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NULLIFYING THE DEBT CEILING THREAT ONCE AND FOR ALL: WHY THE PRESIDENT SHOULD EMBRACE THE LEAST UNCONSTITUTIONAL OPTION

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I. INTRODUCTION

In August 2011, Congress and the President narrowly averted economic and political catastrophe, agreeing at the last possible moment to authorize a series of increases in the national debt ceiling.[1] This respite, unfortunately, was merely temporary. The amounts of the increases in the debt ceiling that Congress authorized in 2011 were only sufficient to accommodate the additional borrowing that would be necessary through the end of 2012. In an economy that continued to show chronic weakness—weakness that continues to this day—the federal government would predictably continue to collect lower-than-normal tax revenues and to make higher-than-normal expenditures, which meant that the debt would necessarily grow over time. Because there is no reason to believe that the annual budget will be balanced after 2012—indeed, because that would be an affirmatively bad idea, even if the economy were to return to full employment[2]—everyone knew that the debt ceiling would have to be raised by the beginning of 2013, to accommodate economic reality as the country continues to try to return to prosperity.

As soon as the agreement temporarily averting the crisis was reached in 2011, however, the two top Republican leaders in Congress announced that they planned to demand additional spending cuts every time in the future that the debt ceiling needed to be increased.[3] Their strategy appears to be based on

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1. See Budget Control Act of 2011, Pub. L. No. 112-25, § 301, 125 Stat. 240, 251–55 (delegating to president power to raise debt ceiling pursuant to complicated procedure whereby members of Congress do not directly vote for debt ceiling increase).

2. See Neil H. Buchanan, Good Deficits: Protecting the Public Interest from Deficit Hysteria, 31 Va. Tax Rev. 75, 105–15 (2011) (articulating benefits of deficit spending, even in good economic times).

3. See 157 Cong. Rec. S5219 (daily ed. Aug. 2, 2011) (statement of Sen. Mitch McConnell) ("[N]ever again will any President, from either party, be allowed to raise the debt ceiling . . .

the assumption that reaching the debt ceiling would, as a matter of course, require the president to cut spending in order to keep total borrowing under the statutory limit. If that were a correct reading of the Constitution, the president would in each case be forced to choose between inflicting severe and immediate austerity on the country at the moment the ceiling was reached—making spending cuts adequate to reduce total spending, so that it would match the tax revenues flowing into the Treasury—and accepting less severe austerity in the immediate term, by agreeing to cut spending by larger amounts in the future as the "price" of allowing borrowing to rise in the immediate term, with concomitantly smaller spending cuts up front. We addressed the debt ceiling standoff in an article published in the *Columbia Law Review* earlier this year: *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*[4] (hereinafter "*How to Choose*"). We argued there that it is incorrect to assume that the president can, or should, reduce authorized spending if the federal government reaches its statutory debt ceiling. Instead, we argued that the president should faithfully carry out the exact levels of spending and taxes that are required by the duly enacted budget of the United States—even if doing so requires him to exceed the debt ceiling—by issuing Treasury bonds in amounts sufficient to finance the difference between the levels of spending and taxation that Congress has authorized.

As this follow-up essay is being published, in late December 2012, the President and congressional Republicans are in the midst of budget negotiations that may hinge on whether our argument was correct—that the president has a duty under the Constitution to set aside the debt ceiling, if the moment of truth comes. Unfortunately, none of the participants in the negotiations has offered any public indication that they even understand the nature of the problem that the president would face, much less how to resolve that problem, should Congress refuse to raise the debt ceiling.

We argue here that the President should make it clear, as soon as possible, that the debt ceiling is not, and cannot legally be used as, a cudgel with which Congress can force him to renegotiate the federal budget. If the President does not do so now, the problem will continue to arise in the future, every time the debt level grows (as it should, in a growing economy which offers continuing opportunities for public investment) above the arbitrary dollar limit that Congress might set. Therefore, the President's best course is to make clear that the debt ceiling must always give way to the wishes of Congress, as expressed through the budget of the United States.

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without having to engage in the kind of debate we have just come through."); Jonathan Weisman, G.O.P. Pledges New Standoff on Debt Limit, N.Y. Times, May 16, 2012, at A1 (reporting House Speaker John A. Boehner's vow "to hold up another increase in the federal debt ceiling unless it was offset by larger spending cuts").

4. Neil H. Buchanan & 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 (2012).

II. The Debt Ceiling, the "Trilemma," and Another Unnecessary and Harmful Political Crisis

As part of the agreement that averted a default on government obligations in mid-2011, both sides agreed to a provision suggested by Senate Minority Leader Mitch McConnell, under which the President was authorized to propose increases in the debt ceiling, and Congress would then have the ability (with a supermajority vote) to overrule the President's decision.[5] President Obama did, indeed, propose such increases, which took effect when Congress failed to block them.[6]

As another political crisis began to come to a boil in late 2012, the President suggested that the parties agree to make the McConnell approach the permanent method for dealing with the debt ceiling, allowing the President to increase the debt ceiling with congressional authorization ex post, thus making it possible for the President to execute the budget of the United States.[7] In response, Senator McConnell said of the President, on the floor of the Senate: "[N]ow the President is asking for unlimited—*unlimited*—authority to borrow whenever he wants to for whatever amount he wants."[8]

That is either a misunderstanding or a mischaracterization of what is at issue in this debate. As we discussed in *How to Choose*, when the debt ceiling limits the president's ability to issue debt sufficient to make up the difference between the funds on hand and appropriated expenditures, it presents the president with what we called a "trilemma"[9]: faced with the constitutional duty to execute the spending laws that Congress enacted, to collect tax revenues under the laws that Congress enacted, *and* to borrow no more than the amount of gross debt specified in the debt ceiling statute, the president would have to violate at least one of those laws when the debt ceiling is reached. In thus violating his oath to faithfully execute the laws—*all* of the laws—of the United States, he would be acting unconstitutionally. The only question was which unconstitutional choice would be *least* unconstitutional.

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5. See supra note 1.

6. See H.R.J. Res. 98, 112th Cong. (2012) (as rejected by Senate, Jan. 26, 2012) (disapproving President's debt limit increase); Robert Pear, Senate Vote Approves Rise of $1.2 Trillion in Debt Limit, N.Y. Times, Jan. 27, 2012, at A12 (reporting Senate's approval of increase as evidenced by its rejection of H.R.J. Res. 98).

7. Treasury Secretary Geithner appeared on various television programs to explain the Obama Administration's position supporting the extension of the "McConnell provision" to deal with the debt ceiling. See Face the Nation (CBS television broadcast Dec. 2, 2012), transcript available at http://www.cbsnews.com/8301-3460_162-57556677/face-the-nation-transcripts-december-2-2012-geithner-sens-graham-feinstein-rep-rogers/; Meet the Press (NBC television broadcast Dec. 2, 2012), transcript available at http://www.msnbc.msn.com/id/50045823/ns/meet_the_press-transcripts/t/december-tim-geithner-bob-corker-claire-mccaskill-grover-norquist-chris-van-hollen-jim-cramer-maria-bartiromo/#.UM4tanPjkZg.

8. 158 Cong. Rec. S7645 (daily ed. Dec. 6, 2012) (statement of Sen. Mitch McConnell).

9. Buchanan & Dorf, supra note 4, at 1197 (explaining that in such circumstances the president "faces a 'trilemma': a choice between three bad options, all of which are unconstitutional").

Our analysis showed that the president's choice must be to honor Congress's wishes regarding spending and taxes by setting aside its purported limitation on gross national debt.[10] In order to execute the budget (which is composed of the taxing and spending laws) as enacted by Congress, the president would obviously not require (or seek) *unlimited* authority to borrow, as Senator McConnell claimed. Instead, he would simply issue enough new Treasury obligations to finance the amount of borrowing that Congress's budget necessitates. Although the president *could* instead choose to act unconstitutionally by violating the spending law or the taxing law (that is, by spending less, or taxing more, than Congress had ordered him to do), and thus keep the debt level below the statutory limit, he would be wrong to do so.

The reasons that we articulated in *How to Choose* remain true today. Congress retains the power to return the national debt to whatever level it sees fit, by passing budgets in the future that would result in annual surpluses sufficient to pay down the debt, to reach any congressionally desired target. Moreover, the president's decision to issue debt in order to execute the congressionally mandated spending and taxing levels would do the least constitutional damage—that is, it would involve the smallest possible exercise of presidential discretion over judgments committed by the Constitution to Congress—because doing so would not give the president the ability to rebalance the spending and taxing priorities that are at the core of Congress's budgeting process.[11] A president who chose to set aside the debt ceiling in such a situation would, therefore, be exercising unconstitutional powers in the most restrained manner possible—under the impossible circumstances that Congress would have imposed upon him.

In early December of 2012, Republican leaders announced that they would follow through on their earlier threats to try to force the President to choose between defaulting on the government's legal obligations and exceeding the debt ceiling.[12] Questions again arose in public discussion about whether the President would use one of the constitutional arguments available to him to void the debt ceiling. One of those arguments, which we also endorsed in *How to Choose*, was based on Section 4 of the Fourteenth Amendment, which forbids actions that would cause "[t]he validity of the public debt of the United States" to be "questioned." If Congress would not increase the debt ceiling, making it possible for the federal government to

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10. See id. at 1215 (concluding that "the president would minimize his assumption of power by issuing debt rather than rebalancing taxing and spending choices").

11. See id at 1214–15 (discussing "costs of allowing a president to violate the balance of Congress's priorities in taxing and spending" including "usurp[ing] legislative power").

12. See Russell Berman, Debt Ceiling Complicates Deficit Talks, The Hill (Dec. 5, 2012, 7:59 PM), http://thehill.com/homenews/administration/271347-debt-limit-complicates-deficit-talks (on file with the *Columbia Law Review*) (discussing growing "threats on an increase in the debt ceiling"); Richard Rubin, Republicans Reprise 2011 Debt-Limit Threat in Cliff Talks, Bloomberg (Dec. 3, 2012, 5:57 PM), http://www.bloomberg.com/news/2012-12-03/republicans-reprise-2011-debt-limit-threat-in-cliff-talks.html (on file with the *Columbia Law Review*) (reporting Republican leadership's attempts to "replicat[e] the 2011 showdown that caused the U.S. to come within days of default").

honor its debts, this provision would be violated.[13]

In response to questions about the President's possible plans to invoke this argument, the White House Press Secretary announced: "[T]his administration does not believe that the 14th Amendment gives the president the power to ignore the debt ceiling—period."[14] Notably, however, this statement did not address, or even acknowledge, that the President would face a trilemma. That is, even setting aside the language from Section 4, the President would still violate the Constitution no matter what choice he made. Yet the White House has said nothing to date about why it would try to resolve the constitutional crisis by cutting spending, rather than raising taxes or issuing additional debt.

