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A Tax Limitation Constitutional Amendment: Issues and Options Concerning a Super-Majority Requirement

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Summary

Proposals to limit the federal government's authority to raise taxes have been made several times in recent years. Most frequently, these proposals call for limits on Congress's ability to pass revenue measures. Typically, limitation proposals would allow increases in tax revenues only under one of two circumstances. First, tax revenues could increase under existing tax laws as a result of economic upturns. Alternatively, they could increase because of a new law, but only if it were passed by a super-majority (typically two-thirds or three-fifths). Questions about how such proposals might be applied in practice have not been clearly answered. Congress has previously considered such proposals in 1996, 1997, 1998, 1999, 2000, and 2001. In each case the proposal has failed to achieve the two-thirds majority necessary for passage.

Most recently, the House considered H.J.Res. 96 on June 12, 2002. The measure failed to achieve the necessary two-thirds, 227-178. This report will be updated to reflect any further legislative actions on such proposals.

Introduction

In recent years, there have been a number of proposals to place limits on the federal government's authority to raise taxes. Some proposals would hold total revenues to a set percentage of some economic indicator, such as gross domestic product (GDP) or gross national product (GNP), while others would limit increases in taxes to a percentage of the growth of a particular economic indicator (such as national income). The term "tax limitation" is also used to describe legislative proposals that would limit Congress's ability to consider revenue measures, regardless of their effect on the level or growth of tax revenues, by requiring a super-majority (typically two-thirds or three-fifths) for their passage. This type of limitation would allow increases in taxes only under one of two circumstances. First, tax revenues could increase under existing tax laws as a result of

economic upturns. Alternatively, they could increase because of a new law, but only if it were passed by a super-majority.¹

Such proposals have often been associated with proposed balanced budget constitutional amendments.² This association is based on the idea that a tax limitation provision is needed so that Congress would be less likely to raise taxes rather than cut spending in order to produce a required balanced budget. For example, the Senate Judiciary Committee has twice reported proposed balanced budget amendments that included a provision limiting increases in receipts to a rate not greater than “the rate of increase in national income” (S.J.Res. 5, 98th Congress, S.Rept. 98-628, and S.J.Res. 13, 99th Congress, S.Rept. 99-162). Neither proposal received floor consideration. Proposals to limit the level or rate of growth of revenues were considered on the House floor in conjunction with consideration of proposed balanced budget amendments in the 101st, 102nd, and 103rd Congresses. The first floor consideration of a freestanding proposal to limit congressional consideration of tax legislation occurred in the 104th Congress.

Legislative History

Action in the 107th Congress. On June 6, 2002, H.J.Res. 96 was introduced by Representative Pete Sessions, along with 150 cosponsors, and referred to the House Judiciary Committee. As introduced, H.J.Res. 96 contains the following provisions:

Section 1. Any bill, resolution, or other legislative measure changing the internal revenue laws shall require for final adoption in each House the concurrence of two-thirds of the Members of that House voting and present, unless that bill, resolution, or other legislative measure is determined at the time of adoption, in a reasonable manner prescribed by law, not to increase the internal revenue by more than a de minimis amount. For purposes of determining any increase in the internal revenue under this section, there shall be excluded any increase resulting from the lowering of an effective rate of any tax. On any vote for which the concurrence of two-thirds is required under this article, the yeas and nays of the Members of either House shall be entered on the Journal of that House.

Section 2. The Congress may waive the requirements of this article when a declaration of war is in effect. The Congress may also waive this article when the United States is engaged in military conflict which causes an imminent and serious 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. Any increase in the internal revenue enacted under such a waiver shall be effective for not longer than two years.

¹ There have also been proposals to require that measures to increase revenues pass by a majority of the total membership of each house rather than a majority of Members voting, a quorum being present (as is typically required) as well as proposals that would require a rollcall vote but these are not discussed in this report.

² For more on the legislative history of proposed balanced budget amendments, see CRS Report 97-379, *A Balanced Budget Constitutional Amendment: Background and Congressional Options*, by (name redacted).

