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Minimizing debt ceiling crises: Principles and practical advice

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INTRODUCTION

Odd-numbered years of the 2010s may yet come to be remembered as the beginning of the end for American government. In 2011 and 2013 we were treated to debt ceiling showdowns that appeared, from the outside, to bring the nation perilously close to government default and financial implosion—not to mention a full-blown constitutional crisis. As we face another likely showdown in 2015, this chance of disaster still looms.

Many insiders confidently dismissed the possibility of a breakdown during both of these episodes (and during other, less nerve-racking recent debt ceiling standoffs), and their assurances turned out to be correct: deals agreed to at the eleventh hour defused each situation. As we prepare for another possible debt ceiling showdown in 2015, insiders will again put out quiet reminders that, bluster aside, there is little to worry about.

That dismissive interpretation of our contemporary debt ceiling showdowns is likely correct, but with so much at stake we should be unwilling to depend on "likely." Officials should pursue ways of escaping this potentially destructive cycle (ideally by removing the ceiling entirely) and minimizing its riskiness if it persists. They must also prepare for the

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Anxiety about potential breakdowns of negotiation leading to default has led many commentators to offer prescriptions for preemptively dissolving the whole debt ceiling problem, especially through manipulations of the Treasury Department's statutory powers. This paper argues that no such formula can offer a reliable way out of what is an extremely complex multi-player interaction, and that most of the proposed solutions would in fact bring on the constitutional crisis they are designed to head off. More generally, there are no clever solutions.

Instead, this paper explains why both sides should approach debt ceiling negotiations with five ordered priorities:

1. Avoiding constitutional crisis.
2. Avoiding financial crisis.
3. Avoiding doing specific harms.
4. Avoiding the routinization of near-crises.
5. Achieving important reforms to fiscal processes.

With these in mind, the ideal resolution of our festering debt ceiling problem would involve creating a bipartisan consensus on budgetary reform and then replacing the debt ceiling with more useful fiscal control mechanisms.

Unfortunately, that ideal will be very difficult to achieve in our current political environment, and so it is important to think through and prepare for situations in which negotiations somehow break down and put the Treasury Department *in extremis*, with no ability to pay all of the nation's bills on time while adhering to the statutory debt ceiling. This paper offers recommendations for avoiding this kind of dire impasse, in which there would be no good options for the nation, as well as offering considerations for how to escape it with as little damage as possible if avoidance fails. In that nightmare scenario, the goal should be to quickly and quietly return to normal Treasury operations, so that in retrospect the broken negotiations could be viewed as a minor malfunction rather than a fateful meltdown.

If we were to arrive at a situation in which the Treasury Department has no cash on hand to pay its bills coming due and no more room to issue debt under the statutory ceiling, some kind of strange action will be made inevitable. The government must think clearly about which of its options represents the least constitutionally offensive and the least harmful way for it to act in such a situation. There would be no good choices, but some options would be less bad than others. The two best options appear to be (1) prioritized debt service combined with delayed payments and (2) debt issuance above the ceiling. The paper considers what conditions might make each preferable, emphasizing that political particulars would be decisive.

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WHY WE CHOSE A DEBT CEILING, AND WHY IT PERSISTS

To understand the role the debt ceiling currently plays in America's fiscal policymaking—a peculiar one among developed nations, none of which have comparable fiscal institutions[1]—it is worth briefly pondering what alternative arrangements preceded it and why it was adopted. Throughout the 19th century, the Treasury Department required congressional authorization for each and every bond issuance. Congress was thus directly involved in deciding on the rates, terms, and amounts of debt issued. This involvement would seem to imply legislative leadership in debt management practices that perhaps is enough to make champions of Congress yearn for a restoration of strong and detailed congressional involvement in fiscal policy. The Wall Street Journal editorial page, for example, has called for "returning to the pre-1917 practice" in which Congress had to approve the amount and terms of each individual bond issue.[2]

But this is an anachronistic misconception of what federal fiscal policy was like in a very different era. Federal spending in the nineteenth century was miniscule compared to what it would become in the 20th century, which naturally made it a less contentious issue. On the eve of World War I in 1914, the United States federal government's outlays and receipts were both around $725 million. Both were more than double what they had been 20 years earlier, but were nevertheless less than 2 percent of national income. Total federal debt in 1914 was around $1.2 billion, or around 3.2 percent of national income.[3] The federal debt was thus more than trivial, but it represented just over a fifth of the country's total government debt outstanding.[4]

> Even if Congress is unlikely to become the primary decision-maker, perhaps it would be healthy for it to at least be a critical ratifier of Treasury's debt management choices rather than having nothing at all to do with these choices.

Apart from size, federal spending, taxation, and borrowing were also simply less subject to political controversy. There was a broad consensus about the desirability of minimizing the federal debt. As one economic historian succinctly put it, "The peacetime debt policy of the federal government over the 19th century was in a word, retirement," both in theory and in practice.[5] And despite continuous congressional involvement, there was a great deal of looseness in matters of debt management, which were not of great concern to the public. Like most state and local governments of the era, the federal government "appropriated funds to various departments without bothering to estimate the total or to assure enough revenue to cover it. Neither expenditure nor revenue was planned but rose and fell in accordance with the changes in the business cycle. If a deficit resulted, debt was incurred; if a surplus occurred, spending was increased sharply; and if a surplus still remained, it was disposed of in the most opportunistic fashion."[6]

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1 Government Accountability Office, "Debt Limit: Delays Create Debt Management Challenges and Increase Uncertainty in the Treasury Market," GAO-11-203 (February 22, 2011). (http://www.gao.gov/assets/320/315843.pdf), 30. Denmark does have a total limit on debt, but that is coupled with a parliamentary system which makes an impasse between legislature and government highly unlikely.

