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**The Debt Ceiling and
Executive Latitude**

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Role in Federal Budget Policy

The debt ceiling (“Ceiling”) limits the amount of obligations that may be issued by the United States Government (“Government”) to finance its general activities and to account for trust fund surpluses. This constraint provides a “mechanism through which Congress can maintain control over the terms of national budgeting”¹. Congress arguably trumps the unitary Executive in this context through its ability to maintain exclusive control over the Ceiling². The obligations subject to the ceiling, primarily issued by the Treasury, include debt held by the public and debt held by Government accounts. As of the end of 2004, the debt held by the public increased to \$4.296 trillion and the debt held by the Government accounts rose to \$3.059 trillion. These totals contribute to calculation of the gross federal debt that stood at \$7.356 trillion at the end of 2004³. The Ceiling constrains growth of the gross federal debt by establishing an upper limit for its growth. But this limit can be modified by statute. Additionally, various suspension, redemption and exchange procedures can be used by the Executive to avoid breaking the ceiling. These mechanisms, therefore, call into question the ability of the Ceiling to effectively constrain the level of national indebtedness.

Legal Basis and Participating Entities

The Ceiling or “public debt limit” is currently set at \$8.184 trillion⁴. The limit applies to the “face amount” of all obligations whose principal and interest are guaranteed by the Government⁵. The current redemption value of an obligation issued at a discount and redeemable prior to maturity represents the face value of the obligation⁶. For discounted obligations that are not redeemable prior to the maturity date, the face value of the obligation (in any given month) consists of the issue price of the obligation

¹ Anita S. Krishnakumar, In Defense of the Debt Limit Statute, Vol. 42 Harv. J. on Legis No. 1 (Winter 2005) at 163.

² But consider the use of Executive maneuvers discussed in the following sections.

³ Office of Management & Budget, FY2006 Budget, Analytical Perspectives, Federal Borrowing and Debt, 248.

⁴ 31 USCS §3101(b) (2005).

⁵ Id.

⁶ 31 USCS §3101(a) (2005).

plus the portion of the discount attributable to the period predating the issuance of the obligation⁷. “Total public debt” (“Debt”) includes all obligations subject to the \$8.184 trillion ceiling⁸. This amount includes debt issued to the public, or “net public debt”⁹, and debt issued to Government accounts.

The United States government has the authority to issue bonds, notes, and other obligations to the public in order to finance duly authorized expenditures. The Secretary of the Treasury (“Secretary”) under 31 USCS §3102(a) has the authority, pursuant to the President’s approval, to issue bonds on the credit of the United States for “amounts necessary for expenditures authorized by law” to the public and Government accounts. The statute includes a presumption in favor of “popular loans”, or issuances that “allow the people of the United States as nearly as possible an equal opportunity to participate in subscribing the offered bonds”¹⁰. The Secretary may overturn this presumption and create a more targeted offering when doing so is in the “public interest”¹¹. The Secretary can also borrow on the credit of the Government to pay for expenditures by issuing notes, certificates of indebtedness, Treasury bills, savings bonds, savings certificates, retirement and savings bonds, and tax and loss bonds¹². He must obtain the President’s approval to conduct these offerings unless dealing with certificates of indebtedness, Treasury bills, or tax and loss bonds¹³.

⁷ 31 USCS §3101(c) (2005).

⁸ 31 USCS §3130(e)(2) (2005).

⁹ 31 USCS §3130(e)(3) (2005).

¹⁰ 31 USCS §3102(b) (2005).

¹¹ 31 USCS §3102(c) (2005) (“When the Secretary decides it is in the public interest in making a bond offering under this section, the Secretary *may* (A) make full amendment on receiving applications for smaller amounts of bonds to subscribers applying before the closing date the Secretary sets for filing applications; (B) reject or reduce allotments on receiving applications filed after the closing date or for larger amounts; (C) reject or reduce allotments on receiving applications from incorporated banks and trust companies for their own account and make full allotments or increase allotments to other subscribers; and (D) prescribe a graduated scale of allotments.”).

¹² 31 USCS §3103(a) (notes); §3104(a) (certificates of indebtedness and Treasury bills); §3105(a) (savings bonds and savings certificates); §3106(a) (retirement and savings bonds); and §3109(a) (tax and loss bonds) (2005).

¹³ The short time frame associated with the exempted instruments likely justifies the absence of a Presidential approval requirement, as compared to the other obligations that require Presidential approval. The potential period in which an obligation may be outstanding is between one and ten years for notes (31 USCS §3103(a)); twenty years for savings bonds (31 USCS §3105(a)); ten years for savings certificates (31 USCS §3105(a)) and between ten and thirty years for retirement and savings bonds (31 USCS §3106(a)). The period in which an obligation may be outstanding is only one year for certificates of deposits and Treasury bills. 31 USCS §3104(b) (2005). Although the statute does not specify a maximum maturity date for tax and loss bonds, these bonds are issued to enable purchasers to comply with the Internal Revenue

Title 31 also vests the Secretary with the power to “buy, redeem, or refund” outstanding bonds¹⁴, notes, certificates of deposit, Treasury bills, or savings certificates of the Government, subject to the President’s approval¹⁵. The Secretary can use this provision to help ensure that the Debt does not exceed the Ceiling. But in order to redeem outstanding securities, the Secretary needs to obtain funds to purchase the obligations. The Secretary can sell obligations of foreign governments, acquired by the United States under the First or Second Liberty Bond Act or §7(a) of the Victory Liberty Loan Act, in order to secure the necessary financing. Once the foreign obligations are sold, the Secretary must first use the proceeds to redeem outstanding Government bonds. If none are outstanding, he must then use the proceeds to retire other “outstanding interest-bearing obligations”, which may include notes, certificates of deposit, Treasury bills, or savings certificates¹⁶.

The Secretary can also evade the Ceiling by delaying the issuance of Government securities to various Government funds or accounts. The Government Securities Investment Fund (“G-Fund”) contains Government securities purchased with funds from the Thrift Savings Fund¹⁷. Title 5 authorizes the Secretary to issue “special interest-bearing obligations” of the United States for purchase by the Thrift Savings Fund for the G-Fund¹⁸. Despite this permissive authority, the Secretary may suspend such issuance if doing so could “not be made without causing the public debt of the United States to exceed the public debt limit”¹⁹. But the Secretary must first determine that the United States falls within a debt issuance suspension period, one in which additional debt cannot be issued without violating the Ceiling, before suspending the issuance of securities for

Code and bear no interest. 31 USCS §3109(a) (2005). The likely involvement of the Internal Revenue Service, which potentially serves as another check on the Secretary, and the lower cost associated with these bonds (as they do not bear interest) may justify the lack of Presidential involvement in this case.

¹⁴ Includes §3105 savings bonds, §3106 retirement and savings bonds, and §3109 tax and loss bonds.

¹⁵ 31 USCS §3111 (2005).

¹⁶ 31 USCS §3110(a) (2005).

¹⁷ 5 USCS §8438(b)(1)(A) (2005). According to the GAO’s Bureau of the Public Debt’s Fiscal Years 2004 and 2003 Schedules of Federal Debt, p. 17 (Nov. 2004), “Other Programs and Trust Funds” represented 11% of the Intra-governmental debt holdings as of September, 2004. The “Other Programs and Trust Funds” likely include Government securities held by the G-Fund. The other components of the Intra-governmental holdings, according to the same report, include Social Security Trust Funds (53%), Civil Service Retirement and Disability Trust Fund (21%), Medicare Trust Funds (9%), and Military Retirement Trust Fund (6%). See Appendix 1.

¹⁸ 5 USCS §8438(e)(1) (2005).

¹⁹ 5 USCS §8438(g)(1) (2005).

the G-Fund²⁰. Additionally, he must issue the obligations that were not released because of the debt issuance suspension period “as soon as” such issuances can be made without violating the Ceiling²¹. These newly issued obligations must carry the appropriate interest rate and maturity date to ensure that the G-Fund contains the assets it would have held in the absence of the debt issuance suspension period²². In accordance with this principle, the Secretary must also pay the difference between the interest the G-Fund would have earned without the debt issuance suspension period and the amount of interest the G-Fund actually earned²³. This payment must be made on the first business day after the termination of the debt issuance suspension period²⁴.

