Written Statement of
Lee A. Casey
Hearing on the Statutory Debt Ceiling
Before the Committee on Ways and Means
House of Representatives

January 22, 2013

Thank you, Mr. Chairman and Members of the Committee.

It is an honor and privilege to appear here today to discuss the critical issue of the federal debt ceiling. At the outset I must emphasize that I am speaking on my own behalf, and not on behalf of my Firm or any of its clients.

There are really two questions before the Committee today, one of policy and one constitutional. The policy question involves the extent to which the so-called "debt ceiling" is a sensible place to do battle over what everyone must concede is an unsustainable level of federal spending. The second question involves the constitutional ramifications of the debt ceiling, whether there must be a congressionally mandated limit to federal borrowing, and the extent to which the President may ignore these restraints or simply raise that limit and borrow money on his own authority.

It is this second question I will address and I believe that the answer is clear: under the Constitution, Congress alone has the power to decide how, when and

why federal spending should take place, and the extent to which that spending may be supported by taxation and/or borrowing.

The debt limit or ceiling is, of course, a statutory device that dates to the First World War. Before that time, Congress customarily voted on individual borrowing measures. In 1917, the Liberty Bond Acts were passed to help fund America's war effort. Although these measures continued limits for individual debt issues, the Second Liberty Bond Act of 1917 became the basis for the modern debt limit ceiling now codified at 31 U.S.C. § 3101.[1] Although the debt limit *in its current form* is not constitutionally mandated, some type of congressionally controlled limit on Executive Branch borrowing is required and, whatever precise form that limitation takes, it is constitutionally protected. The President can neither ignore nor alter the debt limit without fundamentally subverting the Constitution's separation of powers and violating his own oath of office.

There are two principal mechanisms by which the federal government may obtain the resources it needs to operate – through taxation and through borrowing. Both of these mechanisms are the peculiar province of the legislative branch.[2] Under Article I, section 8 of the Constitution, Congress alone is granted the

[1] *See generally*, D. Andrew Austin & Mindy R. Levit*, The Debt Limit: History and Recent Increases* 7-8 (Cong. Res. Serv. Dec. 27, 2012).

[2] A third mechanism for raising revenue, sales of federal assets, is also subject to congressional control. *See* U.S. Const., art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

authority to lay and collect taxes, to pay federal debts, and "[t]o borrow Money on the credit of the United States." The Executive Branch then carries out these functions – that is, its role is to execute what Congress has enacted in these areas. The President has no independent authority to raise taxes or to borrow on the Nation's credit.

This was, of course, the purpose and intent of the Constitution's Framers. In a basic division of governmental power, they granted the President the sword (as Commander-in-Chief), the Courts judgment (in actual cases and controversies), and Congress the power of the purse. Vesting the legislature with this power was, of course, inherited from the British system and was especially viewed as empowering the House of Representatives, where all revenue bills must originate. *See* U.S. Const., art. I, § 7, cl. 1. Moreover, as James Madison explained in Federalist No. 58, the Framers fully anticipated and intended that congressional power over federal taxation, borrowing and spending would be used as a political weapon:

> The house of representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse; that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown

> prerogatives of the other branches of the government. *This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.*

The Federalist No. 58 at 394 (James Madison) (Jacob E. Cooke ed. 1961) (emphasis added).

It follows, of course, that the President cannot "raise the debt ceiling" on his own authority and is bound to respect this limitation on federal spending, even if this requires him to make difficult decisions and take actions he would not otherwise support. Those who have suggested that section 4 of the 14th amendment grants the President such power are mistaken. That provision vests the President with no additional or independent authority.

Section 4 of the 14th Amendment forbids repudiation of federal debts lawfully incurred. It was adopted shortly after the Civil War (ratified July 9, 1868) to ensure that the debts incurred by the federal government fighting that conflict would be honored and those of the Confederate States permanently nullified. Section 4 provides in full that:

> 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.

U.S. Const. amend. XIV, §4. A constitutional amendment was necessary to guarantee this result because, once representatives of the southern States returned to Congress, Congress otherwise could have reversed these decisions under the fundamental principle that the simple legislative actions of one Congress do not bind future Congresses.

