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An Improved Balanced Budget Amendment

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J. HUSTON MCCULLOCH

The national debt of the U.S. government has doubled to \$15.2 trillion in the past four years. The statutory national debt ceiling has proven ineffective in restraining runaway deficit spending, so that a constitutional amendment that requires a supermajority of both houses of Congress to raise the debt ceiling is long overdue. However, an ineffective or ill-written balanced budget amendment would be worse than none at all.

On November 28, 2011, 62 percent of the House of Representatives voted in favor of a proposed balanced budget amendment introduced by Representative Bob Goodlatte (R–Va.). Although this majority was short of the two-thirds majority required for passage, twenty-five Democrats joined all but four Republicans, so it had significant bipartisan support. An identical proposal actually passed the House and nearly passed the Senate back in 1995 and was reconsidered in 1997.

It was fortunate, however, that this well-intentioned proposed amendment, known as House Joint Resolution 2 (HJR2), did not pass because a key provision in it is unworkable. Furthermore, it does nothing to prevent games of budgetary chicken that threaten to shut down the entire federal government, and it contains a gaping loophole that allows the Federal Reserve System to evade its intent easily.

For comparison, HJR2 is included here as exhibit A, and a greatly strengthened and clarified improved balanced budget amendment that corrects these deficiencies is presented as exhibit B at the end of the article.

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The National Debt Ceiling

Section 1 of HJR2 would require the budget to balance every fiscal year unless a three-fifths majority of both Houses approves of the deficit. However, this provision is unworkable because one cannot identify which of several appropriations is the one that drives expenditures over receipts and therefore requires a three-fifths vote. Furthermore, fluctuations in the timing of receipts and expenditures may create surpluses in one year that ought to be carried over to the next year, yet such carryover is prohibited by this wording. The proposed improved amendment eliminates this section altogether.

Section 2 of HJR2 assumes that the national debt has a ceiling and requires a three-fifths vote of both houses to increase it. This provision contains the amendment's real teeth, and therefore it has been built into section 1 of the improved amendment. A hard limit on outstanding debt means that outlays cannot exceed receipts, so this limit makes section 1 of HJR2 entirely redundant. However, HJR2 section 2 simply states that there shall *be* a "national debt limit," not that it may not be exceeded. This defect has been corrected in section 1 of the improved amendment. Furthermore, HJR2 does not state what the initial value of the debt limit should be. The improved amendment gets down to business immediately by setting the initial limit at the value of the debt on the date of ratification. If this limit is deemed too harsh, the initial limit can instead be set a few percentage points higher than the actual debt on the date of ratification.

The No-Chicken Mechanism

A big weakness of the existing statutory national debt limit has been that it often leads to a game of budgetary chicken in which each faction threatens to shut down the *entire* government if it does not get its way. This outcome occurred in 1999 and again in 2011, and HJR2 would do nothing to prevent the recurrence of such crises.

Section 2 of the improved amendment corrects this defect simply by requiring *the president* to "impound any appropriations as necessary and expedient to remain within said limit." This provision gives the president not only the authority but also the responsibility to prioritize which government expenditures are essential and which are expendable. He may gore any sacred-cow spending boondoggle, be it a bridge to Ketchikan or an unnecessary military system, whenever the national debt limit is in danger of being breached. The only way Congress can prevent its pork barrel powers from being cut by this provision is to come up with a budget that actually balances. In deference to the principle of separation of powers, the only expenditures that the improved amendment places off limits to presidential impoundment are the salaries of members of Congress and federal judges.

The Lock-in Option

A further weakness of HJR2 is that it makes no provision for *reducing* the debt limit. If a frugal Congress succeeds in reducing the debt, it should be allowed to lock in its gains in order to prevent them from being squandered by subsequent Congresses. Section 3 of the improved amendment allows Congress to do so by a simple majority vote at any level at or higher than the then outstanding debt. This provision also gives Congress the option to “bank” any surpluses it realizes by leaving the existing limit in place or by only partially lowering it to the new debt level.

The Bernanke-Blocker Clause

Perhaps the biggest shortcoming of HJR2 is that it provides no definition of the “outstanding debt,” and in fact it leaves the door wide open for the Federal Reserve System to do an end run around the debt ceiling. Since 2008, the Bernanke Fed has partially taken over the power of Congress to make all spending decisions by simply printing money, in effect, to bail out failing companies and to buy up incompetently originated subprime mortgage-backed securities. Besides printing \$190 billion in new Federal Reserve Notes (a 24 percent increase), the Fed has also incurred an even more dangerous \$1.6 trillion in new electronic reserve deposit obligations to finance this spending. These reserve deposit obligations are legal tender for the clearing of checks and may be converted into currency at any time by the banks that hold them.

Section 4 of the improved amendment therefore defines the “outstanding debt” to include all legal-tender obligations and monetary instruments issued by the Fed or other agency in addition to regular Treasury debt. To avoid double counting, any Treasury debt held as backing for these legal-tender obligations is excluded from the count. Note, however, that if the Fed were to sell Treasury debt in order to bail out an AIG or a Fannie Mae, as it did in 2008, the bonds it sold would then become part of the outstanding national debt. In order for Congress to regain control of spending, it would have to rein in the Fed’s ability to make such unilateral spending decisions.