At most, the President's spokesman could reasonably have been saying that the Administration does not think that the proper reading of the Fourteenth Amendment authorizes a president to issue debt in excess of the current dollar value of the debt ceiling. The White House is correct that the unconstitutionality of the debt ceiling does not itself empower the president to borrow money without congressional authorization. Whenever it passes a budget that is expected to result in an annual deficit, however, Congress authorizes the president to borrow the necessary funds to cover that shortfall. If the debt ceiling makes it impossible to do so, and if (as we argue) that makes the debt ceiling itself unconstitutional, then the president would not be arrogating to himself the authority to borrow money. Instead, he would simply be borrowing money that Congress has already authorized him to borrow. Such borrowing would clearly be constitutionally valid if the debt ceiling is unconstitutional because of the Fourteenth Amendment. Under the trilemma, the additional borrowing would be constitutionally invalid, but because it would be less unconstitutional than the other options, issuing additional debt would be the required choice.

This issue is increasingly urgent. Currently, the federal government is not operating on a standard, fiscal-year-long budget. When the 2012 fiscal year ended on September 30, 2012, Congress enacted a continuing resolution, valid through March 27, 2013 (if not superseded prior to that date), that required the President to spend and tax in amounts that guaranteed that the debt ceiling would be reached at the end of 2012.[15] Even if the Treasury Department again employs extraordinary accounting measures to extend the period before the debt ceiling would become unavoidably binding, the day of reckoning is now expected to be reached in early February 2013—before the current budget law

13. Buchanan & Dorf, supra note 4, at 1194 (after acknowledging the possibility of reasonable disagreement, concluding that, "during an impasse of the sort that was narrowly avoided in August 2011, Section 4 would require the president to refuse to honor the debt ceiling if doing so would cause the government to fail to meet any of its financial obligations in a timely manner").

14. Press Briefing, White House Press Sec'y Jay Carney (Dec. 6, 2012, 11:58 AM), available at http://www.whitehouse.gov/the-press-office/2012/12/06/press-briefing-press-secretary-jay-carney-12062012 (on file with the *Columbia Law Review*).

15. Continuing Appropriations Resolution, 2013, Pub. L. No. 112-175, § 106, 126 Stat. 1313, 1315 (2012).

has expired.[16]

Accordingly, congressional refusal to increase the debt ceiling would, in fact, create the trilemma that we have described. If we are right that the debt ceiling itself is constitutionally defective, then the President would be legally required to borrow the money that Congress has already ordered him to borrow, in order to spend and tax in the amounts that it specified in its continuing budget resolution.

Yet, as noted above, the White House has not at any time even described the legal choices that the President would face as constitutionally problematic. To be sure, the Administration has emphatically called upon Congress to increase the debt ceiling as a matter of course (not subject to any political "price"), but it has framed that argument entirely in policy and pragmatic terms.

Having publicly ruled out the argument based on Section 4 of the Fourteenth Amendment, the White House has thus ignored the other (more fundamental) constitutional problem and merely taken the public stance that Congress *should* change its ways. Is it possible that the President and his advisors simply do not understand the elements of the trilemma? That seems unlikely.[17]

III. WHAT THE WHITE HOUSE MIGHT BE THINKING, AND WHY IT WOULD BE WRONG IF IT IS

To understand the reasoning that may be underwriting the Obama Administration's refusal to entertain borrowing in excess of the debt ceiling, we begin with common ground. We agree with the Administration about this much: Even if failure to pay some category of government obligees would violate Section 4 of the Fourteenth Amendment, it does not automatically follow that the president may unilaterally issue debt in excess of the debt ceiling, for doing so could usurp congressional power to limit the scope of its delegation of borrowing authority, as Congress purported to do when it enacted the debt ceiling. If there were a practicable alternative method by which the government could meet its obligations without the president engaging in

16. E.g., Steve Bell et al., Bipartisan Policy Ctr., Debt Limit Analysis 4–5 (2012).

17. The President and his staff may not carefully read every issue of the *Columbia Law Review*, but presumably they do peruse the *New York Times*. See Bruce Bartlett, The Debt Limit is the Real Fiscal Cliff, Economix Blog, N.Y. Times (Dec. 3, 2012, 6:00 AM), http://economix.blogs.nytimes.com/2012/12/03/the-debt-limit-is-the-real-fiscal-cliff/ (on file with the *Columbia Law Review*) (discussing Buchanan & Dorf, supra note 4). Perhaps the Administration understands that the President would face a trilemma if Congress fails to raise the debt ceiling but takes the view that when faced with only unconstitutional options, a president may choose whichever option he pleases, free of constitutional constraint. See Brad DeLong, Debt Ceiling: Mark Tushnet Says: "Bruce Bartlett is No True Scotsman" (July 1, 2011, 11:34 AM), http://delong.typepad.com/sdj/2011/07/debt-ceiling-mark-tushnet-says-bruce-bartlett-is-no-true-scotsman.html (on file with the *Columbia Law Review*) (arguing that by giving President Obama inconsistent commands "Congress has punted what to do to the Treasury"). If so, we would welcome acknowledgment of the true nature of the problem, even as we would disagree with the conclusion. See Buchanan & Dorf, supra note 4, at 1218 (rejecting suggestion that obligation to choose among unconstitutional options means "all bets are off").

unauthorized borrowing, he would be constitutionally bound to follow that course.

Perhaps the Administration has ruled out ignoring the debt ceiling because it has concluded that there are in fact practicable constitutional options. As we noted in *How to Choose*, one proposed method for doing so would be to mint two one-trillion-dollar platinum coins,[18] because there is no statutory limit on the value of such coins that the government may mint.[19] We dismissed this "jumbo coins" proposal as "cartoonish and desperate,"[20] but maybe the Administration has concluded that desperate times demand desperate measures.

Yet even Professor Jack Balkin, who first seriously publicized the jumbo coins proposal on his blog in 2011,[21] no longer advocates it.[22] Further, the statutory provision that permits the Treasury to mint platinum coins was enacted as part of a law that clearly manifested Congress's intent to authorize the coining of *commemorative* coins,[23] notwithstanding the fact that, as codified, the current authorization states no such limit.[24]

Thus, all things considered, we doubt that the Administration has ruled out borrowing in excess of the debt ceiling on the ground that, if push comes to shove, it plans to mint jumbo coins. At least absent some official public statement endorsing the jumbo coin option, we believe that serious commentators would be wise to disregard it.

We take a similarly dim view of the possibility that the Administration is contemplating other "outside-of-the-box" options, like auctioning off federal lands or selling corporate naming rights to national monuments. Again, if such a bizarre contingency plan existed, one would expect some indication of it

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18. See Buchanan & Dorf, supra note 4, at 1180 (discussing Professor Jack Balkin's jumbo coins proposal).

19. See 31 U.S.C. § 5112(k) (2006) ("The Secretary may mint and issue platinum bullion coins and proof platinum coins in accordance with such specifications, designs, varieties, quantities, denominations, and inscriptions as the Secretary, in the Secretary's discretion, may prescribe from time to time.").

20. Buchanan & Dorf, supra note 4, at 1231.

21. See Jack M. Balkin, 3 Ways Obama Could Bypass Congress, CNN (July 28, 2011), http://articles.cnn.com/2011-07-28/opinion/balkin.obama.options_1_debt-ceilingcongress-coins [hereinafter Balkin, Ways to Bypass] (on file with the *Columbia Law Review*) (suggesting Treasury circumvent statutory limit on currency notes by issuing two trillion dollar coins).

22. See Brad Plumer, Could Two Platinum Coins Solve the Debt-Ceiling Crisis?, Wonkblog, Wash. Post (Dec. 7, 2012, 12:37 PM), http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/07/could-two-platinum-coins-solve-the-debt-ceiling-crisis/ (on file with the *Columbia Law Review*) (stating "even Balkin now says that he thinks the platinum-coin option is too risky").

23. See id. (citing H.R. 2614, 104th Cong., 1st Sess., available at http://www.gpo.gov/fdsys/pkg/BILLS-104hr2614rfs/pdf/BILLS-104hr2614rfs.pdf) ("Opponents could plausibly argue that the original law was intended to set rules around commemorative coins, not to finance the operations of the government."); see also James Hamilton, Trillion Dollar Platinum Coin, Econbrowser (Dec. 8, 2012, 7:19 AM), http://www.econbrowser.com/archives/2012/12/trillion_dollar.html (on file with the *Columbia Law Review*) (characterizing platinum-coin-minting-authorization as "legislation originally intended to satisfy a small group of numismatists").

24. See supra note 19 (quoting statutory language).

from the Administration.[25]

In any event, it is no mystery what the Administration plans to do in the event that inaction on the debt ceiling leaves the government with insufficient borrowing authority to meet its legal obligations. As in 2011, so in 2013, the Administration apparently plans to spend less money than Congress authorized.[26] The mystery is how the executive could undertake such cuts within the bounds of the Constitution.