2 "Repeal the Debt Ceiling," *Wall Street Journal* (February 11, 2014) (http://www.wsj.com/articles/SB10001424052702304104504579377303355489512).

3 Taken from U.S. Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970 (Washington, D.C.: 1975), Series F-1, Y-335, Y-336, and Y-338.

4 Local debt made up by far the largest component. John Joseph Wallis, "American Government Finance in the Long Run: 1790 to 1990," Journal of Economic Perspectives 14 (2000): Table 2, p. 66. The figure Wallis provides is for 1913.

5 John A. James, "Public Debt Management Policy and Nineteenth-Century American Economic Growth," *Explorations in Economic History* 21 (1984): 192-217, 193.

6 Paul Studenski and Herman E. Kroos, *Financial History of the United States: Fiscal, Monetary, and Tariff, including Financial Administration and State and Local Finance* (2nd Ed.) (New York: McGraw-Hill, 1963), p. 8.

With the First World War and a profusion of federal spending during the New Deal paid for through a new national income tax, this rather relaxed mode of fiscal planning became thoroughly obsolete. Taxation became more political and budgeting more contentious and deliberate. But as Congress and the White House together traveled the road to the modern budgeting process they did not intensify Congress's involvement in debt management. Quite the opposite: during World War I, Congress passed large debt authorizations meant to act as ceilings for war bond issues and in 1919 relinquished to the Treasury Department control of the specifics of duration and terms offered. That became the norm during the 1920s and 1930s, and with a 1939 authorization of debt of up to $45 billion without any restrictions on Treasury's management of its composition, the debt ceiling took what is more or less its modern form.[7] Since that time, Congress has chosen to manage only the total amount of debt authorized—that is, the level of the debt ceiling, a number set and periodically reset by statute.

> Fighting over the debt ceiling thus becomes a substitute for a more efficacious reform program for the broken budget process, much to our national detriment, especially given that worthy reforms are available if sought.

Should Congress be more directly involved in issues of debt management? Although hardly any legislators in the past 75 years have ever shown any interest in doing so, there may be a case for it. Even if Congress is unlikely to become the primary decision-maker, perhaps it would be healthy for it to at least be a critical ratifier of Treasury's debt management choices rather than having nothing at all to do with these choices. Certainly there are some consequential issues involved. A Brookings Hutchins Center working paper released last September noted that Treasury's duration management strategy might have worked at cross-purposes with the Federal Reserve's quantitative easing policies in recent years.[8] Commentators frequently wonder whether the Treasury should be doing more to take advantage of the current moment's historically low rates by offering super-long or perpetual bonds. Were members of Congress to sink their teeth into these issues, useful discussions could conceivably result, and the involvement with a nitty-gritty matter of governance could have a useful educative function for the legislators. (It is also easy to make the contrary case that we are better off having debt management treated as an apolitical matter.)

But it should be clear that these questions have nothing to do with the matters discussed in recent years on the occasion of debt ceiling showdowns. Instead, at issue in 2011 and 2013 was the trajectory of federal government spending, characterized by Republicans as "out of control" or "unsustainable," and characterized by Democrats as merely mismatched with expected revenues. Whatever one makes of the substance of these debates, it is impossible to straightforwardly connect them to matters of debt management. Nobody is getting agitated about the mix of treasury bills with short- and long-term bonds, or about whether the government's debt should be callable, or whether anything should be changed about Treasury's auction practices. Rightly or wrongly, these matters are treated as technical and esoteric, and they have become no less so because of the recent debt ceiling showdowns.

The recent debt ceiling fights represent, instead, attempts to relitigate budget choices already totally controlled through the congressional budget process. We make choices about spending and taxation; these choices produce roughly predictable consequences for the size of the nation's debt; and then our legislators use debt ceiling raises

7 Studenski and Kroos, *Financial History of the United States*, pp. 291-92, 427.

8 Robin Greenwood, Samuel G. Hanson, Joshua S. Rudolph, and Lawrence H. Summers, "Government Debt Management at the Zero Lower Bound," Hutchins Center Working Paper No. 5 (September 30, 2014) (http://www.brookings.edu/research/papers/2014/09/30-government-debt-management-zero-lower-bound).

as an opportunity to second-guess this process. There is nothing automatically destabilizing about this process; for most of its history, the debt ceiling has provided a forum for relatively innocuous out-party grousing by fiscal conservatives followed by perfunctory increases. But at various moments (the late 1950s, late 1970s, mid-1980s, mid-1990s, and early 2010s) the debates around raising the ceiling have taken a more substantive character, with the outcome seeming less certain.[9] When this occurs, these debates obscure the importance of the choices made in the normal budgeting process, such that the electorate could be forgiven for (wrongly) thinking that debt ceiling fights are the most important controllers of future spending and taxation.

