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In This Issue

Balanced Budget Amendment Would Impede Economic Recoveries

Over the past 30 fiscal years, the federal government has run a surplus only three times. In the past three years, the government has seen deficits totaling almost $3.5 trillion, and the Congressional Budget Office's (CBO) baseline prediction shows deficits for at least the next decade. With such a history and with the recent rise of the Tea Party and its fiscally conservative contingent in Congress, it is unsurprising that balanced budget amendments to the Constitution are once again finding their way to the national agenda. While forcing Congress to balance the books through a constitutional mandate may be appealing to many fiscal hawks, a balanced budget amendment could impede economic recoveries following Wall Street meltdowns and other calamities.

A simple balanced budget amendment requires that at the end of the fiscal year, federal revenues match or exceed federal spending. With statutory Pay-As-You-Go (PAYGO) on the books – requiring offsets for any new mandatory spending or tax cuts – a balanced budget amendment seems like the next logical and fiscally responsible step.

Balanced budget amendments were last seriously considered in the mid- to late-1990s when budget deficits were also dominating the political discourse. Indeed, amendments came close to passing twice, once in the 104th Congress and once in the 105th Congress, driven by then-ascendant Republican majorities. Both times, though, the amendment failed to achieve the necessary two-thirds majority in the Senate by only one vote (the House easily passed the amendment in the 104th Congress).

Now, with a Republican House again agitating for what it deems fiscal responsibility, proponents are making another push. Likewise, after the 2010 election, the Senate Republican caucus unanimously approved a resolution calling for a balanced budget amendment, and Sens. Orrin Hatch (R-UT) and John Cornyn (R-TX) recently began circulating a letter asking for cosigners to a Senate version of the amendment.

Passing such an amendment, though, would hinder the government's capacity for combating economic downturns. A strong majority of economists believe that the government plays an important role in moderating the ups and downs of the business cycle, primarily through increasing aggregate demand; that is, putting enough purchasing power into the economy to get businesses to hire workers to meet the new demand. Federal spending also plays another key role: it helps cushion the blow of a faltering economy through "automatic stabilizers."

According to the Tax Policy Center, "automatic stabilizers are features of the tax and spending systems that, by design, offset fluctuations in economic activity without direct intervention by policymakers." In other words, automatic stabilizers are features of the federal budget that automatically adjust in real time when economic tragedy strikes. Examples include programs like unemployment insurance and food stamps, which do not have set enrollment levels and thus see higher usage when the economy dips. Similarly, various tax provisions, such as the Earned Income Tax Credit, function in the same way, but through the tax code.

Automatic stabilizers not only translate into benefits for those hardest hit by recessions, they also have an effect on the greater economy. Thanks to an economic phenomenon known as the multiplier effect, each dollar spent on these programs, either through lower taxes or more benefits, rebounds throughout the nation's economy, greatly increasing the dollar's impact. One study found that the automatic stabilizers in the tax code "offset perhaps as much as 8 percent of initial shocks to GDP [Gross Domestic Product]."

However, this spending, which Congress does not specifically offset, automatically increases the deficit. While automatic stabilizers adjust as the economy starts faltering, it would be difficult for legislators to act as fast if a balanced budget amendment required lower spending or higher taxes to offset the stabilizers. More importantly, though, offsetting the cost of the automatic stabilizers defeats their whole purpose: they pump money into the economy just when it needs it. By raising taxes or cutting spending, the government would be giving out money with one hand while taking it back with the other, reducing the stabilizers' effectiveness.

A balanced budget amendment would create a constitutional mandate for such offsets, effectively preventing the government from acting quickly to help modulate GDP fluctuations.

Indeed, the practical requirements of a balanced budget amendment might have a wide-ranging effect on the federal budget and could require spending caps or enrollment maximums on mandatory spending programs and tax provisions. Of course, a balanced budget amendment would make actual stimulus bills such as the American Recovery and Reinvestment Act (Recovery Act), which are often deficit-financed, all but impossible to pass.

