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The 2011 Debt Limit Impasse:

**Treasury's Actions &
The Counterfactual – What
Might Have Happened if the
National Debt Hit the
Statutory Limit**

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Introduction

During the summer of 2011, political leaders in Washington came to an impasse over negotiations to extend the nation's borrowing authority, as its outstanding debt approached the limit. The statutory debt limit, first established in 1917, acts as a ceiling to the amount of debt the U.S. Treasury can borrow in order to finance deficit expenditures.¹ Failure to raise the limit when appropriated expenses are greater than incoming revenues could cause the U.S. to default on its obligations. The debt limit has been raised by Congress 78 times since 1960, typically without controversy.² In the last two decades, however, it has increasingly been used as a bargaining chip in broader negotiations between the political parties. In 2011, as tensions about the nation's increasing debt and deficits came to the fore of political discussion, the debt limit was once again invoked as a forcing mechanism in broader policy negotiations.

Part I will explore the Department of Treasury's efforts to extend the nation's borrowing authority during the 2011 impasse in order to provide political leaders more time for negotiations and to prevent the country from reaching the statutory limit. Part II will discuss what the Executive Branch might have done if the limit had been reached, including both the legal justifications and practical implications of the unprecedented choices.

I: 2011 Debt Limit Impasse

A. Political Backdrop to 2011 Debt Limit Impasse

¹ See generally D. Andrew Austin & Mindy R. Levit, Cong. Research Serv., 7-5700, The Debt Limit: History and Recent Increases (February 2, 2012).

² Department of the Treasury, *Debt Limit: Myth v. Fact* (available at <http://www.treasury.gov/initiatives/Documents/Debt%20Limit%20Myth%20v%20Fact%20FINAL.pdf>).

On May 16, 2011, the national debt reached the statutory limit of \$14.29 trillion,³ amounting to more than 250% of the same figure only ten years prior.⁴ The nation's debt increased rapidly over the course of the decade due to substantial cuts in tax revenue,⁵ the costs of fighting two wars,⁶ economic stimulus packages,⁷ and the rising cost of entitlements.⁸ When the Republican Party, with the help of the Tea Party, recaptured a majority in the House of Representatives in the midterm elections of 2010, deficit and debt reduction became a focal point of their agenda.⁹ Additionally, early in 2011, several bipartisan commissions studied the problem of structural deficits and the increasing national debt.¹⁰ Against this backdrop, Treasury Secretary Timothy Geithner notified Congress on January 6, 2011 that the outstanding debt subject to the limit stood at \$13.95 trillion, leaving only \$335 billion of borrowing authority.¹¹ Secretary Geithner urged Congress to raise the limit by the first quarter of 2011, warning it could

³ Austin & Levit, *supra* note 1, at 1. February 12, 2010 legislation (P.L. 111-139) increased the statutory debt limit to \$14.29 trillion.

⁴ Treasury Direct, *Monthly Statement of the Public Debt of the United States*, May 31, 2001 (available at [ftp://ftp.publicdebt.treas.gov/opd/opds052001.pdf](http://ftp.publicdebt.treas.gov/opd/opds052001.pdf)). Debt subject to the limit equaled \$5.573 trillion.

⁵ See Cong. Budget Office, *CBO's 2011 Long Term Budget Outlook* 65 (June 21, 2011) (available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/06-21-Long-Term_Budget_Outlook.pdf). Expiration of 2001 tax cuts estimated to generate additional tax revenue amounting to 2.9% of GDP.

⁶ See *Id.* at 58. Defense spending increased from 3% of GDP in 2000 to 4.7% in 2009-2010 "mainly as a result of operations in Iraq and Afghanistan and related activities"

⁷ See Cong. Budget Office, Letter to Nancy Pelosi regarding the American Recovery and Reinvestment Act of 2009, (February 13, 2009) (available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/99xx/doc9989/hr1conference.pdf>). American Recovery and Reinvestment Act of 2009 was scored by CBO at \$787 billion cumulative impact on federal deficits.

⁸ See CBO, *supra* note 5, at 7-10. *Note:* CBO estimates that "growth in noninterest spending as a share of gross domestic product (GDP) is attributable entirely to increases in spending on several large mandatory programs: Social Security, Medicare, Medicaid, and (to a lesser extent) insurance subsidies that will be provided through the health insurance exchanges established by the March 2010 health care legislation."

⁹ See Jennifer Steinhauer, *Debt Bill Is Signed, Ending a Fractious Battle*, New York Times, August 2, 2011, <http://www.nytimes.com/2011/08/03/us/politics/03fiscal.html>.

¹⁰ For example, President Obama established a commission on deficit reduction led by former Senator Alan Simpson and former White House Chief of Staff Erskine Bowles, and the Bipartisan Policy Center established a deficit reduction task force led by former Senator Pete Domenici and former Director of OMB Alice Rivlin. See Bipartisan Policy Center, *Side-by-Side Comparison: Simpson-Bowles Commission, BPC Domenici-Rivlin Task Force, President Obama, and Chairman Ryan*, April 22, 2011, <http://www.bipartisanpolicy.org/library/staff-paper/side-side-comparison-simpson-bowles-commission-bpc-domenici-rivlin-task-force-pr>.

¹¹ Letter from Timothy Geithner, Secretary of the Treasury, to Harry Reid, Majority Leader, US Senate, (January 6, 2011) (available at <http://www.treasury.gov/initiatives/Pages/debtlimit.aspx>).

be reached as early as March 31 or as late as May 16.¹² Before agreeing to an extension of the debt limit, House Republicans insisted on matching spending cuts to correspond with any debt limit increase and advanced a Balanced Budget Amendment.¹³ President Obama and Congressional Democrats pushed to include revenue increases in a deficit reduction measure and sought to protect entitlements.¹⁴ Despite extensive negotiations between President Obama and leaders of the House Republicans, an extension of the debt limit remained in doubt¹⁵ until its ultimate resolution on August 2, 2011.¹⁶

B. Treasury Undertook Extraordinary Measures to Reduce the Debt Subject to the Limit

In anticipation of reaching the statutory debt limit, Treasury Secretary Geithner undertook a variety of financial maneuvers to extend the nation's borrowing authority. On February 3, 2011, Treasury began to draw down its Supplementary Financing Account at the Federal Reserve from \$200 billion to \$5 billion,¹⁷ freeing up \$195 billion to pay for appropriated expenses without new borrowing against the debt limit. However, this maneuver provided a mere reprieve before the debt limit of \$14.294 trillion was reached on May 16, 2011.¹⁸ Approaching and reaching the debt limit prompted Treasury Secretary Geithner to take several "extraordinary measures," including the suspension of new debt issuances, the suspension of the investment of select government trust funds, and the redemption of securities invested in one government trust fund. These maneuvers provided Congress and the Executive Branch an

¹² *Id.*

¹³ See Washington Post, *How the parties fared in the debt-ceiling deal*, August 1, 2011, <http://www.washingtonpost.com/wp-srv/special/politics/debt-ceiling/debt-ceiling-deal/>.

¹⁴ *Id.*

¹⁵ See Andrew Taylor, *Passing Major Debt Deal by Aug. 2 Seems Doubtful*, ABC News, July 1, 2011, <http://abcnews.go.com/Politics/wireStory?id=13978188#.T3Od0jF8Cds>.

¹⁶ Austin & Levit, *supra* note 1, at 2

¹⁷ Press Release, Dep't of Treasury, *Treasury Issues Debt Management Guidance on the Supplementary Financing Program* (January 27, 2011) (available at <http://www.treasury.gov/press-center/press-releases/Pages/tg1037.aspx>).

¹⁸ Austin & Levit, *supra* note 1, at 21.

additional eleven weeks to reach an agreement before the country would exhaust all borrowing authority and face potential default on August 2, 2011.¹⁹

1. Issuance of State and Local Government Series Treasury Securities Suspended

On May 6, 2011, ten days before reaching the statutory debt limit, Secretary Geithner suspended the issuance of State and Local Government Series Treasury Securities (“SLGS”).²⁰ SLGS are special purpose securities issued to state and local governments to provide them with a method for investing cash proceeds from their issuance of bonds in compliance with federal tax laws and Internal Revenue Service (“IRS”) arbitrage rules.²¹ The suspension of SLGS sales is common in anticipation of a debt impasse, as these outstanding securities count against the debt limit and no statute requires their issuance.²² Suspending sales of these securities did not create any headroom under the ceiling, but it did slow the increase in the outstanding debt, providing incremental time for negotiation.²³ Following the increase in the debt limit on August 2, SLGS issuances resumed.²⁴

2. Debt Issuance Suspension Period Declared

When the outstanding debt subject to the statutory limit reached \$14.294 trillion on May 16, 2011, Secretary Geithner notified Congress that a Debt Issuance Suspension Period (“DISP”) would begin and last until August 2, 2011, when the “Department of Treasury projects that the

¹⁹ Letter from Timothy Geithner, Secretary of the Treasury, to Harry Reid, Democratic Leader, US Senate (May 16, 2011) (available at <http://www.treasury.gov/initiatives/Pages/debtlimit.aspx>).

²⁰ Letter from Timothy Geithner, Secretary of the Treasury, to Harry Reid, Democratic Leader, US Senate (April 4, 2011) (available at <http://www.treasury.gov/initiatives/Pages/debtlimit.aspx>).

²¹ Department of Treasury, *State & Local Government Series – Frequently Asked Questions*, Department of Treasury (May 2, 2011) (available at <http://www.treasury.gov/connect/blog/Documents/05.02%20SLGS%20EXTERNAL%20QA%20FINAL.pdf>).

²² *Id.* Issuance of SLGS have been suspended previously during debt limit impasses in 1995-1996, 2002, 2003, 2004, 2006, and 2007.

²³ *Id.*

²⁴ See Treasury Direct, SLGS FAQs (available at http://www.treasurydirect.gov/govt/resources/faq/faq_slgs.htm), stating that SLGS issuances were suspended from May 6, 2011 – August 2, 2011.

borrowing authority of the United States will be exhausted.”²⁵ This declaration enabled the Secretary to take certain actions with regard to the Government Securities Investment Fund (“G-Fund”), and the Civil Service Retirement System Fund (“Civil Fund”) to create headroom under the debt limit.²⁶ Given the use of these measures in the previous debt limit impasses of 1996, 2002, 2003, 2004 and 2006,²⁷ it was widely assumed that Secretary Geithner would undertake these actions without controversy.

a. G-Fund: Reinvestments suspended

Enabled by the declaration of the DISP, Secretary Geithner notified Congress on May 16, 2011, that he would be “unable to invest fully” the G-Fund in interest-bearing securities of the United States.²⁸ The entire balance of the G-Fund, a retirement fund for government employees, matures daily and is reinvested in special-issue Treasury Securities, which count against the debt limit.²⁹ However, during a declared DISP, the Secretary of the Treasury can suspend issuance of additional amounts of obligations into the G-Fund “if issuances could not be made without causing the public debt of the United States to exceed the public debt limit.”³⁰ Under this authority, on the first day of the DISP, \$19 billion in principal and \$1.5 million in interest was suspended from investment in securities for the G-Fund, instantly creating headroom beneath the limit.³¹ Over the eleven weeks of the DISP, \$137.5 billion was suspended from investment in

²⁵ Geithner, May 16, 2011, *supra* 19.

²⁶ *Id.*

²⁷ Department of Treasury, *Frequently Asked Questions on the Civil Service Retirement and Disability Fund and Government Securities Investment Fund Related to the Debt Limit* (May 16, 2011) (available at <http://www.treasury.gov/connect/blog/Documents/20110516%20CSRDF%20and%20G-FUND%20FAQ.pdf>).

²⁸ Geithner, May 16, 2011, *supra* 19. Notification to Congress required by 5 U.S.C. § 8348(h)(2) (2006).

²⁹ G Fund FAQs, *supra* note 27.

³⁰ 5 U.S.C. § 8348(g)(1) (2006).

³¹ Department of Treasury, *Report on the Operation and Status of the Government Securities Investment Fund May 16, 2011 to August 3, 2011*, (August 24, 2011). (available at <http://www.treasury.gov/initiatives/Documents/G%20Fund%20Letters.pdf>). Report pursuant to 5 U.S.C. § 8438(h) (2009).

Treasury securities, allowing the nation to continue to borrow the corresponding amount without exceeding the statutory debt limit.³² On August 2, 2011, when the debt limit was raised, \$137.5 billion in principal was restored to the G-Fund;³³ on August 3, 2011, \$378 million in deferred interest was paid to the Fund to make it whole.³⁴

b. Civil Fund: Reinvestments Suspended and Existing Securities Redeemed

As with the G-Fund, Secretary Geithner announced on May 16, 2011 that he would “be unable to invest fully the portion of the Civil Fund not needed immediately to pay beneficiaries.”³⁵ During a DISP, new contributions to the Civil Fund, which provides defined benefits to retired and disabled federal employees, need not be invested in special issue Treasury securities.³⁶ Instead, these investments can be suspended, effectively reducing the debt subject to the limit and creating additional borrowing authority. Over the course of the DISP, suspension of these new investments totaled \$5.5 billion.³⁷ Additionally, this allowed the Treasury to create more than \$80 billion in headroom on June 30, by (1) not reinvesting \$63 billion in maturing securities eligible for rollover, and (2) declining to invest \$17.4 billion in semi-annual interest.³⁸

In conjunction with the authority to suspend investment of the Civil Fund, the Secretary of the Treasury has the ability to suspend investment in the Postal Service Retiree Health Benefit

³² *Id.* Total suspended daily investments from May 16, 2011 – August 1, 2011 equaled \$137,543,151,298.

³³ *Id.* Repayment pursuant to provision 5 U.S.C. § 8438(g)(3) (2009), requiring the Secretary of the Treasury to replicate what would have happened without the DISP.

³⁴ *Id.* 5 U.S.C. § 8438(g)(4) (2009), which states that Treasury must repay interest.

³⁵ Geithner, May 16, 2011, *supra* 19. Discretionary decision pursuant to 5 USC § 8348(j)(1) (2006).

³⁶ 5 U.S.C. 8348(j)(1) (2006) authorizes the Secretary to “suspend additional investment of amounts in the [Civil Service Retirement and Disability Fund] if such additional investment could not be made without causing the public debt of the United States to exceed the public debt limit.”

³⁷ Department of Treasury, *Report on Fund Operations and Status From May 16, 2011 to December 30, 2011*, (January 27, 2012) (available at

<http://www.treasury.gov/initiatives/Documents/Debt%20Limit%20CSRDF%20Report%20to%20Reid.pdf>). Total suspended daily investments from May 16, 2011- August 2, 2011 equaled \$5.487,140,000.

³⁸ *Id.* Treasury did not invest \$63,062,518, 000 in securities maturing and eligible for rollover or \$17,416,286,000 in semi-annual interest payable on June 30.

Fund (“Postal Fund”).³⁹ During the DISP, Secretary Geithner invoked this discretionary authority, declining to reinvest \$8.7 billion of maturing securities and \$800 million in accrued interest in Treasury securities.⁴⁰

In addition to the suspension of investments, Secretary Geithner authorized the redemption of a portion of the securities held by the Civil Fund.⁴¹ During a DISP, the Treasury Secretary has the authority to redeem existing Treasury securities held by the Civil Fund in the amount equal to the civil service benefit payments authorized to be made by the Fund during the declared period.⁴² Using this delegated authority, Secretary Geithner redeemed \$17.1 billion in Treasury securities from the Civil Fund, immediately lowering the outstanding debt subject to the limit by the same amount.⁴³

When the debt limit was raised on August 2, 2011, the Secretary issued obligations to make the Civil Fund whole, conforming to statutory requirements.⁴⁴ This necessitated investing nearly \$86 billion to account for the suspended investments and reinvestments during the DISP.⁴⁵ Similarly, Treasury invested \$9.5 billion in the Postal Fund to account for the suspended reinvestment of maturing securities and interest.⁴⁶ The Treasury Department also reinvested

³⁹ *Id.* Discretionary authority pursuant to 5 U.S.C. § 8909a(c) (2011), which states that investments of the Postal “shall be made in the same manner” as investments for the CSRDF under 5 U.S.C. § 8348 (2006).

⁴⁰ *Id.* On June 30, Treasury did not invest \$8,724,468,000 in securities maturing and eligible for rollover or \$808,879,000 in semi-annual interest payable to the Postal Fund.

⁴¹ Geithner, May 16, 2011, *supra* 19.

⁴² Civil Fund FAQs, *supra* note 27. Discretionary authority pursuant to 5 U.S.C. § 8348(k)(1) (2006).

⁴³ Report on Civil Fund, *supra* note 37. Treasury redeemed \$17.1 billion from a 2-7/8 percent bond maturing in 2025. Against this amount, Treasury did not redeem \$5.7B in June 1, \$5.7B on July 1, and \$5.3B on August 1, which represented a portion of the payments authorized to be made by the CSRDF during the period of the DISP. Treasury also redeemed \$462M on August 1, which represented the amount needed to make the remainder of the benefit payment from the Fund that day.

⁴⁴ Repayment pursuant to provision 5 U.S.C. § 8348(j)(3) (2006), requiring the Secretary of the Treasury “to replicate to the maximum extent practicable the obligations that would then be held by the [Civil Fund] if the suspension of investment...and any redemption or disinvestment...had not occurred.”