To be fair, the "we" in the preceding paragraph is aspirational at best; Congress itself is far from a unitary body and the president represents an independent and often hostile negotiator dealing from a position of strength on budgetary issues. As a result, settling on spending and taxation choices becomes a devilishly complex negotiating game in which both sides seek to achieve a variety of objectives important to their respective bases, present themselves as reasonable to tuned-in voters, and blame the other side for any unpleasant outcomes. Given these complex dynamics, it is possible for smart people to believe that revisiting budgetary choices in the context of raising the debt ceiling will favor their side's interests. Fiscally conservative Republicans have made this argument, though I have argued that their view of the situation is predicated on faulty assumptions and ends up precisely backward.[10]

[I]f we are doomed to repeat these cyclical confrontations, we should understand why they are so dangerous and how we can best cope with them.

As things stand now, both sides agree on the basically dysfunctional nature of a budgeting process that includes a fraught, market-scaring moment of deciding whether debt should be allowed to follow the path determined by spending and tax choices; it is well-established that these episodes are actually costly.[11] But the two sides cannot agree on what removing this moment would do to the overall fiscal dynamics, nor can they agree on the shape of a better institutional way forward.[12] Fighting over the debt ceiling thus becomes a substitute for a more efficacious reform program for the broken budget process, much to our national detriment, especially given that worthy reforms are available if sought.[13]

Escaping the cycle of recurring debt ceiling crises is thus probably inseparable from the pressing work of reforming America's federal budgetary institutions. Failing that, if we are doomed to repeat these cyclical confrontations, we should understand why they are so dangerous and how we can best cope with them.

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9 For references, see Philip Wallach, "Mr. Boehner, Tear Down This Ceiling!" *Brookings Governance Studies* (January 2013) (http://www.brookings.edu/research/papers/2013/01/10-debt-ceiling-wallach).

10 Philip Wallach, "End the Debt Ceiling," *National Review Online* (October 30, 2013) (http://www.nationalreview.com/article/362411/end-debt-ceiling-philip-wallach). Of course it is fair to question whether it is correct to speak of "both sides" at all, given the variety of interests that members of Congress have; for some members, dysfunction and even crisis may serve their political interests. This paper optimistically assumes that such members represent a marginal faction.

11 GAO, "Debt Limit: Market Response to Recent Impasses Underscores Need to Consider Alternative Approaches," GAO-15-476 (July 2015) (http://www.gao.gov/products/GAO-15-476).

12 One controversy is whether changing the debt ceiling statute to prioritize debt payments would be constructive or would merely invite more conflicts. See Philip Wallach, "Will the Default Prevention Act make debt ceiling standoffs less dangerous?," *FixGov* (Brookings blog) (September 14, 2015) (http://www.brookings.edu/blogs/fixgov/posts/2015/09/14-default-prevention-act-debt-ceiling-wallach).

13 See, for example, ideas collected by the Center for Effective Public Management in 2014 (http://www.brookings.edu/blogs/fixgov/series/reforming-the-budget); and Alice M. Rivlin and Pete Domenici, "Proposal for Improving the Congressional Budget Process," Bipartisan Policy Center (July 2015) (http://bipartisanpolicy.org/wp-content/uploads/2015/07/BPC-Congressional-Budget-Process.pdf).

WHY A FAILURE TO RAISE THE DEBT CEILING WOULD BE SO PROBLEMATIC

Would a failure to raise the debt ceiling once the Treasury Department's extraordinary measures run out really be so bad? The most enthusiastic defenders of debt ceiling brinkmanship express doubts. They say that debt would continue to be serviced and rolled over, thereby averting any truly disastrous fallout related to an increased perception of treasury bonds' riskiness. They also confidently assert that cutting back payments to match revenues would cause no particularly thorny problems. This complacency ignores the complex reality of Treasury's debt management practices and fails to appreciate the profound legal and constitutional difficulties entailed by a debt ceiling crisis, which would indeed be as bad as advertised.

First there are the practical issues of debt management. As noted above, these are quite tangential to the main arguments of debt ceiling standoffs. Most people perceive these issues as technical, better left to the professionals at the Treasury Department to sort out. But we must understand the mechanics of Treasury's day-to-day debt management practices to have a sense of the real-world effects of failing to raise the debt ceiling.

At regular auctions, the Treasury Department offers securities of various durations, most of which are bought by primary dealers (a select group of financial institutions committed to bidding at every auction) and various investment funds, who then trade the securities on secondary markets.[14] Prices (and thus rates) are determined by the level of bids, which are mostly driven by bond market professionals.

A point that Treasury Secretary Jacob Lew has emphasized is that debt must be auctioned to the private sector not only to cover new deficit spending but also to roll over existing debt that reaches maturity.[15] Consequently, when Treasury is at the debt ceiling—as it has been since March—it does not stop holding auctions. Were it to run out of the headroom provided by extraordinary measures (the Treasury's well-worn set of accounting maneuvers used to facilitate additional deficit spending without increasing the total debt subject to the debt limit), the government's finances would immediately become acutely sensitive to the favorability of the bids at auction, since the government would be constrained to offering a set face value of bonds (equivalent to whatever face value is maturing at that time) for whatever payments it can get rather than calibrating its total offerings to yield a desired amount.