Section 4 of the improved amendment explicitly leaves contingent claims such as Federal Housing Administration mortgage guarantees, Federal Deposit Insurance Corporation deposit insurance, projected Social Security and Medicare liabilities, and so forth out of the debt limit until such time as Congress actually appropriates funds to meet these agencies’ shortfalls. However, any Treasury debt actually held by these agencies to meet these contingent claims would be counted as already outstanding.

Other Unnecessary Provisions of HJR2

Section 3 of HJR2 requires the president to send to Congress each year a proposed budget that is *projected* to balance. This empty provision is clutter that has no place in

a constitutional amendment. The president is always welcome to *propose* a budget that is *projected* to balance, but it is up to Congress to *enact* one that actually *does* balance.

Section 4 of HJR2 would require a majority of the whole number of each house to vote for any tax increase rather than only a majority of those present, as is the case currently, and requires a roll-call vote. This provision would make it somewhat more difficult to raise taxes. However, this section arguably works *against* balancing the budget and hence belongs in a separate amendment if it is to be part of the Constitution. I have therefore not included it in the improved amendment.

Section 5 of HJR2 would waive the national debt limit in any year in which a declaration of war is in effect. However, this waiver is unnecessary because in any serious war there would be no trouble finding the three-fifths majority required to raise the debt ceiling. At the same time, it is counterproductive because even limited conflicts would give Congress carte blanche to raise the debt without a three-fifths vote. For example, a declaration of a state of war might have been deemed suitable in a situation such as Vietnam, the Iran hostage crisis, or Afghanistan. Yet if three-fifths of both houses do not feel that such a limited conflict warrants raising the debt ceiling, why suspend the ceiling? Congress can always finance a limited intervention within a balanced budget by reducing other appropriations. This section of HJR2 is actually dangerous because it would give Congress an incentive to maintain a perpetual state of war against the likes of Grenada or the Duchy of Grand Fenwick (recall Peter Sellers's 1959 movie *The Mouse That Roared*) just to allow itself unrestrained deficit spending on other programs. I have therefore eliminated this section from the improved amendment.

Section 6 of HJR2 seems to say that as long as Congress merely *estimates* that the budget is going to balance, anything goes. Congress really can count if it tries hard enough. The improved amendment's section 2, which authorizes the president to whack whatever he chooses in order to keep the debt under the limit, gives Congress plenty of incentive to make sure its appropriations and revenues stay within the limit. HJR2 section 6 has therefore been eliminated.

HJR2 section 7 defines receipts and outlays. I have dropped this section and placed a definition of the national debt in the improved amendment's section 4.

Finally, section 8 of HJR2 postpones the effect of the amendment for at least two years after ratification. Incumbent members of Congress understandably crave one last binge of deficit spending before giving up the bottle, but if a balanced budget amendment is to be taken seriously, it should be treated as a serious matter immediately. The improved amendment therefore eliminates this provision. Congress always can, by a three-fifths vote, pass a one-time initial increase in the ceiling while it figures out how to live within the constraints of the amendment.

Potential Modifications of the Improved Amendment

The improved amendment sets the supermajority vote required to increase the debt limit at three-fifths of each house because this threshold is used in HJR2 and in the

1995–97 proposed amendment. However, serious consideration should be given to a more stringent requirement, such as two-thirds or even three-fourths. Of course, the more stringent the voting requirement, the less likely the amendment is to be passed by Congress and to be ratified by the states.

Section 2 of the improved amendment gives the president complete discretion to determine when the debt ceiling is in danger of being breached and to begin impounding appropriations. In order to restrain the president from invoking this power when there is no real danger of the debt limit's being breached, Congress may wish to restrict this responsibility to times when the actual debt is within some percentage, say 5 percent, of the debt ceiling.

Senate Joint Resolutions 10 and 23 and HJR1

The identical Senate Joint Resolutions 10 and 23 (SJR10 and SJR23), introduced by Senator Orrin Hatch (R-Utah) and Senator Mitch McConnell (R-Ky.), respectively, incorporate all the provisions of HJR2 plus three additional provisions. They had forty-seven and forty-six cosponsors, respectively, as of September 20, 2011.

Section 2 of SJR10/SJR23 provides: “Total outlays for any fiscal year shall not exceed 18 percent of the gross domestic product of the United States for the calendar year ending before the beginning of such fiscal year, unless two-thirds of the duly chosen and sworn Members of each House of Congress shall provide by law for a specific amount in excess of such 18 percent by a roll call vote.”

Although I would like to see the size of the federal government reduced, this provision of the Senate proposal has the same problem that section 1 of HJR2 has—namely, that it will be impossible to say which of several appropriations is the one that causes total appropriations to exceed 18 percent of gross domestic product (GDP). A restriction on spending relative to GDP might also politicize the calculation of GDP. A constitutional limit on borrowing, as in the proposed improved amendment, is equally consistent with big government with high taxes and small government with low taxes, but at least it will rule out crowd-pleasing big government with low taxes. A balanced budget amendment will also be easier to pass Congress and be ratified by the states if it does not at the same time try to restrict spending.

