
CONSTITUTIONAL LAW — SEPARATION OF POWERS — CONGRESS DELEGATES POWER TO RAISE THE DEBT CEILING. — Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240 (to be codified in scattered sections of the U.S. Code).

The tense weeks leading up to the August 2, 2011, deadline for raising the federal debt ceiling witnessed a protracted partisan standoff with the potential for government default hanging in the balance.¹ Meanwhile, legal scholars and public officials debated whether President Obama could invoke constitutional authority to raise the debt ceiling unilaterally.² Ultimately, the President and leaders of Congress averted the impending economic and constitutional crisis by reaching a deal, the Budget Control Act of 2011³ (BCA), which President Obama signed into law on August 2.⁴ In exchange for a promise to hold a vote on a constitutional amendment requiring a balanced budget⁵ and to reduce the federal budget deficit by \$2.4 trillion over a decade,⁶ congressional Republicans agreed to delegate authority to the President to raise the debt ceiling.⁷ Although this deal allowed a divided-party government to step back from the brink of default, the BCA's imposition upon the President of responsibility to raise the debt ceiling represents a conspicuous abuse of the permissive nondelegation doctrine. Furthermore, this episode draws attention to an attempt to craft a standard for distinguishing and more skeptically scrutinizing similar accountability-skewing delegations — an effort begun, but left unfinished, by the Supreme Court in *Clinton v. City of New York*.⁸

In September 1917, forcefully decrying passage of the precursor to the modern debt-limit statute,⁹ Senator Robert La Follette, Sr., remarked that “Congress has acquired the habit of divesting itself of all responsibility as to legislation.”¹⁰ His remarks came in response to

¹ See Elizabeth Drew, *What Were They Thinking?*, N.Y. REV. BOOKS, Aug. 18, 2011, at 13, 13.

² This debate focused on the Public Debt Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 4 (“The validity of the public debt of the United States . . . shall not be questioned.”). See Laurence H. Tribe, Op-Ed., *A Debt Ceiling We Can't Wish Away*, N.Y. TIMES, July 8, 2011, at A21.

³ Pub. L. No. 112-25, 125 Stat. 240 (to be codified in scattered sections of the U.S. Code).

⁴ Jennifer Steinhauer, *Debt Bill Signed, Ending Crisis and Fractious Battle*, N.Y. TIMES, Aug. 3, 2011, at A1.

⁵ See Budget Control Act § 201, 125 Stat. at 250.

⁶ For an effective summary of how the law makes these cuts, see COMM. FOR A RESPONSIBLE FED. BUDGET, SUMMARY OF THE BUDGET CONTROL ACT 1 (2011), available at <http://crfb.org/document/debt-deal-summary>.

⁷ See Budget Control Act § 301(a)(2), 125 Stat. at 251 (to be codified at 31 U.S.C. § 3101A(a)(1)).

⁸ 524 U.S. 417 (1998).

⁹ Second Liberty Bond Act, Pub. L. No. 65-43, § 1, 40 Stat. 288, 288 (1917).

¹⁰ 55 CONG. REC. 7170 (1917).

Congress's delegation of authority to the Treasury Secretary to determine the interest rates and lifespan of World War I liberty bonds.¹¹ Although Congress had historically given the Treasury Department substantial discretion¹² to oversee exercise of the Article I borrowing power,¹³ before World War I, the intermittency of the need to incur debt had made possible direct congressional involvement in approving the contours of individual borrowing plans.¹⁴ By 1939, Congress had gone further by adopting the approach still employed today: rather than setting caps on debt incurred by individual borrowing initiatives, it began approving a single limit on total debt obligations.¹⁵

From the beginning of the summer 2011 negotiations to raise the debt limit, Republican leaders in Congress made three demands: tax increases must not be considered as part of any deficit reduction plan; any increase in the debt ceiling must be accompanied by a plan to slash fiscal outlays; and these spending cuts must offset the increase in the debt limit.¹⁶ The White House soon agreed to Republican demands for significant deficit reduction but set a goal of relying on both tax-revenue increases and spending cuts to reduce the deficit.¹⁷ Against this backdrop, a group of conservative Republicans insisted that they would vote against raising the debt ceiling under virtually any circumstances.¹⁸ In spite of these conflicting agendas, weeks of negotiations between President Obama and House Speaker John Boehner appeared close to yielding a massive deficit reduction package.¹⁹ But on July 22, in a dramatic Friday evening press conference, President Obama announced that Speaker Boehner had abandoned talks due to Democrats' insistence on increasing tax revenue. The President ominously concluded that "[w]e have now run out of time."²⁰

Ten days earlier, Republican Senate Minority Leader Mitch McConnell had stymied conventional wisdom by breaking ranks with

¹¹ *Id.* at 7169; *see also id.* at 7172–74.

