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Clearing the Air on the Debt Limit

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November 2, 2017

Congressional Research Service
7-5700
www.crs.gov
R45011

Summary

The statutory debt limit, currently suspended through December 8, 2017, provides Congress a means of controlling federal borrowing. As the date when that suspension will lapse approaches, discussions about the role of the debt limit among the media, researchers, and Members of Congress promise to become more frequent. In recent discussions, misleading or less than fully accurate claims have, at times, surfaced. This report provides clarifications on five common debt limit contentions.

Some of those points in need of clarification relate to the congressional power of the purse, which stems from three closely related constitutional provisions that charge Congress with deciding how the federal government spends, taxes, and borrows.

The statutory debt limit represents one way that Congress exerts control over federal borrowing and debt, as it has since the beginning of the U.S. government—despite claims that limits on debt began in 1917. Before 1917, Congress typically specified the interest rates, maturities, call options, and other aspects of debt issuances. While the Second Liberty Bond Act of 1917 (P.L. 65-43, 40 Stat. 288) marked a turning point in federal debt policy, the modern debt limit—meaning an overall limit on federal debt without sublimits—might be more properly said to have been established in 1939.

Another claim is that the federal government suffered technical defaults in the late 1970s, which raised federal borrowing costs. In certain past episodes, lapses in temporary debt limit increases caused breaches of the limit, although no payment delays resulted and thus no default occurred in the ordinary sense of that term. In another 1979 episode some interest and principal payments to some small investors holding Treasury securities were delayed. Those delays appeared to stem from problems in updating the U.S. Treasury's computer and accounting systems, rather than the debt limit. Market interest rate movements on the date of the first payment delay were more plausibly affected by significant Federal Reserve announcements made that day rather than payment delays that were not reported until a week and a half later.

Others have claimed that debt limit increases were once less contentious or that debt limit modifications were typically "clean"—that is, not attached to other legislative provisions. Debt policy, however, has often been a divisive issue since the beginning of American government. Many of the debt limit measures enacted in past decades engendered substantial division and debate. Debt, by its nature, allows government to shift the fiscal burden of current expenditures or lessen the burden of current taxes by transferring obligations to future taxpayers. Moreover, debt limit measures have been informally or formally linked with other issues for many decades.

Some commentators have pointed to a statutory provision that allows minting of platinum coins as a purported solution to the prospect of a binding debt limit. Proponents of the platinum coin strategy have encouraged the U.S. Treasury to consider minting a high denomination coin, which—according to proponents—could be deposited at the Federal Reserve and exchanged for cash for the U.S. Treasury's general fund. The platinum coin strategy, however, would present several major policy challenges. Other commentators have claimed that the Public Debt Clause of the Fourteenth Amendment would allow the executive branch to take actions to address debt policy that would bypass Congress. Although predicting how Justices might weigh different factors in interpreting legislative and executive powers is difficult, were the issue to come before the Supreme Court, neither case law associated with this clause, nor the text, structure, or operation of the clause, support this contention.

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The statutory debt limit, currently suspended through December 8, 2017, provides Congress a means of controlling federal borrowing. As the date when that suspension will lapse approaches, discussions about the role of the debt limit among the media, researchers, and Members of Congress promise to become a more frequent. In recent discussions, misleading or less than fully accurate claims have at times surfaced. This report provides clarifications on five common debt limit contentions.

The debt limit represents one way that Congress exerts control over fiscal policy, which stems from closely related constitutional provisions. Those provisions—the Taxing and Spending Clause ("Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States")[1] and the Borrowing Clause ("Power ... To borrow Money on the Credit of the United States")[2]—establish the basis of the congressional power of the purse.[3] Congress, under its Borrowing Clause powers, has authorized the Department of the Treasury to borrow through various debt instruments to finance expenditures not covered by federal receipts.[4] The total amount of outstanding federal debt, with minor exceptions, is constrained by a statutory debt limit.

When that limit is close to binding, the Treasury Secretary can invoke authorities to employ extraordinary measures to finance federal expenditures.[5] If expenditures persistently outrun receipts, and if the debt limit is not modified, at some point Treasury's cash balances and borrowing capacity would be exhausted, leaving the Treasury without means to meet federal obligations.[6]

The latest debt limit episode was resolved on September 8, 2017, when a continuing resolution measure (P.L. 115-56) was enacted that included a suspension of the debt limit through December 8, 2017. Once that debt limit suspension lapses, the Treasury Secretary may again invoke authorities to use extraordinary measures, which would likely suffice to meet federal obligations well into 2018.[7]

Point of Clarification 1: The United States Had Debt Limits Before 1917

Federal debt has been subject to limits since the beginning of the U.S. government. Before 1917, Congress typically specified the interest rates, maturities, call options, and other aspects of debt issuances.[8] During wars, however, the U.S. Treasury was often granted more leeway in deciding

[1] U.S. CONST. art. I, § 8, cl. 1

[2] U.S. CONST. art. I, § 8, cl. 2.

[3] Congress also authorizes governmental entities to draw money from the U.S. Treasury to meet various statutory obligations. *See* U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law").

[4] These instruments include bonds (31 U.S.C. § 3102); notes (*Id.* § 3103); certificates of indebtedness and Treasury bills (*Id.* § 3104); as well as savings bonds and savings certificates (*Id.* § 3105).

