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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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Jeremy Kreisberg
Kelley O'Mara

Under the Supervision of Professor Howell Jackson

TABLE OF CONTENTS

INTRODUCTION

During the summer of 2011, as the nation's outstanding debt approached the statutory limit, political leaders in Washington came to an impasse during negotiations to extend the country's borrowing authority. The statutory debt limit,[1] 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.[2] When appropriated expenses are greater than incoming revenues, failure to raise the limit could cause the United States to default on its obligations. The debt limit has been raised by Congress 78 times since 1960,[3] typically without controversy. 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 annual 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 of this paper 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 THE 2011 DEBT LIMIT IMPASSE

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[1] 31 U.S.C. § 3101(b).
[2] *See generally* D. Andrew Austin & Mindy R. Levit, *The Debt Limit: History and Recent Increases*, CONG. RESEARCH SERV. (Feb. 2, 2012), *available at* http://www.hsdl.org/?view&did=707321.
[3] Dep't of 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 $14.294 trillion,[4] amounting to more than 250% of the same figure only ten years prior.[5] The nation's debt increased rapidly over the course of the decade due to substantial cuts in tax revenue,[6] the costs of fighting two wars,[7] economic stimulus packages,[8] and the rising cost of entitlements.[9] When the Republican Party, with the help of the Tea Party movement, 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.[10] Additionally, early in 2011, several bipartisan commissions studied the problem of structural deficits and the increasing national debt.[11] 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.[12] Secretary Geithner urged Congress to raise the limit by the first quarter of 2011,

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[4] Austin & Levit, *supra* note 2, at 1. Feb. 12, 2010 legislation (Pub. L. No. 111-139) increased the statutory debt limit to $14.29 trillion.

[5] Treasury Direct, *Monthly Statement of the Public Debt of the United States*, DEP'T OF TREASURY, May 31, 2001 (available at ftp://ftp.publicdebt.treas.gov/opd/opds052001.pdf). Debt subject to the limit equaled $5.573 trillion in May 2001.

[6] *See* Cong. Budget Office (CBO), *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.

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

[8] *See* Letter from Cong. Budget Office to Nancy Pelosi regarding the American Recovery and Reinvestment Act of 2009, (Feb. 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.

[9] *See* CBO, *supra* note 6, at 7-10. 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."

[10] *See* Jennifer Steinhauer, *Debt Bill Is Signed, Ending a Fractious Battle*, N.Y. TIMES, Aug. 2, 2011, http://www.nytimes.com/2011/08/03/us/politics/03fiscal.html.

[11] 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. 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*, Apr. 22, 2011, http://www.bipartisanpolicy.org/library/staff-paper/side-side-comparison-simpson-bowles-commission-bpc-domenici-rivlin-task-force-pr.

[12] 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).

warning it could be reached as early as March 31 or as late as May 16.[13] 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.[14] President Obama and congressional Democrats pushed to include revenue increases in a deficit reduction measure and sought to protect entitlements.[15] Despite extensive negotiations between President Obama and leaders of the House Republicans, an extension of the debt limit remained in doubt[16] until its ultimate resolution on August 2, 2011.[17]

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 $200 billion Supplementary Financing Account at the Federal Reserve,[18] freeing up funds to pay for appropriated expenses without new borrowing against the debt limit.[19] This maneuver provided a reprieve before the debt limit of $14.294 trillion was reached on May 16, 2011.[20] Approaching and reaching the debt limit prompted Treasury Secretary Geithner to take several "extraordinary measures," including the

[13] *Id.*
[14] *See* WASH. POST, *How the Parties Fared in the Debt-Ceiling Deal*, Aug. 1, 2011, http://www.washingtonpost.com/wp-srv/special/politics/debt-ceiling/debt-ceiling-deal/.
[15] *Id.*
[16] *See* Andrew Taylor, *Passing Major Debt Deal by Aug. 2 Seems Doubtful*, ASSOCIATED PRESS, July 2, 2011, http://www.azcentral.com/arizonarepublic/news/articles/20110702debt0702.html.
[17] Austin & Levit, *supra* note 2, at 2.
[18] Press Release, Dep't of Treasury, *Treasury Issues Debt Management Guidance on the Supplementary Financing Program* (Jan. 27, 2011) (available at http://www.treasury.gov/press-center/press-releases/Pages/tg1037.aspx).
[19] *See* Treasury Direct, *Daily Treasury Statements*, DEP'T OF TREASURY, Feb. 2, 2011 - May 15, 2012, (available at http://www.fms.treas.gov/dts/index.html). On Feb. 2, 2011 the balance of the Supplementary Financing Program account was $199,963,000,000. On the day of the announcement, the balance dropped to $174,967,000,000, reflecting a $25 billion withdrawal. Periodic withdrawals continued until the balance hit $5 billion on March 24, 2011, where it remained until July 28, 2011 when the remaining money was withdrawn. As of May 15, 2012, this account has not been restored and it retains a $0 balance.
[20] Austin & Levit, *supra* note 2, at 21.

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 additional eleven weeks to reach an agreement before the country would exhaust all borrowing authority and face potential default on August 2, 2011.[21]

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").[22] 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.[23] 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.[24] 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.[25] Following the increase in the debt limit on August 2, SLGS issuances resumed.[26]

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[21] Letter from Timothy Geithner, Secretary of the Treasury, to Harry Reid, Democratic Leader, U.S. Senate (May 16, 2011) (available at http://www.treasury.gov/initiatives/Pages/debtlimit.aspx).
[22] Letter from Timothy Geithner, Secretary of the Treasury, to Harry Reid, Democratic Leader, U.S. Senate (Apr. 4, 2011) (available at http://www.treasury.gov/initiatives/Pages/debtlimit.aspx).
[23] Dep't of Treasury, *State & Local Government Series – Frequently Asked Questions* (May 2, 2011) (available at http://www.treasury.gov/connect/blog/Documents/05.02%20SLGS%20EXTERNAL%20QA%20FINAL.pdf).
[24] *Id.* Issuance of SLGS have been suspended previously during debt limit impasses in 1995-1996, 2002, 2003, 2004, 2006, and 2007.
[25] *Id.*
[26] See Treasury Direct, SLGS FAQs, DEP'T OF TREASURY (available at http://www.treasurydirect.gov/govt/resources/faq/faq_slgs.htm), stating that SLGS issuances were suspended from May 6, 2011 – Aug. 2, 2011. *See also* Treasury Direct, *Daily Treasury Statement*, DEP'T OF TREASURY, Aug. 2, 2011 (available at https://fms.treas.gov/fmsweb/viewDTSFiles?dir=a&fname=11080200.pdf) (showing that on Aug. 2, $3.6 billion in SLGS securities were issued).

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 project[ed] that the borrowing authority of the United States [would] be exhausted."[27] 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.[28] Given the use of these measures in the previous debt limit impasses of 1996, 2002, 2003, 2004 and 2006,[29] it was widely assumed that Secretary Geithner would undertake these actions without controversy. Notably, the Treasury Secretary is precluded from taking similar actions with regard to the Social Security and Medicare trust funds.[30]

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

[27] Geithner, May 16, 2011, *supra* note 21.
[28] *Id. See infra* Appendix F for relevant Debt Issuance Suspension statutes.
[29] Dep't 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).
[30] 42 U.S.C. § 1320b–15 expressly precludes the Secretary or other officers from (1) delaying deposits or credits to Social Security and Medicare trust funds, (2) refraining from investing Social Security or Medicare trust funds in public debt obligations and (3) redeeming any public debt obligations held by the Social Security or Medicare trust funds prior to maturity for any purpose other than the payment of benefits or administrative expenses. *See infra* Appendix G for full text. This provision was passed on Mar. 29, 1996 as a part of Pub. L. No. 104–121, which also raised the debt limit. The bill's sponsor, Rep. Bill Archer, explained that the section "codifie[d] Congress' understanding that the Secretary of Treasury and other Federal officials are not authorized to use Social Security and Medicare funds for debt management purposes under any circumstances." He further elaborated, "[i]t is the purpose of this legislation to clarify that any limitation on the public debt shall not be used as an excuse to avoid the full and timely investment of the Social Security trust funds." In a separate statement, Rep. Archer said, "There are no circumstances envisioned under which the investments of the trust funds will not be made in a timely fashion in accordance with the normal investment practices of the Treasury, or under which the trust funds are drawn down prematurely for the purpose of avoiding limitations on the public debt or to make room under the statutory debt limit for the Secretary of the Treasury to issue new debt obligations in order to cover the expenditures of the Government." 142 CONG. REC. H2987-01, 38-40 (Mar. 28, 1996) (statement of Rep. Archer).

United States.[31] 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.[32] 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."[33] 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.[34] Over the eleven weeks of the DISP, $137.5 billion was suspended from investment in Treasury securities, allowing the nation to continue to borrow the corresponding amount without exceeding the statutory debt limit.[35] On August 2, 2011, when the debt limit was raised, $137.5 billion in principal was restored to the G-Fund;[36] on August 3, 2011, $378 million in deferred interest[37] was paid to the Fund to make it whole.[38]

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

[31] Geithner, *supra* note 21. Notification to Congress required by 5 U.S.C. § 8438(h)(2) (2009).
[32] FAQs, *supra* note 29.
[33] 5 U.S.C. § 8438(g)(1) (2009).
[34] Dep't of Treasury, *Report on the Operation and Status of the Government Securities Investment Fund May 16, 2011 to August 3, 2011* (Aug. 24, 2011) (available at http://www.treasury.gov/initiatives/Documents/G%20Fund%20Letters.pdf). Report pursuant to 5 U.S.C. § 8438(h) (2009).
[35] *Id.* Total suspended daily investments from May 16, 2011 – Aug. 1, 2011 equaled $137,543,151,298.
[36] *Id.* Repayment pursuant to provision 5 U.S.C, § 8438(g)(3) (2009): "Upon expiration of the debt issuance suspension period, the Secretary of the Treasury shall *immediately* issue to the [G-Fund] obligations . . . as are necessary to ensure that . . . the holdings of obligations of the . . . [G-Fund] *will replicate the obligations* that would then be held by the [G-Fund] . . . *if the suspension of issuances* . . . *had not occurred*." (emphasis added).
[37] *Id*. Payment pursuant to 5 U.S.C. § 8438(g)(4) (2009), which states that Treasury must repay interest, as if the DISP had not occurred.
[38] 5 U.S.C. § 8348(g)(2) (2009): "Any issuances of obligations to the [G-Fund] which, solely by reason of the public debt limit are not issued, *shall be issued* . . . *as soon as such issuances can be issued without exceeding the public debt limit*." (emphasis added).

beneficiaries."[39] 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.[40] 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.[41] 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.[42]

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 Fund ("Postal Fund").[43] 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.[44]

In addition to the suspension of investments, Secretary Geithner authorized the redemption of a portion of the securities held by the Civil Fund.[45] 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

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[39] Geithner, *supra* note 21. Discretionary decision pursuant to 5 U.S.C. § 8348(j)(1) (2006).
[40] 5 U.S.C. § 8348(j)(1) (2006) authorizes the Secretary to "suspend additional investment of amounts in the [Civil Fund] if such additional investment could not be made without causing the public debt of the United States to exceed the public debt limit."
[41] Dep't of Treasury, *Report on Fund Operations and Status From May 16, 2011 to December 30, 2011* (Jan. 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 - Aug. 2, 2011 equaled $5,487,140,000.
[42] *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, 2011.
[43] *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 Civil Fund under 5 U.S.C. § 8348 (2006).
[44] *Id.* On June 30, 2011, 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.
[45] Geithner, *supra* note 21.

declared period.[46] 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.[47]

When the debt limit was raised on August 2, 2011, the Secretary issued obligations to make the Civil Fund whole, conforming to the statutory requirement of the Secretary of the Treasury to invest the amount suspended during the DISP "as soon as such investments can be made without exceeding the public debt limit."[48] This necessitated investing nearly $86 billion to account for the suspended investments and reinvestments during the DISP.[49] Similarly, Treasury invested $9.5 billion in the Postal Fund to account for the suspended reinvestment of maturing securities and interest.[50] The Treasury Department also reinvested $17.1 billion of securities redeemed at the outset of the DISP from the Civil Fund.[51] 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.[52]

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[46] FAQs, *supra* note 29. Discretionary authority pursuant to 5 U.S.C. § 8348(k)(1) (2006).
[47] Report on Civil Fund, *supra* note 41. Treasury redeemed $17.1 billion from a 2-7/8 percent bond maturing in 2025. Against this amount, Treasury did not redeem $5.7 billion on June 1, $5.7 billion on July 1, and $5.3 billion on Aug. 1, which represented a portion of the payments authorized to be made by the Civil Fund during the period of the DISP. Treasury also redeemed $462 million on Aug. 1, which represented the amount needed to make the remainder of the benefit payment from the Fund that day.
[48] 5 U.S.C. § 8348(j)(2) (2006). "Any amounts in the Fund which, solely by reason of the public debt limit, are not invested *shall be invested* by the Secretary of the Treasury *as soon as such investments can be made without exceeding the public debt limit*." (emphasis added).
[49] Report on Civil Fund, *supra* note 41. $86 billion comprised of $84,109,884,000 of principal (rollover investment planned for June 30, 2011) and $1,856,060,000 of interest accrued between July 1 and Aug. 1. Payment pursuant to 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."
[50] *Id.* Actions pursuant to 5 U.S.C. § 8909a(c) (2011) and 5 U.S.C. § 8348(j)(3) (2006). On Aug. 2, Treasury invested $9,533,347,000 of principal in the Postal Fund, representing the June 30 payments not reinvested.
[51] *Id.*
[52] *Id.* Payment subject to 5 U.S.C. § 8348(j)(4) (2006), which requires the Secretary to pay the funds the interest that would have been earned during the DISP on the first normal interest payment date after the expiration of the DISP.