¹² Anita S. Krishnakumar, *In Defense of the Debt Limit Statute*, 42 HARV. J. ON LEGIS. 135, 139–40 (2005).

¹³ U.S. CONST. art. I, § 8, cl. 2. The statutory debt ceiling represents Congress's sole remaining nondelegated role in exercising the borrowing power. *See* Krishnakumar, *supra* note 12, at 163–64.

¹⁴ *See* D. ANDREW AUSTIN & MINDY R. LEVIT, CONG. RESEARCH SERV., RL31967, THE DEBT LIMIT: HISTORY AND RECENT INCREASES 2 (2010).

¹⁵ *See id.* at 3.

¹⁶ *See* Carl Hulse, *Boehner Outlines Demands on Debt Limit Fight*, N.Y. TIMES, May 10, 2011, at A16.

¹⁷ *See* Drew, *supra* note 1, at 14.

¹⁸ *See id.*

¹⁹ Naftali Bendavid, Carol E. Lee & Janet Hook, *Obama and Boehner Advance Toward Deal to Cut Deficit*, WALL ST. J., July 22, 2011, at A1.

²⁰ President Barack Obama, Remarks by the President (July 22, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/07/22/remarks-president>.

House Republicans to propose a “last-choice option” delegating authority to President Obama to raise the debt ceiling.²¹ The motivation for this proposed procedure was to prevent members of Congress who had promised not to raise the debt ceiling from having to vote directly to do so and to force the President to bear accountability for the unpopular task historically within the province of congressional responsibility.²² Congressional leaders and the President neither embraced nor expressly rejected the McConnell proposal,²³ preserving it as a viable basis for the ultimate agreement.

Following the breakdown in the Obama-Boehner talks, with just over a week before the looming August 2 deadline, Senate Majority Leader Harry Reid and Speaker Boehner each prepared separate proposals, meanwhile threatening to reject one another’s plans.²⁴ A key remaining obstacle to a deal was Democrats’ demand for a debt-ceiling increase that would extend through the remainder of the President’s term: the Boehner proposal would have forced Democrats to push through another debt-ceiling increase in the midst of the 2012 election year.²⁵ Senator Reid paved the way toward the final compromise by returning to the McConnell approach²⁶: Democrats would surrender their demand for a one-step debt-ceiling increase and agree to a delegation arrangement forcing the President to take responsibility for raising the debt ceiling so long as the two debt-ceiling increases would last long enough to avoid the risk of election-year *déjà vu*.²⁷ Senator Reid also bowed to the consistent Republican demands for offsetting deficit cuts.²⁸

Republicans took the deal.²⁹ The BCA stipulates that when U.S. debt obligations are within \$100 billion of exceeding the debt limit, the President may submit a certification to Congress calling for a \$900 billion increase.³⁰ Automatically, the debt ceiling increases by \$400 billion, and if Congress fails to respond in fifty days, the debt ceiling

²¹ See Jackie Calmes, *Debt Talk Mired, Leader for G.O.P. Proposes Option*, N.Y. TIMES, July 13, 2011, at A1.

²² See *id.*

²³ See *id.*

²⁴ Lori Montgomery, *Debt Strategies Diverge as Talks Remain Mired*, WASH. POST, July 25, 2011, at A1.

²⁵ *Id.*

²⁶ Julie Hirschfeld Davis & Laura Litvan, *Reid Revises Debt Bill to Include McConnell Two-Step Process*, BLOOMBERG (July 29, 2011, 9:36 PM), <http://www.bloomberg.com/news/2011-07-30/reid-revises-debt-limit-proposal-to-include-mcconnell-s-two-step-process.html>.

²⁷ See Carl Hulse & Helene Cooper, *Leaders Agree on Outlines of Deal to End Debt Crisis*, N.Y. TIMES, Aug. 1, 2011, at A1.

²⁸ See *id.*; see also Davis & Litvan, *supra* note 26.

²⁹ See Steinhauer, *supra* note 4.

