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An Essay on the President's Constitutional Duty to Prioritize Expenditures¹

David R. Upham

ROUGH DRAFT: Please cite accordingly.

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Introduction

One year ago, the debt-ceiling standoff between the President and congressional Republicans prompted an interesting and prominent debate as to the President's authority to borrow in violation of the statutory debt ceiling. For decades, Congress has fixed a statutory limit on the debt that the United States is authorized to accrue,² but has often raised this ceiling to authorize the additional debt necessary to finance the perennial federal budget deficit. Last summer, many Republicans declared their opposition to any further debt increase, even though the result would have been insufficient funds to cover all congressionally-authorized appropriations.

The danger of an unfinanced budget deficit led various commentators to argue that the debt ceiling violates the Constitution and should therefore be disregarded by the President.³ The argument was that by stipulating that "[t]he validity of the public debt of the United States, authorized by law...shall not be questioned,"⁴ the Fourteenth Amendment prohibits Congress from imposing borrowing restrictions, like the debt ceiling, that might impede the satisfaction of, and thus "question" the full validity of, federal obligations. To comply with this "Public Debt

¹ Comments are most welcome. Please send them via email to davidrupham@yahoo.com.

² 31 U.S.C. § 3101

³ See, e.g., Bruce Bartlett, *What Debt Limit? Plan B is the 14th Amendment*, THE FISCAL TIMES, June 30, 2011, <http://www.thefiscaltimes.com/Columns/2011/06/30/What-Debt-Limit-Plan-B-is-the-14th-Amendment.aspx#page1> (arguing that "that the Fourteenth Amendment trumps the debt limit" and citing the agreement of Professor Garrett Epps, Professor Michael Abramowicz, Senator Christopher Coons and Senator Patricia Murray).

⁴ U.S. CONST. amend. XIV, § 4.

natural and constitutionally delegated powers in a certain way. For the most part, these provisions do not use the words “duty” or “obligation” or their cognates¹⁸ but the construction “shall + verb,” which the Framers used to identify an obligation except in the first person.¹⁹ So, for instance, Publius explained that “shall call a Convention,” as used in Article V, means that Congress “will be obliged” to call a convention upon the application of two-thirds of the state legislatures, and thus once the applications are received, “[n]othing in this particular is left to the discretion of that body.”²⁰

Some of these duties are imposed comprehensively on the whole federal government. So, for instance, all officers and legislators of the United “shall be bound by Oath or Affirmation, to support this Constitution.”²¹ Moreover, the whole “United States” must “guarantee to every State in this Union a Republican Form of Government [and] protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”²²

Some of these duties, however, are expressly assigned to discrete officers or departments of the United States. To cite a few examples, the Congress of the United States not only is vested with various powers, but has the duty to assemble at least once per year,²³ and to oversee, and (if necessary) determine, the final selection of the President and Vice-President.²⁴ Further, each house of the Congress is separately required to judge the elections, returns, and

¹⁸ But see *id.* art. II, § 2, cl. 6 (referring to the “Power and Duties” of the presidency).

¹⁹ See, e.g., *id.* art. I, § 2, cl. 2 (stipulating that “[n]o Person shall be a Representative who shall not have attained to the Age of twenty five Years”). See also, Nora Tillman & Seth Barrett Tillman, *A Fragment on Shall and May*, 50 Am. J. L. Hist. 453, 455 & n.8 (2010) explaining that “shall + verb,” except in the first person, formerly designated not futurity but “determination, promise, or command”) (quoting BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* 502 (1987)).

²⁰ Federalist 85 *****

²¹ *Id.* art. VI

²² *Id.* art. IV, § 4.

²³ *Id.* amend. XX, § 2

²⁴ *Id.* amend. XII.