1988

Federal Spending and the Deficit: Is a Constitutional Remedy Necessary?

Kate Stith
Yale Law School

FEDERAL SPENDING AND THE DEFICIT: IS A CONSTITUTIONAL REMEDY NECESSARY?

*Kate Stith**

I do *not* favor a constitutional circumscription on legislative powers to spend and borrow. I *do* favor a constitutional command that these powers be exercised openly and clearly. Let me here propose that this command is already in the Constitution. Before we rewrite the fiscal Constitution by formal amendment, we ought to consider the interpretive potential of the present constitutional text.

I. Overview: Fiscal Powers of Congress

What is our present fiscal Constitution? What are the fundamental rules and principles that govern the spending and taxing process? Our constitutional text says very little beyond giving almost all fiscal power, over both revenues and spending, to the legislative branch. Revenues may be in the form of taxes or borrowing. Congress has broad power to spend as "necessary and proper" to provide for the common defense, general welfare, and other public ends. Moreover, Congress is supposed to control the proverbial purse-strings: "No Money may be drawn from the Treasury, except in Consequence of Appropriations made by Law."[1] In other words, Congress must decide how much money to spend and how to spend it.

My thesis is uncomplicated: Congress has failed to observe the appropriations clause of the Constitution by, among other things, creating permanent and indefinite sources of spending authority, thus effectively avoiding a responsibility placed upon it by the Constitution.[2] This failure to exercise the constitutionally prescribed authority to control expenditures has contributed to the growing deficits of our times.

---

* Associate Professor of Law, Yale Law School; B.A., 1973, Dartmouth College; M.P.P., 1977, J.D., 1977, Harvard University. After serving as a law clerk to Judge Carl McGowan and to Justice Byron R. White, the author was a staff economist at the Council of Economic Advisers and an Assistant United States Attorney for the Southern District of New York.

1. U.S. Const. art. I, § 9, cl. 7.

2. Elsewhere I derive at length a theory explaining the significance of legislative appropriations in our constitutional order and explaining why the Constitution's appropriations requirement is a mandate to Congress as well as a limitation on the executive branch. Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343 (1988).

II. FISCAL OBLIGATIONS OF THE FEDERAL GOVERNMENT

In order for Congress to exercise meaningful control over withdrawals from the federal treasury, it must control the financial *obligations* of the federal government. Requiring legislative approval simply at the time of *outlay*, for liquidation of previously incurred obligations, is like shutting the barn door after the horses have left. A major reason that federal spending is difficult to control or reduce is that the horses are already out the door.[3]

Under the prevailing interpretation of the Constitution, Congress has plenary authority to construe and implement the appropriations clause in any way it chooses.[4] The result is a system of budgetary accounting that would not be tolerated in other institutions of our society. The federal budget is primarily a cash-flow ledger, and the budget deficit is simply the measure of annual net expenditures. Neither total federal outlays nor the deficit are particularly useful measures for determining larger questions of policy, such as the appropriate size of government, the appropriate mix of government debt and private debt, or the proper incidence of government taxing and spending activities.

Based as they are on cash-flow accounting, budget documents do not reveal the true financial obligations of the federal government. There is no record kept in the legislative process of depreciation or of accrued liabilities and expectations that previous Congresses have engendered and that future Congresses are compelled, legally or morally, to finance.[5]

Although the Anti-Deficiency Act of 1905[6] prohibits federal agencies from obligating their appropriations beyond the amounts Congress has provided, appropriations constitute only a modest part of all federal obligations and expenditures. In addition to appropriations, Congress enacts many forms

---

3. The critical relationship between control of obligational authority and control of expenditure is explored in Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 Calif. L. Rev. 593 (1988). *See also* Wildavsky, *Item Veto Without a Global Spending Limit: Locking the Treasury After the Dollars Have Fled*, 1 Notre Dame J.L. Ethics & Pub. Pol'y 165 (1985).

4. *See* Harrington v. Bush, 553 F.2d 190, 194 n.7 (D.C. Cir. 1977); Hart's Case, 16 Ct. Cl. 459, 484 (1880), *aff'd*, 118 U.S. 62 (1886). Likewise the prevailing understanding is that Congress may construe the "statement and account" clause of the Constitution, also in art. I, § 9, cl. 7, in any way it chooses. *See* United States v. Richardson, 418 U.S. 166, 178 n.11 (1974); Halperin v. CIA, 629 F.2d 144, 154-62 (D.C. Cir. 1980).

5. Whether Congress is legally or only morally and politically compelled to fund various forms of obligations authorized by previous Congresses raises difficult questions of constitutional law beyond the scope of these remarks. Significantly, however, Congress has usually found these distinctions irrelevant. *See* Stith, *supra* note 2, at 1376-77; Stith, "Funding Entitlements" (unpublished).

6. Act of Mar. 3, 1905, ch. 1484, § 3679, 33 Stat. 1214, 1257-58 (codified as amended at 31 U.S.C. §§ 1341-1351 (1982 & West Supp. 1987)).

of "backdoor" spending authority, such as contract authority, borrowing authority, authority to guarantee loans, and a wide variety of statutory entitlements where payments are permanently and automatically appropriated with no further action by Congress. Even where Congress enacts nominal appropriations to liquidate backdoor obligations, these liquidating appropriations are treated as perfunctory and mandatory in the budget process. The real spending took place when Congress created the backdoor spending authority, but contemporaneous budget documents invariably fail to reveal the full, long-term costs of such spending programs.

Fortunately, Congress itself has recognized that backdoor spending leads to loss of constitutional accountability and fiscal control. Both the Congressional Budget Act of 1974[7] and the recent Gramm-Rudman-Hollings legislation[8] place internal procedural limitations on creation of new forms of backdoor spending in budget documents.

