

Background

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The House and Senate Balanced Budget Amendments: Not All Balanced Budget Amendments Are Created Equal

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Abstract: *Republicans in the House and Senate have announced that they will force votes on balanced budget constitutional amendments. While the Senate and House versions of the current BBA are similar, there are some important differences that Members of Congress and the American people need to understand. For example, the Senate version makes it more difficult to enact revenue-neutral tax reform, while the House version would waive its tax limitation in times of military conflict. How Congress resolves these differences could determine whether future Congresses and Presidents balance the budget without increasing taxes.*

Congress is preparing for a historic debate over what role—if any—a balanced budget amendment (BBA) to the U.S. Constitution should play in relation to the United States' statutory debt ceiling. Some conservatives in the U.S. House of Representatives and the U.S. Senate have demanded a vote on a balanced budget amendment. Other conservatives have gone as far as to demand passage of a BBA in the House and Senate as a precondition to passing a debt limit increase.

If the Senate and House were to pass identical versions of a BBA, the constitutional amendment would then be sent to the states for ratification.¹

Republican leaders in the House and Senate have declared that a vote will be scheduled in both chambers on their respective versions of a BBA. The differences between the two versions are significant: Clearly, not all BBAs are created equal.

Talking Points

- The House and Senate are expected to consider their versions of a balanced budget amendment later this month. Differences between the House and Senate BBAs are significant.
- Both versions provide waivers for war or military conflict. The Senate version mandates that all military spending for a military conflict be the specific amount exceeding balance; the House is silent on this point.
- The House version mandates a “three-fifths” vote of each chamber to pass an unbalanced budget; the Senate requires a “two-thirds” vote.
- The Senate version requires a two-thirds vote to “impose a new tax or increase the statutory rate of any tax or the aggregate amount of revenue”; the House merely subjects the same threshold to a “bill to increase revenue.”
- The Senate version specifically prohibits courts from imposing a tax increase; the House is silent. Courts should play no role in enforcing the BBA.

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The provisions that vary between the House and Senate versions of the BBA may have dramatic policy implications for federal spending. For instance, the two versions of the BBA diverge significantly on such threshold questions as how each amendment's provisions apply during times of "military conflict" and the number of votes required to waive the constitutional mandate that the budget be balanced during a fiscal year.

According to *Roll Call*, Republicans in the House and Senate have announced that they will force votes on balanced budget constitutional amendments.² The Senate is expected to vote the week of July 18, 2011, while the House is expected to vote on another version of the BBA during the same week.

While the Senate and House versions of the current BBA are similar, there are some important differences that Members of Congress and the American people need to understand. How Congress resolves these differences could determine whether future Congresses and Presidents balance the budget without increasing taxes.

The Senate BBA

Senator Mike Lee (R-UT) and Senator Jon Kyl (R-AZ) introduced a BBA that would cap spending as a percentage of gross domestic product (GDP), require supermajority votes to increase the debt limit or raise taxes, and prohibit the judiciary from using a BBA as authority to unilaterally order tax increases to balance the budget.³

Senator Lee's version of the BBA included the following three pillars:

- Requiring a balanced budget for each fiscal year;
- Limiting federal spending to no more than 18 percent of GDP; and
- Requiring a supermajority vote in both Houses of Congress in order to increase taxes, raise the debt ceiling, or run a specific deficit in a particular year.⁴

This version of the BBA, Senate Joint Resolution 5 (S.J. Res. 5), departed from the Contract with America version in that prior incarnations of the BBA did not include a spending cap.