⁴⁵ Report on Civil Fund, *supra* note 37. \$86 billion comprised of \$84.1 billion of principal (rollover investment planned for June 30) and \$1.8B of accrued between July 1 and August 1.

⁴⁶ *Id.* Actions pursuant to §8909a(c) and §8348(j)(3). On August 2, Treasury invested \$9,533,347,000 of principal in the Postal Fund, representing the June 30 payments not reinvested.

\$17.1 billion of securities redeemed at the outset of the DISP from the Civil Fund.⁴⁷ The Civil Fund and Postal Fund were made whole on December 30, 2011, when Treasury paid \$516 million to the Civil Fund and \$22 million to the Postal Fund, representing the interest foregone during the suspension period and accrued since August 2, 2011.⁴⁸

3. Reinvestment in the Exchange Stabilization Fund Suspended

In keeping with precedent set during past debt limit negotiation periods,⁴⁹ Secretary Geithner suspended reinvestments of the portion of the Exchange Stabilization Fund (“ESF”) held in U.S. dollars on July 15.⁵⁰ Congress appropriates funds to the ESF for a variety of purposes, including the stabilization of international financial markets through the purchase and sale of foreign currencies.⁵¹ Similar to the G-Fund, the portion of the ESF held in US dollars is invested in special-issue Treasury securities, the entire balance of which matures and is reinvested daily.⁵² However, no statute requires the investment of the ESF in Treasury securities.⁵³ By declining to reinvest the securities in this fund, Treasury effectively lowered the outstanding debt of the United States by \$23 billion, providing much needed headroom under the statutory debt limit.⁵⁴ This final maneuver sent an important signal that the country was close to exhausting its borrowing authority. The date of this maneuver was concerning to at least one analyst, who predicted this final “extraordinary measure” would not be made until August 1,

⁴⁷ *Id.*

⁴⁸ *Id.* Payment subject to 5 USC 8348(j)(4), which requires the Secretary, on the first normal interest payment date after the expiration of the DISP, to pay the funds the interest that would have been earned during the DISP.

⁴⁹ Department of Treasury, *Exchange Stabilization Fund Q&A*, (July 15, 2011) (available at <http://www.treasury.gov/press-center/press-releases/Documents/07%2013%20ESF%20QA%202.pdf>). Government previously suspended daily reinvestment of Treasury securities held in the ESF during the debt limit impasses in 1996, 2003, 2004, and 2006.

⁵⁰ Press Release, Department of Treasury, *Update: As Previously Announced, Treasury to Employ Final Extraordinary Measure to Extend U.S. Borrowing Authority Until August 2* (July 15, 2011) (available at <http://www.treasury.gov/press-center/press-releases/Pages/tg1243.aspx>)

⁵¹ ESF Q&A *supra* note 49.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

2011.⁵⁵ When the debt limit was raised on August 2, 2011, this portion of the ESF was reinvested in Treasury securities, but the ESF is not entitled to, and did not receive, foregone interest.⁵⁶

4. The Federal Financing Bank Swaps Not Utilized

In contrast to the 1996, 2003 and 2004 impasses, Treasury did not elect to use the Federal Financing Bank (“FFB”) in order to extend the nation’s borrowing authority.⁵⁷ Relevant statutes allow the Secretary to issue up to \$15 billion in FFB obligations in exchange for other federal debt, including securities held by the Civil Fund.⁵⁸ Since FFB securities do not count against the debt limit, this measure could have created some additional breathing room as the nation approached the ceiling.⁵⁹ However, the outstanding balance of FFB securities already amounted to \$10.2 billion in May 2011,⁶⁰ leaving less than \$5 billion of opportunity for potential swaps. On this ground, Secretary Geithner dismissed the option of using FFB securities in a swap as a valid extraordinary measure in April 2011.⁶¹ Additionally, the validity of this maneuver has been questioned because Treasury officials now say that they can no longer reverse these FFB

⁵⁵ Austin & Levit, *supra* note 1, at 26.

⁵⁶ Gov’t Accountability Office, Financial Audit: Bureau of Public Debt’s Fiscal Years 2011 and 2010 21 (November 2011).

⁵⁷ Gov’t Accountability Office, Debt Limit: Delays Create Debt Management Challenges and Increase Uncertainty in the Treasury Market 9, (February 2011). 5 U.S.C. § 8348(e) (2006) authorizes the Secretary of the Treasury to invest surplus Civil Service funds in other interest-bearing obligations of the United States, if the Secretary determines that the purchases are in the public interest.

⁵⁸ *Id.* at 7. 12 U.S.C. § 2288 (1973), “The Bank is authorized, with the approval of the Secretary of the Treasury, to issue publicly and have outstanding at any one time not in excess of \$15,000,000,000, or such additional amounts as may be authorized in appropriations Acts, of obligations having such maturities and bearing such rate or rates of interest as may be determined by the Bank.”

⁵⁹ GAO *supra* note 57, at 7.

⁶⁰ Treasury Direct, *Monthly Statement of the Public Debt of the United States*, May 31, 2011 (available at <http://www.treasurydirect.gov/govt/reports/pd/mspd/2011/opds052011.pdf>). FFB Balance equaled \$10,239 billion.

⁶¹ Geithner April 4, 2011, *supra* note 20, at footnote 14, stating “The potential to use such an exchange transaction is of limited use at this time because the FFB has a limited amount of obligations available to the exchange.”

transactions once the debt limit is raised due to the potential, substantial costs that both the FFB and its counterparties could incur due to unexpected interest rate changes.⁶²

5. Selling Assets to Raise Revenue Not Seriously Considered

To fund appropriated expenditures without raising new taxes or issuing new debt, some suggested that the U.S. should sell its financial assets.⁶³ In May 2011, a Morgan Stanley report estimated that the nation's gold reserves and student loan portfolio were each worth \$400 billion, while Treasury's mortgage backed securities amounted to \$125 billion.⁶⁴ Secretary Geithner stated that selling these assets was "not a viable option."⁶⁵ He suggested that a "fire sale" of assets would undercut confidence in the United States and cause damage to financial markets and the economy.⁶⁶ This view was further espoused by Mary J. Miller, Assistant Secretary of the Treasury for Financial Markets, who stated that selling such assets "would be extremely destabilizing to the world financial system."⁶⁷ Addressing calls to sell Treasury's portfolio of MBS, Secretary Geithner stated that flooding the market with such securities could damage the

⁶² GAO *supra* note 57, at 11-12. *See also* General Accounting Office, Analysis of Actions Taken during 2003 Debt Issuance Suspension Period 12, 25-29 (May 2004), stating that the risks, such as unforeseen interest rate changes, related to transactions between the FFB and Civil Fund may be substantial. "According to FFB estimates, the Civil Service fund lost interest of over \$1 billion on a \$15 billion transaction in October 2002 when the FFB decided to redeem early its 9(a) obligations that were issued to the Civil Service Fund. These obligations related to Treasury's efforts to manage the debt during the 1985 debt ceiling crisis, and the losses occurred because of (1) the unexpected early redemption by FFB and (2) unforeseen interest rate changes." The Secretary of the Treasury does not have statutory authority to restore these types of losses. Further gains and losses are hard to estimate.

⁶³ *See* Mary J. Miller, Assistant Secretary of the Treasury for Financial Markets, *Federal Asset Sales Cannot Avoid Need for Increase in Debt Limit*, (May 6, 2011) (available at <http://www.treasury.gov/connect/blog/Pages/Federal-Asset-Sales-Cannot-Avoid-Need-for-Increase-in-Debt-Limit.aspx>).

⁶⁴ David Greenlaw, et al., Morgan Stanley, US Economics - Debt Ceiling Showdown: An Update 3 (May 2011). Figure for MBS stated lower in Austin & Levit, *supra* note 1, at 5, which states the number for MBS lower, stating that at the end of April 2011, the U.S. Treasury had sold \$121 billion of its \$225 billion portfolio.

⁶⁵ Geithner April 4, 2011, *supra* note 20.

⁶⁶ *Id.*

⁶⁷ Miller *supra* note 63.

value of similar assets held by private investors without making “an appreciable difference in when the debt limit must be raised.”⁶⁸

C. Resolution: The Budget Control Act of 2011

On August 2, 2011, the debt limit impasse officially ended when President Obama signed the Budget Control Act of 2011 (“BCA”).⁶⁹ In addition to providing for a debt limit increase, the BCA established caps on discretionary spending⁷⁰ and created the Joint Select Committee (“Super Committee”), which had the stated goal of achieving at least \$1.5 trillion in savings over 10 years.⁷¹ Though the threat of default was no longer looming, market reactions to the resolution of the impasse were not positive.⁷² The protracted negotiations showcased Washington’s fractious partisan politics and created a crisis of confidence.⁷³ On August 5, 2011, Standard & Poor’s downgraded the long-term sovereign debt credit rating for U.S. Treasuries from AAA to AA+, stating that “the political brinksmanship of recent months highlights what we see as America’s governance and policymaking becoming less stable, less effective, and less predictable than what we previously believed.”⁷⁴

⁶⁸ Geithner April 4, 2011, *supra* note 20. See also Miller, *supra* note 63, stating that these securities were being sold off at up to \$10 billion per month “in order to maximize value to taxpayers without hurting the market of mortgage rates.”

⁶⁹ Austin & Levit, *supra* note 1, at 2. P.L. 112-25: House approval 269-161, and Senate approval 74-26.

⁷⁰ Budget Control Act of 2011, Title 1. Cong Budget Office, Letter to John Boehner and Harry Reid regarding Budget Control Act Analysis (August 1, 2011) estimated that this part of the legislation would reduce budget deficits by \$917 billion between 2012 and 2021.

⁷¹ Budget Control Act of 2011, Title 4. Austin & Levit, *supra* note 1, at 3, states that failure to meet this goal triggers \$1.2 trillion in automatic cuts. Total cuts resulting added to at least \$2.1 trillion over the 2012-2021 period.

⁷² See e.g., Michael Krebs, *Global Markets Crash as Congressional Job Disapproval Hits High*, Digital Journal (August 5, 2011) (available at <http://www.digitaljournal.com/article/309962>).

⁷³ See e.g., Timothy Geithner, Editorial, *Compromise Achieved, Reform’s the Next Chapter*, Wash. Post, August 2, 2011, http://www.washingtonpost.com/opinions/compromise-achieved-reforms-the-next-chapter/2011/08/02/gIQAXQBMqI_story.html, stating “It should not be possible for a small minority to threaten catastrophe if the rest of the government decides not to embrace an extreme agenda of austerity and the dismantling of programs for the elderly and the less fortunate.”

⁷⁴ Press Release, Standard & Poor’s, United States of America Long-Term Rating Lowered To ‘AA+’ Due To Political Risks, Rising Debt Burden; Outlook Negative (August 5, 2011) (available at <http://www.standardandpoors.com/ratings/articles/en/us/?assetID=1245316529563>), stating “We lowered our long-term rating on the U.S. because we believe that the prolonged controversy over raising the statutory debt ceiling and

To resolve the debt limit impasse, the BCA provided for new procedures⁷⁵ to raise the debt limit between \$2.1 trillion and \$2.4 trillion in three stages.⁷⁶ The first extension of the debt limit occurred at enactment. On August 2, 2011, President Obama certified that the debt was within \$100 billion of its legal limit, prompting an immediate \$400 billion increase in the limit.⁷⁷ On that day, the debt subject to the limit increased by \$238 million⁷⁸ (60% of the new borrowing authority), due largely to the restoration of suspended investments during the DISP. This initial Presidential certification also triggered a potential \$500 billion increase in the debt limit, scheduled to be effective only if Congress failed to pass a joint resolution of disapproval using special expedited procedures⁷⁹ within 50 calendar days.⁸⁰ On September 22, 2011, the second increase went into effect, despite a House vote of disapproval.⁸¹

After the initial \$900 billion increase, the BCA authorized the President to once more submit a written certification to Congress that the outstanding national debt was within \$100 billion of the limit.⁸² The BCA provided both the House and the Senate with special expedited procedures⁸³ to adopt a joint resolution of disapproval to prevent a further increase in the limit within 15 days of this certification.⁸⁴ As provided for in the BCA, the amount of the third

the related fiscal policy debate indicate that further near-term progress containing the growth in public spending, especially on entitlements, or on reaching an agreement on raising revenues is less likely than we previously assumed and will remain a contentious and fitful process.”

⁷⁵ Bill Heniff Jr., Cong. Research Service, Legislative Procedures for Adjusting the Public Debt Limit: A Brief Overview 1 (August 4, 2011). Typically the limit can be raised in two ways: (1) under regular legislative procedures in both chambers, either as freestanding legislation or as a part of a measure dealing with other topics; or (2) as part of the budget reconciliation process provided for under the Congressional Budget Act of 1974.

⁷⁶ Austin & Levit, *supra* note 1, at 2.

⁷⁷ *Id.*

⁷⁸ Treasury Direct, *Daily Treasury Statements*, August 1, 2011 & August 2, 2011. Debt subject to the limit August 1 equaled \$14,293,975 billion; on August 2 it equaled \$14,532,332 billion.

⁷⁹ 31 U.S.C.A. §§ 3101A(c) – 3101A(d) (2011).

⁸⁰ 31 U.S.C.A. § 3101A(a)(1)(B) (2011).

⁸¹ Austin & Levit, *supra* note 1, at 2. Increase on September 22, 2011. Disapproval measure passed the House (H.J. Res. 77) on a 232-186 vote. Senate rejected a separate disapproval measure on a 45-52 vote.

⁸² 31 U.S.C.A. § 3101A(a)(2)(A) (2011).

⁸³ 31 U.S.C.A. §§ 3101A(c) – 3101A(d) (2011).

⁸⁴ 31 U.S.C.A. § 3101A(b) (2011). 31 U.S.C.A. § 3101A(f)(6) provides that if such a resolution were passed over a likely presidential veto, the debt limit would not be increased and the Office of Management and Budget (“OMB”)

increase was to be \$1.2 trillion.⁸⁵ However, if the Senate submitted to the states a proposed balanced budget amendment for their ratification, the debt limit would be raised by \$1.5 trillion.⁸⁶ Similarly, if the Super Committee achieved deficit reduction exceeding \$1.2 trillion, the increase would be equal to the amount of that reduction, up to \$1.5 trillion.⁸⁷ Ultimately, the third increase was limited to \$1.2 trillion, as a balanced budget amendment was not submitted for ratification, and the Super Committee failed to achieve deficit reduction.⁸⁸

On January 28, 2012, the debt limit was increased by \$1.2 trillion to \$16.394 trillion,⁸⁹ despite another House disapproval measure.⁹⁰ As currently projected by the BiPartisan Policy Center, the nation will reach its new debt limit between late November 2012 and early January 2013.⁹¹ If “extraordinary measures” are again relied upon, the nation’s borrowing authority is predicted to be exhausted in February 2013 without a further increase to the debt limit.⁹²

II. The Counterfactual: What would have happened if we hit the debt limit in August 2011?

A. Legal Background

1. The Fourteenth Amendment

would sequester budgetary resources on a “pro rata” basis. Effectively, this would mean across-the-board spending cuts to both defense and non-defense programs, not already exempt based on the Balanced Budget and Emergency Deficit Control Act of 1985.

⁸⁵ 31 U.S.C.A. § 3103(A)(a)(2)(i) (2011).

⁸⁶ 31 U.S.C.A. § 3103(A)(a)(2)(ii) (2011).

⁸⁷ 31 U.S.C.A. § 3103(A)(a)(2)(iii) (2011).

⁸⁸ Heidi Pzybyla, *Supercommittee Failure Threatens Recovery as Rating Affirmed*, Bloomberg Businessweek (December 3, 2011) (available at <http://www.businessweek.com/news/2011-12-03/supercommittee-failure-threatens-recovery-as-rating-affirmed.html>).

⁸⁹ Austin & Levit, *supra* note 1, at 1. Debt outstanding at the end of January 2012 was \$15,214. Raise followed a January 12, 2012 certification by the President that the debt was within \$100 billion of the limit.

⁹⁰ *Id.* Disapproval measure passed the House on January 18, 2012 (H.J. Res. 98), 239-176 vote.

⁹¹ Steve Bell, Loren Adler and Shai Akabas, BiPartisan Policy Center, *The Debt Ceiling Slouches Toward 2012*, Posted Feb. 24, 2012 (available at <http://www.bipartisanpolicy.org/blog/2012/02/debt-ceiling-slouches-toward-2012>).

⁹² *Id.*

Section Four of the Fourteenth Amendment (the “Public Debt Clause”⁹³) states, in part: “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.”⁹⁴ The Supreme Court addressed the Public Debt Clause in *Perry v. United States*.⁹⁵ Various interpretations of the phrase, “public debt,” and the word, “questioned,” have stretched the meaning of the Public Debt Clause in academia.

