The Statement and Account Clause: A Forgotten Constitutional Mandate for Federal Reporting

Katherine Clark Harris*

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"I'd appreciate it if you could find a way to place debits and credits so an ordinary citizen like myself could understand what you are trying to show . . . . I don't think that the financial advisor of God himself would be able to understand what the financial position of the Government of the United States is, by reading your statement. And I have been going through them and trying to find out what they mean for twenty-five years!"

— Harry Truman

**Introduction**

The Constitution provides:

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time. This Clause establishes two related duties: a negative appropriations requirement and an affirmative reporting obligation. While several constitutional scholars have explored the appropriations requirement, there is limited scholarship on the corollary reporting obligation. Even among legal scholars, the Statement and Account Clause has been considered only in the context of national security matters. This Note marks a first step in filling this void.

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2. **U.S. Const.** art. I, § 9, cl. 7.
3. See Kate Stith, *Congress’ Power of the Purse*, 97 *Yale L.J.* 1343, 1345 (1988) (arguing that the Appropriations Clause prohibits the expenditure of any public money without legislative approval and that congressional control imposes a "powerful limitation[] on the executive branch"); see also J. Gregory Sidak, *The President’s Power of the Purse*, 1989 *Duke L.J.* 1162, 1172-73 (1989) (contending that the Clause does not vest Congress with exclusive control of the public fisc insofar as such control would undermine the unitary executive).
THE STATEMENT AND ACCOUNT CLAUSE

The Statement and Account Clause was intended to provide the public with a complete understanding of the government’s “receipts and expenditures.” Accurate reporting is not necessary merely for responsible fiscal management; it ensures that the citizenry is informed about government spending priorities and that public officials are accountable to the people. As Justice Thurgood Marshall wrote in *Brock v. Pierce County*, “the protection of the public fisc is a matter that is of interest to every citizen.” It goes to the heart of democratic legitimacy.

Yet the plain meaning of this constitutional provision is being violated in several ways. Off-budget vehicles, such as revolving funds and insurance programs, are central to the way that the government conducts business. Particularly today, in a time of constrained budgets and political dysfunction, these “budget gimmicks” have ballooned to well over four trillion dollars. As a result, the federal government has enormous financial obligations that are not reflected (or are substantially under-represented) in public reporting. This state of affairs defies an unambiguous constitutional mandate, jeopardizes democratic accountability to the public, and masks the scope of our nation’s fiscal problems.


7. See, e.g., Cheryl Block, *Budget Gimmicks*, in FISCAL CHALLENGES, supra note 6, at 39.

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This Note is divided into four Parts. Part I examines the history, language, and original purposes of the Statement and Account Clause. This analysis reveals that the Clause was intended to create transparency and accountability, ensure congressional oversight over the fisc, and prevent corruption. These objectives not only clarify what is required under the Clause, but also operate as standards against which to evaluate modern reporting processes.  

Part II turns to my central thesis: that reporting processes at the Congressional Budget Office (CBO), the Office of Management and Budget (OMB), and the Treasury Department do not fulfill the three principles embodied in this constitutional provision. Specifically, the use of cash accounting and exclusion of certain liabilities continue to plague federal reporting. These issues have taken on a new importance in light of the recent financial crisis. While scholars have noted that fiscal information provided by the government is woefully incomplete, I suggest that Congress' inadequate reporting is unlawful.

Part III moves beyond typical reporting processes and considers two specific examples of budget practices that, by statutory design, evade complete and accurate reporting: the off-balance-sheet treatment of federal insurance programs and government-related entities. These practices expose an inherent tension within the Clause: the congressional charge to report all "receipts and expenditures" runs counter to Congress's desire to obfuscate unpopular or ex-

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8. The Clause does not require a singular approach to federal reporting. Therefore, this Note provides a standard against which to evaluate continuously evolving accounting and reporting practices. It does not provide a rule-by-rule assessment of current reporting practices, nor does it prescribe a comprehensive set of reporting procedures that would constitute compliance with the Clause. Such specificity is beyond the scope of this Note.

9. Today, these budget agencies produce three annual reports that most closely align with the Clause's mandate: the President's Budget, which is produced by the Office of Management and Budget, the Economic Outlook, which is produced by the Congressional Budget Office, and the Consolidated Financial Report, which is produced by the Treasury.

10. Following the financial crisis, Professor Allen Schick predicted that "[g]overnments will give increased attention to long-term sustainability of their budgets... [and] devise new means to measure and monitor fiscal risks." Allen Schick, Crisis Budgeting, ORGANIZATION FOR ECONOMIC COOPERATION & DEVELOPMENT (Jun. 2009), http://www.oecd.org/governance/budgeting/42972436.pdf.


12. This discussion is particularly timely in light of an April 2013 proposal by the Federal Accounting Standards Advisory Board (FASAB) to formally exclude the Federal Reserve and certain government-related entities like Fannie Mae and Freddie Mac from government accounting. This proposal would implicate, if not violate, the spirit of the Statement and Account Clause. See FED. ACCOUNTING STANDARDS ADVISORY BD., EXPOSURE DRAFT: REPORTING ENTITY STATEMENT OF FEDERAL FINANCIAL ACCOUNTING STANDARDS (April 2013).
cessive spending. This raises the question: what mechanisms are available to interpret and enforce this mandate?

Part IV explores this question. To date, the judiciary has been reluctant to open its doors to litigation under this Clause. As a result, this mandate often falls upon institutional actors to enforce. I propose expanding GAO’s powers to audit any government-related entity and render binding opinions against the reporting agencies to improve compliance with reporting duty. I also suggest that GAO auditors be embedded within agencies. This will increase GAO’s effectiveness and improve the quality of financial data given to budget agencies.

Irrespective of this provision’s enforceability, Congress still has an affirmative duty to adhere to its principles. In one of the few cases on the Clause ever to reach the Supreme Court, Justice Douglas wrote a powerful dissent arguing that “[t]he statement of accounts of public expenditures goes to the heart of the problem of sovereignty. If taxpayers may not ask that rudimentary question, their sovereignty becomes an empty symbol and a secret bureaucracy is allowed to run our affairs.”

Inscrutable and incomplete federal reporting directly contravenes the Statement and Account Clause’s core principles. While accounting is indeed an imperfect science, public companies provide financial information in a comprehensive format that produces transparency and minimizes fraud. So too should the federal government.

I. Three Principles

The Statement and Account Clause was introduced in the closing days of the Constitutional Convention, only three days before the Constitution was signed on September 14, 1787. George Mason asserted that the public had a

13. Budget actors charged with overseeing the budget process and ensuring that agencies follow fiscal law include the Congressional Budget Office (CBO), the General Accountability Office (GAO), the Office of Management and Budget (OMB), and the Department of Treasury. Therefore, this paper has practical significance for how budget actors conceive of and seek to meet their institutional mandates. For the authoritative works on the budget process, see ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, AND PROCESS (3d ed., 2007); and ROBERT KEITH & ALLEN SCHICK, CONG. RESEARCH SERV., No. 98-721, INTRODUCTION TO THE FEDERAL BUDGET PROCESS 10 (Dec. 2003).


“right to know” how its money was spent, and introduced a clause requiring an annual account of public expenditures. His suggestion was not without precedent. Article IX of the Articles of Confederation included a similar requirement that the Congress “transmit[] every half-year to the respective states an account of the sums so borrowed or emitted.”

The Framers did not debate the inclusion of this Clause, nor did they question its proposed scope to account for “all public Money.” In fact, the Journal of the Convention notes that it was proposed “nem. con.”—with no one contradicting. There was a general consensus that “[t]he People who give their Money ought to know in what manner it is expended,” James McHenry later explained.

Only the time frame practicable to produce a thorough report of public expenditures was subject to debate. Under the Articles of the Confederation, it had proved unworkable to produce a financial report every six months. So, after limited debate, the Clause was eventually passed with the phrase “from time to time” and appended to the appropriations requirement. Beginning in the second session of the First Congress, Congress required the Treasurer of the United States to provide a quarterly expenditure report to Congress. This reporting mandate was thus followed from the Republic’s outset.

The Statement and Account Clause creates an affirmative obligation that Congress “publish” a comprehensive report of the government’s “receipts and

17. See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 618 (Max Farrand, ed., 1911) [hereinafter FARRAND’S RECORDS]. Kate Stith notes the oddity that the Articles of Confederation included both an appropriations and an accounting requirement, yet the appropriations requirement was proposed alone at the Constitutional Convention: “Madison does not record any discussion of why the statement and account clause was subsequently appended to the appropriations requirement in section 9.” Stith, supra note 3, at 1357 n.64. While this could have been an oversight, it may be attributable to the fact that the bi-annual accounting requirement under the Articles of Confederation proved too onerous to meet.

18. Articles of Confederation of 1781, art. IX.

19. 3 FARRAND’S RECORDS, supra note 17, at 610 n.2.

20. Id. at 149-50. In Britain, Parliamentary control over the purse was an important check on the monarchy’s power. It is likely that the British experience influenced the Framers. See Fisher, supra note 4, at 763-65.


22. There is no record of a debate over the Clause’s placement next to the appropriation power in Article 1, Section 9 of the Constitution. The obvious reading is that this reporting requirement ensures government funds are used in a manner consistent with congressional intent.

23. 1 ANNALS OF CONGRESS 1141 (Joseph Gales ed., 1834).
expenditures.” Its specificity is notable: the Clause requires a “regular” statement of “all” public money. It contemplates no exemptions to this ex post reporting requirement. As Henry Lee argued at the Constitutional Convention, “time to time” had to mean “short, convenient periods.”

Importantly, the Clause does not prescribe accounting forms or require a singular approach to reporting. Its mandate can be met in multiple ways. Indeed, the complexity of government finances and the sophistication of accounting techniques have greatly evolved since the Constitution’s enactment. Today’s reporting process is the accumulation of complex statutory mandates, accounting guidelines, and agency customs.

What is required to satisfy the Statement and Account Clause’s requirements? Identifying a satisfying conceptual framework for the structure and scope of federal reporting is a challenging task. What constitutes a financial

24. 3 DEBATES ON THE FEDERAL CONSTITUTION 459 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT’S DEBATES].