Senator Orrin Hatch (R-UT) drafted a BBA that garnered unanimous support from all 47 Republican Senators. Senator Hatch introduced this BBA, referred to as Senate Joint Resolution 10 (S.J. Res. 10), on March 31, 2011.⁵

On June 29, 2011, Senate Minority Leader Mitch McConnell (R-KY) introduced an identical measure, Senate Joint Resolution 23 (S.J. Res. 23),⁶ which was then read onto the Senate Calendar on June 30. The McConnell BBA contains the following provisions:

- **Section 1.** Total outlays for any fiscal year shall not exceed total receipts for that fiscal year, unless two-thirds of the duly chosen and sworn Members of each House of Congress shall provide by law for a specific excess of outlays over receipts by a roll call vote.
- **Section 2.** 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

1. "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of Legislatures of two thirds of the several, States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress." U.S. Constitution, Article V.
2. Kate Ackley, "McConnell Looks to Wrap Up Budget Talks, Plans Balanced Budget Vote," *Roll Call*, June 26, 2011, at http://www.rollcall.com/news/mcconnell_looks_to_wrap_up_budget_talks_plans_balanced_budget_vote-206795-1.html?pos=hln (July 12, 2011).
3. Press release, "Senators Lee and Kyl Release Balanced Budget Amendment," Office of Senator Mike Lee, January 27, 2011, at <http://lee.senate.gov/public/index.cfm/2011/1/senators-lee-and-kyl-release-balanced-budget-amendment> (July 12, 2011).
4. *Ibid.*
5. *Congressional Record*, U.S. Senate, March 31, 2011, p. S2046.
6. *Congressional Record*, U.S. Senate, June 29, 2011, p. S4234.

provide by law for a specific amount in excess of such 18 percent 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—
 - (1) total outlays do not exceed total receipts; and
 - (2) total outlays do 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.
- **Section 4.** 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.
- **Section 5.** The limit on the debt of the United States shall not be increased, unless three-fifths of the duly chosen and sworn Members of each House of Congress shall provide for such an increase by a roll call vote.
- **Section 6.** The Congress may waive the provisions of sections 1, 2, 3, and 5 of this article for any fiscal year in which a declaration of war against a nation-state is in effect and in which a majority of the duly chosen and sworn Members of each House of Congress shall provide for a specific excess by a roll call vote.
- **Section 7.** The Congress may waive the provisions of sections 1, 2, 3, and 5 of this article in any fiscal year in which the United States is engaged in a military conflict that causes an imminent and serious military threat to national security and is so declared by three-fifths of the duly chosen and sworn Members of each House of Congress by a roll call vote. Such suspension must identify and be limited to the specific excess of outlays for that fiscal year made necessary by the identified military conflict.

- **Section 8.** No court of the United States or of any State shall order any increase in revenue to enforce this article.
- **Section 9.** 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 those for repayment of debt principal.
- **Section 10.** The Congress shall have power to enforce and implement this article by appropriate legislation, which may rely on estimates of outlays, receipts, and gross domestic product.
- **Section 11.** This article shall take effect beginning with the fifth fiscal year beginning after its ratification.

The Senate is expected to commence debate on S.J. Res. 23 during the week of July 18, 2011.

The House BBA

In the House of Representatives, conservatives are considering two competing versions of the BBA. On June 15, 2011, Representative Bob Goodlatte (R-VA) introduced House Joint Resolution 1 (H.J. Res. 1),⁷ which the House Judiciary Committee subsequently approved. Representative Joe Walsh (R-IL) introduced House Joint Resolution 56 (H.J. Res. 56)⁸ as a companion measure identical to the Hatch version (S.J. Res. 10) on April 6, 2011. The House is expected to move forward on H.J. Res. 1.

H.J. Res. 1, which the House Judiciary Committee approved by a 20–12 vote, reads as follows:

- **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.** Total outlays for any fiscal year shall not exceed 18 percent of economic output of the United States, unless two-thirds of each House of Congress shall provide for a specific increase of outlays above this amount.

7. *Congressional Record*, U.S. House of Representatives, January 5, 2011, p. H40.

8. *Congressional Record*, U.S. House of Representatives, April 6, 2011, p. H2410.

- **Section 3.** 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 rollcall vote.
- **Section 4.** 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 5.** A bill to increase revenue shall not become law unless two-thirds of the whole number of each House shall provide by law for such an increase by a rollcall vote.
- **Section 6.** 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 7.** The Congress shall enforce and implement this article by appropriate legislation, which may rely on estimates of outlays and receipts.
- **Section 8.** 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 9.** 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.

