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The 14th Amendment, the Debt Ceiling and a Way Out

By ADAM LIPTAK

WASHINGTON — A few days ago, former President [Bill Clinton](#) identified a constitutional escape hatch should [President Obama](#) and Congress fail to come to terms on a deficit reduction plan before the government hits its borrowing ceiling.

He pointed to an obscure provision in the [14th Amendment](#), saying he would unilaterally invoke it “without hesitation” to raise the [debt ceiling](#), “and force the courts to stop me.”

On Friday, Mr. Obama rejected the idea, though not in categorical terms.

“I have talked to my lawyers,” Mr. Obama [said](#). “They are not persuaded that that is a winning argument.”

Adding another element of uncertainty, and possible court battles, to the debate do not seem to appeal to the White House. And it is, in any event, not clear that the nation’s creditors would continue to lend money to the United States were the president to take unilateral action.

The provision in question, [Section 4 of the amendment](#), was meant to ensure the payment of Union debts after the [Civil War](#) and to disavow Confederate ones. But it was written in broader terms.

“The validity of the public debt of the United States, authorized by law, including debts incurred for payments of pensions and bounties for services in suppressing insurrection or rebellion,” the critical sentence says, “shall not be questioned.”

The Supreme Court has said in passing that those words have outlived the historical moment that gave rise to them.

“While this provision was undoubtedly inspired by the desire to put beyond question the obligations of the government issued during the Civil War,” Chief Justice Charles Evans Hughes wrote for the court in 1935, “its language indicates a broader connotation.”

In recent weeks, law professors have been trying to puzzle out the meaning and relevance of the provision. Some have joined Mr. Clinton in saying it allows Mr. Obama to ignore the debt ceiling. Others say it applies only to Congress and only to outright default on existing debts. **Still others say** the president may do what he wants in an emergency, with or without the authority of the 14th Amendment.

The words of the provision are in important ways quite vague. “Nobody would argue,” said Sanford Levinson, a law professor at the University of Texas, “that Section 4 is clear in its meaning, other than at the time everyone thought that the South, if they ever got back in control, would not pay Civil War debt.”

But Jack M. Balkin, a law professor at Yale, said it was possible to infer a broader principle.

“You’re not supposed to hold the validity of the public debt hostage to achieve political ends,” Mr. Balkin said. He added, though, that “Section 4 is a fail-safe that only comes into operation when everything else is exhausted.”

Mr. Obama’s statement largely dismissing the possibility of invoking the provision may have had a strategic element to it. A deficit reduction deal would seem to be more likely, after all, if both sides thought there was no alternative but economic chaos.

Mr. Obama's reference to "a winning argument" suggested the likelihood that the courts would weigh in if he took unilateral action. But that is not certain.

"This is not a circumstance," said Laurence H. Tribe, a law professor at Harvard, "in which the courts have any plausible point of entry."

Professor Balkin agreed. "This is largely a political question," he said. "It is unlikely courts would decide these questions."

Some law professors have put forward possible legal claims that might overcome threshold requirements for lawsuits, like the one in which plaintiffs show that they have been directly injured and so have standing to sue. "It's unthinkable," Professor Tribe responded, "that the courts would allow a gimmicky lawsuit to proceed."

The president, moreover, can move quickly, but court cases take time. "At the point at which the economy is melting down, who cares what the Supreme Court is going to say?" Professor Balkin said. "It's the president's duty to save the Republic."

Another possible reaction to unilateral action from Mr. Obama is impeachment. Professor Tribe said that was "not politically a very plausible scenario."

Professor Levinson was less certain. Impeachment by the House of Representatives "seems to me quite likely." But, he added, "it is also literally unimaginable that the Senate would convict."

A third possible response is what some law professors call "popular constitutionalism." The meaning of the Constitution, these professors say, is in the end what the public believes it to be. The president and members of Congress may thus pay a political price for taking stands at odds with what the public understands to be their constitutional obligations.



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