Section 4 of the two Senate proposals states: “Any bill that imposes a new tax or increases the statutory rate of any tax or the aggregate amount of revenue may pass only by a two-thirds majority of the duly chosen and sworn Members of each House of Congress by a roll call vote. For the purpose of determining any increase in revenue under this section, there shall be excluded any increase resulting from the lowering of the statutory rate of any tax.”

This provision admirably tries to make it more difficult to raise taxes, but again this extension will make it more difficult for the amendment to pass Congress and be ratified by the states. The second sentence would even allow the top marginal tax rates, say, to be increased with a simple majority vote, provided this increase were

coupled with reductions in the lower marginal tax rates that are projected to more than offset the increases. I do not think this combination is what the Senate drafters had in mind. And because the net revenue effect of a complex bill can be estimated only imperfectly, this provision would be an open invitation to litigation in the courts.

Section 8 of SJR10/SJR23 provides, “No court of the United States or of any State shall order any increase in revenue to enforce this article.” Section 2 of the proposed improved amendment makes this provision unnecessary because it clearly places responsibility for staying under the debt ceiling on the executive branch through selected spending cuts and leaves no confusion as to whether the courts should intervene or if the president should unilaterally authorize tax increases.¹

Besides introducing HJR2, Representative Goodlatte also introduced at the same time another balanced budget amendment, which was designated House Joint Resolution 1. It is very similar to HJR2, but in addition it restricts outlays to 20 percent of economic output (reduced to 18 percent by the House Judiciary Committee), with a two-thirds supermajority to override, and also requires a two-thirds supermajority of each house for any bill to raise revenue instead of only a majority of the whole number, as in HJR2. It is therefore very similar to SJR10/SJR23 except for the omission of their section 8. Although HJR1 passed the House Judiciary Committee on June 23, 2011, it had only 133 cosponsors as of September 17, so it was not as much in contention as HJR2, at least in the House of Representatives.

Exhibit A

House Joint Resolution 2

Introduced in the 112th Cong., January 5, 2011, by Representative Bob Goodlatte (R–Va.) and others.

SECTION 1. Total outlays for any fiscal year shall not exceed total receipts for that fiscal year, unless three-fifths of the whole number of each House of Congress shall provide by law for a specific excess of outlays over receipts by a roll call vote.

SECTION 2. The limit on the debt of the United States held by the public shall not be increased, unless three-fifths of the whole number of each House shall provide by law for such an increase by a roll call vote.

SECTION 3. Prior to each fiscal year, the President shall transmit to the Congress a proposed budget for the United States Government for that fiscal year in which total outlays do not exceed total receipts.

SECTION 4. No bill to increase revenue shall become law unless approved by a majority of the whole number of each House by a roll call vote.

1. During the 1997 debate over a proposed amendment identical to the 2011 HJR2 that left these matters ambiguous, Charles Fried, Robert Bork, and Archibald Cox expressed grave concern that litigation would be “gruesome and intrusive,” that there would be “hundreds, if not thousands, of lawsuits around the country,” and that there was a “strong probability” that the courts would intervene. See Hunt 1997.

SECTION 5. The Congress may waive the provisions of this article for any fiscal year in which a declaration of war is in effect. The provisions of this article may be waived for any fiscal year in which the United States is engaged in military conflict which causes an imminent and serious military threat to national security and is so declared by a joint resolution, adopted by a majority of the whole number of each House, which becomes law.

SECTION 6. The Congress shall enforce and implement this article by appropriate legislation, which may rely on estimates of outlays and receipts.

SECTION 7. Total receipts shall include all receipts of the United States Government except those derived from borrowing. Total outlays shall include all outlays of the United States Government except for those for repayment of debt principal.

SECTION 8. This article shall take effect beginning with the later of the second fiscal year beginning after its ratification or the first fiscal year beginning after December 31, 2016.

Exhibit B

The Improved Balanced Budget Amendment

SECTION 1. The outstanding debt of the United States shall not be increased above its level on the date of ratification of this amendment, unless three-fifths of the whole number of each House shall provide by law for such an increase by a roll call vote.

SECTION 2. Should the President determine that expenditures appropriated by law will necessitate borrowing in excess of the limit provided in Section 1 during any fiscal year, he or she shall impound any appropriations as necessary and expedient to remain within said limit. The compensation of members of Congress or of judges of the supreme and inferior courts may not be reduced under this provision.

SECTION 3. The limit on the outstanding debt of the United States may be reduced at any time to a level no lower than the then outstanding debt by a majority vote of both Houses of Congress by a roll-call vote.

SECTION 4. Outstanding debt shall include all obligations backed by the full faith and credit of the United States as well as all legal tender obligations and monetary instruments issued by the United States and its agencies. It does not include contingent claims of the United States and its agencies and excludes obligations backed by the full faith and credit of the United States held as backing for legal tender obligations and monetary instruments issued by the United States and its agencies.

Reference

Hunt, Albert R. 1997. The Unenforceable Constitutional Amendment (op-ed). *Wall Street Journal*, February 20.