The Administration may take a narrow view of what constitutes an action that violates Section 4 of the Fourteenth Amendment on the ground that it causes the validity of the public debt to be questioned: Perhaps the Administration thinks that only failure to pay bondholders, or more narrowly still, only failure to pay the principal on bonds, would violate Section 4. Let us grant that assumption for the sake of argument. As we were at pains to show in *How to Choose*, and as we have explained again here, even if failure to spend some substantial portion of appropriated funds would not violate Section 4 of the Fourteenth Amendment, it would violate the separation of powers.[27]

So far as we have been able to ascertain, neither the Administration nor the academic critics of setting aside the debt ceiling have even attempted to explain whence the president derives the authority to spend less money than Congress has required him to spend. Accordingly, we will make the effort on their behalf. We think the best argument that might be given in support of unilateral presidential authority to slash spending rather than to issue debt in excess of the debt ceiling would go like this:

The president's failure to spend sums Congress has appropriated would indeed be unlawful. It would violate both the current appropriations laws and

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25. Moreover, even if there might be reasonable disagreement about our conclusion that failing to pay all federal budgetary obligations in full would violate the constitutional prohibition of bringing into question the validity of the public debt, we think there would be consensus that the issuance of jumbo coins (or any other similarly desperate measure to raise money) violates Section 4 of the Fourteenth Amendment. Surely, anything that makes the public reasonably wonder whether the federal government is scraping the bottom of the barrel for ideas on how to raise money, rather than simply raising the debt ceiling, would cast doubt not just on the validity of the debt, but on the future of our financial system—and of the political system as well. See Buchanan & Dorf, supra note 4, at 1231 (noting jumbo coins option could itself violate Section 4, since "the very act of minting trillion-dollar coins . . . could undermine faith in the government's ability to repay its obligations").

26. See Interview by Scott Pelley with President Barack Obama, CBS Evening News (CBS television broadcast July 12, 2011) (describing how debt ceiling may threaten payment of entitlement benefits); Press Briefing, White House Press Sec'y Jay Carney (July 12, 2011), available at http://www.whitehouse.gov/the-press-office/2011/07/12/press-briefing-press-secretary-jay-carney-7122011 (on file with the *Columbia Law Review*) (describing decision of which spending cuts to implement as a "kind of *Sophie's Choice* situation"); see also Press Briefing, White House Press Sec'y Jay Carney (Dec. 5, 2012), available at http://www.whitehouse.gov/the-press-office/2012/12/05/press-briefing-press-secretary-jay-carney-and-nec-prinicipal-deputy-dire (on file with the *Columbia Law Review*) (discussing same issue and confirming Administration's refusal to unilaterally raise debt ceiling).

27. See Buchanan & Dorf, supra note 4, at 1196–1202 (discussing "trilemma" that arises from fact that president cannot faithfully execute all laws enacted by Congress, including appropriations).

the Impoundment Control Act of 1974.[28] *However, if faced with the choice of acting unconstitutionally by unilaterally raising the debt ceiling (or raising taxes) or acting in violation of mere statutes, the president has a duty to respect the constitutional limit and violate the statutes. Under such circumstances, the statutory obligations to spend budgeted amounts are themselves unconstitutional, because obeisance to them would entail violating the (constitutionally protected) debt ceiling.*

Is *that* a persuasive argument? We think it would be persuasive if the premise were correct: If a president's decision to spend less than the amount Congress authorized were merely a statutory violation—and if presidential borrowing in excess of the debt ceiling were *not* merely a statutory violation—then yes, the obligation to spend all of the money would have to give way to a constitutional obligation not to borrow or tax without congressional authorization. If it is impossible to comply with both the Constitution and a statute, the duty to comply with the Constitution prevails over the duty to comply with the statute, at least absent the sort of catastrophic harm that might be thought to justify unconstitutional action.[29]

But is the premise true? Would a president's failure to spend money that Congress has clearly required him to spend amount to a mere statutory violation, or is it also a violation of the president's obligation to take care that the laws are faithfully executed? And if it is merely statutory, how is it any different from the debt ceiling, which is itself a statute?

Proponents of presidential spending cuts might attempt to draw an act/omission distinction between, on the one hand, a president's unilateral borrowing, taxing, or spending, and, on the other hand, a president's unilateral decision not to borrow, tax, or spend in accordance with an act of Congress. Presidential borrowing, taxing, or spending beyond what Congress has authorized, usurps Article I power. However, in this view, a president's unilateral *failure* to spend (or borrow or tax) in the full amount authorized by Congress does not amount to the exercise of an Article I power; it simply fails to fully carry out the delegated authority, and therefore violates the relevant statutes, but not the Constitution.

We are highly dubious about the utility of the act/omission distinction in this context. Should a president's decision to cancel a tax deduction or tax credit be characterized as an affirmative act of taxation—and thus be deemed unconstitutional—or as a mere omission that fails to fully implement Congress's will—and thus be deemed "only" a statutory violation? Under the circumstances, the label of "act" or "omission" is a conclusion, not a fact in the world.

In any event, even if we had greater faith in this approach as a matter of first principle, case law pretty clearly establishes that a president's failure to spend funds that Congress has required him to spend is a *constitutional*

28. Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. §§ 681– 688 (2006).

29. See Buchanan & Dorf, supra note 4, at 1230–31.

violation. The key decisions are *Train v. City of New York*[30] and *Clinton v. City of New York*.[31]

In *Train*, the Court unanimously held that a statutory delegation to the president of the authority to spend money on addressing water pollution was a requirement that the president spend *all* of the appropriated funds.[32] Taken alone, of course, *Train* does no more than establish that Congress can, if it so specifies, require that the president spend money; it does not say that the obligation is a constitutional one.

But even taken alone, *Train*'s logic appears rooted in separation of powers. The unanimous Court in *Train* set the case in context by noting that before President Nixon attempted to impound the funds Congress appropriated for addressing water pollution, he vetoed the underlying bill.[33] Why was that fact relevant to the case? It does not bear directly on the question of whether Congress intended to vest discretion in the president to spend less than the allocated funds. But it does bear on a constitutional issue: If, in the absence of a delegation of discretionary spending authority from Congress, a president could nonetheless choose not to spend money that Congress had appropriated, then he would be able to give himself what amounts to a non-overridable veto power, in contravention of the lawmaking procedure set forth in Article I, Section 7. Put simply, whenever the president unilaterally decides not to spend money that Congress has directed that he spend, he acts in violation of Article I, Section 7 and his Article II, Section 3 obligation to take care that the laws are faithfully executed.

Clinton v. City of New York confirms this reading of the obligation to spend as a constitutional obligation. In *Clinton*, the majority and dissent disagreed over the question of whether Congress, in enacting the Line Item Veto Act, had impermissibly granted the president a line-item veto, in contravention of the all-or-nothing veto power of Article I, Section 7—as the majority concluded[34]—or had merely delegated to the president the power to treat various expenditures as setting maximum spending levels rather than specifying exact sums—as the dissent contended.[35] The majority thought that the Line Item Veto Act impermissibly empowered the president to "repeal" duly enacted laws, in violation of Article I, Section 7.[36] Because the dissenters took a less formalistic view of the Act, they did not think it granted repeal authority, but only because the president acted pursuant to what they regarded as a valid delegation of spending discretion. Even the *Clinton* dissenters did not suggest that the president has any inherent authority to really repeal acts of Congress. More importantly for present purposes, the entire framing of the question in *Clinton* makes clear that a president's assertion of authority to

30. 420 U.S. 35 (1975).

31. 524 U.S. 417 (1998).

32. *Train*, 420 U.S. at 41.

33. See id. at 40.

34. *Clinton*, 524 U.S. at 438–47.

35. See id. at 463–69 (Scalia, J., concurring in part and dissenting in part); id. at 473–80 (Breyer, J., dissenting).

36. Id. at 438 (opinion of the Court) ("In both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each.").

decline to spend money appropriated by Congress raises a constitutional question under Article I, Section 7, not just a statutory question. Every justice who decided *Clinton* took for granted that the Constitution would forbid a president from canceling funding Congress had required him to spend in the absence of a valid delegation of funding-canceling authority.[37]

And that makes good sense. In giving the power of the purse to Congress, rather than the president, the Framers no doubt meant to guard against the sorts of abuses perpetrated by the Stuart kings, who repeatedly battled parliament over appropriations.[38] But that is not the only sort of abuse against which the assignment of the purse power to Congress guards. Libertarians may worry only about presidents attempting to spend money that Congress has not authorized. But our Constitution assumes (quite correctly, in our view) that threats to the public welfare and safety may sometimes arise from a decision to spend too little on a pressing public need (by, for example, refusing to spend money to save life and limb during a natural disaster, or to invest adequately in the education of the nation's children). A president who impounds funds in the teeth of a congressional judgment that some government program must be funded thereby usurps legislative power.

It might nonetheless be objected that our argument proves too much. If a president's refusal to spend money appropriated by Congress is unconstitutional, does that mean that every less-than-total enforcement of federal law by the executive also violates the Constitution? What about the Obama Administration's forbearance (thus far) from enforcing the federal Controlled Substances Act[39] with respect to possession of small quantities of marijuana for medical purposes in states where such possession is legal?[40] Or the Administration's decision to offer the chance to stay in the United States to some non-citizens who came to this country as children?[41] Do these policies violate Article I, Section 7 and/or the Take Care Clause because they implement the relevant federal statutes only partially?

We offer nothing like a full view on these questions here. We will say that we find deeply troubling any suggestion that the president can simply choose

37. In dissent, Justice Scalia cited historical instances of presidents asserting a constitutional right to cancel funding even absent a congressional grant of such discretion, but then cited *Train* for the proposition that they were wrong. See *Clinton*, 524 U.S. at 467–68 (Scalia, J., dissenting).

38. See, e.g., The Federalist No. 58 (James Madison) (observing that under Constitution, members of Congress "hold the purse[,] that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government.")

39. 21 U.S.C. §§ 801–971 (2006).

40. Memorandum from David W. Ogden, Deputy Attorney Gen. to U.S. Attorneys, on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), available at http://www.justice.gov/opa/documents/medical-marijuana.pdf (on file with the *Columbia Law Review*).

41. Memorandum from Janet Napolitano, Sec'y of Homeland Sec. to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Prot., on Exercing Prosecutorial Discretion with Respect to Individuals Who Came to the U.S. as Children (June 15, 2012), available at http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf (on file with the *Columbia Law Review*).

not to enforce some law on the ground that he disagrees with the policy underlying that law. At a minimum, we would expect the president to offer some justification for not enforcing a law.[42] With respect to marijuana possession and deferred action on unlawful immigration, the Obama Administration has invoked the traditional prosecutorial discretion that the executive branch enjoys in such matters.[43] Perhaps that argument is persuasive; perhaps it is not. In any event, it is quite a different argument from the one we are now considering with respect to federal spending. Thus, one could conclude—as we do—that the president lacks the constitutional authority to make unilateral spending cuts in the event that Congress fails to raise the debt ceiling, without committing oneself to any particular view about the constitutionality or wisdom of the Obama Administration's policies with respect to medical marijuana and immigration.