The House is expected to debate H.J. Res. 1 during the week of July 18, 2011.

Differences Between S.J. Res. 23 and H.J. Res. 1

Waivers for War or Military Conflict

Both the Senate and House versions of the BBA provide for a waiver during a war or military conflict because an unyielding requirement to balance the

budget during such times might unduly constrain the U.S. military, but these waiver provisions differ dramatically and warrant close scrutiny. Specifically, the House provision would suspend the entire BBA, while the Senate version would permit only a partial waiver when the U.S. is engaged in a congressionally authorized “military conflict.”

Both the Senate and House versions of the BBA provide for a waiver during time of declared war. The House version would waive all provisions of the BBA, and the Senate version would waive all provisions of the BBA with the exception of Section 4, which requires a two-thirds vote in each chamber to increase taxes.

The Senate version requires a higher threshold for waiver during “military conflict” than for official declarations of war. Section 6 of the Senate version allows for Congress to waive certain provisions of the BBA “for any fiscal year in which a declaration of war against a nation-state is in effect” by a majority vote of both chambers. Section 7 allows for Congress to waive certain provisions “in any fiscal year in which the United States is engaged in a military conflict that causes an imminent and serious military threat to national security and is so declared by three-fifths” of both the House and Senate.

The House version allows Congress to waive the whole BBA “for any year in which a declaration of war is in effect” or “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.” The House waiver provision would go into effect with a simple majority vote of each chamber.

Neither the House nor the Senate version would require a declaration of war as a predicate to waive certain provisions of the constitutional amendment. The Senate version requires a supermajority to authorize a waiver, whereas the House version requires a mere simple majority to waive during time of authorized “military conflict.”

For example, if a majority, but less than three-fifths, of each chamber authorized a waiver of the BBA during military conflict, the House version would allow Congress to waive the entire amendment and deficit-spend in areas unrelated to the

military conflict. The Senate version would not allow a waiver, because both chambers would have to approve a waiver by a three-fifths vote. For the House version, the declaration of “military conflict” allows a waiver by majority vote of both chambers, whereas the Senate version would allow a waiver only if three-fifths of both chambers voted affirmatively. This is a significant difference in the two approaches to securing a waiver during a “military conflict.”

Additionally, the Senate BBA requires that, even if the United States were in a state of declared war or a military conflict, the House and Senate would still have to pass a revenue or tax measure by a supermajority roll-call vote. The House version does not contain such a requirement.

A specific condition on the nature of funding a “military conflict” appears in Section 7 of the Senate version but is absent in the House version. This condition would require Congress to specify the amount necessary for the military conflict as part of the budgeting process. The Senate resolution states that “such suspension must identify and be limited to the specific excess of outlays for that fiscal year made necessary by the identified military conflict.” The deficit for a fiscal year envisioned in the Senate version is limited to the cost of the military conflict itself, and in no circumstances can it be used to justify deficit spending elsewhere in the government.

The House waiver provision, on the other hand, is exceptionally broad in that it would give Congress *carte blanche* authority to deficit-spend on non-military items such as education, entitlements, transportation, or any other area where the federal government spends taxpayer dollars.

The requirement for a simple majority vote, coupled with the provision allowing non-military spending to breach a balanced budget requirement during times of military conflict, weakens the practical effects of the House BBA. Since the United States has been in a continuous state of “military conflict” since 2001 and may continue in such a state for the foreseeable future, the House language could be used to justify budget deficits for many years to come.

Effective Date

The two versions of the BBA have different effective dates. Both dates, however, give Congress and the President time to prepare to meet the BBA’s balanced budget requirement.

Section 11 of the Senate version of the BBA states that the budget must be balanced “beginning with the fifth fiscal year beginning after [the amendment’s] ratification.” Section 9 of the House version makes the effective date “beginning with the later of the second fiscal year beginning after [the amendment’s] ratification or the first fiscal year beginning after December 31, 2016.”