The meaning of “public debt” may determine the scope of the obligations that the executive is bound to fulfill if the national debt hits the debt limit. For instance, if “public debt” only includes bond payments, then the Public Debt Clause would not protect Social Security, Medicare, Medicaid, or discretionary spending.⁹⁶ On the other end of the spectrum, “public debt” may refer to all statutory obligations, including mandatory programs and other appropriations.⁹⁷

The meaning of “questioned” may determine the threshold at which the Public Debt Clause is triggered. Some legal academics have argued that the debt limit itself is unconstitutional because its existence allows for the possibility that the United States would default.⁹⁸ Others have taken the view that the debt limit is only unconstitutional when the national debt exceeds the statutory limit because the validity of the public debt will be in doubt

⁹³ The “Public Debt Clause” was coined by Professor Michael Abramowicz. Michael B. Abramowicz, Train Wrecks, Budget Deficits, and the Entitlements Explosion: Exploring the Implications of the Fourteenth Amendment's Public Debt Clause (June 29, 2011), GWU Legal Studies Research Paper No. 575, GWU Law School Public Law Research Paper No. 575, available at <http://ssrn.com/abstract=1874746>.

⁹⁴ U.S. Const. amend. XIV, § 4 states, in full: “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.”

⁹⁵ 294 U.S. 330 (1935). See Appendix D.

⁹⁶ See, e.g., Gerard Magliocca, *Could the 14th Amendment End Debt Ceiling Negotiations?*, Washington Post Live Chat, July 7, 2011, <http://live.washingtonpost.com/14th-Amendment-debt-ceiling-chat.html>.

⁹⁷ See, e.g., Neil H. Buchanan, *Borrowing, Spending, and Taxation: Further Thoughts on Professor Tribe's Reply*, Dorf on Law (July 19, 2011), http://www.dorfonlaw.org/2011/07/borrowing-spending-and-taxation-further_19.html.

⁹⁸ See, e.g., Abramowicz, *supra* note 93, at 37.

only when the United States technically defaults.⁹⁹ This unresolved ambiguity is a primary response to the applicability of the Public Debt Clause to the debt limit because many governmental actions, including perennial deficits, question the validity of the public debt.¹⁰⁰

2. The Duty to Fulfill Statutory Spending Obligations

While the debt limit would constrain the President's authority to borrow money, a different statutory and judicial scheme limits executive authority to curtail spending of appropriated obligations. In 1972, President Nixon asserted his authority to impound, or refuse to pay a congressionally-allotted sum, but the courts¹⁰¹ consistently¹⁰² ordered the President to spend the full allotment when beneficiaries of impounded programs brought claims.¹⁰³ In response, Congress passed the Impoundment Control Act of 1974,¹⁰⁴ the current version¹⁰⁵ of which prescribes the rules for the rescission or deferral of spending obligations.¹⁰⁶

If the President wishes to defer spending obligations, he must submit a "special message" to Congress regarding his proposed rescission;¹⁰⁷ however, the President must spend the money, which he proposed to rescind unless, within forty-five days, Congress passes¹⁰⁸ a rescission

⁹⁹ See, e.g., Neil H. Buchanan, *The Debt Ceiling Law is Unconstitutional: A Reply to Professor Tribe*, Verdict (July 11, 2011), <http://verdict.justia.com/2011/07/11/the-debt-ceiling-law-is-unconstitutional>.

¹⁰⁰ See, e.g., Laurence Tribe, Op-Ed, *A Ceiling We Can't Wish Away*, N.Y. Times, July 7, 2011, www.nytimes.com/2011/07/08/opinion/08tribe.html?_r=1&pagewanted=print.

¹⁰¹ For example, in *Train v. City of New York*, the Supreme Court held that the President could not withhold a portion of an appropriation; rather, he would have to allot the entire sum. 420 U.S. 35, 44 (1975).

¹⁰² Cathy S. Neuren, *Addressing the Resurgence of Presidential Budgetmaking Initiative: A Proposal to Reform the Impoundment Control Act of 1974*, 63 Tex. L. Rev. 693, 697-98 (1984).

¹⁰³ President Nixon used impoundment to refuse to fulfill an obligation if it would push spending to levels exceeding his proposed \$250 billion ceiling for the following fiscal year. He used this authority to cancel Democratic programs and push his own agenda. *Id.* at 702-03.

¹⁰⁴ 2 U.S.C. §§ 681-688. The Impoundment Control Act is Title X of the Congressional Budget and Impoundment Control Act, 2 U.S.C. §§601-688. The full text of the Impoundment Control Act can be found in Appendix E.

¹⁰⁵ The original deferral procedures were struck down in *City of New Haven v. United States*, 809 F.2d. 900 (D.C.C. 1987), due to its unconstitutional use of the legislative veto, see *INS v. Chadha*, 462 U.S. 919 (1983).

¹⁰⁶ Neuren, *supra* note 102, at 703.

¹⁰⁷ See 2 U.S.C. § 683(a) (1987).

¹⁰⁸ The Senate cannot filibuster a rescission bill because debate on rescission bills is limited by 2 U.S.C. § 688(d) (1974). See Jim Cooper, Op-Ed, *Rescission Time in Congress*, New York Times, March 11, 2005, <http://query.nytimes.com/gst/fullpage.html?res=980CE6D8173CF932A25750C0A9639C8B63>.

bill.¹⁰⁹ The President cannot propose to rescind an obligation more than once.¹¹⁰ The President may defer spending until the end of the fiscal year under three circumstances: “(1) to provide for contingencies; (2) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or (3) as specifically provided by law.”¹¹¹ The Comptroller General, and not private individuals,¹¹² may bring suits pursuant to the Act.¹¹³

In *Clinton v. City of New York*,¹¹⁴ the Supreme Court affirmed the President’s duty to spend the full allotment of money authorized by Congress. After Congress enacted the Line Item Veto Act¹¹⁵ in 1996, President Clinton canceled provisions of the Balanced Budget Act of 1997 and the Taxpayer Relief Act of 1997.¹¹⁶ Justice Stevens’ majority opinion struck down the Line Item Veto Act on the narrow ground that it violated the Presentment Clause¹¹⁷ of the Constitution.¹¹⁸ Justice Kennedy’s concurrence provided a separation of powers argument against the Line Item Veto Act on the basis that unilateral presidential infringement in the budget process threatens individual liberties.¹¹⁹

B. Legal Theories for Executive Action if the National Debt Hits the Statutory Limit

Theory 1: The President is Bound by the Debt Limit, and Treasury Must Follow “First In, First Out” Procedures

A. The President is Bound by the Debt Limit

¹⁰⁹ See 2 U.S.C. § 683(b) (1987).

¹¹⁰ *Id.*

¹¹¹ 2 U.S.C. § 684(b) (1987).

¹¹² See *Rocky Ford Hous. Auth. v. U.S. Dept. of Agric.*, 427 F. Supp. 118, 134 (D.D.C. 1977).

¹¹³ 2 U.S.C. § 687 (1987).

¹¹⁴ 524 U.S. 417 (1998).

¹¹⁵ The Line Item Veto Act allowed the President to cancel spending authority unless Congress passed a disapproval bill. The President retained the authority to veto the disapproval bill. *Id.* at 437.

¹¹⁶ *Id.* at 420-21

¹¹⁷ U.S. Const. Art. I, Sec. 7.

¹¹⁸ 524 U.S. at 448-49.

¹¹⁹ See *id.* at 449-52.

The debt limit may prevent the President from borrowing more money. Proponents of this view argue that the Public Debt Clause does not invalidate the debt limit based on their interpretations of “questioned” and “public debt,” and several arguments exist to rebut the applicability of *Perry* to the debt limit.

First, the word “questioned” may have a narrow interpretation, which protects repudiation but does not protect default.¹²⁰ Professor Michael Stern argues that the legislative history is either unsettled¹²¹ or demonstrates that the Public Debt Clause was intended to prevent repudiation based on floor speeches by the framers of the amendment.¹²² Professor Laurence Tribe contends that the lack of a clear threshold for triggering the Public Debt Clause illustrates the absurdity of applying the Clause to the debt limit because, if any act that increases the risk of default is unconstitutional, then a “budget deficit, tax cut, or spending increase” may be unconstitutional.¹²³

Second, the Public Debt Clause may not apply to the debt limit if non-borrowing revenues are sufficient to fulfill all payments included within the scope of “public debt.”¹²⁴ In response to an interpretation of “public debt” that includes all statutory spending commitments, Professor Stern points to the second sentence of the Public Debt Clause¹²⁵ to show that only

¹²⁰ See Michael Stern, “*Threatening Default*”: A Response to Professor Balkin, Point of Order (July 1, 2011), <http://www.pointoforder.com/2011/07/01/threatening-default-a-response-to-professor-balkin/>.

¹²¹ See Appendix C.

¹²² See *id.* Senator Ben Wade said of his proposal, “[i]t puts the debt incurred in the civil war on our part under the guardianship of the Constitution of the United States, so that a Congress cannot *repudiate* it.” (emphasis added)

¹²³ Tribe, *supra* note 100. Professor Tribe points out that, if acts that increase the risk of default are unconstitutional, “the absence of a debt ceiling could likewise be attacked as unconstitutional — after all, the greater the nation’s debt, the greater the difficulty of repaying it, and the higher the probability of default.” *Id.*

¹²⁴ See Calvin Massey, *The Debt Limit and the Fourteenth Amendment*, The Faculty Lounge (June 30, 2011), <http://www.thefacultyounge.org/2011/06/the-debt-limit-and-the-fourteenth-amendment.html>. Professor Massey argues that “public debt” protects principal and interest payments to bondholders, as well as “old-age pensions under Social Security, military pensions, and other federal pensions.” *Id.* Refined interpretations of “public debt” are discussed in the theories below.

¹²⁵ “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.

“debt” obligations fall within the scope of “public debt” because “debt” and “obligations” are separate entities in the rest of the Clause.¹²⁶ Professor Tribe argues that the usage of “debt” in the original Constitution cannot refer to all statutory obligations.¹²⁷ Moreover, a proposed floor amendment¹²⁸ replaced “public debt” with “obligations.” Therefore, the Framers may have “deliberately decided to exclude ‘obligations’ from the Public Debt Clause.”¹²⁹

Third, it is unclear how a court would evaluate the Public Debt Clause today. When given the opportunity in 1989 and 1990, several federal appellate courts did not apply the Clause. With respect to the Court’s only interpretation of the Public Debt Clause, Professor Abramowicz notes that “*Perry* was decided at the height of the constitutional crisis between the Roosevelt Administration and the Court over new Deal legislation,”¹³⁰ and “[i]n post-1937 cases, the Court backed away from earlier activist stances limiting the government’s ability to craft economic policy.”¹³¹

Perry was decided on the same day as four other cases¹³² relating to the constitutionality of the Joint Resolution of June 5, 1933 (the “Joint Resolution”), which permitted the government to satisfy its obligations with any legal currency when the bondholder’s contract required

¹²⁶ Michael Stern, “*Arrest Me. I Question the Validity of the Public Debt.*”, Point of Order (June 2, 2011), <http://www.pointoforder.com/2011/06/02/arrest-me-i-question-the-validity-of-the-public-debt/>.

¹²⁷ Laurence Tribe, *Guest Post on the Debt Ceiling by Laurence Tribe*, Dorf on Law (July 16, 2011), <http://www.dorfonlaw.org/2011/07/guest-post-on-debt-ceiling-by-laurence.html>.

¹²⁸ See Appendix C. Senator Howard’s amendment is as follows: “The obligations of the United States, incurred in suppressing insurrection, or in defense of the Union, or for payment of bounties or pensions incident thereto, shall remain inviolate.” *Id.*

¹²⁹ Stern, *supra* note 126. In response to this argument, Professor Jack Balkin points out that Senator Howard’s wording appears narrower than the final version of the Public Debt Clause because it is limited to the obligations enumerated in the proposed amendment. Jack Balkin, *More on the Original Meaning of Section Four of the Fourteenth Amendment*, Balkinization (July 2, 2011), <http://balkin.blogspot.com/2011/07/more-on-original-meaning-of-section.html>.

¹³⁰ *Id.*

¹³¹ *Id.* at 15-16. However, it is debatable whether an application of the Public Debt Clause to the debt limit debate would be an “activist interpretation.”

¹³² These five cases are known as the “gold clause cases.” Henry M. Hart, Jr., The Gold Clause in United States Bonds, 48 Harv. L. Rev. 1057, 1057-58 n.2 (1935). The cases are: *Norman v. Baltimore & Ohio R. R.*, 294 U.S. 240 (1935), *United States v. Bankers Trust Co.*, 294 U.S. 240 (1935) (two cases), and *Nortz v. United States*, 294 U.S. 317 (1935). *Id.*

payment in gold.¹³³ The Supreme Court in *Perry* stated, “[h]aving 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.”¹³⁴ However, the plaintiff did not collect the value of his contract in gold because he did “not show[] . . . that in relation to buying power he has sustained any loss whatever.”¹³⁵

While some academics interpret the decision in *Perry* as prohibiting the government from breaching its obligations,¹³⁶ Professor Henry Hart questioned how the bondholder could have suffered no damage if the Joint Resolution was unconstitutional.¹³⁷ Professor Hart did not have a “conviction” of what was the proper interpretation of the *Perry* decision.¹³⁸ However, he reconciles the conflicting messages from Chief Justice Hughes by noting that “it was not easy to come out baldly and announce that the public credit has no integrity,” but when the Court had to decide on an ultimate resolution of whether the United States would have to satisfy its obligations in gold, “different considerations solicited its judgment.”¹³⁹ While Professor Hart considered the remedy as “manifestly useless” for the bondholder in *Perry*, he argued that it “may not always be useless” under different circumstances.¹⁴⁰

If the Public Debt Clause is insufficient, the President’s emergency powers may not permit unilateral executive action. Congress has the power “to borrow money on the credit of the United States.”¹⁴¹ According to Professor Tribe, “[n]othing in the 14th Amendment or in any other constitutional provision suggests that the president may usurp legislative power to prevent

¹³³ See Appendix D.

¹³⁴ 294 U.S. at 353.

¹³⁵ *Id.* at 357.

¹³⁶ Abramowicz, *supra* note 93, at 13.

¹³⁷ Hart, *supra* note 132, at 1060.

¹³⁸ *Id.* at 1094.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1096.

¹⁴¹ U.S. Const. Art. I, Sec. 8

a violation of the Constitution.”¹⁴² In support of this argument, Professor Tribe cites Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*¹⁴³ and argues that the President’s power to borrow would be at its “lowest ebb” of legitimacy.¹⁴⁴ In addition, Professor Tribe reasons that the “debt limit statute merely limits *one source of revenue* that the government might use to pay its bills,” which begs the question why the debt limit statute is unconstitutional while the tax code and other revenue limits are not.¹⁴⁵ The President may be bound to use legal revenue sources¹⁴⁶ before he can breach a statutory obligation.¹⁴⁷

Professor Neil Buchanan argues that the President must choose to breach the obligation to borrow within the debt limit rather than levy additional taxes or spend less than Congress appropriated.¹⁴⁸ Professor Tribe responds by framing the debate as one between (1) the power to spend money and (2) the power to raise revenues.¹⁴⁹ Thus, the authority to borrow money is grouped with the power to tax, sell assets, and print money. As between these two powers, “the principle that must yield is the one barring executive control over spending, not the one barring executive control over revenue-raising.”¹⁵⁰ In support of his argument, Professor Tribe tracks the admonition of executive revenue-raising from England through the “battle cry of the

¹⁴² Tribe, *supra* note 100.

¹⁴³ 343 U.S. 579, 637-38 (1952).

¹⁴⁴ Tribe, *supra* note 100.

¹⁴⁵ Tribe, *supra* note 127.

¹⁴⁶ For example, the United States can legally sell its assets to raise money. See Magliocca, *supra* note 96. A potential legal solution outlined by Brad Plumer, *Can A Giant Platinum Coin Save Our Credit?*, Wonkblog (July 30, 2011), http://www.washingtonpost.com/blogs/ezra-klein/post/can-a-giant-platinum-coin-save-our-credit/2011/07/11/gIQA2VAPjI_blog.html?hpid=z1, would have been minting trillion dollar coins. Technically, Treasury could mint platinum coins of any value, which could be deposited in the Federal Reserve. The Fed could then transfer the balance to Treasury, allowing for full payment of all expenses. The potential inflationary effects are questionable, but some argue this would be a fully legal strategy. However, it is not likely to be seen popularly as a legitimate exercise of executive power in this situation.

¹⁴⁷ Tribe, *supra* note 127.

¹⁴⁸ See Buchanan, *supra* note 97.

¹⁴⁹ Tribe, *supra* note 127.