We have considered and found wanting each of the most plausible explanations for the Obama Administration's apparent conclusion that, in the event that Congress fails to raise the debt ceiling, it will have to make unilateral spending cuts. There is, however, one explanation that we would applaud: Perhaps the Administration believes that under such circumstances, unilateral spending cuts would be unconstitutional, but *less* unconstitutional than exceeding the debt ceiling. For the reasons we set forth in *How to Choose*, we would disagree with the conclusion; in our judgment, exceeding the debt ceiling is the least unconstitutional option.[44] Nonetheless, at least the contrary conclusion that cutting spending would be less unconstitutional is the right kind of judgment.

Unfortunately, none of the Obama Administration's public statements to date indicate that the President or his advisors regard the choice that the president would face in the event that Congress fails to raise the debt ceiling as a choice among unconstitutional options. Until they understand the nature of the problem, we cannot expect them to offer a well-reasoned response to it.

IV. CONCLUSION

In this essay, we have treated the Obama Administration's statements regarding the debt ceiling as expressing sincere views about the law, but it may be possible to read them instead as tactical moves in the budget negotiations with congressional Republicans. As we have explained, the President's contingency plan of unilateral spending cuts would in fact usurp more power from Congress than would unilaterally issuing debt. Perhaps the President has ruled out the least unconstitutional option for the very reason that doing so is

42. Cf. Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011) (explaining Administration's reasons for its decision no longer to defend constitutionality of Section 3 of Defense of Marriage Act), available at www.justice.gov/opa/pr/2011/February/11-ag-222.html (on file with the *Columbia Law Review*).

43. Id.; Memorandum from James M. Cole, Deputy Attorney Gen. to U.S. Attorneys, on Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), available at http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf (on file with the *Columbia Law Review*).

44. Buchanan & Dorf, supra note 4, at 1215–17.

most likely to frighten Republicans into making concessions at the bargaining table. After all, a unilateral presidential decision to cut spending on various projects, at his sole discretion, should be utterly unacceptable to his political opponents. Congressional Republicans should, in that light, wish to limit the President's power in exactly the way that we have described here. They could so limit him by actually passing an increase in the debt ceiling, however.

In a sense, learning that the Administration has been prevaricating would be welcome news, for it would show that the President properly understands that congressional failure to raise the debt ceiling would place him in the trilemma we have described. Nonetheless, we regard this possibility as remote for two reasons.

First, the politics suggest otherwise. Although Congress as an institution would lose the most were the president to make unilateral spending cuts, in the current political climate, Republicans have made it clear that they favor spending cuts over additional borrowing on ideological grounds, either because they have not considered the power that this would bestow upon the President, or because they believe that he would not use that power in ways that they would find unacceptable. Thus, taking congressionally unauthorized borrowing off of the table makes little sense as a tactic designed to pressure congressional Republicans.

Second, we hesitate to ascribe Machiavellian motives to the Administration. By all indications, President Obama and his advisors sincerely believe that if Congress fails to raise the debt ceiling, they will have no choice but to cut spending. We think that they are wrong. In any case, they have to date not articulated persuasive reasons for their belief.

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Legislating Crisis
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Abstract

For the last several years, the congressional budget process has jumped from self-created crisis to self-created crisis. Debt limit, shutdown, sequester, potential withholding of congressional pay, and others beyond that—all of these crises coming in quick succession and requiring Congress to take action to avert a problem. There is a common element to each of these crises. In particular, Congress sets an undesirable event to occur at a later time—hence, prompting the possible crisis. This chapter represents an exploration of these devices, and a modest defense of some of them, despite the recent chaos in Washington. In particular, in legislating crisis, Congress may be addressing some of its other failings. These devices can serve constructive purposes by allowing Congress to not fully specify the way legislation will work in the future given the transaction costs involved in doing so; by allowing Congress to enforce the deals it makes; and, finally, by allowing Congress to better coordinate negotiations and, specifically, set timelines for deal-making. Thus, in some cases, the threat of crisis may be better than the alternative of none.

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For the last several years, the congressional budget process has jumped from self-created crisis to self-created crisis. Debt limit, shutdown, sequester, potential withholding of congressional pay, and others beyond that—all of these crises coming in quick succession and requiring Congress to take action to avert a problem. The result has been measurable damage to the economy and federal agencies (Council of Economic Advisers 2013). This has rightly engendered much commentary about the political system broadly, including the deleterious effects of polarization in American politics. And, it has also raised questions about the specific devices that led to these crises, with calls for many them to be abolished (e.g., Meyers 2014, Louk and Gamage 2015).

There is a common element to each of these devices. In particular, Congress sets an undesirable event to occur at a later time—hence, prompting the possible "crisis." It is an event that the parties agreeing to the deal do not want to actually happen despite making it possible that the event does. To put it colorfully, Congress and the President set up a mechanism that could shoot them in the foot.

This chapter represents an exploration of these devices—and a modest defense of some of them, despite the recent chaos in Washington. At the least, these devices can and are used in ways that address other legislative failings. Thus, there is a trade-off in simply throwing out such devices entirely, and this chapter seeks to outline both the benefits and costs of legislating crisis.

But, why should Congress ever create even the possibility of a crisis? There are a variety of reasons, as this chapter explores, but most of these involve changing the behavior of Congress going forward relative to what it otherwise would be without the threat of an undesirable outcome at that future point in time. One of the key conclusions of this chapter is that, in doing so, Congress may be trying to address some of its other failings. These devices may allow Congress to not fully specify the way legislation will work in the future given the transaction costs involved in doing so; allow it to enforce its deals; and allow it to better coordinate negotiations and, specifically, set timelines.

The conclusion that these devices can serve some constructive ends, in part, reflects an underlying judgment that the legislation facilitated by these devices is of some significant value to the country. In other words, it reflects the conclusion that it is valuable for Congress to coordinate opportunities for fiscal deal-making, including regular updates to appropriations and broader deals with regard to the fiscal position. If the deals themselves were not valuable, then risky legislative tools used to facilitate them would not be worth employing.

Thus, the wisdom of using these devices involves a cost-benefit trade-off. On the one hand, there is the benefit of deal-making being facilitated. On the other hand, there are the actual risks associated with legislating a crisis. And, while policymakers may not actually want the crisis to transpire, the government and private sector must often still plan for the crisis, which involves costs of its own, and, then, there is the risk that the crisis in fact happens. Further, these costs can be magnified by policymakers strategically using crises in ways that do not align with the interests of their constituents.

Importantly, the benefits from legislating the possibility of a crisis derive, to some degree, from

the costs of that crisis. It is the potential costs that help to motivate policymaking. Further, if the crisis were not sufficiently salient, then the device would deliver little reward; it would do little to facilitate policymaking. This does not mean that the bigger crisis is always better. If the threat of a small or moderate crisis can prompt similar action from Congress as the threat of a large crisis, then clearly the smaller one—if any—should be the one used. In short, it is a question of using those devices where the benefits outweigh the costs and where there are not alternative devices with better benefit-cost trade-offs.

It is this trade-off that leads to the tentative conclusion in this chapter that the threat of a debt limit breach is an ill-suited crisis device. This is because of the deep risks involved with it to the economy and the fact that alternative structures may better facilitate the legislative process at significantly less risk. It is also this trade-off that leads to the tentative conclusion that some of the other crisis devices discussed here—such as government shutdowns, a modified sequester, and, especially, withholding of congressional pay—are probably worthwhile.

This chapter is not meant to be a decisive and comprehensive evaluation of these devices, but, rather, an attempt to begin a more nuanced analysis of this family of legislative tools—as to their constructive goals, their costs, and the overall wisdom of using them. It is an analysis that recognizes that there is, in fact, be a place for certain self-created crises in our legislative process.

I. Crisis Devices: Definition and Examples

What is common to these disparate devices is that Congress at Time 1 legislates the possibility of a crisis at Time 2 under certain conditions. The word "crisis" here and throughout this chapter is being used as a term of art, although as a colloquial matter it is apt to describe some of the possible outcomes. In particular, by crisis, I mean to refer to a point at which policies would, under certain conditions, come into place that are undesirable from the perspective of most policymakers who are enacting them. Or, to repeat the analogy, the parties set up a device that would shoot them all in the foot if certain conditions occur, absent agreement from the relevant parties to unload the gun.

This chapter focuses on a few specific examples of these devices that have been particularly prominent in the budget standoffs of recent years. In particular, the chapter focuses on the debt limit, shutdowns, the sequester, and, finally, withholding of congressional salary. Each of these involves the possibility of a crisis that leaves most of the policymakers and their constituents worse off. For instance, in some cases (debt limit and shutdown), the devices literally destroy economic resources; in another case (the sequester), the device hurts priorities that both parties support; and, in a final example (withholding congressional pay), the crisis literally hits all members in their personal pocket books. Each of these is described briefly below, and Part III returns to them, discussing benefits and costs of these particular devices in greater detail.

A. The Debt Limit

The debt limit is a statutory limit on the amount of debt that the federal government is allowed to issue. There have always been limits on issuance of debt by the executive branch. The modern

limit—a single aggregate limit on federal debt—was created in the 1930s and has been in place since then (Austin 2015a, 5-7). Because of growth in the gross debt, the limit requires regular upward adjustment. Since 2001, the debt limit has been modified a total of fifteen times (Austin 2015b, 4).

Importantly, the debt limit is an overlay on other, existing spending and tax authorities. Congress separately approves appropriations and tax levels, and those appropriations and tax levels require a certain amount of borrowing in order to be financed. And, while the government obligates funds assuming those spending and tax levels would be maintained and financed in part via debt, the debt limit stands as a separate barrier—threatening the possibility that the government would not make good on its existing obligations.

Under the debt limit, the "crisis" occurs if Congress fails to approve a debt-limit increase in time. There is substantial uncertainty about the exact nature of that crisis. After Treasury runs through certain "extraordinary measures" that free up space under the debt limit, it eventually has no more accounting maneuvers at its disposal and would run out of cash to pay bills on time without issuing more debt—a point in time sometimes referred to as the "X date." The country has never crossed the "X date." At that point, the executive would face the dilemma of choosing between delaying payments, prioritizing payments (paying some bills in priority to others), or possibly even issuing debt over the limit. Treasury has suggested that the "least harmful"—though still highly disruptive—measure would be delaying payments (Thorson 2012, 3-4 Enclosure 1).

