THE CONSTITUTIONAL ARGUMENT AGAINST THE PLATINUM COIN STUNT



They came for the 4th Amendment, but it was necessary for the war on drugs. They came for the 5th Amendment, but due process had to be sacrificed for the war on terror. They came for the 6th Amendment, but confrontation had to succumb to classification and secrecy. They came for the War Powers Act because Libya was "required to be protected". Now they are coming for one of the most fundamental of Constitutional checks and balances, the Congressional prerogative of the purse.

Who are "they"? They are, of course, the ubiquitous Article II Executive Branch. And they have a never ending thirst for usurping power, all in the name of efficacy. It is always necessary, it is always an emergency, there is always a reason, for them to take the power. They are the Daddy Branch, and it is always best to trust them. So they say.

Back when "they" were the Bush/Cheney regime, liberals, progressives, and Democrats in general, had a seriously dim view of accumulation and usurpation of power in a unitary Executive. When Dick Cheney, David Addington and John Yoo contorted existing law, gave it application never intended, and manufactured legal and governmental gimmickry to accomplish stunningly naked Executive power grabs, those on the left, especially the

blogosphere, screamed bloody murder. Well, that is precisely what is afoot here with the Mint the Coin! push.

Where is that principled set of voices on the left now? Things are different when it is your guy in office I guess. Because the active liberal/progressive left I see out there is currently screaming to “Mint the Coin!” doesn’t seem to realize they are calling for the same type of sham rule of law that John Yoo engaged in.. This is most curious, because “Minting the Coin!” contemplates a naked power grab by the Executive Branch of historic proportions. It is a wholesale taking of the Congressional purse prerogative under the Constitution. But, hey, its an “emergency”. Of course. It always is when the Article II Executive Branch comes to feed in the name of efficacy.

What is the value of Separation of Powers, and constriction of Constitutionally assigned powers to the branch to which they were assigned, and what is the value in insuring that an imperial Executive Branch does not usurp too many powers? Let James Madison, in Federalist No. 47 explain:

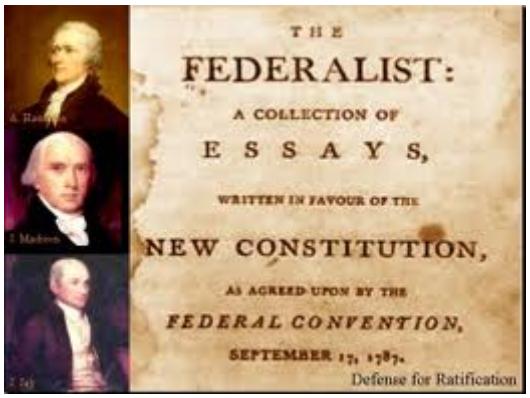
> No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to every one, that the charge

> cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied. In order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.
> ….
> The constitution of Massachusetts has observed a sufficient though less pointed caution, in expressing this fundamental article of liberty. It declares “that the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them. ” This declaration corresponds precisely with the doctrine of Montesquieu, as it has been explained, and is not in a single point violated by the plan of the convention. It goes no farther than to prohibit any one of the entire departments from exercising the powers of another department (Publius, Federalist 47).

What is the import of the Congressional “Power of the Purse”? As James Madison said in Federalist No. 58:

> This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate represen- tatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure (Publius, Federalist 58).

The mantra is always "oh it will be reined in later after the emergency is over" and/or "the courts will sort it out later and fix it". Not so in this case, the courts will not be settling this one; it is almost certainly the exact type of political issue historically and consistently refused to be entertained by federal courts under the Political Question Doctrine. Even if a federal court, presumably the District Court for the District of Columbia, would entertain the matter, do you really think the DC Circuit Court of Appeals, much less the Supreme Court led by Roberts and Scalia, would uphold this tomfoolery?



Also, as Hamilton noted in Federalist No. 78:

> The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.

The only other avenue of corrective legal relief is the impeachment process pursuant to Article I, Sections 2-3. It is highly doubtful the House would issue a charge of impeachment (although, don't kid yourself, this is exactly the type of situation the impeachment power was designed for); but even if the House did, the Senate would never convict. So, the upshot is that if Obama is insane enough to pull the coin stunt, it will wind up as a historic and destructive gutting of power from the Article I Congress by the usurping Article II Executive Branch. And it

will stand because there was no truly available forum to litigate the merits on their own right. Is that a good precedent to set in the name of efficacy? No.

