

# Denial in the Face of “Debt Default”: There is No “Debt Ceiling”

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Debt Ceiling? What Debt Ceiling? That’s a unicorn in Congress’s garden!

For all the talk about the United States approaching a catastrophic Debt Ceiling and subsequent unprecedented but exceptional default that would have unpredictable but probably dire impact on pretty much everybody, one thing you don’t hear much is that *There is No Debt Ceiling*.

Seriously, the relevant law literally does nothing to control the national debt. A serious Debt Ceiling law would prevent Congress from appropriating expenditures beyond the debt limit. Congress has never done that, Congress probably never would do that, even if it could. Congress doesn’t want to do that, and it would probably be irresponsible for Congress to do that.

Presumably a president could veto any appropriation that exceeded the Debt Ceiling of the moment, but why would a president do that?

The Debt Ceiling is a legal fiction, a fantasy, a mindless game the United States has been playing with itself since 1917, for reasons that defy rational comprehension. There is no compelling constitutional basis for this contra-constitutional legalism. The only other democratic country in the world with a Debt Ceiling is Denmark, where it is an empty formality that tracks with the reality of government spending and has never been manipulated to create a dishonest debt “crisis.”

Even the phrase “Debt Ceiling” is false on its face. The law does nothing to stop the accumulation of debt by Congress. What the law does is hamper the executive branch, the Treasury Dept., in paying off debt that Congress voted into law. Congress, in its traditionally narrow vision, creates one law to make the president spend money and another law to prevent him from spending it, and then expects him to obey both laws.

Isn’t it un-American for Congress to make us all play Russian roulette?

In other words, the Debt Ceiling dance is an inherently stupid charade, a kind of Russian roulette that the Republicans now think would be fun to play with no empty chambers. That would be no empty chambers in the revolver, empty chambers among the people’s representatives is another matter entirely.

The ridiculousness of the Debt Ceiling duplicity has been apparent to most sentient people right along, that’s why congressional passage of bills to raise the Debt Ceiling were, until recently, largely theatrical opportunities for public posturing that even the performing

demagogues knew was an empty gesture, since the comedy had a foregone conclusion: the bill would pass the Debt Ceiling would be raised to cover the expenses Congress had already incurred.

Somewhere along the line, sanity lost its edge and now the nihilist know-nothings in Congress, in the House of Representatives, in the Republican caucus are allowed to hold that fully-loaded revolver to everybody's head and play Russian roulette with the world. This would make some sense in an Oliver Stone movie, the audience might thrill to the spectacle of so many people's blood and brains blown against the clean, white, and imaginary walls of law and tradition. Then they'd walk out of the theatre. We can't.

Or can we?

Why won't President Obama act like a president?

If President Obama would act forcefully and decisively (presidentially!) then this phony crisis would be over faster than the Secret Service could shoot a crazy person racing across the White House lawn. (This is NOT an argument for using lethal force on Congress, no matter how justified that could be made to seem.)

Go back to 2011 for a moment, the first time the people's hostage-takers held the Debt Ceiling gun to the country's head. President Obama, whether due to inexperience or philosophy or some other sad trait, played nice and made concession after concession after concession resulting not only in a loss off billions of dollars to the economy, not only in an unprecedented downgrade in the U.S. credit rating, but finally in an unjustifiable "compromise" that solved nothing and opened the way to the rolling fiscal crises we have experienced ever since, including the current double-barreled one (Debt Ceiling *and* shutdown).

President Obama blew it in 2011. But everyone else who could make any difference also blew it in 2011, so the blame was diffused and minimized and apparently forgotten and here we are again. Thanks 2011 mud wrestle, the increased cost of government borrowing alone was \$18.9 billion, according to the General Accounting Office (GAO).

If President Obama blows it again this time, he should be impeached.

Impeachment for this, or any other reason, seems hardly likely, which is another measure of the country's cultural impotence, of our collective, national inability to see what matters most, never mind our unwillingness to act in the interest of the common good.

The president says, in a voice too whiny, that he is "exasperated" with Republicans in Congress and makes fun of some of the absurd things they say, but this is on the level of cable news infotainment and makes the president look like part of the problem. Another reason for that look is that he is part of the problem. The president can complain all he wants about Speaker Boehner's refusal to let the House vote on a budget bill that, by all accounts, would pass easily. But that creates the false impression that the president is helpless, that he is limited to an "Obama's Complaint" approach to governing, when the more important issue is his unwillingness to take decisive action.

There is a Gordian Knot solution to the problem of the moment – in fact there are at least three such solution that cut through the political knot and restore the country to a rational

state where the possibility of fiscal sanity and health replaces the looming uncertainty and disaster the Republican true believers would pull down on us all.

How about a trillion-dollar coin? Or special premium Treasury Bonds?

Two of the president's possible solutions are relatively simple, but somewhat gimmicky – and certainly vulnerable to Congressional reaction and rollback.

One is for the Treasury to issue trillion dollar platinum commemorative coins, then borrow against them, indefinitely. According to Yale Law School's professor of constitutional law Jack Balkin, this is both legal and constitutional, thanks to the loose way Congress wrote the law governing platinum commemorative coins. But it's hard to see how this sort of dodge would escape challenge legally, legislatively, politically, and rhetorically, especially in the talk radio fact-free zone. And it's hard to see the public understanding the ploy, much less cheering for the president.