[5] 5 U.S.C. § 8348(j) et seq.

[6] Neil H. Buchanan and Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175 (2011).

[7] For details, see CRS Report R43389, *The Debt Limit Since 2011*, by D. Andrew Austin.

[8] For a list of pre-World War I debt issuances, see U.S. Congress, National Monetary Commission , *Laws of the United States Concerning Money, Banking, and Loans, 1778-1909*, 61st Cong., 2nd sess., 1910, S.Doc. 580, pp. 766-769; https://fraser.stlouisfed.org/scribd/?item_id=21954&filepath=/files/docs/historical/nmc/nmc_580_1910-pt1.pdf.

terms offered to investors.[9] At times, Congress designated loan proceeds for specific purposes such as rolling over existing federal debt, helping construct an intercontinental railroad in the 1860s, or financing the Panama Canal after the turn of the 20th century. At other times, bonds were authorized simply to "meet the current expenses of the Government."[10]

Enactment of the Second Liberty Bond Act of 1917 (P.L. 65-43, 40 Stat. 288) on September 24, 1917, marked a turning point in federal debt policy, but maintained substantial constraints on Treasury debt operations. The act imposed the first aggregate limit on federal borrowing, but retained individual limits on separate bond issues as well.

During 1920s and 1930s, Congress allowed the U.S. Treasury more leeway to manage federal debt in order to roll over World War I-era debt.[11] In July 1939, Congress set an aggregate limit (P.L. 76-201) on federal debt, allowing Treasury officials to decide how to manage that debt.[12] Thus, the modern debt limit—meaning an overall limit on federal debt without sublimits—might more properly be said to have been established in 1939.

Point of Clarification 2: Did the Federal Government Default in the 1970s?

Some contend that the federal government suffered technical defaults in the late 1970s. An examination of the historical record suggests otherwise. While the meanings of the terms "default" or "technical default" are clear in private contracts, they are less clear when applied to the federal government. Private-sector contracts normally spell out "events of default," such as failure to pay on time as well as other lapses. Technical defaults refer to violations of a legal agreement—such as a loan or securities contract—not involving failure to pay.[13] The issuance of Treasury securities, however, is governed by the Universal Offering Circular, which does not address failure to pay or other types of default events.[14]

Moreover, a breach of the debt limit—that is, a situation in which total federal debt subject to limit exceeded that limit—does not necessarily imply delayed or missed payments or other failures to uphold the federal obligations. In certain past episodes, breaches caused by lapsed temporary debt limit increases resulted in no payment delays, and thus were not defaults in the ordinary sense of that term. In the present context, however, a fully binding debt limit or breach could quickly lead to systematic payment delays and damage to the federal government's fiscal reputation, its credit rating, and its ability to borrow at advantageous rates.

[9] For details, see CRS Report RL31967, *The Debt Limit: History and Recent Increases*, by D. Andrew Austin.

[10] Act of March 2, 1839, 5 Stat. 323.

[11] Revenue Act of November 23, 1921 (42 Stat. 227; P.L. 67-98). *See also* Paul Studenski and Herman E. Kroos, *Financial History of the United States*, 2nd ed. (New York: McGraw-Hill, 1963), p. 316.

[12] "President Urges Ending of Limit on Bonded Debt; Asks Congress to Facilitate Borrowing by Eliminating $30,000,000,000, 'Ceiling' Stands By Total Debt Top $45 Billion All Right for Now, Message Says—Yielding to Economizers is Seen," *New York Times*, March 21, 1939. While a separate $4 billion limit for "National Defense" series securities was introduced in 1940, in the next year federal debt was consolidated under an increased aggregate limit of $65 billion.

[13] "Lexicon: Definition of Technical Default," *Financial Times*, n.d., at http://lexicon.ft.com/Term?term=technical-default.

[14] U.S. Treasury, *Universal Offering Circular*, Fiscal Service Series No. 1-93, https://www.treasurydirect.gov/instit/statreg/auctreg/CFR-2014-title31-vol2-part356.pdf.

Political scientists Thomas Mann and Norman Ornstein contend that a technical default occurred in October 1977, when a temporary debt limit increase lapsed before a revised debt limit measure was enacted.[15] The previous debt limit measure (P.L. 94-334), enacted on June 30, 1976, included three temporary increases in the debt limit for specific time periods above a "permanent" limit of $400 billion. The last temporary increase of $300 billion lapsed after Friday, September 30, 1977. While both the House and Senate had approved a debt limit measure by that date, differences were not resolved until Tuesday, October 4, 1977, when it was enacted. Thus, for two business days, federal debt, which was close to $700 billion, was above its statutory limit of $400 billion.[16] After the temporary debt limit increase lapsed, Treasury could not borrow, though its cash reserves were sufficient to meet federal obligations until the new measure was enacted, even if some special financial measures were employed.[17] No federal payments, however, were missed or delayed—suggesting that no technical default occurred. Moreover, federal officials responsible for issuing that debt acted within their statutory authorities.

