

THE UNSTATED CONSTITUTIONAL PROBLEMS WITH OBAMA “USING THE 14TH”

As about everyone knows by now, the great debate is still ongoing on the issue of



the debt ceiling. The frustration of those on the left with the intransigence of the Republican Tea Party, coupled with the neutered Democratic Congress, has led many to call for President Obama to immediately “invoke the 14th”. The common rallying cry is that legal scholars (usually Jack Balkin is cited), Paul Krugman and various members of Congress have said it is the way to go. But neither Krugman nor the criers in Congress are lawyers, or to the extent they are have no Constitutional background. And Balkin’s discussion is relentlessly misrepresented as to what he really has said. “Using the 14th” is a bad meme and here is why.

The Founders, in creating and nurturing our system of governance by and through the Constitution provided separate and distinct branches of government, the Legislative, Executive and Judicial and, further, provided for intentional, established and delineated checks and balances so that power was balanced and not able to be usurped by any one branch tyrannically against the interest of the citizenry. It is summarized by James Madison in Federalist 51 thusly:

First. In a single republic, all the

power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments.

....

We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other – that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

which must be read in conjunction with Madison in Federalist 47:

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.

This is the essence of the separation of powers and checks and balances thereon that is the very root foundation of our American governance. It may be an abstract thing, but it is very real and critical significance. And it is exactly what is at stake when people blithely clamor to “Use the 14th!”.

Specifically, one of the most fundamental powers given by the Founders to the Article I branch, Congress, was the “power of the purse”. That was accomplished via Article I, Section 8, which provides:

The Congress shall have power to lay and collect taxes, duties, imposts and

excises, to pay the debts and provide
for the common defense and general
welfare of the United States...

and

To borrow money on the credit of the
United States;

The call to "Use the 14th" is a demand that the President, the embodiment of the Article II Executive Branch, usurp the assigned power of the Article I Congress in relation to "borrow money on the credit of the United States". This power is what lays behind the debt ceiling law to begin with, and why it is presumptively Constitutional. It is Congress' power, not the President's, and "invoking the 14th" means usurping that power. Due to "case and controversy" and "standing" limitations, which would require another treatise to discuss fully, there is literally likely no party that could effectively challenge such a usurpation of power by the Executive Branch and an irretrievable standard set for the future. The fundamental separation and balance of powers between the branches will be altered with a significant shift of power to the Executive Branch.

This is not something to be done lightly or if there is any possible alternative available. Indeed, the only instance in which it could be rationally considered would be if all alternatives were exhausted. That does NOT mean because the GOTeasers are being mean and selfish. It does NOT mean because you are worried about some etherial interest rate or stock market fluctuation that may, or may not, substantially occur. It does NOT mean because your party's President and Congressional leadership are terminally lame. That, folks, is just not good enough to carve into the heart of Constitutional Separation of Powers. Sorry.

And for those that are thinking about throwing "experts" such as Jack Balkin in the face of what I have argued, go read them, notably Jack

himself, who said before invoking the 14th, first the President would have to prioritize what was paid by existent resources, those that could be liberated and revenues that did still come in:

...certainly payments for future services – would not count and would have to be sacrificed. This might include, for example, Social Security payments.

....

Assume, however, that even a prolonged government shutdown does not move Congress to act. Eventually paying only interest and vested obligations will prove unsustainable – first because tax revenues will decrease as the economy sours, and second, because holders of government debt will conclude that a government that cannot act in a crisis is not trustworthy.

If the president reasonably believes that the public debt will be put in question for either reason, Section 4 comes into play once again. His predicament is caused by the combination of statutes that authorize and limit what he can do: He must pay appropriated monies, but he may not print new currency and he may not float new debt. If this combination of contradictory commands would cause him to violate Section 4, then he has a constitutional duty to treat at least one of the laws as unconstitutional as applied to the current circumstances.

So, contrary to those shouting and clamoring for Obama to “Use the 14th”, it is fraught with peril for long term government stability and function, and is not appropriate to consider until much further down the rabbit hole. It is NOT a quick fix panacea to the fact we, as citizens, have negligently, recklessly and wantonly elected blithering corrupt idiots to represent us. There is no such thing as a free

lunch; and the "14th option" is not what you think it is.

As a parting thought for consideration, remember when invasion of privacy and civil liberties by the Executive Branch was just a "necessary and temporary response to emergency" to 9/11? Have you gotten any of your privacies and civil liberties back? Well have ya?

UPDATE: Joberly added this in comments, and a quick perusal of legislative intent materials and the limited case interpretation seems to indicate it is spot on:

Thanks to Bmaz for his post and for his Comments # 3 and # 34. I'm no lawyer, just a history teacher who has taught Civil War & Reconstruction for some time. This is not the time and place for a history essay on the context of Section 4 ("validity of the public debt" clause) of the 14th amendment; instead, let me just point to the so-far-ignored Section 5 of the amendment: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." None of the first dozen amendments to the Constitution had anything like this clause; for the most part, the first dozen limited Congress in what it could enact (think "Congress shall make no law..."). The 13th Amendment, passed by Congress in March 1865 was the first to affirm that Congress had the power to enforce a constitutional right. The 14th amendment repeated that. In short, Section 5 put Congress specifically in charge of making sure of the "validity of the public debt," and definitely not the president. That was no accident. The Congress that passed the 14th Amendment had zero confidence in the president (Andrew Johnson) in carrying out congressional policy. The last thing they wanted over the winter of 1865-66

was to give Pres. Johnson any more power that he could abuse. But abuse he did and the next House, elected in 1866, impeached him. I'm with Bmaz on this one.

[Note: I actually did this post at the request of our good friend Howie Klein at his blog Down With Tyranny and it is cross posted there as well]