3. REINVESTMENT IN THE EXCHANGE STABILIZATION FUND SUSPENDED

In keeping with precedent set during past debt limit negotiation periods,[53] Secretary Geithner suspended reinvestments of the portion of the Exchange Stabilization Fund ("ESF") held in U.S. dollars on July 15.[54] 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.[55] Similar to the G-Fund, the portion of the ESF held in U.S. dollars is invested in special-issue Treasury securities, the entire balance of which matures and is reinvested daily.[56] However, no statute requires the investment of the ESF in Treasury securities.[57] 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.[58] 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, 2011.[59] 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.[60]

4. FEDERAL FINANCING BANK SWAPS NOT UTILIZED

[53] Dep't 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.
[54] Press Release, Dep't 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).
[55] ESF Q&A, *supra* note 53.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] Austin & Levit, *supra* note 2, at 26.
[60] Gov't Accountability Office (GAO), *Financial Audit: Bureau of Public Debt's Fiscal Years 2011 and 2010* 21 (Nov. 2011). As of Sept. 2011, the affected portion of the ESF amounted to $22,721,204,000.

In contrast to the 1996, 2003 and 2004 impasses, the Department of Treasury did not elect to use the Federal Financing Bank ("FFB") in order to extend the nation's borrowing authority.[61] 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.[62] 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.[63] However, the outstanding balance of FFB securities already amounted to $10.2 billion in May 2011,[64] 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.[65] Additionally, the prudence of this maneuver has been questioned, as Treasury officials now say that they can no longer reverse these FFB transactions once the debt limit is raised because of the potential substantial costs that both the FFB and its counterparties could incur due to unexpected interest rate changes.[66]

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[61] Gov't Accountability Office (GAO), *Debt Limit: Delays Create Debt Management Challenges and Increase Uncertainty in the Treasury Market* 9 (Feb. 2011). 5 U.S.C. § 8348(e) (2006) authorizes the Secretary of the Treasury to invest Civil Fund obligations in "other interest-bearing obligations of the United States, if the Secretary determines that the purchases are in the public interest."
[62] *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."
[63] GAO, *supra* note 61, at 7.
[64] Treasury Direct, *Monthly Statement of the Public Debt of the United States*, DEP'T OF TREASURY (May 31, 2011) (available at http://www.treasurydirect.gov/govt/reports/pd/mspd/2011/opds052011.pdf). FFB balance totaled $10.239 billion.
[65] Geithner, *supra* note 22, at fn. 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."
[66] GAO *supra* note 61, 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.

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 United States should sell its financial assets.[67] In May 2011, a Morgan Stanley report estimated that the nation's gold reserves[68] and student loan portfolio[69] were each worth $400 billion, while Treasury's mortgage-backed securities[70] amounted to $125 billion.[71] Secretary Geithner stated that selling these assets was "not a viable option."[72] He suggested that a "fire sale" of assets would undercut confidence in the United States and cause damage to financial markets and the economy.[73] 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."[74] Addressing calls to sell Treasury's portfolio of MBS faster than currently scheduled,[75] Secretary Geithner stated that

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[67] *U.S. Should Sell Assets Like Gold to Get Out of Debt, Conservative Economists Say*, WASH. POST, May 12, 2011, http://www.washingtonpost.com/national/economy/us-should-sell-assets-like-gold-to-get-out-of-debt-economists-say/2011/05/12/AFIvmI4G_story_1.html. In addition to gold, some commentators suggested that the United States sell land, interstate highway property, or utilities.

[68] *See* 31 U.S.C. § 5116(a)(1)(A) (2002), which grants the Treasury Secretary the authority, with the approval of the President, to "sell gold in the way, in amounts, at rates, and on conditions the Secretary considers most advantageous to the public interest." *See* also 31 U.S.C. §5116(a)(2): "Amounts received from the sale of gold shall be deposited by the Secretary in the general fund of the Treasury and shall be used for the sole purpose of reducing the national debt."

[69] *See* 20 U.S.C. § 1087i (1998), which grants the Secretary of Education, in consultation with the Secretary of the Treasury, the authority to sell loans "on such terms as the Secretary determines are in the best interest of the United States."

[70] *See* 12 U.S.C. § 5211(c)(4), which grants the Treasury Secretary the authority to sell TARP assets.

[71] David Greenlaw, et al., Morgan Stanley, *US Economics - Debt Ceiling Showdown: An Update* 3 (May 2011). Figure for MBS estimated lower in Austin & Levit, *supra* note 2, at 5, which states that at the end of Apr. 2011, the U.S. Treasury had sold $121 billion of its $225 billion portfolio.

[72] Geithner, *supra* note 22.

[73] *Id.*

[74] Mary J. Miller, Assistant Secretary of the Treasury for Financial Markets, *Federal Asset Sales Cannot Avoid Need for Increase in Debt Limit*, DEP'T OF TREASURY (May 6, 2011) (available at http://www.treasury.gov/connect/blog/Pages/Federal-Asset-Sales-Cannot-Avoid-Need-for-Increase-in-Debt-Limit.aspx).

[75] *Id*. "Treasury is gradually selling these assets, at the rate of up to $10 billion per month, in order to maximize value to taxpayers without hurting the market or mortgage rates."

flooding the market with such securities could damage the value of similar assets held by private investors without making "an appreciable difference in when the debt limit must be raised."[76]

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").[77] In addition to providing for a debt limit increase, the BCA established caps on discretionary spending[78] 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.[79] Though the threat of default was no longer looming, market reactions to the resolution of the impasse were not positive.[80] The protracted negotiations showcased Washington's fractious partisan politics and created a crisis of confidence.[81] The price on one-year U.S. CDSs more than doubled during the summer of 2011, reflecting the increased speculation that an agreement would not be reached and a "credit event" would take place.[82] 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

[76] Geithner, *supra* note 22.
[77] Austin & Levit, *supra* note 2, at 2. Pub. L. No. 112-25: House approval 269-161, and Senate approval 74-26.
[78] Budget Control Act of 2011, Title 1. *See* Letter from Cong. Budget Office, to John Boehner and Harry Reid regarding Budget Control Act Analysis (Aug. 1, 2011), which estimated that this part of the legislation would reduce budget deficits by $917 billion between 2012 and 2021.
[79] Budget Control Act of 2011, Title 4. Austin & Levit, *supra* note 2, at 3, states that failure to meet this goal triggers $1.2 trillion in automatic cuts, for a resulting total of at least $2.1 trillion in cuts over the 2012-2021 period.
[80] *See e.g.*, Michael Krebs, *Global Markets Crash as Congressional Job Disapproval Hits High*, DIGITAL JOURNAL, Aug. 5, 2011, http://www.digitaljournal.com/article/309962.
[81] *See e.g.*, Timothy Geithner, Editorial, *Compromise Achieved, Reform's the Next Chapter*, WASH. POST, Aug. 2, 2011, http://www.washingtonpost.com/opinions/compromise-achieved-reforms-the-next-chapter/2011/08/02/gIQAXQBMqI_story.html ("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.").
[82] The Economist, *The Mother of All Tail Risks*, June 23, 2011, http://www.economist.com/node/18866851 ("One-year protection is now almost as expensive as five-year protection. This is more often seen in distressed markets where investors are pricing in an imminent default than with otherwise healthy borrowers with long-term problems.").

effective, and less predictable than what we previously believed."[83] Additionally, the lengthy negotiations served to increase borrowing costs in FY 2011 by $1.3 billion.[84]

To resolve the debt limit impasse, the BCA provided for new procedures[85] to raise the debt limit between $2.1 trillion and $2.4 trillion in three stages.[86] 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.[87] On that day, the debt subject to the limit increased by $238 billion[88] (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

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

[84] Gov't Accountability Office (GAO), *Debt Limit: Analysis of 2011-2012 Actions Taken and Effect of Delayed Increase on Borrowing Costs* 2 (July 2012); *see also* Ed O'Keefe, *GAO: Debt fight cost at least $1.3 billion*, WASH. POST, July 23, 2012, http://www.washingtonpost.com/politics/gao-debt-fight-cost-at-least-13-billion/2012/07/23/gJQAZdOE5W_story.html (stating that, in addition to the increased borrowing costs, the impasse created 5,570 hours of work for employees of the Bureau of Public Debt and 500 hours of work for the Government Accountability Office).

[85] Bill Heniff Jr., *Legislative Procedures for Adjusting the Public Debt Limit: A Brief Overview*, CONG. RESEARCH SERV. 1 (Aug. 4, 2011), http://www.fas.org/sgp/crs/misc/RS21519.pdf. Typically the limit can be raised in two ways: (1) under regular legislative procedures in both chambers, either as freestanding legislation or as a pert 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.

[86] Austin & Levit, *supra* note 2, at 2.

[87] *Id.*

[88] Treasury Direct, *Daily Treasury Statements*, DEP'T OF TREASURY, Aug. 1, 2011 - Aug. 2, 2011 (available at http://www.fms.treas.gov/dts/index.html). Debt subject to the limit on Aug. 1 equaled $14,293,975,000,000; on Aug. 2 it equaled $14,532,332,000,000. An increase in intergovernmental holdings of the public debt (including Civil Fund, Postal Fund, ESF) accounted for 48% ($113.6 billion) of this increase. 52% ($124.7 billion) was an increase in debt held by the public, which includes the G-Fund. These figures are not in alignment with the sum of reinvested DISP funds because of other public debt issues and redemptions.

special expedited procedures[89] within 50 calendar days.[90] On September 22, 2011, the second increase went into effect, despite a House vote of disapproval.[91]

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.[92] The BCA provided both the House and the Senate with special expedited procedures[93] to adopt a joint resolution of disapproval to prevent a further increase in the limit within 15 days of this certification.[94] As provided for in the BCA, the amount of the third increase was to be $1.2 trillion.[95] 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.[96] Alternatively, 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.[97] 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.[98]

On January 28, 2012, the debt limit was increased by $1.2 trillion to $16.394 trillion,[99] despite another House disapproval measure.[100] As currently projected by the BiPartisan Policy

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[89] 31 U.S.C. §§ 3101A(c) – 3101A(d) (2011).
[90] 31 U.S.C. § 3101A(a)(1)(B) (2011).
[91] Austin & Levit, *supra* note 2, at 2. Increase on Sept. 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.
[92] 31 U.S.C. § 3101A(a)(2)(A) (2011).
[93] 31 U.S.C. §§ 3101A(c) – 3101A(d) (2011).
[94] 31 U.S.C. § 3101A(b) (2011). 31 U.S.C. § 3101A(f)(6) (2011) 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") 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.
[95] 31 U.S.C. § 3103(A)(a)(2)(i) (2011).
[96] 31 U.S.C. § 3103(A)(a)(2)(ii) (2011).
[97] 31 U.S.C. § 3103(A)(a)(2)(iii) (2011).
[98] Heidi Przybyla, *Supercommittee Failure Threatens Recovery as Rating Affirmed*, BLOOMBERG BUSINESSWEEK, Dec. 3, 2011, http://www.businessweek.com/news/2011-12-03/supercommittee-failure-threatens-recovery-as-rating-affirmed.html.
[99] Austin & Levit, *supra* note 2, at 1. Debt outstanding at the end of Jan. 2012 was $15,214 trillion. Raise followed a Jan. 12, 2012 certification by the President that the debt was within $100 billion of the limit.

Center, the nation will reach its new debt limit between late November 2012 and early January 2013.[101] 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.[102]

II. THE COUNTERFACTUAL: WHAT WOULD HAVE HAPPENED IF THE UNITED STATES HIT THE DEBT LIMIT IN AUGUST 2011?

Despite the protracted negotiations, political leaders were able to reach a compromise to raise the debt limit just before the government exhausted all borrowing authority. Therefore, it is unclear what events may have transpired if an agreement was not reached by August 2, 2011. The following discussion considers the alternatives the President may have elected to pursue, and the legal grounds on which such decisions could have been defended, if the public debt hit the statutory limit and spending obligations exceeded projected revenues.

