

Analysis of SJ Res 6 Balanced Budget Amendment

This resolution was introduced in February, 2015, by Sen. Orrin Hatch (R-UT) and had 53 cosponsors as of June 11, making it the only Balanced Budget Amendment in either house of the 114th Congress with majority support (though a constitutional amendment requires two-thirds support for passage).

The provisions of SJ Res 6 are similar to many other balanced budget amendments. The total outlays of the Federal government during each fiscal year are to be no more than receipts for that year, and no more than 18% of the nation's gross domestic product (GDP). The debt limit can be increased only by a three-fifths vote of all the members of each house, instead of the current majority. The President must submit to Congress a balanced budget which also is within the 18% limit. Tax increases would require a two-thirds majority of the total membership of each house rather than a majority of those voting, which is an attempt to make it more difficult to raise taxes than cut spending. It would take effect five years after ratification, allowing time to gradually phase out any existing deficit. An unusual item is that the amendment does not include the now traditional 7-year time limit for ratification by the states.

The customary problems with balanced budget amendments are that they contain loopholes and lack a practical means of enforcement. SJ Res 6 suffers from both.

There are two explicit loopholes allowing deficit spending. Section one requires that Federal outlays not exceed revenues, but allows Congress to ignore this at any time and for any reason by a two-thirds vote in each house. The same two-thirds vote can suspend the 18% of GDP limit. Sections 6 and 7 allow Congress to run a deficit by declaring war (simple majority) or by passing a resolution declaring "an imminent and serious military threat to national security" by a three-fifths vote.

The military threat loophole would be easily invoked given that it requires only majority support and that we seem to live in times of perpetual serious military threats. The amendment attempts to limit the damage by allowing a deficit only to the extent that extra spending is "made necessary by the identified military conflict." However, there is nothing to prevent Congress from claiming that it would have reduced military spending in order to increase domestic spending, but that the "serious military threat" makes it necessary to postpone those cuts. Once the imaginary cuts in defense spending have become the baseline, those costs can be attributed to the war and considered as exceptions to the balanced budget requirement while allowing the domestic spending increases.

The two-thirds vote to suspend, which does not require using wartime as an excuse nor involve any imaginary spending cuts, could become a common practice. Given that members of Congress will come under enormous pressure from constituents resisting any cuts in programs from which they benefit, it might well be easier to get two-thirds to vote for deficit spending than a majority to vote for painful spending cuts. The rule of thumb in dealing with the budget is that using loopholes to avoid spending cuts is always the political course of least resistance.

There is no explicit enforcement mechanism in the amendment other than the three-fifths vote to raise the debt limit (and the debt limit itself appears nowhere in the Constitution – it could be abolished by Congress at any time). Yet finding a practical method of enforcement is the key to making a balanced budget amendment work. Section 10, which formally recognizes the necessity of using estimates when Congress and the President prepare their budgets, is a reminder that no one ever really knows in advance what the revenues or expenses of the Federal government are going to be. The President may propose a budget, based on optimistic estimates, which he claims is in balance. Congress may pass that budget, unwilling to question those estimates and perhaps create the necessity of cutting some spending from the President's proposal. If it eventually becomes obvious that the government is going to run a deficit, how is that to be prevented?

Merely saying in the Constitution that outlays are not to exceed revenue will not make it happen. Article I, Section 2 of the Constitution clearly states that after each census the number of representatives for each state is to be adjusted to match the new population figures. However, following the 1920 census, Congress failed to act. There was no way to force them to do what the Constitution mandated and the 1910 census numbers remained in effect for an extra decade.

SJ Res 6 seems to assume that Congress and the President would cut spending (or raise taxes) in order to eliminate the deficit, but that is unlikely. No one would want to take responsibility and anger the voters. Congress might go through the motions of voting on various bills, allowing every member to say that he had voted at least once for a balanced budget, while none receive the necessary majority. (This is exactly what was done in 1995 when the House voted on term limits amendments.) No one person would be clearly responsible for the failure. The deficit would remain.

The great flaw in all balanced budget amendments is that voters prefer that they continue to receive whatever Federal spending is coming to them, and consider that to be more important than balancing the budget. If the public were truly demanding that spending be cut (and/or their own taxes raised), it would have already been done. As long as the public opposes the steps needed to balance the budget, Congress and the President will eagerly use every possible means to avoid

it. (It is also possible that Congress might evade the limitation on spending no more than 18% of the GDP by making its own, unique definition of Gross Domestic Product, and altering it as needed to make more spending possible.)

Section 8 of the amendment hints that the Federal courts might be the last resort for enforcement, taking advantage of the fact that they do not have to face the voters. Although Section 8 merely says that no court may order a revenue increase as a means of enforcing the amendment, it therefore implies that they might be authorized to order cuts in spending. However, this is unlikely to be a practical means of enforcement.

To begin with, the amendment does not clearly grant anyone the legal “standing” to file a suit for enforcement (some other amendments include such a provision), and the courts might easily construe the rules of standing to make such a suit impossible.

Even if the Federal courts were to accept the suit, there are at least three more problems. First, Federal judges have no expertise in budgeting. If they are told to cut a certain amount of spending, they may choose very unwisely, or may follow their prejudices (e.g. making all the cuts in the Department of Defense). Second, by the time a Federal case had made its way through the District Court, Appeals Court, and finally the Supreme Court for a final decision, the fiscal year would have long since ended with nothing done to balance the budget. Finally, there is no guarantee that the Federal courts could reach a decision. If the matter reached the Supreme Court, would any five justices be able to agree on a complex list of spending cuts, or would the Court produce nine different budget plans?

Balancing the budget by a constitutional amendment is a very difficult proposition, and SJ Res 6 has not found the solution.

*Prepared by The Conservative Caucus Foundation
92 Main Street, Ste 202-8, Warrenton, VA 20186 tccf.foundation
540-219-4536 info@conservativeusa.org*