Funds from the Civil Service Retirement and Disability Fund (“Civil Fund”) may also be used by the Secretary to avoid violating the Ceiling²⁵. As with the G-Fund, the Secretary may accept and credit to the Civil Fund money received for the benefit of civil service employees²⁶. He must, upon receipt of the funds, “immediately invest” them in interest-bearing Government securities²⁷. This requirement, however, also contains a Debt exception. During debt issuance suspension periods, the Secretary may suspend issuing Government obligations under this section²⁸. But as with the G-Fund after the expiration of the debt issuance suspension period, the Secretary must restore the Civil Fund to the position it would have assumed but for the suspension period²⁹. This restoration includes the issuance of Government obligations with the appropriate interest

²⁰ 5 USCS §8438(g)(1) (2005). The Secretary must notify the Executive Director of the Thrift Savings Fund and Congress after making such a determination. 5 USCS §8438(h)(2) (2005).

²¹ 5 USCS §8438(g)(2) (2005).

²² 5 USCS §8438(g)(3) (2005).

²³ 5 USCS §8438(g)(5) (2005).

²⁴ To assist the Secretary in making this repayment, the Executive Director of the Thrift Savings Fund must report the amount that would have been invested or redeemed in the G-Fund during each day of the debt issuance suspension period. *Id.* Additionally, the Secretary must provide a report to Congress on the “operation and status” of the Thrift Savings Fund within thirty days of the first business day after the expiration of the suspension period. 5 USCS §8438(h)(1) (2005).

²⁵ The Civil Fund contained 21% of Intra-governmental debt holdings as of September 2004. See GAO, Bureau of the Public Debt’s Fiscal Years 2004 and 2003 Schedules of Federal Debt, p. 17 (Nov. 2004). See Appendix 1.

²⁶ 5 USCS §8348(b) (2005).

²⁷ 5 USCS §8348(c) (2005).

²⁸ 5 USCS §8348(j)(1) (2005). But the Secretary must notify Congress in writing upon entering such a period. 5 USCS §8348(l)(2) (2005). Additionally, he must invest the funds subject to the delay “as soon as possible” and report to Congress on the “operation and status” of the Civil Fund during the debt issuance suspension period within thirty days after expiration of the period. 5 USCS §§8348(j)(2); 8348(l)(1) (2005).

²⁹ 5 USCS §8348(j)(3) (2005).

rate and maturity date to ensure that “the holdings of the (Civil) Fund will replicate to the extent practicable the obligations that would then be held by the (Civil) Fund if the suspension... during such period had not occurred”³⁰. Additionally, the Secretary must pay over to the Civil Fund any forgone interest, utilizing the same net interest calculation as found in the G-Fund context³¹. But these interest payments do not have to be paid on the first business day after the end of the debt issuance suspension period. Instead, they must be made on “the first normal interest payment date” after the termination of the suspension period³².

The Secretary may opt to redeem obligations contained within the Civil Fund in order to fall within the limits of the Ceiling. Under this approach, the Secretary pays down the amount of Debt by redeeming Government obligations rather than using funds from Government accounts to pay down other outstanding obligations or cover general Government expenses. But the Secretary can only utilize this authority when failure to do so would violate the Ceiling³³. Additionally, the statute limits the amount of Civil Fund obligations that may be redeemed to the amount of authorized payments to be made by the Fund³⁴. The existence of sufficient funds within the Civil Fund to make the authorized payments does not prevent the Secretary from exercising his authority under this section³⁵.

The stabilization fund (“Exchange Stabilization Fund”) can also be utilized by the Secretary to ensure that the Debt remains beneath the Ceiling. The Exchange Stabilization Fund may be utilized by the Secretary to stabilize the exchange rates and to “deal in gold, foreign exchange, and other instruments of credit and securities the Secretary considers necessary”, subject to the President’s approval³⁶. Monies within the

³⁰ *Id.* But the statute does not specify the limits of “to the maximum extent practicable”. Perhaps the standard turns on the difference between the Ceiling and the Debt. In situations where there is a larger difference (perhaps because of a recent statutory increase in the size of the Ceiling under 31 USCS §3101(b)), more obligations can be issued to the Civil Fund.

³¹ 5 USCS §8348(j)(4) (2005).

³² *Id.* Because of this distinction, the Government appears to assign a higher priority to Civil Fund assets.

³³ 5 USCS §8348(k)(1) (2005).

³⁴ 5 USCS §8348(k)(2) (2005) (“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 (Civil) Fund...*”).

³⁵ *Id.*

³⁶ 31 USCS §5302(a)(1) (2005).

Exchange Stabilization Fund can also be used by the Secretary to invest in Government obligations. These Exchange Stabilization Fund assets are included within the calculation of the Debt. But the Secretary's ability to invest in domestic obligations turns on a determination that the monies are not needed to stabilize exchange rates, as established by the Secretary and the President³⁷. Pending such a finding, the Secretary can redeem Exchange Stabilization Fund Government obligations in order to reduce the Debt.³⁸

The Federal Financing Bank (“FFB”) provides another way for the Secretary to reduce the Debt. Such a reduction could enable the Government to issue more debt to the public, so as to generate cash for additional expenditures. FFB exists for the benefit of federal agencies and provides them with a centralized mechanism through which they can finance their operations³⁹. The bank was created in 1974 as a “central financing authority” for marketable non-Treasury federal securities. FFB was granted the authority to borrow up to \$15 billion through the issuance of its own securities and an unlimited ability to borrow from the Treasury⁴⁰. Under 12 USCS §2285(a), FFB is authorized to purchase and sell “any obligation which is issued, sold or guaranteed by a Federal agency”. Additionally, “any Federal agency which is authorized to issue, sell or guarantee any obligation is authorized to issue or sell such obligations directly to the Bank”⁴¹. FFB's ability to purchase and sell Government obligations is important, as obligations held or issued by FFB are not included within the Debt⁴². Under this

³⁷ Id.

³⁸ See General Accounting Office, Debt Ceiling Limitations and Treasury Actions, GAO/AIMD-96-38R, Jan. 26, 1996 at 5 (speaking of the Exchange Stabilization Fund, “The Secretary has the authority to invest balances of this fund that are not needed for program purposes in obligation of the federal government. These securities are considered part of the outstanding debt subject to the debt ceiling. Therefore, when the Secretary redeems the securities held by the Exchange Stabilization Fund, the amount of outstanding debt is reduced.”).

³⁹ See Federal Financing Bank, Federal Financing Bank Lending Policy, 1973 at 1 (“The Federal Financing Bank should be the vehicle through which Federal agencies finance programs involving the sale or placement of credit market instruments, including agency securities, guaranteed obligations, participation agreements and sale of assets.”).

⁴⁰ Congressional Budget Office, The Federal Financing Bank and the Budgetary Treatment of Federal Credit Activities, Summary (Jan. 1982).

⁴¹ 12 USCS §2285(a) (2005).

⁴² 12 USCS §2290(c) (2005) (speaking of the FFB, “The receipts and disbursements of the Bank in the discharge of its functions shall not be included in the totals of the budget of the United States Government and shall be exempt from any limitation imposed by statute on expenditures and net lending of the United States.”).

authority, FFB can issue its own securities in exchange for Government obligations held by Federal agencies, subject to the \$15 billion limitation⁴³. This exchange creates a mechanism through which Federal agencies can “hide” Government securities within the FFB, thereby decreasing the Debt and providing the Government with more room beneath the Ceiling.

The Debt often threatens to break through the Ceiling, despite the use of suspension, redemption and exchange mechanisms⁴⁴. In response to the potential breach, various members within Congress may want to increase the Ceiling by amending 31 USCS §3101(b). But to avoid being characterized as fiscally irresponsible (especially for those that previously approved a tax cut or spending increase), Congressional members may want to hide their attempts to raise the Ceiling. Alternatively, they may want to expedite the process in light of an impending violation of the Ceiling and potential default of Government obligations.