The Constitution grants Congress the power to spend, the power to tax, and the power to borrow. The Executive enforces congressional action in these areas by spending the money Congress appropriates, raising revenue within the bounds of the tax code, and borrowing money to fulfill any projected shortfalls. However, just as the tax code presents a limit on the Executive's authority to raise revenue through taxation, the debt limit provides an upper boundary on how much the Executive can borrow. These revenue-raising constraints are coupled with the President's longstanding obligation to spend all money appropriated by Congress. Thus, when the country reaches the debt limit, the Executive faces a dilemma: assuming that the President cannot unilaterally raise taxes, the Executive must either spend less than Congress appropriated or borrow more than the debt limit permits. Something must give.

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[100] *Id.* Disapproval measure passed the House on Jan. 18, 2012 (H.J. Res. 98), 239-176 vote.
[101] Steve Bell, Loren Adler & Shai Akabas, *The Debt Ceiling Slouches Toward 2012*, BIPARTISAN POLICY CENTER (Feb. 24, 2012) (available at http://www.bipartisanpolicy.org/blog/2012/02/debt-ceiling-slouches-toward-2012).
[102] *Id.*

A. LEGAL BACKGROUND

1. The Fourteenth Amendment

Any decision the President may have made if borrowing authority had been exhausted before a compromise was reached would have been made in light of section four of the Fourteenth Amendment ("Public Debt Clause"[103]). The Clause states: "The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned."[104] The Supreme Court has only addressed the Public Debt Clause once, in *Perry v. United States,*[105] leaving a significant interpretive gap as to the full meaning of the Clause. Various academic commentators have attempted to fill this gap with a range of interpretations of the phrase, "public debt," and the word, "questioned," which, if adopted, would serve to stretch the meaning of the Public Debt Clause.

The meaning of "public debt" could determine the scope of the obligations that the Executive is bound to fulfill if the national debt hits the 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.[106] On the other end of the spectrum, "public

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[103] 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* (GWU Law School Public Law Research Paper No. 575) (June 29, 2011), http://ssrn.com/abstract=1874746.

[104] 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."

[105] 294 U.S. 330 (1935). *See infra* Appendix D.

[106] *See, e.g.*, Gerard Magliocca, *Could the 14th Amendment End Debt Ceiling Negotiations?*, WASH. POST, Live Chat, July 7, 2011, http://live.washingtonpost.com/14th-Amendment-debt-ceiling-chat.html.

debt" might be said to refer to all statutory obligations, including mandatory programs and other appropriations.[107]

The meaning of "questioned" could 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.[108] 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 only when the United States technically defaults.[109] This broad reading of the word "questioned" under the Public Debt Clause is, however, problematic because many governmental actions, including perennial deficits, might be said to question the validity of the public debt.[110]

2. The Duty to Fulfill Statutory Spending Obligations

The President's course of action, had the statutory limit been reached, must also have been chosen in consideration of his duty to spend money as appropriated by Congress. Congress has the power "to borrow money on the credit of the United States."[111] While the debt limit constrains executive borrowing authority by delegating borrowing power to the Executive up to the statutory debt limit,[112] a different statutory and judicial scheme limits Executive authority to curtail spending of appropriated obligations. In 1972, President Nixon asserted his authority to

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[107] *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.

[108] *See, e.g.*, Abramowicz, *supra* note 103, at 37.

[109] *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.

[110] *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.

[111] U.S. Const. Art. I, Sec. 8, Cl. 2. Power delegated to the Secretary of the Treasury pursuant to 31 U.S.C. 3101(b).

[112] *See* Anita S. Krishnakumar, *In Defense of the Debt Limit Statute*, 42 HARV. J. ON LEGIS. 135 at 135-36.

impound, or refuse to pay a congressionally-allotted sum, but the courts[113] consistently[114] ordered the President to spend the full allotment when beneficiaries of impounded programs brought claims.[115] In response, Congress passed the Impoundment Control Act of 1974,[116] the current version[117] of which prescribes the rules for the rescission or deferral of spending obligations.[118]

If the President wishes to defer spending obligations, he must submit a "special message" to Congress regarding his proposed rescission;[119] however, the President must spend the money that he proposed to rescind unless, within forty-five days, Congress passes[120] a rescission bill.[121] The President cannot propose to rescind an obligation more than once,[122] and he can only propose rescissions of discretionary spending authority.[123] 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

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[113] For example, in *Train v. City of New York*, 420 U.S. 35, 44 (1975), the Supreme Court held that the President could not withhold a portion of an appropriation; rather, he would have to allot the entire sum.
[114] 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).
[115] *Id.* at 702-03. 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 advance his agenda.
[116] 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 *infra* in Appendix E.
[117] 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).
[118] Neuren, *supra* note 114, at 703.
[119] *See* 2 U.S.C. § 683(a) (1987).
[120] 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*, N.Y. TIMES, March 11, 2005, http://query.nytimes.com/gst/fullpage.html?res=980CE6D8173CF932A25750C0A9639C8B63.
[121] *See* 2 U.S.C. § 683(b) (1987).
[122] *Id.*
[123] Gov't Accountability Office, *Impoundment Control Act: Use and Impact of Rescission Procedures* 7 (Dec.16, 2009), Statement of Susan A. Poling, Managing Associate General Counsel, Office of General Counsel, Before the Subcommittee on Federal Financial Management, Government Information, Federal Services, and International Security, Committee on Homeland Security and Governmental Affairs, U.S. Senate.

operations; or (3) as specifically provided by law."[124] The Comptroller General, and not private individuals,[125] may bring suits pursuant to the Act.[126]

In *Clinton v. City of New York*,[127] 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 Act[128] in 1996, plaintiffs challenged President Clinton's authority to cancel spending provisions of the Balanced Budget Act of 1997 and the Taxpayer Relief Act of 1997.[129] Specifically, President Clinton canceled section 4722(c) of the Balanced Budget Act of 1997, which would have exempted New York from returning certain Medicaid subsidies to the federal government,[130] and section 968 of the Taxpayer Relief Act of 1997, which provided a tax benefit to "owners of certain food refiners and processors . . . if they sell their stock to eligible farmers' cooperatives."[131]

Although Justice Stevens' majority opinion struck down the Line Item Veto Act on the narrow ground that it violated the Presentment Clause[132] of the Constitution,[133] Justice Kennedy's concurrence provided a separation of powers argument against the Line Item Veto Act on the basis that unilateral, presidential cancellation of budget authority threatens individual liberties.[134] According to Justice Kennedy, "if a citizen who is taxed has the measure of the tax or the decision to spend determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened. Money is the instrument of policy,

[124] 2 U.S.C. § 684(b) (1987).
[125] *See* Rocky Ford Hous. Auth. v. U.S. Dept. of Agric., 427 F. Supp. 118, 134 (D.D.C. 1977).
[126] 2 U.S.C. § 687 (1987).
[127] 524 U.S. 417 (1998).
[128] *Id.* at 437. 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.
[129] *Id.* at 420-21.
[130] *Id.* at 422-23.
[131] *Id.* at 423-25.
[132] U.S. Const. Art. I, Sec. 7.
[133] 524 U.S. at 448-49.
[134] *See id.* at 449-52.

and policy affects the lives of citizens. The individual loses liberty in a real sense if that instrument is not subject to traditional constitutional constraints."[135] However, Justice Scalia disagreed, arguing that, while the Line Item Veto Act was an impermissible delegation of legislative authority to "'cancel' an item of spending," the Act would have been constitutional if it "authorized the President to 'decline to spend' any item of spending."[136]

B. LEGAL THEORIES FOR EXECUTIVE ACTION IF THE NATIONAL DEBT HITS THE STATUTORY LIMIT

If the national debt hit the statutory limit, the legal ambiguities surrounding the Fourteenth Amendment and the Executive's duty to fulfill statutory spending obligations could be resolved in numerous ways. The section below outlines several courses of action the Executive might take if borrowing authority is exhausted, and explores the legal rationale on which each theory could be grounded.

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

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.[137] Professor Michael Stern argues that the legislative

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[135] *Id.* at 451.
[136] *Id.* at 468-69.
[137] *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/.

history is either unsettled[138] or demonstrates that the Public Debt Clause was intended to prevent repudiation based on floor speeches by the framers of the amendment.[139] 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.[140]

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."[141] 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 Clause[142] to show that only "debt" obligations fall within the scope of "public debt" because "debt" and "obligations" are separate entities in the rest of the Clause.[143] Professor Tribe argues that the usage of "debt" in the original Constitution cannot refer to all statutory obligations.[144] Moreover, a proposed floor amendment[145] would have replaced "public debt" with "obligations," but failed to be adopted.

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[138] *See infra* Appendix C.

[139] *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).

[140] Tribe, *supra* note 110. 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."

[141] *See* Calvin Massey, *The Debt Limit and the Fourteenth Amendment*, THE FACULTY LOUNGE, June 30, 2011, http://www.thefacultylounge.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."

[142] "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.

[143] 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/.

[144] 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.

[145] *See infra* 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."

Therefore, the Framers of the Fourteenth Amendment may have "deliberately decided to exclude 'obligations' from the Public Debt Clause."[146]

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,"[147] and "[i]n post-1937 cases, the Court backed away from earlier activist stances limiting the government's ability to craft economic policy."[148]

Perry was decided on the same day as four other cases[149] 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 payment in gold.[150] 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."[151] However, the plaintiff did not

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[146] Stern, *supra* note 143. 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.
[147] *Id.*
[148] *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."
[149] 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).
[150] *See infra* Appendix D.
[151] 294 U.S. at 353.

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."[152]

While some academics interpret the decision in *Perry* as prohibiting the government from breaching its obligations,[153] Professor Henry Hart questioned how the bondholder could have suffered no damage if the Joint Resolution was unconstitutional.[154] Professor Hart did not have a "conviction" of what was the proper interpretation of the *Perry* decision.[155] 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."[156] 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.[157]

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."[158] 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 a violation of the Constitution."[159] In support of this argument, Professor Tribe cites Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*[160] and argues that the

[152] *Id.* at 357.
[153] Abramowicz, *supra* note 103, at 13.
[154] Hart, *supra* note 149, at 1060.
[155] *Id.* at 1094.
[156] *Id.*
[157] *Id.* at 1096.
[158] U.S. Const. Art. I, Sec. 8
[159] Tribe, *supra* note 110.
[160] 343 U.S. 579, 637-38 (1952).

President's power to borrow would be at its "lowest ebb" of legitimacy.[161] 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"; therefore, it is unclear why the debt limit statute is unconstitutional while the tax code and other revenue limits are not.[162] The President may be bound to use legal revenue sources[163] before he can breach a statutory obligation.[164]

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.[165] Professor Tribe responds by framing the debate as one between (1) the power to spend money and (2) the power to raise revenues.[166] 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."[167] In support of his argument, Professor Tribe tracks the admonition of executive revenue-raising from England through the "battle cry of the American Revolution . . ., 'No taxation without representation!'"[168] In addition, Professor Tribe cites various examples of Presidents who refused to spend money[169] in contrast to zero examples

[161] Tribe, *supra* note 110.
[162] Tribe, *supra* note 144.
[163] *See* Magliocca, *supra* note 106. For example, the United States can legally sell its assets to raise money. *See supra* notes 68, 69, 70. Another potential legal solution outlined by Brad Plumer, *Can A Giant Platinum Coin Save Our Credit?*, WASH. POST, 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. This authority is derived from 31 U.S.C. § 5112(k) (2010), which states, "The Secretary may mint and issue platinum bullion coins and proof platinum coins in accordance with such specifications, designs, varieties, quantities, denominations, and inscriptions as the Secretary, in the Secretary's discretion, may prescribe from time to time." 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.
[164] Tribe, *supra* note 144.
[165] *See* Buchanan, *supra* note 107.
[166] Tribe, *supra* note 144.
[167] *Id.*
[168] *Id.*
[169] *Id.* E.g. Ulysses Grant, Franklin D. Roosevelt, Harry Truman, and Richard Nixon.