Others have pointed to a 1979 episode when some interest and principal payments to some small investors holding Treasury securities were delayed.[18] In late April and early May 1979, about 4,000 Treasury checks for interest payments and security redemptions were delayed due to back-office technical and organizational problems, in part related to a reorganization of Treasury debt operations.[19] Delays affected payments estimated at $122 million, with foregone interest totaling an estimated $125,000.[20] Those amounts represented a small share of the market in Treasury securities: for instance, a few days before those delays, the U.S. Treasury rolled over $6 billion in debt.[21] The federal government may have reached a settlement with affected investors.[22]

Some ascribe those payment delays to a debt limit episode. A temporary increase in the debt limit (P.L. 96-5), however, was enacted on April 2, 1979—more than three weeks before the first delayed payment.[23] Those payment delays were also blamed for increasing federal borrowing costs.[24] Market interest rate movements on the date of the first payment delay—April 26, 1979—were more plausibly affected by significant Federal Reserve announcements made that day[25] rather than payment delays that were not reported until a week and a half later.[26]

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[15] Thomas E. Mann and Norman J. Ornstein, *It's Even Worse than it Looks* (New York: Basic Books, 2012), p. 6. Two other lapses occurred in 1956 and 1973. A temporary debt limit lapsed after June 30, 1956. On July 9, 1956, Congress retroactively raised the debt limit from July 1, 1955, through June 30, 1957 (70 Stat. 519; P.L. 84-678). A temporary debt limit lapsed after November 30, 1973, and was followed by another temporary increase enacted on December 3, 1973 (87 Stat. 691; P.L. 93-173).

[16] 31 U.S.C. § 757b. That section was superseded after a 1984 codification.

[17] "Expired Debt Ceiling Sparks Juggling Act by U.S. Treasury," *Wall Street Journal*, October 3, 1977, p. 31.

[18] Edward D. Kleinbard, "The Debt-Ceiling Crisis Is Real," *New York Times*, August 7, 2017; https://www.nytimes.com/2017/08/07/opinion/debt-ceiling-congress-default-real.html. Also see Terry L. Zivney and Richard D. Marcus, "The Day the United States Defaulted on Treasury Bills," *Financial Review*, vol. 24 (1989), issue 3, pp. 475-489.

[19] For details, see CRS Report R44704, *Has the U.S. Government Ever "Defaulted"?*, by D. Andrew Austin.

[20] Zivney and Marcus, op. cit.

[21] "Treasury Bill Auction to Reduce U.S. Debt by About $200 Million," *Wall Street Journal*, April 5, 1979.

[22] A class action suit was dismissed with prejudice on May 12, 1980, which barred refiling of the claim. The resolution of the suit is unclear because case records were destroyed on November 28, 2011.

[23] Kleinbard, op. cit.

[24] Kleinbard, op. cit. and Zivney and Marcus, op. cit.

[25] "Big Boost in Money Supply May Put Fed Under Heavy Pressure to Tighten Credit," *Wall Street Journal*, April 27, 1979, p. 32.

[26] Edward P. Foldessy, "Treasury Hits Delays in Mailing Checks to the Holders of its Maturing Securities," *Wall Street*
(continued...)

Point of Clarification 3: Were "Clean" Debt Limit Increases Once the Norm?

Some commentators have claimed that contentious debt limit episodes are a recent phenomenon.[27] Debt policy, however, has been a divisive issue since the beginning of American government. Debt, by its nature, allows government to shift the fiscal burden of current expenditures or lessen the burden of current taxes by transferring obligations to future taxpayers.[28] Shifting fiscal burdens into the future through debt management is a powerful and potentially beneficial tool of fiscal policy, but can also become a means of avoiding fiscal responsibility in the present. Debt policy discussions, therefore, often become contentious.

Since 1978, 27 of a total of 56 debt limit modifications were "clean"—meaning that a debt limit measure was not linked to other provisions.[29] That delineation, however, is imperfect. In some cases a debt limit provision might have been attached to another measure that acted as a convenient legislative vehicle for passage. In other cases, combining a debt limit modification with other provisions may have resulted from a broad fiscal compromise among policymakers. In addition, a debt limit modification enacted as a standalone measure could have resulted from a policy compromise involving other issues. For instance, on February 15, 2014, a "clean" debt limit increase (P.L. 113-83) was enacted. On the same afternoon another measure (P.L. 113-82) was enacted to reverse certain reductions in cost-of-living adjustments to working-age military retiree pensions that had been included in the Bipartisan Budget Act of 2013 (BBA2013; P.L. 113-67). Although nothing formally linked the two measures, their passage in quick succession may have reflected a fiscal compromise.

Debt limit measures have been informally or formally linked with other issues for many decades.[30] In 1939, when Congress was considering creating what became the modern debt limit, Senator George Norris offered an amendment to allow the Tennessee Valley Authority (TVA) to use bonds to consummate purchases of some power plants. Once a separate TVA measure was agreed to, the amendment to the debt limit measure (H.R. 5748) was withdrawn.[31] In 1957, Congress declined to raise the limit until the following February, in part to "compel more economy of efficiency, better management of money and manpower in the defense program."[32] In the 1960s, debt limit debates provided a forum for those concerned about the expansion of federal spending due to federal credit guarantees, new social insurance programs, and the escalation of the Vietnam War.[33] In the early 1970s, debt limit measures were embroiled in debates over

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Journal, May 6, 1979, p. 8.

[27] Simon Johnson, "The Debt Ceiling and Playing with Fire," *New York Times*, January 24, 2013. "In the past, the potential for confusion around binding debt-ceiling limits was well understood. The debt ceiling was therefore raised without too much fuss, and the party in opposition would typically object in principle but not put up a real fight."