Any attempt to make the government operate smoothly once the limit has been reached could end in a failed auction, missed payments attributable to administrative confusion, or some other confidence-eroding result. Although the nation's primary dealers are required to bid on U.S. debt, there is no guarantee that they will make bids that imply yields favorable to the government. If they were to defect en masse, it is hard to see what adverse consequence they would face—the New York Fed could suspend their status as primary dealers, but ultimately it depends on this set of financial counterparties to facilitate its operations.[16] Developed nations, including the U.K. and Germany, have experienced failed auctions in recent years, and there should be no illusion that the U.S. would be immune

14 In recent years, primary dealers' share of purchases has fallen sharply, but they remain responsible for slightly more than half of all purchases. See Michael Fleming and Sean Myers, "Primary Dealers' Waning Role In Treasury Auctions," *Liberty Street Economics* (February 20, 2013) (http://libertystreeteconomics.newyorkfed.org/2013/02/primary-dealers-waning-role-in-treasury-auctions.html#.VaQVufPD-DZ); Daniel Kruger, Kasia Klimasinska, and Caroline Gage, "Dealers Seek U.S. Treasury's Help in Regaining Grip on Debt," *Bloomberg Business* (February 24, 2014) (http://www.bloomberg.com/news/articles/2014-02-24/bond-dealers-seek-u-s-treasury-s-help-in-regaining-grip-on-debt).

15 See his remarks, "The Debt Limit," Hearing before the Senate Finance Committee (October 10, 2013) (http://www.finance.senate.gov/hearings/hearing/download/?id=8dfd9f0b-715b-4122-a52d-0ad8a9d8ebe7): 8-10.

16 Federal Reserve Bank of New York, "Administration of Relationships with Primary Dealers" (January 11, 2010) (http://www.newyorkfed.org/markets/pridealers_policies.html).

from this danger if investors' confidence were shaken by acrimonious failed negotiations.[17] In addition to sending a destabilizing vote of no confidence, a failed auction would exacerbate the government's cash flow problems.

Meanwhile, if the Treasury sought to make as many payments as debt rollovers and cash flow allowed, there is no guarantee that they would be able to do so competently, since they have no experience with such prioritization. The Secretary of the Treasury and the department's staff have been the most forceful publicists of this limitation in recent years, stressing that their computer systems give them no way to pick some payments (e.g., to seniors or veterans) over others, with the likely exception of debt service.[18] While some of the debt ceiling's most enthusiastic adherents claim that the Treasury could selectively honor the nation's most crucial commitments while delaying non-essential payments, there is little evidence that bureaucrats are up to this task—understandable, since no law has ever suggested that doing so is a valid function.

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Indeed, trying to contemplate what selective prioritization would look like brings us to the constitutional problems that running out of operating cash would immediately raise. As Professors Neil Buchanan and Michael Dorf have argued since 2011, an executive branch faced with bills to pay and no cash to pay them with would face a constitutional "trilemma" admitting of no clearly constitutional solution. Three binding constraints would seem to create an impossible situation: (1) Expenditures are set by law, and spending duly ordered by Congress is non-discretionary; (2) Revenues are also a function of existing laws, and the executive branch has no power to levy new taxes unilaterally; and (3) The debt ceiling statute prevents the executive from closing the gap between revenues and spending by issuing new debt once the limit is reached.[19] Although many commentators have acted like there would be nothing constitutionally problematic about simply withholding payments when there is no money available to make them, Buchanan and Dorf argue that this kind of decision is explicitly barred by the Impoundment Control Act of 1974. As they see it, there is no prioritization power and thus every action that the president might take would be unconstitutional—as well as open to charges of arbitrariness and favoritism. The question then becomes which way out of the crisis is least constitutionally problematic, and Buchanan and Dorf favor issuing debt above the ceiling.

One can challenge Buchanan and Dorf's equation of delays in payments caused by a lack of available cash with impoundments, and doing so calls into question their certainty about an inescapable constitutional zugzwang.[20] But whether their analysis is definitive or not, it illustrates the perilous situation the nation would face if we were hard up

17 Neil Shah, "U.K. Bond Auction Fails for First Time in 14 Years," Wall Street Journal (March 26, 2009) (http://www.wsj.com/articles/SB123799043956938621); Emese Bartha, "Uncovered, But Not Disastrous in Germany," *The Euro Crisis* (*Wall Street Journal* blog) (September 26, 2012) (http://blogs.wsj.com/eurocrisis/2012/09/26/uncovered-but-not-disastrous-in-germany/).

18 Mindy R. Levit et al., "Reaching the Debt Limit: Background and Potential Effects on Government Operations," Congressional Research Service 7-5700 (March 27, 2015) (https://www.fas.org/sgp/crs/misc/R41633.pdf): 9-12.

19 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," Columbia Law Review 112 (2012): 1175-1243; see also Neil H. Buchanan, *The Debt Ceiling Disasters* (e-book) (Durham, N.C.: Carolina Academic Press, 2013).