Many of the balanced budget amendments currently before Congress come with other provisions that would hamper the federal government's operations. The most drastic of the proposals is House Joint Resolution 1, which, in addition to requiring a balanced budget every year, would also set a limit on spending levels, cap the debt ceiling, and require a super-majority vote for increasing revenues. None of these provisions are necessary for balancing the budget, but they would make it difficult for the government to react to changing fiscal situations. The resolution currently has 98 sponsors in the House.

Balanced budget amendments face other practical problems, as well. First, it is difficult to predict revenue and outlays accurately for the coming fiscal year, again thanks to budget items like automatic stabilizers that rise and fall with economic fortunes. Looking at the federal budget estimates from 1983 to 2005, the Tax Policy Center noted that "the average absolute error in the five-year revenue projection of the Congressional Budget Office (CBO) caused by changes in the economic and technical assumptions was 1.6 percent of GDP, which would be $219 billion at the 2007 level of GDP." With errors like that ($219 billion would be equal to the 2007 budgets of the Departments of Transportation, Education, Health and Human Services, and Homeland Security), Congress could unintentionally violate the amendment after the fact, such as when a year's unexpectedly low revenues do not cover unforeseen costs.

But there is another issue: which entity would enforce a balanced budget amendment? The balanced budget amendments being considered are all enforced through future legislation, but even that raises a whole host of questions. Would the executive branch be responsible for keeping budgets balanced, say through sequestration? What if the president refused to act? Would the judicial system have to get involved every time Congress passed an unbalanced budget? Would anyone even have standing to bring a lawsuit? Balanced budget amendments exist in a legal gray area of the fiscal world.

Ultimately, while balanced budget amendments have significant support in Congress, it may be impossible to add such an amendment to the Constitution. The current economic slump has shown how important the federal government is in filling fiscal gaps in state budgets, and governors and state legislatures have not missed that lesson, despite remarks by some to the contrary. With stimulus efforts like the Recovery Act playing a large role in helping the states weather the recession, state leaders know how crucial federal economic stabilizers are. With any constitutional amendment requiring ratification by three-fourths of the states, this could prove to be a hard sell.

DOD Getting a Better Handle on Contractor Numbers

The Department of Defense (DOD) and the branches of the armed forces utilize hundreds of thousands of contractors to perform a multitude of support functions each year. This includes everything from management and information technology (IT) support to intelligence work and weapons maintenance. Until 2008, neither the Pentagon nor the military branches knew exactly how many contractors they employed, nor were they required to find out. A new Government Accountability Office (GAO) report sheds some light on the Pentagon's congressionally mandated efforts to tally its contractors, along with whether DOD is using the information to make better personnel decisions.

While contractors can offer the federal government flexibility, overuse of contractors can transfer important government responsibilities into private hands, creating conflict-of-interest issues. Moreover, a culture of dependency can arise because the government loses the capability to perform certain tasks without the aid or outright assumption of the function by a contractor. Rules exist to help prevent contractors from performing "inherently governmental" functions, but due to their vague wording – and a less-than-effective recent update – enforcement depends greatly on the executive branch.

In one of his first executive actions, President Obama called for greater transparency and efficiency within the government contracting process. In April 2009, Secretary of Defense Robert Gates reinforced this goal by announcing a plan to reduce the Pentagon's reliance on contractors by bringing several functions "in house." The plan entailed cutting 33,000 service support contractors by 2015, replacing them with 39,000 new full-time government employees. This is in contrast to the growth in DOD contracting seen in recent years, as spending on contractor services more than doubled between 2001 and 2009.

To make the best decisions possible, though, the Pentagon needs to know exactly how many contractors are under hire and what functions they are performing. In 2008, Congress required the Pentagon to begin just such an annual exercise. Then, in the FY 2010 National Defense Authorization Act, Congress directed GAO to review the survey.

The most recent finding, while affirming the distressing fact that Defense Department contractors are performing inherently governmental functions, shows that the Pentagon and the military branches are doing a better job at collecting data on contractors. This allows the agencies to gain a better picture of the contracting landscape and to make informed personnel decisions. These personnel decisions are important, as GAO found that DOD and the military branches employed roughly 766,000 service contractors in FY 2009; because of limited information, they could not accurately estimate the total number of contractors performing inherently governmental tasks.