³⁰ Budget Control Act § 301(a)(2), 125 Stat. at 251.

increases by an additional \$500 billion.³¹ Subsequently, when debt obligations again reach the \$100 billion danger zone, the President may file a second certification, this time calling for a default increase of \$1.2 trillion.³² If Congress does not respond in fifteen days, the debt limit rises to the level commanded by the President.³³ In both rounds, to prevent a debt-ceiling increase as large as the President requests, Congress may pass a “joint resolution of disapproval,” like an ordinary bill, subject to a presidential veto and in turn, a veto override.³⁴

Few scholars or commentators have seriously questioned the constitutionality of this debt-ceiling delegation. And for good reason: the procedure is entirely consistent with the intelligible principle standard ordinarily governing the constitutionality of delegated authority. Yet the BCA is wholly inconsistent with crucial assumptions underlying the modern nondelegation doctrine. In *Clinton v. City of New York*, striking down the Line Item Veto Act of 1996³⁵ (LIVA), the Supreme Court made a tentative foray toward creating a carve-out from the otherwise permissive nondelegation doctrine for purposeful attempts by Congress to disclaim accountability for legislative outcomes. But ultimately the Court conceived too narrowly of how Congress could employ delegation to shift accountability to the executive. The BCA, unlike the LIVA, was not an attempt by Congress to avoid resolving a contentious policy decision entirely, but rather a bid to force the President to effectuate an unpopular legislative judgment. *Clinton’s* framework thus has underappreciated utility but requires elaboration.

The nondelegation doctrine as currently constituted is a paragon of tolerance, guarding the constitutionally prescribed lines of democratic accountability but doing so only weakly. The conventional articulation of the doctrine grounds its constitutional analysis in the Vesting Clause of Article I,³⁶ a general safeguard the Court has enforced more leniently than more specific constitutional boundaries.³⁷ But this choice of constitutional predicate is itself a form of accommodation of delegation: executive exercise of delegated power is a type of lawmaking authority that courts could regulate under the more strictly enforced constitutional requirements of bicameralism and presentment.³⁸

³¹ *Id.* at 251–52.

³² The President may increase the debt limit by \$1.5 trillion if Congress approves a balanced budget amendment or enacts a debt-reduction package of at least \$1.5 trillion. *Id.* at 252.

³³ *Id.*

³⁴ *Id.* at 252, 255.

³⁵ Pub. L. No. 104-130, 110 Stat. 1200.

³⁶ U.S. CONST. art. I, § 1 (vesting in Congress “[a]ll legislative Powers herein granted”).

³⁷ See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2008–13, 2017, 2021 (2011).

³⁸ JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 389–90 (2010).

Broadly, these provisions demarcate a constitutional interest in “a distinctive form of accountability” in which Congress makes policy decisions that the electorate can hold the body responsible for reaching.³⁹

Applying the Vesting Clause, the Supreme Court has largely avoided the formalist exercise of differentiating between executive and legislative power,⁴⁰ instead opting for a standard that requires Congress to pair delegations with an “intelligible principle” guiding execution of the delegated authority.⁴¹ This test purportedly functions to preserve the lines of democratic accountability for legislative action by forcing Congress to resolve and hold itself out as responsible for a given policy decision.⁴² In practice, the hallmark of this test has been lenient application, justifiable on the basis of an assumption about the purity of congressional motive when delegating.⁴³ That is, Congress delegates because it lacks the expertise to address the regulatory challenges of industrial modern society.⁴⁴

The delegation of power to raise the debt ceiling almost certainly satisfies the intelligible principle test but nevertheless departs markedly from crucial assumptions underlying the test’s propriety. The BCA sets forth an intelligible principle by preventing the President from raising the ceiling unless debt obligations reach the \$100 billion danger zone and the President determines “that further borrowing is required to meet existing commitments.”⁴⁵ Yet the executive has no comparative expertise in raising the debt limit: the Treasury Department certainly monitors U.S. debt obligations, but once it predicts a date upon which the debt level will exceed its limit, Congress can just as easily vote to raise it as the President can do so unilaterally. Furthermore, the very purpose of the BCA is to shift accountability for a legislative decision to the executive,⁴⁶ intentionally pursuing the constitutional mischief, ordinarily only collateral, that the intelligible principle test ostensibly seeks but apparently fails to cabin.

In the face of evident abuse of the intelligible principle test, a sub-current of legal scholarship has ardently supported a reinvigoration of

³⁹ Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 323 (2000).

⁴⁰ See Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 483–84 (1989).

⁴¹ *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

⁴² See DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* 158 (1993).

⁴³ See David Epstein & Sharyn O’Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 965–66, 986–87 (1999); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 254.

⁴⁴ See *J.W. Hampton*, 276 U.S. at 406.

⁴⁵ See Budget Control Act § 301(a)(2), 125 Stat. at 251–52.