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."[170]

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" ("FIFO") procedure.[171]

The 1985 Senate Finance Committee, under the leadership of Bob Packwood, espoused this theory.[172] The Committee found, based on the "best available information," that the President and the Secretary of the Treasury have no authority to prioritize payments.[173] 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."[174] The report expected the Secretary of the Treasury to fulfill its spending obligations "as they come due while cash remains in the till."[175]

In response to Senator Packwood and the Senate Finance Committee, the Government Accountability Office wrote, "[w]e 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

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[170] *Id.*
[171] *See* Mindy R. Levit, Clinton T. Brass, Thomas J. Nicola, Dawn Nuschler, & Alison M. Shelton, *Reaching the Debt Limit: Background and Potential Effects on Government Operations*, CONG. RESEARCH SERV. 7-8 (July 27, 2011).
[172] S. Rep. No. 99-144, at 5 (Sept. 26, 1985).
[173] *Id.*
[174] *Id.*
[175] *Id.*

will best serve the interests of the United States."[176] However, Treasury has maintained that it does not have the authority to prioritize spending obligations.[177] 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."[178]

The 1995-1996 impasse may act as a precedent, forcing Treasury to follow a FIFO procedure unless Congress passes a bill providing prioritization guidelines.[179] 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.[180] In response, Congress passed temporary exemptions[181] from the debt limit in

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[176] 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)**.** The letter, addressed to Senator Packwood states in full: "YOU HAVE REQUESTED OUR VIEWS ON WHETHER THE SECRETARY OF THE TREASURY HAS AUTHORITY TO DETERMINE THE ORDER IN WHICH OBLIGATIONS ARE TO BE PAID SHOULD THE CONGRESS FAIL TO RAISE THE STATUTORY LIMIT ON THE PUBLIC DEBT OR WHETHER TREASURY WOULD BE FORCED TO OPERATE ON A FIRST IN-FIRST-OUT BASIS. BECAUSE OF YOUR NEED FOR AN IMMEDIATE ANSWER, *OUR CONCLUSIONS MUST, OF NECESSITY, BE TENTATIVE*, BEING *BASED ON THE LIMITED RESEARCH* WE HAVE BEEN ABLE TO DO. IT IS OUR CONCLUSION THAT THE SECRETARY OF THE TREASURY DOES HAVE THE AUTHORITY TO CHOOSE THE ORDER IN WHICH TO PAY OBLIGATIONS OF THE UNITED STATES. ON A DAILY BASIS THE TREASURY DEPARTMENT RECEIVES A NORMAL FLOW OF REVENUES FROM TAXES AND OTHER SOURCES. AS THEY BECOME AVAILABLE IN THE OPERATING CASH BALANCE, TREASURY MAY USE THESE FUNDS TO PAY OBLIGATIONS OF THE GOVERNMENT AND TO REISSUE EXISTING DEBT AS IT MATURES. SEE GENERALLY H.R. REPT. NO. 31, 96TH CONG., 1ST SESS. 9-10 (1979). WE ARE AWARE OF NO STATUTE OR ANY OTHER BASIS FOR CONCLUDING THAT 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. UNLESS IT IS RELEASED EARLIER OR WE HEAR OTHERWISE FROM YOU, THIS LETTER WILL BE AVAILABLE FOR RELEASE TO THE PUBLIC 30 DAYS FROM TODAY." (emphasis added).
[177] *See* Levit, *supra* note 171, at 7-8.
[178] *Id.* at 8.
[179] *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.
[180] General Accounting Office, *Debt Ceiling: Analysis of Actions During the 1995-1996 Crisis* 10 (1996).
[181] Pub. L. No. 104-103 (Feb. 8, 1996) and Pub. L. No. 104-115 (Mar. 12, 1996). *See infra* Appendix G for full text. These two provisions had the effect of temporarily exempting some newly issued Treasury securities from being counted against the debt limit. This allowed "Treasury to (1) raise $29 billion to pay March 1996 Social Security benefits and (2) in March 1996, invest $58.2 billion from government trust fund receipts and maturing securities." General Accounting Office, *supra* note 180 at 6. *See* 42 CONG. REC. H1197-01, 1-2 (Feb. 1, 1996) (statement of

order to allow the President to issue new debt to the Social Security Trust Funds, and to pay Social Security beneficiaries.[182]

Absent congressional authorization, the Supreme Court's decision in *Clinton*[183] may provide an implicit prohibition on executive discretion regarding the satisfaction of statutory spending obligations.[184] Professor Buchanan writes that the *Clinton* Court "held that the president may not cancel appropriations that Congress has authorized."[185] 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.[186] 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."[187]

Rep. Archer). The Act's sponsor Rep. Bill Archer stated that this bill was enacted "in an effort to reassure our seniors." He further stated, "[w]ith the passage of this bill, President Clinton has no excuse not to send out Social Security checks."

Note: This provision was limited to new debt *issuances* and is distinct from the issue discussed *infra* in Theory 2D, which would allow for Social Security Trust Fund *redemptions* in order to pay beneficiaries. Pub. L. No. 104-103 specifically addressed the monthly process of crediting the Trust Funds with new debt securities equal to the amount of incoming Social Security revenues received by the Treasury. Rep. Smith contended that "[Treasury has] no legal authority to withhold payments for Social Security or any other trust fund when there are surpluses coming into those trust funds." However, Social Security currently runs a current account deficit, which may change this evaluation. Without an Act similar to this 1996 measure, the Secretary may be forced to violate either 42 U.S.C. § 1320b-15, which prohibits a delay of deposits into the Trust Funds, or the Debt Limit.

[182] *See* Gov't Accountability Office, *supra* note 61, at 9;142 CONG. REC. H1197-01, 4 (Feb. 1, 1996) (statement of Rep. Smith). "Under normal circumstances Treasury would sell bonds a few days before benefit payments are due with a settlement date the same as the benefit payment date. Then the trust fund is disinvested and the debt limit has returned to what it was. Because we are at the debt limit Treasury cannot use this normal procedure. Because the Social Security Trust is void of any cash, Treasury must sell securities to make benefit payments that come due. This bill will allow these securities to be sold outside the debt limit, then as the benefit payments are met the trust fund securities will be redeemed. The securities which were sold will then come under the debt limit, so by March 15, when all benefit checks have been paid, the debt will be the same as it was before."

[183] 524 U.S. 417. *See supra* Section II.A.2 – The Duty to Fulfill Statutory Spending Obligations.

[184] *See* Buchanan, *supra* note 107.

[185] *Id.*

[186] *Id.*

[187] *Id.*

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,"[188] suggesting a *pari passu* approach.[189] 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."[190] In a separate statement, Deputy Secretary of the 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."[191] 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

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[188] 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).
[189] Meaning that payments would be put on an "equal footing," as in bankruptcy proceedings.
[190] 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).
[191] Neal Wolin, Deputy Secretary of the Treasury, *Proposals to "Prioritize" Payments on U.S. Debt Not Workable; Would Not Prevent Default*, DEP'T OF TREASURY, Jan. 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).

limit.[192] 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."[193]

The FIFO approach would not only have been a legally permissible explanation,[194] 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 constituencies. Further, adherence to a FIFO approach may have served to apply pressure to Congressional Republicans. As one commentator observed, certain members of Congress may have been more likely to negotiate in the face of "soldiers going without pay."[195] Lastly, it can be argued that a default FIFO prioritization scheme may have been more practical[196] than comprehensively prioritizing 80 million payments per month.[197] Despite superficial plausibility, however, a FIFO payment scheme is not without complexity, since Treasury does not control 100% of payments.[198]

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[192] 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-federa/.
[193] Binyamin Applebaum, *Treasury to Weigh Which Bills to Pay*, N.Y. TIMES, July 27, 2011, http://www.nytimes.com/2011/07/28/business/economy/treasury-to-weigh-which-bills-to-pay.html?_r=1.
[194] *See* Senate Report, *supra* note 172.
[195] Felix Salmon, *Can Treasury Prioritize Bond Payments?*, REUTERS, July 29, 2011, http://blogs.reuters.com/felix-salmon/2011/07/29/can-treasury-prioritize-bond-payments/.
[196] Jay Powell, *How Will the Federal Government Decide Who Gets Paid after August 2?*, BIPARTISAN POLICY CENTER (July 25, 2011) (available at http://www.bipartisanpolicy.org/blog/2011/07/how-will-federal-government-decide-who-gets-paid-after-august-2).
[197] Jerome Powell, *Real Implications of Debt Debate*, POLITICO, June 29, 2011, http://www.politico.com/news/stories/0611/58026.html.
[198] Ease of FIFO method should not be assumed, as Treasury's Financial Management Service only disburses 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 disburse the remaining sum. Coordinating receipt of bills among the various agencies for a FIFO disbursement of moneys may have presented significant difficulties.

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.[199] 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 payments[200] 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.[201] 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.[202] Even if these payments were the first expense of the day, the obligations could not have been satisfied in full until August 25.[203] By August 31, the accumulated expense carryover figure would have amounted to $127 billion, and Treasury would have been eleven days delinquent on appropriated expenditures.[204]

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[199] Treasury Direct, *Daily Treasury Statements*, DEP'T OF TREASURY, Aug. 2, 2011 – Aug. 31, 2011. Reflects actual figures. Aug. 3, 2011 Non-debt inflows = $6.287 billion, Expenses = $9.686 billion.
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.* Unpaid expenses by August 31 based on inflows alone would have been equal to $127.16 billion. The first among these delinquent obligations would have been incurred on August 17, 2011. *See infra* Appendix B.

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; Funds would not have been made whole on Aug. 2
Interest Payments to Bondholders (Aug. 2 – Aug. 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.[205]
Mandatory Spending on Entitlements (Aug. 2 – Aug. 31)	Payments delayed on a FIFO basis, treated equally with all other obligations.
Appropriated Discretionary Spending (Aug. 2 – Aug. 31)	Payments delayed on a FIFO basis, treated equally with all other obligations.
Proportion of total expenses paid Aug. 2 – Aug. 31	59% [206]
Outstanding Debt on Aug. 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 requires a FIFO procedure.[207] In order to effectively prioritize spending obligations, OMB may "apportion" funding pursuant to the Antideficiency Act.[208]

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[205] *Id.*
[206] *Id.* During Aug. 2 – Aug. 31, 2011: Inflows = $186.404 billion, Expenses = $313.564 billion.
[207] GAO, *supra* note 176**.**
[208] *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 et al. *supra* note 171, at 8.

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.[209] 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.[210]

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.[211] When a spending obligation comes due that the President does not want to pay, he may propose to rescind the obligation.[212] 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.[213] The deferral provisions of the Act would permit the President to defer spending obligations until the end of the fiscal year.[214] 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."[215]

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[209] *See* Tribe, *supra* note 144. *See also supra* Theory I.A – *The President is Bound by the Debt Limit.*
[210] *See id.*
[211] *See* Levit, et al., *supra* note 171, at 8-9.
[212] *See* 2 U.S.C. § 683(a) (1987).
[213] *See* 2 U.S.C. § 683(b) (1987).
[214] 2 U.S.C. § 684(b) (1987).
[215] *Id.*

If the President attempted to achieve prioritization through deferral, he would likely seek to justify it as a provision for "contingencies" under the Impoundment Control Act. When the D.C. Circuit in *City of New Haven v. United States* reviewed the original deferral language, it upheld "routine 'programmatic' deferrals . . . to meet the inevitable contingencies that arise in administering congressionally-funded agencies and programs," but it declared that "'policy' deferrals, which are intended to advance the broader fiscal policy objectives of the Administration," are unconstitutional.[216] The Act was amended with the "contingencies" language to reflect this distinction and permit only "programmatic" deferrals.[217] Therefore, "[d]eferrals for policy reasons are not authorized."[218]

Professor Peter Shane writes that prioritization through "programmatic deferral" would be "deeply ironic" because "the President could select expenditures to defer or not defer only by making policy judgments about spending levels that are different from the policy judgments that Congress enacted in its appropriations Acts."[219] However, Professor Shane argues that the President would have no other option and he "would have to decide, on his own initiative, what projects and activities to put on hold to keep from violating the law. Congress would thus have tacitly abdicated to the executive branch a huge swath of the power over government fiscal policy that the Framers quite deliberately vested in Congress."[220]

[216] 809 F.2d at 901. "The critical distinction between 'programmatic' and 'policy' deferrals is that the former are ordinarily intended to *advance* congressional budgetary policies by ensuring that congressional programs are administered efficiently, while the latter are ordinarily intended to *negate* the will of Congress by substituting the fiscal policies of the Executive Branch for those established by the enactment of budget legislation."
[217] *See* Letter from Milton J. Socolar for the Comptroller General of the United States, to the President of the Senate and the Speaker of the House of Representatives (Mar. 6, 1990) (available at http://www.gao.gov/assets/220/212244.pdf).
[218] U.S. General Accounting Office, *Principles of Federal Appropriations Law: Third Edition,* Volume I, 1-32 fn. 61.
[219] Peter M. Shane, *What May a President Do if He Cannot Pay Our Bills Without Borrowing and Borrowing More Money is Unlawful?*, SHANE REACTIONS, July 19, 2011, http://shanereactions.wordpress.com/2011/07/19/what-may-a-president-do-if-he-cannot-pay-our-bills-without-borrowing-and-borrowing-more-money-is-unlawful/.
[220] *Id.*

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 prioritization authority. However, it is clear that Treasury had a distaste for prioritizing.[221] Secretary Geithner stated that prioritization would be "unwise, unworkable, unacceptably risky, and unfair to the American people."[222] In addition to a likely political backlash that would result from any prioritization choice,[223] the markets expressed their opposition to any such scheme.[224]

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 payments[225] should be "winners" and "losers." From August 2 - August 31, 2011, revenues amounted to over $186 billion,[226] while expenses totaled almost $314 billion,[227] leaving a shortfall of $127 billion, which would normally have been provided for through continued debt 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.[228] However, he would not have been able to satisfy other appropriations, including payments to Defense vendors, the Department of Education, or Federal Employee Salary and Benefits.[229]