¹⁵⁰ *Id.*

American Revolution . . . , ‘No taxation without representation!’”¹⁵¹ In addition, Professor Tribe cites various examples of Presidents who refused to spend money¹⁵² in contrast to zero examples of a President who unilaterally raised revenue and a “deeply-rooted tradition of prioritizing personal liberty from government imposition over affirmative expectations of government payment. . . .”¹⁵³

B. The President Cannot Prioritize Spending Obligations; Therefore, Treasury Must Follow “First In, First Out” Procedures

If the President is bound by the debt limit, he may not have the legal authority to unilaterally prioritize spending obligations. As a result, Treasury may have to continue to pay its bills as they come due using a “First In, First Out” (or “FIFO”) procedure.¹⁵⁴

The 1985 Senate Finance Committee, under the leadership of Bob Packwood, espoused this theory.¹⁵⁵ The Committee found, based on the “best available information,” that the President and the Secretary of the Treasury have no authority to prioritize payments.¹⁵⁶ It stated, “each law that authorizes expenditures or makes appropriations stands on equal footing, and there are no grounds for the Administration to distinguish a payment for any one program over any other program.”¹⁵⁷ The report expected the Secretary of the Treasury to fulfill its spending obligations “as they come due while cash remains in the till.”¹⁵⁸

¹⁵¹ *Id.*

¹⁵² E.g. Ulysses Grant, Franklin D. Roosevelt, Harry Truman, and Richard Nixon. *Id.*

¹⁵³ *Id.*

¹⁵⁴ See Mindy R. Levit, Clinton T. Brass, Thomas J. Nicola, Dawn Nuschler, and Alison M. Shelton, Cong. Research Serv., 7-5700, Reaching the Debt Limit: Background and Potential Effects on Government Operations 7-8 (July 27, 2011).

¹⁵⁵ Senate Report, September 26, 1985, Increase of Permanent Public Debt Limit, The Committee on Finance, Submitted by Mr. Packwood. P. 5. (Report 99-144).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

In response to Senator Packwood and the Senate Finance Committee, the Government Accountability Office wrote, “We are aware of no statute or any other basis for concluding the Treasury is required to pay outstanding obligations in the order in which they are presented for payment unless it chooses to do so. Treasury is free to liquidate obligations in any order it finds will best serve the interests of the United States.”¹⁵⁹ However, Treasury has maintained that they do not have the authority to prioritize spending obligations.¹⁶⁰ The Congressional Research Service reconciles the differing opinions of GAO and Treasury by noting that they “offer two different interpretations of Congress’s silence with respect to a prioritization system for paying obligations.”¹⁶¹

The 1995-1996 impasse may act as a precedent, forcing Treasury to follow a FIFO procedure unless Congress passes a bill providing prioritization guidelines.¹⁶² During the 1995-1996 impasse, Treasury adopted the interpretation of the 1985 Senate Finance Committee and notified Congress that, absent an extension of the debt limit, Social Security payments could not be completed.¹⁶³ In response, Congress passed temporary exemptions¹⁶⁴ from the debt limit in order to allow the President to issue new debt to pay Social Security beneficiaries.¹⁶⁵

Absent congressional authorization, the Supreme Court’s decision in *Clinton*¹⁶⁶ may provide an implicit prohibition on executive discretion regarding the satisfaction of statutory spending obligations.¹⁶⁷ Professor Buchanan writes that the *Clinton* Court “held that the

¹⁵⁹ Letter from U.S. Government Accountability Office to Bob Packwood, Chairman, Committee on Finance, United States Senate (Oct. 9, 1985) (available at <http://redbook.gao.gov/14/fl0065142.php>).

¹⁶⁰ See Levit, *supra* note 154, at 7-8.

¹⁶¹ *Id.* at 8.

¹⁶² See Bruce Bartlett, *How Will the Debt Limit “Game of Chicken” End?*, The Fiscal Times (May 20, 2011), <http://www.thefiscaltimes.com/Columns/2011/05/20/How-Will-the-Debt-Limit-Game-of-Chicken-End>.

¹⁶³ General Accounting Office, Debt Ceiling: Analysis of Actions During the 1995-1996 Crisis 10 (1996).

¹⁶⁴ Pub. L. No. 104-103 (Feb. 8, 1996) and Pub. L. No. 104-115 (Mar. 12, 1996).

¹⁶⁵ See Gov’t Accountability Office, *supra* note 57, at 9.

¹⁶⁶ 524 U.S. 417. See Section II.A.2 – The Duty to Fulfill Statutory Spending Obligations.

¹⁶⁷ See Buchanan, *supra* note 97.

president may not cancel appropriations that Congress has authorized.”¹⁶⁸ As compared to the line item veto at issue in *Clinton*, Professor Buchanan argues that prioritization is more “extreme” because it allows the President to reduce levels of spending within each obligation, while the line item veto only allows the President to cancel an entire spending item.¹⁶⁹ Professor Buchanan further contends that the Impoundment Control Act “establishes that Congress has aggressively disapproved of presidential encroachment on its spending authority -- encroachment of precisely the type that prioritization represents.”¹⁷⁰

C. 2011 Impasse: Treasury Appears to Favor FIFO Approach

Throughout the 2011 impasse, Treasury officials implied in their statements that the Department would most likely employ the FIFO method of making payments if the outstanding debt reached the statutory limit. In his May 2 letter, Secretary Geithner stated that, upon default, “a broad range of payments would have to be limited or delayed, including military salaries, Social Security and Medicare payments, interest on debt, unemployment benefits and tax refunds,”¹⁷¹ suggesting a *pari passu* approach.¹⁷² Further, Treasury repeatedly expressed a bias against prioritizing payments, implicating the use of the FIFO method instead. For example, in responding to Senator Jim DeMint’s suggestion that interest payments be prioritized, Secretary Geithner called such a proposal “a radical and deeply irresponsible departure from the commitment by Presidents of both parties, throughout American history, to honor all of the commitments our Nation has made.”¹⁷³ In a separate statement, Deputy Secretary of the

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Letter from Timothy Geithner, Secretary of the Treasury, to John Boehner, Speaker of the House, US House of Representatives (May 2, 2011) (available at <http://www.treasury.gov/initiatives/Pages/debtlimit.aspx>).

¹⁷² Meaning that payments would be put on an “equal footing,” as in bankruptcy proceedings.

¹⁷³ Letter from Timothy Geithner, Secretary of the Treasury, to Jim DeMint, Senator, US Senate (June 28, 2011) (available at <http://www.treasury.gov/initiatives/Pages/debtlimit.aspx>).

Treasury Neal Wolin contended that prioritizing bond payments would be “unworkable” and “unacceptable to American servicemen and women, retirees, and all Americans who would rightly reject the notion that their payment has been deemed a lower priority by their government.”¹⁷⁴ Even President Obama seemed to deny plans to prioritize, saying that he could not “guarantee” that Social Security checks would go out if the country hit the statutory debt limit.¹⁷⁵ On July 27, 2011, a New York Times article cited Treasury officials’ repeated statements that they did not have “the legal authority to pay bills based on political, moral or economic considerations,” and suggested that these statements imply that “the government will need to pay bills in the order that they come due.”¹⁷⁶

The FIFO approach would not only have been a legally permissible explanation,¹⁷⁷ but also may have been more politically expedient for the Executive Branch than making difficult choices about which payable accounts should “win” and “lose” in a unilateral prioritization scheme. Such decisions with limited resources would upset various political contingencies. Further, adherence to a FIFO approach may have served to apply pressure to Congressional Republicans. As one commentator observed, “Tea Party types in Congress” may have been more likely to negotiate in the face of “soldiers going without pay.”¹⁷⁸ Lastly, it can be argued that a default FIFO prioritization scheme may have been more practical¹⁷⁹ than comprehensively

¹⁷⁴ Neal Wolin, Deputy Secretary of the Treasury, *Proposals to “Prioritize” Payments on U.S. Debt Not Workable; Would Not Prevent Default*, January 21, 2011 (available at <http://www.treasury.gov/connect/blog/Pages/Proposals-to-Prioritize-Payments-on-US-Debt-Not-Workable-Would-Not-Prevent-Default.aspx>).

¹⁷⁵ Politifact, *Barack Obama said Social Security and other federal checks may not go out on Aug. 3 if the debt ceiling is not increased*, Tampa Bay Times, July 12, 2011, <http://www.politifact.com/truth-o-meter/statements/2011/jul/13/barack-obama/barack-obama-said-social-security-and-other-federal/>.

¹⁷⁶ Binyamin Applebaum, *Treasury to Weigh Which Bills to Pay*, N.Y. Times, July 27, 2011, available at http://www.nytimes.com/2011/07/28/business/economy/treasury-to-weigh-which-bills-to-pay.html?_r=1.

¹⁷⁷ See Senate Report, *supra* note 155.

¹⁷⁸ Felix Salmon, *Can Treasury Prioritize Bond Payments?*, Reuters, July 29, 2011, available at <http://blogs.reuters.com/felix-salmon/2011/07/29/can-treasury-prioritize-bond-payments/>.

¹⁷⁹ Jay Powell, BiPartisan Policy Center, *How Will the Federal Government Decide Who Gets Paid after August 2?*, Posted July 25, 2011 (available at <http://www.bipartisanpolicy.org/blog/2011/07/how-will-federal-government-decide-who-gets-paid-after-august-2>).

prioritizing 80 million payments per month.¹⁸⁰ Despite superficial plausibility, however, a FIFO payment scheme is not without complexity, since Treasury does not control 100% of payments.¹⁸¹

A FIFO approach would have led to a de facto prioritization of accounts based on temporal payment. On August 2, when all borrowing authority would have been exhausted, expenses exceeded revenue by almost \$3 billion.¹⁸² Therefore, \$3 billion in expenses would have carried over to August 3 to be paid before new incoming bills. On August 3, \$22 billion in Social Security payments¹⁸³ would have become subject to temporal ordering, and could not have been paid in full by the end of the day, likely unleashing a political firestorm. Potentially more concerning would be the technical default on sovereign debt obligations, which would have occurred on August 5, when \$1 million in interest expense came due but could not have been satisfied due to backlogged payments from August 3.¹⁸⁴ While delay of these relatively diminutive daily interest payments may have been excused, failing to make \$32 billion in interest payments due on August 15 would have certainly qualified as a technical default.¹⁸⁵ Even if these payments were the first expense of the day, the obligations could not have been satisfied in full until August 25.¹⁸⁶ By August 31, the accumulated expense carry over figure would have

¹⁸⁰ Jerome Powell, *Real Implications of Debt Debate*, Politico, June 29, 2011, available at <http://www.politico.com/news/stories/0611/58026.html>.

¹⁸¹ Ease of FIFO method should not be assumed, as Treasury's Financial Management Service only disperses 85% of government payments. See Financial Management Service, Fact Sheet: Payment Management (available at http://www.fms.treas.gov/news/factsheets/pmt_mgmt.html). The Department of Defense, the Postal Service and other independent agencies disperse the remaining sum. Coordinating receipt of bills among the various agencies for a FIFO dispersal of moneys may have presented significant difficulties.

¹⁸² Treasury Direct, *Daily Treasury Statements*, August 2, 2011 – August 31, 2011. Reflects actual figures. August 3, 2011 non-debt inflows: \$6.287 billion, Expenses = \$9.686 billion.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

amounted to \$127 billion, and Treasury would have been eleven days delinquent on appropriated expenditures.¹⁸⁷

Theory 1: The President is bound by the debt limit, and Treasury must follow "First In, First Out" Procedures	
Status of Funds utilized during DISP	DISP likely would have been extended to avoid necessary, immediate repayment
Interest Payments to Bondholders (August 2 – August 31)	Interest payments delayed on a FIFO basis, treated equally with all other obligations. Technical default on debt obligations as of August 5 as a result of delinquency on a \$1 million interest payment. ¹⁸⁸
Mandatory Spending on Entitlements (August 2 – August 31)	Payments delayed on a FIFO basis, treated equally with all other obligations.
Appropriated Discretionary Spending (August 2 – August 31)	Payments delayed on a FIFO basis, treated equally with all other obligations.
Proportion of total expenses paid August 2 – August 31	59% ¹⁸⁹
Outstanding Debt on August 31	\$14.294 trillion, as approved in Feb 2010 legislation

Theory 2: The President is Bound by the Debt Limit, but Treasury Can Prioritize Spending Obligations

A. The President Can Prioritize at His Discretion

If the national debt hits the statutory limit, the President may have the authority to breach his obligation to spend the money appropriated by Congress. The primary justification for prioritization is the aforementioned position of the Government Accountability Office, which reasoned that Treasury could prioritize its obligations in the public interest because no law

¹⁸⁷ *Id.* Unpaid expenses by August 31 based on inflows alone would have been equal to \$127.160 billion. The first among these delinquent obligations would have been incurred on August 17, 2011. See Appendix B.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* Inflows = \$186.404 billion, expenses = \$313.564 billion during August 2 – August 31, 2011.

requires a FIFO procedure.¹⁹⁰ In order to effectively prioritize spending obligations, OMB may “apportion” funding pursuant to the Antideficiency Act.¹⁹¹

Professor Tribe argues that the President would have the authority to prioritize spending if the national debt hit the statutory limit because (1) the existing revenue sources would not allow the President to fulfill all spending obligations and (2) he does not have the power to raise revenues without congressional authorization.¹⁹² As a result, the President’s only option would be to cut spending in order to avoid a breach of the debt limit or the rules of the tax code.

According to Professor Tribe, the President may be under some constraints when he chooses which obligations to prioritize. Importantly, the spirit of the impoundment crisis and its legal backlash provide an implicit prohibition against prioritizing obligations for political allies.¹⁹³

Prioritization is a de facto choice to *not* fulfill some appropriated obligations; therefore, the President may be able to justify temporary prioritization by using the rescission or deferral provisions of the Impoundment Control Act.¹⁹⁴ When a spending obligation comes due that the President does not want to pay, he may propose to rescind the obligation.¹⁹⁵ Congress would then have forty-five days to pass a rescission bill; otherwise, the President must fulfill the obligation. Thus, even if Congress does not pass a rescission bill, the rescission proposal could buy the President forty-five days until he must spend the undesired allotment.¹⁹⁶ The deferral provisions of the Act would permit the President to defer spending obligations until the end of

¹⁹⁰ GAO, *supra* note 159.

¹⁹¹ See 31 U.S.C. § 1512 (1982). The Antideficiency Act, composed of multiple statutory provisions, provides rules for federal employees with respect to appropriations. Gov’t Accountability Office, *Antideficiency Act Background* (2006) (available at <http://www.gao.gov/legal/lawresources/antideficiencybackground.html>). See also Levit, *supra* note 154, at 8.

¹⁹² See Tribe, *supra* note 127. See also Theory I.A – The President is Bound by the Debt Limit.

¹⁹³ See *id.*

¹⁹⁴ See Levit, *supra* note 154, at 8-9.

¹⁹⁵ See 2 U.S.C. § 683(a) (1987).

¹⁹⁶ See 2 U.S.C. § 683(b) (1987).

the fiscal year.¹⁹⁷ However, the President would have to show that the deferral proposal fits into one of the three permitted purposes stated in the Act: “(1) to provide for contingencies; (2) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or (3) as specifically provided by law.”¹⁹⁸

Following the 1985 GAO opinion stating that the Secretary of the Treasury has “the authority to choose the order in which to pay the obligations of the United States,”¹⁹⁹ the Executive Branch could have argued that it had the discretion to choose which payments to prioritize. Partially due to the Administration’s hesitance to discuss the issue during debt limit negotiations, it is unknown if the Executive Branch would have acted on this putative authority. However, it is clear that Treasury had a distaste for prioritizing.²⁰⁰ Secretary Geithner stated that prioritization would be “unwise, unworkable, unacceptably risky, and unfair to the American people.”²⁰¹ In addition to a likely political backlash that would result from any prioritization choice,²⁰² the markets expressed their opposition to any such scheme.²⁰³

If the Executive Branch had decided to prioritize, however, it would have faced an endless number of intricate political decisions in choosing which of over 80 million monthly payments²⁰⁴ should be “winners” and “losers.” From August 2 - August 31, 2011, revenues amounted to over \$186 billion,²⁰⁵ while expenses totaled almost \$314 billion,²⁰⁶ leaving a shortfall of \$127 billion, which would normally have been provided for through continued debt

¹⁹⁷ 2 U.S.C. § 684(b) (1987).

¹⁹⁸ *Id.*

¹⁹⁹ GAO, *supra* note 159.

²⁰⁰ *See, e.g.*, Geithner, *supra* note 9; Wolin, *supra* note 174.

²⁰¹ Salmon, *supra* note 178.

²⁰² *See* Greenlaw, *supra* note 64, at 3.

²⁰³ *See e.g.*, Jennifer Saba & Walter Brandimarte, *S&P Warns Against Prioritizing Debt Payments: Report*, Reuters (July 26, 2011) (available at <http://www.reuters.com/article/2011/07/27/us-usa-debt-sp-idUSTRE76Q0DR20110727>).

²⁰⁴ Powell, *supra* note 180.

²⁰⁵ Treasury Direct, *supra* note 182. Sum of Non-Debt Issuance inflows.

²⁰⁶ *Id.* Sum of Outflows, excepting public debt cash redemptions.

issuances. There are an unlimited number of prioritization schemes that could have been chosen. For example, the President could have paid-in-full bondholders, Social Security, Medicare, Medicaid, Unemployment, Active Duty Military, Veteran's Administration, TANF, SNAP, TSA and HUD with \$742 million remaining.²⁰⁷ However, he would not have been able to satisfy other appropriations, including Defense vendors, the Department of Education, or Federal Employee Salary and Benefits.²⁰⁸

²⁰⁷ *Id.* This approach assumes revenue smoothing over the course of the month. Not all chosen expenses could have been paid on their given due date.