The House of Representatives reenacted the “Gephardt Rule” (Rule XXVII of the 108th Congress) (“Rule”) to facilitate amending 31 USCS §3101(b) in order to increase the Ceiling. The Rule was originally established in 1979 and applied to the FY1981 budget resolution⁴⁵. The 107th Congress removed it from the House rules. Under the Rule, the House automatically passes a joint resolution for a change to the Ceiling upon approving a budget resolution⁴⁶. The amount of the proposed Ceiling increase or

⁴³ See Debt Ceiling Limitations and Treasury Actions at 5 (“The FFB is authorized to issue publicly and have outstanding at any one time not in excess in \$15 billion in securities.”).

⁴⁴ One such mechanism, the use of compensating balances, was eliminated through the enactment of 12 USCS §5018 (2005). Previously, the Treasury had deposited balances with depository institutions in non-interest bearing accounts as a means of compensating them for services rendered. But because of cash management issues associated with responding to increases and decreases in interest rates (and maintaining the appropriate level of compensating balances), the Treasury replaced compensating balances with depository compensatory securities, on which it paid interest to the banks. Congress phased out the use of these securities with §5018 appropriations to enable the Treasury to make direct payments to the compensated financial institutions. See Office of Management & Budget, FY2006 Budget, Analytical Perspectives, Federal Borrowing and Debt at 249.

⁴⁵ Bill Heniff, Debt-Limit Legislation in the Congressional Budget Process, CRS Report for Congress (Feb. 3, 2004) at 2.

⁴⁶ House of Representatives, Statutory Limit on Public Debt, Rule XXVII §1 (“Upon adoption by Congress of a concurrent resolution on the budget under section 301 or 304 of the Congressional Budget Act of 1974 that sets forth, as the appropriate level of the public debt for the period to which the concurrent resolution relates, an amount that is different from the amount of the statutory limit on the public debt that otherwise would be in effect for that period, the Clerk shall prepare an engrossment of a joint resolution increasing or decreasing, as the case may be, the statutory limit on the public debt in the form prescribed in clause 2. Upon engrossment of the joint resolution, the vote by which the concurrent resolution on the budget was

decrease matches the change contained within the budget resolution⁴⁷. At this point, the House of Representatives passes the joint resolution to the Senate for its review⁴⁸. Senate members, perhaps because of their longer terms and larger constituencies, may be better able to shield themselves from the public criticism and political fallout associated with proposals to increase the Ceiling. If so, it may be better for them to openly review the merits of a proposed change to the Ceiling⁴⁹. Although the Rule has resulted in the creation of sixteen joint resolutions (to raise the Ceiling), of which twelve joint resolutions were enacted, it has not been utilized since the 103rd Congress⁵⁰. Therefore, it may represent a relic of the past.

Actual Practice

Case Study: The Debt Limit Crisis of 1995-1996

The debt limit crisis that began in October of 1995 and lasted through March of 1996 was the most dramatic and dangerous such episode since the passage of the Second Liberty Bond Act of 1917. The contest, which occurred at the height of tensions between the Republican-controlled Congress and the Clinton Administration, threatened to push the United States into default on its bond obligations – a situation that could have important and expensive repercussions. As early as April, 1995, House Speaker Newt Gingrich promised to use the impending debt limit crisis as an opportunity to force passage of a Republican budget bill⁵¹, to which the President was strongly opposed. Buried within the legislation was a provision to raise the Ceiling. Neither side seemed willing to back down, and the crisis that ensued demonstrates the ways in which the

finally agreed to in the House shall also be considered as a vote on passage of the joint resolution in the House and the joint resolution shall be considered as passed by the House and duly certified and examined.”).

⁴⁸ See Congressional Quarterly, Inc., Debt Limit ‘Weapon’ Lacks Force, Vol. LI Cong. Q. Almanac 2-64 (1995) (speaking about the Rule, “In practice, the Gephardt Rule had given the Senate control over the ‘must-pass’ debt bills.”).

⁴⁹ But perhaps because of their ability to shield themselves from the negative public relations associated with such a proposed change (and the associated constituents), decisions made by the Senate are less likely to reflect public preferences on the issue.

⁵⁰ Debt-Limit Legislation in the Congressional Budget Process at 2.

⁵¹ Robert E. Rubin & Jacob Weisberg, In An Uncertain World: Tough Choices from Wall Street to Washington 169 (2003).

Secretary can keep the government afloat, when additional borrowing is prohibited by the debt limit, by maneuvering within the existing statutory framework. For a period of several months, budget bills passed by the Congress – some of which included provisions that would have stripped the Secretary of his statutory authority during a federal debt crisis – were met by the President’s veto.

In April of 1995, with the Ceiling at \$4.9 trillion – where it had been since 1993 – Newt Gingrich appeared on *This Week With David Brinkley* and stated his willingness to force the government into default.⁵² At the end of July, during testimony before the Senate Committee on Finance, CBO projected that the government would be able to “squeak through September”⁵³ without breaching the debt ceiling, and “[w]ith a little ingenuity, the Treasury may even be able to hold out into early November.”⁵⁴ Treasury Secretary Robert Rubin found such a default “unthinkable” and “akin to nuclear war.”⁵⁵ To prevent President Clinton from having to sacrifice key initiatives and abandon his political agenda, Secretary Rubin sought to operate beneath the debt ceiling for as long as possible. For the duration of the crisis, the Treasury Department was advised by chief Treasury counsel Ed Knight and bolstered by legal opinions from the Office of Legal Counsel.⁵⁶

Debt Issuance Suspension Period

On November 15, 1995, the Secretary declared a debt issuance suspension period. This action was necessary to enable certain actions involving the Civil Fund and the G-Fund. Enacted in the wake of the debt limit crisis of 1985, the statute authorizing the declaration of a debt issuance suspension period does not specify the permissible duration of the suspension period.⁵⁷ Nor does it delineate factors that should be considered in fixing the length of the “period for which ... the issuance of obligations of the United States may not be made without exceeding the public debt limit.”⁵⁸ Since the passage of

⁵² Id.

⁵³ Congressional Budget Office, *The Economic and Budget Outlook: An Update* 52 (1995).

⁵⁴ Congressional Budget Office, *CBO Testimony before the Senate Committee on Finance*, 104th Cong. 8 (1995) (statement of James L. Blum, Deputy Director CBO).

⁵⁵ Rubin & Weisberg, supra note 51, at 171.

⁵⁶ See Table 1, infra, for a chronology of events during the 1995-1996 debt crisis.

⁵⁷ 5 USCS § 8438(g)(1) (2005).

⁵⁸ Id.

the suspension period statute in the Omnibus Budget Reconciliation Act of 1986, this was the first time its provisions were being invoked. A memorandum prepared by the Office of Legal Counsel concluded that the Treasury Secretary should determine, to the best of his ability and after considering all relevant contextual factors, when the United States would be able to resume issuing debt obligations.⁵⁹ In light of actions taken and public statements made by Congress and the President, the Secretary declared a 12-month debt issuance suspension period, on the premise that “a significant impasse ... made it unlikely that a statute raising the debt ceiling could be enacted ... before the next election, which was 12 months away.”⁶⁰

Actions Affecting the G-Fund

For the duration of the debt limit crisis, the Secretary confined his activities to three funds: the G-Fund, the Civil Fund, and the Exchange Stabilization Fund. The only actions affecting the G-Fund were suspensions of the investment of excess funds in Treasury securities.⁶¹ Typically, G-Fund receipts are invested in Treasury securities that mature the next business day.⁶² Federal debt obligations issued to the G-Fund are subject to the debt limit. Each day, the Treasury Secretary determined the maximum amount of G-Fund receipts that could be invested in Treasury securities without breaching the debt limit and suspended the investment of excess funds. Approximately \$18 billion of fund receipts were not invested in Treasury securities during the crisis.⁶³ Upon termination of the debt issuance suspension period, pursuant to the specified statutory procedure, the G-Fund was compensated for all lost interest income, which totaled about \$255 million.⁶⁴

Actions Affecting the Civil Fund

The three primary actions taken by the Secretary that affected the Civil Fund included: (1) the early redemption of Treasury securities, (2) the suspension of the investment of excess funds in Treasury securities, and (3) the exchange of Treasury

⁵⁹ 19 U.S. Op. Off. Legal Counsel No. 286, (1995).

⁶⁰ General Accounting Office, Debt Ceiling: Analysis of Actions During the 1995-1996 Crisis 24 (1996).