[28] Or alternatively, to future program beneficiaries affected by later spending reductions.

[29] CRS Report R41814, *Votes on Measures to Adjust the Statutory Debt Limit, 1978 to Present*, by Justin Murray.

[30] Linda K. Kowalcky and Lance T. LeLoup, "Congress and the Politics of Statutory Debt Limitation," *Public Administration Review*, vol. 53, no. 1, January-February 1993, pp. 14-27.

[31] Senate debate, *Congressional Record*, vol. 84, part 6 (June 1, 1939), pp. 6480, 6497-6501; part 9 (July 14, 1939), pp. 9141, 9164.

[32] Rep. George H. Mahon, "Battle of the Budget in Defense Program," Extension of Remarks, *Congressional Record*, vol. 103 (August 30, 1957), pp. H16805-H16809.

[33] For example, a legislative history of temporary debt limit increases in 1967 runs 1,195 pages. See U.S. Congress, (continued...)

campaign finance reform and in congressional conflicts with the Nixon and Ford Administrations.[34] In the mid-1980s, a debt limit provision was packaged with the Gramm-Rudman-Hollings budget constraints.[35] The debt limit episode of 1995-1996 was described by the U.S. General Accounting Office (GAO; now Government Accountability Office) as a "crisis."[36]

Point of Clarification 4: Could a Platinum Coin Avoid a Binding Debt Limit?

Some commentators have pointed to a statutory provision[37] that allows minting of platinum coins as a purported solution to the prospect of a binding debt limit. Unlike other provisions governing coinage, the face values of platinum coins are not limited. That provision, according to its author, was introduced to give the U.S. Treasury flexibility in minting relatively low-denomination platinum coins for collectors.[38]

Instead, proponents of the platinum coin strategy have encouraged the U.S. Treasury to consider minting a high-denomination coin, which—according to proponents—could be deposited at the Federal Reserve and exchanged for cash for the U.S. Treasury's general fund.[39] Officials of both the U.S. Treasury and the Federal Reserve System therefore would have to approve the strategy. Both the U.S. Treasury and the Federal Reserve, however, rejected such options in 2013.[40] A Treasury spokesman stated that "Neither the Treasury Department nor the Federal Reserve believes that the law can or should be used to facilitate the production of platinum coins for the purpose of avoiding an increase in the debt limit." The U.S. Treasury again rejected such stratagems in 2015.[41]

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House Committee on Ways and Means, *Legislative History of H.R. 4578 to Provide a Temporary Increase in the Public Debt Limit (P.L. 90-3) and H.R. 10867 to Increase the Public Debt Limit Set Forth in Sec. 21 of the Second Liberty Bond Act*, committee print, prepared by Staff of the Committee on Ways and Means, 90th Cong., 1st sess., 1967, H. 1046 (Washington: GPO, 1967).

[34] Congressional Quarterly, *Congress and the Nation*, vol. IV, pp. 62-64, 68, 70.

[35] Balanced Budget and Emergency Deficit Control Act of 1985 (P.L. 99-177).

[36] U.S. GAO, *Debt Ceiling: Analysis of Actions During the 1995-1996 Crisis*, GAO/AIMD-96-130, http://www.gao.gov/archive/1996/ai96130.pdf.

[37] 31 U.S.C. § 5112(k).

[38] Dylan Matthews, "Michael Castle: Unsuspecting Godfather of the $1 Trillion Coin Solution," *Washington Post*, January 4, 2013, https://www.washingtonpost.com/news/wonk/wp/2013/01/04/michael-castle-unsuspecting-godfather-of-the-1-trillion-coin-solution/.

[39] Joe Weisenthal, "The Former US Mint Director Behind The Controversial Law Explains Why A Platinum Coin Could Avoid A Major Crisis," *Business Insider*, January 8, 2013; http://www.businessinsider.com/mint-the-coin-former-mint-director-philip-diehl-explains-why-the-trillion-dollar-coin-law-would-work-2013-1. Also see Paul Krugman, "Be Ready to Mint That Coin," *New York Times*, January 7, 2013, https://krugman.blogs.nytimes.com/2013/01/07/be-ready-to-mint-that-coin/.

[40] Ezra Klein, "Treasury: We Won't Mint a Platinum Coin to Sidestep the Debt Ceiling," *Washington Post*, January 12, 2013; https://www.washingtonpost.com/news/wonk/wp/2013/01/12/treasury-we-wont-mint-a-platinum-coin-to-sidestep-the-debt-ceiling/. Also see then Federal Reserve Chairman Ben Bernanke, Remarks at the University of Michigan Ford School, January 14, 2013, http://fordschool.umich.edu/sites/default/files/2013-ben-bernanke.txt.

[41] Daniel Watson, Deputy Assistant Secretary for Public Affairs, "There is Only One Solution to the Debt Limit," *Treasury Notes*, October 16, 2015, https://www.treasury.gov/connect/blog/Pages/one-solution-debt-limit.aspx.