25. For example, should payments by individuals to insurance companies through federal exchanges be represented as a federal liability? In 1994, former CBO Director Bob Reischauer, a Democratic appointee, mandated that private healthcare payments be included in the federal budget—an accounting decision that increased the bill’s projected cost by sixty percent and contributed to the demise of President Clinton’s healthcare legislation. See CONG. BUDGET OFF., AN ANALYSIS OF THE ADMINISTRATION’S HEALTH PROPOSAL (Feb. 1994); George Hager, Brunt of Budget Battle Falls on CBO Chief’s Findings, WASH. POST, Oct. 23, 1999, http://www.washingtonpost.com/wp-srv/politics/special/budget/stories/crippen102399.htm; see also Reihan Salam, Is the Failure of the Mandate a Disaster for the Right?, NAT’L REV. ONLINE (Jan. 14, 2010). In 2009, former CBO Director Peter Orszag, also a Democratic appointee, did not include the similar costs in the estimates of President Obama’s healthcare legislation, thereby allowing the healthcare law to be more fiscally viable than it would have been had such mandates been included. See CONG. BUDGET OFF., PATIENT PROTECTION AND AFFORDABLE CARE ACT (Nov. 2009); Michael F. Cannon, Bland CBO Memo, or Smoking Gun?, CATO AT LIBERTY (CATO INST.) (Dec. 16, 2009 7:49 AM), http://www.cato-at-liberty.org/bland-cbo-memo-or-smoking-gun. This example not only shows the strong disagreement among budget experts of the same party as to what should be included in a federal financial report, but it also demonstrates the enormous consequences of such reporting decisions in policy outcomes. Another contemporary example is whether and how to represent the significant losses that the Federal Reserve will incur as a result of its quantitative easing program. See David Greenlaw et al., Crunch Time: Fiscal Crises and the Role of Monetary Policy (Nat’l Bureau of Econ. Research, Working Paper No. 19297, 2013), http://www.nber.org/papers/w19297. In addition, the treatment of tax expenditures has been subject to extended debate. See, e.g., Leonard E. Burman & Marvin Phaup, Tax Expenditures, the Size and Efficiency of Government, and Implications for Budget Reform (Nat’l Bureau of Econ. Research, Working Paper No. 17268, 2011), http://www.nber.org/papers/w17268. This Note does not attempt to resolve these thorny accounting questions. It focuses on government “receipts and expenditures” that fall squarely within basic accounting frameworks. For a further discussion of non-traditional liabilities of the state, see sources cited supra note 6.
obligation of the federal government? How broadly should government “receipts and expenditures” be construed? Is cash accounting sufficient to accurately depict government liabilities or should commonplace private-sector techniques such as accrual accounting be used?

To fully comprehend what is required under the Statement and Account Clause, one must understand the Clause’s original three objectives. In 1977, Elliot Maxwell published a Note that briefly discussed the primary objectives of the Statement and Account Clause:

The most obvious [objective] is that it allows the people to see the course of policy as reflected in governmental expenditures. . . . It allows the people, jointly with Congress, to determine if the expenditures by the Executive reflect the intent embodied in the appropriations. The information also provides an opportunity for the people to scrutinize appropriations by Congress and expenditures by the Executive to determine if they were for purposes allowed by the Constitution. Finally, on a somewhat more mundane level, the information allows the people, as Story put it, to detect “errors,” uncover “misapplication of funds,” and discover “corruption and public peculation,” supplementing the efforts of law enforcement officials charged with unearthing wrongdoing.

Maxwell’s framework provides a useful starting point to understanding the three key objectives embodied in the Statement and Account Clause: to ensure transparency and accountability, maintain congressional oversight over the fisc, and prevent corruption. These objectives not only clarify what is required by the Clause in the abstract, but also operate as standards by which to assess whether the Clause is being met in practice. Evaluating today’s reporting regime against the Framer’s three purposes allows for a dynamic understanding of this mandate.

A. Accountability Through Transparency

First, the Clause embodies democratic accountability to the people and goes to the heart of representative government. It allows citizens to evaluate how Congress governs by requiring a “statement and account” of how public resources are used. Indeed, this was the Framers’ explicit intent. Chancellor Livingston declared during the New York debates over ratifying the Constitution in 1788:

26. While historical context grounds my assessment of the Clause, I am not advocating for a static interpretation. At the time of its enactment, basic accounting concepts did not exist to accurately represent government “receipts and expenditures.” Nor did the Framers contemplate the complex financing mechanisms that are commonplace today.

27. Maxwell, supra note 4, at 615-16 (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1348 (1833)).
Congress are to publish, from time to time, an account of their receipts and expenditures. These may be compared together; and if the former, year after year, exceed the latter, the corruption will be detected, and the people may use the constitutional mode of redress.  

David Ramsey, a commentator on the proposed Constitution, echoed this view in a 1788 pamphlet: "The people of the United States who pay, are to be judges how far their money is properly applied."  

Madison also held the strong belief that transparency was the primary means by which the federal government is held accountable to the people. In Federalist 26, Hamilton explained that, "as often as the question [on military spending] comes forward, the public attention will be roused and attracted to the subject, by the party in opposition." Several decades later, James Madison articulated the same view in a letter to W.T. Barry: "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both . . . [A] people who mean to be their own Governors, must arm themselves with the power which knowledge gives."  

For Madison, information was central to the democratic process. The quality of that information was also important to the Framers. During the Constitutional Convention, the only point of contention around the Statement and Account Clause was the time frame needed to produce a "thorough" report. Rufus King of Massachusetts argued that reporting more than once per year "would be impracticable. [Congress] might indeed make a monthly publication, but it would be in such general statements as would afford no satisfactory information." In response, James Madison suggested that "giving [Congress] an opportunity of publishing [statements]. . . from time to time, as might be found easy and convenient" would allow for statements that "would be more full and satisfactory to the public, and would be sufficiently frequent." Supporters of Madison’s proposal explained that, "if the interval were fixed and proved to be too short, the statements would cease as they had done under the Articles, be incomplete, or be too general to be satisfactory." They wanted to ensure that reporting would be comprehensive and useful to the public.

28. Id. at 615 n.44.
30. The Federalist No. 26 (Alexander Hamilton). Although Hamilton was discussing the Appropriations Clause, his logic similarly applies to the reporting obligation.
32. Maxwell, supra note 4, at 610 n.18 (internal quotations and citations omitted).
33. Id. at 622 (internal quotations and citations omitted) (emphasis added).
34. Id. at 610 (internal citations omitted). At the time of its enactment, foreign observers were interested in the Statement and Account Clause. In 1788, the French
Importantly, there is no evidence that the Framers contemplated any exemptions to the simple yet broad requirement of financial transparency. During the debate on June 17, 1788, George Mason objected to the phrase from "time to time" because he feared this ambiguity would result in secrecy. He believed that,

[i]n matters relative to military operations and foreign negotiations, secrecy was necessary sometimes. But [he] did not conceive that the receipts and expenditures of the public money ought ever to be concealed. . . . But this expression was so loose, it might be concealed forever from them, and might afford opportunities of misapplying the public money, and sheltering those who did it.

Madison replied that his point was not to exempt secret affairs, but rather to delay their publication. But Patrick Henry countered that a report of public finances posed no security threat: "[G]entlemen say that the publication from time to time is a security unknown in our state government! . . . [But] the people see the journals of our legislature, and hear their debates, every day." For Henry, the norm of transparency superseded any security concerns.

Other constitutional provisions bolster this understanding of the Clause. The concept of creating accountability through transparency is pervasive throughout the Constitution. For example, the Journal Clause demonstrates this concept of full transparency by requiring the publication of congressional debates. The Presentment Clause, outlining a public voting procedure, also

philosopher and economist Marquise de Condorcet wrote an essay on the new United States, commenting that "[a]n unspecified period of time to account for the use of public funds can lead to the most pernicious effects." CONDORCET: WRITINGS ON THE UNITED STATES 54 (Guillaume Ansart ed. & trans., 2012).

35. As early as 1790, Congress authorized $40,000 for expenditures in foreign disclosure that could be kept secret if the President determined "it advisable not to specify." Fisher, supra note 4, at 756 (internal citations and quotation marks omitted). On national-security exemptions, see Maxwell, supra note 4.

36. 3 FARRAND'S RECORDS, supra note 17, at 326.

37. Id.

38. Id. at 327. The Administration's brief in United States v. Richardson presents a different interpretation of the Framers' intent: "As the debates make clear, the principal reason for modifying Mason's original language was to permit secrecy in matters which required it." Brief for Petitioners at 24, United States v. Richardson, 418 U.S. 166 (1974) (No. 72-885), 1973 WL 173861.

39. 3 ELLIOT'S DEBATES, supra note 24, at 462. Most state constitutions did not include similar provisions.

reflects this approach.\textsuperscript{41} Similarly, the Speech and Debate Clause offers explicit protection to legislators against punishment for “Speech or Debate.”\textsuperscript{42} Such protection presumes that the legislative process will occur in the public domain and be subject to public critique.

Thus, the Statement and Account Clause does more than simply echo the principle of accountability pursued and implemented by the Constitution’s more famous provisions. It strengthens that principle through an absolute and unambiguous duty to publish an account of “all public Money.” As Madison asserted during the Constitutional Convention, the Statement and Account Clause “went farther than the constitution of any state in the Union, or perhaps in the world.”\textsuperscript{43}

\textbf{B. Strengthening Congressional Oversight of the Fisc}

Second, the Statement and Account Clause strengthens and broadens Congress’s power of the purse. It compels Congress to actively oversee how the executive uses public funds, thereby effectuating the carefully designed balance of power between the branches.