⁴⁶ The plan’s architect, Senator McConnell, expressly drew attention to this goal: “One of the most important aspects of this legislation is the fact that never again will any President, from either party, be allowed to raise the debt ceiling without being held accountable for it by the American people” 157 CONG. REC. S5219 (daily ed. Aug. 2, 2011).

the nondelegation doctrine.⁴⁷ But courts and scholars have been anxious about this agenda, given its potential to disrupt the regulatory state⁴⁸ and to invite the infiltration of judicial partisan bias.⁴⁹ In *Clinton v. City of New York*, the Supreme Court took a hesitant step⁵⁰ toward developing a narrower approach, carving out clearly identifiable instances of abuse⁵¹ but in a manner sensitive to concerns of judicial overreach. The Court struck down the LIVA, in which Congress, attempting to rely on the President to eliminate spending projects that Congress itself lacked the discipline to control, had delegated authority to President Clinton to “cancel” individual appropriations by submitting a cancellation notice with presumptive legal force.⁵² Despite the opportunity to use the case to reinvigorate the conventional nondelegation doctrine,⁵³ the Court grounded its analysis in the Presentment Clause,⁵⁴ thereby avoiding any doctrinal impact on the otherwise lenient consideration of regulatory delegations under the Vesting Clause.⁵⁵ The Court also reduced judicial administrability concerns by drawing a formal line limiting the scope of the decision to delegations of authority “to enact, to amend, or to repeal”⁵⁶ statutory text rather than grants to engage in rulemaking.⁵⁷

⁴⁷ See Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 330 (2002) (“The nondelegation doctrine . . . is the Energizer Bunny of constitutional law: No matter how many times it gets broken, beaten, or buried, it just keeps on going and going.”).

⁴⁸ See, e.g., Richard J. Pierce, Jr., Commentary, *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 400–03 (1987).

⁴⁹ See Thomas O. Sargentich, Commentary, *The Delegation Debate and Competing Ideals of the Administrative Process*, 36 AM. U. L. REV. 419, 431 (1987).

⁵⁰ Some scholars and courts have questioned the precedential significance of *Clinton*, viewing it as a case-specific wrangling of doctrine to invalidate a de facto line-item veto structured as a delegation, see, e.g., Saikrishna Bangalore Prakash, *Deviant Executive Lawmaking*, 67 GEO. WASH. L. REV. 1, 40–42 (1998), or a prohibition of only delegated statutory repeal — not revision — authority, *Terran ex rel. Terran v. Sec’y of Health & Human Servs.*, 195 F.3d 1302, 1312–14 (Fed. Cir. 1999).

⁵¹ See David Schoenbrod, *Politics and the Principle that Elected Legislators Should Make the Laws*, 26 HARV. J.L. & PUB. POL’Y 239, 263–64 (2003).

⁵² See *Clinton v. City of New York*, 524 U.S. 417, 436 (1998).

⁵³ *Id.* at 448.

⁵⁴ *Id.* at 448–49 (citing U.S. CONST. art. I, § 7).

⁵⁵ See Steven G. Calabresi, *Separation of Powers and the Rehnquist Court: The Centrality of Clinton v. City of New York*, 99 NW. U. L. REV. 77, 86 (2004); Steven F. Huefner, *The Supreme Court’s Avoidance of the Nondelegation Doctrine in Clinton v. City of New York: More Than “A Dime’s Worth of Difference,”* 49 CATH. U. L. REV. 337, 416–20 (2000).

⁵⁶ *Clinton*, 524 U.S. at 438.

⁵⁷ See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1389 (2001). This focus on only delegations of statutory-revision authority also captures a greater potential for accountability shifting — delegation to amend a previously enacted statute necessarily entails reliance upon the executive to undertake a role that Congress had previously felt competent to fulfill. The debt ceiling is an extreme example: since 1962, Congress has voted to amend the debt ceiling seventy-four times. AUSTIN & LEVIT, *supra* note 14, at 3.

The BCA contains similar flaws to the warning signs that tripped the Court's alarm in *Clinton*. Even though the LIVA, like the BCA, probably satisfied the intelligible principle test, the Court was unmoved.⁵⁸ It instead focused on the fact that the LIVA gave the President authority, in effect, to amend appropriations laws. Just as these spending provisions set the level of given appropriations, 31 U.S.C. § 3101(b), which the BCA amends,⁵⁹ explicitly fixes the level of the debt ceiling.⁶⁰ The BCA appended to this statutory provision a new, temporary mechanism for computing the debt limit, but because this new procedure relied on the President "to change the text of [a] duly enacted statute[],"⁶¹ it satisfies the threshold inquiry for invalidation under the express terms of *Clinton*.