Apart from various legal, accounting, and practical uncertainties,[42] the platinum coin strategy would present several major policy issues. First, such actions by executive branch officials could be seen as undermining Congress's fiscal powers. Second, both the U.S. Treasury and Federal Reserve have sought for many decades to maintain a separation between fiscal and monetary policy.[43] Governments can finance their expenditures through revenues or borrowing or by printing money. The latter option, however, would likely affect the value of the dollar by signaling either a reluctance to make fiscal adjustments or that monetary policy goals had been subordinated to other ends. As a senior Federal Reserve official stated, "central banks are generally assigned the responsibility for establishing and maintaining the value or purchasing power of the nation's monetary unit of account. Yet, that task can be undermined or completely subverted if fiscal authorities independently set their budgets in a manner that ultimately requires the central bank to finance government expenditures with significant amounts of seigniorage in lieu of tax revenues or debt."[44] Third, were the U.S. Treasury to obtain cash balances via such a strategy, the debt limit would likely continue restricting the issuance of federal securities, potentially disrupting scheduled auctions and undermining the U.S. Treasury's reputation for regular and predictable debt operations.[45] Such disruptions could raise federal borrowing costs.[46]

Point of Clarification 5: Would the Fourteenth Amendment Allow the President to Act Unilaterally?

Some have contended that the Public Debt Clause of the Fourteenth Amendment—which states that the "validity of the public debt ... shall not be questioned"[47]—would justify unilateral presidential actions, such as ignoring the debt limit, in order to avoid a federal default.[48] Others

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[42] For a discussion of issues regarding issuance of such a coin, see "Why the $1 Trillion Platinum Coin Idea Won't Work," January 8, 2013, http://goldandsilverblog.com/why-the-trillion-dollar-platinum-coin-wont-work-0450/.

[43] See Charles I. Plosser, President and Chief Executive Officer, Federal Reserve Bank of Philadelphia, "Fiscal Policy and Monetary Policy: Restoring the Boundaries, *2012 Annual Report of the Federal Reserve Bank of Philadelphia*; https://www.philadelphiafed.org/publications/annual-report/2012/restoring-the-boundaries. Until 1981, the Federal Reserve had limited authority to buy Treasury securities directly to meet emergency cash management circumstances. *See* Kenneth D. Garbade, "Direct Purchases of U.S. Treasury Securities by Federal Reserve Banks," Federal Reserve Bank of New York Staff Report No. 684, August 2014.

[44] *Id*. Seigniorage is the market value of currency minus the cost of minting coins or printing banknotes.

[45] Kenneth Garbade, "The Emergence of 'Regular and Predictable' as a Treasury Debt Management Strategy," *Federal Reserve Bank of New York Economic Policy Review*, March 2007, vol. 13, no. 1, https://www.newyorkfed.org/research/epr/07v13n1/0703garb.html.

[46] U.S. Treasury, "The Meaning and Implications of 'Regular and Predictable' as a Tenet of Debt Management, presentation at Treasury Borrowing Advisory Council, August 2015, https://www.treasury.gov/resource-center/data-chart-center/quarterly-refunding/Documents/August2015TBACCharge1.pdf.

[47] The Public Debt Clause states the following:

> 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.

U.S. CONST. amend. XIV, § 4.

[48] *See, e.g.*, Garrett Epps, "The Speech Obama Could Give: 'The Constitution Forbids Default'," *The Atlantic* (April 28, 2011); Jonathan Zasloff, "If the Debt Ceiling is Unconstitutional, How Would Anyone Know? " The Reality-Based (continued...)

argue that such executive branch actions would be extraconstitutional and would usurp the congressional power of the purse, but might be justified by an appeal to necessity.[49] Although there is scant case law on the meaning of the Public Debt Clause,[50] the clause would appear unlikely to justify the President spending funds in excess of a congressionally imposed debt ceiling.

Why Does the Fourteenth Amendment Have a Public Debt Clause?

Framers of the Fourteenth Amendment sought to assert federal powers to protect civil rights and ensure that the eventual reentry of former Confederate states would not lead to a rollback of constitutional reforms. During the latter part of the Civil War, Members of Congress began to consider the issue of reconstruction. In 1864, the Wade-Davis Bill, passed by Congress but pocket vetoed by President Lincoln, included a clause that "No debt, state or confederate, created by or under the sanction of the usurping power, shall be recognized or paid by the state."[51] After the Confederate surrender, the assassination of President Lincoln, and the inauguration of President Andrew Johnson in April 1865, congressional leaders took more direct initiatives to shape the reconstruction process.

Establishment of federal guarantees for civil and political rights for former slaves became a central aim of a strong majority of lawmakers.[52] Many realized that extending political rights to former slaves would mean superseding the three-fifths clause that set out rules for apportionment of House seats in Article I, Section 2 of the Constitution. Counting former slaves as whole persons for purposes of apportionment would eventually increase the size of delegations from former Confederate states.[53] Representative James Garfield estimated that those states would gain at least 15 seats and others estimated gains of some 40 to 60 seats.[54] Such potential shifts in political power raised alarms that a future coalition could emerge that would repudiate federal

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Community (May 19, 2011); Bruce Bartlett, "The Debt Limit Option President Obama Can Use," *The Fiscal Times* (April 29, 2011). Jeffrey Rosen, "How Would the Supreme Court Rule on Obama Raising the Debt Ceiling Himself?" *New Republic* (July 29, 2011). As stated by one commentator:

> ... it's not hard to argue that the Constitution places both payments on the debt and payments owed to groups like Social Security recipients – pensioners, that is,—above the vagaries of Congressional politics. These debts have to be paid, the argument would be, in full, on time, without question. If Congress won't pay them, then the executive must.

