact same arguments for 40 years now.

This is not to say that having a balanced federal budget would be a bad idea; on the contrary balanced budgets should be the norm and striven for in all but truly emergency situations, such as when Congress has declared war. However, the fact remains that a BBA would not address the real problem of multitudes of usurpations of powers by officials in all branches of the federal government. Moreover, a BBA would tend to legitimize these usurpations by focusing on the goal of balancing the budget and ignoring the problem of widespread usurpations. Furthermore, it must be emphasized that if the federal government would only follow the Constitution, then the budget would easily be brought into balance.

Brief History of Federal Usurpations

Focusing on balancing the federal budget leads to ignoring the fundamental problem of a federal government that started to ig-

nore the Constitution in small ways early in our nation's history, then went on to rapidly increase its usurpations of powers in the 20th century.

Let's step back and look at our problem of an "out-of-control" government from a historical perspective. What's one of the most noticeable aspects of this being "out-of-control"? The answer is those huge federal deficits that have amounted to anywhere from a half trillion to a trillion dollars annually over the past decade, and which have led to a rapid rise in the national debt to a fantastic total of \$18.4 trillion as of early September 2015.

What are other important aspects of the "out-of-control" government problem? A good answer here would be to point to how all three branches of the federal government have been frequently departing from the Constitution.

We can simplify how we understand the "out-of-control" government problem by realizing that the huge annual federal budget deficits are the result of Congress clearly refusing to comply with the enumerated powers granted to it in Article I, Section 8 of the Constitution. Some constitutionalists maintain that approximately 80 percent of federal spending is unconstitutional. One way to verify this is to look at the current lineup of federal agencies and major programs. Most of them are not based on powers granted to Congress by the Constitution. Here are some examples of blatantly unconstitutional federal departments and programs: Agriculture, Education, Energy, Environmental Protection, Health and Human Services, Housing and Urban Development, foreign aid, and the various entitlement programs, such as Social Security, Medicare, and Medicaid. Of course, these three major entitlement programs are the ones that account for most of the (variously estimated) \$100-200 trillion in unfunded liabilities that the federal government has incurred.

Focusing on balancing the federal budget leads to ignoring the fundamental problem of a federal government that started to ignore the Constitution in small ways early in our nation's history, then went on to rapidly increase its usurpations of powers in the 20th century.



Education Secretary Arne Duncan speaks about the administration's plans for education at an elementary school, January 12, 2015. Nothing in the Constitution authorized Congress to establish a Department of Education.

A good question is: How long have these usurpations been going on? The short answer is that the federal government's departure from the Constitution began in small ways almost from the beginning of our nation's history. Let's look at a couple of examples.

First consider the U.S. Department of Agriculture (USDA). This entire department is unconstitutional. It was officially established as a federal department in 1862, but just when did this unconstitutional activity begin? This quote from *Congressional Series of United States Public Documents*, Volume 2757, 1893, shows that even our first president, George Washington, played a role in planting the germ of an idea that eventually led to the USDA:

The establishment of a National Board of Agriculture was one of the measures which President Washington strongly urged upon the attention of Congress. The propriety of giving national aid to agriculture was considered by committees of both Houses of

Congress in those early days, but the indifference of the farmers and *constitutional objections prevented any legislative action*. [Emphasis added.]

Notice that the "propriety of giving national aid to agriculture" was considered by Congress and that "constitutional objections" prevented Congress from authorizing any funding for agriculture in the early days of our constitutional republic. However, we know that at some point these constitutional objections were ignored, leading to the establishment of the U.S. Department of Agriculture in 1862. As of 2015, Congress is clearly usurping powers not granted to it in the Constitution by providing many billions of dollars in subsidies to farmers annually, and also providing \$80 billion in food stamps annually.

Let's take another interesting example, the U.S. Department of Education, which was established in 1980. When did Congress begin its unconstitutional funding for education? It turns out that the answer is 1866. Here's an excerpt of the floor debate in the House over whether to establish an education bureau in the federal government consisting of a commissioner and a handful of other employees:

Sir, it is hardly necessary for me to stand here and show what are the constitutional objections to this bill. *No man can find anywhere in the letter or spirit of the Constitution one*

word that will authorize the Congress of the United States to establish an Educational Bureau. If Congress has the right to establish an Educational Bureau here in this city for the purpose of collecting statistics and controlling the schools of the country, then, by the same parity of reason, a fortiori, Congress has the right to establish a bureau to supervise the education of all the children that are to be found in the thirty millions of the population of this country. [Emphasis added.]

[Representative Andrew Rogers of New Jersey, floor debate in the House of Representatives, June 5, 1866]

The bill to establish an Educational Bureau was passed by the House on June 19, 1866, and signed into law in 1867. Notice that even when this tiny germ of today's Department of Education was being debated in Congress, the very astute Representative Andrew Rogers stated: "No man can find anywhere in the letter or spirit of the Constitution one word that will authorize the Congress of the United States to establish an Educational Bureau." Then, he went on to warn that if Congress had the right to establish an Educational Bureau within the federal government consisting of only a handful

of people, then it had the right to establish a bureau to supervise the education of all children in our nation.

How prophetic. That's exactly what happened. It took a century or so from the time when Congress first usurped the power to fund an educational bureau until Congress was routinely ignoring the Constitution by funding a huge educational bureaucracy to supervise the education of all American children.

There's a similar story behind all of the other unconstitutional agencies and programs of the federal government. Our problem of an "out-of-control" government should be described as our "out-of-compliance-with-the-Constitution" federal government. This problem first manifested itself in the early days of our nation, but really began to accelerate in size about a century ago. President Wilson's notion of "a flexible or fluid constitution" was very widely shared by American political leaders throughout the 20th century, and this way of thinking continues to prevail among our political leaders today.