⁶¹ Id. at 9.

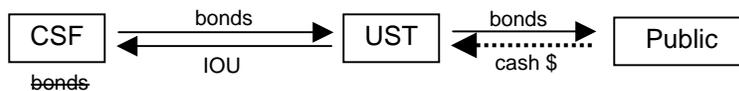
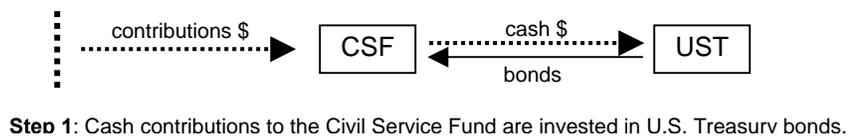
⁶² Id. at 30.

⁶³ Id.

⁶⁴ Id. at 38.

securities for FFB securities. About \$46 billion of Treasury securities held by the Civil Fund were redeemed by the Treasury Department earlier than necessary to pay fund benefits and expenses.⁶⁵ Such redemptions amounted in effect to the cancellation of obligations subject to the debt limit, and the issuance of instruments that functioned essentially as IOUs. For example, to redeem \$10 billion in Treasury securities held by the Civil Fund, the Treasury Department would extinguish this amount of securities and issue to the Civil Fund, in consideration, “instruments used to pay for the trust fund’s benefits and expenses when they are presented for payment.”⁶⁶ Once the outstanding federal debt was reduced by \$10 billion, Treasury would conduct a sale of securities to the public and raise \$10 billion of cash, which then could be used to satisfy immediate needs. All Civil Fund redemptions were done in accordance with policies and procedures developed by the Treasury Department in 1989, whereby securities with the shortest maturities and the lowest interest rates were redeemed first.⁶⁷

Figure 1: Civil Service Fund Early Redemption Process



In a process substantially similar to that followed with the G-Fund, as described above, the Secretary suspended the investment of excess Civil Fund receipts in order to remain beneath the debt ceiling. The Treasury Department suspended the investment of approximately \$14 billion of excess Civil Fund receipts⁶⁸; upon termination of the debt issuance suspension period, the fund was compensated for lost interest income. Pursuant

⁶⁵ *Id.* at 5.

⁶⁶ *Id.* at 23.

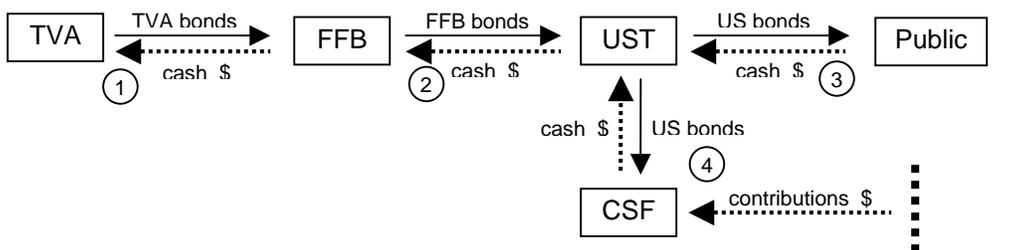
⁶⁷ *Id.* at 25.

⁶⁸ *Id.* at 5.

to the redemption procedure followed by the Treasury Department, uninvested cash was not redeemed first, but instead was treated as if it were invested in specific Treasury securities of a certain maturity and at a certain interest rate.⁶⁹

Finally, the Treasury Department swapped about \$8.6 billion in Treasury securities held by the Civil Fund in exchange for Postal Service (“USPS”) and Tennessee Valley Authority (“TVA”) securities held by the FFB.⁷⁰ A memorandum prepared by the Office of Legal Counsel concluded: (1) that these agency securities were “suitable investments” for the Civil Fund; (2) that the Treasury Department could “purchase the public debt obligations received by the FFB in exchange for the cancellation by Treasury of FFB obligations of an equivalent value held by Treasury”; and (3) that the USPS and TVA securities held by the Civil Fund would not be subject to the debt limit.⁷¹ The Treasury Department retained the services of an independent third-party to value the debt instruments. The complex pricing methodology included a consideration of prevailing market prices for the securities, the probability of interest rate shifts, prepayment risk, and a risk premium associated with the agency securities.⁷²

Figure 2: Exchange of Securities with the Federal Financing Bank



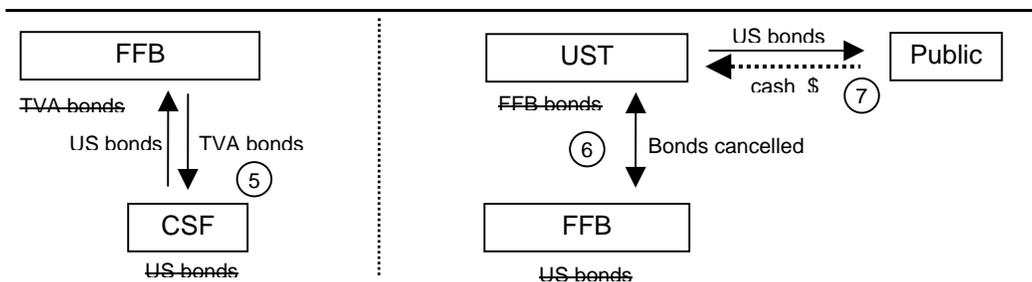
- Step 1:** TVA and other agencies issue debt instruments to FFB in exchange for cash.
- Step 2:** FFB obtains the cash requested by TVA by issuing debt instruments to the Treasury.
- Step 3:** Treasury obtains the cash requested by FFB by issuing bonds to the public.
- Step 4:** Cash contributions to the Civil Service Fund are invested in U.S. Treasury bonds.

⁶⁹ *Id.* at 26.

⁷⁰ *Id.* at 27.

⁷¹ 20 U.S. Op. Off. Legal Counsel No. 64, (1996).

⁷² General Accounting Office, *supra* note 60, at 28.



Step 5: FFB sends TVA bonds to the Civil Service Fund in exchange for U.S. bonds.

Step 6: Treasury “purchases” U.S. bonds held by FFB by canceling an equal amount of FFB bonds.

Step 7: Treasury raises cash through a public bond issuance.

Actions Affecting the Exchange Stabilization Fund

The Secretary chose not to reinvest maturing Treasury securities held by the Exchange Stabilization Fund. As the Treasury Secretary has sole discretion as to the investment of the fund’s assets, and as there is no statutory provision for restoring interest losses borne by the fund, the Exchange Stabilization Fund lost approximately \$1.2 million in interest during the debt crisis.⁷³

Congressional Enactment of Authorizing Legislation

For the first few months of the debt limit crisis, Secretary Rubin chose not to disturb Treasury securities held by the Social Security trust fund. By January of 1996, however, the situation had become untenable. Secretary Rubin notified the Congress that, without additional statutory authority to incur public debt, Social Security checks would not be mailed for the month of March.⁷⁴ In response to this request, on February 8, the Congress passed Public Law 104-103, which enabled the Treasury Department to issue debt obligations in an amount sufficient to pay Social Security benefits for the month of March, without having such securities count against the debt subject to statutory limit until the end of March. Then, on March 12, the Congress enacted Public Law 104-115, which empowered the Secretary to issue special Treasury securities to government trust funds, for investment of excess funds and for reinvestment of maturing securities.

⁷³ *Id.* at 38.

⁷⁴ *Id.* at 20.

The Treasury Department issued about \$58.2 billion of these “special” securities, which were not subject to the debt limit.⁷⁵

Resolution

The debt limit crisis came to an end on March 29, 1996, when the debt limit was raised to \$5.5 trillion.⁷⁶

Existing Critiques

Definition of the Debt and Potential for Default:

The Debt, as currently defined, includes debt held by the public and debt held by Government accounts. Additionally, both categories of indebtedness invoke the credit of the Government. But they may have different impacts on the economy, depending on the nature of the debt holdings under consideration. Debt held by the public, or net public debt, represents borrowing from the private sector and is used primarily to finance deficit spending. Budget surpluses are commonly used to pay down this form of indebtedness⁷⁷. The Government must compete with the capital markets when attempting to issue debt to the public sector. In times when the Government’s appetite for debt held by the public is high, interest rates likely rise in response to the increased demand for financing. The increased rates may attract potential investors away from private investment opportunities. The combination of increased interest rates and a decreased supply of private investment dollars likely negatively impacts economic growth⁷⁸. Additionally, the Government must pay more to service its debt because of the higher interest rates. These interest payments, unlike the ones made to service debt held by Government accounts, constitute expenditures, thereby increasing the potential negative impact on the

⁷⁵ Id. at 34.