Garrett Epps, "Our National Debt 'Shall Not Be Questioned,' the Constitution Says," *The Atlantic* (May 4, 2011).

[49] Neil H. Buchanan and Michael C. Dorf, *supra* note 6.

[50] The Supreme Court appears to have addressed the Public Debt Clause in only one case. In *Perry v. United States*, 294 U.S. 330, 354 (1935), the Court struck down a 1933 joint resolution purporting to abrogate a clause in government war bonds calling for payment in "gold coin of the present standard of value." *Id.* at 331. Instead, the resolution allowed payment in dollars of the bond's face amount. *Id.* at 349. The Court held that the clause was intended to "put beyond question the obligations of the government.... " *Id.* at 354.

[51] National Archives and Records Administration, Transcript of Wade-Davis Bill (1864), https://www.ourdocuments.gov/doc.php?flash=true&doc=37&page=transcript.

[52] Joseph B. James, *The Framing of the Fourteenth Amendment* (Urbana: University of Illinois Press, 1956), pp. 3-20.

[53] Ibid., p. 22. On September 18, 1866, *New York Herald* editor James Gordon Bennett estimated that southern states would gain 40 seats if the franchise were restricted to white voters and 61 seats with universal (male) franchise (p. 5).

[54] The 1860 Census results indicated a House of 243 Members, although due to secession the 39th Congress had only 193 Members. See Office of the Historian, U.S. House of Representatives, 39th Congress Profile; http://history.house.gov/Congressional-Overview/Profiles/39th/. Also see archived CRS Report 95-791, *House of Representatives: Setting the Size at 435*, by David C. Huckabee, available upon request.

debts.[55] While federal guarantees for an expansion of the franchise were viewed as a counterweight to such shifts, an explicit guarantee of the validity of federal debts was also included.[56]

Does the Public Debt Clause Give the Executive Branch Powers to Avoid Default?

There is little doubt that Congress has an obligation to pay its debts under a variety of constitutional provisions, including the Borrowing Clause,[57] the Due Process Clause,[58] and theories of vested contractual rights.[59] The failure of the government to pay its debts would also appear to violate the Public Debt Clause.[60] The instant question, however, is not whether the government is legally obligated to pays its debts, but what powers are available to the President when a default on the public debt is threatened.[61] Thus, the question arises as to whether the President could unilaterally pay for such threatened debt by, for instance, borrowing money in excess of the debt ceiling.[62] Some commentators have made the argument that the Public Debt Clause provides the President sufficient authority to borrow money beyond the debt ceiling even

[55] James (op. cit., pp. 23-27). On August 16, 1865, Treasury Secretary McCulloch wrote to Senator Sumner that "nothing can be more damaging to our national credit than the openly-expressed opinion by leading men, that there may arise contingencies in which the national debt will be repudiated." Quoted in James (p. 25). James (p. 185) suggests that the prospects of repudiation were exaggerated, although several ex-Confederate states repudiated state debts in the post-Civil War period. See William Scott, *Repudiation of State Debts: A Study in the Financial History of Mississippi, Florida, Alabama, North Carolina, South Carolina, George, Louisiana, Arkansas, Tennessee, Minnesota, Michigan, and Virginia* (Boston: Crowell, 1893). Representative John Bingham, one of the framers of the Amendment, asserted that "Unless this Congress, charged as it is, like the first Continental Congress, with the care of the liberties of all, shall perform the duty enjoined upon it, and send to the people the necessary constitutional provisions and guarantees for the future safety of the Republic, I apprehend that there are men now within these walls who may learn, when it is too late, that the ballot in the hand of the conspirator is more dangerous to the safety of the Republic than the bayonet." *Congressional Globe*, January 25, 1866, pp. 428-429.

[56] Some Civil War loan issues were marketed widely to the public soon after hostilities commenced in 1861. Providing a constitutional guarantee for federal debt, therefore, may have served political as well as financial ends. See Franklin Noll, "Repudiation! The Crisis of United States Civil War Debt, 1865-1870," working paper, Graduate Institute of International and Development Studies, Geneva, December 2012.

[57] Perry v. United States 294 U.S. 330, 349-51 (1935) (attempt by Congress to abrogate a clause in government war bonds calling for payment in gold coin violated the Borrowing Clause, U.S. Const. art. I, § 8, cl. 2, because Congress does not have the authority to issue a debt that it does not intend to repay).

[58] Lynch v. United States, 292 U.S. 571, 579-80 (1934) (statute withdrawing the consent of the United States to be sued under contracts of war risk insurance from World War I held to violate due process).

[59] United States v. Winstar Corp., 518 U.S. 839, 876 (1996) (failure by the United States to comply with the stated terms of vested contracts can result in a breach by Congress of the vested contractual rights).

[60] *Perry*, 294 U.S. at 354 (striking down a law abrogating a clause in government war bonds calling for payment in gold coin as inconsistent with the Public Debt Clause).

[61] According to one law review article on the Public Debt Clause, the clause might apply even before a default occurs. *See* Michael Abramowicz, *Beyond Balanced Budgets, Fourteenth Amendment Style*, 33 TULSA L.J. 561, 589 (1997). The article's author proposes that the provision acts as a "prohibition not only of governmental failure to make payments on a debt, but also of government action that will ultimately lead to such failure." *Id.* at 590.