Of course, not all of the military departments utilize the same approach to reviewing the number of contractors under hire or the activities they perform, which affects each department's ability to use the information to make better workforce decisions. The Army takes a centralized approach, incorporating contractor-reported data, including direct labor hours, from its

Contractor Manpower Reporting Application (CMRA), to identifying contractors and the tasks they perform. The Air Force and Navy, on the other hand, use a more decentralized method that relies on major commands to collect the numbers and information and then feed them up to the departments. According to GAO, the Army's approach is more effective at reaching an accurate number while also properly identifying functions the department should in-source.

The latest review found that of the Army's approximately 262,000 service contractors employed during FY 2009, some 2,300 contractors performed inherently governmental functions and close to another 46,000 contractors executed tasks closely associated with inherently governmental functions. Most significantly, close to 1,900 contractors provided "unauthorized personal services," or tasks that the military should not have even bid out in the first place, no matter what. Numbers for the Air Force and Navy were not available due to the departments' defective data collection abilities.

No matter how accurate the Pentagon's information, though, a lack of funding to convert contractors to civil service employees will thwart any in-sourcing effort. Indeed, just over a year after announcing his department's effort, Gates announced that the Pentagon – though only the Pentagon and not the military branches – would halt its in-sourcing effort because of anticipated budget crunches. According to Gates, "We weren't seeing the savings we had hoped from in-sourcing." While the secretary did not provide specifics, it seems that the positions the Defense Department was not required to in-source, yet did so anyway, did not provide significant savings. It should be noted, however, that bringing a function in-house usually does cost less over the long run.

According to *Government Executive*, as of June 2010, DOD has created more than 16,500 civilian positions due to in-sourcing contracted services. According to a Defense Department employee, the agency brought more than half of the positions in-house because it determined the work to be inherently governmental or closely associated with an inherently governmental task. Moreover, the employee estimated that the Pentagon would add another 12,000 new civilian positions in FY 2011 despite the budget fears.

GAO recommends that the Pentagon provide the military branches with clear guidelines on how to collect contractor data and asses the various functions they perform under their command. This should help DOD make more informed manpower decisions in the future and may prevent the government from becoming further dependent on contractors to perform functions that only government employees should undertake.

Corporate Secrecy at Issue in Supreme Court Case

The U.S. Supreme Court heard oral arguments on Jan. 19 in a case that could have far-reaching ramifications for public access to corporate-related information. AT&T, fighting to prevent disclosure of Federal Communications Commission (FCC) files investigating the company, has argued that releasing the documents under the Freedom of Information Act (FOIA) would

damage the company's privacy. This argument comes despite the fact that the expectation of privacy has long been recognized only as an individual right, not a corporate one.

A decision in the company's favor in *Federal Communications Commission v. AT&T, Inc.* would erect a major new obstacle to public access to information about federal interaction with corporations, including regulatory compliance and criminal investigations. Transparency advocates and privacy experts have asked the Court to overturn a lower court decision in favor of AT&T.

The Case

In August 2004, SBC Communications admitted improperly charging for services under an FCC program to subsidize phone and Internet access for schools and libraries. (In 2005, SBC merged with AT&T.) SBC returned the money and paid an additional $500,000 to the government under the terms of a consent decree adopted in December 2004, in exchange for the FCC closing its investigation into the matter.

In April 2005, Comptel, a trade association whose members include AT&T competitors such as Sprint and Verizon, submitted a FOIA request for the FCC's investigation file. SBC opposed the request on the grounds that the records were exempt from release under FOIA's "personal privacy" provision. In August 2005, the FCC decided to release the records because "generally, businesses do not possess 'personal privacy' interests." SBC appealed the agency's decision.

In September 2008, the FCC decided against SBC's appeal, noting FCC and judicial precedents that FOIA's personal privacy exemption would not apply to SBC in its corporate capacity. "We do not believe that protecting a corporation from 'embarrassment' falls within the purposes of Exemption 7(C)," the decision stated. AT&T filed suit to prevent the disclosure.