⁷⁶ See Table 1, infra, for a chronology of events during the 1995-1996 debt crisis. Important events omitted from Table 1 include warnings issued by ratings agencies, including Standard & Poor’s and Moody’s, that federal government bonds could suffer a downgrade from their AAA status. Rubin & Weisberg, supra note 50, at 175.

⁷⁷ Office of Management & Budget, FY2006 Budget, Analytical Perspectives, Federal Borrowing and Debt, 249 (“Over the long-run, it is a good approximation to say that ‘the deficit is financed by borrowing from the public’ or ‘the surplus is used to repay debt held by the public’.”).

⁷⁸ Peter Orszag and Robert Greenstein, Center on Budget and Policy Priorities, Federal Debt: What Matters and Why, Feb. 22, 1999 at 2 (“Increased government borrowing from entities outside government (i.e. increases in debt held by the public) discourages private investment in part through higher interest rates.”).

economy. Alternatively, lower levels of debt held by the public likely correspond with higher levels of private investment and productivity in response to decreased demand for financing dollars and the associated reduction in interest rates⁷⁹.

Debt held by Government accounts represents a series of intra-government transfers, in which one agency or account receives money in return for issuing an obligation to the transferor agency or account. These acquired obligations do not represent assets of the Government and they do not represent future benefit payments, which are calculated based on separate legal considerations. Instead, they represent the difference between current revenues and expenditures, which must be invested with the Treasury in Government obligations in some cases. Commentators argue that debt held by the Government does not affect the economy, at least not directly⁸⁰. An indirect effect, however, may be felt when the Treasury has to issue debt to public in order to obtain funds to service the debt held by Government accounts. Additionally, increased levels of Intra-Governmental debt may decrease levels of private investment, especially when considering Government accounts that compete with private investment vehicles. A decision made by a Government employee to invest in the G-Fund or the Civil Fund, perhaps to save for retirement, reduces the monies available to invest in the private sector.

Intra-governmental debt holdings could be used to convert the implicit or unfunded promises associated with many trust funds, including Social Security, into explicit obligations⁸¹. Increased levels of debt held by Government accounts could be incurred after decreasing the amount of debt held by the public in the context of the

⁷⁹ Id (“Conversely, when debt held by the public decreases, the government is borrowing less in private credit markets, leaving more capital for private investment. By boosting private investment, this creates a basis for higher levels of productivity and hence a larger economy in the future.”).

⁸⁰ See Federal Debt: What Matters and Why at 1 (“Debt that the Treasury issues and other parts of the government hold does not directly effect national saving and investment.”); See also Congressional Budget Office, Federal Debt and the Commitments of Federal Trust Funds, No. 4, Rev. May 6, 2003 (“Adding federal securities to and subtracting them from the government’s trust fund accounts have no direct impact on businesses and the financial markets.”); See also Office of Management & Budget, FY2006 Budget, Analytical Perspectives, Federal Borrowing and Debt at 248 (“Issuing debt to Government accounts does not have any of the economic affects of borrowing from the public. It is an internal transaction of the Government, made between two accounts that are both within the Government itself.”).

⁸¹ See Federal Debt: What Matters and Why at 4 (speaking of President Clinton’s proposal to direct surplus funds to Social Security and Medicare funds, “The Administration’s proposal would make explicit, in form of additional debt the trust funds would hold, a part of the implicit debt the government faces as a result of these unfunded liabilities.”).

current Ceiling, increasing the Ceiling to allow for an increase in this type of borrowing, or excluding debt held the Government from the calculation of the Debt. But this later approach may be problematic for its ability to increase the likelihood of a Government default on its public obligations. Without the inclusion of these intra-Government obligations in the definition of Debt, the Administration cannot redeem (or disinvest) these obligations so as to reduce the Debt and avoid breaking the Ceiling. Additionally, the Government will not be able to borrow monies from the funds (in accordance with the debt issuance suspension period procedures) without incurring an offsetting obligation that would be included in the Debt. Without these safety mechanisms in place, the prospect of a Government default seems more likely. The market may pick up on this increased risk and demand higher rates of interest from the Government, thereby increasing the Debt and the likelihood of default⁸². But as the default would be attributable to breach of a statutory or self-imposed debt limit, as opposed to one created by investors, the consequences of a default may not be especially traumatic⁸³.

Ineffectiveness of the Ceiling:

The Ceiling may be largely ineffective in its ability to constrain Government borrowing. According to Congressional testimony of former Secretary Robert Rubin, “the evolution of Congressional fiscal processes has rendered the statutory debt limit an anachronism, and bills to raise it are no more than retrospective ‘housekeeping’”⁸⁴. As

⁸² See Richard Kogan, Center on Budget and Policy Priorities, [Redefining the Debt Ceiling Poses Unnecessary Risks](#), June 22, 2004 (speaking of a proposal to move from the Debt to “net debt”, in which debt held by Government accounts would not be subject to the Ceiling, “If the definition of debt subject to statutory limit becomes the net debt, as proposed, the likelihood of an unprecedented default by the federal government would be substantially increased. Such a default would likely increase Treasury interest rates for decades to come and thereby cost the government substantial amounts (most of which would benefit foreign creditors.”).

⁸³ See Kuroshin (Technology and Culture from the Trenches), [The Statutory Debt Limit](http://www.kuroshin.org/story/2003/4/6/14576/79615) found at <http://www.kuroshin.org/story/2003/4/6/14576/79615> (“If the default were simply due to the statutory debt limit, it would be difficult to draw a comparison with Russia’s default in 1998 or Argentina’s default in 2001. The statutory debt limit is a “soft” limit voluntarily imposed by investors themselves. People might figure that Congress will eventually raise the limit, so while some payments might be delayed, the Treasury would eventually make good on them. On the other hand, the repercussions of a default might be somewhat worse this year than they would have been in earlier years, because of growing international tensions. Foreign investors who oppose the war may take particular satisfaction in moving their money elsewhere.”).

⁸⁴ [In Defense of the Debt Limit Statute](#) at 168. But consider the way in which increases to the Ceiling involve independent, prospective considerations as the amount of the increase is not defined by statute or

evidenced by the number of times in which the Ceiling has been raised, the limit does not appear to sufficiently constrain Congress in its spending⁸⁵. Additionally, the Executive, through the use of the gimmicks of suspension, redemption and exchange, can secure additional funds without increasing the amount of the Debt. For example, by suspending the issuance of Government obligations to the G-Fund, the Treasury is able to utilize G-Fund monies to support other activities without incurring an equivalent obligation captured within calculation of the Debt⁸⁶.

Congressional rules also help to ensure the ineffectiveness of the Ceiling. The Gephardt Rule permits the House to approve a joint resolution to increase the Ceiling after only having reviewed a budget resolution containing the proposed increase. Such a rule arguably shields the increase from public discourse and increases the likelihood that the Ceiling will be modified, perhaps in violation of public preferences. But Anita Krishnakumar argues that debt increase votes are public events and provide unique opportunities to shame members of Congress for their failures to reduce the deficit⁸⁷. Additionally, as interest groups are usually not involved in this process, decisions made by Congress are less likely to be influenced by the preferences of influential coalitions and more likely to reflect the views of the public, especially in light of the public nature of the political process⁸⁸.

the amount of the existing debt. See Id at 198 (citing examples of Ceiling increases enacted by Congress are less than the amount of the increase proposed by the Executive).

