

[By Alexander Bolton](#)

Democratic lawmakers are urging President Obama to force Republicans to take him to court over the controversial issue of raising the debt ceiling.

They believe the Supreme Court ultimately will have to resolve the battle over spending now raging between Republicans and the president.

But how the courts will rule is shrouded in uncertainty because little case law exists to serve as meaningful precedent, legal scholars say.

Democrats in Congress argue Obama should not feel constrained by the 1917 debt-limit law, which the federal government is projected to hit in late February, because it conflicts with other laws.

"The president, I think, has the authority under the Constitution and under the various statutes that are passed — if nothing is done — he must do something about paying the bills," said Sen. Tom Udall (D-N.M.). "That issue may well go to the courts in our system.

"He's got two different statutes telling him different things and he can resolve — multiple statutes telling him different things — he can resolve that issue," Udall added.

Udall and other Democrats say Obama has the discretion to arbitrate among conflicting laws.

Udall believes the debt limit, which was created by the Second Liberty Bond Act of 1917, clashes with landmark legislation such as the Social Security Act of 1935, the Medicare Act of 1965 and various appropriations laws that direct the executive branch to spend federal funds on an array of priorities.

If Obama or Treasury Secretary Timothy Geithner were to suspend payment for various government programs, they would ignore Congress's previously expressed wishes, he argues.

Twenty-one House Democrats have signed a draft letter urging Obama to invoke Section 4 of the 14th Amendment to raise the debt limit unilaterally if Republicans demand steep cuts to entitlement programs in return for expanding borrowing authority.

The signatories have pledged to "support your use of any authority available to you, including the 14th Amendment, to preserve America's full faith and credit and prevent further damage to our economy."

"If the president is faced with that degree of congressional irresponsibility, we would support his use of the 14th Amendment to pay our bills and then let the courts sort out what the legalities are," said Rep. Peter Welch (D-Vt.), the lead author of the letter.

House Democratic Leader Nancy Pelosi (Calif.), who did not sign the letter, has also endorsed Obama's use of the 14th Amendment to resolve the debt-limit standoff.

"I've made my view very clear on that subject: I would do it in a second," Pelosi told reporters Friday. "But I'm not the president of the United States."

Republicans disagree on several points.

They argue that the federal government would not be forced to default on its debts if Congress fails raise the debt limit. They say Obama could selectively cut government programs to keep spending in check and ensure creditors are paid.

Senate Republican Whip John Cornyn (Texas) suggested in an op-ed published by the Houston

Chronicle that a partial government shutdown might be necessary.

"It may be necessary to partially shut down the government in order to secure the long-term fiscal well-being of our country, rather than plod along the path of Greece, Italy and Spain," he wrote.

Don Stewart, the spokesman for Senate Republican Leader Mitch McConnell (Ky.), says Democrats are in essence asking Obama to break the law.

"That's an interesting argument that they would ask him to ignore a law, but the White House has already ruled that out," he said.

Former President Bill Clinton was one of the first Democrats to publicly raise the possibility that Obama could get around the debt limit by invoking the 14th Amendment.

But Obama immediately rejected the possibility.

"I have talked to my lawyers," Obama said at the height of the debt-limit standoff in the summer of 2011. "They are not persuaded that that is a winning argument."

Jack M. Balkin, a professor of constitutional law at Yale Law School, predicted Obama would not attempt to circumvent Congress.

"The president will not increase borrowing authority without congressional approval. There will be a partial government shutdown," he said.

Balkin said lawmakers would have little recourse to challenge Obama's decisions under such a scenario.

"Individual members of Congress do not have standing to challenge the president in his decisions about what to prioritize during such a shutdown," he said.

Udall and Welch are advancing slightly different arguments.

While Welch pegs his argument to the 14th Amendment, Udall says Obama would have the authority to ignore the debt limit because his office is empowered by the Constitution to enforce laws and must use discretion when laws conflict.

Michael Dorf, a professor at Cornell University Law School, said Obama could pursue several legal strategies if the issue winds up in court.

He believes the president could argue that borrowing money in excess of the debt ceiling would be less of a usurpation of Congress's authority than unilaterally deciding which programs to cut, or taxes to raise, to keep within the limit.

"If Congress were to authorize spending that exceeds tax collection by \$1 trillion in a year, at a time when the existing federal debt is only one-half trillion dollars below its statutory ceiling, then the president could not execute all three laws as written. Faced with that impossible choice, the president risks acting unconstitutionally no matter what he might do," Dorf and co-author Neil H. Buchanan, a law professor at George Washington University, wrote in a Columbia Law Review article.

Dorf said the 14th Amendment could also give the president a strong legal argument, even though it was originally written to prevent Southern lawmakers from repudiating war debts in the aftermath of the Civil War.

The 14th Amendment states, "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 the legal relevance of the amendment to today's debate is questioned by other scholars.

Michael W. McConnell, director of the Stanford Constitutional Law Center at Stanford University, said arguments based on the 14th Amendment are weak.

"Section 4 of the 14th Amendment is not about default, it's about repudiation of the debt. It was passed in the wake of the Civil War with the single purpose of ensuring that when Southern representatives were readmitted to Congress that they could not repudiate the war debt," he said. "Repudiation is not the same as default."