How do we solve this problem of an "out-of-compliance-with-the-Constitution" government?

Many conservatives have been promoting a Balanced Budget Amendment as a solution to our problem of an "out-of-control" government. They imply that some-

thing is wrong with our Constitution, and that has led to our problem, so that obviously we need to change the Constitution. However, this analysis is too superficial and clearly a BBA would be inadequate for solving our real problem of an out-of-compliance-with-the-Constitution government. That's because a BBA would not include any remedies for the situation in which we find ourselves, where federal officials are all too often no longer adhering to the Constitution, and where the voters are not holding them accountable for disobeying the Constitution.

The BBA has never been sold as a way to return the federal government to adhering to the limitations of the Constitution. Instead, a BBA would have the perverse effect of legitimizing the federal government's usurpations of powers not granted to it by the Constitution. With a BBA in place, the debates in Congress would hinge on whether a specific funding bill would fit within a balanced budget, not on whether it would be in accordance with the Constitution, which in reality is already pretty much how debates on spending bills proceed in Congress. Congressmen already profess to be striving for balanced budgets and make a great pretense of doing so.

Then, there are the loopholes in virtually all BBAs that have been proposed. Most BBAs have exemptions for national emergencies. Depending on how "national emergencies" are defined, that can be a very low bar for allowing unbalanced budgets. There is also generally a provision in BBA proposals that permits the budget to be unbalanced whenever 60 percent of both houses of Congress approve it.

This Is a Republic, Not a Democracy!

Fifty-four years ago, on September 17, 1961, Constitution Day, Robert Welch, who had founded The John Birch Society less than three years earlier, gave a speech entitled "Republics and Democracies" to a patriotic Chicago-based organization, "We the People." This speech went on to influence millions of Americans to understand that our nation is a republic, not a democracy.

The essence of the speech is that our Founding Fathers had studied Greek and Roman history and were virtually unanimous in their denunciation of the evils of



In order to remain free, we must remedy the ignorance of voters through a widespread, grassroots educational campaign under sound leadership.

“democracies” and their appreciation of the virtues of “republics.”

As an example of what’s wrong with “democracies,” Welch approvingly quoted James Madison:

Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.

In contrast, Welch approvingly quoted John Adams’ definition of a “republic” as “a government of laws and not of men.”

In brief, democracies do not have checks and balances to prevent majorities from tyrannizing minorities. To the extent that there are powerful special interest groups with their combined voting blocs constituting a majority of voters, our nation has already become a democracy. On the other

hand, republics have a constitution, which imposes limitations on the actions of government officials along with checks and balances and due process to protect the rights of minorities and individuals. We need to restore our republic.

Our research into the 40-year history of the BBA Con-Con movement has shown



Robert Welch’s “Republics and Democracies” speech in 1961 went on to influence millions of Americans to understand that our nation is a republic, not a democracy.

that virtually all arguments for bringing about a constitutional convention to propose a Balanced Budget Amendment have emphasized only the need to balance the budget and have not mentioned the importance of restoring the government’s adherence to the enumerated powers in Article I, Section 8, and other powers

granted to the federal government in other parts of the Constitution.

To the extent that a BBA would legitimize the continuation of the increasingly widespread usurpations of powers within the federal government by focusing on balancing the budget as the highest priority, it would be leading our nation away from its founding as a constitutional republic and toward becoming a democracy.

Creating an Informed Electorate Is the Solution

As Thomas Jefferson famously asserted in a letter to Charles Yancey, January 6, 1816: “If a nation expects to be ignorant & free, in a state of civilisation, it expects what never was & never will be.”

In order to remain free, we must remedy the ignorance of voters through a widespread, grassroots educational campaign under sound leadership.* This would be a campaign to inform a sufficient number of citizens about the principles of the Constitution so that majorities could be elected to both houses of Congress that would enforce the Constitution and not usurp powers not granted to them. ■

*As an example of an educational tool for such a campaign, please see *The Constitution Is the Solution!* Lecture Series DVD set in the ad on page 7.

Arguments Against a BBA Article V Convention

by Larry Greenley

In view of everything covered in this article, we say that a Balanced Budget Amendment Article V convention would be a threat to the Constitution because:

- A BBA Article V convention would have the inherent power to be a runaway convention that could make harmful changes in the Constitution, including a new ratification procedure, or even completely rewrite it; and
- A BBA would tend to legitimize the longstanding usurpations of powers by federal officials, thereby moving our nation away from its founding as a constitutional republic (rule of law) and toward being a democracy (rule of men).

Based on most drafts of BBAs, we would expect a BBA to have loopholes, such as exemptions from balancing the budget would be permissible:

- In the event of variously defined national emergencies; or
- In the event that 60 percent of both houses of Congress would approve a deficit budget.

A BBA with such loopholes could not be counted on to guarantee an end to budget deficits. ■



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This educational tool presents three basic reasons why state legislators should vote against applications to Congress for an Article V convention. Also included is a second article, "Not-so-smart ALEC," a critique of one of the leading Con-Con advocates. (Reprint) (2015, 12pp, 1/\$0.50; 25/\$10.00; 100/\$35.00; 1,000/\$300.00) RPSCNAV

The New BBA Con-Con Threat

This article explains why a Balanced Budget Amendment Article V convention would be a threat to the Constitution because of its inherent power to be a runaway convention, and the tendency of a BBA to move our nation from a republic to a democracy. (Reprint) (2015, 8pp, 1/\$0.50; 25/\$10.00; 100/\$35.00; 1,000/\$300.00) RPNBBA

The Constitution Is the Solution!

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