B. Shutdowns

In the case of shutdowns, the crisis occurs if there is a lapse in appropriations. Regular operations of federal agencies are generally subject to an annual appropriations process. (This is in contrast to mandatory programs that have ongoing authorities to spend funds.) If Congress fails to approve appropriations, operations shut down for those parts of the government subject to this process and that are not interpreted to be excepted—with the most important exception being one for the safety of life or property (Brass 2014, 3-6). In the most recent shutdown in 2013, this resulted in a suspension of activities equivalent to about 15 percent of the budget (Phillips and Dawsey 2013).

Prior to 1980, lapses in appropriations did not lead to shutdowns as they are experienced today. Up until that point, federal agencies largely continued operating, even as they minimized nonessential operations and obligations. This was done based on an assumption that Congress did not intend for them to shut down. That changed in 1980, with the Attorney General at the time issuing much stricter guidance for what was to occur in the event of a lapse in appropriations, and that stricter interpretation remains in effect today (Brass 2014, 4). Notably, Congress has since affirmed the Attorney General opinion, as it narrowed the statutory exception for the safety of life or property largely in line with Attorney General opinion (Brass 2014, 6) and has not acted to reverse any other effects in the over three decades hence.

Since this stricter interpretation came into place, there have been twelve shutdowns. Nine of those were short—of three days or less—and all occurred from 1981 through 1990. Three of the shutdowns were longer—ranging from five to as many as twenty-one days—and occurred in two

years, 1996 and 2013. So, shutdowns in recent years have been relatively rare; in fact, they are rarer than they were in the 1980s. However, these recent shutdowns have been longer, including the most recent one of sixteen days in 2013 (Tollestrup 2013, 3).

C. Sequester

The sequester creates a crisis by automatically cutting spending in ways that are intended to be undesirable and gets triggered on the basis of pre-specified conditions.

There have been various versions of the sequester negotiated over time. The first was negotiated as part of the Gramm-Rudman-Hollings legislation (GRH) in the mid-1980s as a way to try to force Congress to approve deficit reduction. Under GRH, if certain deficit targets were not achieved, a sequester would be triggered in order to correct the deficit path. The savings were to come equally from defense and non-defense programs—though most entitlement programs were either excepted or largely protected—and the cuts would apply across-the-board to the affected programs. By having cuts come equally from defense and non-defense, this was intended as a "mutually assured destruction" device in the eyes of both Democrats and Republicans (Muffson and Yang 1990).

In the 1990s, versions of the sequester were used to enforce the pay-as-you-go (PAYGO) rule—requiring that new tax cuts or mandatory spending be fully paid for—and the discretionary caps. PAYGO was revived in 2010, again with a sequester as enforcement, and the sequester was employed once more in the 2011 debt limit deal to try to force yet another agreement on deficit reduction (Keith 2004) (Spar 2013, 1).

Until 2013, only one significant sequester—in 1986—was allowed to actually occur. While sequesters were triggered four other times, they were either small or largely turned off by Congress (Keith 2004, 4). (This is not to suggest that Congress always stuck with the deals it made; the GRH deficit targets were also evaded until the discrepancies became too large for this to work.) It was only in 2013 that a significant sequester went off and remained in effect for an extended period. The sequester was scheduled to cut back spending back by $110 billion per year from 2013 to 2021. This sequester applied across-the-board cuts in the first year it was in effect (in 2013) and then left to Congress how to hit lower discretionary spending caps in the years that followed. That sequester was alleviated modestly in 2013-2015 (Reich 2015), and much more significantly in 2016-2017—with the threat that it will return in full force in 2018 (Greenstein 2015).

D. Withholding Congressional Salary

This tool focuses solely on Congress and generates a crisis by withholding salary for members if certain conditions occur. In the one version of this that has actually been enacted in the No Budget, No Pay Act of 2013, members' salary would be placed in escrow until the particular condition was alleviated (in that case, failure to pass a budget resolution) or until the 113th Congress came to an end.

This is a relatively untested tool. As noted, it has been enacted once, and, in that case, the

withholding was avoided as both houses approved budget resolutions (though the houses failed to reconcile them). Importantly, its constitutionality is in question. Some have expressed concern that the provision violates the 27th Amendment, which states that a given congress cannot vary its own pay (whether up or down), so that any changes can only take affect with the next congress (Weiner 2013). The issue is whether temporarily withholding salary is an unconstitutional type of variation. The fact that there is this question does not mean that the tool is useless, as—for now—it poses a credible threat. But, it is possible the device could be entirely thrown out if it were implemented and challenged in court.

II. Why Legislate a Crisis

This section explores ways in which legislating crisis can help policymakers overcome other failings in the legislative process. There are three models offered here: (1) An incomplete contract model in which the "crisis" reflects policymakers today not drawing out a fully specified contract due to limited agenda-space and information; (2) A model in which the "crisis" reflects policymakers using the undesirable outcome to help enforce a previously-made deal; (3) A model in which the "crisis" reflects policymakers today wanting to force a compromise tomorrow.

Each of these models involves imposition of a crisis that can be turned off by policymakers. And, yet—despite being at the discretion of policymakers—the possibility of a crisis can change policymaking for the better. By helping policymakers to avoid decisions they would otherwise have to make (in the case of the first model) or coordinate policymakers seeking to enforce a deal or make a deal (in the case of the second two models), the crisis changes the legislative environment, potentially for the better. And, importantly, the crisis can only be turned off if policymakers controlling each veto-gate agrees to do so. This is the key constraint, and means, for instance, that, when policymakers use a crisis as a deadline for negotiations, the deadline is real in the sense that it only gets continued if everyone controlling a veto gate agrees to do so. A single party defecting cannot change the deadline.

These different models for how crises can facilitate legislation are not entirely independent of each other, nor entirely comprehensive. For instance, a crisis might represent policymakers deciding to agree to disagree for the moment about the future course of policy (the first model), even as it is intended to force later compromise (the third model). Nonetheless, these three separate categories can help illuminate how these devices can overcome other problems in the legislative process.

A. Incomplete Contract Model

It is well recognized that both private and public actors are limited in their capacity to negotiate contracts. Incomplete contracts are often said to result from there being transaction costs that prevent parties from specifying all parameters. Among the problems that are often cited are the possibility of unforeseen contingencies and the cost of writing contracts (i.e. even if contingencies can be foreseen, it is costly to write contracts to address every contingency) (e.g., Tirole 1999, 743-744).

The theory of incomplete contracts can be applied to legislation (Tirole 1999, 742). Just like private contractors, legislators are limited by transaction costs, and so cannot fully specify the parameters in their deals. Legislation will, as a result, inevitably be incomplete—and the question then is what should happen in the parts of the deal that are not specified or, in other words, what should be the default.[1]

The "crisis"-style defaults can then be attractive since the transaction costs involved in negotiating them are relatively low. Members of Congress are legislating a state of the world that is never intended to occur; thus, what must be negotiated is not an agreement on what policy should be in various states of the world—but, instead, what policy should not be and a guarantee that the contract is revisited to be further specified. Or, to put it differently, the realm of policies that are disagreeable to the parties in most states of the world may be easier to identify than the policies that are agreeable.

By contrast, negotiating a non-crisis style default can involve similar transaction costs to negotiating a more complete policy to begin with; in fact, there can be little to differentiate it. And, of course, there are boons to more complete policies, including not necessarily having to revisit those policies in the future, greater certainty, and no risk of a crisis actually occurring. However, there are costs involved with trying to negotiate more complete contracts—exactly why incomplete contracts exist to begin with.

To give an example: Legislators negotiate agency appropriation levels on an annual basis, with the default now being that parts of the government shut down absent a new appropriation. It is a crisis-style default that is relatively easy for Congress to set, with policymakers confident that they are not negotiating an outcome that will be allowed to occur, at least for any significant length of time.

An alternative would be for Congress to negotiate funding levels that would, by default, come into place in the absence of a new appropriation. But, that would require Congress deciding on a default that could have significant effects on the actual outcome; if any policymakers controlling a veto gate preferred the default to the alternatives, they could use that veto. Thus, it is more challenging to negotiate since members must essentially fill in more details.

The difficulty of negotiation represents a social cost, at least to some degree. Negotiating a non-crisis style default for future policy will trade off against other activities in which Congress could be engaged. It might even be an insurmountable cost. For instance, it is possible that there might not be enough time for Congress to agree on anything but a crisis default in striking a deal at a given point in time.

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[1] There is a considerable literature focused on the question of the optimal default rule where legislation is left incomplete (e.g., Baker and Krawiec 2004). While this literature is related to the issue of legislating crisis, it is not entirely on point. In particular, it is largely focused on what default rule a *third party* should set for contracting parties or legislators (and, in that context, some recommend applying a penalty default—similar to a crisis—in certain circumstances). The issue here is instead what default rule the actual contracting parties (members of Congress) should set for themselves. Congress could, of course, delegate the power to set the default rule to agencies or the judiciary, in which case this literature becomes directly relevant. But, it may choose not to do that.

This is not to suggest that crisis defaults are always desirable, but it is to say that they can reduce negotiating costs at the time that the default is set.

B. Deal-Enforcement Model

Legislating crisis can also help enforce previously-made deals. In this context, the crisis is not necessarily being set as a default to fill in an incomplete contract. Instead, it is meant as a type of coordinating device for policymakers.

Policymaking can suffer from a lack of coordination. As a result, even if policymakers may agree on a particular goal, they may not be able to achieve it. This is due to the nature of the legislative process—with multiple committees at work and legislation being considered at different points in time rather than at once. Crisis-style tools can be used to address this challenge by punishing deviation from the agreed-upon goal. Enforcement of this kind has been used throughout the budget process, mostly with different versions of the sequester, as described in Part I.C.

