



Plaintiffs To The Rescue!

[Last week I argued](#) that a lawsuit from a private party challenging the debt ceiling would be a good way to break the impasse between President Biden and GOP terrorists. Well, as it turns out, someone has done just that, although not on my account. This lawsuit is better than my idea, I think, because it also strokes the Supreme Court's legal erogenous zones. The plaintiff is the 75,000-strong [National Association of Government Employees](#), an affiliate of the Service Employees International Union.

[NAGE's lawsuit](#), the brainchild of the brilliant labor lawyer [Thomas Geoghegan](#), is pretty straightforward:

- 1) Congress has passed a whole bunch of spending bills;
- 2) Congress has also passed the debt ceiling;
- 3) In order for the President to adhere to both spending and the debt ceiling, he must decide which spending to move forward with, and which spending to impound.
- 4) This kind of decision means that the Executive has the spending power.
- 5) Article I of the Constitution gives that power to Congress, and thus the debt ceiling is unconstitutional.

(If you are wondering about standing, the argument is that in order to put off the debt

ceiling, Treasury has taken “extraordinary measures,” which means that it is no longer putting enough money into the pension funds that NAGE negotiated for its members. Injury-in-fact, causation, redressability).

One of the strongest aspects of this litigation is that it has a case right on point: [Clinton v New York](#) (1998), which held the line-item veto unconstitutional. The Court held (6-3, Stevens writing the opinion, which was joined by Thomas among others), if Congress decides to spend money, the President cannot choose to refuse to spend it unless Congress gives him new authority rejecting the spending.



GOP Negotiating Strategy

The logic is exactly the same here, argue the NAGE plaintiffs: by passing appropriations, and then the debt ceiling, Congress is essentially telling the President to decide which duly-enacted appropriations to spend and which to ignore. That is the line-item veto, and it has already been ruled unconstitutional.

That is strong in and of itself. But, [as the late-night television ads used to say](#): Wait! There’s more!

Federalist Society founder Steven Calabresi called *Clinton* a “nondelegation case masquerading as a bicameralism and presentment case.” His reasoning was straightforward: by passing the line-item veto act, Congress had specifically delegated to the President the right to make certain spending choices, and the Court said that that sort of delegation was unconstitutional.

This is precisely the logic underlying the [Major Questions Doctrine](#). That Doctrine says that Congress cannot delegate such large policy questions to the President. (The Court's current definition of a Major Question is "a policy that the six of us don't like," but for that is neither here nor there).

Well, compared to the intricately detailed Clean Air Act, the debt ceiling law is basically contentless, and thus gives the President completely untrammelled discretion to make policy choices. It provides no standards, or priorities, or values, or anything else.

Put another way, if the debt ceiling does not violate the Major Questions doctrine, then *nothing* violates the Major Questions doctrine. Given the right-wing majority's ideological commitment to its new doctrinal invention, it stands to reason that it will want to put flesh on its bones and will jump at the chance to do so.

Note also that because the debt ceiling is so extreme in the discretion it offers the Executive, at least as a matter of doctrine it should not endanger most regulatory statutes. One can easily uphold the Clean Air Act's provisions while invalidating the debt ceiling; but one cannot do the opposite, at least if one wants to act with intellectual honesty.

And this last point is the greatest weakness of my argument. This Court has made intellectual dishonesty into something close to an art form. So maybe arguments don't matter; it's all power and ideology now.

But that actually provides something of a strength as well. [As I wrote in my last TAP piece on the subject](#): Republican billionaire contributors do not want a default. Neither does Harlan Crow. If saving Republican contributors isn't good enough for the Court, maybe reinforcing their new doctrinal toy will.