In \textit{The Fiscal Constitution}, Kate Stith argues that federal reporting strengthens congressional oversight. Discussing both the Appropriations and Statement and Account Clauses, she asserts:

Equivalent coverage of the two clauses does not, by itself, necessarily imply that both include all public spending. For instance, the coverage of each might be limited to monies raised from taxes and government borrowing. However, the statement and account clause refers broadly to “expenditures of public Money” (emphasis added). Therefore, this clause expands Congress’ oversight powers to all expenditures and simultaneously curbs any fiscal discretion within the Executive branch.\textsuperscript{44}

The placement of the Statement and Account Clause in Article I supports this reading. It follows directly after the Appropriations Clause as part of a single sentence, modifying the appropriations power and augmenting Congress’s power of the purse. And, like the Appropriations Clause, this provision is not “self-executing,” but rather falls upon Congress to carry out.\textsuperscript{45} Although modern budgeting practices might suggest otherwise, it is ultimately an obligation of

\textsuperscript{41.} U.S. CONST. art. I, § 7, cl. 2-3.
\textsuperscript{42.} U.S. CONST. art. I, § 6, cl. 1.
\textsuperscript{43.} 3 ELLIOT’S DEBATES, supra note 24, at 460.
\textsuperscript{44.} Stith, supra note 3, at 1357 n.65.
\textsuperscript{45.} In reference to the Appropriations Clause, the D.C. Circuit wrote that “[i]t is not self-defining and Congress has plenary power to give meaning to the provision . . . [It] is to be found in various statutory provisions.” Harrington v. Bush, 553 F.2d 190, 194-95 (D.C. Cir. 1977).
Congress, not the executive branch. It requires Congress to ensure its appropriation directions are followed.

Justice Story provides further support for this reading of the Clause’s second purpose. He stresses its importance as “a most useful and salutary check” upon the executive, allowing Congress to ensure that the executive has expended money according to its appropriation choices. He writes:

It is highly proper, that Congress should possess the power to decide how and when any money should be applied for these purposes. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure. The power to control and direct the appropriations constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public speculation.... [A]nd to make their responsibility complete and perfect, a regular account of the receipts and expenditures is required to be published, that the people may know, what money is expended, for what purposes, and by what authority.46

C. Preventing Abuse and Corruption

Third, the Statement and Account Clause minimizes the potential for corruption and the inappropriate use of public funds. While closely related to the Clause’s accountability purpose, this third purpose relates to improper, not imprudent, use of funds. This reading of the Clause’s third purpose subtlety differs from Maxwell’s understanding. He focused on “errors” and “misapplication” of public funds. But particularly in the Republic’s early days, the primary budgetary concern was corruption and abuse.

In April 1802, President Thomas Jefferson wrote to the Secretary of the Treasury, Albert Gallatin, emphasizing that comprehensible financial reporting is central to preventing abuse:

I think it an object of great important [sic] ... to simplify our system of finance, and to bring it within the comprehension of every member of Congress ... [A] simplification of the form of accounts ... [so] we might hope to see the finances of the Union as clear and intelligible as a merchant’s books, so that every member of Congress, and every man of any mind in the Union, should be able to comprehend them to investigate abuses, and consequently to control them.47


47. VIII The Writings of Thomas Jefferson: Being His Autobiography, Correspondence, Reports, Messages, Addresses, and Other Writings, Official and Private 139-141 (H.A. Washington ed., 1861) [hereinafter Jefferson Writings].
Jefferson was not alone in his concern about the misuse of funds. The GAO underscores that “abuses were commonplace” in the early Republic. Indeed, [a]s early as 1809, one senator, citing a string of abuses, introduced a resolution to look into ways to prevent the improper expenditure of public funds. In 1816 and 1817, John C. Calhoun lamented the “great evil” of diverting public funds to uses other than those for which they were appropriated. Even as late as the post-Civil War years, the situation saw little improvement.

Thus, preventing abuse and corruption is a third, but no less important, function of the Statement and Account Clause. It is against these three objectives—ensuring transparency and accountability, maintaining congressional control over the purse, and preventing abuse and corruption—that today’s reporting practices should be evaluated.

II. STATUTORY FRAMEWORK

Because the Statement and Account Clause is not self-executing, Congress has “from time to time” enacted statutory provisions that implement the Clause. These statutes define who is responsible for annual financial reports, the amount of detail and scope required, the methodologies used to measure financial obligations, and exceptions to the general norm of transparency.

This Part provides the first complete picture of the statutory provisions that fill the interstices of this Clause. I trace how this reporting duty has evolved


49. 1 GAO RED BOOK, supra note 4, at 1-11.

50. It is unlikely that the Statement and Account Clause was originally conceived as a check on deficit spending. Professor Stith argues that, at the time of the Constitution’s adoption, there was a strong moral imperative against deficit spending and the accumulation of debt. Stith, supra note 3, at 1355 n.61.

51. Some statutes create budget institutions to produce an annual financial report. Other statutes standardize how federal finances should be presented and delegate decision-making authority with respect to public accounting. Others have as their goal improving the accuracy of financial reporting. These provisions are largely codified at 31 U.S.C. § 1105. GAO describes these fiscal laws as “pieces of a puzzle that fit together to form the larger picture of how Congress exercises its control over the ‘power of the purse.’” 1 GAO RED BOOK, supra note 4, at 1-12.

52. Only one other publication discusses the statutory framework through which Congress executes its reporting duty under the Statement and Account Clause. In 2012, Joseph Marren, a corporate lawyer, published a series of blog posts through Fordham Law School on this topic. While his blog adds to the limited scholarship,
over the past two hundred and twenty-six years, arguing that it was always ancillary to the appropriations process and never fully executed by Congress. Specifically, I contend that two major problems have persisted in federal reporting since the Founding: the use of cash-basis accounting for certain expenditures, and the exclusion of government-related entities that lend and insure.

Even today, these two issues continue to plague federal reporting by the Office of Management and Budget, Congressional Budget Office, and Treasury Department. Therefore, today's reporting regime violates the three original principles embodied in the Statement and Account Clause.

While the academic literature has recognized that the information about government spending is inadequate, this Part makes a stronger claim. By failing to meet its affirmative reporting obligation, Congress is acting unlawfully—shirking its responsibilities to be transparent to the public, to oversee the executive branch, and to minimize the potential for corruption.

it provides only a cursory treatment of this Clause. Marren shows that Congress fails to include many federal obligations in the budget and violates its constitutional requirement. However, he conflates the appropriations and reporting processes. He also argues that the federal budget should be considered political speech under the First Amendment. See Marren, supra note 4, at parts 1-5.

Scholarship on the budget process often conflates the reporting process (ex post) with the appropriations process (ex ante). Appropriations refer to spending decisions by Congress for future fiscal years, whereas reporting refers to publication of public revenue, expenditures and outstanding financial liabilities for the prior fiscal year. These are two distinct activities that are conducted pursuant to different constitutional mandates. But today, appropriations and reporting are intertwined and executed by the same budget agencies, leading to confusion among both scholars and practitioners.

Most scholars also argue that the failure to recognize the cost of funds and to apply market-based discounts meaningfully distorts federal reporting. But this claim is subject to debate. See Deborah Lucas & Marvin Phaup, Reforming Credit Reform, 28 PUB. BUDGETING & FIN. 4 (2008) (advocating for the use of fair-value accounting and a market-discount rate in federal budgeting). But see David Kamin, Risky Returns: Accounting for Risk in the Federal Budget, 88 IND. L.J. 724 (2013) (arguing that including “cost of risk,” namely the amount of risk that the private market would bear, would improperly skew budget estimates). Recently, the Congressional Budget Office outlined how risk would be incorporated in estimates of federal credit programs. See CONG. BUDGET OFF., FAIR-VALUE ACCOUNTING FOR FEDERAL CREDIT PROGRAMS 8 (2012) (“[I]nstead of using Treasury rates to discount . . . cash flows, fair-value estimates employ discounting methods that are consistent with the risk of the loan or loan guarantee.”).

It is unclear how an originalist would interpret this mandate because, at the time of its enactment, basic accounting concepts did not exist to accurately represent government “receipts and expenditures.” U.S. CONST. art. I, § 9, cl. 7.

The federal budget is both inadequate and imprecise. On its inadequacies, see Block, infra note 88, and Jackson, supra note 6. On its imprecision, see Graetz, infra note 105.
A. The Nineteenth Century

From the nation’s outset, the reporting obligation was never fully executed by Congress and, as President Jefferson wrote, “the whole system [of government finances] was involved in impenetrable fog.”

Public expenditures were not transparent and accessible to the public; Congress exerted limited control over, or knowledge of how, funds were spent; non-standardized, unaudited agency budget submissions did little to minimize potential abuse. As an independent mandate (apart from the appropriations process), the reporting mandate had been all but forgotten by the close of the nineteenth century.

The First Congress delegated its reporting duty under the Statement and Account Clause to the Treasury Secretary shortly after the Constitution’s ratification:

[It] shall be the duty of the Secretary of the Treasury . . . to prepare and report estimates of the public revenue, and the public expenditures; to superintend the collection of the revenue; to decide on the forms of keeping and stating accounts and making returns.

Based on this statutory authority, the practice evolved that agencies submitted annual budget requests to the Treasury, which then recorded each request in the Book of Estimates. This book included detailed line-item requests from each agency as well as all revenues received by the Treasury. There was no uniformity as to how requests were made or how each agency managed existing accounts.

The Treasury Secretary would simply forward the Book of Estimates to Congress without review, thereby acting as an “agent of transmission.” By 1875, Congress amended the relevant statutes to reflect this reporting practice.

The piecemeal agency submissions compiled in the Book of Estimates were a far cry from the comprehensive “statement and account” envisioned by the Framers. President Taft later described the Book of Estimates as “rather a more or less well-digested mass of information submitted by agents of the Legislature.

57. Letter from Thomas Jefferson, President of the U.S., to Albert Gallatin, Sec’y of the Treasury (April 1, 1802), in IV JEFFERSON WRITINGS, supra note 47, at 427, 428.


60. Following its compilation by the Treasury, the Book of Estimates was sent to Congress. Once Congress appropriated funds, the Treasury was responsible for the auditing and oversight of federal finances to ensure that the uses were consistent with the congressional mandate. See Frederick A. Cleveland, How We’ve Been Getting Along Without A Budget, in 9 PROC. AM. POL. SCI. ASS’N 48 (1912).

to the Legislature." Specifically, the Book of Estimates had two central issues that persist in federal reporting even today.