The Senate version allows for Congress to take five years to balance the budget no matter what year the states ratify the constitutional amendment—a provision that gives Congress five years to develop a plan to chip away at overspending.

If it were to be ratified this year, the House version gives Congress until 2016 to balance the budget. But what if it takes five years for Congress to ratify the amendment? The House version would give Congress two years to put the budget in balance. For a Congress that has had a hard time coming even close to balancing the budget, this requirement might prove rather daunting.

Total Outlays v. Total Receipts

The House and Senate versions of a BBA include a procedure by which more than a majority is necessary for Congress to pass an unbalanced budget. This provision in both measures allows some flexibility in the operation of a BBA. There may be a time when a supermajority of House and Senate Members deems it necessary to spend more than is taken in for a specific fiscal year.

The House and the Senate versions differ on the percentage of votes required to pass an unbalanced budget for a given fiscal year. Section 1 of the Senate version provides for a “two-thirds” vote of each chamber to pass an unbalanced budget; Section 1 of the House version provides for a “three-fifths” vote of each chamber.

If the House version were to become part of the Constitution, the House would need 261 votes and the Senate would need 60 votes to pass an unbal-

anced budget. If the Senate version were to become an amendment to the Constitution, the House would need 290 votes and the Senate would need 67 votes to pass an unbalanced budget. The House version would create a lower threshold to run budget deficits.

Clearly, the Senate version makes it tougher for Congress to waive the BBA during a time when the U.S. is at peace with other nations.

Prohibition on Court-Ordered Tax Increases

Section 8 of the Senate BBA states that “no court of the United States or of any State shall order any increase in revenue to enforce this article.” This provision would prohibit activist federal judges from ordering tax increases as a means to balance the budget. This provision is absent in the House version.

While preventing the courts from raising revenue is certainly prudent, it is not enough. The courts can still meddle with a BBA—for example, by issuing declaratory judgments or choosing how to balance the budget. The only way to prevent activist judges from intruding on political questions such as spending choices is a complete ban on judicial enforcement of the amendment. Any BBA should contain such a complete and explicit ban on judicial enforcement.⁹

The President’s Budget

The House and Senate BBAs require that the President submit a balanced budget to Congress. This provision is subject to waiver during time of military conflict or war, but during times of peace, the President would be bound by the Constitution to submit balanced budgets to Congress each fiscal year.

The House and Senate versions differ on the constitutional requirements for the content of the President’s budget. Section 3 of the Senate version provides that two conditions must be met by the President’s submission to Congress. First, “total outlays do not exceed total receipts.” This provision is

identical to the condition in Section 4 of the House version. Second, the Senate version adds a condition not included in the House version that “outlays do 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.” The Senate version references “gross domestic product,” but the House version is silent on GDP.

There is one other significant difference. Section 2 of the House version caps spending at “18 percent of the economic output of the United States,” whereas the Senate version states (also in Section 2) that spending is capped at “18 percent of the gross domestic product of the United States” for the prior calendar, not fiscal, year. This provision will allow for different calculations with regard to how the 18 percent number is reached in both approaches.

In truth, both the House and Senate versions may become problematic. The House version is vague in that it does not explain who calculates “18 percent of the economic output of the United States.” The Senate version may not be transparent. Limiting growth in gross domestic product to the prior calendar year may essentially limit spending to less than 18 percent of GDP.

On average, growth in GDP has historically been at about 3 percent to 4 percent, which means that spending is capped closer to 17 percent of GDP for the current fiscal year. While capping spending at 17 percent of GDP might be desirable, it must be understood that “18 percent” calculated by looking back at a prior year’s GDP would result in a figure that is actually lower than 18 percent.

Tax Increases

The House and Senate BBAs are designed to make it difficult for Congress to use tax increases as a means to balance the budget. Once amended, the Constitution would contain a provision that would force a supermajority in both chambers to raise taxes on the American people in order to balance the budget, with certain exemptions in one version.