Of course, policymakers have other tools at their disposal in addition to these crisis-style devices to help coordinate them. That includes using congressional rules to organize decision-making and coordinate among disparate actors. For instance, that was among the goals of the Congressional Budget Act of 1974. That Act established a process by which both houses could set out common budget targets and then enforce those budget targets with special points of order—often requiring sixty votes in the Senate to override—if the targets were violated (Saturno 2013, 5-8). In that case, voting rules rather than a crisis are used to enforce a deal. With that said, there is reason to think that coordinating devices enacted into law—and thus requiring laws passed by both houses and signed by the President to override—may have more force (e.g., DeWald 2009).

To emphasize, while the devices can be turned off by the institutions that created them, the threat of a crisis if certain conditions transpire can have real effect in helping to coordinate legislators. Turning off the crisis requires approval of those controlling each veto gate to do so, and policymakers must publicly explain why they are taking that affirmative action. As a result, it changes the legislative landscape, as compared to one where there is no crisis threatened if certain conditions occur.

There is evidence to suggest these devices make a difference. For instance, Alan Auerbach finds that these types of budget enforcement devices affect budgetary outcomes—and despite the fact that even the crisis-style enforcement mechanisms can always be overridden by passage of a new law (Auerbach 2009). In short, devices such as these seem to actually facilitate coordination.

C. Deal-Forcing Model

Policymakers may legislate crisis not just to enforce a deal but to force one to begin with. In this model, policymakers legislate crisis in order to force them to the table at a later time and get them to agree to a deal that they might not otherwise, at least along the same timeline.

The basic idea is to create an outcome that is less desirable to the policymakers controlling the relevant veto gates than the possible compromise solutions. The crisis, thus, would play a catalyzing role, getting the policymakers to reach a deal that may not otherwise be possible at that point in time unless the crisis loomed as a possibility.

This simple model, though, is insufficient. The crisis is not created by some third party forcing it on policymakers but, rather, by the policymakers themselves. In other words, the very same policymakers who control the veto gates that could prevent a compromise from being reached often legislate the crisis into existence. The question is why policymakers would do so in order to force themselves to later compromise. If the compromise were desirable to them, why would they not achieve it directly?

One possibility is some form of inconsistent preferences. At Time 1, as the crisis gets legislated, policymakers do not think they can legislate a compromise directly. It is not merely a question of transaction costs being impossible to overcome (in which case, this would be similar to the incomplete contract model). Rather, the policymakers do not think that, at Time 1, there is a bargaining zone that all sides would prefer to the status quo—but that there could be such a bargaining zone at Time 2, if the threat of a crisis were over-hanging. Further, at Time 1, they want to create such a bargaining zone.

For instance: It is possible that voters and their representatives may not want to run large deficits; they see it against their collective interests to do so. However, the voters and the representatives may have other preferences that are inconsistent with this. When it comes to deficit reduction at any point in time, voters and, as a result, their representatives may lack the self-control to optimally limit deficits (e.g., Bisin, Lizzeri, and Yariv 2015). As a way to overcome that problem—and preferencing the desire for deficit reduction—policymakers might set up a crisis mechanism that can only be turned off if the deficit reduction were achieved. Of course, this could fail to the degree that policymakers later decide to simply turn off the crisis, preferring that to discrete deficit reduction. But, it is possible that the crisis itself and the prior indication of commitment to deficit reduction could change the later outcomes.

Something like this might have happened with GRH. While the GRH deficit targets have often been described as failures, since the specific deficit targets were evaded, they in fact helped to force a series of negotiations. That culminated with the 1990 bipartisan deficit reduction agreement which turned off the scheduled sequester and replaced it with a significant set of deficit reduction measures (Calmes 2011). This included measures that various parties had previously forsworn, including—famously—the first President Bush agreeing to a tax increase (along with spending reductions).

There is some question as to whether this is in fact normatively good. After all, if preferences are simply inconsistent, which preferences are the right ones? Still, at least in the context of GRH and many of the later fiscal rules (perhaps the 2011 debt limit deal being a key exception given the need for fiscal expansion at the time), there is some reason to believe these rules actually improved outcomes—as deficit reduction was needed.

Another possible model returns to the issue of transaction costs. Bargaining can be costly, both

to the negotiators themselves and those affected by the policies, and it can be lengthy—sometimes inefficiently so (e.g., Fershtman and Seidmann 1993). And, while it could be in the interests of all parties involved to shorten the bargaining period, they would not want to do so through unilateral disarmament—for instance, by not taking an aggressive negotiating stance. In fact, each side can have an incentive to "hold out" to try to beat the other side, even if the negotiation is dragging on longer than is optimal for either party. Such problems in negotiation can potentially be overcome by some form of mutual disarmament, or at least some additional pressure to resolve the issues by a specific date (Chandler 2015). This is essentially another form of coordination among the legislators; this time, policymakers are striking a deal as to how long negotiations should go on.

Legislative crisis can work in exactly this fashion—by giving a deadline to the parties involved. The parties know that, if they exceed the deadline, a crisis of some kind will transpire, and so the sides are coordinated in trying to resolve the negotiation by the date that the crisis is scheduled to occur absent an intervention. While the oncoming crisis itself can spawn its own set of potentially negative strategic dynamics that are discussed in the next section, it has the benefit of helping to set a coordinated timeline for negotiations.

Again, while the crisis can be turned off by the same institutions that set the deadline to begin with, it meaningfully changes the legislative dynamics. Turning off the deadline requires those controlling each veto gate to agree that it is in their interest as well to extend negotiations—which it may not be. In other words, just as it requires coordination to set the deadline, it requires coordination to turn it off. One "defector" from the previous agreement is insufficient for the deadline to be extended.

The shutdown is a case in point. This gives negotiators over appropriations a date certain by which time appropriations negotiations must be resolved or else face the crisis of a shutdown, which adds credibility to the date. Negotiators have frequently been known to extend the amount of time they have to negotiate by enacting a "continuing resolution" that temporarily continues the last year's funding level, sometimes with some formulaic adjustment. But, extending the deadline then requires policymakers controlling each veto gate to agree that such a continuation makes sense. They remain coordinated on the length of time that negotiations should extend, with another deadline in place.

The bottom line is that a crisis can be used as a way to force a compromise that may not otherwise be possible, at least along that same timeline.

III. Costs of Crisis

The point of the prior part was to show that legislating crisis can, in theory, do some good—to overcome other problems that can plague the legislative process. But, of course, these legislative tools do come with real costs, and the costs have rightly engendered considerable attention. This section discusses the types of costs that these tools create as a general matter.

A. Threat of Crisis

The very idea of legislating a crisis is for the crisis not to actually transpire. But, even if the crisis never occurs, the threat of a crisis involves costs, potentially considerable ones. In particular, the threat can lead to wasteful planning and harmful uncertainty.

The threat of crisis can lead to planning, so long as that avoidance of the crisis is not guaranteed. And, as the next section describes, there generally is some probability of the crisis itself occurring. The planning may not be as extensive as if the crisis were certain to occur, but, for a number of the crises discussed here, the planning is hard to scale down and is still worth doing even if the probability of the event occurring is low. The Treasury will or will not have a plan for a liquidity crisis as a result of the debt limit. Agencies will or will not have shutdown plans. And the same is true for private sector actors deciding what to do if these events occur. The point is that there are real planning costs that must occur as a crisis approaches.

Further, the threatened crisis can lead to uncertainty, with negative effects on risk-averse private sector planners. Private sector actors may immediately change their behavior in the face of a threat, such as suspending investment until there is greater certainty or building up cash reserves in case the government stops or delays payments in the event of a liquidity crisis.

The point is that a crisis is not really just a crisis when the actual adverse policy comes into place; it can be one—with very real costs—as that point approaches.

B. Crisis Itself

The crisis itself of course can be costly. The outcome is designed to be undesirable after all; if the occurrence of the crisis were not costly for policymakers, the crisis would not in fact facilitate legislation. This means that the cost cannot be entirely reversible if it were to occur. That is, the crisis must threaten some form of harm that cannot be entirely undone in order to facilitate legislation. If the harm could be readily reversed, it would not apply much pressure at all. With that said, the magnitude of the cost and who it affects varies widely among the various tools. Some would involve broad costs that would be felt across much of the economy—a government liquidity crisis due to the debt limit being an example of this. Others involve much more targeted costs that may verge on being insufficient to motivate—the delay in pay to members of Congress being an illustration.

Of course, the actual adverse policy outcomes are meant to be avoided, but they may not be. This is for at least two reasons.

The first is an accident in negotiation as the crisis approaches. While these crises can overcome other issues that can plague negotiations, they create new problems as well. Essentially, these devices can set up something akin to a "chicken game," with two cars driving directly at each other daring the other to swerve. And, in a chicken game, there are two equilibria for each player—"unilateral defection" (continuing to drive straight) or "unilateral cooperation" (swerving). For each party, the best outcome is defecting (driving straight) and the other player cooperating (swerving), and the worst outcome is each player defecting—producing an accident.

However, it is possible that both players in fact choose defection, causing the accident (e.g., Kollock 1998, 186).

Strategic posturing, and agency costs could increase the possibility of such an accident. For instance, there is an incentive for those seeking negotiating leverage to deny the severity of the negative consequences of an accident in an attempt to suggest to the other side that they might prefer enduring the crisis if their negotiating partner does not give enough (Kollock 1998, 186). There is also the possibility that agency costs could help spark a crisis, as policymakers may think that constituents will blame the rival party if a crisis occurs even as they may act to precipitate one. In this situation, the policymakers do not actually like the substantive outcome from a crisis, nor do their constituents, but the policymakers may believe that their political rivals will be the ones blamed.

Notably, there are factors that can reduce these risks and increase the probability of cooperation (and vice versa). This includes better communication among the negotiators; building a greater sense of "group identity," to the extent that is possible; and repetition of negotiations giving the sides better information as to the identity and history of their negotiating partners (Kollock 1998). This also raises challenging normative questions in the legislative context—to the degree that communication can improve outcomes in these negotiations, should such communication extend broadly including to the extremes of the parties, or will the appeasement of the extremes be costly in other ways even if it might reduce the probability of a crisis? As explored in the next section, such crises could in fact be used to either empower or disempower these extremes.

Still, the key point for purposes of this chapter is that negotiations do not always end in a mutually beneficial result. Because of a lack of coordination, strategic gamesmanship, and agency costs, accidents can happen.