In September 2009, the Third Circuit Court of Appeals sided with AT&T, ruling that corporations could use FOIA's personal privacy exemption because "'personal' is the adjectival form of 'person,' and FOIA defines 'person' to include a corporation ... Corporations, like human beings, face public embarrassment, harassment, and stigma." In April 2010, the government asked the Supreme Court to hear the case, and the Court accepted in September 2010.

In November and December 2010, the government and AT&T filed their briefs in the case, along with Comptel and several *amici curiae*. "The court of appeals' decision is itself a singular outlier in an otherwise uniform body of more than 35 years of decisional law and commentary," the government argued in its brief. "A corporation itself can no more be embarrassed, harassed, or stigmatized than a stone."

Potential Effects

Siding with AT&T would "erode the public's right to know," according to Sandra F. Chance, executive director of the University of Florida's Brechner Center for Freedom of Information.

"This is unacceptable, especially when the documents in dispute concern taxpayer funds paid to AT&T."

"Broad new swaths of previously public records will be hidden from view" if the court rules for AT&T, writes Rebecca Jeschke of the Electronic Frontier Foundation, which generally supports individuals' privacy claims. "It's not hard to imagine how documents on the BP oil spill, or coal mine explosions, or the misdeeds of Bernie Madoff's investment firm might be significantly harder to find if AT&T's misguided arguments prevail."

A.C. Ranasinghe writes for the Sunlight Foundation that "federal agencies already have difficulty complying with FOIA requests in a timely fashion whenever business entities object to disclosure. Extending the privacy exemption to corporations may make businesses more able to resist or significantly delay public disclosure."

"Corporations across the country would gain a new weapon to deny public records and to hinder reporters' abilities to investigate not only corporate activities but also to monitor the federal regulators who police those corporations," said Hagit Limor, president of the Society of Professional Journalists.

Oral Argument

Reports from the oral argument seemed unfavorable to AT&T's case. "It might be an understatement to say the Supreme Court on Wednesday seemed skeptical that corporations have 'personal privacy' rights," wrote *The Washington Post*. "The justices did not seem ready to affirm the lower court ruling for AT&T," wrote *USA Today*. *The New York Times* described "widespread skepticism."

Grammar and word origins played a considerable role in the arguments. Assistant Solicitor General Anthony A. Yang, arguing for the government, stated that "'person' is used in certain legal contexts to refer to artificial persons and corporations and the like, 'personal' is not." Chief Justice John Roberts noted several instances "where the adjective was very different from the root noun," including "craft" and "crafty," "squirrel" and "squirrelly," "pastor" and "pastoral."

The case also featured a sort of role reversal. As the *Wall Street Journal* noted, "Usually in Freedom of Information Act cases, the government is on the opposite side, fighting to withhold documents from the public." However, Yang explicitly declined to endorse the Court's frequently held view that all exemptions to FOIA are to be interpreted narrowly. In December, Yang argued in a separate case for a broad interpretation of a different FOIA exemption.

Other Corporate Secrecy Issues

The week of Jan. 17 marked the one-year anniversary of the Supreme Court's decision in *Citizens United v. Federal Election Commission*, which permitted new forms of corporate spending to influence elections, for which few disclosure requirements currently exist. Though the Court upheld the long-standing but controversial notion that corporations are "persons"

entitled to certain rights under the Constitution, the majority opinion also noted that disclosure regimes were permitted, seemingly pushing back against the idea that corporations are entitled to "personal privacy" rights.

The DISCLOSE Act, which attempted to institute stronger transparency for corporate spending in elections, passed the House but was unable to overcome a Republican filibuster in the Senate, keeping in place the cloak of secrecy and the potential for corruption that surrounds corporate campaign spending.

In addition, a proposal in 2010 to post federal contracts online faced opposition from corporations. Corporations have also used claims of "confidential business information" to prevent disclosure of dangerous chemicals.