²⁰⁸ *Id.*

Theory 2A: The President is bound by the debt limit, but can prioritize at his discretion	
Status of Funds utilized during DISP	DISP likely would have been extended to avoid necessary, immediate repayment
Interest Payments to Bondholders (August 2 – August 31)	Likely to be prioritized and paid as scheduled (\$38 billion) ²⁰⁹
Mandatory Spending on Entitlements (August 2 – August 31)	Likely to be prioritized and paid as scheduled (Social Security: \$51 billion; Medicare: \$32 billion) ²¹⁰
Appropriated Discretionary Spending (August 2 – August 31)	34% ²¹¹ of discretionary expenses could have been prioritized for payment at the Executive’s discretion, after payment on interest and entitlements.
Proportion of total expenses paid August 2 – August 31	59% ²¹²
Outstanding Debt on August 31	\$14.294 trillion, as approved in Feb 2010 legislation

B. The President Must Prioritize Bondholder Payments

If the President is bound by the debt limit, the Public Debt Clause may provide a directive to prioritize “public debt.”²¹³ Most academics agree that “public debt” includes bond payments.²¹⁴ However, others advocate a broader interpretation of “public debt” to include statutory spending commitments or all contractual obligations.²¹⁵ A concern arising from a broader interpretation is that, if “public debt” includes all statutory spending commitments, the Public Debt Clause may prevent Congress from rescinding or altering a statutory

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* Inflows of \$186,404 million - \$37,951 million in interest payments - \$31,793 million in Medicare expenses - \$51,214 million in Social Security expenses = \$66,446 million in remaining revenue for \$192,606 in expenses.

²¹² *Id.* Inflows = \$186.404 billion, Expenses = \$313.564 billion during August 2 – August 31, 2011.

²¹³ See Tribe, *supra* note 127. Various interpretations of “public debt” would determine which payments must be prioritized. While the government would not be able to fulfill all obligations pursuant to a broad interpretation, inclusive of all obligations, it may be able to prioritize “public debt” if it includes only bond payments or bond payments and “contractual” obligations.

²¹⁴ See, e.g., Abramowicz, *supra* note 93, at 20.

²¹⁵ See, e.g., Buchanan, *supra* note 97.

appropriation.²¹⁶ An interpretation that allowed for such a conclusion would not be plausible. Using the same logic, Professor Tribe argues that “public debt” cannot include Social Security payments because, in *Flemming v. Nestor*,²¹⁷ “the Supreme Court held that Congress could revise or repeal Social Security Act benefits even though they had already been promised by prior legislation.”²¹⁸ While some academics argue that “public debt” protects all contractual obligations,²¹⁹ Social Security beneficiaries contributed taxes, rather than voluntary payments pursuant to an agreement, and they have not signed a written contract.²²⁰

In response to the argument that current “pensions” are part of the “public debt,” proponents of a narrow interpretation contend that, due to the fear that southern Democrats would refuse to pay back war debts, the “pensions and bounties” phrase²²¹ was only necessary to provide an unambiguous indication that those debts could not be questioned.²²² On that view, the “including” phrase is limited to those unique situations that involve the Civil War or, in a broader view, the suppression of insurrections.

This narrow construction of the Fourteenth Amendment to support favoring only bondholder payments was widely discussed as a valid form of prioritization throughout the 2011 impasse.²²³ On April 25, 2011, in anticipation of reaching the debt limit, Matthew Zames, Chairman of the Treasury Borrowing Advisory Committee and Managing Director at J.P. Morgan Chase, wrote Secretary Geithner, warning that “any delay in making an interest or

²¹⁶ See Abramowicz, *supra* note 93, at 43-44.

²¹⁷ 363 U.S. 603 (1960).

²¹⁸ Tribe, *supra* note 127.

²¹⁹ See Abramowicz, *supra* note 93, at 20-21.

²²⁰ *Id.* at 43-44. Although the contributions to Social Security and Medicare are tied to the benefits received, they are a tax rather than a contractual agreement.

²²¹ U.S. Const. amend. XIV, § 4: “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.” (emphasis added)

²²² See Abramowicz, *supra* note 93, at 20.

²²³ Letter from Jim DeMint, et. al., US Senate, to Timothy Geithner, Secretary of the Treasury (May 26, 2011) (available at http://www.demint.senate.gov/public/index.cfm?ContentRecord_id=7371d3a9-9435-4277-87ef-330fcf689087&p=PressReleases).

principal payment by Treasury even for a very short period of time . . . could trigger another catastrophic financial crisis.”²²⁴ However, it is unclear if Treasury would have acted on its putative authority to prioritize these payments. In responding to Senator Jim DeMint’s suggestion that inflows should be used to pay interest only, Secretary Geithner wrote that the “idea is starkly at odds with the judgment of every previous Administration, regardless of party, that has faced debt limit impasses.”²²⁵ Deputy Secretary of the Treasury Neal Wolin insisted that prioritizing bondholders would simply cause “default by another name” and would be recognized by the world as a “failure by the U.S. to stand behind its commitments.”²²⁶

Despite this purported stance, on July 28, 2011, a report, based on a statement from an anonymous administration official, asserted that Treasury would give priority to bondholder interest payments if lawmakers failed to raise the debt limit.²²⁷ The statement was likely made to reassure the markets.²²⁸ However, it is unclear if Treasury would have followed through on this plan, and it is unknown if and how they would have further prioritized payments, as the administration was reluctant to discuss such plans for fear it would relieve pressure on Congress to reach an agreement.²²⁹

Prioritizing bondholder payments alone would have prevented technical default, as inflows were sufficient to satisfy this obligation. From August 2 - August 31, Treasury paid \$38

²²⁴ Letter from Matthew Zames, Chairman of the Treasury Borrowing Advisory Committee, to Timothy Geithner, Secretary of the Treasury, (April 25, 2011) (available at http://www.treasury.gov/resource-center/data-chart-center/quarterly-refunding/Documents/Geithner_Debt_Limit_Letter_4_25_11E.pdf).

²²⁵ Geithner, *supra* note 173. Further, Geithner wrote “Your letter is based on an untested and unacceptably risky assumption: that if the United States were to continue to pay interest on its debt – yet failed to pay legally required obligations to its citizens, servicemen and women, and businesses – there would be no adverse market reaction and no damage to the full faith and credit of the United States.”

²²⁶ Wolin, *supra* note 174.

²²⁷ Peter Cook and Cheyenne Hopkins, *U.S. Contingency Plan Said to Give Priority to Bondholders*, Bloomberg, July 28, 2011, <http://www.bloomberg.com/news/2011-07-28/u-s-contingency-plan-gives-bondholders-priority.html>.

²²⁸ *See id.*

²²⁹ *Id.*

billion of interest on government bonds.²³⁰ Prioritizing these payments would have left \$148 billion in inflows to pay \$276 billion in obligations.²³¹ Presumably, the remainder of these obligations would have been made using a FIFO approach.²³²

Theory 2B: The President must prioritize bondholder payments	
Status of Funds utilized during DISP	DISP likely would have been extended to avoid necessary, immediate repayment
Interest Payments to Bondholders (August 2 – August 31)	Paid, as scheduled (\$38 billion) ²³³
Mandatory Spending on Entitlements (August 2 – August 31)	With no authority to prioritize, entitlements would likely be subject to a FIFO payment scheme
Appropriated Discretionary Spending (August 2 – August 31)	With no authority to prioritize, discretionary would likely be subject to a FIFO payment scheme
Proportion of total expenses paid August 2 – August 31	59% (47% of non-interest expenses) ²³⁴
Outstanding Debt on August 31	\$14.294 trillion, as approved in Feb 2010 legislation

C. The President Must Prioritize Bond Payments and Other “Obligations”

“[P]ublic debt” may refer to certain obligations with a wider scope than mere bond payments and a narrower scope than all statutory obligations. Professor Abramowicz proposes a definition of “public debt” which is limited to statutory “agreements” and excludes “gratuitous promises.”²³⁵ Social Security may be included because the trust fund is constituted in part by

²³⁰ Treasury Direct, *supra* note 182.

²³¹ *Id.*

²³² See Theory 1. Prioritizing interest would have presented a unique difficulty under a FIFO approach in that \$32 billion was due to be paid on August 15. Inflows from that day alone would not have been sufficient to make such a payment. Therefore, funds would have to have been set-aside in advance, prioritizing a future payment over payments already due.

²³³ Treasury Direct, *supra* note 182.

²³⁴ *Id.* Inflows = \$186.404 billion, expenses = \$313.564 billion during August 2 – August 31, 2011. Interest Expense = \$37.951 billion.

²³⁵ Abramowicz, *supra* note 93, at 19-21. Professor Abramowicz explains, “[f]irst, a government promise is ‘authorized by law’ only if it is contained in a congressional statute. Second, a debt is ‘[a] sum of money due by certain and express agreement.’ Applying this definition to the Public Debt Clause, the United States incurs a

recipients' tax payments, and future beneficiaries may rely on these payments.²³⁶ It is unclear whether Medicare fits the form of an agreement because its contributions and benefits are more attenuated than Social Security.²³⁷ Under this interpretation, the Public Debt Clause would also protect the discretionary programs that represent contractual obligations, such as payments owed to contractors or pension funds.²³⁸

Professor Calvin Massey argues that the “pensions and bounties” phrase of the Public Debt Clause²³⁹ provides an indication of what is included within the scope of “public debt.”²⁴⁰ Under this interpretation, the President has a constitutional obligation to prioritize bond payments and “old-age pensions under Social Security, military pensions, and other federal pensions.”²⁴¹

Prioritizing Social Security payments became a key flashpoint of the public debate between the President and Congressional Republicans during the 2011 debt impasse. While some in Washington contended that the President had the legal authority to at least prioritize Social Security payments,²⁴² the President stated, “I cannot guarantee that [Social Security] checks go out on August 3 if we haven't resolved this issue, because there may simply not be the money in

public debt only if a statute embodies an agreement, or, more restrictively, only if the government issues a written agreement. Since a gratuitous promise does not ordinarily constitute a legally enforceable agreement, the Clause would be further limited to governmental promises made in exchange for good consideration.” *Id.* at 20-21.

²³⁶ *Id.* at 36.

²³⁷ *Id.* Medicare “Part B, offering supplemental medical insurance, is funded primarily through general tax revenues.” *Id.* at 36 n.156.

²³⁸ *Id.* at 35-36. “For example, government civil-service pension payments and money owed to independent contractors represent unambiguous obligations that the government owes because of past agreements in which the debt-holders have already fulfilled their part of the bargains.” *Id.*

²³⁹ U.S. Const. amend. XIV, § 4: “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.” (emphasis added)

²⁴⁰ See Massey, *supra* note 124.

²⁴¹ *Id.*

²⁴² See e.g., Foxnews.com, Social Security Checks Could Be Delayed Without Debt-Ceiling Deal (July 13, 2011) (available at <http://www.foxnews.com/politics/2011/07/13/report-backs-obama-warning-that-social-security-checks-at-risk-in-debt-crisis/#ixzz1pu12fdjo>). “Rep. Tim Huelskamp, R-Kansas, said Wednesday that if the administration were to withhold Social Security payments, it would be a ‘political decision’ because there are ‘sufficient receipts’ to cover the checks.”

the coffers to do it."²⁴³ In response, Speaker of the House John Boehner stated "the Treasury Secretary is going to have options in terms of who should be paid and who shouldn't. . . . [T]here are some debts that have to be rolled over. But there's going to be money available on August 3, and I think it's way too early to be making some types of veiled threats like that."²⁴⁴ In 1995-1996, facing similar ambiguity, Congress passed a statute allowing the Treasury Secretary specific additional borrowing authority beyond the debt limit in order to ensure the payment of Social Security benefits.²⁴⁵ Without a similar statute in 2011, it is unclear if the President would have claimed the authority to prioritize Social Security or other mandatory "obligations."

Even if payment were restricted only to interest and Social Security, this interpretation of "obligations" would have created challenges just one day after all borrowing authority was exhausted. On August 3, 2011, when \$22 billion of Social Security payments were due, Treasury would have been \$3.5 billion short of paying these two line items in full.²⁴⁶ This gap would have been filled the next day through new inflows;²⁴⁷ however, damage from such a "default" already may have been done. At the end of the month, under this prioritization scheme, Treasury could have made all required payments on interest and Social Security if inflows were smoothed, with only \$97 billion remaining to pay \$224 billion in other obligations.²⁴⁸

²⁴³ See, e.g. Politifact, *supra* note 175.

²⁴⁴ Foxnews.com, *supra* note 242.

²⁴⁵ *Supra* note 164.

²⁴⁶ Treasury Direct, *supra* note 182. Non-Debt revenues for August 2 & August 3 = \$18.537 billion. Interest and Social Security Expense = \$22.023 billion.

²⁴⁷ *Id.* August 4 revenues – \$3.546 billion. New Social Security and Interest Expense = \$64 million.

²⁴⁸ *Id.* Other payments likely to be made under a FIFO approach. Non-prioritized payments would be delayed in favor of the prioritized programs.

Theory 2C: President must prioritize bondholder payments and other “obligations”	
Status of Funds utilized during DISP	DISP likely would have been extended to avoid necessary immediate repayment
Interest Payments to Bondholders (August 2 – August 31)	Paid, as scheduled (\$38 billion) ²⁴⁹
Mandatory Spending on Entitlements (August 2 – August 31)	Social Security likely to be paid as scheduled (\$51 billion). ²⁵⁰ Medicare less likely to be deemed an “obligation.”
Appropriated Discretionary Spending (August 2 – August 31)	Expenses deemed “obligations” would be paid (e.g., government pensions, previously incurred contractual expenses)
Proportion of total expenses paid August 2 – August 31	59% (43% of non-interest and Social Security expenses) ²⁵¹
Outstanding Debt on August 31	\$14.294 trillion, as approved in Feb 2010 legislation

Theory 3: The President Can Ignore the Debt Limit

Several legal mechanisms exist to justify further borrowing in excess of the debt limit.

A. The Debt Limit is Unconstitutional

The constraints of the Public Debt Clause may require the President to breach the debt limit. The President may argue that the debt limit is unconstitutional because it “question[s]” the “validity of the public debt” either (1) on its face because its existence makes default possible; or (2) at the point that the national debt hits the statutory limit because the debt limit prevents further borrowing to satisfy statutory obligations.²⁵² Alternatively, the President may argue that a strategy of threatening to refuse to extend to the debt limit is unconstitutional.²⁵³

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* Inflows – Interest and Social Security = \$97,239 billion. Outflows – Interest and Social Security = \$224,399.

²⁵² See Section II.A.2 – *The Fourteenth Amendment*.

²⁵³ See Jack Balkin, *Secretary Geithner understands the Constitution: The Republicans are violating the Fourteenth Amendment*, Balkinization (July 8, 2011), <http://balkin.blogspot.com/2011/07/secretary-geithner-understands.html>. During the debt limit impasse in 2011, Professor Balkin argued that the “strategy of congressional leaders in the Republican Party violates the Constitution because they are threatening to take us over a cliff in order to push their

The argument for the unconstitutionality of the debt limit depends on an interpretation of “questioned” that is broader than “repudiation” and inclusive of either “default” or acts that jeopardize²⁵⁴ the “validity of the public debt.”²⁵⁵ Proponents of this interpretation point to the political context after the Civil War²⁵⁶ to show that the northern Republicans framed the Public Debt Clause to prevent the southern Democrats from excusing their war debts, and the distinction between repudiation and default was irrelevant to their goal.²⁵⁷ They also argue that an interpretation which limits “questioned” to “repudiation” is redundant because the Court in *Perry* reasoned that debt repudiation is unconstitutional without the Public Debt Clause.²⁵⁸ Finally, they look to linguistic hints within the Public Debt Clause, including its passive construction,²⁵⁹ and to the change from the initial proposed language,²⁶⁰ which used “inviolable” instead of “questioned,”²⁶¹ to suggest a broad reading of “questioned.”

radical policy agenda.” Professor Balkin suggested that the argument against the constitutionality of the threat could be a political boon for the President and a means of applying pressure on Congress to extend the debt limit without further threats. However, he warned that the constitutional argument must be made early and often, and a failure to clarify this point may “virtually guarantee[] that this same hostage taking strategy will be used repeatedly whenever a House of Congress controlled by one party wants to stick it to a White House controlled by the other. Professor Balkin substantiates his point by referring to Senator Wade’s speech about his proposed amendment, *see* Appendix C, to demonstrate that the purpose of the Public Debt Clause was to “remove threats of default on federal debts from partisan struggles.” Jack Balkin, *The Legislative History of Section Four of the Fourteenth Amendment*, Balkinization (June 30, 2011), <http://balkin.blogspot.com/2011/06/legislative-history-of-section-four-of.html>.

²⁵⁴ *See* Abramowicz, *supra* note 93, at 24.

²⁵⁵ If the national debt hit the statutory limit and the United States was no longer able to satisfy its interest payments to bondholders, the likely consequence would be that the government would “default” on its debt until the government raised the debt limit rather than openly “repudiate” its obligations. “Roughly speaking, to repudiate a debt means that you state that you are not going to pay it and that you don’t owe the money. Defaulting on a debt means that you aren’t able to perform, but you still acknowledge that you owe the money.” Balkin, *supra* note 129.

²⁵⁶ *See* Appendix C.

²⁵⁷ *See* Balkin, *supra* note 253.

²⁵⁸ *See* Appendix D. *See also* Abramowicz, *supra* note 93, at 15.