The second reason that a crisis could occur is due to mistakes at the point that the parameters of the crisis are originally negotiated. Specifically, policymakers may fail to create a crisis that is less appealing to policymakers controlling at least one veto gate than the alternatives that other policymakers would be willing to agree to. In other words, at the time the crisis is put into law, policymakers controlling most of the veto gates may believe it will never happen based on a reading of the preferences of the other policymakers. But, that reading could be wrong; they may have in fact have passed into law a crisis that is likely to then transpire.

This second reason for a crisis occurring could call into question whether what has happened is a crisis at all, at least within the definition of this chapter. After all, some of the policymakers prefer it to other outcomes that could be negotiated; in which case, it is an intended policy, at least by those controlling one of the veto gates. So, it perhaps is better called a quasi-crisis in this case. The crisis is one that most policymakers and their constituents would want to avoid, but some want it—and so it occurs.

C. Empowering the Extremes (or Disempowering?)

Legislating crisis also has the potential to empower extreme policymakers—though the effect may not run entirely in that direction.

For the extremes to have any influence in a negotiation, they must have influence or control over a veto gate. As has become clear over the last few years in what has transpired in governance of the House of Representatives, it possible for a relatively small band of extreme policymakers to exert such influence. This is of course a more general problem to the degree that policymaking should tend reflect the preferences of the median and not the extremes, but it can be a particular problem in the face of a crisis.

Specifically, a crisis may give greater leverage to extreme members. Even if they do not actually prefer the crisis to transpire relative to many outcomes that could be negotiated, their very extremity could give greater credibility to a negotiating stance in which they claimed that the opposite was the case—and that they essentially welcome the crisis unless others accept their demands. In declaring that position, they may have more credibility than more moderate members. Or, to put it differently, the negotiator that *seems* crazy has the advantage in a game of chicken.

Further, the extreme members may actually prefer the crisis to many of the possible negotiated solutions. In that case, the threat to allow the crisis to transpire would be fully credible. And, to avoid the crisis, others would have incentive to fold. It becomes a game of blackmail rather than a game of chicken, with attendant empowerment of the extremes.

However, legislating crisis can be a double-edged sword for those at the extremes. To the extent that an extreme element has control over a veto gate, it is possible that a crisis may be needed to force any sort of compromise. Imagine an extreme set of legislators who are demanding that any legislation in a particular area include some desired reform that those controlling the other veto gates do not want. If the default is not a crisis, the extreme member may simply hold out and refuse to negotiate. It could be that the possibility of a crisis—with the political blame potentially being attributed to the extreme member—is needed to force the extreme policymakers to a compromise.

So, it is not entirely clear which of these dynamics is more important. In theory, there are plausible ways in which the possibility of crisis could empower *or* disempower extremes.

D. Agency Costs

There is a further danger that the costs of these tools could be magnified by agency costs—and, specifically, that crises will be legislated in ways that policymakers see as being in their interests but are not in the interests of their constituents. For instance, policymakers today could legislate the possibility of crisis tomorrow as a way to constrain future, different policymakers (akin to the theory of how present policymakers may use fiscal deficits as a way to constrain future policymakers (Alesina and Perrotti 1995)). Or, as already mentioned, policymakers may believe that the opposing party may be the one blamed for a crisis and legislate (and precipitate) it for that reason, even as they understand that their constituents will suffer as a result.

This chapter is not meant to deny that crises could be used in ways that are counterproductive for society broadly. But, as opposed to seeing these crises as necessarily being driven by agency costs (or the mistaken beliefs of policymakers), it explores how they can be used in ways that are in fact *both* in the interests of policymakers and their constituents.

IV. The Benefit and Costs of the Specific Tools

This chapter has so far largely discussed legislating crisis in the abstract. This part returns to the four specific devices that have been so prominent in recent budget negotiations: the debt limit, shutdowns, the sequester, and withholding congressional salary.

First, as a general matter, the case for or against each is complicated. There are trade-offs. Second, the benefits of these devices to some degree derive from the costs. That is, these devices facilitate legislation by threatening a crisis that is salient to policymakers. So, there is naturally a cost-benefit trade-off with each of these devices. Third, the bigger crisis is not always better as a legislative device. Instead, the better legislative devices are ones that maximize net benefits, and sometimes, a smaller crisis will be just as good—or good enough—at facilitating legislation as compared to a larger crisis. Or, to put this in other terms, it may sometimes make sense to set a legislative bomb, but a bigger bomb is not better when a smaller one can get the job done.

Importantly, the wisdom of using tools like this to facilitate legislation depends in large part on the substance of that legislation. The greater is the benefit derived from the underlying policies, the greater is the justification for such tools and vice versa. Notably, these tools can and have facilitated policies of real social importance, whether it be overall fiscal deals or regular updating of appropriations. But, to the extent there are less costly tools available to achieve similar ends, then crises should not be used in this way, and, to the extent that the underlying policies being facilitated are not of much benefit, they probably should not be used at all.

A. Debt Limit

1. Benefits

The debt limit is among the most limited of the tools in terms its uses. It has one significant constructive purpose: and that is to potentially bring parties to the table and force a compromise. There is the threat of disaster that could focus parties on fiscal issues especially.

And, that is consistent with some debt limit deals across time, including the original enactment of GRH (Ellwood 1988, 562-564) and the 2011 debt limit deal imposing discretionary caps and the later sequester (Hulse and Cooper 2011). It can be hard to differentiate the deals that were facilitated by the debt limit versus ones that included a debt limit increase as part of agreements that would have been struck anyway with similar outcomes and timing. But at least some of the deals—including these two—were closely wrapped up in attempts to raise the debt limit.

However, the debt limit—at least as currently operated—cannot be used in a number of the other ways that other crises can. In particular, it cannot effectively enforce a deal (as opposed to forcing a deal to fruition). That is because the debt limit is set as a fixed nominal figure and in terms of gross government debt. For the most part, budget plans—even ones that aggressively reduce the deficit—involve growth in gross debt.

Further, the debt limit cannot help much in allowing policymakers to not fully specify their policy preferences. The policymakers must still agree to tax and spending levels independent of the debt limit. The debt limit can, in a sense, leave the contract unspecified since it sets a point in time at which the debt limit itself will have to be revisited, but it does not save decision-makers from having to otherwise set parameters for tax and spending policies. As is often said with regard to the debt limit, it imposes a limit on obligations that the government has already made.

2. Costs

Of these tools to legislate crisis, the debt limit's potential costs are probably the most severe. Notably, a government liquidity crisis has never fully materialized—policymakers have always acted before it would transpire—and so there is also great uncertainty as to what a crisis would look like.

We do know that the debt limit involves planning costs. As the debt limit approaches, Treasury, first, engages in a set of accounting hijinks ("extraordinary measures") to extend the solvency of the government; this part is done regularly by Treasury and with relative ease. The rest of the planning costs are less clear but still real. Treasury must plan for what would happen if it in fact ran out of cash. At Treasury, they must ready their systems for whatever approach they would take in the event of a liquidity crisis. Treasury has considered a number of plans, and said that delaying payments may be the least harmful (Thorson 2012, 3-4 enclosure). Further, the private sector must engage in its planning, and recent debt limit negotiations have in fact sparked upward movements in Treasury interest rates, reflecting market actors taking action as the chance of an accident rose (and, ironically, worsening the government's fiscal position) (Government Accountability Office 2015).

The great danger with the debt limit is the possibility of a true government liquidity crisis. The effects of such an event are uncertain and depend in part on the financing needs of the government at the time (the larger the deficit, the larger the effect). What seems clear is that—in the event the government delayed or prioritized payments so that revenues matched spending—it would involve a significant fiscal drawback. That, in itself, could potentially throw the economy

into a deep recession especially if the Federal Reserve was limited in its ability to react (as it was in the years following the Great Recession). Further, the financial markets could also be impacted especially if the government either did not make payments on its debt or, alternatively, issued debt over the limit of questionable validity—with these credit market effects also carrying over into the broader economy.

For instance, as the government approached the "X" date in the fall of 2013 at which point the government would run short of liquidity, analysts at Goldman Sachs painted a dark picture. At the time, given the government's financing needs, crossing the X date would have required essentially cutting 35 percent of federal spending. According to their estimates, the fiscal pullback would have reduced economic growth in the fourth quarter of the year by between 1.7 percent and 4.2 percent on an annualized basis if this were to last for a month (Phillips and Dawsey 2013). And, while Goldman Sachs downplayed possible credit market effects, other analysts thought that a financial crisis could add to maelstrom. Concluding that "crossing the debt ceiling would be catastrophic," financial analysts at RBC Capital described how private credit markets could freeze up as Treasury debt would no longer be a secure form of collateral (Garcia 2013)—and that could occur if either there was a default on that debt or Treasury issued debt over the limit without congressional authorization.

And, the debt limit has prompted a certain amount of strategic positioning increasing the chance of an accident. Some, especially on the right, publicly question how bad a government liquidity shortage would be as they have made policy demands (Weisman 2013). It is unclear the degree to which they believe the rhetoric, as opposed to it being a negotiating stance. The point is that some of the strategic positioning that could both empower extremes and potentially lead to an accident is evident in the way current parties—and especially parts of the Republican party—have approached debt limit negotiations.

With all that said, there has never been a liquidity crisis in the many decades that the debt limit has been in place and subject to negotiation. Congress always acts before the fateful point at which there could be a problem—even if the rhetoric may have grown more extreme of late. It is the bomb that has not gone off, but there is a realistic fear that it might.

3. Trade-Off

While the debt limit is effective at forcing parties to legislate and sometimes compromise, the dangers involved are substantial. An accident could potentially have severe repercussions for the economy, or, to repeat the conclusion of one set of analysts, it is possible that the effects are "catastrophic" (Garcia 2013). It is also notable that the debt limit cannot actually enforce any kind realistic budget agreement or save policymakers from negotiations on spending and revenue levels. They need to negotiate those even with a debt limit in place. Thus, it is a tool of limited purpose—to possibly force deals, especially around the budget—and with certain potentially extreme dangers.

To be clear, the debt limit has served that limited purpose somewhat successfully for decades. One could question the substance of some of those deals, perhaps especially the recent one in 2011, which imposed fiscal austerity at a time when the opposite was needed. But, that is

disputed, and some of the other agreements—such as GRH leading into the 1990 budget accords—reflect the debt limit creating an opportunity for negotiation over the debt and deficits that were, in fact, needed.