Whatever the circumstances of section 4's enactment and ratification, its language is not limited to the public debt incurred during the Civil War, and the Supreme Court has suggested a broader application. In *Perry v. United States*, 294 U.S. 330 (1935), one of the actions spawned when Congress abandoned a gold currency in 1934, the Court noted with regard to section 4 that:

> While this provision was undoubtedly inspired by the desire to put beyond question the obligations of the government issued during the Civil War, its language indicates a broader connotation. We regard it as confirmatory of a fundamental principle which applies as well to the government bonds in question, and to others duly authorized by the Congress, as to those issued before the amendment was adopted.

294 U.S. at 354.[3] This provision should, of course, give confidence to those who have loaned money to the United States, through the purchase of various debt instruments, that their investment is safe. Unlike other sovereigns, the United States cannot repudiate or dishonor its debts.[4]

However, claims that this fundamental rule permits the President to raise the debt ceiling on his own authority are specious. Not only would such power upset the Constitution's basic separation of powers – and there is no evidence that the Framers of the 14th amendment had any such purpose – but it is also plainly

---

[3] Significantly, there is evidence in the amendment's drafting history that this broader effect was specifically intended. *See* Andrew M. Grossman, *Heritage Foundation Legal Memorandum: The Fourteenth Amendment is No Blank Check for Debt Increases* 2 (July 11, 2011) (quoting the statement of Senator Benjamin Wade that "I believe that to do this will give great confidence to capitalists and will be of incalculable pecuniary benefit to the United States, for I have no doubt that every man who has property in the public funds will feel safer when he sees that the national debt is withdrawn from the power of Congress to repudiate it and placed under the guardianship of the Constitution.").

Moreover, in *Perry* eight justices (four among the majority and four in dissent from the Court's decision) found the obligation to honor such debt instruments not merely in the 14th amendment, but inherent in the power to borrow "on the credit of the United States" in the first instance:

> The binding quality of the promise of the United States is of the essence of the credit which is so pledged. Having this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy those obligations.

294 U.S. 353, 372-379.

[4] Under current law, were federal payments on debt stopped or interrupted, injured bondholders would likely be able to obtain relief in the United States Court of Federal Claims. *See* 28 U.S.C. § 1491 (granting United States Court of Federal Claims Jurisdiction over damage claims against the United States founded in the Constitution, statute or contract). *Cf. Hatter v. United States*, 953 F.2d 626 (Fed. Cir. 1992) (Claims Court had jurisdiction over claim by federal judges that their salaries had been reduced in violation of the compensation clause, U.S. Const. Art. III, § 1).

inconsistent with that amendment's language. The 14th amendment, including section 4, gives the President no additional authority. Indeed, section 5 of the 14th amendment specifically vests the power to enforce its requirements *in Congress*: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The next question, of course, is what is the "public debt" that section 4 renders sacrosanct. The most obvious interpretation is that the public debt consists of debt instruments issued by the United States in exchange for money – the results of Congress' exercising its power under Article I, section 8, to "borrow Money on the credit of the United States." This certainly was the usage adopted by the *Perry* Court, although its actual holding was limited to determining that the plaintiff had not been damaged by the government's refusal to pay in gold or the equivalent amount in currency. *See Perry v. United States*, 294 U.S. at 356-57, 361.

What is clear is that this "public debt" does not include federal spending programs, including "entitlement" programs, simply because the government has in some general sense made a commitment to them. In *Flemming v. Nestor*, 363 U.S. 603 (1960), the Supreme Court ruled that even the Social Security program created no vested right to benefits thereafter immune from legislative change. Indeed, even at that early date the Court recognized that the future vitality of such programs depends on Congress's legal right to make changes in the available

benefits: "[t]o engraft upon the Social Security system a concept of 'accrued property rights' would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands." *Id*. at 610.

Thus, as a constitutional matter, Congress has the authority and obligation to regulate federal borrowing. It can exercise this power in a number of different ways, including by voting on individual debt issues as was the case before the First World War, or by establishing an overall limit on the amount of debt the federal government may incur without further congressional action. The President is bound by such limits. He can neither ignore the debt ceiling, nor can he "raise" it on his own authority. Section 4 of the 14th Amendment does not grant the President this power. Although it forbids any repudiation or dishonoring of the existing federal "public debt," it does not require or itself authorize new or additional borrowing.

I would be pleased to answer any questions the Committee may have.