²⁵⁹ Professor Abramowicz argues, “[q]uestioning a proposition is not equivalent to insisting that the proposition is false but merely entails suggesting that it might be.” *Id.* at 24. The passive construction of the Public Debt Clause may also “allow[] for a reading . . . containing a reassuring promise from the Framers to bondholders” and “make[] the Clause more evocative than descriptive, more like an announcement of a general principle of debt validity than like a technical rule barring failure to make debt payments.” *Id.* at 25.

²⁶⁰ This was the proposal by Senator Ben Wade. *See* Appendix C.

²⁶¹ The replacement of “inviolable” with “questioned” may “suggest[] a preference for phraseology that protects the public debt so strongly as to put the government’s commitment to it beyond question” by “precluding government action that makes default possible.” Abramowicz, *supra* note 93, at 27.

In the response to the argument that a broad interpretation of “questioned” presents a slippery slope in which any act that increases the risk of default might be unconstitutional,²⁶² Professor Neil Buchanan responds that “[a]n increase in the nation’s level of debt does nothing to increase the probability of default because the definition of default is the inability to repay obligations on the terms to which the parties have agreed. No matter how large the debt, the possibility of default remains zero, so long as there is no debt limit.”²⁶³

Depending on the revenues relative to spending obligations,²⁶⁴ the argument for the unconstitutionality of the debt limit may depend on a broad reading of “public debt.” The “pensions and bounties” phrase of the Public Debt Clause²⁶⁵ may bolster the argument that “public debt” includes more than bond payments.²⁶⁶ The *Perry* Court indicates that the Public Debt Clause protects “the integrity of the public obligations,”²⁶⁷ which may include all statutory spending obligations.²⁶⁸ Professor Buchanan cites *United States v. Winstar Corp.*²⁶⁹ and *Cherokee Nation of Okla. v. Leavitt*²⁷⁰ to support the proposition that “statutory spending

²⁶² See Tribe, *supra* note 100.

²⁶³ Buchanan, *supra* note 99. Professor Buchanan’s argument is dependent on the combination of statutes through which appropriations bills and mandatory spending programs outpace other revenue streams. As a result (on the assumption that the President cannot unilaterally raise taxes), borrowing money would be the only way to avoid the possibility of default if the national debt hits the statutory limit.

²⁶⁴ If tax revenues allow the President to fulfill all of the obligations protected by the Public Debt Clause, the debt limit may not present constitutionality issues.

²⁶⁵ U.S. Const. amend. XIV, § 4: “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.” (emphasis added)

²⁶⁶ See Abramowicz, *supra* note 93, at 19. Professor Abramowicz states, “the ‘including’ phrase indicates that the Framers conceived the ‘public debt’ as including not just financial instruments, but also such promises as war pensions and bounties.” *Id.* He further argues that “[t]he word ‘debts’ draws a parallel with the phrase ‘public debt,’ suggesting that the Framers naturally thought of pensions and bounties as being part of the ‘public debt.’” *Id.*

²⁶⁷ See Appendix D

²⁶⁸ See Neil H. Buchanan, *The Debt-Limit Crisis: A Problem That Will Keep Coming Back Unless President Obama Takes a Constitutional Stand Now*, Verdict (July 7, 2011), <http://verdict.justia.com/2011/07/07/the-debt-limit-crisis>.

²⁶⁹ 518 U.S. 839 (1996).

²⁷⁰ 543 U.S. 631 (2005).

obligations are legally binding commitments that the government . . . cannot ignore once it has committed to pay the funds.”²⁷¹

B. The President’s Emergency Powers Justify Further Borrowing

The President may justify unilateral borrowing by asserting his emergency powers.²⁷² If the market responds negatively to the debt limit, the President may argue that he must borrow money to allay the concerns of investors. In support of this general proposition, Professor Balkin²⁷³ and Professors Eric Posner and Adrian Vermeule²⁷⁴ cite the suspension of habeas corpus by President Abraham Lincoln during the Civil War. Professor Balkin warned that “the President has the power to act *as a default rule* in emergencies,” but “he must ask Congress for retroactive authorization of what he has done” and, “without subsequent authorization, it would be illegal.”²⁷⁵

C. The President Must Obey Statutory Spending Commitments Rather Than the Debt Limit

The President may base his authority to borrow on a theory of statutory interpretation. Because Congress has passed an appropriations bill and has set revenue levels with a tax code and a debt limit, the President must breach one of the following if the national debt hits the statutory limit: (1) the obligation to spend all money appropriated by Congress; (2) the obligation

²⁷¹ Buchanan, *supra* note 97. Professor Buchanan further asserts that a narrow interpretation of “public debt” is less logical because the debt we currently owe would not include interest payments, which are “simply a contractual commitment,” while the principal payments would remain the only debt already incurred. *Id.*

²⁷² The President is vested with the “executive Power,” U.S. Const. Art. II, Sec.1, swears that he will “preserve, protect, and defend the Constitution of the United States,” *id.*, serves as the Commander-in-Chief, U.S. Const. Art. II, Sec. 2, and “take[s] Care that the Laws be faithfully executed,” U.S. Const. Art. II, Sec. 3.

²⁷³ See Jack Balkin, *Under What Circumstances Can the President Ignore the Debt Ceiling?*, Balkinization (July 6, 2011), <http://balkin.blogspot.com/2011/07/under-what-circumstances-can-president.html>.

²⁷⁴ See Eric A. Posner and Adrian Vermeule, Op-Ed, *Obama Should Raise the Debt Ceiling on His Own*, New York Times, July 22, 2011, <http://www.nytimes.com/2011/07/22/opinion/22posner.html>. “[President Lincoln] said that it was necessary to violate one law, lest all the laws but one fall into ruin.” *Id.*

²⁷⁵ Balkin, *supra* note 273.

to tax at the levels provided by Congress; or (3) the obligation to borrow money without hitting the debt limit.²⁷⁶ The President may be able to breach his duty to borrow within the debt limit because the spending obligations have been defended through the impoundment crisis and the decision in *Clinton*,²⁷⁷ and the prohibition on unilateral taxation is foundational in our country's history.²⁷⁸ An alternative statutory argument holds that an appropriations bill, if later in time than the most recent debt limit increase, may implicitly supersede the debt limit.²⁷⁹

D. 2011 Impasse: Debt Limit Would Not Likely Have Been Repudiated

It is unclear whether or not President Obama would have invoked any of these arguments to repudiate the debt limit statute, if the BCA had not been passed on August 2, 2011, but it appears unlikely. On May 25, 2011, Secretary Geithner read the 14th Amendment aloud at a public event when discussing the debt limit negotiations,²⁸⁰ signaling to some that the Executive Branch was considering invoking this authority.²⁸¹ However, in an official statement on July 8, Treasury General Counsel George Madison stated that Secretary Geithner “never argued that the 14th Amendment to the U.S. Constitution allows the President to disregard the statutory debt

²⁷⁶ See Buchanan, *supra* note 97.

²⁷⁷ See *id.* Professor Buchanan argues that, as between the power to borrow money and spend money, Congress has more zealously guarded its power to control appropriations. *Id.* In contrast to the Impoundment Control Act and its subsequent protection by the courts, debt limit extensions were relatively routine occurrences before 2011. *Id.* Furthermore, Professor Buchanan asserts that a “reasonable Congress” would prefer that the President continue to borrow money in excess of the debt limit rather than cancel spending to vital programs, including Medicaid. *Id.*

²⁷⁸ See Tribe, *supra* note 127.

²⁷⁹ See Zachary A. Goldfarb, *Obama, Democrats not ready to play 14th Amendment card with debt ceiling*, July 6, 2011, http://www.washingtonpost.com/business/economy/obama-democrats-not-ready-to-play-14th-amendment-card-with-debt-ceiling/2011/07/06/gIQAVU1O1H_story.html. The argument is set forth by Professor Larry Rosenthal.

²⁸⁰ Huffington Post, *Tim Geithner: 14th Amendment Says Debt ‘Shall Not Be Questioned’*, First posted June 30, 2011, Updated on August 30, 2011 (available at http://www.huffingtonpost.com/2011/06/30/tim-geithner-14th-amendment_n_887925.html). (Can be viewed in C-SPAN video at 39 minute mark). After reading the Public Debt Clause, he criticized the tactics of Republican leaders, which he characterized as: ‘If you don’t do things my way, I’m going to force the United States to default--not pay the legacy of bills accumulated by my predecessors in Congress,’ Geithner responded to this perception, stating “it’s not a credible negotiating strategy, *and it’s not going to happen.*” (emphasis added).

²⁸¹ See *e.g.*, Tribe, *supra* note 100.

limit.”²⁸² Instead, Madison wrote, “[l]ike every previous Secretary of the Treasury who has confronted the question, Secretary Geithner has always viewed the debt limit as a binding legal constraint that can only be raised by Congress.”²⁸³ On June 29, when asked about invoking the Fourteenth Amendment if negotiations to raise the debt limit proved unsuccessful, President Obama responded, “I’m not a Supreme Court Justice, so I’m not going to put my constitutional law professor hat on here.”²⁸⁴

If the President repudiated the debt limit statute as unconstitutional on any legal theory, Treasury presumably would have continued to spend on August 2 as authorized under the appropriations continuing resolution.²⁸⁵ Effectively, such a decision would have required no departure from the actual inflows, outflows, or borrowing observed when the BCA was enacted. The Funds utilized to create headroom through “extraordinary measures” would likely have been made whole, new debt auctions would have proceeded, and spending presumably would have been unaffected. Therefore, as seen in reality, the debt would have increased to \$238 billion on August 2 after repaying the Funds, and would have continued to increase to \$14.639 trillion by the end of August 2011.²⁸⁶ The President’s decision to repudiate the debt limit statute would not have been without predictable adverse consequences. At the very least, the cloud of uncertainty

²⁸² Erika Gudmundson, *FACT CHECK: Treasury General Counsel George Madison Responds to New York Times Op-Ed on 14th Amendment Statement*, (July 8, 2011) (available at <http://www.treasury.gov/connect/blog/Pages/FACT-CHECK-Treasury-General-Counsel-George-Madison-Responds-to-New-York-Times-Op-Ed-on-14th-Amendment.aspx>).

²⁸³ Gudmundson, *supra* note 282.

²⁸⁴ Huffington Post, *supra* note 280.

²⁸⁵ P.L. 112-10: “Department of Defense and Full-Year Continuing Appropriations Act, 2011” became law on April 15, 2011.

²⁸⁶ Treasury Direct, *supra* note 182. Reflects the actual increase in the debt after the BCA was passed and the debt limit was increased.

surrounding such unprecedented, unilateral executive action may have significantly raised interest rates on new debt issued.²⁸⁷

Theory 3: The President can ignore the debt limit	
Status of Funds utilized during DISP	With repudiation of debt limit, Funds likely would have been made whole on August 2
Interest Payments to Bondholders (August 2 – August 31)	Paid as scheduled, with no interruptions
Mandatory Spending on Entitlements (August 2 – August 31)	Paid as scheduled, with no interruptions
Appropriated Discretionary Spending (August 2 – August 31)	Paid in conformity with continuing resolution
Proportion of total expenses paid August 2 – August 31	100%
Outstanding Debt on August 31	\$14.639 trillion (\$345 billion above the debt limit) ²⁸⁸

Theory 4: The President is Bound by the Debt Limit and Statutory Spending Obligations

If the President is bound by the debt limit, and Treasury does not use a First In, First Out approach, some alternative legal theories may allow the President to ground his decisions through implicit statutory preferences or directives.

A. Congressional Silence Implies a Pro Rata Approach

The President may use a pro rata spending approach in which the Executive Branch calculates the projected revenues relative to spending obligations and cuts the same percentage from each obligation. OMB may apportion funding at a lower rate pursuant to the

²⁸⁷ See e.g., Kathy A. Ruffing and Chad Stone, Center on Budget and Policy Priorities, Separating the Debt Limit from the Deficit Problem 1 (July 21, 2011). “History shows that even the uncertainty surrounding a debt limit increase can raise interest rates.”

²⁸⁸ Treasury Direct, *supra* note 182.

Antideficiency Act.²⁸⁹ This theory is predicated on the idea that Congress' statutory scheme provides the President with an implicit order to spend less than Congress appropriated in an amount that can be discerned by looking to the revenue limits and spending appropriations passed by Congress. However, by using a pro rata approach, the President would de facto decide to default on interest payments because the government would pay only a portion of its obligations to bondholders. The President may also breach his duty to spend the money appropriated by Congress unless he rescinds or defers a portion of each obligation pursuant to the Impoundment Control Act.²⁹⁰

Following a pro rata interpretation, the government could have dispersed funds to outstanding accounts in proportion to receipts. In FY2011, receipts accounted for 64% of outlays.²⁹¹ Therefore, using a yearly pro rata approach, all expenses would receive a 36% haircut. If the allocation was done on a daily basis, this could result in accounts being paid at as low as 35%²⁹² of the amount due or as high as 100%, depending on the day.²⁹³ There would have been a technical default on August 2, when \$2 million in interest was payable, but only 64% of could have been paid on a yearly pro rata allocation, and only 70% on a daily pro rata allocation.²⁹⁴

²⁸⁹ See 31 U.S.C. § 1512 (1982). See also Levit, *supra* note 154, at 8.

²⁹⁰ See Section II.A.2 - *The Duty to Fulfill Statutory Spending Obligations*; see also Levit, *supra*, at 8-9.

²⁹¹ Press Release, Department of Treasury, *Joint Statement of Timothy Geithner, Secretary of the Treasury, and Jacob Lew, Director of the Office of Management And Budget, on Budget Results for Fiscal Year 2011*, October 14, 2011 (available at: <http://www.treasury.gov/press-center/press-releases/Pages/tg1328.aspx>). Budget results for FY2011: Receipts = \$2,301 billion, Outlays = \$3,601 billion, Deficit = \$1,299 billion.

²⁹² Treasury Direct, *supra* note 182. On August 4, Inflows accounted for only 35% of outflows. On August 23, this figure was 27%. However, on August 22, there were excess inflows, which would be rolled-over effectively allowing for a 53% prorated allocation on August 23. Similarly on August 9 and August 30, 30% and 29% prorated rates, respectively, would have effectively been higher due to excess inflows on previous days.

²⁹³ *Id.* On August 8, August 11, August 27, and August 29 revenues exceeded expenses, so 100% of expenses could have been paid.

²⁹⁴ *Id.* On August 2, non-debt inflows totaled 6.287 billion, while outflows totaled 9.686 billion.

Theory 4A: Congressional silence implies a pro rata approach	
Status of Funds utilized during DISP	DISP likely would have been extended to avoid necessary immediate repayment
Interest Payments to Bondholders (August 2 – August 31)	Yearly pro rata allocation: 64% Daily pro rata allocation: 51% ²⁹⁵
Mandatory Spending on Entitlements (August 2 – August 31)	Yearly pro rata allocation: 64% Daily pro rata allocation: ²⁹⁶ Social Security = 43% Medicare = 63%.
Appropriated Discretionary Spending (August 2 – August 31)	Yearly pro rata allocation: 64% Daily pro rata allocation, e.g.: ²⁹⁷ Defense vendor = 65% Medicaid = 63% Unemployment = 67%
Proportion of total expenses paid August 2 – August 31	59% ²⁹⁸
Outstanding Debt on August 31	\$14.294 trillion, as approved in Feb 2010 legislation

B. Treasury Should Look to Statutes for Guidance

Legislative Prioritization

The President and Congress may attempt to create legislative, stop-gap solutions. For instance, Congress passed temporary exemptions²⁹⁹ from the debt limit in order to allow the President to issue new debt to pay Social Security beneficiaries during the 1995-1996 impasse.³⁰⁰ Several similar bills were proposed in 2011. Legislation introduced by Senator Pat Toomey and

²⁹⁵ *Id.* Between August 2, 2011 – August 31, 2011, interest paid on a daily pro rata basis would have totaled \$19,418 million, 51% of \$37,951 million in interest expense due over that time.

²⁹⁶ *Id.* Between August 2, 2011 – August 31, 2011, Social Security paid on a daily pro rata basis would have totaled \$21,767 million, 43% of \$51,214 million Social Security payments due over that time. During the same period, Medicare paid on a daily pro rata basis would have totaled \$20,131 million, 63% of \$31,793 million in Medicare payments due.

²⁹⁷ *Id.* Between August 2, 2011 – August 31, 2011, Defense Vendor expenses paid on a daily pro rata basis would have totaled \$21,381 million, 65% of \$32,923 Defense Vendor payments due over that time. During the same period, Medicaid paid on a daily pro rata basis would have totaled \$11,566 million, 64% of \$18,122 million in Medicaid payments due. Unemployment payments would have totaled \$5,541 million, 63% of \$8,757 in Unemployment payments due over that time.

²⁹⁸ *Id.* Inflows = \$186.404 billion, Expenses = \$313.564 billion during August 2 – August 31, 2011.

²⁹⁹ *See, e.g.*, Pub. L. No. 104-103 (Feb. 8, 1996).

³⁰⁰ *See* Gov't Accountability Office, *supra* note 57, at 9.