20 As a leading student of the budget notes, "The line between routine financial management and impoundment is not always clear." Allen Schick, *The Federal Budget: Politics, Policy, Process* (Washington, D.C.: Brookings Institution Press, 2007), p. 286. Of course there would be nothing routine about delaying payments because of an exhaustion of the Treasury's funds, but arguably doing so would be better understood as a natural form of financial management than as a policy-driven impoundment.

against the debt ceiling. Whatever choices are made at that point, we would see prominent scholars, media figures, and government officials declaring that these choices represent egregious violations of the Constitution, possibly impeachable ones. At best, this would be short-lived and leave only a nasty bruise on America's international reputation; at worst, it could be the beginning of a more serious political crack-up.

WHY NONE OF THE CLEVER IDEAS CAN SAVE US

The enormity of the threat posed by a failed debt ceiling negotiation thus noted, it should be clear why so many commentators have sought out ways to proactively nullify the possibility by vitiating the debt ceiling itself. It is hard not to be charmed by the cleverness encapsulated in some of these proposed solutions, and impossible to disagree that we would be better off rid of the debt ceiling. In spite of that, the political dynamics of the debt ceiling standoffs make it so that any *deus ex machina* capable of extracting us from our current fights will strike people as deeply illegitimate, heighten political tensions, and potentially accelerate the constitutional crisis it is meant to ward off. A brief consideration of two of the most-discussed options shows why this is the case.

> A good rule of thumb for executives in troubled times: if you can help it, don't do anything that can plausibly be characterized as a coup.

First there is the idea that the Treasury secretary (in conjunction with the president) ought to render the debt ceiling irrelevant through an act of autonomous constitutional interpretation. In other words, they ought to come forward to say: given a correct understanding of the Fourteenth Amendment's public debt clause (§ 4), subjecting the full and timely repayment of the United States' public debt to the vagaries of partisan brinkmanship is manifestly unconstitutional. As a result, the Treasury Department will go on issuing bonds regardless of how the existing stock of debt compares to the statutory limit.[21] A jarring variant on this seeks to reach the same conclusion through an appeal to the judiciary. That is, "the Supreme Court can, under its own, independent, power under Article III of the Constitution, impose taxes and borrow money." Assuming that some party with a plausible case for standing, such as the Trustees of the Social Security Trust Fund, would bring a case to the Supreme Court, the Justices would "directly order the Department of Treasury to issue debt obligations in the amount and type determined by the Court to be sufficient to remedy the violation" created by the debt ceiling impasse.[22]

The proponents of these bold constitutional maneuvers are imprecise on specific mechanics, but they seem to be implying that the time to resort to these options is just as soon as the possibility of default becomes a serious one. That would include the standoffs in 2011 and 2013; the implication is that if the president and Treasury secretary (or perhaps even the Supreme Court, somehow insinuating itself into the process) had simply curtailed the fraught negotiations by a bold declaration of their own constitutional duty, we would today be free of further debt ceiling theatrics and better off for it.

This thinking is almost comically blind to the potential downsides of such a declaration, however. Congress, which has always worked to resolve debt ceiling confrontations in the past, would rightly see the executive branch (or judiciary) as attempting to usurp its constitutional borrowing power, now and forever after. There would be no way

21 Jacob D. Charles, "Note: The Debt Limit and the Constitution: How the Fourteenth Amendment Forbids Fiscal Obstructionism," *Duke Law Journal* 62 (2013): 1227-66; Neil H. Buchanan and Michael C. Dorf, "Nullifying the Debt Ceiling Threat Once and for All: Why the President Should Embrace the Least Unconstitutional Option," *Columbia Law Review Sidebar* (December 21, 2012): 237-49.

22 Adam Rosenzweig, "The Article III Fiscal Power," *Constitutional Commentary 29* (2014) (http://ssrn.com/abstract=2334424): 128, 163.

to de-escalate what would quickly become one of the most significant interbranch conflicts in American history, and it seems hard to imagine that Congress would have any other recourse than impeachment. As this epic battle played out, U.S. debt repayments would look less certain than ever and the country's international reputation would (justifiably) plummet.

Very similar problems would attend any attempt to exploit legal technicalities as a way out of the debt ceiling bind. The most popular of these has been the platinum coin option, in which the Treasury would use a legal provision designed to allow it to create platinum coins of any denomination to mint coins with $1 trillion (or more) in face value, which could then be credited to Treasury's accounts and allow timely payments to be made without raising any over-the-limit debt. Proponents of the idea concede that Congress never meant to give the Treasury such an unbounded power, but point out that it was put in place to generate seigniorage income (government profit reaped through issuing currency). And they argue that exploiting this loophole has policy consequences less egregious than playing out repeated debt ceiling confrontations.[23]

Once again this ignores the way in which a small chance of debt ceiling negotiation breakdown is replaced with an absolute certainty that Congress would feel that the president had inappropriately usurped powers that belong with the people's branch. Once again de-escalation apart from complete congressional acceptance would be very difficult (though at least in this case statutory changes could clearly prohibit the maneuver in the future), and impeachment would be very likely.