Beyond this initial filter, the *Clinton* Court built in a check to ensure that its approach did not reach delegations serving a legitimate regulatory purpose: the Court examined whether exercise of the delegated authority was "contingent upon a condition that did not exist" at the time of delegation.⁶² This consideration served as an expertise inquiry, examining whether Congress delegated due to its institutional incapacity to foresee and legislate in reaction to future developments.⁶³ Although the envisioned increase in total U.S. debt obligations is literally a changed circumstance, it is not one that Congress lacks the institutional capacity to predict and act upon when necessary.

The *Clinton* Court then looked for an affirmative attempt by Congress to modify the lines of accountability for legislative decisionmaking.⁶⁴ *Clinton*, however, narrowly conceived of accountability shifting as an attempt by Congress to abjure entirely the task of resolving a policy dispute.⁶⁵ Specifically, the Court found impermissible the congressional willingness to permit the President to contravene congressional decisions embodied in recently enacted statutes.⁶⁶ Although the BCA appears at first glance to adopt a similar structure, allowing the President to override Congress's last duly enacted compromise setting the level of the debt ceiling, Congress itself arguably resolved the fun-

⁵⁸ *Clinton*, 524 U.S. at 484–85 (Breyer, J., dissenting).

⁵⁹ See Budget Control Act § 301(a)(2), 125 Stat. at 251.

⁶⁰ See 31 U.S.C. § 3101(b) (2006).

⁶¹ *Clinton*, 524 U.S. at 447.

⁶² *Id.* at 443.

⁶³ See Lawson, *supra* note 47, at 390.

⁶⁴ See 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-13, at 750 (3d ed. 2000) (identifying and praising the decision's restriction of accountability shifting).

⁶⁵ See *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring) ("Abdication of responsibility is not part of the constitutional design.").

⁶⁶ See *id.* at 444 (majority opinion); see also Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2366 (2001) ("What truly seemed to gall the [*Clinton*] majority . . . was that Congress had authorized the President to implement his policy views . . . in ways conflicting directly with prior legislative judgments.").

damental policy choice of whether to raise the debt limit. The BCA set the amount of the cumulative debt-ceiling increase, and during debate on the legislation, members of Congress conceived of the vote as a decision to raise the debt ceiling.⁶⁷

Clinton, therefore, missed the mark in focusing upon only one method by which Congress can shift accountability for tough decisions — it can either shirk decisionmaking responsibility altogether or, as in the BCA, give the executive discretion to effectuate a judgment, even repeatedly at predetermined intervals.⁶⁸ Moreover, the power delegated by the BCA is not any mere power: raising the debt ceiling is both highly unpopular⁶⁹ and realistically unavoidable, forcing the President's hand. Congress thus imposed a politically toxic responsibility on the President, effectively aggrandizing Congress's power compared to the status quo in which all debt limit increases begin in the halls of the Capitol. Thus, the BCA's skewing of constitutionally structured lines of democratic accountability had an effect akin in spirit to unambiguously unconstitutional congressional usurpations of power.⁷⁰ Of course, unlike these instances of legislative aggrandizement, the BCA did not formally hoard power within the legislative branch. Yet scholars have contended that constitutional analysis should not blind itself to the fact that manipulation of political power can impose far more potent burdens on the executive than can formal but realistically anemic assertions of aggrandizement.⁷¹

Given marked evidence in recent decades of increasing partisanship driven by sheer party loyalty rather than genuine ideological disagreement,⁷² divided-government Congresses may have an incentive to resort to BCA-like delegations with greater frequency. Yet the nondelégation doctrine will continue to lend a false veneer of credibility to these efforts. As an illustration of how Congress can shift accountability in ways that *Clinton* did not anticipate, the BCA demonstrates that the Court must go further to protect the constitutional safeguards of democratic accountability against modification in the name of political gamesmanship only.

⁶⁷ See, e.g., 157 CONG. REC. H5847 (daily ed. Aug. 1, 2011) (statement of Rep. David Dreier); *id.* at H5861 (statement of Rep. John Dingell).

⁶⁸ For example, the original McConnell delegation proposal called for requiring the President to raise the debt ceiling three times. Calmes, *supra* note 21.

⁶⁹ See, e.g., Lydia Saad, *U.S. Debt Ceiling Increase Remains Unpopular with Americans*, GALLUP (July 12, 2011), <http://www.gallup.com/poll/148454/Debt-Ceiling-Increase-Remains-Unpopular-Americans.aspx>.

⁷⁰ The Court has lectured in broad terms about the impropriety of legislative aggrandizement. See, e.g., *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 273 (1991); *INS v. Chadha*, 462 U.S. 919, 946–47 (1983).

⁷¹ See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2362 (2006).

⁷² See FRANCES E. LEE, *BEYOND IDEOLOGY* 68–73 (2009).