

(b) (5)

From: Larry Tribe (b) (6)
Sent: Saturday, July 30, 2011 08:44 AM
To: Patterson, Mark (DO)
Subject: On the "constitutional option"

Mark:

I hope you won't mind my sharing my current thinking on this situation and hope you and Tim might find it at least somewhat helpful.

Although a growing chorus of voices, including that of President Clinton, is calling on the President to employ the so-called "constitutional option" that the Secretary has said is off the table, I've held my ground on the proposition that the President has no more support in the 14th Amendment to borrow beyond the authority granted him by Congress than he has to impose taxes beyond the authority Congress has granted. I continue to think the contrary reading of the 14th Amendment is insupportable (despite the emergence of some support both among a few academics and among many politicians and pundits) and that, even though it's almost certain that no court would interfere with the President's decision to borrow above the statutory ceiling should that decision be made, it would nonetheless be a mistake to ground any such decision in the 14th Amendment.

In this circumstance, prioritization of payments to avoid default would still seem to me to be the principal lawful alternative should Congress fail to raise the ceiling in time. Against claims that such prioritization is itself illegal under the anti-impoundment and line-item-veto decisions and that the President should have gone the 14th Amendment route instead, my inclination would be to interpose a defense of impossibility. Because the Treasury would no doubt be sued by vendors or claimants whose checks were being delayed by whatever prioritization the executive branch chose to employ, an opportunity (albeit an unwelcome one) might then arise to litigate the question whether the option of borrowing in violation of the debt ceiling had been open to the President after all.

Needless to say, the litigation chaos that would ensue, in addition to the financial disaster, might lead the President to reconsider the wisdom of taking some more extraordinary action to disregard the debt ceiling, perhaps in the name of the "Take Care" clause and of his Oath rather than in the name of the

14th Amendment. Whether that would be a wise step would depend on balancing the downside of financial and legal meltdown against the downside of setting a genuinely dangerous precedent of ignoring the rule of law. If the President were nonetheless to pursue that course in the event that efforts at compromise in Congress fail, I would obviously understand a decision not to announce any such possibility in advance lest doing so reduce pressure on Congress to do what surely ought to be done before August 2, even at the 11th hour.

If you think that discussing any of this with me in confidence would be of any use, please know that I'd be more than happy to talk. (b) (6) . (b) (6)

Best of luck with this terrible situation.

Larry

Laurence H. Tribe

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-----Original Message-----

From: Mark.Patterson@treasury.gov [<mailto:Mark.Patterson@treasury.gov>]

Sent: Friday, July 08, 2011 7:54 PM

To: Larry Tribe

Subject: RE: Letter re Secretary Geithner's position on the "constitutional option"

Professor Tribe:

Thanks for this. I will of course share it with Tim.

If you'd like to discuss further, I think I could shed some more light on the issues you raise in your letter. But I certainly understand if you'd prefer not to.

I would say that I was present at the Mike Allen interview and I don't believe Mike, or anyone else I talked to, thought the Secretary's reference to the 14th Amendment indicated he supported or was considering the constitutional option. That would have been a major news story. (It wasn't.) When Tim said "it's not going to happen," he was clearly saying, as he has said many times publicly, that he was confident Congress is not going to fail to raise the debt ceiling and cause a default. That's definitely how it came through.

However, in the ensuing days and weeks some people in the blog world and other outlets, most of whom seem to support the constitutional option, latched onto the Secretary's 14th Amendment reference in the interview to try to buttress their case in favor of the idea. They have an agenda and we understand that. One such posting I saw included a photo of Tim holding up the Constitution, and it's possible that image may have influenced people who didn't see or read the actual interview. It's true we didn't rebut those things but the Secretary doesn't generally respond to that kind of stuff, and in fact it's impossible for us to respond to every erroneous thing that's written or said about him on the internet or on cable TV. The quantity of bad information and shoddy reporting out there is just overwhelming.

When Laurence Tribe writes something, however, it's a much bigger deal, which is what prompted my call. I only wish you had been able to check with the Secretary or anyone at Treasury before characterizing his position publicly on this very important issue.

Non Responsive

Sorry to have had the slightly tense exchange on this with you today. As I said, I'm a longtime admirer of yours and have the greatest respect for your work. But everyone at Treasury cringed this morning when we saw the reference to Tim in your otherwise excellent piece, and I just felt I had to call.

Thanks again,

Mark

-----Original Message-----

From: Larry Tribe [(b) (6)]

Sent: Friday, July 08, 2011 4:11 PM

To: Patterson, Mark (DO)

Subject: Letter re Secretary Geithner's position on the "constitutional option"

Importance: High

Mark:

As you'll see from the attached letter, although your General Counsel took me to task (in his letter to The Times) for having made an "assertion" that the Secretary had "argued" that the constitutional option was a valid one (whereas in fact my op/ed took care to say only that Secretary Geithner had "suggested" that the public debt clause "might" provide such an option), I decided not to make anything of that distinction but chose to say simply that I hadn't intended to "mischaracterize the Secretary's position," that I'm delighted to learn that the Secretary has now expressly "disavowed" the option of unilateral executive action, and that I take you at your word that he had "never intended to suggest that the option had ever been under active consideration."

I nonetheless thought it important, given the care and thought that I put into the op/ed and the importance I attach to being as accurate as I can, to explain why I, like so many others, had understood the Secretary otherwise until his most recent clarification. I trust you will forward the attached letter to the General Counsel and to Secretary Geithner, for whom I have the greatest respect.

Hopefully, this will put the matter to rest.

All the best,

Sincerely,

Larry

Laurence H. Tribe

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Professor of Constitutional Law
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-----Original Message-----

From: Mark.Patterson@treasury.gov [<mailto:Mark.Patterson@treasury.gov>]
Sent: Friday, July 08, 2011 2:19 PM
To: Larry Tribe
Subject: RE: Final version of Treasury letter to NYT

Thanks but I don't quite understand -- does that mean you find something to take issue with in the G.C. letter?

-----Original Message-----

From: Larry Tribe (b) (6)
Sent: Friday, July 08, 2011 1:43 PM
To: Patterson, Mark (DO)
Subject: RE: Final version of Treasury letter to NYT

Mark:

Thank you for sharing this with me. Having now reviewed the record for myself, I am in the process of writing a response to the General Counsel's letter. I will be sending it as soon as possible.

Sincerely,

Larry

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From: Mark.Patterson@treasury.gov [<mailto:Mark.Patterson@treasury.gov>]

Sent: Friday, July 08, 2011 1:26 PM

To: tribe@law.harvard.edu

Subject: Final version of Treasury letter to NYT

Professor Tribe:

Attached is the final version of the letter we sent to the NYT. It has one change from the text I sent you earlier: we deleted the last sentence regarding the Secretary's remarks at yesterday's meeting with the congressional leadership. (We dropped that sentence because, although the substance of the Secretary's statement was reported in today's Times, there was an agreement in the room not to characterize the discussion publicly.)

Thanks again,

Mark