A good rule of thumb for executives in troubled times: if you can help it, don't do anything that can plausibly be characterized as a coup. Both strategies just discussed fail this test. For all of the certainty summoned by the champions of the "solutions" that they are legally in the right, they err in thinking that legal correctness is the crux of the matter. Such high stakes constitutional law is always to a large degree constitutional politics, and the maneuvers they propose would unquestionably escalate hostilities in our already troubled polity. The Obama administration's explicit rejection of these options thus shows real prudence.[24]

WHY AVOIDANCE IS APPROPRIATE—BUT POSTPONEMENT STRATEGIES ARE OF LIMITED VALUE

A different class of options would be far less drastic: rather than rendering the debt ceiling irrelevant, they would simply push off the day of reckoning. Essentially, these would be extra-extraordinary measures that would bolster the Treasury's ability to juggle the nation's financing needs even as the debt ceiling remains constant. Avoidance of unnecessary reckonings and crises is good constitutional practice, and several ideas along these lines deserve consideration, but there are reasons to doubt that they provide any dependable escape route from our debt ceiling problems.

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23 See Joe Wiesenthal, "UPDATE: Suddenly, Lots Of Influential People Are Talking About The Trillion Dollar Coin Idea To Save The Economy," *Business Insider* (January 3, 2013) (http://www.businessinsider.com/suddenly-lots-of-influential-people-are-talking-about-the-trillion-dollar-coin-idea-to-save-the-economy-2013-1); Josh Barro, "Why We Must Go Off the Platinum Coin Cliff," *BloombergView* (January 3, 2013) (http://www.bloombergview.com/articles/2013-01-03/why-we-must-go-off-the-platinum-coin-cliff); Matthew Yglesias, "The Platinum Coin Was Intended to Create Seigniorage," *Slate Moneybox* (blog) (January 10, 2013) (http://www.slate.com/blogs/moneybox/2013/01/10/platinum_coin_seigniorage_the_intended_use_of_the_platinum_coin_provision.html).

24 For repudiation of the platinum coin strategy, see Ezra Klein, "Treasury: We won't mint a platinum coin to sidestep the debt ceiling," *Washington Post Wonkblog* (January 12, 2013) (http://www.washingtonpost.com/news/wonkblog/wp/2013/01/12/treasury-we-wont-mint-a-platinum-coin-to-sidestep-the-debt-ceiling/); for repudiation of the Fourteenth Amendment strategy, see White House Press Briefing of October 3, 2013 (https://www.whitehouse.gov/the-press-office/2013/10/03/press-briefing-press-secretary-jay-carney-10313).

These ideas often come down to manipulating Treasury's debt management practices so as to raise more cash in the present for the same increase in the total face value of the debt—paid for in the form of higher long-term cost. For example, Matt Levine explored the possibility of issuing "super-high-coupon bonds" which would raise a multiple of their face value at sale.[25] Steven Schwarcz makes a well-thought-out presentation of how the government might essentially create de facto financial obligations that nevertheless escape debt limit considerations through structured financial vehicles.[26] Charles Tiefer explains how the Federal Reserve might create emergency facilities analogous to those it used to fend off the financial crisis in 2008 to provide temporary relief.[27] These are far better ideas than the ones that purport to nullify the debt ceiling in the previous section, in large part because they are less obviously confrontational and more arcane. To the extent that these options might provide an escape hatch from a failed negotiation, the Treasury Department (and Fed) should seriously consider having them as backups.

> Avoidance of unnecessary reckonings and crises is good constitutional practice, and several ideas along these lines deserve consideration, but there are reasons to doubt that they provide any dependable escape route from our debt ceiling problems.

But these options would require significant departures from past practice, which might limit their usefulness. It is probable that Treasury would need to change its own regulations to be able to take these actions, which would require advance planning and ideally some lead time. However, publicly initiating any such process in advance would once again signal the executive branch's lack of confidence in the negotiation process, potentially exacerbating the problem.

If we suppose that Congress was not unduly provoked by this planning, these maneuvers would nevertheless be of limited value if they created well-understood amounts of extra cash with which to fund operations at the ceiling. In that case, Congress could simply incorporate a new deadline into its calculations. Since the so-called "X date" when extraordinary measures run out is essentially subject to conscious manipulation in debt ceiling negotiations (especially given the recent pattern of suspending the ceiling until a specific date, rather than setting a somewhat less predictable dollar amount), all that these measures might do is change the timing of the showdown.

What would make these options most valuable is if they could provide uncertain amounts of financing that nevertheless were clearly inferior to regular, under-the-ceiling financing, and perhaps Schwarcz's structured financing options could be made to fit this bill. If Congress reconciled itself to the existence of such a trap door, so that we could use the X date as the negotiating deadline but still have some mechanism for getting a little extra time after that, it would significantly mitigate the risk of these conflicts. But it would also probably correspondingly diminish Congress's negotiating leverage and so it is hard to understand why Congress would acquiesce to its development. We might hope that some of these measures can be made super-secret backups, but the risk of leaks or backlash against behind-the-curtains machinations if they are eventually used make that a dangerous game.

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25 Matt Levine, "Instead Of A Trillion-Dollar Platinum Coin, Treasury Should Mint A Trillion-Dollar $500bn Bond," *Dealbreaker* (January 15, 2013) (http://dealbreaker.com/2013/01/instead-of-a-trillion-dollar-platinum-coin-treasury-should-mint-a-trillion-dollar-500bn-bond/); "Mint the Premium Bonds!" *BloombergView* (October 2, 2013) (http://www.bloombergview.com/articles/2013-10-02/mint-the-premium-bonds-).

26 Steven L. Schwarcz, "Bypassing Congress on Federal Debt: Executive Branch Options to Avoid Default," *Yale Journal on Regulation* 31 (2014): 269-302.