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[221] *See, e.g.*, Geithner, *supra* note 22; Wolin, *supra* note 191.
[222] Salmon, *supra* note 195.
[223] *See* Greenlaw, *supra* note 71, at 3.
[224] *See, e.g.*, Jennifer Saba & Walter Brandimarte, *S&P Warns Against Prioritizing Debt Payments: Report*, REUTERS, July 26, 2011, http://www.reuters.com/article/2011/07/27/us-usa-debt-sp-idUSTRE76Q0DR20110727.
[225] Powell, *supra* note 197.
[226] Treasury Direct, *supra* note 199. Sum of Non-Debt Issuance inflows.
[227] *Id.* Sum of Outflows, excepting public debt cash redemptions.
[228] *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.
[229] *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; Funds would not have been made whole on Aug. 2
Interest Payments to Bondholders (Aug. 2 – Aug. 31)	Likely to be prioritized and paid as scheduled ($38 billion)[230]
Mandatory Spending on Entitlements (Aug. 2 – Aug. 31)	Likely to be prioritized and paid as scheduled (Social Security: $51 billion; Medicare: $32 billion)[231]
Appropriated Discretionary Spending (Aug. 2 – Aug. 31)	34%[232] 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 Aug. 2 – Aug. 31	59%[233]
Outstanding Debt on Aug. 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."[234] Most academics agree that "public debt" includes bond payments.[235] However, others advocate a broader interpretation of "public debt" to include statutory spending commitments or all contractual obligations.[236] 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

[230] *Id.*
[231] *Id.*
[232] *Id.* Inflows of $186.404 billion - $37.951 billion in interest payments - $31.793 billion in Medicare expenses - $51.214 billion in Social Security expenses = $65.446 billion in remaining revenue for $192.606 billion in expenses.
[233] *Id.* Inflows = $186.404 billion, Expenses = $313.564 billion during Aug. 2 – Aug. 31, 2011.
[234] *See* Tribe, *supra* note 144. 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.
[235] *See, e.g.*, Abramowicz, *supra* note 103, at 20.
[236] *See, e.g.*, Buchanan, *supra* note 107.

appropriation;[237] 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*,[238] "the Supreme Court held that Congress could revise or repeal Social Security Act benefits even though they had already been promised by prior legislation."[239] While some academics argue that "public debt" protects all contractual obligations,[240] Social Security beneficiaries contributed taxes, rather than voluntary payments pursuant to an agreement, and they have not signed a written contract.[241]

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" phrase[242] was only necessary to provide an unambiguous indication that those debts could not be questioned.[243] 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.[244] On April 25, 2011, in anticipation of reaching the debt limit, Matthew Zames, Chairman of the Treasury Borrowing Advisory Committee and a Managing Director at J.P. Morgan Chase, wrote Secretary Geithner, warning that "any delay in making an interest or

[237] *See* Abramowicz, *supra* note 103, at 43-44.
[238] 363 U.S. 603 (1960).
[239] Tribe, *supra* note 144.
[240] *See* Abramowicz, *supra* note 103, at 20-21.
[241] *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. *Id.*
[242] 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).
[243] *See* Abramowicz, *supra* note 103, at 20.
[244] Letter from Jim DeMint, et. al., U.S. 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."[245] However, it is unclear if Treasury would have acted on its presumptive 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."[246] 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."[247]

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.[248] The statement was likely made to reassure the markets.[249] 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.[250]

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[245] Letter from Matthew Zames, Chairman of the Treasury Borrowing Advisory Committee, to Timothy Geithner, Secretary of the Treasury (Apr. 25, 2011) (available at http://www.treasury.gov/resource-center/data-chart-center/quarterly-refunding/Documents/Geithner_Debt_Limit_Letter_4_25_11E.pdf). Zames cited fears of contagion, possibly prompting runs on money market funds, and warned of potential increases in Treasury borrowing costs over the long term. Zames' concerns regarding increased borrowing rates for taxpayers are supported by D. Andrew Austin & Rena S. Miller, *Treasury Securities and the U.S. Sovereign Credit Default Swap Market*, CONG. RESEARCH SERV. 15 (Aug. 15, 2011), http://www.fas.org/sgp/crs/misc/R41932.pdf. In fact, one study cited claims that after the U.S. missed a payment on T-bills in 1979, the government borrowed at a 60bp premium for years afterward.

[246] Geithner, *supra* note 190. Further, Geithner wrote, "[y]our 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."

[247] Wolin, *supra* note 191.

[248] 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.

[249] *See id.*

[250] *Id.*

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 billion of interest on government bonds,[251] leaving $148 billion in inflows to pay $276 billion in obligations.[252] Presumably, the remainder of these obligations would have been made using a FIFO approach.[253] Notably, protecting from technical default alone may not have been sufficient to prevent a negative market reaction, especially in light of the CDS definition of "credit event," which includes failure to pay any "obligation."[254]

[251] Treasury Direct, *supra* note 199.
[252] *Id.*
[253] *See supra* Theory 1. Prioritizing interest would have presented a unique difficulty under a FIFO approach in that $32 billion was due to be paid on Aug. 15. Inflows from that day alone would have been insufficient to make such a payment. Therefore, funds would have to have been set-aside in advance, prioritizing a future payment over payments already due.
[254] *See* Austin & Miller, *supra* note 245 at 11-12; *see also* International Swaps and Derivatives Association, *CDS on US Sovereign Debt Q&A*, http://www2.isda.org/news/cds-on-us-sovereign-debt-qampa. "A CDS is triggered when a Credit Event occurs. There are three Credit Events that are typically used for Sovereigns such as the United States. They are: Failure to Pay; Repudiation/Moratorium and Restructuring. . . . 'Failure to Pay means, after the expiration of any applicable Grace Period . . . the failure by a Reference Entity to make, when and where due, any payments in an aggregate amount of not less that the Payment requirement under one or more *Obligations*, in accordance with the terms of such Obligation at the time of such failure.'" (emphasis added). The grace period for U.S. CDS is 3 days. The U.S. CDS market is relatively small, and exposures are limited, so the triggering of CDS alone would not be a large threat to the economy at this time. However, if the U.S. CDS market grows, or if the broader market is afflicted with contagion concerns upon a triggering event, the danger to the U.S. economy could be large, despite continued payment on the reference entity (Treasury securities).

THEORY 2B: THE PRESIDENT MUST PRIORITIZE BONDHOLDER PAYMENTS	
Status of Funds utilized during DISP	DISP likely would have been extended; Funds would not have been made whole on Aug. 2
Interest Payments to Bondholders (Aug. 2 – Aug. 31)	Paid, as scheduled ($38 billion)[255]
Mandatory Spending on Entitlements (Aug. 2 – Aug. 31)	With no authority to prioritize, entitlements would likely be subject to a FIFO payment scheme
Appropriated Discretionary Spending (Aug. 2 – Aug. 31)	With no authority to prioritize, discretionary expenseswould likely be subject to a FIFO payment scheme
Proportion of total expenses paid Aug. 2 – Aug. 31	59% (54% of non-interest expenses)[256]
Outstanding Debt on Aug. 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."[257] Social Security may be included because the trust fund is constituted in part by recipients' tax payments, and future beneficiaries may rely on these payments.[258] It is unclear whether Medicare fits the form of an agreement because its contributions and benefits are more

[255] Treasury Direct, *supra* note 199.
[256] *Id.* During Aug. 2 – Aug. 31, 2011: Inflows = $186.404 billion, Expenses = $313.564 billion, Interest Expense = $37.951 billion.
[257] Abramowicz, *supra* note 103, 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 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.
[258] *Id.* at 36.

attenuated than Social Security.[259] 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.[260]

Professor Calvin Massey argues that the "pensions and bounties" phrase of the Public Debt Clause[261] provides an indication of what is included within the scope of "public debt."[262] 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."[263]

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,[264] 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 the coffers to do it."[265] 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 . . . .

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[259] *Id.* Medicare "Part B, offering supplemental medical insurance, is funded primarily through general tax revenues." *Id.* at 36 n.156.
[260] *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."
[261] 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).
[262] *See* Massey, *supra* note 141.
[263] *Id.*
[264] *See, e.g., Social Security Checks Could Be Delayed Without Debt-Ceiling Deal*, FOXNEWS.COM, July 13, 2011, 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.").
[265] *See, e.g.* Politifact, *supra* note 192.

[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."[266]

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.[267] This gap would have been filled the next day through new inflows;[268] 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.[269]

[266] FOXNEWS.COM, *supra* note 264.
[267] Treasury Direct, *supra* note 199. Non-Debt revenues for Aug. 2 & Aug. 3 = $18.537 billion. Interest and Social Security Expense = $22.023 billion.
[268] *Id.* Aug. 4 Revenues = $3.546 billion. Aug. 4 new Social Security and Interest Expense = $64 million.
[269] *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; Funds would not have been made whole on Aug. 2
Interest Payments to Bondholders (Aug.2 – Aug. 31)	Paid, as scheduled ($38 billion)[270]
Mandatory Spending on Entitlements (Aug. 2 – Aug. 31)	Social Security likely to be paid as scheduled ($51 billion).[271] Medicare less likely to be deemed an "obligation."
Appropriated Discretionary Spending (Aug. 2 – Aug. 31)	Expenses deemed "obligations" would be paid (e.g., government pensions, previously incurred contractual expenses)
Proportion of total expenses paid Aug. 2 – Aug. 31	59% (43% of non-interest and Social Security expenses)[272]
Outstanding Debt on Aug. 31	$14.294 trillion, as approved in Feb. 2010 legislation

D. SOCIAL SECURITY AND MEDICARE TRUST FUND REDEMPTIONS COULD ENABLE PAYMENTS AFTER REACHING THE STATUTORY DEBT LIMIT

The President may not be forced to develop a prioritization scheme that ensures payments to Social Security beneficiaries after reaching the debt limit; instead, the Executive Branch may provide for such payments by redeeming obligations possessed by the Social Security Trust Funds.[273] In November 1985, when the government reached the debt limit, Secretary of the Treasury James Baker redeemed nearly $15 billion of Treasury securities held by the Social Security Trust Funds in order to pay beneficiaries.[274] This maneuver lowered the outstanding debt subject to the limit by the amount of the redemption, and simultaneously allowed for new

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[270] *Id.*
[271] *Id.*
[272] *Id.* Inflows – Interest and Social Security = $97.239 billion. Outflows – Interest and Social Security = $224.399 billion.
[273] Nancy Altman & Mark S. Scarberry, *Disentangling Social Security from the Debt Ceiling*, HUFFINGTON POST, July 20, 2011, http://www.huffingtonpost.com/nancy-altman/disentangling-social-secu_b_905227.html.
[274] Letter from Charles Bowsher, Comptroller General of the United States, to James R. Jones, Chairman, Subcommittee on Social Security, Committee on Ways and Means, House of Representatives (Dec. 5, 1985) (available at http://archive.gao.gov/d12t3/128621.pdf).

borrowing at that amount in order to pay beneficiaries.[275] The Comptroller General later investigated the validity of this maneuver and implicitly upheld the principle of Trust Fund redemptions to pay Social Security benefits, as long as such redemptions are undertaken at the precise amount and speed "absolutely necessary" to effect benefit payments.[276] The following year, in a proposed debt limit increase bill, the Senate Finance Committee introduced a provision that would have expressly "prohibit[ed] the Secretary of the Treasury, in his role as Managing Trustee of the Social Security trust funds, from engaging in premature redemption of securities held by the trust funds during a debt limit crisis *even if such redemption were required in order to pay beneficiaries.*"[277] This bill was not passed.[278]

Following the 1995-1996 debt limit impasse, Congress enacted a provision that effectively codified the Comptroller General's opinion.[279] The "Protection of Social Security and Medicare Trust Funds" provision proscribes the use of these Funds to create general "headroom" during a DISP,[280] but ostensibly allows for public debt obligations held by the Trust Funds to be redeemed prior to maturity for the purpose of "payment of benefits or administrative expenses."[281] This authority, however, does not give the Secretary the legal authority to

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[275] Michael McConnell, *Three Common Legal Misunderstandings About the Debt Ceiling*, ADVANCING A FREE SOCIETY, THE HOOVER INSTITUTION, July 28, 2011, http://www.advancingafreesociety.org/2011/07/28/three-common-legal-misunderstandings-about-the-debt-ceiling/.
[276] Bowsher, *supra* note 274. The Comptroller found that "it appears, on the basis of the information now available, that the Secretary redeemed or failed to invest the Trust Funds' assets in amounts and for periods of time greater than *absolutely necessary* to pay social security benefits." (emphasis added). The Comptroller, however, found that such actions by the Secretary were reasonable under these specific circumstances.
[277] S. Rep. No 99-335, at 7 (1986). Emphasis added.
[278] H.R.J.Res.668, 99th Cong. (1986).
[279] McConnell, *supra* note 275.
[280] 42 U.S.C. § 1320b–15, *supra* note 30.
[281] *Id.* Statute precludes "redeem[ing] prior to maturity amounts. . . . which are invested in public debt obligations *for any purpose other than* the payment of benefits or administrative expenses." (emphasis added).

continue to invest incoming Social Security receipts in Treasury securities if the debt limit has been reached.[282]

The use of Trust Fund redemptions in order to make Social Security beneficiary payments was not widely discussed during the 2011 impasse. Both the President and Secretary Boehner discussed Social Security in the context of prioritization[283] and indicated that it was possible that Social Security benefit payments would be interrupted.[284] However, it is possible that the Executive Branch could have invoked this redemption exception in order to create the borrowing authority necessary to guarantee Social Security benefit payments without exceeding the statutory debt limit.[285]

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[282] Jeffrey Kunkel, Social Security Administration Chief Actuary, *Social Security Trust Fund Investment Policies and Practices, Actuarial Note No. 142*, 3. *See supra* note 181, 182. In 1996, Congress passed a bill to allow for continued investment of these receipts in excess of the debt limit. Without similar legislation enabling investment of receipts, the Secretary would be violating 42 U.S.C. 1320b-15 by not investing receipts immediately.
[283] *See supra* Theory 2C.
[284] Altman & Scarberry, *supra* note 273.
[285] Thomas Saving, Op. Ed., *Obama's Debt Ceiling Scare Tactics*, WALL ST. J., July 22, 2011, http://online.wsj.com/article/SB10001424053111903554904576458294273264416.html?mod=opinion_newsreel ("[M]eeting Social Security obligations in August, September and all future months in this fashion would add nothing to the gross government debt subject to the debt limit. Not, at least, until the $2.4 trillion Trust Fund is exhausted in 2038.").