On June 12, 2002, the proposal was considered by the House under the terms of H.Res. 439, a special rule providing for its consideration. H.Res. 439 provided for 2 hours of general debate, and one additional hour of debate on an amendment if offered by the minority leader (or his designee), although no amendment was offered. On final passage, H.J.Res. 96 failed to achieve the necessary two-thirds, 227-178.³

Previously, Representative Sessions introduced H.J.Res. 41 on March 22, 2001. That measure was referred to the House Judiciary Committee and subsequently reported on April 20, 2001 (H.Rept. 107-43). On April 25, 2001, the proposal was considered by the House under the terms of H.Res. 118, a special rule providing for its consideration. H.Res. 118 provided for 2 hours of general debate, and one additional hour of debate on an amendment if offered by the minority leader (or his designee), although no amendment was offered. On final passage, H.J.Res. 41 failed to achieve the necessary two-thirds, 232-189.⁴

Action in the 106th Congress. In the 106th Congress, the House of Representatives considered proposals for a tax limitation constitutional amendment in both sessions. On March 11, 1999, Representative Barton introduced H.J.Res. 37, a proposal similar in most respects to those voted on in the 105th Congress. H.J.Res. 37 was deliberated in the House on April 15, 1999, under the terms of H.Res. 139, a special rule providing for its consideration. H.Res. 139 provided for 3 hours of general debate, and one additional hour of debate on an amendment if offered by the minority leader (or his designee), although no amendment was offered. On final passage, H.J.Res. 37 failed to achieve the necessary two-thirds, 229-199.⁵

On April 6, 2000, Representative Pete Sessions introduced H.J.Res. 94. The measure was deliberated in the House on April 12, 2000, under the terms of H.Res. 471, a special rule providing for its consideration. H.Res. 471 provided for 2 hours of general debate, and one additional hour of debate on an amendment if offered by the minority leader (or his designee), although no amendment was offered. H.J.Res. 94 failed to achieve the necessary two-thirds, 234-192.⁶

Action in the 105th Congress. In the 105th Congress, the House of Representatives considered proposals for a tax limitation constitutional amendment in both sessions. On March 11, 1997, Representative Joe Barton introduced H.J.Res. 62. The measure was referred to the House Judiciary Committee, and a hearing was held by the Subcommittee on the Constitution on March 18. H.J.Res. 62 was reported on April 10, 1997 (H.Rept. 105-50), and considered by the House on April 15, 1997, under the terms of H.Res. 113, a special rule providing for its consideration. This special rule allowed 3 hours of debate and provided for the self-executing adoption of an amendment to clarify the application of H.J.Res. 62 by adding language stating that “For the purposes of determining any increase in the internal revenue under this section, there shall be

³ See vote no. 225 in the *Congressional Record*, daily edition, vol. 148, June 12, 2002, p. H3480.

⁴ See vote no. 87 in the *Congressional Record*, daily edition, vol. 147, Apr. 25, 2001, p. H1582.

⁵ See vote no. 90 in the *Congressional Record*, daily edition, vol. 145, Apr. 15, 1999, p. H2097.

⁶ See vote no. 119 in the *Congressional Record*, daily edition, vol. 146, Apr. 12, 2000, p. H2146.

excluded any increase resulting from the lowering of an effective rate of any tax.” As thus amended, the measure failed to achieve the necessary two-thirds majority, 233-190.⁷

On February 28, 1998, Representative Joe Barton again introduced a proposed tax limitation amendment (H.J.Res. 111). This measure was subsequently modified and deliberated under the terms of H.Res. 407, a special rule for its consideration that was adopted on April 22, 1998. H.Res. 407 provided for 3 hours of general debate and one additional hour of debate on an amendment if offered by the minority leader (or his designee), although no amendment was offered. As amended, H.J.Res. 111 failed to achieve the necessary two-thirds, 238-186.⁸