27 Charles Tiefer, "Confronting Chaos: The Fiscal Constitution Faces Federal Shutdowns and (Almost) Debt Defaults," *Hofstra Law Review* 43 (2014): 518-20, 545-59.

HOW TO DEFUSE A CRISIS IF IT COMES

The problems inherent in debt ceiling nullification and delay strategies indicate two prescriptions. First, to repeat what has already been said, bipartisan compromises to permanently remove the debt ceiling would be of tremendous value; barring that unlikely possibility, figuring out ways of smoothing negotiations to raise the debt ceiling and thus avoid a near-term crisis should also be valued quite highly. Second, the Treasury Department and president should be prepared for the catastrophic possibility that negotiations would break down, with a strategy to minimize the harm from any crisis.

Five priorities should inform this strategy, ranked from most important to least important:

1. Avoiding constitutional crisis.
2. Avoiding financial crisis.
3. Avoiding doing specific harms.
4. Avoiding the routinization of near-crises.
5. Achieving important reforms to fiscal processes.

If we are already in a situation in which the Treasury has exhausted all of its extraordinary measures and the debt ceiling has become a hard constraint, it may seem that there is no avoiding a constitutional crisis, which would already be upon us. But portraying crises as all or nothing affairs is the stuff of Sorkinian drama, not of real politics. Given the right mindset, potential implosions of our constitutional order may be reduced to hiccups; what seem like irreparable harms may be converted into manageable malfunctions.

Drawing inspiration from George R.R. Martin's Lannisters, leaders should coordinate around the message that "The United States always pays its debts."

In the midst of an exploded debt ceiling negotiation, the country's political leaders should look to their Constitutional oaths to inform them: legislators have sworn to "support this Constitution" and the president to "preserve, protect, and defend" it, and together those commitments should push them toward rapid reconciliation. More concretely, as a way of minimizing the fallout from the crisis, it is crucial that leaders from Congress and the executive branch figure out a way to concurrently broadcast reassuring messages about the ephemerality of the current difficulties; the more that the situation can be characterized as something other than "default," the better. Drawing inspiration from George R.R. Martin's Lannisters, leaders should coordinate around the message that "The United States always pays its debts."

Cultivating this reputation is important even if the statement is less than 100 percent true. But could any deviation from this unbroken norm really be minimized? In some political environments, this might be less difficult than it sounds. Indeed, the question is an ironic one, given that the United States did in fact experience a technical default in 1979.[28] Following protracted debt limit negotiations in March and April of that year and with the help of "an unanticipated failure of word processing equipment used to prepare check schedules," the Treasury missed payments to T-bill holders due on April 26, May 3, and May 10. Further, it did not readily pay interest to compensate for its lateness, but had to be forced into doing so.[29] This episode was costly, leading to a lingering spike in yields and a

28 The application of the "technical default" label could be contested, but that basically proves the broader point.

29 Donald Marron, "The Day the United States Defaulted on Treasury Bills," *TaxVox* (May 26, 2011) (http://taxvox.taxpolicycenter.org/2011/05/26/the-day-the-united-states-defaulted-on-treasury-bills/).

GAO report sternly recommending that "A New Approach to the Public Debt Legislation Should Be Considered."[30] But by now the episode is barely remembered at all, let alone as a defining constitutional crisis.

We are worlds away from 1979 in very many ways. Rather than a fractious but large majority of his own party in Congress, the president today faces a hostile partisan opposition; the media has evolved to amplify all confrontations; and financial markets are far larger and more open to public scrutiny. It would be much harder for the Treasury secretary and leaders of Congress in 2015 to strongly and *credibly* convey that payment would only be a matter of when, not if, to nervous investors. And yet this would still be the key to minimizing the damage from the crisis. The goal should be to make the whole situation seem anomalous, regrettable, fleeting; a mere snafu rather than a permanent warping of the separation of powers and our constitutional fabric.

All this is very abstract; what should the Treasury Department actually do as it faces a day's payments due without sufficient cash on hand to meet them all?

Sounding out Congress, Treasury would have two primary options. First, it could attempt to prioritize debt service while making all other payments on a day-by-day basis as cash becomes available. Second, it could simply hold a bond auction to raise new funds, notwithstanding the offense to the debt limit statute.

The preceding discussion should make it clear that the answer to this must depend on the feeling of the negotiating partners in Congress, whose cooperation will be the key to ending the crisis quickly. This assumes, of course, that they want to find a shared way out of the crisis: if 218 House members, 41 senators, the Speaker of the House, or the Senate majority leader were intent on forcing the government to operate on its cash flows for an extended period of time, the situation would be much bleaker—indeed, it might be so bad that inviting a financial crisis would be necessary to avoid a full-blown constitutional meltdown. But there is absolutely no indication that we live in such a world right now.

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Hold on! Didn't this paper already explain why prioritization and nullification of the debt limit statute were uncertain, dangerous options that should be eschewed if at all possible? It did, and they should; there is no denying that these are very bad options, but if it came to the point where the Treasury's cash reserves were exhausted and payments were due, both would probably be better than missing debt service payments. Both have advantages and disadvantages.