Obama's Regulatory Reforms Protect the Status Quo

On Jan. 18, President Obama issued a long-awaited executive order on the regulatory process and two related presidential memoranda. The order and the memos are aimed at reaffirming the existing regulatory process rather than significantly reforming it. The most impactful of the three documents is likely to be the memo on regulatory compliance, which stems from the administration's commitment to greater government accountability.

In a Jan. 30, 2009, memo, Obama sought to reform the regulatory process, stating that the principles set out in Executive Order 12866 (E.O. 12866), "Regulatory Planning and Review," "should be revisited." E.O. 12866 is the 1993 presidential order that defines much of the structure by which agencies produce regulations.

The president's 2009 memo asked agencies to develop within 100 days recommendations for a new order. In an unprecedented step, the administration solicited public comments on the development of the order, and it received comments from approximately 160 different organizations and individuals. Nearly two years later, the new executive order reaffirms the principles contained in E.O. 12866 and adds some positive new elements. The order does little, however, to change the existing burdensome regulatory process and could potentially distract agencies with time-consuming reviews of regulations, depending on how the administration implements the order. It is unclear whether any of this is the result of Obama's 2009 memo or the recommendation and public comment process that followed.

Besides reaffirming key elements of E.O. 12866, the new order emphasizes three concepts. First, the order states that "regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole."

This focus on public participation tracks efforts within the administration to improve electronic rulemaking by encouraging agencies to have an "open exchange of information" and to create

more complete rulemaking dockets. This section urges agencies to provide "timely online access to the rulemaking docket on Regulations.gov, including relevant scientific and technical findings" in "open formats" that can be easily searched and downloaded.

Second, the order emphasizes the administration's focus on scientific integrity in the rulemaking process, an issue not addressed by E.O. 12866. Section 5 of the order states, "Consistent with the President's Memorandum for the Heads of Executive Departments and Agencies, 'Scientific Integrity' (March 9, 2009), and its implementing guidance, each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions."

In addition to the March memo, the Office of Science and Technology Policy issued a memo to executive branch agencies touting the importance of science in policy development and identifying three issues in need of agency attention: federal scientists' right to communicate their work to the media and the public; scientific and technical advice developed and presented by federal advisory committees; and professional development of federal scientists and engineers. Scientific integrity issues became an important focus of this administration because of the extensive political interference in scientific and technical issues exerted by the Bush administration.

Third, the Obama order contains a section called "Retrospective Analyses of Existing Rules," which directs agencies to consider how to best review rules "that may be outmoded, ineffective, insufficient, or excessively burdensome." This section requires agencies to submit to the Office of Information and Regulatory Affairs (OIRA) preliminary plans by which agencies will periodically review existing rules. Agencies already conduct reviews of some rules as requirements or needs exist.

E.O. 12866 has similar language, which required a "program" within 90 days, while the new E.O. asks for only a "preliminary plan" within 120 days. The new order urges agencies to release the results of the retroactive analyses; E.O. 12866 was silent on the topic of disclosure of reviews.

Obama's memo entitled "Regulatory Flexibility, Small Business, and Job Creation" accepts the long-held position of corporations and conservatives that regulations impose unnecessary burdens on small businesses. This assumption was reflected in the Regulatory Flexibility Act (RFA), enacted in 1980. The law requires agencies to conduct an assessment of a proposed regulation's impact on small entities.

While the memo provides little in the way of new requirements, it does say that agencies are "to reduce regulatory burdens on small businesses..." There is no emphasis on balancing these burdens with the benefits generated by public protections, and the approach is inconsistent with the balancing of costs and benefits, which the administration has been advocating for the last two years. Moreover, the memo states that regulatory flexibility analyses that agencies conduct under the RFA are intended to ensure that proposed and final rules "are less likely to be based on intuition and guesswork." In making such a statement, the memo repeats a false notion perpetuated by anti-regulatory forces. In fact, public protections are usually developed in a

painstaking fashion based on fact, science, interagency review, and extensive public comment periods.

