

A Good Plan for a Bad Idea

By Lawrence Lessig

Wall Street Journal; Dec 6, 1996; ProQuest

pg. A.18

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It's been two years since Republicans almost succeeded in proposing an amendment to the Constitution to require a balanced budget. Principled and strong opposition from President Clinton killed it. Times have changed, and so have the votes. The president's opposition may now be gone. Some balanced budget amendment is likely to pass both houses of Congress next year. So our focus now should be on an amendment that works, without eroding much in our constitutional tradition that is good.

The problems with the proposals are all well-known. The idea of a balanced budget may be a good one. (I don't happen to think so, but never mind.) The problem is how to achieve it. Most proposals envision some role for the courts as final arbiters of budget disputes. But as constitutionalists on the left and right have argued, involving the courts in such a process would be a disaster for the budget and for the courts. Balancing budgets is an inherently political act, and courts are meant to be studiously apolitical, even if they don't always live up to that ideal. An amendment that forced judges into the center of a political struggle would sap from the courts the neutrality that they generally work so hard to preserve.

On the other hand, an amendment without an effective way to enforce it would be a disaster as well. Ours is not a Constitution that is filled with aspirational commands. We mean our Constitution to mean business, which means we mean it to constrain elected officials when called for. Obviously, the paper restraint of a balanced budget amendment without a way to enforce it would be bad constitutionalism, regardless of the merits of the ideal.

There's a simple solution to both problems, and it's time that Congress consider it. The idea is to mix the balanced budget amendment with the line-item veto. A balanced budget would still be the Constitution's demand, but if this demand were not met, the remedy would be the veto. Congress would get first crack through the normal budget process. But if it failed, the courts wouldn't take over. Instead the president would get his chance to achieve balance through a constitutionalized line-item veto. (The president next year will have a statutory line-item veto, but that power is too weak—it could be taken away by a future Congress, for example—and too strong—it gives the president veto power even if the budget is balanced.) The line-item veto then is the remedy—and the

only remedy—for a failure to balance the budget, but it is a remedy imposed by a branch of government better able to make the political choices that a budget requires.

The benefits of such an amendment should be obvious. The Founders thought Congress best able to control the budget process. We should try and stick with their choice, insofar as possible. But if Congress fails to live up to the balanced budget ideal, then and only then, the president should give it a shot too. Using the power of a line-item veto, the president would then cut spending to achieve a balance, at least if he believes he should.

One advantage of this idea is that it would leave up to the president, an elected official, the choice of whether and how to seek balance. Another advantage is its flexibility. The present balanced budget proposals are all inflexible. Yet most political observers agree that sometimes flexibility is needed—that sometimes it makes no sense to require the budget be balanced, for example in war or recession. In these instances, the last thing the country needs is some district court judge declaring the budget unconstitutional because it's unbalanced. Whether it should be balanced in a particular case is a judgment courts can't make. But it is just the sort of judgment presidents make all the time. By giving the enforcement of the budget amendment to the president, we would place it in the hands of someone who could be trusted to take into account these practical considerations. And if he chose not to cut spending, the aspiration of the Constitution notwithstanding, then he would no doubt have to explain why, and then face all the political costs (or benefits) that such a decision might bring.

Adding the president to the process is better than allowing Congress to override the requirements of the amendment in an emergency. As columnist Anthony Lewis has argued, giving Congress the override threatens political stalemate. With 535 legislators on Capitol Hill, it's hard to pin down who to blame if balance isn't achieved. And if no reason were apparent, then there would no way for someone to pay the political price for failing to live up to the requirements of the Constitution. If the president had the duty, however, then he would take the heat.

This is just the political check a system of budgeting requires. Gimmicks have not been the hallmark of our constitutional tradition; they should not become its staple now. If America has decided that its

budget should be balanced, then it should implement that decision in a way that does least damage to other parts of our constitutional tradition. Budgets are politics writ large; they are not the stuff for courts. If we need a balanced budget amendment, then we need one that achieves its balance through political institutions—Congress and the president, not the courts.

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