First, some government activities funded by public money were simply not subject to annual reporting. For example, pension costs accounted for more than fifty percent of the growth in government expenditures following the Civil War. But since pensions were enacted through private relief bills, they were excluded from appropriations totals. Hiding these obligations from public scrutiny plainly defied the Statement and Account Clause's first purpose: to ensure accountability through transparency. Even today, certain federal obligations continue to be excluded from annual reporting through "accounting gimmicks" embedded in legislative directives.

Second, the Book of Estimates was kept on a cash, not accrual, basis. Cash accounting records revenue when received and spending when paid, whereas accrual accounting records revenue when earned and spending when incurred. Simply put, cash accounting "cannot recognize an essential feature of every credit transaction: the promise to pay cash late." Consider this example:

[A]ssume there is a choice between two ways to solve a problem: one would cost $40 billion, but would solve the problem for 40 years, and the other would cost $4 billion, but would solve the problem for only one year. Under the cash method of accounting, the former would have a far larger budgetary impact in the immediate year, and so even though the latter is clearly a less prudent option, lawmakers concerned either with balancing the budget or with appearing fiscally responsible to constituents might opt for that course of action . . . an accrual-based

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62. PRESIDENT'S COMM'N ON ECONOMY & EFFICIENCY, THE NEED FOR A NATIONAL BUDGET, at 10 (1912) [hereinafter TAFT COMMISSION].

63. This refers to the period between 1878 and 1886. See JOHN F. COGAN, TIMOTHY J. MURIS & ALLEN SCHICK, THE BUDGET PUZZLE: UNDERSTANDING FEDERAL SPENDING 138 n.25 (1994).

64. Willoughby, supra note 59, at 749 ("The statement as to the condition of the Treasury now submitted to Congress shows little more than the actual cash on hand. To be adequate, it should be upon an accrual basis, and should clearly exhibit the status of all trust and other special funds, including the funds which each appropriation creates.").

65. See Lucas & Phaup, supra note 15, at 90.

system would accurately reflect the relative financial merits of the two options.69

This problem is exacerbated with respect to loan and insurance programs, which involve long-term obligations with varying default risks. Dating back to veterans' benefits following the Revolutionary War, the federal government has always engaged in financial activities that incurred future liabilities.68 The Book of Estimates did little to capture these future (and often large) expenditures. Therefore, it failed to accurately inform the public and legislators of how public resources were actually being expended.

In part, this failure can be attributed to the infancy of accounting principles. "Expenditures were not considered in connection with revenues. Even the idea of balancing the budget did not exist," explained W.F. Willoughby, a former Director of the Institute for Government Research and the person often credited with the 1921 budget reform.69 Even in the private sector, key accounting concepts had not yet developed.70 Unsophisticated bookkeeping practices constrained Congress's ability to fully execute its constitutional reporting obligation.

However, the primary reason why a robust reporting system never developed was that government officials quickly found that publicizing spending de-


68. VA History in Brief, DEPT OF VETERANS AFF. 3, http://www.va.gov/opa/publications/archives/docs/history_in_brief.pdf ("In 1789, with the ratification of the U.S. Constitution, the first Congress assumed the burden of paying veterans benefits .... [They] were administered by the Bureau of Pensions under the Secretary of War. Subsequent laws included veterans and dependents of the War of 1812, and extended benefits to dependents and survivors."). On massive pension programs following the Civil War, see DORA L. COSTA, THE EVOLUTION OF RETIREMENT: AN AMERICAN ECONOMIC HISTORY 1880-1990, at 161-62 (1998). Similarly, nineteenth-century land-development loans such as the Homestead Act of 1862 also involved large future liabilities that were inadequately represented by cash accounting. See Homestead Act, Pub. L. No. 37-64, 12 Stat. 392 (1862).


isions ran contrary to their political interests. Treasury officials, charged with executing this constitutional duty, intentionally avoided it. In his account of early administrative agencies, Jerry Mashaw discusses the political disadvantages of transparency: "Alexander Hamilton learned to his dismay, the reporting requirement in the hands of political opponents could be a prodigious mechanism for harassment."71 Like Treasury, Congress also had little incentive to develop a comprehensive accounting system. They had other means of exerting control over the public fisc and the failure to report lessened political accountability.72 Therefore, Congress failed to meet the most basic requirements of the Statement and Account Clause during the nineteenth century with the heterogeneous agency submissions collectively known as the Book of Estimates.

B. The Twentieth Century

By the twentieth century, it was clear that the Book of Estimates was not providing an accurate picture of the government’s financial condition.73 Congress and successive Presidents recognized the need to improve fiscal management.74 Prompted by the strain of financing World War I, Congress enacted the Budget and Accounting Act of 1921 and established a unified cash budget for the government.75 This marked an important step towards fulfilling the Clause’s mandate by producing a comprehensive annual report of all “receipts and expenditures.”

71. Mashaw, supra note 58, at 1287.

72. Government finances were also under less scrutiny in the nineteenth century because federal activities were more limited (except during the Civil War). Federal expenditures roughly averaged between two and three percent of gross national product, which meant that individual citizens felt the impact of government financial policy less directly. See Christopher Chantrill, US Federal Spending Since the Founding, U.S. GOV’T SPENDING (July 25, 2013), http://www.usgovernmentspending.com/federal_spending_chart.

73. The federal government grew dramatically around the turn of the century, which necessitated the 1921 Act. Between 1884 and 1915, nominal federal spending doubled. SCHICK, supra note 13, at 14. And beginning in 1917, the government undertook two new types of financing activities: (1) refinancing farm loans following the agricultural crisis and (2) making loans to railroad companies, which were returning to private ownership after World War I. See generally R.J. SAULNIER ET AL., FEDERAL LENDING AND LOAN INSURANCE, NAT’L BUREAU OF ECON. RESEARCH (1958) (providing a history of federal lending activities).

74. For example, Congress passed the Sundry Civil Appropriation Act of 1909, 35 Stat. 945. A year later, the Taft Commission issued a formal recommendation that the government, like private companies, should publish a unified budget. TAFT COMMISSION, supra note 62.

The 1921 Act remains the cornerstone of fiscal law today and substantially improved the reporting process. It tasked the President with formulating a budget proposal each year. It also created the Bureau of the Budget (today’s Office of Management and Budget) within the Executive Office of the President to assist with the preparation of an annual budget proposal and determine the form and contents of the budget’s presentation. The Bureau of the Budget began to standardize public sector accounting practices and used trained government employees to ensure consistency across the administrative agencies. As a counterweight to the enhanced executive power, the 1921 Act also established the GAO, a congressional agency, to audit executive agencies, prescribe accounting standards, and report to Congress. While the GAO is not involved in producing “a statement and account,” its audits create accountability in the reporting process. This new reporting system moved closer to fulfilling the Clause’s purpose: publishing a report for public consumption that portrayed government “receipts and expenditures” using standardized accounting measures.

Nonetheless, the two primary problems—the use of cash accounting and the exclusion of certain obligations—persisted under the reporting system codified in the 1921 Act and subsequent statutes. The President’s Commission on Budget Concepts later concluded that government reporting was “confusing to the public and the Congress and deficient in certain essential characteristics.” Put simply, federal reporting remained far from compliant with the Statement and Account Clause’s three objectives.

First, certain federal spending vehicles continued to be off-budget. Presidents presented the fiscal activities of the federal government in different ways,
depending on what would be most politically advantageous.\textsuperscript{81} New types of spending—such as trust accounts, federal credit programs, and government-related entities—remained outside the budget’s scope. For example, in President Franklin D. Roosevelt’s 1935 budget, “trust funds were not even shown in the same tables as general and special funds as they had been in previous years; all transactions involving trust accounts were shown separately and given lesser prominence.”\textsuperscript{82} It was not until 1964 that detailed tables—including trust accounts, deposit funds, and certain government-related entities—reappeared in the President’s Budget, albeit on a cash basis.\textsuperscript{83}

Second, reporting continued to be on a cash basis, thereby minimizing future obligations of the government.\textsuperscript{84} Debates over the 1921 Act acknowledge the deficiencies of cash accounting, but accrual accounting was not included in the final bill.\textsuperscript{85} The distortion caused by cash accounting only increased throughout the twentieth century. The federal government’s extension of credit increased from less than fifty billion dollars to over five hundred billion dollars between 1964 and 1990.\textsuperscript{86} Cash-basis accounting was particularly inaccurate for these programs because loan guarantees appear costless in the year that they are issued, thereby masking large future contingent obligations. While Congress passed several statutes intended to improve accounting accuracy and standardize presentation, limited progress was made with respect to federal reporting.\textsuperscript{87}

\textsuperscript{81} See id. at 92 tbl.8 (illustrating the variance among annual budget submissions across Administrations).


\textsuperscript{83} Id. at 2-3.

\textsuperscript{84} As compared to cash accounting, accrual accounting creates a more accurate estimate of assets and liabilities at a given point in time, and most scholars agree that it is superior to cash accounting. Today, the President’s Budget continues to present financial information primarily on a cash basis with the exception of federal credit programs. See Burd & Fujitani, supra note 67; infra Part III.

\textsuperscript{85} See Willoughby, supra note 59, at 749.

\textsuperscript{86} OFFICE OF MGMT. & BUDGET, SPECIAL ANALYSIS F, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1990, at F-2.

Any accounting improvements were effectively offset by new budget gimmicks that obfuscated spending.88

The 1921 Act raised two additional issues that ran counter to the Statement and Account Clause’s principles. First, it effectively consolidated the President’s power over federal reporting, undermining principle two (congressional oversight of public funds).89 Although the CBO was created in 1974 to produce an independent budget analysis and strengthen congressional oversight, the executive branch retains primary control over the reporting process—directly interacting with agencies and compiling the raw data used by budget agencies. This executive-led system runs counter to the Framers’ second objective of ensuring congressional oversight of the public fisc.90 Second, the appropriations process continued to dominate the budget system and overshadow the constitutional reporting duty. The central purpose of the President’s Budget was to serve as a negotiation document in appropriations battles. It was not aimed at the Clause’s first principle: informing the public and empowering voters with information in the democratic process.

