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Constitutional Guidance for Lawmakers

You Can Borrow, But You Can't Hide: The Prudential Limits of the Borrowing Clause

So important is the power to borrow money that it was one of the few real powers expressly delegated to the weak and ineffectual government created under the Articles of Confederation. In drafting the Constitution, the Framers recognized the importance of empowering the government to provide for emergencies—in particular in times of war—and did not therefore place a limit on how much money Congress could borrow. They deemed it wise to leave this a political question to be determined on prudential grounds by our elected representatives. That is not to say, of course, that Congress should borrow recklessly. As George Washington exhorted his fellow Americans in his Farewell Address: "As a very important source of strength and security, cherish public credit. One method of preserving it is to use it as sparingly as possible." With the federal public debt now at a staggering $14 trillion, it is high time Congress reined in its profligacy. This essay is adapted from The Heritage Guide to the Constitution *for a new series providing constitutional guidance for lawmakers.*

"The Congress shall have Power To...borrow Money on the credit of the United States...."
—Article I, Section 8, Clause 2

The power to borrow money is essential to the existence and survival of a national government. In the Founding era, political leaders expected that in peacetime the Congress would craft the federal government's budget so that revenues equaled or surpassed expenditures. Indeed, the Treasury Department strictly complied with a policy of earmarking all revenues for particular government programs. Nonetheless, the nation could not successfully defend itself militarily without the power to borrow quickly and extensively when the need arose. The Framers therefore drafted the Borrowing Clause without an express limitation.

The Borrowing Clause, however, has a practical corollary. The terms upon which a nation could borrow money depended upon its credit standing. George Washington's Farewell Address captures the general sentiment of the times:

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> preserving it is to use it as sparingly as possible: avoiding occasions of expense by cultivating peace, but remembering also that timely disbursements to prepare for danger frequently prevent much greater disbursements to repel it; avoiding likewise the accumulation of debt, not only by shunning occasions of expense, but by vigorous exertions in time of peace to discharge the debts which unavoidable wars may have occasioned, not ungenerously throwing upon posterity the burden which we ourselves ought to bear.

Although Federalists and Republicans agreed on the need to maintain the public credit, they diverged considerably on how the borrowing power should be implemented. Indeed, the core differences in the visions of the Federalists and Republicans in the Founding era relate to contrasting views of this power. Alexander Hamilton sought to assure a strong central government by interpreting the Borrowing Clause as authorizing Congress to charter the First Bank of the United States (established in 1791), which maintained federal control over the federal reserves and issued debt instruments that circulated like money. Hamilton viewed large federal issues of debt instruments as an essential stimulant to commerce, providing a source of capital to a capital-poor society, and equally important for revenue collection purposes. The Constitution, however, did not expressly authorize Congress to charter corporations, and the constitutionality of the bank was widely debated.

Thomas Jefferson dismantled much of Hamilton's program. To the Jeffersonian Republicans, a balanced budget reflected a popular desire to limit the size and power of the federal government and to protect states' rights. Jefferson repealed Hamilton's internal taxes (which provided security for the federal debt) and appointed Albert Gallatin as Secretary of the Treasury with a mandate to pay down the federal debt. With a few exceptions, subsequent administrations also prioritized balancing the federal budget, and Andrew Jackson successfully paid down the federal debt in 1834.

Wartime exigencies and economic crises led the country toward the modern interpretation of the Borrowing Clause. A financial emergency that threatened national security during the War of 1812 led to the bipartisan acceptance of the need for federal government control of its reserves through the Bank of the United States, which was held constitutional in Justice John Marshall's expansively written *McCulloch v. Maryland* (1819). With respect to a federal currency, the Report of the Committee of Detail (debated at the Constitutional Convention) gave Congress the power to "borrow money, and emit bills on the credit of the United States." The delegates voted to strike the power to "emit bills," which strongly suggests that Congress was not authorized to borrow by means of a paper money, although it is clear that interest-bearing debt instruments were permissible. The Union's financial crisis during the Civil War, however, led to the attempt by the federal government to issue and make legal tender a paper-money currency, which was held constitutional in the *Legal Tender Cases* (1871). Financial problems during the Great Depression led Congress to define what constitutes legal tender. In 1933, a congressional joint resolution prohibited the enforcement of gold clauses in both contracts between the government and individuals and in private contracts, thereby making Federal Reserve notes the exclusive legal tender. The Supreme Court held the resolution constitutional in *The Gold Clause Cases* (1935).

Legal disputes dealing with the Borrowing Clause today involve two issues. The most litigated issue involves the principle of intergovernmental-taxation immunity. The Supreme Court has held that the Supremacy Clause (Article VI, Clause 2) prohibits state and municipal governments from directly or indirectly taxing the interest income on federal government debt and thereby interfering with the federal government's power under the Borrowing Clause. *See State ex rel. Missouri Insurance Co. v. Gehner* (1930).

The clause also implicitly requires Congress to maintain the public credit. The Supreme Court has invoked the clause in treating the government like a private party in its contractual dealings and in vesting Congress with the power to contract against subsequent repudiation or impairment of its obligations by future Congresses even in the exercise of independent substantive powers authorized under the Constitution. In *Perry v. United States* (1935), the Court cautioned that the power to borrow money is

> a power vital to the government, upon which in an extremity its very life may depend. 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.

In *United States v. Winstar Corp.* (1996), the Court held, among other things, that contractual obligations of the government would be enforced unless doing so blocked the exercise of one of the government's essential sovereign powers.

Because the Constitution imposes no express limits on the borrowing power, the political branches must decide the issue. As in the Founding era, the question of the extent to which the government should run deficits and maintain a large federal debt is at the essence of contrasting views about the proper scope of the federal government.

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