Action in the 104th Congress. The first floor consideration of a proposal to limit congressional consideration of tax legislation occurred in the 104th Congress. On February 1, 1996, Representative Joe Barton introduced H.J.Res. 159. The measure was referred to the Judiciary Committee and a hearing was held by the Subcommittee on the Constitution on March 6, 1996. On April 15, 1996, the joint resolution was considered by the House under the terms of H.Res. 395. On final passage, the measure failed to achieve the necessary two-thirds, 243-177.⁹

Issues and Options

At the beginning of the 104th Congress, the House adopted a new provision in its rules, now in Rule XXI, clause 5(b), to limit certain increases in federal income tax rates. This rule was subsequently modified at the beginning of the 105th Congress.¹⁰ Some tax limitations advocates, however, argue that House Rule XXI, clause 5(b) is not sufficient, and that a permanent, broad-based limitation needs to be imposed by the Constitution. They argue that whereas House rules must be readopted every 2 years, a constitutional amendment is much more difficult to change. Further, they assert that a tax limitation would benefit the U.S. economy, and that states with tax limitations have a comparative advantage in terms of economic growth over states without such limitations.

Advocates of a tax limitation amendment point to polls that suggest the public supports the idea of making it difficult for the federal government to raise taxes. However, opponents argue that a super-majority requirement would be anti-democratic, and should not be imposed. In addition, they point out that although several states operate with various types of tax limitations, it is not clear that these would be directly applicable to the federal government. Further, they suggest that significant questions remain about the language of proposed tax limitation constitutional amendments, and how it might be interpreted, either by Congress or the Courts, and point to difficulties in applying House Rule XXI, clause 5(b) in the 104th Congress.

The term “revenue” appears in this context in Article I, section 7 of the Constitution, the so-called Origination Clause. As interpreted by the Supreme Court, the phrase “all

⁷ See vote no. 78 in the *Congressional Record*, daily edition, vol. 143, Apr. 15, 1997, p. H1506.

⁸ See vote no. 102 in the *Congressional Record*, daily edition, vol. 144, Apr. 22, 1998, p. H2170.

⁹ See vote no. 243 in the *Congressional Record*, daily edition, vol. 142, Apr. 15, 1996, p. H3304.

¹⁰ For more on this rule, see CRS Report RL31197, *Revenue Measures in Congress: Procedural Considerations*, by (name redacted).

bills raising revenue” has typically meant measures raising revenue to support government generally, but not necessarily measures that raise funds to support specific governmental programs.¹¹ This constitutional understanding of the term “revenue” may therefore differ from “internal revenue” as intended in recent limitation proposals.

Relatedly, not all types of receipts to the federal government are currently treated alike in the budget process. Collections from the public based on the government’s exercise of its sovereign powers are generally treated as revenues (e.g., personal income taxes). Collections by the government from business or market-oriented activities are generally treated as offsets to outlays (e.g., various royalties and licensing fees). These offsetting collections are sometimes applied against the outlays of a specific agency or program and sometimes against the outlays of the government generally.

In an effort to clarify the application of a super-majority requirement, the terms “internal revenue” and “internal revenue laws” have sometimes been used. As with House Rule XXI, these terms are intended to limit the application of proposed amendments to legislation concerning explicit changes in tax laws, rather than all legislation effecting revenues, however, these terms have not been subject to rigorous interpretation by the courts. Therefore, how the application of such a limitation might be interpreted remains unclear. It is possible that a limitation on tax increases could apply only to measures that raise money for the general fund of the federal government, but not to some funds raised for specific programs or for some types of fees paid to the federal government or government entities. For example, at one time President Clinton proposed that fees be imposed by the Federal Deposit Insurance Corporation (FDIC) and the Federal Reserve for the examination of both FDIC-insured banks and bank holding companies. It is not clear whether such fees, tied to a particular, closely related service, might be regarded as revenues for the purposes of this type of limitation amendment.

Conversely, the phrase “increasing revenue,” as used in these proposals could be interpreted to apply these requirements broadly to a wide variety of measures. Such a provision might apply not only to measures that would increase revenues by increasing the rate of taxation, but also to measures that would increase revenues by lowering the rate of taxation while increasing either the taxable base or the volume of taxable activity, or both. Broadly interpreted, such a provision could have an impact on a large portion of the legislation considered by Congress. Legislation that has the direct or indirect effect of stimulating economic (hence taxable) activity and thereby increasing revenues might be covered by a tax limitation provision. For most recent proposals the question of rate increases versus revenue increases is not resolved, although revenue increased resulting from lowered rates were specifically excluded from the application of H.J.Res. 37 and H.J.Res. 94 (106th Congress).