As a result, federal reporting continued to be non-compliant with the Statement and Account Clause. President Lyndon Johnson warned, “[t]he traditional administrative budget is becoming an increasingly less complete and less reliable measure of the Government’s activities and their economic impact.”91

C. Modern Reporting Practices

Today, the United States publishes three annual, ex post accounts of federal finances: the President’s Budget (OMB), the Economic Outlook (CBO), and the Consolidated Financial Report (Treasury). This reporting regime was enacted through a series of laws in the 1990s that professionalized federal accounting, requiring most agencies to submit audited financial statements to OMB.92 They also redefined how government obligations are recorded, moving certain parts

88. See Block, Budget Gimmicks, in FISCAL CHALLENGES, supra note 6, at 39 (describing how budget gimmicks distort policy choices).


90. The question of whether Congress improperly delegated its reporting duty has not been heard by the Court.

91. See Rodgers & Sullivan, supra note 82, at 3 (quoting President’s COMM’N ON BUDGET CONCEPTS: STAFF PAPERS 99 (1967)).

of the budget from cash to accrual-like accounting. Budget experts at OMB, CBO, Treasury, the Federal Accounting Standards Advisory Board, and federal agencies continue to make meaningful strides in federal reporting via new regulations or updated practices.

Notwithstanding important improvements in federal reporting, these three publications continue to suffer from two chief weaknesses: the use of cash-basis accounting and the off-budget treatment of government-related entities. As described in Part II.A, cash accounting substantially understates the government’s expenditures by not recognizing liabilities until actually paid. Although cash accounting is appropriate for certain circumstances, it distorts the financial condition of an entity. Thus, it violates the norm of transparency and accountability embodied in principle one. Similarly, excluding certain government-related entities obviously distorts the federal government’s fiscal condition. This violates all three prongs of the Statement and Account Clause by obfuscating public scrutiny, thwarting ongoing congressional oversight, and creating opportunities for abuse. This Section considers each of the three federal reports.

First, the President’s Budget is the most well-known report. According to CBO, it is “the framework generally used by executive branch agencies and the Congress and... commonly discussed in the press.” Its historical tables provide a wide range of data on federal government finances dating back to 1940. However, it continues to account for government liabilities primarily on a cash basis, which significantly understates future liabilities. Where accrual accounting is used, market risk is not fully captured. While the President’s Budget acknowledges material off-budget activities, such as the Social Security trusts, the recorded estimates have meaningful flaws due to unreliable data, forecasting errors, or statutory requirements obscuring certain activities. The data provided for other off-budget activities is sparse and often qualitative.

93. See Burd & Fujitani, supra note 67, at 1-7. Some scholars contend that federal accounting used for lending programs today is not really on an accrual basis because the government does not use a market-discount rate and assumes no cost of funds. See, e.g., Lucas & Phaup, supra note 15 (advocating for the use of fair-value accounting and a market-discount rate in federal budgeting).


95. See Burd & Fujitani, supra note 67, at 8 (“[W]hile the federal budget is largely compiled under a cash-based method of accounting, it also occasionally employs accrual-based accounting.”). One example of this problem is that tax revenue, a significant source of federal income, is not subject to accrual accounting. Id. at 7.

96. See supra note 84 and accompanying text.

Second, the Economic Outlook also includes information on government finances insofar as it reprints the historical tables listed in the President's Budget. With respect to past obligations, CBO reprints OMB's historical tables under the theory that monies already spent should be presented on a consistent basis. With respect to current and future activities, CBO uses accrual accounting. This practice also creates a discrepancy within the Economic Outlook: it presents future liabilities on an accrual basis, but records past obligations on a cash basis. Therefore, this report has limited utility as an ex post account of government "receipts and expenditures."

Third, the CFR is the most comprehensive report on federal financial activities. It accounts for the government’s operations on an accrual basis, thereby recognizing costs when incurred but not necessarily paid (although it does not apply market-discount rates). It also recognizes a broader range of government liabilities than other reports. For example, Appendix A contains a list of 121 government-related entities (GREs) that have significant contingent liabilities (e.g., Fannie Mae, Freddie Mac, Thrift Savings Fund, and the Federal Reserve System, among others). But only thirty-five of these entities are consolidated into the budget totals, and GAO has expressed concerns about the integrity of Treasury's analysis. Partially due to material accounting issues at

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98. See Analytical Perspectives FY 2014, supra note 97, at 94-95.

[I]goring the cost of risk understates the federal cost of credit assistance, potentially biasing the allocation of budgetary resources. For example, excluding the cost of risk from budget and program decisions may mislead policymakers by suggesting that some federal credit programs provide financial resources to the government at no cost to taxpayers. It also encourages reliance on credit rather than other policies that might be more efficient in achieving particular goals.


100. FY2013 Consolidated Financial Report, supra note 99, at 52 ("Certain entities are excluded from the Financial Report because they are Government-Sponsored Enterprises (GSE), such as the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), or their activities are not included in the Federal budget, such as the Thrift Savings Fund and the Board of Governors of the Federal Reserve System.").

101. See 1 TREASURY FINANCIAL MANUAL pt. 2, ch. 4700 (2013) (providing an explanation of why the Treasury includes 35 of the 121 GREs in its aggregate analysis); U.S.

Finally, it is worth noting that all three reports often produce different results, even when adjusted for format and timing.\footnote{U.S. Gov't Accountability Office, GAO-09-946SP, Understanding the Primary Components of the Annual Financial Report of the United States Government i (2009). Most recently, a July 2013 GAO report questioned the CFR's estimates for social insurance-related liabilities, which comprise $27.2 trillion (or 70.5 percent) of the federal government's reported future expenditures. GAO Reliability Report, supra note 101, at 13 n.29; see Howell E. Jackson, Accounting for Social Security and Its Reform, 41 Harv. J. on Legis. 59, 149 (2004) (discussing FASAB's decision to only partially represent the future liabilities associated with the Social Security trusts).} GAO reports suggest that data discrepancies result from technical issues with intra-governmental accounting.\footnote{On difficulties estimating costs, see OMB Cir. No. A-11, supra note 78, § 185.6 (discussing re-estimation procedures). On difficulties calculating interest rates, see U.S. Gov't Accountability Office, GAO-05-409, SBA Disaster Loan Program: Accounting Anomalies Resolved but Additional Steps Would Improve Long-Term Reliability of Cost Estimates 2-3 (2005).} In many cases, budget experts struggle to explain how the historical data in each report relate and why discrepancies occur.\footnote{On the imprecision of federal reporting, see Louis Fisher, President Budgetary Duties, 42 Presidential Stud. Q. 754-90 (2012); and Michael J. Graetz, Paint-by-Numbers Tax Lawmaking, 95 Colum. L. Rev. 609 (1995). See also Allen Schick, The Capacity to Budget 7-8 (1990) (discussing the limits of budgeting tools in creating political accountability and reducing federal deficits).} Although federal budget actors continue to make substantial improvements to data collection, resource forecasting, and financial reporting, more work remains.

While accounting is an imperfect science and risk-assessment techniques continue to evolve, scholars widely acknowledge that public accounting is "light years behind accounting in the private sector."\footnote{Lucas & Phaup, supra note 15.} Some argue that federal reporting by the government differs from financial accounting by private compa-
ties because it is not only an internal planning tool, but also "one of the principal means of communicating with citizens."\textsuperscript{107} If anything, this communicative function warrants more, not less, precise reporting. Nonetheless, federal reporting continues to fall short of the Statement and Account Clause's three purposes. The result is that federal programs appear to cost taxpayers less, meaningfully distorting public understanding of how resources are being used and frustrating efforts to achieve fiscal responsibility.

III. Modern Violations

Looking beyond the flaws of typical reporting processes, this Part offers two specific examples of policy choices that explicitly defy the Statement and Account Clause's "most pointed directions."\textsuperscript{108} It also sheds light on a tension arising from the Clause itself. Indeed, the congressional mandate to lay bare all spending runs counter to Congress's political interests to obscure spending which would be unpopular with the electorate and could be used by its political opponents.\textsuperscript{109} Two examples illustrate how Congress's decision to place programs outside typical reporting processes contravenes the Statement and Account Clause: the treatment of federal insurance programs (FIPs)\textsuperscript{110} and government-related entities (GREs).\textsuperscript{111} They compound the reporting weaknesses

\begin{itemize}
  \item \textsuperscript{107} ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 259 (2d ed., 2000).
  \item \textsuperscript{108} 3 ELLIOT'S DEBATES, supra note 24, at 459.
  \item \textsuperscript{109} Former FASAB Chairman David Mosso has noted that "[t]ax expenditures are a politician's dream because once enacted they are invisible, perpetual, not subject to annual appropriations committee scrutiny and ... [make] the government look smaller than it is. Those same characteristics make them an accountability nightmare, probably the preeminent form of financial obfuscation." See Mosso, supra note 6, at 7. Budget actors also have an incentive to avoid annual risk assessments for complex, specialized entities given their limited resources and time. Budget agencies have repeatedly testified to Congress about the difficulties arising from more rigorous statutory requirements. On the difficulties involved with measuring future government liabilities, see David B. Pariser, Implementing Federal Credit Reform: Challenges Facing Public Sector Financial Managers, 12 PUB. BUDGETING & FIN. 19, 28 (1992).
  \item \textsuperscript{110} In April 2013, FASAB issued an exposure draft to institutionalize the practice of excluding the GREs and the Federal Reserve from federal reporting. This proposed rule would codify accounting practices in tension with the Statement and Account Clause's mandate. See sources cited supra note 11; see also Robin Goldwyn Blumenthal, Auditors Wanted: Federal Numbers Game?, BARRON'S ONLINE (Aug. 17, 2013), http://online.barrons.com/article/SB5000142405274870414830457901791019363596.html.
  \item \textsuperscript{111} GREs, as used herein, refer to a broader category of entities than those included in the statutory definitions, such as "government corporations" and government controlled corporations. See 31 U.S.C. § 9101(2) (2012)) (identifying specific mixed-ownership government corporations); 2 U.S.C. § 622(8) (2012) (identifying
described in the prior Part and materially distort any “statement and account” of the government’s overall fiscal condition by excluding four trillion dollars of potential “expenditures.”