[62] There are arguably other ways for the President to avoid a default on the public debt, such as unilaterally raising taxes. *See* Neil H. Buchanan & Michael C. Dorf, *supra* note 6, at 19-23. No commentator to date, however, has suggested that the executive branch has the authority under the Public Debt Clause to unilaterally raise taxes in order to avoid default of the public debt.

if Congress has not allocated the President this borrowing authority under the Borrowing Clause.[63]

In general, the adjudication of whether Congress has exercised an authority in a way that violates a provision of the Constitution has been allocated to the judiciary.[64] Thus, under most circumstances, a holder of debt that is threatened or has been defaulted upon would turn, not to the President, but to the federal courts to seek relief.[65] Whether the President would have a role in providing relief to debt holders would depend on whether the President has the delegated, inherent, or implied power to take action to relieve such debt, such as by exercising the power vested in Congress under the Borrowing Clause. The question of whether the President can exercise authority in an area where Congress has been assigned the principal constitutional power is addressed in the case of *Youngstown Sheet & Tube Co. v. Sawyer*.[66]

In *Youngstown*, President Truman was faced with a potential nationwide strike of steel workers, which might have jeopardized the United States' fighting capability during the Korean War. To avert a strike, the President issued an Executive Order directing the Secretary of Commerce to seize and operate most of the steel mills.[67] The President did not cite any statutory authority for this action, but argued that he was acting in his role as Commander-in-Chief of the Armed Forces[68] and with the inherent powers vested in the President as Executive.[69] Congress, however,

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[63] *See supra* note 49; s*ee also* Neil H. Buchanan, *Borrowing, Spending, and Taxation: Further Thoughts on Professor Tribe's Reply*, DORF ON LAW (Tuesday, July 19, 2011), http://www.dorfonlaw.org/2011/07/borrowing-spending-and-taxation-further_19.html. This author suggests that the President has the authority to borrow in excess of the debt ceiling because the President has the authority to ignore unconstitutional laws. Although the authority of Presidents to decline to enforce statutes considered unconstitutional is the topic of substantial academic commentary, s*ee, e.g.*, Dawn E. Johnsen, *The Constitution Under Clinton: A Critical Assessment: Presidential Non-Enforcement Of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. 7, 8 (2000); David Barron, *The Constitution Under Clinton: A Critical Assessment: Constitutionalism In The Shadow Of Doctrine: The President's Non-Enforcement Power*, 63 LAW & CONTEMP. PROB. 61 (2000); Peter L. Strauss, *The Constitution Under Clinton: A Critical Assessment: The President And Choices Not To Enforce*, 63 LAW & CONTEMP. PROB. 107 (2000), this commentary has generally considered situations where there is a conflict between the President and the Congress in the exercise of their respective constitutional authorities. As the power of the purse solely resides with Congress, the issue raised by the President borrowing in excess of the debt ceiling appears to be a different one: what authority does the President gain when Congress exceeds its constitutional authority by failing to raise the debt ceiling to allow the payment of debts?

[64] Marbury v. Madison, 5 U.S. 137 (1803).

[65] Assuming that the debt limit had been reached and that the executive branch did not have funds available to pay a court judgment, however, it is not clear if there would be an effective remedy enforceable by the courts. Impossibility of performance, and in particular fiscal impossibility, has been accepted by virtually all courts as a defense to contempt—at least where the party did not itself contribute to the impossibility. In *Pennsylvania DER v. Pennsylvania Power Co.*, 337 A.2d 823, 829 (Pa. 1975), the Pennsylvania Supreme Court stated that:

> If it is demonstrated that an alleged contemnor is unable to perform (in contrast to willfully disobeying) and has in good faith attempted to comply with a court order ... the purposes for punishing noncompliance are eliminated.

Federal court decisions specifically recognizing fiscal inability as a defense to contempt include *Securities Investor Protection Corp. v. Executive Securities Corp*., 433 F. Supp. 470, 473 (S.D.N.Y. 1977) and *O'Leary v. Moyer's Landfill, Inc.*, 536 F. Supp. 218, 219 (E.D. Pa. 1982).

[66] 343 U.S. 579 (1952); *see* Chad Deveaux, *The Fourth Zone of Presidential Power: Analyzing the Debt-Ceiling Standoffs Through the Prism of* Youngstown *Steel*, 47 CONN. L. REV. 395 (2014).

[67] 343 U.S. at 582.

[68] U.S. CONST. art. II, § 2, cl. 1.

[69] 343 U.S. at 582-83.

had established a different statutory regime for seizure of industrial resources[70] under its authority to "raise and support Armies."[71]

The Court struck down the seizure of the steel mills as beyond the authority of the President to issue.[72] Although Justice Black wrote the majority opinion, it is the concurring opinion of Justice Jackson that has most often been relied upon by the courts in this area.[73] In *Youngstown*, Justice Jackson identified three different scenarios in which a President's exercise of authority in an area assigned to Congress by the Constitution might be exercised. The first is where the President acts pursuant to an express or implied authorization of Congress. In these cases, the President's authority is at its maximum, and would only be unconstitutional if the federal government as an undivided whole lacks power.[74] The second is when the President acts in absence of either a congressional grant or denial of authority, so that he can only rely upon his own independent powers. In these cases, congressional "inertia, indifference or quiescence" may sometimes enable an independent presidential responsibility.[75] The third is when the President takes measures incompatible with the expressed or implied will of Congress. In this scenario, his power is at its "lowest ebb," as he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Under this "severe" test,[76] courts can only sustain presidential control by disabling Congress from acting upon the subject: "Presidential claim[s] to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[77]