THEORY 2D: SOCIAL SECURITY AND MEDICARE TRUST FUND REDEMPTIONS COULD ENABLE PAYMENTS AFTER REACHING THE STATUTORY DEBT LIMIT	
Status of Funds utilized during DISP	DISP likely would have been extended; Funds would not have been made whole on Aug. 2
Interest Payments to Bondholders (Aug. 2 – Aug. 31)	May be subject to either prioritization or FIFO procedures
Mandatory Spending on Entitlements (Aug. 2 – Aug. 31)	Social Security Trust Fund obligations redeemed to pay beneficiaries as scheduled ($51 billion).[286] Medicare Trust Fund obligations redeemed to pay beneficiaries as scheduled ($32 billion).[287]
Appropriated Discretionary Spending (Aug. 2 – Aug. 31)	May be subject to either prioritization or FIFO procedures
Proportion of total expenses paid Aug. 2 – Aug. 31	86% (100% of Social Security and Medicare expenses; 81% of non-Social Security and Medicare expenses)[288]
Outstanding Debt on Aug. 31	$14.294 trillion, as approved in Feb. 2010 legislation. No difference, in overall debt. As the balance held by the Trust Funds decreases, an off-setting increase in Debt held by the Public would occur.

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

[286] Treasury Direct, *supra* note 199.
[287] *Id.* Assumes that Medicare Trust Fund would operate in the same fashion as Social Security Trust Fund redemptions, given that the Medicare trust fund is included in 42 U.S.C. § 1320b-15.
[288] *Id.* Assumes that none of the incoming revenues would be put toward Social Security or Medicare payments to beneficiaries. Thus, Social Security and Medicare trust funds would be depleted by the amount needed for beneficiary payments, as would the outstanding debt subject to the limit. Treasury could then use the additional "headroom" to borrow the corresponding amount to pay beneficiaries. This would increase the percentage of general expenses that could be paid using inflows.

(2) at the point that the national debt hits the statutory limit because the debt limit prevents further borrowing to satisfy statutory obligations.[289] Alternatively, the President may argue that a strategy of threatening to refuse to extend the debt limit is unconstitutional.[290]

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 jeopardize[291] the "validity of the public debt."[292] Proponents of this interpretation point to the political context after the Civil War[293] 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.[294] 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.[295] Finally, they look to linguistic hints within the Public Debt Clause, including its passive

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[289] *See supra* Section II.A.2 – *The Fourteenth Amendment.*

[290] *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 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 infra* 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.

[291] *See* Abramowicz, *supra* note 103, at 24.

[292] 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 146.

[293] *See infra* Appendix C.

[294] *See* Balkin, *supra* note 290.

[295] *See infra* Appendix D. *See also* Abramowicz, *supra* note 103, at 15.

construction,[296] and to the change from the initial proposed language,[297] which used "inviolable" instead of "questioned,"[298] to suggest a broad reading of "questioned."

In 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,[299] 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."[300]

Depending on the revenues relative to spending obligations,[301] 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 Clause[302] may bolster the argument that "public debt" includes more than bond payments.[303] The *Perry* Court indicates that the Public

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[296] 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.

[297] This was the proposal by Senator Ben Wade. *See infra* Appendix C.

[298] The replacement of "inviolable" with "questioned" may "sugges[t] 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 103, at 27.

[299] *See* Tribe, *supra* note 110.

[300] Buchanan, *supra* note 109. 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.

[301] 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.

[302] 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).

[303] *See* Abramowicz, *supra* note 103, 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.'"

Debt Clause protects "the integrity of the public obligations,"[304] which may include all statutory spending obligations.[305] Professor Buchanan cites *United States v. Winstar Corp.*[306] and *Cherokee Nation of Oklahoma v. Leavitt*[307] to support the proposition that "statutory spending obligations are legally binding commitments that the government . . . cannot ignore once it has committed to pay the funds."[308]

B. THE PRESIDENT'S EMERGENCY POWERS JUSTIFY FURTHER BORROWING

The President may justify unilateral borrowing by asserting his emergency powers.[309] 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 Balkin[310] and Professors Eric Posner and Adrian Vermeule[311] cite the suspension of habeas corpus by President Abraham Lincoln during the Civil War. Professor Richard Pildes responded to Professors Posner and Vermeule by arguing that unilateral borrowing by the President would cause similar consequences to a default.[312] According to Professor Pildes, unilateral borrowing could result in economic turmoil both domestically and in the world economy because "the country would have been tied in knots for a year or more about whether the President had acted

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[304] *See infra* Appendix D.
[305] *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.
[306] 518 U.S. 839 (1996).
[307] 543 U.S. 631 (2005).
[308] Buchanan, *supra* note 107. 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.
[309] 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.
[310] *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.
[311] *See* Eric A. Posner and Adrian Vermeule, Op-Ed, *Obama Should Raise the Debt Ceiling on His Own*, N.Y. 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."
[312] Richard H. Pildes, *Book Review: Law and the President*, 125 HARV. L. REV. 1381, 1411 (2012).

unconstitutionally; impeachment surely would have loomed; and it is unclear who would have bought U.S. debt, and at what price, given all the legal uncertainty that would have existed about whether the President had issued the debt lawfully."[313] 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."[314]

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 to tax at the levels provided by Congress; or (3) the obligation to borrow money without hitting the debt limit.[315] 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*,[316] and the prohibition on unilateral taxation is foundational in our country's history.[317] 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.[318]

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313 *Id.*
314 Balkin, *supra* note 310.
315 *See* Buchanan, *supra* note 107.
316 *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. In contrast to the Impoundment Control Act and its subsequent protection by the courts, debt limit extensions were relatively routine occurrences before 2011. 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.
317 *See* Tribe, *supra* note 144.
318 *See* Zachary A. Goldfarb, *Obama, Democrats not ready to play 14th Amendment card with debt ceiling*, WASH. POST, July 6, 2011, http://www.washingtonpost.com/business/economy/obama-democrats-not-ready-to-play-14th-

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,[319] signaling to some that the Executive Branch was considering invoking this authority.[320] 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 limit."[321] 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."[322] 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."[323] However, it appears that a decision to invoke the Public Debt

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amendment-card-with-debt-ceiling/2011/07/06/gIQAVU1O1H_story.html. The argument is set forth by Professor Larry Rosenthal.

[319] *Tim Geithner: 14th Amendment Says Debt 'Shall Not Be Questioned'*, HUFFINGTON POST, first posted June 30, 2011, updated on Aug. 30, 2011 (available at http://www.huffingtonpost.com/2011/06/30/tim-geithner-14th-amendment_n_887925.html). The clip can be viewed in the C-SPAN video at the 39-minute mark. After reading the Public Debt Clause, he criticized the tactics of Republican leaders, which he characterized as follows: "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 that "it's not a credible negotiating strategy, *and it's not going to happen.*" (emphasis added).

[320] *See e.g.,* Tribe, *supra* note 110.

[321] Erika Gudmundson, *FACT CHECK: Treasury General Counsel George Madison Responds to New York Times Op-Ed on 14th Amendment Statement*, DEP'T OF TREASURY, (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).

[322] Gudmundson, *supra* note 321.

[323] Huffington Post, *supra* note 319.

Clause in order to repudiate the statutory limit may have been supported by several political leaders, including House Minority Leader Nancy Pelosi and former President Bill Clinton.[324]

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.[325] 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.[326] 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 surrounding such unprecedented, unilateral executive action may have significantly raised interest rates on new debt issued.[327]

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[324] Matthew Yglesias, *Nancy Pelosi Calls for Constitutional Abrogation of the Debt Ceiling*, SLATE.COM, June 20, 2012, http://www.slate.com/blogs/moneybox/2012/06/20/pelosi_says_14th_amendment_makes_the_debt_ceiling_unconstitutional.html.

[325] Pub. L. No. 112-10: Department of Defense and Full-Year Continuing Appropriations Act, 2011 became law on Apr. 15, 2011.

[326] Treasury Direct, *supra* note 199. Reflects the actual increase in the debt after the BCA was passed and the debt limit was increased.

[327] *See e.g.*, Kathy A. Ruffing & Chad Stone, *Separating the Debt Limit from the Deficit Problem*, CENTER ON BUDGET AND POLICY PRIORITIES 1 (July 21, 2011). "History shows that even the uncertainty surrounding a debt limit increase can raise interest rates."

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 Aug. 2
Interest Payments to Bondholders (Aug. 2 – Aug. 31)	Paid as scheduled, with no interruptions
Mandatory Spending on Entitlements (Aug. 2 – Aug. 31)	Paid as scheduled, with no interruptions
Appropriated Discretionary Spending (Aug. 2 – Aug. 31)	Paid in conformity with continuing resolution
Proportion of total expenses paid Aug. 2 – Aug. 31	100%
Outstanding Debt on Aug. 31	$14.639 trillion ($345 billion above the debt limit)[328]

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 elect to 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. Although OMB typically uses its apportionment authority to prevent agencies from exhausting their budget authority, it may attempt to use apportionment procedures to issue funds at a lower rate pursuant to the Antideficiency Act.[329] However, apportionment authority is under the same constraints as deferral authority, and OMB would

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[328] Treasury Direct, *supra* note 199.
[329] *See* 31 U.S.C. § 1512 (1982); Levit, *supra* note 171, at 8.

have to justify the apportionment procedure as a provision for "contingencies."[330] The pro rata 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 pro rata approach may also amount to a breach of the President's duty to spend the money appropriated by Congress, unless he rescinds or defers a portion of each obligation pursuant to the Impoundment Control Act.[331]

Following a pro rata interpretation, the government could have disbursed funds to outstanding accounts in proportion to receipts. In FY2011, receipts accounted for 64% of outlays.[332] 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%[333] of the amount due or as high as 100%, depending on the day.[334] There would have been a technical default on August 2, when $2 million in interest was payable, but only 64% of it could have been paid on a yearly pro rata allocation, and only 70% on a daily pro rata allocation.[335]

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[330] 31 U.S.C. § 1512(c); *see supra* Theory 2A – *The President Can Prioritize at His Discretion.*
[331] *See supra* Section II.A.2 - *The Duty to Fulfill Statutory Spending Obligations; see also* Levit, *supra* note 171, at 8-9.
[332] 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*, (Oct. 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.
[333] Treasury Direct, *supra* note 199. On Aug. 4, inflows accounted for only 35% of outflows. On Aug. 23, this figure was 27%. However, on Aug. 22, there were excess inflows that would be rolled-over, effectively allowing for a 53% pro rata allocation on Aug. 23. Similarly on Aug. 9 and Aug. 30, 30% and 29% pro rata rates, respectively, would have effectively been higher due to excess inflows on previous days.
[334] *Id.* On Aug. 8, Aug. 11, Aug. 27, and Aug. 29 revenues exceeded expenses, so 100% of expenses could have been paid.
[335] *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; Funds would not have been made whole on Aug. 2
Interest Payments to Bondholders (Aug. 2 – Aug. 31)	Yearly pro rata allocation: 64% Daily pro rata allocation: 51%[336]
Mandatory Spending on Entitlements (Aug. 2 – Aug. 31)	Yearly pro rata allocation: 64% Daily pro rata allocation: [337] Social Security = 43% Medicare = 63%.
Appropriated Discretionary Spending (Aug. 2 – Aug. 31)	Yearly pro rata allocation: 64% Daily pro rata allocation, e.g.: [338] Defense vendor = 65% Medicaid = 64% Unemployment = 63%
Proportion of total expenses paid Aug. 2 – Aug. 31	59% [339]
Outstanding Debt on Aug. 31	$14.294 trillion, as approved in Feb. 2010 legislation

B. TREASURY SHOULD LOOK TO STATUTES FOR GUIDANCE

1. LEGISLATIVE PRIORITIZATION

The President and Congress may attempt to create legislative, stop-gap solutions. For instance, during the 1995-1996 impasse Congress passed temporary exemptions[340] from the debt limit in order to allow the President to issue new debt to the Social Security Trust Funds in order

[336] *Id.* Between Aug. 2, 2011 – Aug. 31, 2011, interest paid on a daily pro rata basis would have totaled $19.418 billion, 51% of $37.951 billion in interest expense due over that time.