The second memo released by the president as part of his regulatory reform strategy is about regulatory compliance. The memo builds on the government accountability agenda of the administration by focusing on disclosure of regulatory data by agencies. It directs agencies to develop within 120 days plans to disclose regulatory compliance and enforcement activities in online, searchable formats. This disclosure is intended to allow the public and the Office of Management and Budget (OMB) to more easily assess which agencies are most effectively enforcing compliance and reducing overlapping enforcement efforts. If fully implemented, the emphasis on transparency should allow the public to hold the administration accountable for its enforcement actions.

Viewed as a whole, the reform policies issued by the administration do little to achieve the transformation of the regulatory process that Obama called for when he ordered E.O. 12866 to be revisited. Rather than defend the work of his administration in providing health, safety, and environmental protections, the policies leave in place a process designed to delay and stifle agencies' abilities to produce timely and responsive policies to address the serious problems facing the nation.

Obama Continues Post-Spill Reforms to Better Police Drilling

The Obama administration continued revamping offshore oil drilling regulation by recently announcing the next step in its plans to reorganize the Department of the Interior – creating a new agency to oversee drilling safety.

Reorganizing the Interior Department has been a high priority for the Obama administration in the wake of the BP-Deepwater Horizon oil spill and its aftermath, which exposed major loopholes and conflicts of interest in the process for approving and monitoring offshore drilling. President Obama's commission investigating the spill also called for a bureaucratic overhaul.

In the administration's latest move, Interior Secretary Ken Salazar announced Jan. 19 that he would split the department's Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) in two, tasking one agency with reviewing drilling plans for their environmental and economic impacts and the other with making decisions on permits and conducting on-site inspections. BOEMRE, which will disband once the bifurcation is complete, is one of the successors to the Minerals Management Service (MMS), the now-defunct agency that came under fire in the wake of the April 20, 2010, spill. Salazar said the reorganization will be completed by Oct. 1.

Salazar also announced the creation of the Offshore Energy Safety Advisory Committee comprised of researchers, industry representatives, and federal employees that will advise the secretary on drilling precautions.

The BP-Deepwater Horizon oil spill disaster underscored the perils of poor regulation. MMS was responsible for both resource management and protection and revenue maximization from the exploitation of those resources. As a result, regulators often found themselves siding with industry, from which they acquired a significant portion of the agency's revenue, on matters of resource and environmental management. Inspectors were powerless at best and compliant at worst during safety inspections, permitting unsafe conditions and practices such as those existing on the Deepwater Horizon rig.

The Obama administration has been attempting to remedy the situation ever since. In May 2010, Salazar announced the end of MMS, replacing it with BOEMRE and the Office of Natural Resource Revenue. The split was intended to erect a stronger barrier between revenue and environmental decisions. The two offshoots of BOEMRE will be named the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement.

Environmentalists reacted positively to the Jan. 19 announcement. Regan Nelson of the Natural Resources Defense Council called the reorganization a "good first step" but also added, "The department, though, needs to go further to ensure that safety and environmental concerns are insulated from the kind of political pressure that has compromised this crucial mission in the past."

The oil and gas industry criticized Salazar's announcement, saying that the reorganization will result in delays to drilling permit approvals, according to the *Houston Chronicle*. The administration lifted a moratorium on deepwater offshore drilling imposed after the BP spill but has yet to approve new drilling projects pending safety reviews, irritating industry officials.

The reorganization does not go as far as Obama's oil spill commission recommended. The commission, which released its final report on the BP-Deepwater Horizon disaster and its recommendations for reforming federal policy, called for a more independent regulatory structure. Specifically, the commission called for the new safety agency to be headed by an official appointed to a five-year term and subject to Senate confirmation. The commission also recommended that Congress pass a new law better defining Interior's offshore drilling oversight responsibilities.

Because Salazar has called for the reorganization to be completed by Oct. 1, the first day of fiscal year 2012, Obama's next budget plan should reflect the organizational change. Less certain is whether Obama's budget, scheduled for release in mid-February, will include additional resources for the new agencies. The commission report repeatedly comments that Interior's drilling oversight functions have been underfunded, and the commission recommended a new funding structure in which industry user fees account for a greater share of the department's budget. However, in the prevailing tight fiscal environment, Obama is likely to exercise caution in proposing new spending.

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