Debt service prioritization coupled with chronological prioritization of other payments seems like the least arbitrary way to comply with the debt limit. Although its prioritization of bondholders makes Treasury vulnerable to "Pay China and rich people first" political attacks, these should be easily shrugged off, as this limited perception of unfairness is a small price to pay for avoiding financial crisis. There are reasons to think that prioritizing debt service alone is more

30 GAO, "A New Approach to the Public Debt Legislation Should Be Considered," FGMSD-79-58 (September 7, 1979) (http://www.gao.gov/assets/130/127694.pdf).

feasible than any other category of payments, since these payments are handled by separate computer systems, making the risk of accidental default modest.[31] And meanwhile it minimizes any other concerns of arbitrariness by saying that the executive will not pick and choose which duly appropriated expenditures ought to be made first.

On the other hand, there is no statutory basis for the procedure, and it thus represents a fairly bold assertion of executive authority. There is no way around the essentially political nature of putting debt payments first, and millions of Americans would be adversely affected by having scheduled payments from the government made late, potentially causing an immediate negative economic shock. Political leaders of both parties might nevertheless treat this as the responsible holding pattern, and so debt prioritization coupled with chronological payments for all other commitments might represent the least politically conflictual way to bide time until a debt ceiling increase could be secured.

The other major option seems far more dramatic: the Department of the Treasury could simply schedule and hold bond auctions in its normal way, notwithstanding the fact that new issuance would push debt subject to limit above the statutory limit. Put plainly: Treasury could just ignore the debt ceiling and see what happens.

The good thing about this is that issuing new debts does not impose direct costs on people expecting payments from government or anyone else. Instead, it relies on bond-buyers' willingness to lend money to the government in exchange for interest. Nobody ever died from the choice to hold a bond auction. If investors fear that this debt will be repudiated, they can effectively charge a political risk premium, making lower bids for the securities and thus effectively being promised higher yields. If such auctions came off successfully, they could bring in all of the money needed for the country to stay current on all its obligations, thereby minimizing real economic harms stemming from a failed debt ceiling negotiation. And any over-the-ceiling stigma could be quickly dispelled if Congress included language in its debt ceiling increase to accept the debt as valid and in every equivalent to other public debt.

Two obvious questions plague this approach, though. First, would it simply mean the end of the debt ceiling forever? Second, would investors demand such a high premium as to make the new issuance politically toxic—or, worse yet, might they simply spurn the auction so much that it would fail outright? If either question could be answered in the affirmative, this maneuver would quickly look both aggressive and self-defeating, and there is a good chance that it would end up giving rise to the kind of constitutional crisis described above.

An above-the-ceiling issuance could be attractive only if it could be credibly portrayed as a kind of contained anomaly. That is, if everyone could think of the offering as unusual just because of a little glitch—not in the Treasury's back office, as in 1979, but in interbranch relations—then the premium might not be too high, the debt ceiling's general applicability might not be questioned, and no constitutional crisis would follow. If everyone thought of the debt as "illegal," it would have little chance of raising money at politically acceptable rates; if people thought of the new securities as "legally challenged," encumbered by soon-to-be-cured technical difficulties but basically sound, then over-the-ceiling debt could be an attractive option for financial institutions looking to lock in quick above-market returns.

How likely is it that, even as debt ceiling negotiations failed and produced the need for extraordinary action, America's political leaders could agree to give each other the political shelter needed to make an above-the-ceiling debt issuance come off as a minor variant on business as usual? The question seems to bleakly answer itself: this would require a great deal of trust, and if that were present then there would be no reason to reach the crisis in the

31 See testimony of Donald Marron, "The Costs of Debt Limit Brinkmanship," before the Joint Economic Committee (September 18, 2013) (http://www.urban.org/sites/default/files/alfresco/publication-pdfs/904601-The-Costs-of-Debt-Limit-Brinksmanship.PDF): 3-4.

first place. But, looked at more closely, it depends on exactly how many leaders need to be a part of this maneuver. If the president, speaker, and Senate majority leader joined their voices to say that a normal debt ceiling increase was on its way and there was no reason to disrupt normal government operations with such a sure resolution in the offing—and if Wall Street turned out in force to purchase this debt at near-normal rates—that might be enough. This would be transparently "insiderish" in a way that would surely inspire widespread condemnation, and so these leaders would need to take their case directly and forcefully to the American public. But if the leaders of both parties acted together it might create a moment of truth in which all elected officials would have to decide whether to accept an irregular procedure with few apparent harms, or initiate a full-blown constitutional crisis in which all of the country's top leaders are implicated as wrongdoers.

As emphasized above, there can be no pre-determining the correct strategy apart from the particulars of a broken debt ceiling negotiation. If there is one overarching imperative, it is to minimize deep constitutional conflict, but that necessarily requires reference to the actual constitutional players on the spot and their understandings of the situation. If key players share a common desire to quickly exit a developing crisis, an above-the-ceiling debt offering and its promise of not missing any payments may offer the closest approximation of business-as-usual. If key players stand ready to condemn such an offering as a constitutional usurpation, timely debt service combined with some delayed payments for other government commitments will probably be the least bad option. The full range of expectations and communications between the two sides will be decisive in determining what approach is most constructive, however; a broken negotiation that leads us into the perilous situation of near-default remains a negotiation, and can only end with the reconciliation of the two sides.

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