A. Understating Federal Insurance Programs

The first obvious violation is the treatment of federal insurance programs—both the presentation of federal insurance programs on a cash basis and the exclusion of “independent” insurance programs entirely. This practice frustrates all three principles embodied in the Statement and Account Clause: it undermines transparency and accountability regarding the size of insurance expenditures; it minimizes congressional oversight of how insurance is administered; and it increases the potential for corruption within these programs. And the impact is significant. Federal insurance programs present large future liabilities that often cover high-risk areas or populations that cannot access insurance through private market mechanisms.

First, there is strong evidence that issues with cash accounting are more acute with respect to insurance liabilities that depend on actuarial projections of future losses. GAO has stated that “cash-based budgeting for federal insurance programs may provide neither the information nor incentives necessary to signal emerging problems, make adequate cost comparisons, control costs, or ensure the availability of resources to pay future claims.” Misrepresenting insurance programs has material consequences and impacts other resource allocation decisions. The Center on Federal Financial Institutions estimates that “the federal government insure[s] against property, liability, or credit losses of more than $7 trillion in potential payouts in a worst-case scenario.”

By way of example, recent losses incurred by the NFIP forced Congress to increase NFIP’s borrowing authority by an additional $9.7 billion to cover new claims. U.S. GOV’T ACCOUNTABILITY OFFICE,


114. Federal Insurance Programs, CENTER FED. FIN. INSTITUTIONS, http://www.coffi.org/ins_progs.html (last visited April 27, 2014) (discussing various estimates of federal insurance programs liabilities). By way of example, recent losses incurred by the NFIP forced Congress to increase NFIP’s borrowing authority by an additional $9.7 billion to cover new claims. U.S. GOV’T ACCOUNTABILITY OFFICE,
Notwithstanding this evidence, Congress continues to reject proposals to extend accrual accounting to insurance programs.115 In fact, due to concerns about agency capacity, insurance programs were explicitly excluded from accrual accounting under section 506 of the Fair Credit Reporting Act.116 Budget agencies have repeatedly testified that quantifying potential liabilities would be difficult since “[o]ften, historical data are unavailable, frequent program modifications occur, and fundamental changes take place in the activities insured.”117 But private insurance companies regularly publish risk analyses, showing that this task is worthy of pursuit.

The implications of these omissions are significant. For example, the Pension Benefit Guaranty Corporation (PBGC), which insures single- and multi-employer defined benefit plans, is not shown on an accrual basis even though its “liabilities exceeded its assets by about $36 billion.”118 The CFR warns about PBGC’s potential liabilities, but does not depict them. GAO highlights that the actual and potential costs of insurance programs are so significant that omitting these liabilities is materially misleading.119

B. Treatment of Government-Related Entities

The second violation of the Clause is the exclusion of most government-related entities (GREs) from the three annual reports. While certain accounting

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117. BICKLEY, supra note 115, at 12-13 (discussing budget agency concerns with moving to accrual accounting for insurance programs). As then GAO Associate Director for Budget Issues, Susan Irving, testified in April 1998, “the complexity of the issues involved ... suggest that it is not feasible to integrate accrual based costs directly into the budget at this time.” Irving Testimony, supra note 113, at 13.


119. Id.
practices have minimal impact on a budget as large as that of the federal government's, the presentation of GREs materially distorts modern reporting. Today, "an increasing portion of the government's business is being done outside the traditional structure." The National Academy of Public Administration (itself a GRE) similarly writes, "[t]he boundary between the public and private sectors has been blurred so that one cannot say with assurance to which sector many corporations belong or to whom they are accountable."

To date, budget entities have struggled to establish a satisfying conceptual framework to capture GREs due to their broad range of ties to the government. In 2008, GAO added a new section to its Red Book, entitled "The Problem of Definition," that addresses this challenge:

The lack of a uniform, governmentwide statutory definition is not the only complication . . . . Even when Congress has been quite specific in declaring that a corporation is not a federal instrumentality, it may still take on that status for constitutional purposes.

The fact that the government's relationship to and responsibility for GREs is not well defined makes measuring the "expenditures" associated with GREs extraordinarily difficult. In addition to the practical challenges, the contingent nature of these "expenditures" poses a conceptual challenge. According to international accounting standards, contingent liabilities are obligations triggered by a condition or event that may or may not occur. For example, a natural disaster or banking

120. 3 U.S. Gov't Accountability Office, GAO-08-978SP, Principles of Federal Appropriations Law 15-87 (3d ed. 2008), http://www.gao.gov/special.pubs/d08978sp.pdf [hereinafter 3 GAO REDBOOK]. This trend has been widely commented on by budget scholars. See, e.g., Thomas Stanton, Government-Sponsored Enterprises: Mercantilist Companies in the Modern World (2002) (providing a robust description of "government instrumentalities" which he defines as non-government entities that represent contingent liabilities and perform core state functions).

121. 3 GAO RED BOOK, supra note 120, at 15-87 to 15-88 (internal citations omitted).

122. Id. at 15-67.

123. The FDIC is one example of an entity where there are significant difficulties associated with identifying and estimating potential liabilities. Since the FDIC insures the entire U.S. banking system, it has potential liabilities of roughly seven billion dollars in the event of a systemic crisis. Of course, this tail scenario overstates the potential liability. But the federal budget shows zero cost to taxpayers, which vastly understates the liabilities. After the savings and loan crisis, the FDIC required additional borrowing capacity to stay solvent under the Federal Deposit Insurance Corporation Improvement Act (FDICI). See 12 U.S.C. § 1811 (2006). For more information, see A Brief History of the Federal Deposit Insurance Corporation in the United States, FDIC Div. Res. & Stat. 54-55 (1998), http://www.fdic.gov/bank/historical/brief/brhist.pdf.

crisis is an exogenous condition that would result in future government outlays. Similarly, underpriced government programs (e.g., single-family mortgages, small business loans, flood insurance) or poor regulatory supervision could also result in future government expenditures. As Hana Polackova of the World Bank explains, "[t]he probability of the contingency occurring and the magnitude of the government outlay required to settle the ensuing obligation are difficult to forecast." The federal government already recognizes certain contingent liabilities with respect to its own programs. It uses financial models to predict future obligations, albeit with varying degrees of accuracy.

Generally accepted accounting principles (GAAP) similarly require the recognition of certain contingent liabilities for public companies. With respect to GREs, the government has no explicit obligation to settle future liabilities under a particular law or contract. But it is widely acknowledged by lawmakers and creditors that the government will stand behind the GREs in times of stress. In other words, there is an implicit obligation based on "public expectations, political pressures, and the overall role of the state as society understands it." Contingent liabilities of the GREs, though technically off-budget, will ultimately be borne by the taxpayer. GAO warns that these entities could affect the government’s long-term fiscal soundness.

Two examples demonstrate why GREs should be included in typical reporting processes on an accrual basis. First, the United States Postal Service (USPS) has significant actual and potential liabilities, including two lines of credit to the Federal Financing Bank. By statute, it can borrow up to $15 billion, of which roughly $11 billion is currently drawn. There is a substantial risk that the government will not be paid back and USPS will require further assistance given its tenuous financial condition. But since Congress designated USPS an independent corporation per 39 U.S.C. § 201, it is only mentioned in the appendices and not included in budget totals. Second, the National Consumer Cooperative Bank (NCCB) is a private enterprise that was chartered by Congress in 1978. 

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125. Id. at 2.

126. In addition to the government’s resource and technology constraints, its programs often lack comparable historical data. The government often serves areas and populations that do not attract private sector investment for the very reason that the risk is potentially high and difficult to predict.


128. GAO CFR ANALYSIS 2012-2013, supra note 118, at 5.


The federal government owns roughly $184 million of its debt which comes due in 2020. Like USPS, its financial condition suggests that repayment is unlikely. Nonetheless, NCCB is not named, not even in the appendices. These are just two of the hundreds of GREs that have actual and contingent liabilities for which the federal government is responsible, but are intentionally kept outside of typical reporting processes.

Federal housing programs provide the most well known example of these problems. Despite the fact that Fannie Mae and Freddie Mac required a bailout during the recent financial crisis, federal reporting continues to ignore the credit risks associated with these entities. In fact, the reality is just the opposite: because the Treasury Department owns stock in the entities, Fannie Mae and Freddie Mac appear to generate revenue for taxpayers. Thus, these entities violate the transparency and accountability norms embodied in the Statement and Account Clause. The need for better public reporting is acute.


See NCCB, OVERSIGHT ADEQUATE, supra note 131, at 3.

See FY2013 CONSOLIDATED FINANCIAL REPORT, supra note 99, at app. A.

It is worth noting that proponents of excluding the GREs from the government’s consolidated reporting argue that “the federal government has no legal responsibility to ‘bail out’ GSEs.” BICKLEY, supra note 115, at 13. However, in many cases, the government already has outstanding financial liabilities with GREs (as the examples above demonstrate).

It is possible that the bailout will ultimately impose no cost on taxpayers and even reduce the long-term deficit by several hundred billion dollars. See Phillip Swagel, Proposal 13: Increasing the Role of the Private Sector in Housing Finance, HAMILTON PROJECT 76-83 (2013), http://www.hamiltonproject.org/files/downloads_and_links/THP_15WaysRethinkFedDeficit_F2_2.pdf. But significant credit risk remains on their roughly four trillion dollar portfolio. Professors Deborah Lucas and Marvin Phaup explain that “[t]he imperative to address [current budget] issues is heightened by the federal government’s recent assumption of Fannie Mae and Freddie Mac . . . . Going forward this would have a significantly positive effect on the budget surplus each year, and the riskier their book of new business, the greater would be the savings. We hope that this stunning example of the perverse effects of the current accounting treatment of credit risk will serve as an impetus for change.” Lucas & Phaup, supra note 15, at 107. In addition to their placement in appendices, it is worth noting the large discrepancies in federal reporting. The President’s Budget for fiscal year 2014 estimates, for example, are $134 billion lower than CBO’s projections. The size of this discrepancy reflects OMB’s use of cash accounting. See An Analysis of The President’s 2014 Budget, CONG. BUDGET OFFICE 16 (May 2013), http://www.cbo.gov/sites/default/files/cbofiles/attachments/44173-APB_0.pdf.
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Significantly, for the first time, the President’s Budget for fiscal year 2013 added a table that aggregated the net outstanding lending and borrowing of the largest GREs. The CFR also lists by name 119 GREs and includes 35 of those entities in its analysis.