9. See Todd Gaziano and John Yoo, “Just Say No to Judicial Enforcement of a Balanced-Budget Amendment: It’s an Invitation to Judicial Activism,” *National Review Online*, March 9, 2011, at <http://www.nationalreview.com/articles/print/261755> (July 12, 2011).

The House and Senate versions differ significantly on what measures would be subject to the tax limitation provision in the amendments. Section 4 of the Senate version subjects any measure that “imposes a new tax or increases the statutory rate of any tax or the aggregate amount of revenue” to a two-thirds vote of both chambers. Section 5 of the House version, however, merely states that “a bill to increase revenue” would trigger a constitutionally mandated two-thirds vote. The Senate language would encompass far more legislation and subject that legislation to a supermajority vote.

For example, if a measure were to create a new tax yet cut taxes commensurately in another area of the tax code, the Senate version would subject that to a two-thirds vote; the House version would allow that measure to go forward under the regular order of the House and Senate. The same would happen if one tax rate was increased and another was to be decreased in a revenue-neutral manner.

The Senate version would make revenue-neutral tax reform much more difficult to pass with a two-thirds vote, but it would be a strong deterrent for Members to cut taxes on one sector of society while raising taxes on another.

Making it more difficult to conduct revenue-neutral tax reform is a big concern for many conservatives. Consequently, some conservatives may need to rethink the specifics of this provision. Conservative revenue-neutral tax reform would raise taxes on those taxpayers who lose exemption and deductions and impose one rate that would initially take in the same amount of revenue.

The Senate language may deter using the tax code as a means to forward the cause of class warfare, but conservatives would be effectively abandoning revenue-neutral tax reform if they allowed the language in the Senate BBA to be sent to the states. There are serious trade-offs in this debate and consequences for the specific working of the House versus the Senate provision imposing supermajorities to raise revenues or taxes.

Also, if the provisions relating to a declaration of war or military conflict are satisfied by the House version, then the Congress may increase taxes through the regular order. The Senate version spe-

cifically makes the tax increase provision subject to a two-thirds vote waiver during time of war or military conflict. The waiver of a BBA during time of war or “military conflict” under the Senate version does not affect the application of the supermajority requirement to raise taxes; there is no such exemption in the House version.

Enforcing Legislation

The House and Senate versions differ on the authorization for legislation to enforce the BBA. Section 7 of the House version allows Congress to enforce and implement the BBA “by appropriate legislation, which may rely on estimates of outlays and receipts.” Section 10 of the Senate version, however, allows enforcement “by appropriate legislation, which may rely on estimates of outlays, receipts, and gross domestic product.” The Senate’s version specifically references GDP, whereas the House version is silent on this point.

Conclusion

These proposed balanced budget amendments differ on some fundamental issues that would dramatically affect the way Congress attempts to balance the budget. The House version, for example, is easier to waive. There is a lower threshold to declare military conflict in the House version that would allow for an easier waiver. Also, the tax limitation—forcing a two-thirds vote to increase taxes—would be waived in times of military conflict in the House version. The House version allows a lower supermajority threshold to pass an unbalanced budget than the Senate version does.

The Senate version makes it more difficult to enact revenue-neutral tax reform. The provision that forces a two-thirds vote to raise any tax would make it more difficult to modify the tax code in a revenue-neutral manner to implement a flat tax. For a flat tax to work, some Americans might have their tax rates increased as a means to make every American pay the same rate.

Also, neither version contains the complete ban on judicial enforcement that is necessary to prevent activist judges from setting budget priorities, which is a job reserved for the political branches of government.

The differences between the House and Senate BBAs may seem small to those who are not steeped in the budget process, but they will have a dramatic impact on the lives of all Americans. Ultimately, these differences would need to be reconciled in a manner that leads to a balanced budget without

jeopardizing U.S. military interests or punishing taxpayers.

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