Representative Tom McClintock³⁰¹ would prioritize principal and interest payments.³⁰² Senator David Vitter and Representative David Heller’s proposal³⁰³ would prioritize “all obligations on the debt held by the public and Social Security benefits,” while Representative Martin Stutzman³⁰⁴ would add some military expenditures to the Vitter/Heller proposal.³⁰⁵ These bills did not pass Congress.

Government Shutdown

In order to ground his prioritization strategy in statutory guidelines, the President could use government shutdown procedures to direct his decisions. When Congress and the President fail to pass a timely³⁰⁶ appropriations bill or continuing resolution, government shutdown procedures define the guidelines for running the government.³⁰⁷ The Antideficiency Act prohibits voluntary services for the government “except for emergencies involving the safety of human life or the protection of property” or those services otherwise “authorized by law.”³⁰⁸ Pursuant to the Antideficiency Act and several opinions by Attorneys General,³⁰⁹ the Office of Management and Budget’s most recent Circular No. A-11³¹⁰ instructs agencies to prepare for a government shutdown by planning to retain only those employees that fall within specified categories.³¹¹ Government shutdown procedures are distinct from a debt limit crisis because a

³⁰¹ S. 163/H.R. 421; 112th Congress.

³⁰² Levit, *supra* note 154, at 13.

³⁰³ S. 259/H.R. 568; 112th Congress.

³⁰⁴ H.R. 728; 112th Congress.

³⁰⁵ Levit, *supra*, note 154, at 13.

³⁰⁶ A timely budget or continuing resolution is passed by the end of the fiscal year.

³⁰⁷ See Puja Seam and Brad Shron, Government Shutdowns (May 4, 2005), Harvard Law School Federal Budget Policy Seminar, Briefing Paper No. 10 1, available at http://www.law.harvard.edu/faculty/hjackson/GovernmentShutdowns_10.pdf.

³⁰⁸ 31 U.S.C. § 1342 (1996).

³⁰⁹ See Sean and Shron, *supra* note 307, at 15.

³¹⁰ *Id.*

³¹¹ “Their compensation is financed by a resource other than annual appropriations; [t]hey are necessary to perform activities expressly authorized by law; [t]hey are necessary to perform activities necessarily implied by law; [t]hey are necessary to the discharge of the President’s constitutional duties and powers; or [t]hey are necessary to protect

government shutdown occurs due to a lack of appropriations authority, while the debt limit involves a lack of borrowing authority.³¹² However, the President may use the government shutdown procedures to justify a preference for spending obligations, which are essential to protect “life and property.”³¹³

Conclusion

It remains unclear what would have happened if the national debt had hit the statutory limit on August 2, 2011. While legal concerns may have impacted the decision-making of the Executive Branch, practical and political considerations were the most likely catalyst for actions taken during the impasse. The specter of defaulting on the debt, rising interest rates, and late Social Security payments pushed the nation’s political leaders to an agreement, but the mounting national debt may incite political stalemates prior to future extensions of the debt limit. Treasury’s actions before August 2, while allowing a buffer zone before the outstanding debt hit the limit, appeared to soften the urgency in Washington, and may offer a dangerous precedent for future negotiations.

The BiPartisan Policy Center projects that the nation will reach its \$16.394 trillion debt limit³¹⁴ between late November 2012 and early January 2013.³¹⁵ If “extraordinary measures” are again relied upon, the nation’s borrowing authority is predicted to be exhausted in February 2013

life and property.” Office of Mgmt. & Budget, Circular No. A-11 (2011), available at http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a_11_2011.pdf, at 2, Section 124.

³¹² Levit, *supra* note 154, at 10: “Alternatively stated, in a situation when the debt limit is reached and Treasury exhausts its financing alternatives, aside from ongoing cash flow, an agency may continue to obligate funds. However, Treasury may not be able to liquidate all obligations that result in federal outlays due to a shortage of cash. In contrast to this, if Congress and the President do not enact interim or full year appropriations for an agency, the agency does not have budget authority available for obligation. If this occurs, the agency must shut down non-excepted activities, with immediate effects on government services.”

³¹³ *See id.*

³¹⁴ Austin & Levit, *supra* note 1, at 1. Debt outstanding at the end of January 2012 was \$15,214. Raise followed a January 12, 2012 certification by the President that the debt was within \$100 billion of the limit.

³¹⁵ Steve Bell, Loren Adler and Shai Akabas, BiPartisan Policy Center, *The Debt Ceiling Slouches Toward 2012*, Posted Feb. 24, 2012 (available at <http://www.bipartisanpolicy.org/blog/2012/02/debt-ceiling-slouches-toward-2012>).

without a further increase to the debt limit.³¹⁶ Concurrently, major budgetary changes will take place at the end of 2012 without congressional action. The expiration of the Bush tax cuts, which is projected to increase revenues by \$3.7 trillion over the next decade, is set to take place on December 31, 2012.³¹⁷ On January 2, 2013, sequestration cuts from the Budget Control Act will trigger \$1.2 trillion in deficit reduction over nine years, divided between defense and non-defense programs.³¹⁸ This combination of wide-scale tax increases, substantial cuts to defense, and another potential gridlock over the debt limit may provide an impetus for all sides to negotiate a long-term deficit reduction plan. The alternative, including more stop-gap measures to delay the difficult choices, may simply prolong the fiscal and political issues in Washington.

³¹⁶ *Id.*

³¹⁷ Jeanne Sahadi, *Bush tax cuts: The real endgame*, CNN Money, November 28, 2011, http://money.cnn.com/2011/11/28/news/economy/bush_tax_cuts/index.htm.

³¹⁸ *Id.*

Appendix A: Timeline of Actions During 2011 Debt Limit Impasse

Date	Event
February 12, 2010	<ul style="list-style-type: none"> • Congress passes legislation raising the debt limit to \$14.29 trillion.
January 6, 2011	<ul style="list-style-type: none"> • Secretary Geithner writes Congress that the outstanding debt stood at \$13.95 trillion, leaving only \$335 billion of borrowing authority.
February 3, 2011	<ul style="list-style-type: none"> • Treasury began to draw down its Supplementary Financing Account at the Federal Reserve from \$200 billion to \$5 billion, freeing up \$195 billion.
April 15, 2011	<ul style="list-style-type: none"> • After long negotiations, Congress passes the “Department of Defense and Full-Year Continuing Appropriations Act, 2011” to fund the government for the rest of the fiscal year, narrowly averting government shutdown for the second time in 8 days.
May 6, 2011	<ul style="list-style-type: none"> • Secretary Geithner suspended the issuance of State and Local Government Series Treasury Securities (“SLGS”) to slow the increase in the outstanding debt.
May 16, 2011	<ul style="list-style-type: none"> • National debt reaches debt limit of \$14.29 trillion. • Secretary Geithner declares a “Debt Issuance Suspension Period,” to enable actions affecting the G-Fund, Civil Fund, and Postal Fund.
July 12, 2011	<ul style="list-style-type: none"> • In a CBS interview, President Obama warns that he cannot “guarantee” that Social Security checks will go out if the limit is reached.
July 15, 2011	<ul style="list-style-type: none"> • Secretary Geithner suspends reinvestments in the portion of the ESF held in US Dollars.
August 2, 2011	<ul style="list-style-type: none"> • Budget Control Act becomes law and debt limit is raised instantly by \$400 billion to \$14.69 trillion, following a Presidential Certification. • G-Fund, Civil Fund and Postal Fund suspended principal investments were reinvested in Treasury securities. • SLGS issuances resumed.
August 3, 2011	<ul style="list-style-type: none"> • Interest due to the G-Fund was invested in Treasury securities.
August 5, 2011	<ul style="list-style-type: none"> • Standard & Poor’s downgraded the long-term sovereign debt credit rating for U.S. Treasuries from AAA to AA+, citing the political brinksmanship observed during the impasse.
September 22, 2011	<ul style="list-style-type: none"> • Debt limit was raised by \$500 billion to \$15.19 trillion, as called for by BCA, despite a House disapproval measure.
December 30, 2011	<ul style="list-style-type: none"> • Interest earned by Civil Fund and Postal Fund during impasse was restored and invested in Treasury securities.
January 12, 2012	<ul style="list-style-type: none"> • President Obama certified that the outstanding debt subject to the limit was within \$100 billion of the statutory limit.
January 28, 2012	<ul style="list-style-type: none"> • Debt limit was raised by \$1.2 trillion to \$16.39 trillion, despite a House disapproval vote.

Appendix B: Relevant August 2011 Financials³¹⁹

Figure 1. Actual August 2011 Deposits and Withdrawals (in \$ billions)

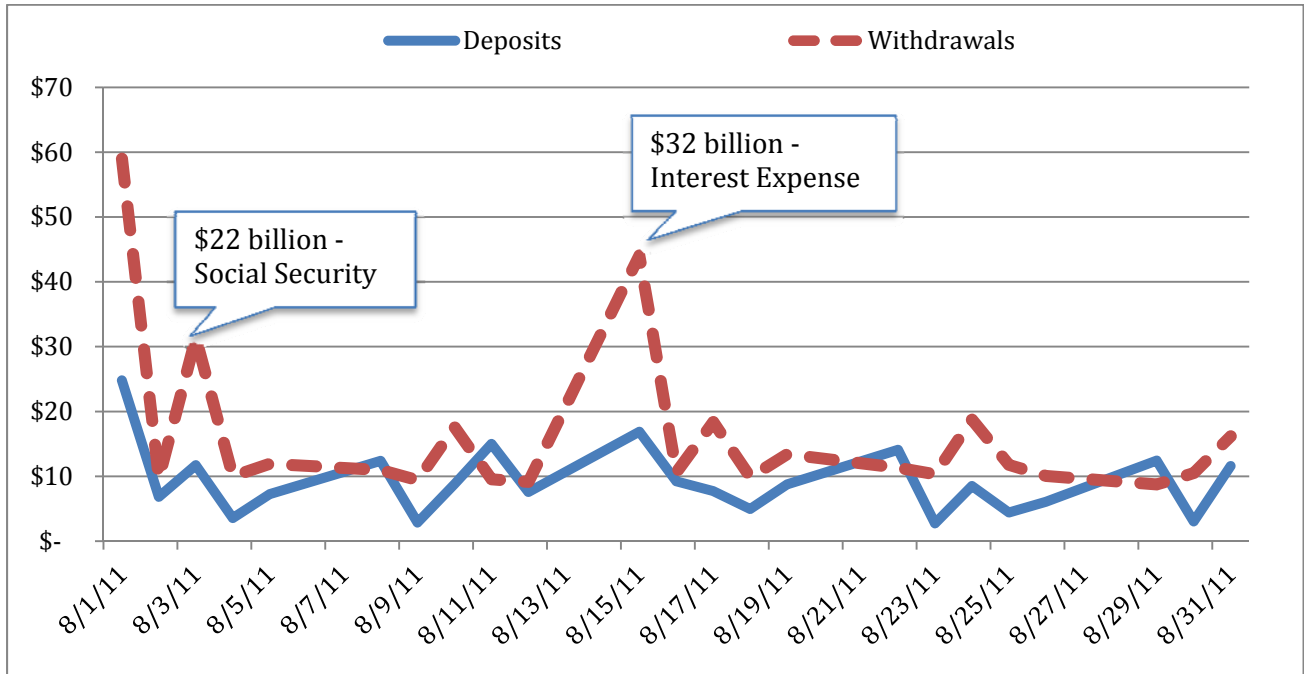
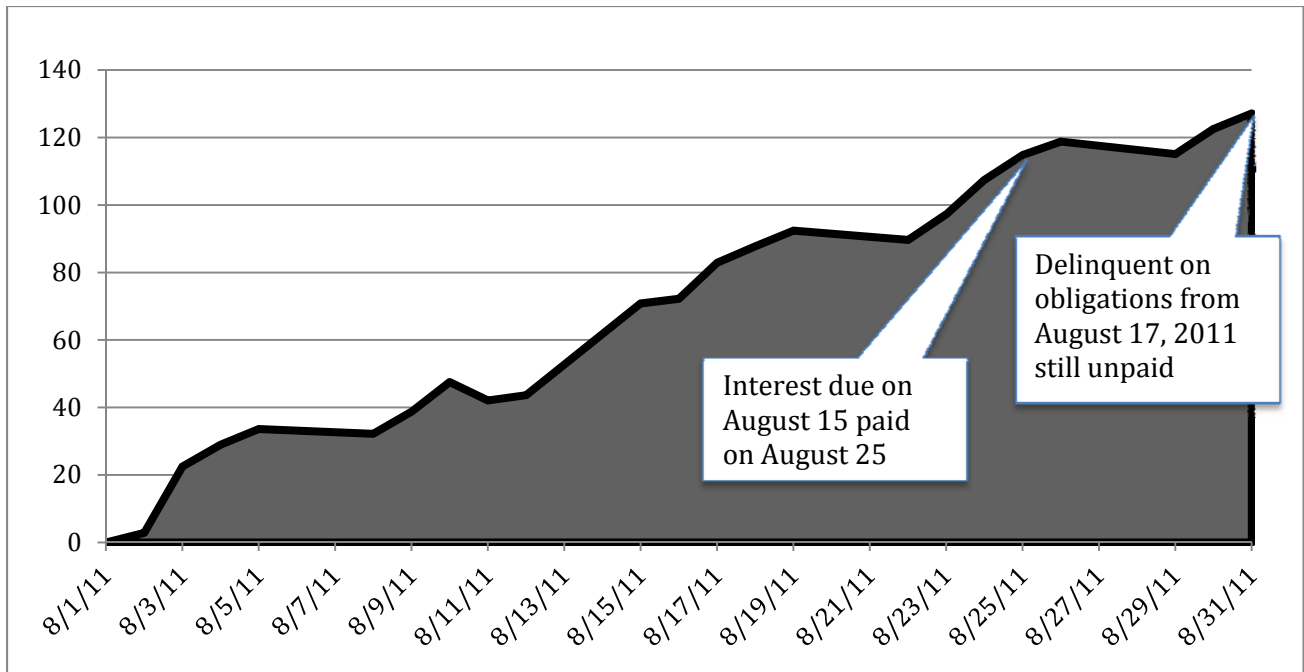


Figure 2. Accumulation of Delinquent Payments Under FIFO Approach (in \$ billions)



³¹⁹ Treasury Direct, *Daily Treasury Statements*, August 1, 2011 – August 31, 2011. Amounts reflect actual figures observed in August 2011, as stated in 31 days of Daily Treasury Statements. Figure 1: “Deposits” calculated as Gross Deposits minus deposits from Public Debt Cash Issuances, which were only enabled due to the BCA. “Withdrawals” are displayed as gross Withdrawals minus Public Cash Redemptions, which were rolled over in new debt issuances. Figure 2 displays accumulated net withdrawals minus net deposits over the course of August.

Appendix C: History of the Public Debt Clause

Political Backdrop of the 14 th Amendment	Despite the northern victory in the Civil War, the Emancipation Proclamation “unraveled the Three-Fifths Compromise and thus increased the population base that determined the South’s representation.” ³²⁰ The purpose of the Public Debt Clause “was to prevent the Democrats, once they regained political power, from repudiating the Union debt. . . .” ³²¹
Economic Context of the Public Debt Clause	Financial instruments in the 1860’s were risky, the value of American debt had fallen during the Civil War, and the possibility remained that the United States would default on its debt in the aftermath of the war. ³²² The Thirty-Ninth Congress, which passed the Fourteenth Amendment, had an “almost religious commitment to hard-money principles.” ³²³ Congress rolled back the wartime maneuvers allowing the issuance of greenbacks, which were not backed by gold or silver, by a vote of 144-6. ³²⁴
Legislative History of the Public Debt Clause	Senator Ben Wade, whose proposal may have motivated the final version of the Public Debt Clause, ³²⁵ said of his proposal that “[i]t puts the debt incurred in the civil war on our part under the guardianship of the Constitution of the United States, so that a Congress cannot repudiate it.” ³²⁶ Senator Wade’s proposal states, in part, “[t]he public debt of the United States . . . shall be inviolable.” ³²⁷ Others believe ³²⁸ that the motivation for the Public Debt Clause came from Senator Jacob Howard’s proposed amendment, ³²⁹ which replaced “public debt” with “obligations.” Senator Wade “was a key Republican leader during this period . . . and was soon to be elected President pro tempore of the Senate.” ³³⁰ Senator Wade’s status as President pro tempore would make him, “in effect, the Vice-President in waiting.” ³³¹

³²⁰ Abramowicz, *supra* note 93, at 11-12.

³²¹ Balkin, *supra* note 129.

³²² Abramowicz, *supra* note 93, at 10.

³²³ *Id.* at 11.

³²⁴ *Id.*

³²⁵ See Balkin, *supra* note 257.

³²⁶ Congressional Globe, 39th Cong., 1st session 2769 (May 23, 1866), available at <http://memory.loc.gov/ammem/amlaw/lwcglink.html>.

³²⁷ *Id.* at 2768.

³²⁸ See Stern, *supra* note 120.

³²⁹ Senator Howard’s amendment is as follows: “The obligations of the United States, incurred in suppressing insurrection, or in defense of the Union, or for payment of bounties or pensions incident thereto, shall remain inviolate.” Congressional Globe, *supra* note 326, at 2938.

³³⁰ Balkin, *supra* note 129.