⁸⁵ See General Accounting Office, Information on Debt Ceiling Limitations and Increases, GAO/AIMD-96-49R, Feb. 23, 1996 at 4-6 (finding that Congress raised the Ceiling fifty-six times between 1941 and 1984). Increases to the Ceiling have also been criticized for their inclusion of extraneous measures, ones usually inserted by the party in control of the Congress to secure valuable concessions from the Executive, who may desperately require the Ceiling increase. See In Defense of the Debt Limit Statute at 171 (citing Jackie Calmes in Riders Line Up for Free Trip on Multi-Pass Debt Bill, “There is a persuasive belief among political commentators that Congress regularly uses debt limit increases as a tool or vehicle for enacting numerous unrelated measures that could not garner enough support to pass on their own or force the President to accept policies he otherwise would veto.”). But according to Ms. Krishnakumar’s analysis of the past 25 years, 30 of the 42 Ceiling increase legislation were “clean” and did not contain extraneous riders. See In Defense of the Debt Limit Statute at 2.

⁸⁶ But note that Government obligations, which are included in calculation of the Debt, must be issued to the G-Fund after expiration of the debt issuance suspension period.

⁸⁷ In Defense of Debt Limit Statute at 165 (“Publicly visible votes to increase the debt limit have proved one of the few effective media for shaming Congress and for inspiring serious reforms and summits focused on debt reduction.”).

⁸⁸ The lack of interest group involvement in debt limit increase negotiations can perhaps be explained because of its failure to invoke the interests of, or promise immediate benefits to, any particular group. See In Defense of Debt Limit Statute at 166 (citing Elizabeth Garrett’s Rethinking the Structures of Decision Making in the Federal Budget Process, “Debt limit legislation, however, raises not immediate concerns

The Ceiling, however, may serve as an effective restraint against Federal borrowing. Presidential maneuvering, via the suspension, redemption and exchange tools, would likely not exist but for the existence of the Ceiling. Therefore, without such a limitation, one might expect to see even higher levels of Government indebtedness. Additionally, the statutory “gimmicks” are limited. The reporting requirements imposed upon the Secretary likely help to ensure that the damage inflicted upon any fund or Government account is limited, as multiple parties will be monitoring activities conducting during the suspension period. The debt issuance suspension period disclosure requirement, under which the Secretary must disclose to Congress (and in some cases to a fund Executive) that the Government has entered such period, likely chills the incentives of a Secretary to make such a determination. This disclosure may reflect negatively on his (and the President’s) ability to manage the Debt.

Questionable Executive Procedures:

Executive “gimmicks, or procedures used by the Treasury to avoid violating the Ceiling, may impose costs upon the system. According to one commentator, they may be used as a justification for withholding funds from disfavored programs⁸⁹. The delay of issuing Government obligations and of redeeming outstanding obligations can be costly. According to a 1979 Statement by Elmer Staats, the Comptroller General of the United States, delays in issuing Government obligations resulted in an additional \$4 million to \$11 million in interest expense and the suspension of sales of Government bonds resulted in an additional \$17,000 in operating expenses⁹⁰. Redemptions of Government

about the funding for next month’s operations. While interest group lobbyists certainly are capable of recognizing the connection between how much the debt limit is increased and the availability of funding for their operations one or two years down the line, that connection is remote and non-threatening.”). Because of the lack of interest group involvement, pluralist or interest group theories which suggest that “government spending and the national debt will have a tendency to spiral out of control as a result of excessive Congressional acquiescence to requests from organized, well funded interest groups” and republican or deliberative theories in which interest groups police each other are not applicable in this context. In Defense of Debt Limit Statute at 161, 162.

⁸⁹ See Loretta Haggopin Garrison, Who Decides? The Struggle for Control over the Federal Government’s Spending Power, 38 Case W. Res. 66, n. 92 (1988) (“The public debt limit has been used as a justification for withholding funds. As one scholar observed, this was merely a pretext for the administration to selectively excise programs which it did not want and fully fund those programs it supported.”).

⁹⁰ See United States General Accounting Office, A New Approach to the Public Debt Legislation Should be Considered, Sept. 11, 1979 at 2, 3.

obligations may also result in lost interest income for funds. According to Comptroller Staats' estimates, a redemption of \$2.7 billion in securities resulted in a loss of approximately \$1.3 million in interest income to the fund⁹¹. Additionally, the delays generated confusion among public investors that likely reduced their incentives to invest in Government obligations⁹². If confusion was sufficiently widespread, the Government's cost of borrowing may increase. Alternatively, these procedures may be seen as mechanisms that prevent the Government from defaulting on its obligations, especially in light of contentious Ceiling increase negotiations. As such, the "gimmicks" are a valuable tool through which the Government can maintain its credit rating and decrease its cost of borrowing⁹³.

Proposals for Reform

Until recently, most proposals to reform the debt limit statute called for its elimination altogether.⁹⁴ Others recommended substantial modification, such that the statute would become inextricably intertwined with the budget resolution process.⁹⁵ Perhaps the first complete and thorough examination of the statute, including not only its economic implications but also its constitutional significance, was completed recently by Anita Krishnakumar, who argues for retention and reformation of the Ceiling.⁹⁶ Generally, commentators have varying answers to critical questions, which shape and inform their reform proposals. First, what objectives should debt limit legislation seek to attain? And second, what would be the repercussions of a government default on its public debt obligations – only a temporary dislocation in federal borrowing, or disastrous and long-lasting damage to domestic markets, the federal budget, and the global economy?

⁹¹ See *id* at 3, 4.

⁹² See *id* at 3 (speaking of a delay in selling Government savings bonds, "This action resulted in the Treasury incurring about \$17,000 in additional operating costs, but more importantly, investors may have been confused about the suspensions.").

⁹³ Defense of the Debt Limit Statute at 175 – 176 ("Moreover, if and when a debt crisis does occur, Congress has created a safety net by providing the Treasury with authorization to engage in a number of maneuvers that allow the Government to stay technically within the debt limit, and thus to prevent default, until a debt ceiling increase is enacted.").

⁹⁴ See, e.g., Congressional Budget Office, supra note 53.

⁹⁵ See, e.g., General Accounting Office, A New Approach to the Public Debt Legislation Should be Considered (1979).

⁹⁶ Krishnakumar, supra note 1.

Repeal

CBO has called for repeal of the debt limit statute.⁹⁷ Implicit in CBO statements is the belief that a balanced budget should be the primary goal of the federal budget process and its accompanying legislation. In July of 1995, during testimony to the Senate Committee on Finance, CBO Deputy Director James Blum decried the use of the debt limit statute as a tool by which to achieve deficit reduction: “Limiting the Treasury’s borrowing authority is not a productive method of achieving deficit reduction. Significant deficit reduction can best be accomplished by legislative decisions that reduce outlays or increase revenues.”⁹⁸

GAO has recommended a process that effectively relegates the debt limit statute to a provision that flows inescapably from the concurrent budget resolution.⁹⁹ Avoidance of a government default emerges as the primary motivation behind GAO proposals. In 1979, a GAO publication denounced the use of temporary debt limit increases – a practice formerly used by the Congress to maintain control over the size of the public debt, whereby the statutory debt limit dropped, sometimes substantially, to the permanent level upon expiration of the temporary increase in the debt ceiling – and supported a proposal by the Treasury department to incorporate the debt limit statute into the budget process.¹⁰⁰ Under this proposal, the permissible level of the public debt would reflect the amount of debt contained in the concurrent budget resolution, such that “[a] vote for the budget resolution would constitute a vote for the debt ceiling.”¹⁰¹ This proposal is substantially similar to the Gephardt Rule, which was reenacted in the House of Representatives, but which has been suspended each year since 1995.¹⁰² The GAO recommendation was made in the wake of the enactment of the Congressional Budget and Impoundment Control Act of 1974, which provided a mechanism by which the entire federal budget would be “considered in total” by one unified congressional committee.

⁹⁷ See, e.g., Congressional Budget Office, *supra* note 53.

⁹⁸ Congressional Budget Office, *supra* note 53, at 54.

⁹⁹ General Accounting Office, *supra* note 95, at 20.

¹⁰⁰ *Id.* at 19-21.

¹⁰¹ *Id.* at 21.

¹⁰² Philip D. Winters, Cong. Research Serv., No. IB93054, *The Debt Limit* (2001), available at <http://www.ncseonline.org/NLE/CRSreports/economics/econ-55.cfm>.