IV. ENFORCEMENT MECHANISMS

These substantial reporting issues reduce the quality of information with which citizens evaluate their elected representatives, potentially hampering the democratic process. They also obfuscate the use of off-budget spending—which has ballooned to over four trillion dollars over the past century—and hamper any efforts towards fiscal responsibility. Particularly today, in a period of limited resources and heightened attention to fiscal responsibility, it is important that both Congress and the citizenry have complete and accurate information about the government’s “receipts and expenditures.” Without accurate information, Congress cannot address the fiscal issues for which it has responsibility.

The question thus arises how the Statement and Account Clause can be enforced against the budget agencies, and, when appropriate, against Congress. At the time of the state debates over ratification of the Constitution, at least some people believed that the public would have a means of redress under the Statement and Account Clause. This Part first considers the limited jurisprudence on this Clause. Since the judiciary has been hesitant to intervene in reporting disputes, Congress itself must create procedures to bring annual reporting into


139. See Douglas J. Elliott, Uncle Sam in Pinstripes: Evaluating U.S. Federal Credit Programs 3 (2011) (estimating taxpayers bear the risk for eight trillion dollars in federal loan and guarantees in FY2010); Jackson, supra note 6, at 2 (estimating that government liabilities exceed budget by $3.3 trillion in fiscal year 2005).

140. See United States v. Richardson, 418 U.S. 166, 201 (1974) (Douglas, J., dissenting) (“The mandate runs to the Congress and to the agencies it creates to make 'a regular Statement and Account of the Receipts and Expenditures of all public Money.' The beneficiary—as is abundantly clear from the constitutional history—is the public. The public cannot intelligently know how to exercise the franchise unless it has a basic knowledge concerning at least the generality of the accounts under every head of government.”)

141. See supra Part I. By design, the reporting requirement provides information to voters so they can exercise their rights as citizens and therefore is germane to the democratic process.
greater compliance with the Clause’s mandate.\footnote{142} I conclude that Congress should expand GAO’s powers to interpret, monitor, and enforce compliance with the Statement and Account Clause. This is one way to improve federal reporting and bring renewed attention to the Clause’s mandate.

\subsection*{A. The Role of the Judiciary}

Only a few Supreme Court decisions have mentioned the Statement and Account Clause and, to date, not one has recognized a citizen’s right to hold Congress responsible under this Clause.\footnote{143} This Section surveys the limited jurisprudence and concludes that any judicial challenge to the adequacy of Congress’s reporting processes is, as Kate Stith has predicted, “doomed.”\footnote{144} Consequently, other institutional mechanisms should be developed to improve compliance with this affirmative reporting duty.

The earliest case related to the Statement and Account Clause is \textit{Hart’s Case} (1880), in which the Court established that Congress has the absolute power to define and execute its duties in Article I, Section 9, Clause 7.\footnote{145} The case does not directly mention the Statement and Account Clause, but later cases have relied on this opinion to establish that Congress has complete discretion to design budget processes and delegate power to institutional actors.\footnote{146}

\footnote{142} This idea that enforcement responsibility ought to lie with Congress itself, not the judiciary, echoes Professor Stith’s argument regarding the appropriation power. \textit{See} Stith, \textit{supra} note 3, at 1386 (noting that “Congress itself must identify institutions and procedures to vindicate its constitutional power of the purse”).

\footnote{143} The Court has declined to reach a conclusion on the merits, stating that the plaintiffs lack standing to bring suit. \textit{See}, e.g., \textit{Richardson}, 418 U.S. at 166. As a result, the political process is the primary means of redress.

\footnote{144} \textit{Stith}, \textit{supra} note 3, at 1392.

\footnote{145} \textit{Hart’s Case}, 16 Ct. Cl. 459, 484 (1880), \textit{aff’d sub. nom} Hart v. United States, 118 U.S. 62 (1886) (“Auditing and accounting are but parts of a scheme for payment ... absolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people.”). In \textit{Hart’s Case}, it is worth noting that the Court actually qualifies the view that Congress has “absolute control” of “auditing and accounting” by saying that Congress is ultimately responsible to the people in the way in which it exercises this control. This important qualification is often overlooked by scholars and later cases citing this opinion.

\footnote{146} Congress’s “absolute” discretion with respect to spending legislation should be distinguished from its authority with respect to reporting standards. The Appropriations Clause gives Congress considerable authority to enact backdoor spending (for example, off-balance-sheet vehicles such as trust funds) so long as Congress clearly defines the terms of funding. In contrast, the Statement and Account Clause contemplates no exemptions to the requirement of transparency. So while Congress has authority to prescribe accounting forms and delegate reporting duties, exempting “receipts or expenditures” from the reporting requirement runs counter to the constitutional mandate. In addition, the judiciary has recognized
Almost one hundred years later, in the only Supreme Court case brought under the Statement and Account Clause, the Court affirmed Congress's absolute fiscal authority. In *United States v. Richardson*, a private citizen alleged that the provision of the Central Intelligence Agency Act of 1949 (CIA Act) exempting activities of the CIA from federal reporting requirements violated the public reporting obligation under the Statement and Account Clause. The Court dismissed the suit for lack of standing in a five-to-four ruling. Chief Justice Burger's majority opinion reiterated that Congress has absolute power to define the scope and requirements of the Statement and Account Clause.

Three years later, Michael Harrington attempted to circumvent the Court's ruling by challenging the CIA Act in his capacity as a Congressman. In *Harrin-
ton v. Bush (1976), Harrington argued that his "lack of information [on national security spending] impairs the quality of his participation in the appropriations process and thus constitutes a significant injury to him in his capacity as a Congressman." The D.C. Circuit dismissed the suit and reiterated Congress’s authority over fiscal reporting.

Several litigation strategies have yet to be tested. No case has directly challenged the adequacy of typical reporting processes (only the denial of financial information upon a citizen’s request). Nor has any case questioned Congress’s authority to delegate its reporting duty to the executive branch or budget agencies. One could also imagine a litigant invoking “voter standing” to demand more comprehensive reporting of government finances. The mere fact that a


152. The majority noted that, “Since Congressional power is plenary with respect to the definition of the appropriations process and reporting requirements, the legislature is free to establish exceptions to this general framework.” Id. at 194-95. But unlike the Richardson opinion where the taxpayer failed to state a particular grievance, the Court denied standing in Harrington because the Congressman had alternative means of finding financial information. Id. The D.C. Circuit addressed a similar suit four years later in Halperin v. CIA, 629 F.2d 144, 146 (D.C. Cir. 1980). A citizen sought access to CIA documents describing legal bills and fee arrangements with private attorneys, claiming that Exemption 3 of the Freedom of Information Act (FIOA) violated the Statement and Account Clause. The D.C. Circuit dismissed the case for lack of standing. There is also a line of cases related to statutory grants of transparency under the Freedom of Information Act (FOIA). See, e.g., Aftergood v. CIA, 355 F. Supp. 2d 557, 560 (D.D.C. 2005) (holding that the CIA cannot deny requests for historical budget information because Congress has not provided an exemption applicable to the requested documents). However, the FOIA is fundamentally different in that it places the burden on the public to request information. By contrast, the Statement and Account Clause provides a positive obligation (e.g., an affirmative obligation to provide information to the public).

153. Congress originally delegated the reporting duty to the Treasury Department, which was “functionally a part of the Congress” at the time of that delegation. Mashaw, supra note 58, at 1286. Only later did Treasury become part of the executive branch, thereby moving this congressional duty into the President’s purview. Id. The creation of FASAB in the 1990s through a memorandum of understanding among the budget agencies further complicates the delegation question. See Marron, supra note 4, at part 3. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), is the foundational case regarding non-delegation doctrine. The issue in that case was whether Congress could delegate regulation of the poultry industry to the President under the Commerce Clause. There have been several cases addressing Congress’s authority to delegate its fiscal responsibilities to agencies. See, e.g., Bowsher v. Synar, 478 U.S. 714 (1986) (striking down the deficit-limit provision of the Gramm-Rudman-Hollings Act that vested power in the GAO Comptroller).

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constitutional provision has lain dormant in our nation’s history does not mean that it could never be adjudicated should the appropriate controversy arise.

But even if the courts choose to intervene, judicial restraint would dictate, at least in the first instance, directing Congress to fashion a remedy. Absent conflict between Congress and the executive branch, the courts have a strong incentive to invoke canons of constitutional avoidance.155 And federal courts have good reason to be cautious about exercising power in this area: state courts have encountered considerable difficulties enforcing balanced-budget provisions and other fiscal requirements.156 Furthermore, judicial enforcement might not be the most effective means of ensuring compliance. Courts do not have the expertise to evaluate accounting standards or to prescribe forms of presentation for “receipts and expenditures.” Particularly given the complicated and unique relationship of different entities to the government, and the numerous accounting and economic issues involved, technical knowledge may be required.157 The right to information on federal spending may be an area where the courts cannot provide judicial protection—what Professor Larry Sager calls an “underenforced constitutional norm.”158 Therefore, the judiciary should only be considered a last resort if other enforcement mechanisms fail.

B. Expanded GAO Oversight

Enforcing the Statement and Account Clause therefore poses a distinctive challenge. Standing issues and the political question doctrine make judicial intervention unlikely. And voluntary legislative compliance is equally improbable since it is against Congress’s interest to expose spending choices to public scrutiny. So how can the government improve compliance with the Statement and Account Clause and provide a more accurate picture of the government’s fiscal condition?