The second Gordian knot solution is even more baroque and gimmicky, involving the Treasury Dept. creating "premium" Treasury Bonds that Treasury could then manipulate to control the calculation of the national debt to keep it technically under the Debt Ceiling. The full explanation of how all this works relies on a recondite rendering of the intricate interplay of par values, pricing, interest rates, rollovers, face values, and other variables that can be managed in their own fantastical way to fit within the chimera of the Debt Ceiling. This might be less vulnerable to attack because it's so hard to explain, but that would make it hard to defend, too. In the present moment already awash with suspicion and distrust, this response to the Debt Ceiling seems unlikely to clear the air at all.

So is this the situation the Constitution mandates? Really?

The third immediate, and perhaps permanent, means of stalling the Debt Ceiling crisis machine is for the president to throw a constitutional wrench in its gears.

This is the much-discussed 14<sup>th</sup> Amendment solution. The Fourteenth Amendment to the United States Constitution was ratified and adopted in 1868. Relevant to the Debt Ceiling mirage is the amendment's little-litigated section 4:

Section 4. 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 neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void. [emphasis added]

The plain meaning of the first sentence certainly seems to be, roughly: the public debt incurred by Congress shall be paid. Period. In 1935, in a Supreme Court case not directly related to the Debt Ceiling (*Perry v. United States*, 294 U.S. 330), the court's holding stated in highly relevant part:

"By virtue of the power to borrow money 'on the credit of the United States,' Congress is authorized to pledge that credit as assurance of payment as stipulated — as the highest assurance the Government can give — its plighted faith. To say that Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise, a

pledge having no other sanction than the pleasure and convenience of the pledgor. When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments.

“The right to make binding obligations is a power of sovereignty. The sovereignty of the United States resides in the people, and Congress cannot invoke the sovereignty of the people to override their will as declared in the Constitution. The power given Congress to borrow money on the credit of the United States is unqualified and vital to the Government, and the binding quality of the promise of the United States is of the essence of the credit pledged. “ [emphasis added]

“We in the White House see ourselves as really, really weak and ineffective.”

The White House continues to spin the Debt Ceiling story around the president’s perceived powerlessness, which is certainly an effective self-fulfilling prophecy. The president who says he has no authority to act seems pretty likely not to act. But it’s also possible the rationale is bogus and the president simply doesn’t want to act. The White House says it has an in-house legal opinion supporting the president’s impotence, but presidents tend to get the legal opinions they want – President Bush wanted torture to be legal, and presto White House counsel said torture to your little heart’s content.

The president’s oath of office, as provided in the Constitution, is elegantly simple and direct: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”

But the White House appears more concerned about bond markets than the obligations of the president’s oath or the nation’s general welfare and all the other priorities enumerated in the Constitution’s preamble.

So we have the chairman of the White House Council of Economic Advisers, Jason Furman, citing the White House legal opinion as justification for inaction, and then arguing that even if the president could act, paying the bills incurred by Congress would still be a bad idea because: “You could not have an economically successful [bond] auction in an environment like that.” He apparently did not go on to explain why a default on the national debt was a better idea.

And we have National Economic Council director Gene Sperling speaking from the same script: “The 14th Amendment does not give the President of the United State the ability to unilaterally borrow. And by the way, even if you did something that questionable, you would need all of the global financial markets to not be shaken by the specter of the United States government seeking to borrow money with a cloud of legal fuzziness over it.” He did add that he believed that such borrowing “would have a lot of the same harm that “a technical default would have.” He did not rule out a 14<sup>th</sup> amendment, but came close, ducking behind the White House legal opinion and saying “the cure does not exist.”

White House: the Constitution matters, except when it doesn’t

One of the things the White House consistent avoids mentioning is that the Debt Ceiling is not in the Constitution. It’s not even implied by the Constitution. It is only an untested law passed by Congress, with little or no real impact until 2011. But rather than challenge a

manifest absurdity, the White House cites the Constitution's grant of authority to Congress to borrow money and pay debts, as if those obligations can be trumped by the Debt Ceiling law which has no constitutional basis.

White House press secretary Jay Carney tosses out a red herring when he tells reporters that the White House legal opinion says the 14<sup>th</sup> amendment doesn't give the president the authority to raise the Debt Ceiling. He may be right in a narrow sense, but his point is totally irrelevant.

The president doesn't have to raise the Debt Ceiling this crisis. He doesn't have to address the Debt Ceiling in any direct way. All he has to do is *ignore* the Debt Ceiling and pay the government's bills.

Does anyone think the markets have much confidence in the United States now? Isn't it possible that the markets, watching a president acting with uncharacteristic clarity and vigor for the sake of the common good, might even feel a bit more confidence in a country where the lunatics were allowed to run the asylum for only a limited time?

Would Republicans move to impeach the president for acting to preserve the good faith and credit of the United States? Quite probably. But so what? Why isn't that a fight the president should embrace? Why shouldn't President Obama go fully on offense for sanity against the crazies? Why shouldn't he exercise the inherent emergency powers of the presidency to defend the nation and the Constitution? Why shouldn't he act presidentially and lead for a change? Wouldn't most people find that refreshing after all the feigned limpness?

And how much harder for the president would it be to act responsibly against the Debt Ceiling, really, than the way he already acts with even less authority to kill strangers with drones, also an impeachable offense by any reasonable measure, and one for which he will never be held accountable?

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