GAO believed that consideration a separate debt limit statute “largely duplicated” efforts to determine “appropriate levels of receipts, disbursements ... and public debt.”¹⁰³

Both CBO and GAO believe that a government default would have serious and complicated implications on the federal budget and the economy. GAO states that a government default “could set in motion a series of actions that could have devastating effects on the economy, the public welfare, and the Government’s ability to market future securities.”¹⁰⁴ Adverse effects could include the triggering of loan covenants (i.e., creditors could demand immediate payment in full), higher interest rates, depreciation of the U.S. dollar, and impairment of the full faith and credit of the U.S. government. CBO echoes these sentiments, stating that “even a temporary default – that is, a few days’ delay in the government’s ability to meet its obligations – could have serious repercussions in the financial markets,” including higher interest rates, depreciation in the U.S. dollar, “a permanent increase in federal borrowing costs,” and a “loss of confidence in government and a higher risk premium on Treasury borrowing.”¹⁰⁵

Reformation

Proposal: Anita Krishnakumar

The U.S. Constitution grants to Congress the power “to pay the Debts ... of the United States” and “to borrow Money on the credit of the United States.”¹⁰⁶ Thus begins Krishnakumar’s defense of the federal debt limit statute, with a reminder of the restrictions and obligations imposed by the Constitution. This theme courses throughout her article and emerges as perhaps the most convincing justification for her proposal. Krishnakumar identifies three principles, which are thought to flow from the structure and language of the Constitution, and which she believes should guide federal borrowing and repayment: (1) a Principle of Regulated Borrowing, whereby the Congress must control the timing and terms of federal borrowing and repayment, (2) a Principle of Borrowing and Debt Control, whereby the Congress must determine the amount of federal borrowing and the use of the proceeds, and (3) a Principle of Repayment,

¹⁰³ General Accounting Office, *supra* note 95, at 19.

¹⁰⁴ *Id.* at 17.

¹⁰⁵ Congressional Budget Office, *supra* note 53, at 49.

¹⁰⁶ U.S. Constitution Article I, § 8, Cl. 1-2.

whereby the Congress must manage borrowing in such a way that the government's ability to repay is not impaired.¹⁰⁷

With these principles forming the foundation from which to begin her analysis, Krishnakumar responds to three common criticisms of the debt limit statute. First, in response to the criticism that the debt limit statute is anachronistic (i.e., because it refers to gross federal debt, the ceiling would need to be raised during years in which the federal government runs a surplus, if trust fund receipts exceed the size of the budget surplus) and functions primarily as a retrospective housekeeping device, Krishnakumar highlights the prospective aspect of regular debt limit legislation.¹⁰⁸ Second, in response to the criticism that the debt limit statute has become a legislative pawn or vehicle by which the Congress attempts to force legislation upon the President, Krishnakumar surveys the 42 increases in the debt limit between 1978 and 2002 notes that only four bills contained legislation unrelated to the debt limit.¹⁰⁹ Third, Krishnakumar accepts the third common criticism of the debt limit statute – that it creates an unnecessary threat to the government's credit – as “the most legitimate,” but argues that the criticism “is exaggerated,” and cites the fact that the nation has never defaulted on its debt.¹¹⁰

Krishnakumar's proposed reforms of the debt limit statute include procedural and substantive modifications, all of which are designed to advance the three bedrock principles outlined above and to address existing concerns and critiques. The bulk of the suggested reforms are procedural, and include (1) repealing the Gephardt Rule, which currently permits legislators to avoid public accountability; (2) requiring that the Congress consider debt limit increases as separate pieces of legislation, to focus deliberation on the size of the national debt and protect the interests of the diffuse public; (3) including a requirement that all amendments to debt limit bills satisfy a “germaneness requirement,” to prevent the debt limit from being used as a coercive device; and (4) timing debt limit increases to occur in November or December, after the budget process

¹⁰⁷ Krishnakumar, *supra* note 1, at 158-59.

¹⁰⁸ *Id.* at 169.

¹⁰⁹ *Id.* at 172-73.

¹¹⁰ *Id.* at 175.

completes and before the start of a congressional recess.¹¹¹ The main substantive reform is the suggested exclusion from the debt limit of intra-government trust fund securities.¹¹²

Recent Attempts at Reformation

In June of 2004, Congressman Kirk introduced House Resolution 3925 (the “Kirk Amendment”), which included a provision that would have made the debt limit applicable only to net debt, or debt held by the public. As intra-government trust fund debt would no longer be subject to the debt limit, the Kirk Amendment proposed reducing the debt limit to \$4.39 trillion. On June 24, 2004, the Kirk Amendment failed by a vote of 120 to 296.

The Center on Budget and Policy Priorities (“CBPP”) was strongly opposed to the Kirk Amendment’s proposed changes to the debt limit.¹¹³ While CBPP thought that focusing on net debt would be “consistent with considering the budget as a unified whole,” it concluded that the proposed changes would increase substantially the possibility of a government default.¹¹⁴ The Kirk Amendment would have eliminated the flexibility enjoyed by the Secretary of the Treasury during debt limit crises, for if Treasury securities held by federal trust funds were no longer subject to the debt limit, the Secretary would not be able to postpone a breach of the debt ceiling through early redemptions or by suspending temporarily the investment of excess fund receipts: “The problem with the proposed change in the definition of the debt subject to the limit is that the maneuver now used to avoid a default when Congress has not acted in time would no longer work. Treasury would no longer be able to use the gimmick of temporarily ‘disinvesting’ part of the Civil Service Retirement trust fund.”¹¹⁵

¹¹¹ Id. at 179-81, 182-84.

¹¹² Id. at 182.

¹¹³ Richard Kogan, Center on Budget and Policy Priorities, Refining the Debt Ceiling Poses Unnecessary Risks (2004).

¹¹⁴ Id.

¹¹⁵ Id.

State Debt Limits

Most states regulate debt levels through constitutional provisions or constitutional amendments.¹¹⁶ Debt limitations employed by states include, among others, blanket prohibitions on debt, specified levels of debt permitted for different types of activities, and debt levels that correspond to a certain percentage of the budget.¹¹⁷ Debt level increases are often restricted through procedural requirements, such as legislative supermajorities or public referenda. One study suggests that legislative voting thresholds lead to greater levels of state-guaranteed debt: “States that either prohibit [full faith and credit] debt or require referendum approval to issue it had less guaranteed debt than those that required a supermajority of the legislature to issue debt or those with revenue-based limitations.”¹¹⁸ Commentators historically have been loath to analogize or extrapolate these findings to the federal government. Interestingly, state courts often have been willing to authorize arrangements that otherwise would violate constitutional or statutory debt limitations. For example, state courts have given their imprimatur to practices that function effectively as borrowing arrangements, including sale-leaseback transactions, tax increment financing, revenue bonds, and public authorities and other special purpose agencies or institutions.¹¹⁹ In addition to these methods of circumvention, states have resulted to devolution, whereby local governments perform the borrowing that state governments cannot. In this sense, restrictions on state debt levels “may serve only to displace the issuance of long-term debt from the state level of government to the local level.”¹²⁰

¹¹⁶ See Stewart E. Sterk & Elizabeth S. Goldman, Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations, 1991 Wis. L. Rev. 1301, 1315 (1991).

¹¹⁷ See, e.g., Id.; Krishnakumar, supra note 1, at 176-79.

¹¹⁸ D. Roderick Kiewiet & Kristin Szakaly, Constitutional Limitations on Borrowing: An Analysis of State Bonded Indebtedness, 12 J.L. Econ. & Org. 62, 93 (1996). See also Krishnakumar, supra note 1, at 178.

¹¹⁹ See Sterk & Goldman, supra note 116, at 1329-34.

¹²⁰ Kiewiet & Szakaly, supra note 118, at 70.

