



Legality of 'Fourteenth amendment solution' comes under fire

By Alicia M. Cohn and Daniel Strauss - 07/10/11 05:47 AM ET

Legal scholars are discrediting the idea that the president has the power to circumvent the debt ceiling set by Congress in order to avoid a government default.

This so-called "14th amendment solution" relies on an interpretation of the amendment that would make it illegal for the federal government to default. Advocates argue that if negotiations to broker an agreement on raising the debt limit break down ahead of an Aug. 2 deadline the president could bypass Congress to avoid defaulting.

Talk of the idea, which has persisted over the past few weeks of rapidly intensifying partisan battles over the debt ceiling and the budget deficit, provoked 12 Republican Senators to co-sign a resolution proposed Friday by Sen. Lindsey Graham (R-S.C.) that would censor the president for attempting to raise or bypass the debt ceiling on his own.

"In the last 30 years, particularly starting with the Reagan presidency, you've had lawyers arguing that the president can do anything that the constitution doesn't bar him from doing," said Garrett Epps, a law professor at the University of Baltimore Law School.

The theory behind the idea would make a 14th amendment solution legal because "the debt limit is [stopping] you from doing something the Constitution requires you to do," Epps said.

Many Democrats and Republicans quickly latched onto the possibility that President Obama may actually have legal authority to raise the debt ceiling without Congressional authorization, prompting questions about the possibility in White House briefings that the president appeared to avoid without flat-out dismissing the idea.

The Treasury Department appeared to fan the flames when in early July, Treasury Secretary Tim Geithner said threatening a default was "not a credible negotiating strategy" due to the 14th amendment.

Geithner's statement resulted in widespread speculation that the Obama administration was considering disregarding Congress if it voted not to raise the debt ceiling.

Roughly a week later, the Treasury Department released a response stating that Geithner was not arguing that the 14th amendment authorized Obama to raise the debt ceiling on his own.

"The Constitution explicitly places the borrowing authority with Congress, not the President," Treasury Department General Counsel George W. Madison wrote.

"Like every previous Secretary of the Treasury who has confronted the question, Secretary Geithner has always viewed the debt limit as a binding legal constraint that can only be raised by Congress."

The letter was a denial from the White House that it was considering raising the debt ceiling based on the 14th Amendment, but with the deficit debates still at an impasse and the Treasury Department's default deadline coming soon on Aug. 2, the idea is still being debated.

David B. Rivkin, Jr., an attorney who served in the Department of Justice during the Ronald Reagan and George H.W. Bush administrations, said the DOJ would never advise the president to use the 14th amendment as a legal run-around on the debt ceiling.

"It's so absurd," Rivkin said. "It is an empty threat. Not even a threat, it is a legal impossibility. ... It's not just a question of opinion, it's a question of case law."

Still, Republican push-back over the threat of a 14th amendment solution has been swift and fierce. Sen. Ron Johnson (R-Wis.) said Republicans would take the president to court over it, while Tim Scott (R-S.C.) said it would be "an impeachable act."

Rivkin agreed. "Any president who did something like this would be engaging in the most outrageous conduct of any president in ... constitutional history. There's no doubt that this would be an impeachable offense," he said.

Republican concerns seem to come from the idea of a president willing to usurp Congressional authority, and Rivkin said the GOP response was appropriate.

"I don't think the White House would ever do this, but if you're presented with even the not-very-likely threat to do something outrageous, something to totally subvert our constitutional fabric, the proper response is one of push-back and outrage," Rivkin said.

The White House and the Treasury Department have sought to downplay the idea. White House Press Secretary Jay Carney said this week that White House lawyers have no plans to look into the legality of using the 14th amendment as grounds to extend the Treasury's borrowing authority. "I don't know that anybody is studying it," Carney said.

However, some Senate Democrats have expressed interest in exploring the 14th amendment as an option either now or, as Sen. Charles Schumer (D-N.Y.) has suggested, in future debt ceiling talks.

The issue had been raised in "some private debate between senators," according to Sen. Chris Coons (D-Del.) last week, with many advocating taking a "strong second look."

"The attractiveness of this argument for some was the possibility that it would create a fait accompli, that regardless of the merits of the argument that they [the White House] might be able to block any judicial review of the argument that would leave the administration unchallengeable," according to George Washington University Professor Jonathan Turley, a legal scholar.

"But what it would also do is trigger a very intense fight between the legislative and executive branches. I think that both sides realized that this was not a time when we should be playing constitutional chicken."

It might not be a serious threat, but Republicans are taking it seriously.

"I wouldn't call it empty [as a threat] because there are some legal authorities who seem to think it has some merit," said Robert A. Levy, chairman of the Cato Institute.

"I do think politically it's a dead issue," Levy said, because "there's no political upside." The president would end up under fire for circumventing Congress, and would likely face a drawn-out legal battle.

Rep. Barney Frank (D-Mass.) said something similar in a Senate Democrat policy hearing on Thursday. "The political bitterness and the vitriol would be amplified" by using a 14th amendment solution," he said.

According to Levy, the sticking point is the difference between the debt ceiling and the possibility of a government default.

Levy and Rivkin both said that meant that a default is unconstitutional. However, Levy said, hitting the debt ceiling does not necessarily produce a default.

"All that debt ceiling does is shut off one source of funding," Levy said. The debt ceiling caps the U.S. ability to borrow. "The president still has lots of options [to avoid a default]," he said.

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