¹¹ Justice Joseph V. Story, in *Commentaries on the Constitution of the United States* (Boston: Hilliard, Gray & Co., 1833; reprint edition Littleton, CO: Fred B. Rothman & Co., 1991) vol. 2, chap. XIII, sec. 877, p. 343, wrote that only bills to raise taxes in the strict sense of the word are “bills for raising revenue”; and that bills for other purposes, which may incidentally create revenue, are not included. This principle has been upheld by the Supreme Court in several instances (for example, *Twin City Bank v. Nebeker* 167 U.S. 196 (1897), *Millard v. Roberts* 202 U.S. 429 (1906), and, more recently, *United States v. Munoz-Flores* 495 U.S. 385 (1990)). For more on the interpretation of the term revenue, see CRS Report RL31399, *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement*, by (name -r edacted).

To overcome some of the imprecision in such definitions, several proponents have tried to develop language that focuses more on the terms of the measures than on their effect on revenues. During the 104th Congress, one such proposal would have required “Any bill to levy a new tax or increase the rate or base of any tax may pass only by a two-thirds majority of the whole number of each House of Congress” (H.J.Res. 159, S.J.Res. 49). Similarly, the focus of H.J.Res. 62 (105th Congress) and H.J.Res. 37 (106th Congress) was partly on the form of a measure rather than on its effect. Each proposal specifies that it would apply to measures “changing internal revenue laws,” although it qualifies that phrase by excluding measures whose effect would not be to increase internal revenue by more than a *de minimis* amount.¹² The language in H.J.Res. 94 (106th Congress), and H.J.Res. 41 (107th Congress) takes this one step further by specifying the super-majority requirement would not apply to any legislation projected to produce increased revenue as a result of “lowering of an effective rate.”

Again, the language is such that some interpretation would be required to fulfill the measure’s mandate. For example, President Clinton proposed limiting deferrals of gains associated with exchanges of like-kind property used in a trade or business or for investment to only those exchanges located within the United States. Would this narrowing of the provision to exclude exchanges of property located outside the United States be seen as a change in the taxable base and therefore subject the proposal to a super-majority requirement? Also, would the extension of a tax due to expire be seen as a new tax and thus require two-thirds to pass?

However, proposals in this vein generally focus on the effect of revenue legislation. For example, one typical proposal “Prohibits a bill to increase receipts from becoming law unless approved by a three-fifths majority in each House” (S.J.Res. 12, 105th Congress).

It is not clear whether a limitation on increasing revenues could also be applied to measures which increase tax rates to a level intended to inhibit an activity (e.g., a possible increase in taxes on tobacco products) and thus lower taxes collected. The intended effect in such a case may be a reduction in revenues, due to the inhibitory effect of making something cost more, rather than an increase in revenues due to the higher rate. The question remains as to how a limitation amendment would be applied to such a provision: so that the long-term intended effect of such a measure would exempt it from the restrictions of a tax limitation provision by offsetting any temporary upsurge in revenues due to the increased rate, or so that the short-term revenue increase would be sufficient to require the measure to be passed by a super-majority.

In the above example, questions concerning the rate at which revenues would decrease, and possibly when, could make revenue estimates a critical, and controversial, factor in determining the applicability of a tax limitation constitutional amendment. Who would make such estimates (possibly the Joint Tax Committee, the Congressional Budget Office, the Treasury Department, or the Office of Management and Budget)? Relatedly, would estimates focus on revenues generated in the next fiscal year or some longer period? In addition, the reliability of estimates, already a significant factor in the budgeting of federal expenditures, would likely be at issue.

¹² The phrase “more than a *de minimis* amount,” is generally understood to mean more 0.1% of federal revenues.

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