Unfortunately, these recent enactments have not removed the political incentive to enact spending programs whose full cost is not revealed in the budget process. By making the annual deficit the touchstone of the entire budget process, Gramm-Rudman-Hollings has exaggerated still further Congress's institutional preoccupation with cash-flow ledgers to the exclusion of more meaningful measures of fiscal health. The new procedural limitations on backdoor spending do not apply to existing programs, and they do nothing about unfunded obligations that now exist. Moreover, there exist other long-term obligations outside both appropriations and backdoor spending mechanisms. It has been estimated that the total of unfunded pension, social security, housing, and other obligations based on present legislation exceeds $10 trillion,[9] but budget documents reveal or confirm only a small fraction of this amount.

---

7. The full title was the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 2, 31 & 42 U.S.C. (1982)).

8. The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985), *amended by* Pub. L. No. 100-119, 101 Stat. 754 (1987) (to be codified in scattered sections of 2 & 42 U.S.C.). For a detailed analysis of the historical development of the budget process and post-enactment administration of appropriations, with particular emphasis on the theory, political strategy, and implementation of Gramm-Rudman-Hollings, *see* Stith, *supra* note 3.

9. *See* Peterson, *The Morning After*, Atl. Monthly, Oct. 1987, at 43, 60. *See generally* H. Leonard, Checks Unbalanced (1986) (discussing various forms of "quiet spending" by both federal and state governments).

III. REEVALUATION OF CONGRESSIONAL FISCAL POWER

How can reinterpretation of the constitutional text help? Suppose we reinterpret the appropriations clause so that it requires meaningful legislative approval in advance for every increase in government obligations. Our present Constitution may be adequate to constrain creation of permanent or indefinite appropriations, to require accrued expenditure appropriations instead of contract authority, and to require current appropriation of the present value of newly created financial obligations.

I readily concede that interpreting the appropriations clause to require explicit enactment in the appropriations process of all backdoor spending and to require appropriation of all future liabilities — rather than creating them, *sub silencio*, in substantive legislation — would not by itself avoid federal deficit crises. But a stricter interpretation of the appropriations clause would deny legislative power to engage in the politically alluring game of making promises that a future Congress will be morally or politically obliged to keep. No program would have a permanent or automatic appropriation, and all obligations would be revealed in budget documents. There would be no such thing as an unfunded promise to pay. Congress would have to put its money where its mouth is.

Unlike a balanced budget amendment, a reinterpretation of the appropriations clause of the Constitution would not attempt to reduce all of the fiscal and political variables in the federal spending process to one, easily manipulable and misleading number: the deficit. Nor would it constitutionally circumscribe or alter Congress's power to spend. A strict interpretation of the appropriations clause would, however, increase the political burden borne by those who would increase federal spending.[10] Instead of automatic increases in entitlement payments, which become law unless the President and Congress are prepared to stop them, there would be no increases, indeed no "entitlements," unless the current President and Congress were willing to act affirmatively to renew or extend entitlement legislation. Similarly, Congress would still have power to create pension and other obligations, but Congress would be required to appropriate these liabilities explicitly, to reveal them in its budget documents, and to treat them as the spending which they are.

Of course, Congress and the President would face tremendous political pressures to enact, periodically, spending programs for the middle-class that

---

10. Increasing the political burden on those who would increase spending or the deficit is also the major strategy of Gramm-Rudman-Hollings. *See* Stith, *supra* note 3. *Compare* Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 Hastings Const. L.Q. 185 (1986) and Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 A. B. Found. Res. J. 379, 426 n.215 (1987).

are now protected by the very concept of "entitlement" and by automatic appropriations — programs which constitute the great bulk of backdoor spending and other unfunded obligations. Moreover, as a matter of legislative practice, Congress would probably budget for these programs in the same way it now budgets for the discretionary federal budget: using last year's spending level as a baseline from which reductions are seldom made. But each year, or other periodic interval, Congress would have to legislate the baseline and the increase, if any, for each spending program.

Requiring Congress really to control the purse would not end all entitlements and other unfunded, indefinite obligations that earlier Congresses have thus far put on a kind of automatic pilot. It would threaten only those obligations that could no longer pass the test of democratic consensus.

CONCLUSIONS

Assuming that reinterpretation of the Constitution is possible, how is any such reinterpretation to be enforced? I am skeptical of judicial enforcement of a balanced budget amendment or a constitutional spending limitation; courts lack the expertise and institutional competence to perform the function assigned to the Comptroller General and the Office of Management and Budget under Gramm-Rudman-Hollings.[11] I am more sanguine about the ability of courts to recognize Congress' failure to exercise its power over the purse by enacting monetary obligations of indefinite size and duration. If Congress itself explicitly recognizes that the Constitution requires an appropriation whenever fiscal obligations are created and makes clear its own expectation that the courts must be available ultimately to enforce this interpretation, the judicial branch may find it possible to strike down or limit legislation that creates future financial obligations of the federal government and fails to provide the necessary funding.

In any event, we should urge Congress and the President to recognize the constitutional duty of the legislative branch of government to exercise its appropriations power openly and explicitly. The power of the purse is great; in failing to exercise control over federal expenditures, the legislative branch fails to adhere to a fundamental norm of our constitutional order.

---

11. Bowsher v. Synar, 478 U.S. 714 (1986), held that the Comptroller General's role in implementing Gramm-Rudman-Hollings violated constitutional separation-of-powers principles. In 1987 Congress transferred the function originally envisaged for the Comptroller General to the Office of Management and Budget, *see supra* note 8.