[337] *Id.* Between Aug. 2, 2011 – Aug. 31, 2011, Social Security paid on a daily pro rata basis would have totaled $21.767 billion, 43% of $51.214 billion Social Security payments due over that time. During the same period, Medicare paid on a daily pro rata basis would have totaled $20.131 billion, 63% of $31.793 billion in Medicare payments due.

[338] *Id.* Between Aug. 2, 2011 – Aug. 31, 2011, Defense Vendor expenses paid on a daily pro rata basis would have totaled $21.381 billion, 65% of $32.923 billion in Defense Vendor payments due over that time. During the same period, Medicaid paid on a daily pro rata basis would have totaled $11.566 billion, 64% of $18.122 billion in Medicaid payments due. Unemployment payments would have totaled $5.541 billion, 63% of $8.757 billion in Unemployment payments due over that time.

[339] *Id.* During Aug. 2 – Aug. 31, 2011: Inflows = $186.404 billion, Expenses = $313.564 billion.

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

to credit the accounts for incoming revenues.[341] Several similar bills were proposed in 2011. Legislation introduced by Senator Pat Toomey and Representative Tom McClintock[342] would prioritize principal and interest payments.[343] Senator David Vitter and Representative David Heller's proposal[344] would prioritize "all obligations on the debt held by the public and Social Security benefits," while Representative Martin Stutzman[345] would add some military expenditures to the Vitter/Heller proposal.[346] These bills did not pass.

2. 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 timely[347] appropriations bill or continuing resolution, government shutdown procedures define the guidelines for running the government.[348] 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."[349] Pursuant to the Antideficiency Act and several opinions by Attorneys General,[350] the Office of Management and Budget's most recent Circular No. A-11[351] instructs agencies to prepare for a government shutdown by planning to retain only those employees that fall within specified

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341 Pub. L. No. 104-103 (Feb. 8, 1996). *See supra* note 181. "In addition to any other authority provided by law, the Secretary of the Treasury may issue under chapter 31 of title 31, United States Code, obligations of the United States before March 1, 1996, in an amount equal to the monthly insurance benefits payable under title II of the Social Security Act in March 1996."
342 S. 163/H.R. 421; 112th Congress.
343 Levit, *supra* note 171, at 13.
344 S. 259/H.R. 568; 112th Congress.
345 H.R. 728; 112th Congress.
346 Levit, *supra*, note 171, at 13.
347 A timely budget or continuing resolution is passed by the end of the fiscal year.
348 *See* Puja Seam & Brad Shron, *Government Shutdowns* 1 (Harvard Law School Federal Budget Policy Seminar, Briefing Paper No. 10, 2005) (available at http://www.law.harvard.edu/faculty/hjackson/GovernmentsShutdowns_10.pdf).
349 31 U.S.C. § 1342 (1996).
350 *See* Seam & Shron, *supra* note 348, at 15.
351 *Id.*

categories.[352] Government shutdown procedures are distinct from a debt limit crisis because a government shutdown occurs due to a lack of appropriations authority, while the debt limit involves a lack of borrowing authority.[353] However, the President may use the government shutdown procedures to justify a preference for spending obligations that are essential to protect "life and property."[354]

CONCLUSION

It remains unclear how the President and the Treasury Department would have responded 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 provoke 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.

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[352] 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. "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 life and property."

[353] Levit, *supra* note 171, 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.").

[354] *See id.*

The BiPartisan Policy Center projects that the nation will reach its $16.394 trillion debt limit[355] between late November 2012 and early January 2013.[356] 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.[357] 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.[358] 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.[359] 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.

On May 15, 2012, Speaker John Boehner voiced his willingness to leverage this upcoming debt limit increase, stating, "[w]e shouldn't dread the debt limit. We should welcome it. It's an action-forcing event in a town that has become infamous for inaction."[360] Boehner announced, "When the time comes, I will again insist on my simple principle of cuts and reforms greater than the debt limit increase. This is the only avenue I see right now to force the elected

[355] Austin & Levit, *supra* note 2, at 1.
[356] Steve Bell, Loren Adler & Shai Akabas, *The Debt Ceiling Slouches Toward 2012*, BIPARTISAN POLICY CENTER, (Feb. 24, 2012) (available at http://www.bipartisanpolicy.org/blog/2012/02/debt-ceiling-slouches-toward-2012).
[357] *Id. See* Congressional Budget Office, *The Budget and Economic Outlook: Fiscal Years 2012-2022* (January 2012) (available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/01-31-2012_Outlook.pdf). Notably, CBO baseline assumptions for FY2013 project deficit spending at 16%, and CBO's alternative fiscal scenario project deficit spending at 26.8%. These projections fall far short of the 41% of deficit spending observed in August 2011.
[358] Jeanne Sahadi, *Bush tax cuts: The real endgame*, CNN MONEY, Nov. 28, 2011, http://money.cnn.com/2011/11/28/news/economy/bush_tax_cuts/index.htm.
[359] *Id.*
[360] John Boehner, Speaker of the House, *Address on the Economy, Debt at the Peter G. Peterson Foundation 2012 Fiscal Summit* (May 15, 2012) (available at http://www.speaker.gov/speech/full-text-speaker-boehners-address-economy-debt-limit-and-american-jobs).

leadership of this country to solve our structural fiscal imbalance."[361] Boehner's words prompted Secretary Geithner to respond, warning that "[t]his commitment to meet the obligations of the nation, this commitment to protect the creditworthiness of the country, is a fundamental commitment that you can never call into question or violate."[362] Geithner expressed his hope that Congress can resolve the next debt limit increase "without the drama and the pain and the damage they caused the country last July."[363]

Speaker Boehner's recent comments highlight a potential reality in American politics—that debt limit increases may no longer be routine. The possibility of future crises underscores the impact of legal uncertainties that surround these issues. As a result, the 2011 debt limit impasse may properly act as a call for legal clarity, specifically with regard to the Executive Branch authority to prioritize spending obligations. While prior debates over the debt limit have been clouded by disagreements over the legal consequences of inaction, a clear legislative scheme might inform both political leaders and the public during future negotiations.

[361] *Id.*
[362] Erik Wasson, *Geithner warns Boehner not to play with next deal to increase the debt ceiling*, THEHILL.COM, May 15, 2012, http://thehill.com/blogs/on-the-money/budget/227393-geithner-warns-boehner-not-to-play-with-debt-ceiling-again.
[363] *Id.*

APPENDIX A: TIMELINE OF ACTIONS DURING 2011 DEBT LIMIT IMPASSE

Date	Event
February 12, 2010	• Congress passes legislation raising the debt limit to $14.29 trillion.
January 6, 2011	• Secretary Geithner writes Congress that the outstanding debt stood at $13.95 trillion, leaving only $335 billion of borrowing authority.
February 3, 2011	• Treasury began to draw down its $200 billion Supplementary Financing Account at the Federal Reserve
April 15, 2011	• 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	• 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	• 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	• 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	• Secretary Geithner suspends reinvestments in the portion of the ESF held in US Dollars.
August 2, 2011	• 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	• Interest due to the G-Fund was invested in Treasury securities.
August 5, 2011	• 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	• Debt limit was raised by $500 billion to $15.19 trillion, as called for by BCA, despite a House disapproval measure.
December 30, 2011	• Interest earned by Civil Fund and Postal Fund during impasse was restored and invested in Treasury securities.
January 12, 2012	• President Obama certified that the outstanding debt subject to the limit was within $100 billion of the statutory limit.
January 28, 2012	• Debt limit was raised by $1.2 trillion to $16.39 trillion, despite a House disapproval vote.

APPENDIX B: RELEVANT AUGUST 2-31, 2011 FINANCIALS[364]

Figure 1. Actual Non- Debt Inflows ($186bn) and Outflows ($314bn) (in $ billions)

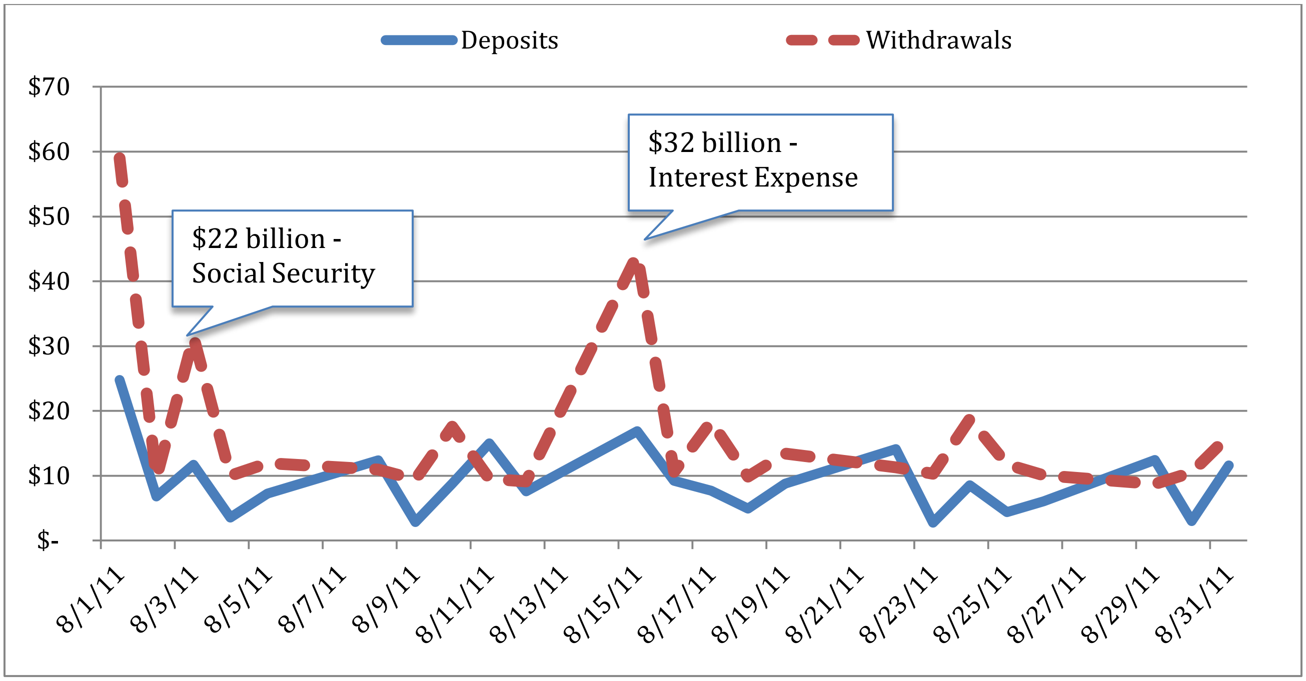
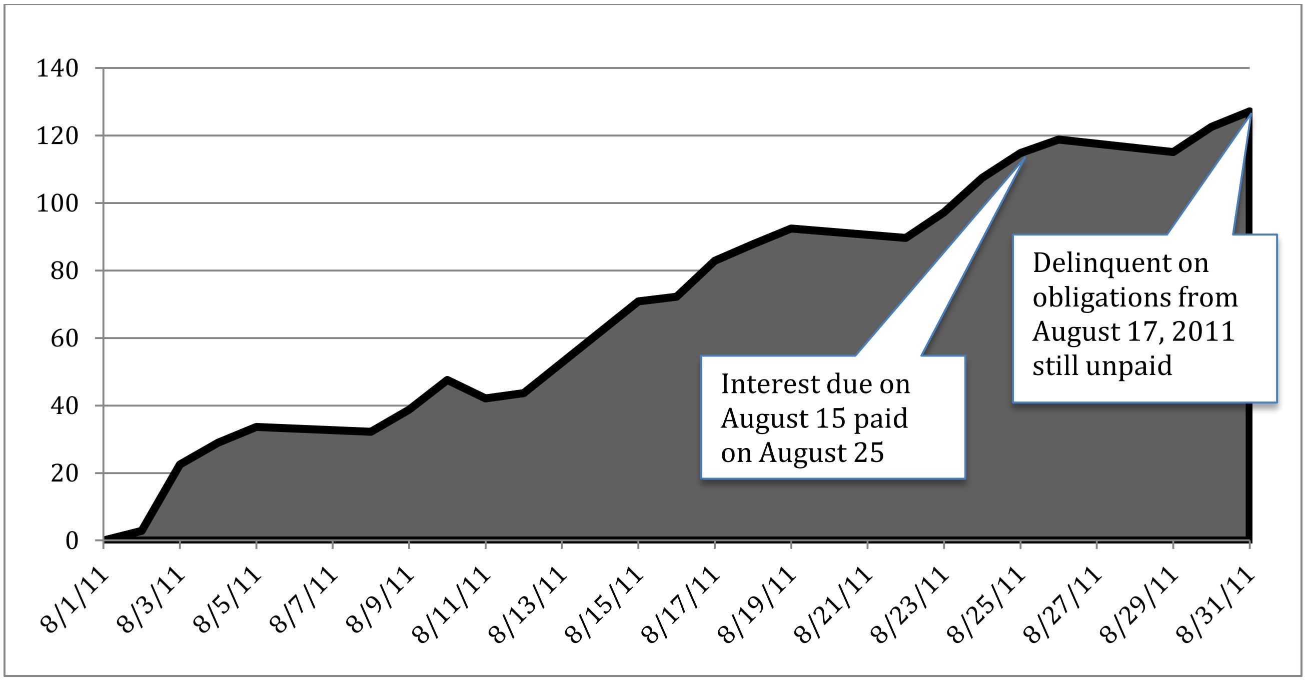