The argument that the President can borrow in excess of the debt ceiling imposed by Congress would not be evaluated under the first scenario, as that analysis is reserved for when Congress has delegated power to the President to pursue a course of action. Here, such borrowing authority as has been delegated to the executive branch by Congress via the Secretary of the Treasury is explicitly limited by the debt ceiling, and the President has not been delegated the authority to exceed it.[78] Nor would the argument be addressed under the second scenario, as that analysis is reserved for when Congress has been silent regarding a delegated authority. Thus, the instant case would seemingly fall into the third scenario, where there is a conflict between the purported authority of Congress and a presidential course of action. As Congress's power of the purse is well established, the focus of this scenario would likely be on what countervailing powers the President might have in this situation.[79]

[70] *Id.* at 642.

[71] U.S. CONST., Art. I, § 8, cl. 12.

[72] 343 U.S. at 588-59.

[73] Christopher Bryant and Carl Tobias, *Youngstown Revisited,* 29 HASTINGS CONST. L.Q. 373, 410 (2002).

[74] 343 U.S. at 636-37 (Jackson, J, concurring).

[75] *Id.* at 637 (Jackson, J, concurring).

[76] *Id.* at 640 (Jackson, J, concurring)

[77] *Id.* at 638 (Jackson, J, concurring).

[78] Although, it should be noted, the issuance of certain debts by the Secretary of the Treasury requires the concurrence of the President. 31 U.S.C. §§ 3102, 3103, 3105.

[79] In *Youngstown*, the most significant power used to argue (albeit unsuccessfully) in favor of the seizures was the President's role as Commander-in-Chief. That power, however, seems factually unavailable here. Other broad constitutional language unsuccessfully relied upon in *Youngstown* included the requirement that the executive power be vested in a President. U.S. CONST. art. II, § 1. Although the government had argued that such language "constitutes a grant of all the executive powers of which the Government is capable," Justice Jackson regarded such language as merely an allocation to the President of the executive powers that are otherwise provided for in the Constitution. 343 U.S. at 640-41 (Jackson, J, concurring). The third clause on which the government relied in *Youngstown* was the constitutional provision that "he shall take Care that the Laws be faithfully executed.... " U.S. CONST. art. II, § 3. (continued...)

As noted, commentators have argued that the President's authority to borrow in excess of the debt ceiling may be found in the Public Debt Clause[80] or that such actions might be justified by an appeal to necessity.[81] However, in order to evaluate this authority under the third *Youngstown* scenario, a court would likely need to identify the precise language in the Public Debt Clause that provides the President borrowing authority. Then, under this "severe" test, a court would only be able to sustain the President's action if it could find that the borrowing authority is "within [the President's] domain and beyond control by Congress."[82] This would appear to be a difficult test for the President to meet. The text of the Public Debt Clause, by itself, does not seem to allocate such power to either the President or the executive branch. The clause does not mention the President, nor is there any indication in the clause that its breach would imply the existence of a borrowing power in the executive branch. Rather, the clause appears to be a limitation on the ability of the government to default on debt that has been issued under the Borrowing Clause. Finally, it appears that no court has suggested that the Public Debt Clause serves as the basis for the exercise of Congress's borrowing authority by the President.

Concluding Question: Is the Debt Limit Obsolete?

Various officials and commentators have called for eliminating the debt limit on grounds that it is "obsolete,"[83] or simply gives a venue to "stir up debate about debt,"[84] or is redundant because the need to issue debt results from the excess of spending over revenues. Others argue that control over debt is a critical third leg of the power of the purse.[85] While the other two legs—the power to authorize spending and the power to collect taxes—allow Congress to fine tune policies and priorities, the debt limit is a blunt instrument. Modifying the debt limit typically involves either a change in the limit amount or the date through when a suspension extends. That bluntness, however, may have the advantage of inducing policymakers to focus on fundamental fiscal issues from time to time.

(...continued)

However, Justice Jackson concluded only that this signifies that "ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules." 343 U.S. at 646 (Jackson, J, concurring).

[80] *See supra* note 49.

[81] *See* Neil H. Buchanan and Michael C. Dorf, *supra* note 6. These commentators argue that, while borrowing in excess of the debt ceiling or taking other extra-constitutional measures would usurp congressional authority, allowing a default on debt would also be unconstitutional. *Id.* at 1179. The article goes on to suggest how the President should choose among unconstitutional options by giving distinctively constitutional policy concerns—such as preservation of the balance of powers among the branches—extra weight. *Id.* at 1182.

[82] *Youngstown,* 343 U.S. at 640.

[83] Matthew Yglesias, "The Looming Debt Ceiling Fight, Explained," *Vox*, August 9, 2017, https://www.vox.com/policy-and-politics/2017/8/9/16112364/debt-ceiling-explained.

[84] Bruce Bartlett, "Why Congress Must Now Abolish its Debt Limit," *New York Times*, October 22, 2009.

[85] Anita S. Krishnakumar, *In Defense of the Debt Limit Statute*, 42 HARVARD JOURNAL ON LEGISLATION 135 (2005).

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