Appendix D: *Perry v. United States*³³²

Context	<i>Perry</i> was decided on the same day as four other cases ³³³ relating to the constitutionality of the Joint Resolution of June 5, 1933, which declared that “‘every obligation . . .’ shall be discharged ‘upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts.’” ³³⁴
Facts	The plaintiff purchased a bond for \$10,000 which stated, “[t]he principal and interest hereof are payable in United States gold coin of the present standard of value.” ³³⁵ After an appreciation of the value of gold relative to the value of the dollar, ³³⁶ the United States invoked the Joint Resolution of June 5, 1933 and “refused to redeem the [plaintiff’s] bond ‘except by the payment of 10,000 dollars in legal tender currency.’” ³³⁷
Reasoning	The Constitution, absent the Public Debt Clause, does not permit the repudiation of payment to bondholders. ³³⁸ Chief Justice Hughes stated, “[h]aving 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.” ³³⁹ The Court viewed the Public Debt Clause as “confirmatory of a fundamental principle” rather than merely applicable to the “obligations . . . issued during the Civil War.” ³⁴⁰ Regarding the scope of the Public Debt Clause, the Court could not “perceive any reason for not considering the expression ‘the validity of the public debt’ as embracing whatever concerns the integrity of the public obligations.” ³⁴¹
Holding	Plaintiff cannot recover because he has “not shown . . . that in relation to buying power he has sustained any loss whatever.” ³⁴²
Relevance	<i>Perry</i> is the only time the Supreme Court has addressed the Public Debt Clause.

³³¹ *Id.*

³³² 294 U.S. 330 (1935).

³³³ These five cases are known as the “gold clause cases.” Hart, *supra* note 132, at 1057-58 n.2. The cases are: *Norman v. Baltimore & Ohio R. R.*, 294 U.S. 240 (1935), *United States v. Bankers Trust Co.*, 294 U.S. 240 (1935) (two cases), and *Nortz v. United States*, 294 U.S. 317 (1935). *Id.*

³³⁴ 294 U.S. at 349.

³³⁵ *Id.* at 346-47.

³³⁶ Abramowicz, *supra* note 93, at 13.

³³⁷ 294 U.S. at 347.

³³⁸ Congress’ power to borrow money cannot include the power to repudiate its obligations because the Constitution does not “contemplate[] a vain promise.” *Id.* at 351.

³³⁹ *Id.* at 353.

³⁴⁰ *Id.* at 354.

³⁴¹ *Id.* at 354.

³⁴² *Id.* at 357.

Appendix E: Impoundment Control Act of 1974 – 2 U.S.C § 681-688
(Current as of April 2012)

§ 681. Disclaimer (1974)

Nothing contained in this Act, or in any amendments made by this Act, shall be construed as--
(1) asserting or conceding the constitutional powers or limitations of either the Congress or the President;

(2) ratifying or approving any impoundment heretofore or hereafter executed or approved by the President or any other Federal officer or employee, except insofar as pursuant to statutory authorization then in effect;

(3) affecting in any way the claims or defenses of any party to litigation concerning any impoundment; or

(4) superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder.

§ 682. Definitions (1974)

For purposes of sections 682 to 688 of this title--

(1) “deferral of budget authority” includes--

(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or

(B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law;

(2) “Comptroller General” means the Comptroller General of the United States;

(3) “rescission bill” means a bill or joint resolution which only rescinds, in whole or in part, budget authority proposed to be rescinded in a special message transmitted by the President under section 683 of this title, and upon which the Congress completes action before the end of the first period of 45 calendar days of continuous session of the Congress after the date on which the President's message is received by the Congress;

(4) “impoundment resolution” means a resolution of the House of Representatives or the Senate which only expresses its disapproval of a proposed deferral of budget authority set forth in a special message transmitted by the President under section 684 of this title; and

(5) continuity of a session of the Congress shall be considered as broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain shall be excluded in the computation of the 45-day period referred to in paragraph (3) of this section and in section 683 of this title, and the 25-day periods referred to in sections 687 and 688(b)(1) of this title. If a special message is transmitted under section 683 of this title during any Congress and the last session of such Congress adjourns sine die before the expiration of 45 calendar days of continuous session (or a special message is so transmitted after the last session of the Congress adjourns sine die), the message shall be deemed to have been retransmitted on the first day of the succeeding Congress and the 45-day period referred to in paragraph (3) of this section and in section 683 of this title (with respect to such message) shall commence on the day after such first day.

§ 683. Rescission of budget authority (1987)

(a) Transmittal of special message

Whenever the President determines that all or part of any budget authority will not be required to carry out the full objectives or scope of programs for which it is provided or that such budget authority should be rescinded for fiscal policy or other reasons (including the termination of authorized projects or activities for which budget authority has been provided), or whenever all or part of budget authority provided for only one fiscal year is to be reserved from obligation for such fiscal year, the President shall transmit to both Houses of Congress a special message specifying--

(1) the amount of budget authority which he proposes to be rescinded or which is to be so reserved;

(2) any account, department, or establishment of the Government to which such budget authority is available for obligation, and the specific project or governmental functions involved;

(3) the reasons why the budget authority should be rescinded or is to be so reserved;

(4) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the proposed rescission or of the reservation; and

(5) all facts, circumstances, and considerations relating to or bearing upon the proposed rescission or the reservation and the decision to effect the proposed rescission or the reservation, and to the maximum extent practicable, the estimated effect of the proposed rescission or the reservation upon the objects, purposes, and programs for which the budget authority is provided.

(b) Requirement to make available for obligation

Any amount of budget authority proposed to be rescinded or that is to be reserved as set forth in such special message shall be made available for obligation unless, within the prescribed 45-day period, the Congress has completed action on a rescission bill rescinding all or part of the amount proposed to be rescinded or that is to be reserved. Funds made available for obligation under this procedure may not be proposed for rescission again.

§ 684. Proposed deferrals of budget authority (1987)

(a) Transmittal of special message

Whenever the President, the Director of the Office of Management and Budget, the head of any department or agency of the United States, or any officer or employee of the United States proposes to defer any budget authority provided for a specific purpose or project, the President shall transmit to the House of Representatives and the Senate a special message specifying--

(1) the amount of the budget authority proposed to be deferred;

(2) any account, department, or establishment of the Government to which such budget authority is available for obligation, and the specific projects or governmental functions involved;

(3) the period of time during which the budget authority is proposed to be deferred;

(4) the reasons for the proposed deferral, including any legal authority invoked to justify the proposed deferral;

(5) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the proposed deferral; and

(6) all facts, circumstances, and considerations relating to or bearing upon the proposed deferral and the decision to effect the proposed deferral, including an analysis of such facts, circumstances, and considerations in terms of their application to any legal authority, including specific elements of legal authority, invoked to justify such proposed deferral, and to the maximum extent practicable, the estimated effect of the proposed deferral upon the objects, purposes, and programs for which the budget authority is provided.

A special message may include one or more proposed deferrals of budget authority. A deferral may not be proposed for any period of time extending beyond the end of the fiscal year in which the special message proposing the deferral is transmitted to the House and the Senate.

(b) Consistency with legislative policy

Deferrals shall be permissible only--

(1) to provide for contingencies;

(2) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or

(3) as specifically provided by law.

No officer or employee of the United States may defer any budget authority for any other purpose.

(c) Exception

The provisions of this section do not apply to any budget authority proposed to be rescinded or that is to be reserved as set forth in a special message required to be transmitted under section 683 of this title.

§ 685. Transmission of messages; publication (1974)

(a) Delivery to House and Senate

Each special message transmitted under section 683 or 684 of this title shall be transmitted to the House of Representatives and the Senate on the same day, and shall be delivered to the Clerk of the House of Representatives if the House is not in session, and to the Secretary of the Senate if the Senate is not in session. Each special message so transmitted shall be referred to the appropriate committee of the House of Representatives and the Senate. Each such message shall be printed as a document of each House.

(b) Delivery to Comptroller General

A copy of each special message transmitted under section 683 or 684 of this title shall be transmitted to the Comptroller General on the same day it is transmitted to the House of Representatives and the Senate. In order to assist the Congress in the exercise of its functions under section 683 or 684 of this title, the Comptroller General shall review each such message and inform the House of Representatives and the Senate as promptly as practicable with respect to--

(1) in the case of a special message transmitted under section 683 of this title, the facts surrounding the proposed rescission or the reservation of budget authority (including the probable effects thereof); and

(2) in the case of a special message transmitted under section 684 of this title, (A) the facts surrounding each proposed deferral of budget authority (including the probable effects thereof) and (B) whether or not (or to what extent), in his judgment, such proposed deferral is in accordance with existing statutory authority.

(c) Transmission of supplementary messages

If any information contained in a special message transmitted under section 683 or 684 of this title is subsequently revised, the President shall transmit to both Houses of Congress and the Comptroller General a supplementary message stating and explaining such revision. Any such supplementary message shall be delivered, referred, and printed as provided in subsection (a) of this section. The Comptroller General shall promptly notify the House of Representatives and the Senate of any changes in the information submitted by him under subsection (b) of this section which may be necessitated by such revision.

(d) Printing in Federal Register

Any special message transmitted under section 683 or 684 of this title, and any supplementary message transmitted under subsection (c) of this section, shall be printed in the first issue of the Federal Register published after such transmittal.

(e) Cumulative reports of proposed rescissions, reservations, and deferrals of budget authority

(1) The President shall submit a report to the House of Representatives and the Senate, not later than the 10th day of each month during a fiscal year, listing all budget authority for that fiscal year with respect to which, as of the first day of such month--

(A) he has transmitted a special message under section 683 of this title with respect to a proposed rescission or a reservation; and

(B) he has transmitted a special message under section 684 of this title proposing a deferral.

Such report shall also contain, with respect to each such proposed rescission or deferral, or each such reservation, the information required to be submitted in the special message with respect thereto under section 683 or 684 of this title.

(2) Each report submitted under paragraph (1) shall be printed in the first issue of the Federal Register published after its submission.

§ 686. Reports by Comptroller General (1974)

(a) Failure to transmit special message

If the Comptroller General finds that the President, the Director of the Office of Management and Budget, the head of any department or agency of the United States, or any other officer or employee of the United States--

(1) is to establish a reserve or proposes to defer budget authority with respect to which the President is required to transmit a special message under section 683 or 684 of this title; or

(2) has ordered, permitted, or approved the establishment of such a reserve or a deferral of budget authority;

and that the President has failed to transmit a special message with respect to such reserve or deferral, the Comptroller General shall make a report on such reserve or deferral and any available information concerning it to both Houses of Congress. The provisions of sections 682 to 688 of this title shall apply with respect to such reserve or deferral in the same manner and with the same effect as if such report of the Comptroller General were a special message transmitted by the President under section 683 or 684 of this title, and, for purposes of sections 682 to 688 of this title, such report shall be considered a special message transmitted under section 683 or 684 of this title.

(b) Incorrect classification of special message

If the President has transmitted a special message to both Houses of Congress in accordance with section 683 or 684 of this title, and the Comptroller General believes that the President so transmitted the special message in accordance with one of those sections when the special message should have been transmitted in accordance with the other of those sections, the Comptroller General shall make a report to both Houses of the Congress setting forth his reasons.

§ 687. Suits by Comptroller General (1987)

If, under this chapter, budget authority is required to be made available for obligation and such budget authority is not made available for obligation, the Comptroller General is hereby expressly empowered, through attorneys of his own selection, to bring a civil action in the United States District Court for the District of Columbia to require such budget authority to be made available for obligation, and such court is hereby expressly empowered to enter in such civil action, against any department, agency, officer, or employee of the United States, any decree, judgment, or order which may be necessary or appropriate to make such budget authority available for obligation. No civil action shall be brought by the Comptroller General under this section until the expiration of 25 calendar days of continuous session of the Congress following the date on which an explanatory statement by the Comptroller General of the circumstances giving rise to the action contemplated has been filed with the Speaker of the House of Representatives and the President of the Senate.

§ 688. Procedure in House of Representatives and Senate (1974)

(a) Referral

Any rescission bill introduced with respect to a special message or impoundment resolution introduced with respect to a proposed deferral of budget authority shall be referred to the appropriate committee of the House of Representatives or the Senate, as the case may be.

(b) Discharge of committee

(1) If the committee to which a rescission bill or impoundment resolution has been referred has not reported it at the end of 25 calendar days of continuous session of the Congress after its introduction, it is in order to move either to discharge the committee from further consideration of the bill or resolution or to discharge the committee from further consideration of any other rescission bill with respect to the same special message or impoundment resolution with respect to the same proposed deferral, as the case may be, which has been referred to the committee.

(2) A motion to discharge may be made only by an individual favoring the bill or resolution, may be made only if supported by one-fifth of the Members of the House involved (a quorum being present), and is highly privileged in the House and privileged in the Senate (except that it may not be made after the committee has reported a bill or resolution with respect to the same special message or the same proposed deferral, as the case may be); and debate thereon shall be limited to not more than 1 hour, the time to be divided in the House equally between those favoring and those opposing the bill or resolution, and to be divided in the Senate equally between, and controlled by, the majority leader and the minority leader or their designees. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(c) Floor consideration in House

(1) When the committee of the House of Representatives has reported, or has been discharged from further consideration of, a rescission bill or impoundment resolution, it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the bill or resolution. The motion shall be highly privileged and not debatable. An amendment to the motion shall not be in order, nor shall it be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(2) Debate on a rescission bill or impoundment resolution shall be limited to not more than 2 hours, which shall be divided equally between those favoring and those opposing the bill or resolution. A motion further to limit debate shall not be debatable. In the case of an impoundment resolution, no amendment to, or motion to recommit, the resolution shall be in order. It shall not be in order to move to reconsider the vote by which a rescission bill or impoundment resolution is agreed to or disagreed to.

(3) Motions to postpone, made with respect to the consideration of a rescission bill or impoundment resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

(4) All appeals from the decisions of the Chair relating to the application of the Rules of the House of Representatives to the procedure relating to any rescission bill or impoundment resolution shall be decided without debate.

(5) Except to the extent specifically provided in the preceding provisions of this subsection, consideration of any rescission bill or impoundment resolution and amendments thereto (or any conference report thereon) shall be governed by the Rules of the House of Representatives applicable to other bills and resolutions, amendments, and conference reports in similar circumstances.

(d) Floor consideration in Senate

(1) Debate in the Senate on any rescission bill or impoundment resolution, and all amendments thereto (in the case of a rescission bill) and debatable motions and appeals in connection therewith, shall be limited to not more than 10 hours. The time shall be equally divided between, and controlled by, the majority leader and the minority leader or their designees.

(2) Debate in the Senate on any amendment to a rescission bill shall be limited to 2 hours, to be equally divided between, and controlled by, the mover and the manager of the bill. Debate on any amendment to an amendment, to such a bill, and debate on any debatable motion or appeal in connection with such a bill or an impoundment resolution shall be limited to 1 hour, to be equally divided between, and controlled by, the mover and the manager of the bill or resolution, except that in the event the manager of the bill or resolution is in favor of any such amendment, motion, or appeal, the time in opposition thereto, shall be controlled by the minority leader or his designee. No amendment that is not germane to the provisions of a rescission bill shall be received. Such leaders, or either of them, may, from the time under their control on the passage of a rescission bill or impoundment resolution, allot additional time to any Senator during the consideration of any amendment, debatable motion, or appeal.

(3) A motion to further limit debate is not debatable. In the case of a rescission bill, a motion to recommit (except a motion to recommit with instructions to report back within a specified number of days, not to exceed 3, not counting any day on which the Senate is not in session) is not in order. Debate on any such motion to recommit shall be limited to one hour, to be equally divided between, and controlled by, the mover and the manager of the concurrent resolution. In the case of an impoundment resolution, no amendment or motion to recommit is in order.

(4) The conference report on any rescission bill shall be in order in the Senate at any time after the third day (excluding Saturdays, Sundays, and legal holidays) following the day on which such a conference report is reported and is available to Members of the Senate. A motion to proceed to the consideration of the conference report may be made even though a previous motion to the same effect has been disagreed to.

(5) During the consideration in the Senate of the conference report on any rescission bill, debate shall be limited to 2 hours to be equally divided between, and controlled by, the majority leader and minority leader or their designees. Debate on any debatable motion or appeal related to the conference report shall be limited to 30 minutes, to be equally divided between, and controlled by, the mover and the manager of the conference report.

(6) Should the conference report be defeated, debate on any request for a new conference and the appointment of conferees shall be limited to one hour, to be equally divided between, and controlled by, the manager of the conference report and the minority leader or his designee, and should any motion be made to instruct the conferees before the conferees are named, debate on such motion shall be limited to 30 minutes, to be equally divided between, and controlled by, the mover and the manager of the conference report. Debate on any amendment to any such instructions shall be limited to 20 minutes, to be equally divided between, and controlled by, the mover and the manager of the conference report. In all cases when the manager of the conference report is in favor of any motion, appeal, or amendment, the time in opposition shall be under the control of the minority leader or his designee.

(7) In any case in which there are amendments in disagreement, time on each amendment shall be limited to 30 minutes, to be equally divided between, and controlled by, the manager of the conference report and the minority leader or his designee. No amendment that is not germane to the provisions of such amendments shall be received.

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