

Senator Dick Durbin
Senate Judiciary Committee Hearing on “Preventing America's Looming Fiscal Crisis: the
Need for a Balanced Budget Amendment to the Constitution”
Questions for the Record

Questions for Mr. Greenstein

1. Mr. Greenstein, S. J. Res. 6 would require that every year federal government outlays must not exceed receipts. Social Security is one example of a federal program that would be severely impacted by this requirement because Social Security builds up reserves over time in order to ensure that benefits are paid in the current year. Under this balanced budget amendment, Social Security payments could be challenged as unconstitutional unless there were offsetting revenues elsewhere in the budget that year – even if the Social Security Trust Fund had huge reserves.

There are other federal programs that would be seriously affected by this annual balancing requirement. For example, the military retirement system provides monthly compensation and benefits for over two million military retirees and eligible survivors. The military retirement system also operates on a trust fund system, but could not use surplus reserves to pay annual benefits under a balanced budget amendment.

Mr. Greenstein, would a balanced budget amendment endanger Social Security and our nation’s military retirement system? How about our system of FDIC insurance for bank deposits? What about other middle-class programs like Medicare?

2. It is important to consider the increased burdens that a federal balanced budget amendment would impose on the states.

On March 16, a group of eight leading economists, including four Nobel Laureates, sent a letter to Congress opposing a balanced budget amendment as a “very unsound policy.” Among the concerns listed in the letter was the following:

“A balanced budget amendment would invite Congress to enact unfunded mandates, requiring states, localities, and private businesses to do what it cannot finance itself.”

Also, the Congressional Research Service said in an August 2011 report on balanced budget amendments that:

“There is also some concern that if a federal balanced budget requirement caused significant cuts in federal programs, that at least some states would find it necessary to make compensatory increases in their own spending, regardless of whether such expenditures were mandated by the federal government.”

Mr. Greenstein, can you elaborate on how a constitutional balanced budget amendment would potentially have a harmful fiscal impact on the states?

Questions for Professor Morrison

3. Professor Morrison, your testimony makes clear that the enactment of a constitutional balanced budget amendment would almost certainly guarantee years of high-stakes litigation in the courts.

If the amendment is silent or ambiguous on the issue of whether there will be judicial review of its requirements, then there will be significant litigation trying to determine the scope of judicial review. And if the amendment explicitly provides someone with standing to sue to enforce the balanced budget, then there will likely be extensive litigation over these enforcement actions. It is no wonder that former Solicitor General and Judge Robert Bork said, when stating his opposition to a balanced budget amendment. that: “the result... would likely be hundreds, if not thousands, of lawsuits around the country, many of them on inconsistent theories and providing inconsistent results.”

Professor Morrison, what would be the impact of a wave of balanced budget amendment litigation? How much uncertainty would this create for the economy and for the budget process?

ANSWER: The first wave of litigation would be over the issue of whether claims that section 1 (requiring receipts to equal expenditures) had been violated are justiciable. Unless the amendment expressly provided for such a lawsuit, it is my opinion that the Supreme Court would not allow it proceed, but there would surely be litigation over that question. If such lawsuits were permitted, they would cause great uncertainty in the economy as a whole and to federal agencies that must comply with the laws governing their expenditures. Such lawsuits would be very fact-intense and time consuming. Under the best of circumstances, the outcome could not be known, and implementation begun, until three quarters of the fiscal year were over. Until then, no one, inside the government or out, would know how much the federal government could spend in that fiscal year. And if there were significant end of the year cuts, they would have a serious impact on the economy as a whole.

4. On October 5, 2011, the late Justice Antonin Scalia testified before the Senate Judiciary Committee about the role of judges under the Constitution. At one point, Chairman Leahy asked, quote: “Justice Scalia, under our Constitution, what is the role, if any, that judges play in making budgetary choices or determining what is the best allocation of taxpayer resources – is that within their proper role or is that somewhere else?”

Justice Scalia answered: “You know it’s not within our proper role Mr. Chairman. Of course it’s not. Of course it’s not.”

Professor Morrison, do you believe federal judges have the expertise to make sound budgetary choices? Would it create uncertainty in the economy if we put budgetary choices in federal judges’ hands?

ANSWER: There would be two parts to litigation over an alleged budget imbalance. The first would be a legal and factual inquiry, based on estimates and expert testimony, on whether the balanced budget standard had been violated. Deciding that question would be difficult because of the many variables, but it is the kind of question that federal judges are capable of

deciding and is within their proper areas of expertise. The second question would be, what is the proper remedy? Unless Congress specified that in advance, there would be no judicially manageable standards by which a judge could make such a decision. Allocation of federal dollars is inherently a political matter, and federal judges have no expertise nor any legitimacy in making a decision as to whether, for example, to cut defense or law enforcement or social security or the national parks. And that assumes that judges cannot raise taxes, which is another way to balance the budget. I can hardly think of a less appropriate job for federal judges than to decide how to allocate budget cuts, and I doubt that any true conservative would disagree if that choice were put to that person.