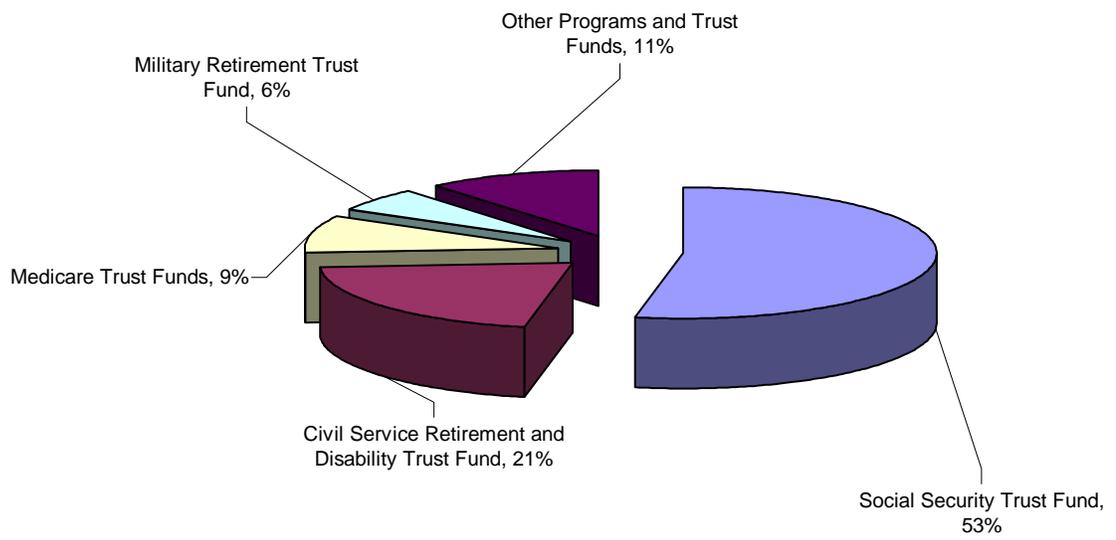
Table 1**Chronology of 1995-1996 Debt Ceiling Crisis Events**

Date	Event
June 29, 1995	The Congress passed the Conference Report on the 1996 Budget Resolution, which called for a \$5.5 trillion debt ceiling in order to fund government operations through fiscal year 1997.
July 17, 1995	The Secretary of the Treasury wrote to the congressional leadership calling for an increase in the debt ceiling before October 31, 1995.
September 18, 1995	The Secretary of the Treasury wrote to the congressional leadership urging an increase in the debt ceiling separate from the resolution of the budget debate.
October 17, 1995	Treasury announced that it would reduce by \$7 billion the October 23, 1995, auction of 13-week Treasury bills in order to stay under the debt ceiling on October 31, 1996. Treasury also suspended foreign add-ons, and the issuance of State and Local Government Series Treasury securities.
November 1, 1995	Treasury called back about \$2.4 billion in Treasury cash balances from eight large banks. According to Treasury officials, these funds were received between November 2 and November 8, 1995.
November 6-8, 1995	Treasury postponed auctions of 3- and 10-year notes and 52-week bills.
November 10, 1995	The Congress passed a bill that increased the debt ceiling by \$67 billion through December 12, 1995. The bill would have repealed the Secretary's authorities contained in 5 U.S.C. § 8348 and 5 U.S.C. § 8438. The authorities allow the Secretary to use the Civil Service fund and G-Fund to help discharge his financial management responsibilities during a debt crisis. This was vetoed on November 13, 1995.
November 15, 1995	The Secretary of the Treasury declared a 12-month debt issuance suspension period. This allowed Treasury to prematurely redeem Treasury securities held by the Civil Service fund and not reinvest a portion of the G-Fund. As a result, Treasury issued securities to the public to raise the cash needed to pay \$24.9 billion in interest due on the public debt.
November 30, 1995	The Congress passed the Balanced Budget Act of 1995. This increased the debt ceiling to \$5.5 trillion. On December 6, 1995, the President vetoed this bill.
December 31, 1995	Treasury did not have sufficient room under the debt ceiling to invest about \$14 billion in Civil Service fund receipts. The receipts were associated with semiannual interest payments made on trust fund holdings.
January 22, 1996	The Secretary of the Treasury notified the Congress that unless the debt ceiling was raised prior to February 15, 1996, Treasury would (1) suspend reinvestment of about \$3.9 billion in the Exchange Stabilization Fund, (2) exchange about \$9 billion of agency securities held by FFB for Treasury securities held by certain government trust funds, and (3) extend debt issuance suspension period for 2 months and redeem about \$6.4 billion of Treasury securities held by the Civil Service fund earlier than normal. In the letter, the Secretary stated that "I want to emphasize that we will have no other options that are both legal and prudent."
February 8, 1996	The Congress authorized Treasury to issue about \$29 billion of securities prior to March 1, 1996, in order to ensure that the March Social Security payments could be made (Public Law 104-103). These securities, when issued, would not count against the debt ceiling until March 15, 1996.
February 14, 1996	The Secretary (1) authorized the suspension of reinvestment of maturing Treasury securities in the Exchange Stabilization Fund, (2) authorized the exchange of agency securities held by FFB for Treasury securities held by the Civil Service fund, and (3) extended the debt issuance suspension period by 2 months and authorized the redemption of an additional \$6.4 billion of Treasury securities held by the Civil Service fund earlier than normal.
February 23, 1996	Treasury issued about \$29 billion of securities that did not count against the debt ceiling in accordance with Public Law 104-103.
March 12, 1996	Public Law 104-115 was enacted which authorized Treasury to invest trust fund receipts in Treasury securities which did not count against the debt ceiling until March 30, 1996. In addition, it extended the exemption of the securities issued under Public Law 104-103 from counting against the public debt ceiling until March 30, 1996.
March 29, 1996	The debt ceiling was raised to \$5.5 trillion and Treasury began to restore the losses incurred by the Civil Service fund and G-Fund.
June 30, 1996	Treasury completed the restoration of the losses incurred by the Civil Service fund.

Source: General Accounting Office, Debt Ceiling: Analysis of Actions During the 1995-1996 Crisis 19-20 (1996).

Appendix 1 - GAO, Bureau of the Public Debt's Fiscal Years 2004 and 2003 Schedules of Federal Debt, p. 17, Figure 4 (Nov. 2004)

Components of Intra-governmental Debt Holdings as of September 30, 2004



Bibliography

- Congressional Budget Office, CBO Testimony before the Senate Committee on Finance, 104th Cong. 8 (1995)
- Congressional Budget Office, The Economic and Budget Outlook: An Update (1995)
- Congressional Budget Office, Federal Debt and the Commitments of Federal Trust Funds, No. 4, Rev. May 6, 2003.
- Congressional Budget Office, The Federal Financing Bank and the Budgetary Treatment of Federal Credit Activities (Jan. 1982).
- Congressional Quarterly, Inc., Debt Limit 'Weapon' Lacks Force, Vol. LI Cong. Q. Almanac 2-64 (1995)
- Federal Financing Bank, Federal Financing Bank Lending Policy, 1973.
- Loretta Haggopin Garrison, Who Decides? The Struggle for Control over the Federal Government's Spending Power, 38 Case W. Res. 66 (1988).
- General Accounting Office, Debt Ceiling: Analysis of Actions During the 1995-1996 Crisis (1996).
- General Accounting Office, Debt Ceiling Limitations and Treasury Actions, GAO/AIMD-96-38R, Jan. 26, 1996.
- General Accounting Office, Information on Debt Ceiling Limitations and Increases, GAO/AIMD-96-49R, Feb. 23, 1996.
- General Accounting Office, A New Approach to the Public Debt Legislation Should be Considered (1979).
- D. Roderick Kiewiet & Kristin Szakaly, Constitutional Limitations on Borrowing: An Analysis of State Bonded Indebtedness, 12 J.L. Econ. & Org. 62 (1996).
- Richard Kogan, Center on Budget and Policy Priorities, Redefining the Debt Ceiling Poses Unnecessary Risks, June 22, 2004.
- Anita S. Krishnakumar, In Defense of the Debt Limit Statute, Vol. 42 Harv. J. on Legis No. 1 (Winter 2005).
- Office of Management & Budget, FY2006 Budget, Analytical Perspectives, Federal Borrowing and Debt.

Peter Orszag and Robert Greenstein, Center on Budget and Policy Priorities, Federal Debt: What Matters and Why, Feb. 22, 1999.

Robert E. Rubin & Jacob Weisberg, In An Uncertain World: Tough Choices from Wall Street to Washington (2003).

Stewart E. Sterk & Elizabeth S. Goldman, Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations, 1991 Wis. L. Rev. 1301 (1991).

Philip D. Winters, Cong. Research Serv., No. IB93054, The Debt Limit (2001).