Figure 2. Accumulation of Delinquent Payments Under FIFO Approach (in $ billions)



364 Treasury Direct, *Daily Treasury Statements*, August 2, 2011 – August 31, 2011. Amounts reflect actual figures observed in August 2011, as stated in 30 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 14th Amendment	Despite the Union 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."[365] The purpose of the Public Debt Clause "was to prevent the Democrats, once they regained political power, from repudiating the Union debt."[366]
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.[367] The Thirty-Ninth Congress, which passed the Fourteenth Amendment, had an "almost religious commitment to hard-money principles."[368] 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.[369]
Legislative History of the Public Debt Clause	Senator Ben Wade, whose proposal may have motivated the final version of the Public Debt Clause,[370] 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."[371] Senator Wade's proposal states, in part, "[t]he public debt of the United States . . . shall be inviolable."[372] Others believe[373] that the motivation for the Public Debt Clause came from Senator Jacob Howard's proposed amendment,[374] 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."[375] Senator Wade's status as President pro tempore would make him, "in effect, the Vice-President in waiting."[376]

[365] Abramowicz, *supra* note 103, at 11-12.
[366] Balkin, *supra* note 146.
[367] Abramowicz, *supra* note 103, at 10.
[368] *Id.* at 11.
[369] *Id.*
[370] *See* Balkin, *supra* note 290.
[371] Congressional Globe, 39th Cong., 1st session 2769 (May 23, 1866), available at http://memory.loc.gov/ammem/amlaw/lwcglink.html.
[372] *Id.* at 2768.
[373] *See* Stern, *supra* note 137.
[374] 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 371, at 2938.
[375] Balkin, *supra* note 146.
[376] *Id.*

APPENDIX D: *PERRY V. UNITED STATES*[377]

Context	*Perry* was decided on the same day as four other cases[378] 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.'"[379]
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."[380] After an appreciation of the value of gold relative to the value of the dollar,[381] 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.'"[382]
Reasoning	The Constitution, absent the Public Debt Clause, does not permit the repudiation of payment to bondholders.[383] 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."[384] 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."[385] 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."[386]
Holding	Plaintiff cannot recover because he has "not shown . . . that in relation to buying power he has sustained any loss whatever."[387]
Relevance	*Perry* is the only time the Supreme Court has addressed the Public Debt Clause.

[377] 294 U.S. 330 (1935).
[378] These five cases are known as the "gold clause cases." Hart, *supra* note 149, 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.*
[379] 294 U.S. at 349.
[380] *Id.* at 346-47.
[381] Abramowicz, *supra* note 103, at 13.
[382] 294 U.S. at 347.
[383] 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.
[384] *Id.* at 353.
[385] *Id.* at 354.
[386] *Id.* at 354.
[387] *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.

APPENDIX F: RELEVANT DEBT ISSUANCE SUSPENSION PROVISIONS (CURRENT AS OF APRIL 2012)

5 U.S.C. § 8438. INVESTMENT OF THRIFT SAVINGS FUND (2009)

(g)(1) Notwithstanding subsection (e) of this section, the Secretary of the Treasury may suspend the issuance of additional amounts of obligations of the United States, if such issuances could not be made without causing the public debt of the United States to exceed the public debt limit, as determined by the Secretary of the Treasury.
(2) Any issuances of obligations to the Government Securities Investment Fund which, solely by reason of the public debt limit are not issued, shall be issued under subsection (e) by the Secretary of the Treasury as soon as such issuances can be issued without exceeding the public debt limit.
(3) Upon expiration of the debt issuance suspension period, the Secretary of the Treasury shall immediately issue to the Government Securities Investment Fund obligations under chapter 31 of title 31 that (notwithstanding subsection (e)(2) of this section) bear such interest rates and maturity dates as are necessary to ensure that, after such obligations are issued, the holdings of obligations of the United States by the Government Securities Investment Fund will replicate the obligations that would then be held by the Government Securities Investment Fund under the procedure set forth in paragraph (5), if the suspension of issuances under paragraph (1) of this subsection had not occurred.
(4) On the first business day after the expiration of any debt issuance suspension period, the Secretary of the Treasury shall pay to the Government Securities Investment Fund, from amounts in the general fund of the Treasury of the United States not otherwise appropriated, an amount equal to the excess of the net amount of interest that would have been earned by the Government Securities Investment Fund from obligations of the United States during such debt issuance suspension period if--
(A) amounts in the Government Securities Investment Fund that were available for investment in obligations of the United States and were not invested during such debt issuance suspension period solely by reason of the public debt limit had been invested under the procedure set forth in paragraph (5), over
(B) the net amount of interest actually earned by the Government Securities Investment Fund from obligations of the United States during such debt issuance suspension period.
(5) On each business day during the debt limit suspension period, the Executive Director shall notify the Secretary of the Treasury of the amounts, by maturity, that would have been invested or redeemed each day had the debt issuance suspension period not occurred.
(6) For purposes of this subsection and subsection (h) of this section--
(A) the term "public debt limit" means the limitation imposed by section 3101(b) of title 31; and
(B) the term "debt issuance suspension period" means any period for which the Secretary of the Treasury determines for purposes of this subsection that the issuance of obligations of the United States may not be made without exceeding the public debt limit.

(h)(1) The Secretary of the Treasury shall report to Congress on the operation and status of the Thrift Savings Fund during each debt issuance suspension period for which the Secretary is required to take action under paragraph (3) or (4) of subsection (g) of this section. The report shall be submitted as soon as possible after the expiration of such period, but not later than 30

days after the first business day after the expiration of such period. The Secretary shall concurrently transmit a copy of such report to the Executive Director.
(2) Whenever the Secretary of the Treasury determines that, by reason of the public debt limit, the Secretary will be unable to fully comply with the requirements of subsection (e) of this section, the Secretary shall immediately notify Congress and the Executive Director of the determination. The notification shall be made in writing.

5 U.S.C. § 8348. CIVIL SERVICE RETIREMENT AND DISABILITY FUND (2006)

(e) The Secretary may purchase other interest-bearing obligations of the United States, or obligations guaranteed as to both principal and interest by the United States, on original issue or at the market price only if he determines that the purchases are in the public interest.

(j)(1) Notwithstanding subsection (c) of this section, the Secretary of the Treasury may suspend additional investment of amounts in the Fund if such additional investment could not be made without causing the public debt of the United States to exceed the public debt limit.
(2) Any amounts in the Fund which, solely by reason of the public debt limit, are not invested shall be invested by the Secretary of the Treasury as soon as such investments can be made without exceeding the public debt limit.
(3) Upon expiration of the debt issuance suspension period, the Secretary of the Treasury shall immediately issue to the Fund obligations under chapter 31 of title 31 that (notwithstanding subsection (d) of this section) bear such interest rates and maturity dates as are necessary to ensure that, after such obligations are issued, the holdings of the Fund will replicate to the maximum extent practicable the obligations that would then be held by the Fund if the suspension of investment under paragraph (1) of this subsection, and any redemption or disinvestment under subsection (k) of this section for the purpose described in such paragraph, during such period had not occurred.
(4) On the first normal interest payment date after the expiration of any debt issuance suspension period, the Secretary of the Treasury shall pay to the Fund, from amounts in the general fund of the Treasury of the United States not otherwise appropriated, an amount determined by the Secretary to be equal to the excess of--
(A) the net amount of interest that would have been earned by the Fund during such debt issuance suspension period if--
(i) amounts in the Fund that were not invested during such debt issuance suspension period solely by reason of the public debt limit had been invested, and
(ii) redemptions and disinvestments with respect to the Fund which occurred during such debt issuance suspension period solely by reason of the public debt limit had not occurred, over
(B) the net amount of interest actually earned by the Fund during such debt issuance suspension period.
(5) For purposes of this subsection and subsections (k) and (l) of this section--
(A) the term “public debt limit” means the limitation imposed by section 3101(b) of title 31; and
(B) the term “debt issuance suspension period” means any period for which the Secretary of the Treasury determines for purposes of this subsection that the issuance of obligations of the United States may not be made without exceeding the public debt limit.

(k)(1) Subject to paragraph (2) of this subsection, the Secretary of the Treasury may sell or redeem securities, obligations, or other invested assets of the Fund before maturity in order to prevent the public debt of the United States from exceeding the public debt limit.
(2) The Secretary may sell or redeem securities, obligations, or other invested assets of the Fund under paragraph (1) of this subsection only during a debt issuance suspension period, and only to the extent necessary to obtain any amount of funds not exceeding the amount equal to the total amount of the payments authorized to be made from the Fund under the provisions of this subchapter or chapter 84 of this title or related provisions of law during such period. A sale or redemption may be made under this subsection even if, before the sale or redemption, there is a sufficient amount in the Fund to ensure that such payments are made in a timely manner.

(l)(1) The Secretary of the Treasury shall report to Congress on the operation and status of the Fund during each debt issuance suspension period for which the Secretary is required to take action under paragraph (3) or (4) of subsection (j) of this section. The report shall be submitted as soon as possible after the expiration of such period, but not later than the date that is 30 days after the first normal interest payment date occurring after the expiration of such period.
(2) Whenever the Secretary of the Treasury determines that, by reason of the public debt limit, the Secretary will be unable to fully comply with the requirements of subsection (c) of this section, the Secretary shall immediately notify Congress of the determination. The notification shall be made in writing.

5 U.S.C. § 8909A. POSTAL SERVICE RETIREE HEALTH BENEFIT FUND (2011)

(c) The Secretary of the Treasury shall immediately invest, in interest-bearing securities of the United States such currently available portions of the Fund as are not immediately required for payments from the Fund. Such investments shall be made in the same manner as investments for the Civil Service Retirement and Disability Fund under section 8348.

APPENDIX G: RELEVANT SOCIAL SECURITY – DEBT LIMIT PROVISIONS (CURRENT AS OF APRIL 2012)

42 U.S.C. § 1320B–15. PROTECTION OF SOCIAL SECURITY AND MEDICARE TRUST FUNDS (1996)
(a) In general
No officer or employee of the United States shall--
(1) delay the deposit of any amount into (or delay the credit of any amount to) any Federal fund or otherwise vary from the normal terms, procedures, or timing for making such deposits or credits,
(2) refrain from the investment in public debt obligations of amounts in any Federal fund, or
(3) redeem prior to maturity amounts in any Federal fund which are invested in public debt obligations for any purpose other than the payment of benefits or administrative expenses from such Federal fund.
(b) "Public debt obligation" defined
For purposes of this section, the term "public debt obligation" means any obligation subject to the public debt limit established under section 3101 of Title 31.
(c) "Federal fund" defined
For purposes of this section, the term "Federal fund" means--
(1) the Federal Old-Age and Survivors Insurance Trust Fund;
(2) the Federal Disability Insurance Trust Fund;
(3) the Federal Hospital Insurance Trust Fund; and
(4) the Federal Supplementary Medical Insurance Trust Fund.

PL 104–103 (HR 2924). TIMELY PAYMENT OF MARCH 1996 SOCIAL SECURITY BENEFITS GUARANTEED (Feb. 8, 1996)
31 USCA § 3101 NOTE
SECTION 1. TIMELY PAYMENT OF MARCH 1996 SOCIAL SECURITY BENEFITS GUARANTEED.
(a) FINDINGS.—
(1) Congress intends to pass an increase in the public debt limit before March 1, 1996.
(2) In the interim, social security beneficiaries should be assured that social security benefits will be paid on a timely basis in March 1996.
(b) GUARANTEE OF SOCIAL SECURITY BENEFIT PAYMENTS.—In addition to any other authority provided by law, the Secretary of the Treasury may issue under chapter 31 of title 31, United States Code, obligations of the United States before March 1, 1996, in an amount equal to the monthly insurance benefits payable under title II of the Social Security Act in March 1996.
(c) OBLIGATIONS EXEMPT FROM PUBLIC DEBT LIMIT.—
(1) IN GENERAL.—Obligations issued under subsection (b) shall not be taken into account in applying the limitation in section 3101(b) of title 31, United States Code.
(2) TERMINATION OF EXEMPTION.—Paragraph (1) shall cease to apply on the earlier of—
(A) the date of the enactment of the first increase in the limitation in section 3101(b) of title 31, United States Code, after the date of the enactment of this Act, or
(B) March 15, 1996.