The temporary thrill that those on the left would receive from the stunt would leave indelible lasting harm on our root Constitutional government. And, yes, that still, even in this day and age, matters. But, what about Harvard Professor Lawrence Tribe having given his blessing to the "legality" of "Minting the Coin!"? There is, sadly for the coin aficionados, a difference between the legality of the physical "minting" of the trillion dollar platinum coin, and the legality and constitutionality of the plan to use it as a direct effective substitute for Congressionally authorized debt. Yes, it really is that simple.

Yesterday, I broached this subject with Professor Erwin Chemerinsky, and here is his response:

> The Constitution says that Congress has the power to borrow money. The President cannot do this by unilaterally raising the debt ceiling or issuing a trillion dollar coin. The debt ceiling is set by statute and I think that there is not a plausible argument that it is unconstitutional.
>
> I wish the President could do these things. I think increasing the debt ceiling here is essential and should not be an issue. But I do not think it can be done without Congress.

Yes. And that is the thing; even assuming arguendo the physical minting of the trillion dollar platinum coin is "legal" as suggested in this post by Markos (and for reasons left for another day, I maintain that is not nearly as clear as claimed), the contemplated *use of the coin* is not constitutional, and it is not appropriate. Therein lies the problem so many

seem to suddenly, now that it is our man in the White House, conveniently ignore. Again, though, it is always convenient and exigent when the power hungry, usurping, unitary Executive theory comes calling, isn't it?



So, there is the Constitutional case, or at least a healthy part of it. But what of the more pragmatic considerations? Do they militate in favor of President Obama being so brash as to blow up the founding checks and balances, in the form of the Purse prerogative being designated to the Congress? No, they don't.

It is not every day I agree this much with something Ezra Klein said, but credit where due, I do today:

> But there's nothing benign about the platinum coin. It is a breakdown in the American system of governance, a symbol that we have become a banana republic. And perhaps we have. But the platinum coin is not the first cousin of cleanly raising the debt ceiling. It is the first cousin of defaulting on our debts. As with true default, it proves to the financial markets that we can no longer be trusted to manage our economic affairs predictably and rationally. It's evidence that American politics has transitioned from dysfunctional to broken and that all manner of once-ludicrous outcomes have muscled their way into the realm of possibility. As with default, it will mean our borrowing costs rise and financial markets gradually lose trust in our system, though perhaps not with the disruptive

> panic that default would bring.
>
> ….
>
> The argument against minting the platinum coin is simply this: It makes it harder to solve the actual problem facing our country. That problem is not the debt ceiling, per se, though it manifests itself most dangerously through the debt ceiling. It's a Republican Party that has grown extreme enough to persuade itself that stratagems like threatening default are reasonable. It's that our two-party political system breaks down when one of the two parties comes unmoored. Minting the coin doesn't so much solve that problem as surrender to it.

While Mr. Klein does not address the Constitutional considerations and related arguments against the coin, and perhaps takes too easily some of the arguments for "legality", his depiction of the political and practical wasteland that would result from Minting the Coin! are spot on. And it is, as with the Constitutional considerations, not a very pretty picture painted.

Back in July of 2011, the last time the debt ceiling crisis reared its ugly head, the call was to "Use the 14th" and have the president simply issue more debt without the consent of Congress. I wrote then why "Using the 14th" was not a viable option. It is still not a viable option now. We also learned after that 2011 iteration of the debt ceiling crisis was resolved, that the White House had received guidance from the Office of Legal Counsel in the form of an OLC memo. Considering the strength of the Executive Branch's statements that it could not circumvent the Congress' control of the debt, it is almost certainly the case that the OLC guidance was that any such action was unconstitutional.

The premise, however, behind "Mint the Coin!" is no more constitutional that that of "Use the

14th". In fact they both, at root, rely on the same premise, namely the language in the first sentence of Section 4 of the 14th Amendment:

> The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.

But that sentence cannot be taken in isolation from the remainder of the Constitution, especially the primacy of the Article I Purse Power. No matter how much the gimmick crowd may wish it to be, it is not an ultimatum on the President to blow up the Constitutional system of checks and balances our government is based on. If one needed any further reminder of this fact, it is contained in Section 5 of the 14th Amendment, which states:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

So, not only does the 14th Amendment not provide the rationale for a gimmick solution to the debt ceiling crisis, if anything, it reinforces that it is Congress who controls the issue. Exactly as Professor Chemerinsky opined above.

I too join Professor Chemerinsky in wishing there was an easy path for President Obama to do these things and win the day. Such, however, is not how our Constitution is designed, nor does it so allow.