



U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON THE BUDGET

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Chris Van Hollen,
Ranking Democrat

November 15, 2011

How Will the “Balanced Budget Amendment” Be Enforced?

Dear Democratic Colleague:

In addition to the legal analysis I sent yesterday raising serious questions about the enforceability of the Republican [“balanced budget” amendment](#) to the Constitution, I wanted to forward the attached opinion piece by Walter Dellinger III, the former assistant attorney general under President Clinton. This *New York Times* op-ed from this summer outlines some of the many difficulties with enforcing the Constitutional amendment and the legal ramifications of taking budgetary decisions out of the hands of Congress.

Dellinger notes that because the Amendment does not say how to enforce the requirement that outlays for any year not exceed receipts for that year, the question will likely end up in court.

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This Constitutional amendment raises all sorts of legal issues that could tie the budget up in court while generating a Constitutional impasse with catastrophic consequences. I urge you to vote “No” on H.J.Res. 2.

If you would like more information about the budgetary consequences of the Amendment, please contact me or the Budget Committee Democratic staff at 6-7200, or review the Committee’s website at <http://democrats.budget.house.gov/>.

Sincerely,

Chris Van Hollen
Ranking Democrat

The New York Times

Op-Ed Contributor

An Amendment That Could Not Be Enforced

By WALTER E. DELLINGER III

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Washington

FOR decades, supporting a balanced-budget amendment to the Constitution has conveniently allowed many politicians to seem serious about the deficit without actually having to identify a single spending cut or tax increase. It was a neat trick — until now.

Members of the House are poised to vote on such an amendment next week. With President Obama and the House speaker, John A. Boehner, in negotiations over a major budget deal, and little interest in the Senate, the amendment seems to have little chance of being passed. But the fact that so many House members support the amendment is alarming; if it were to become law, it would do grave harm to our constitutional system, because the process for enforcing it would be uncertain and perilous.

Most versions of the proposal set a seemingly simple rule for the federal budget: “Total outlays for any fiscal year shall not exceed total receipts for that fiscal year.” (Some versions also provide that outlays cannot exceed a certain percentage of the previous year’s gross domestic product.) But how will it come about? The amendment does not say.

Even if every member of Congress individually favored a combination of taxes and expenditures that would be in balance, there is no way to ensure that any particular proposal would gain majority support. And even if Congress as a whole were able to agree on budget in which receipts exceeded expenditures, what happens if later in the fiscal year spending turns out to be greater, or revenue less, than expected?

Could the president take the position that the amendment confers upon him the authority to ignore appropriations and entitlements, or the Impoundment Control Law, which restricts the president from withholding funds for programs he opposes? Under that reading, the amendment would give a president sweeping new powers while providing no guidance on how to exercise them.

Court is where the whole budget process would likely wind up. Unlike older versions of the amendment, which left enforcement a mystery, the current proposals clearly contemplate judicial involvement and even provide that members of Congress can bring lawsuits to enforce the limits.

What a nightmare. Allowing federal judges to make fundamental decisions about spending whenever outlays threatened to exceed receipts would be an extraordinary expansion of judicial

authority. Absolutely nothing in the training or experience of judges remotely equips them to decide whether weapons systems or Social Security should be cut, and by how much.

Robert H. Bork, a former solicitor general and federal judge, once said an amendment would result in “hundreds, if not thousands, of lawsuits around the country, many of them on inconsistent theories and providing inconsistent results.”

“By the time the Supreme Court straightened the whole matter out,” he said, “the budget in question would be at least four years out of date and lawsuits involving the next three fiscal years would be slowly climbing toward the Supreme Court.”

Because judicial budgeting would so distort our constitutional system, federal judges might find a way to avoid playing such a profoundly inappropriate role. While that would preserve the judiciary as we know it, it would also render the amendment unenforceable.

That is not a good alternative. Placing an empty promise in the Constitution could have a very corrosive effect.

It would be wonderful if we could declare that from this day forward the air would be clean, our children well educated and the budget forever in balance. But merely putting such things in the Constitution — as some foreign governments have done — would not make them happen.

Walter E. Dellinger III, a lawyer at O'Melveny & Myers, was an assistant attorney general and acting solicitor general under President Bill Clinton.