

Default and the 14th Amendment

**Third Way**

Is the 14th Amendment an escape hatch from the madness that could result in breaching the nation's debt ceiling and a possible default? Could the President invoke the 14th Amendment's provision that "the validity of the public debt of the United States, authorized by law . . . shall not be questioned" as a means to avert the unthinkable?

In a recent op-ed in the *New York Times*, historian Sean Wilentz argues not only that the President has the power to avert a debt default, but also that the 14th Amendment requires that he do so. As precedent, Wilentz points to Lincoln's use of emergency powers to protect the full faith and credit of the United States and to ward off other threats to the Constitution during the Civil War.

This and other commentary have generated questions about whether President Obama's public rejection of the 14th Amendment argument is genuine or simply a negotiating tactic to get Congress to act.

At Third Way, we have taken a look at this, and while no one outside the White House is privy to its legal reasoning, we agree with the President's public comment. We believe the case for using the 14th Amendment to avoid default is both incorrect and impractical—and Congress should not expect Obama to do so.

Our reasoning is as follows:

The 14th Amendment Legal Theory is Unsound

There is a real question as to whether the 14th Amendment would apply here at all. A failure to raise the debt ceiling does not, in and of itself, question the "validity" of the public debt. It simply means that the government cannot borrow more money to pay existing obligations. The debt remains valid

and due. What causes default is not a questioning of the debt, but a failure to make payments on it. This fact alone likely moots the argument that Wilentz is making.

This gets to a more complex and pernicious argument for why no debt limit increase is needed. To avoid default, the country needs to make its periodic payments on existing debt — interest payments on debt instruments and redemption of any instruments that are due. Right now, Treasury borrows more money to pay off these expenses. But as some Republicans have argued, that may not be actually necessary. Every day, money flows into the government from taxes. It is not enough money to write all the checks of the U.S. Government (i.e., pay interest on our debt and pay government employees and pay Social Security benefits and pay for Medicare), but it probably is enough money to avoid default. So, could the President avoid a default by directing the Treasury Secretary to make payments to bond holders out of incoming funds, without any increase in the debt limit? Perhaps. There may be no Social Security checks and no veterans' benefits. But if he were to prioritize payments, he could probably avoid default without a debt limit. That would be bad all around — terrible politics and awful policy, but it would not abrogate the 14th Amendment.

Moreover, some point to the language in the amendment that “validity of the debt shall not be questioned,” inferring that this gives the President expansive powers to enforce the amendment. But the Constitution contains many broad phrases of “thou shalt” and “thou shalt not.” How those translate into presidential powers is more subtle and complex. The 14th Amendment also says that no state “shall deny to any person within its jurisdiction the equal protection of the laws.” Does that give the President the power to order states to provide health insurance to all people? Or to make states equally hire Republicans and Democrats for state jobs? That is, there is a significant gap between a constitutional provision that forbids something and that constitutional injunction becoming a presidential power to mandate something in the absence of a specific statutory authority.

The Legal Precedent Probably is Set

Whatever anyone's view of the 14th Amendment, it's likely that the Justice Department has one. Of course, we do not have access to opinions of the Department's Office of Legal Counsel (OLC), which are regarded as precedent within the Executive Branch. But by custom and tradition, presidents cannot just proclaim the law. To restrain excess and to give legitimacy, presidents have always relied upon and been guided by legal interpretations of the OLC.

Given the high profile of the 14th Amendment argument in the debt debate of 2011, it is highly likely that OLC has issued a legal opinion on the applicability of the 14th Amendment and on the scope of the authority that it accords the President. Indeed, those opinions may even predate the Obama years, since we've been to this dance before. On a matter of such extraordinary legal novelty, it would be a very aggressive and unsettling act for the President to reach an interpretation of law that is at odds with an existing OLC opinion, if one exists.

Unilateral Action Would Raise Uncertainty in the Markets

The issues raised by the 14th Amendment argument are many, and the most important may not even be the legal ones. Take the impact on the markets and the thing that they value most in T-bills: certainty. Let's say that the President concludes he has the legal authority to direct government agencies to continue to issue debt in the absence of a debt limit increase. So the Treasury would then issue bonds under that circumstance. Would anyone buy those bonds? How does the auction of those bonds go—would bidders show up? What if the auction fails? What sort of premium would buyers have to pay, due to the uncertainty over the bonds' legality and legitimacy? What would that do to yields, spreads, and interest rates? What happens when someone inevitably sues, questioning the legitimacy of those bonds? What happens when a buyer of these instruments then sells them, and what if their legitimacy is later called into question?

That is, the President can SAY that he is acting to avoid having the “debt of the United States questioned,” but ironically, as a matter of economics, any debt issued under such circumstances would be questioned in the market. And such uncertainty about the legal status of this debt could persist for a long time, with grave consequences.

The President made this case at a news conference on October 8: “Setting aside the legal analysis, what matters is that if you start having a situation in which there's legal controversy about the U.S. Treasury's authority to issue debt, the damage will have been done even if that were constitutional because people wouldn't be sure. It would be tied up in litigation for a long time. That's going to make people nervous...ultimately what matters is, ‘What do the people who are buying Treasury bills think?’”

Thus, whatever you think about the legal argument here, one can understand that as a matter of economics and the stability of interest rates and currency exchange, the President is right to insist on a debt limit increase to eliminate all doubts about the legitimacy of any debt incurred or debt-backed instruments issued by the Treasury.

Conclusion

The legal and practical grounds for such an extraordinary use of the 14th Amendment are academically interesting but deeply suspect. But even if one clings to the belief that this path is somehow lawful and economically viable, it is not politically sustainable. Under the 14th Amendment approach, the President would have to pay interest on the debt with current receipts, but then he would be unable to pay anyone else. No President, of either party, would tell the Treasury Secretary to keep the interest checks flowing to Chinese bond holders and not to Social Security recipients.

If we thought the 14th Amendment offered a way out of the debt default crisis, we would be calling for it loudly and often. But we are confident in our assessment that there is no magic wand for the President to wave: Congress must act.

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