156. For an overview of the challenges that state courts have faced enforcing fiscal provisions, see Richard Briffault, Courts, Constitutions, and Public Finance: Some Recent Experiences from the States, in Fiscal Challenges, supra note 6, at 418 (discussing the Fifth Amendment and anti-confiscatory provisions as evidence that the judiciary cannot bind the spending decisions of future Congresses); and John Harrison, New Property, Entrenchment, and the Fiscal Constitution, in Fiscal Challenges, supra note 6, at 401 (Garrett et al. eds., 2008) (arguing that judicial efforts to enforce balanced budget provisions have had mixed results).
158. Id. at 1213.
Several mechanisms already exist to interpret principles of fiscal law, such as opinions by the Attorney General and Comptroller General.\textsuperscript{159} For example, GAO is required to issue reports on government accounting practices and highlight reporting concerns about particular programs to Congress.\textsuperscript{160} Although these opinions do not have the authority of judicial decisions, they do have "great practical force in providing rules of operation for administrative officers."\textsuperscript{161} Therefore, these institutional bodies provide an obvious vehicle through which to enforce the Statement and Account Clause.

This Section suggests that Congress should empower the GAO to audit any government-related entity and issue binding opinions against reporting entities. In addition, GAO auditors should be embedded within agencies like inspectors general (IG) or financial-compliance officers. This would require legislative action to accomplish. While expanding GAO's authorities does not prevent Congress from enacting new laws that frustrate the Statement and Account Clause's mandate, it would improve the quality of information being assembled by budget actors and agencies. But once authority was delegated, GAO would be charged with actively overseeing compliance with the Statement and Account Clause's mandate—an improvement upon the status quo.

This idea is not without precedent. Several scholars have argued that GAO, led by the Comptroller General, is uniquely well situated to interpret fiscal laws, monitor agency compliance, and resolve disputes.\textsuperscript{162} First, the Comptroller General is not answerable to either Congress or the executive branch. This independence makes GAO unique among budget agencies.\textsuperscript{163} Second, the Comptroller General is already empowered to review and audit executive, legislative,
and judicial agencies. It can also prescribe accounting principles in consultation with the President and Secretary of the Treasury. Third, GAO’s determinations have historically carried significant weight with the executive branch and received substantial deference from the judiciary (at least in the context of appropriations law). It is arguable that the oversight duties of GAO already operate as one way—albeit a weak one—through which Congress attempts to implement its reporting duty.

But GAO’s current authority is limited in certain key respects, particularly since the Supreme Court’s decision in Bowsher v. Synar (1986). In Bowsher, the Court held that the Comptroller General may not play an enforcement role by bringing suit under the Impoundment Control Act. This also called into question GAO’s subpoena powers. In addition, GAO’s authority to audit agencies does not apply to all agencies—leaving many government-related enterprises and independent federal insurance programs outside of its purview.

Therefore, for GAO to act as an effective enforcement mechanism with respect to the Statement and Account Clause and to provide a more accurate picture of the government’s financial position, Congress must further empower GAO to audit all government-related entities and render binding opinions against the reporting agencies. The power to render binding opinions is par-


165. See id. § 3511 (2012).

166. Stith, supra note 3, at 1390.

167. 478 U.S. 714 (1986). In Bowsher, the Court struck down the Gramm-Rudman-Hollings’ (GRH) deficit provision, reasoning that the Comptroller General, a legislative officer, cannot exercise authority over how the President executes budget laws. While the holding is narrowly tailored, the case curtailed GAO’s authority. Bruce Ackerman, The New Separation of Powers, 113 HARV. L. REV. 653, 729 n.137 (2000) (“[T]he American separation of powers doctrine is relatively uncongenial to the GAO, based on a fear of excessive encroachment on the powers of the executive branch.”); see Kate Stith, Rewriting The Fiscal Constitution: The Case of Gramm-Rudman-Hollings, 76 CALIF. L. REV. 593 (1988).


169. See 1 GAO RED BOOK, supra note 3, at 1-22 n.39 (“[C]ertain agencies and activities are not subject to audit by reason of specific statutory prohibitions and the type of funds involved.”). In addition, “independent” government-chartered corporations, like USPS or Fannie Mae, are not subject to GAO audits.

170. If Congress were to give GAO enforcement authority with respect to its reporting obligation, it should not conflict with the holding in Bowsher. It is theoretically possible that the Court could reach a similar conclusion, i.e., that allowing GAO to determine the adequacy of reporting is usurping the executive’s “take care” power. But as discussed in Parts I and II, the Statement and Account Clause is unquestionably a legislative mandate. If anything, it can be argued that Congress has impermissibly delegated its reporting duties to the executive branch.
particularly important because it would allow GAO to compel an executive agency
to provide more robust financial information.\textsuperscript{171} This would effectively make
GAO the arbiter of disputes between budget actors and reporting agencies. To-
day, GAO can only issue non-binding opinions against executive agencies with
respect to reporting norms. In addition, Congress could also embed GAO audi-
tors within agencies akin to inspectors general.\textsuperscript{172} Since many of the reporting
issues arise at the agency level, giving GAO auditors direct access to agencies (as
opposed to working through the budget agencies) would be particularly use-
ful.\textsuperscript{173} Several scholars have raised the idea of \textquotedblleft embedded experts\textquotedblright \ with respect
to national security oversight.\textsuperscript{174} A similar \textquotedblleft in-house\textquotedblright \ model is used by regulators
of financial institutions, who have analogous reporting, oversight and risk
management responsibilities.\textsuperscript{175} Since \textquotedblleft receipts and expenditures,\textquotedblright \ often require

\begin{itemize}
  \item \textsuperscript{171} Alternatively, Congress could enact a citizen-suit provision allowing for any tax-
  payer to challenge reporting processes. Not only is this alternative politically in-
  feasible, citizen suit provisions have had mixed results. In addition, the Freedom
  of Information Act (FOIA) already serves a similar function with respect to gov-
  ernment disclosures. See, e.g., Wash. Post Co. v. U.S. Dep't of State, 685 F.2d 698,
  700 (D.C. Cir. 1982) (upholding the State Department's decision to deny infor-
  mation requested under FOIA).
  \item \textsuperscript{172} Inspectors general (IGs) are tasked with ensuring that agencies comply with the
  letter of the law. Legal requirements related to reporting are only a small piece of
  an IG's duties. By contrast, the primary duty of \textquotedblleft in house\textquotedblright \ GAO auditors would
  be to ensure robust, complete, and accurate reporting. See Paul C. Light, Moni-
  \item \textsuperscript{173} While the concept of \textquotedblleft in house\textquotedblright \ GAO auditors is new, agencies are already re-
  quired to comply with a number of \textquotedblleft internal control\textquotedblright \ requirements issued by
  (2012) (requiring agencies to establish internal accounting and administrative
  control systems in accordance with GAO standards).
  \item \textsuperscript{174} See, e.g., Jack Balkin, The Constitution in the National Surveillance State, 93 Minn.
  L. Rev. 1, 24 (2008) (advocating for \textquotedblleft a cadre of informational ombudsmen within
  the executive branch—with the highest security clearances—whose job is to en-
  sure that the government deploys information collection techniques legally and
  nonarbitrarily\textquotedblright ); Kenneth A. Bamberger & Deirdre K. Mulligan, Privacy Deci-
  sionmaking in Administrative Agencies, 75 U. Chi. L. Rev. 75, 96 (2008) (proposing
  independent \textquotedblleft embedded privacy experts\textquotedblright \ in the Department of Homeland Secu-
  rity \textquotedblleft specifically charged with advancing privacy among competing agency inter-
  ests, located in a central position within the agency decisionmaking structure . . .
  and able to operate with relative independence\textquotedblright ).
  \item \textsuperscript{175} On embedding regulators within financial firms, see Aaron Lucchetti, The Regu-
  lator Down the Hall: Fed and Comptroller of Currency Bolster the Ranks of Staffers 'Em-
  065334.
complex risk assessments to determine future liabilities, giving GAO enhanced auditing powers and access to data would be particularly useful.\(^{76}\)

And, importantly, this proposal seeks to bring government into compliance with the Statement and Account Clause’s mandate through existing institutional capacity. Thus, it avoids the temptation to add another institutional actor to an already complex area of federal reporting that involves hundreds of government agencies. It also avoids the imposition of yet another annual report that will merely reproduce the incomplete information already printed in the President’s Budget, the Economic Outlook, and the Consolidated Financial Report.

While this proposal cannot prevent Congress from enacting new reporting exemptions or distortive accounting rules, expanding GAO’s powers would provide an institutional mechanism for highlighting reporting deficiencies. It would also markedly improve the quality of agency-level financial data being provided to budget actors. And, perhaps most importantly, this proposal would bring renewed attention to the Statement and Account Clause’s mandate.

**CONCLUSION**

The Statement and Account Clause poses a unique challenge. The simplicity of the Clause stands in contrast to the increasing complexity of government finances. Today, it is especially important that the public and legislators have a complete understanding of the government’s receipts and expenditures. Standards, although imperfect, are set for public companies to provide investors with transparency and accountability in financial statements, as well as to diminish the possibility of fraud and corruption. The Statement and Account Clause was intended to provide the public with the same protections vis-a-vis their government. It is incumbent upon Congress to carry out this mandate to create transparency and accountability, to ensure continued oversight of public funds, and to prevent corruption. Given the complexities of today’s “receipts and expenditures,” expanded GAO audits may indeed be one way to better fulfill this constitutionally required reporting.

Meeting this constitutional mandate is no easy task, but it is certainly a task worthy of pursuit. While the task of producing a comprehensive report of federal financial activities is potentially an onerous and unpopular duty, a better understanding of our nation’s fiscal health is necessary to achieve fiscal responsibility. It is also an essential aspect of how citizens evaluate their elected representatives in a democratic government. Therefore, renewed attention to the Statement and Account Clause is not merely an accounting issue. It is critical to protecting our democracy.

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176. GAO has recognized the increasing need for agencies to better assess and manage the financial risk incurred on behalf of the taxpayer. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-01-385T, LONG-TERM BUDGET ISSUES: MOVING FROM BALANCING THE BUDGET TO BALANCING FISCAL RISK (2001).