The trade-off here is not completely clear, but the risks surrounding the debt limit seem simply to be too great for it to continue to be used as a way to coordinate fiscal negotiations or negotiations over any other matters, especially with less risky alternatives available. The most recent rounds of negotiations, and the positioning especially of the Republicans (and reaction of the debt markets), indicates that there is a real risk of an accident, with broad negative implications for the economy. The accident may be low probability but the costs are so large that the expected costs of using this coordinating device could still outweigh the benefits—and the risks appear to be growing (Schesinger 2013).

To be clear, the problem is not the concept of there being some limit on the debt. It is how this particular device works, both in terms of what functions it serves and the costs of the device. The limit could be changed so that it is no longer set as a fixed amount of debt in nominal dollars but rather either forces or enforces a deal that policymakers could and should achieve—such as limiting debt to rising with GDP or some other realistic metric. This would make the device more helpful. Even more importantly, the consequences of the device could be changed so that the "crisis" would not be one with such large and negative implications for the broad economy; the crisis might be a revised version of the sequester or even a withholding of congressional salary or some other outcome that, if there were an accident, would not impose such deep costs more broadly on the country. Such changes might produce a mechanism that could achieve more at significantly less risk to the country (Shapiro 2013).

B. Shutdown

1. Benefits

Shutdowns have two main benefits. These benefits are relative to a system in which shutdowns are not the default when appropriations run out. Instead, in this alternative system, appropriations continue automatically at some pre-approved level—an alternative often called an "automatic continuing resolution."

First, the expiration of appropriations can force a deal to update appropriations levels. That is, it can reduce the risk that negotiations drag on for too long in the absence of a forcing device like this. Such over-extended negotiations would produce not just costs in terms of the negotiations themselves, but, more importantly, would mean that agency appropriations would not be updated for new conditions.

Of course, it is hard to know the degree to which negotiations would extend in the absence of a shutdown to force the issue. Some question the importance of the shutdown as a forcing device, noting that policymakers already have incentives to update appropriations (Louk and Gamage 2015, 250-251). After all, appropriations are one of the key ways of currying favor among constituents, and there are at least two examples of U.S. states (Wisconsin and Rhode Island) with such default budgets but which have still managed to consistently deliver new budgets early

in the fiscal year (Louk and Gamage 2015, 250-251).

However, I am more skeptical that appropriations would be regularly updated in the absence of a forcing device like a shutdown, at least at the federal level. In particular, it is notable the degree to which Congress already has difficulty updating appropriations, even *with* the shutdown as a coordinating device. Appropriations bills are almost never done on time. One scholar estimates that fewer than 15 percent of appropriations bills get completed by the start of the new fiscal year, looking at the forty year period from 1974 (which marked the start of the modern congressional budget process) through 2013 (McCarty 2014, 10). When appropriations are not completed on time, Congress enacts "continuing resolutions" that continue funding based on previous levels for the relevant period. The modal month of passage of an appropriations bill is three months into the fiscal year, but, in roughly 20 percent of cases, appropriations bills were not completed at all and instead continuing resolutions were used to fund agencies for the entire fiscal year (McCarty 2014, 10-12). The current period of divided government has seen a particularly poor record in this regard (McCarty 2014, 12).

Of course, completing an appropriations bill is not an end in itself; the concern is that the failure to get appropriations done on time or in some cases at all is reflective of negotiating failures rather than reflective of what is actually desirable. And, eliminating a shutdown as a forcing mechanism seems likely to make this worse, unless it were replaced by some other device to force decision-making.

The second benefit of a shutdown is that it can be used as an easy way to avoid full specification of future policy. It is a relatively easy default to set when policymakers do not want to agree on what they want future appropriations to look like. This is perhaps a paradigmatic example of an incomplete contract; after time X, the contract expires and it must be renegotiated, with the default being no appropriations whatsoever. It would be more challenging to negotiate a default in which the appropriations are essentially fully specified (even if by formula) as a default in the absence of new appropriations.

Note that, like the debt limit, a shutdown cannot do much to enforce an existing deal. That is because the trigger is relatively inflexible; being based simply on the passage of a certain amount of time. And, while the trigger could be something other than that (if conditions change a certain amount, appropriations automatically end), that has not been done before, at least in any significant way.

2. Costs

Like with the debt limit, shutdowns involve significant planning costs and costs if the shutdown actually occurs—though, importantly, the costs of an actual shutdown are probably significantly less than a debt limit accident. Also in contrast to the debt limit, the costs here are better known since there have been previous shutdowns, though they have been infrequent.

Planning for a shutdown wastes time across the whole government. Each agency must have a shutdown plan according to the Office of Management and Budget (OMB) (OMB 2015, Section 124.2). As a possible lapse in appropriations approaches, OMB convenes a series of meetings

with senior agency officials to help implement the plans. Among other things each agency must decide is who among its staff are considered excepted from the shutdown or not. Thus, planning for a shutdown distracts senior managers in the government, taking them away from more productive activities.

A shutdown itself involves costs as well. The 2013 shutdown lasted two and a half weeks. It led to the initial furlough of 850,000 workers (Executive Office of the President 2013, 13), and the suspension of activities equal to about 15 percent of the entire budget (Phillips and Dawsey 2013).[2] The Obama administration estimates that this essentially wasted $2.5 billion because the workers were left idle (Executive Office of the President 2013, 4).[3] This also had broader effects on the economy as a part of the government stopped purchasing goods and services. In reviewing third-party estimates, the Congressional Research Service arrived at a predicted reduction in GDP growth of about 0.1 percentage points in the affected quarter for each week of the shutdown, or about $40 billion per week on an annualized basis (Labonte 2015, summary). Importantly, though, this growth effect could largely be erased going forward as government spending "bounced back" once the government reopened (Labonte 2015, 7-8). There are other costs as well, which are harder to quantify—like the inconvenience experienced by many Americans due to the shutdown of government services ranging from the national parks to Head Start programs.

These are real and significant effects of a shutdown, but they are important to put in perspective. The $2.5 billion in direct costs wasted on the two and a half week shutdown in 2013 are small compared to the over $3 trillion per year spent on federal programs at the time. And, in terms of the broader economic consequences, it is notable that fourth quarter of 2013 actually saw above-average economic growth of 3.8 percent (Labonte 2015, 4). Performance may very well have been better if the shutdown had not occurred, but the point is that the effect was not sufficient to knock the economy off a growth trajectory.

These costs should be differentiated from the possible ones coming from a debt limit crisis. A debt limit crisis can involve a much broader and dramatic reduction in government spending leading to much more significant economic disruption; that reduction would likely be much less orderly and chaotic; and, finally, there is the possibility of sparking a financial crisis. While those effects are highly uncertain, they are potentially of an entirely different of magnitude in terms of costs to the country than the more limited government shutdown in the event of an appropriations lapse.

Shutdowns also illustrate how crises like these can both empower and disempower the extremes. The 2013 shutdown transpired because certain members in the Republican party were demanding health care reform be defunded as part of the appropriations, and they were willing to shut down the government to make the point (Stolberg and McIntire 2013). So, on the one hand, the shutdown itself reflected them flexing their muscles. On the other hand, the crisis disempowered

[2] The impact grew less as the shutdown proceeded because the Department of Defense interpreted a temporary law passed just before the shutdown to allow it to bring back most of its civilian workforce.
[3] This estimate of "waste" is based on the amount that the workers were later paid for this period for work not done. Importantly, this amount is essentially wasted irrespective of whether the workers are paid, since the workers, who would otherwise have been productive, were left idle.

them. They ended up having to back down under tremendous public pressure. And, absent a shutdown, it is not clear the extreme members could have been forced to back down. For instance, if an automatic continuing resolution were in place, extreme members may have been much more willing to reject any new appropriations for a much more extended period of time unless their demands were met.

3. Trade-Off

There is not a clear-cut case for replacing shutdowns with something like an automatic continuing resolution. Congress already has difficulty coordinating its negotiations over appropriations. Getting rid of a forcing mechanism entirely seems likely to leave matters worse off in this regard, especially in a polarized political environment, and it would require negotiating default appropriation levels to replace it. And, regular updates of appropriations serve an important social good, as they reflect new information about the programs and the people they serve.

Further, the costs of shutdowns, while real, are limited. Most of the government remains running, in part because executive branch has some flexibility in terms of how a shutdown is implemented. The waste of the 2013 shutdown added up into the billions but was small on the scale of the budget as a whole. Finally, and importantly, shutdowns in recent times have been relatively rare, with only three in the last twenty years (although this does not stop agencies from having to plan for a shutdown).

Could there be something better to replace it? Perhaps. For instance, the withholding of congressional salary is a possibility some have suggested (Louk and Gamage 2015, 252), though that may or may not be effective. Further, to the degree that shutdowns are still deemed too disruptive, Congress could further expand the category of excepted activities that are allowed to continue when appropriations are suspended. For instance, it could establish an automatic continuing resolution but only for agreed upon areas of the budget, whether Head Start for young children or support activities at the Pentagon. But, in the absence of another effective device or a more limited version of a shutdown , it is not clear that eliminating the possibility of a shutdown is better than the alternative—at least not when accidents remain relatively rare and the costs real but limited.

C. Sequester

1. Benefits

In theory, a sequester—unlike both the debt limit and shutdowns—can be used for any of the purposes for legislating crisis described above. A sequester can allow policymakers to not fully specify the terms of the deal by putting in place a penalty default if policymakers fail to further specify a deal later on. It can enforce an existing deal by going off when the parameters are violated and, thus, can serve a coordinating role. Finally, a sequester can create pressure for a deal to be reached, by threatening undesirable cutbacks in the absence of additional legislation.

And, as noted above, the sequester to some degree served these roles in the past. It did so in

GRH, where it was first initiated with the threat of sequester potentially leading to the 1990 budget deal. It did so again to enforce the main elements of that deal via PAYGO and discretionary caps. Finally, it was used again—if less successfully—in the 2011 debt limit deal when it allowed policymakers to, first, raise the debt limit without fully specifying the composition of the connected deficit reduction and to, second, try to force a later deal to do so.

2. Costs

The costs of the sequester are not as immediately dramatic as those of the debt limit and shutdown, but that, in fact, can be the problem. The sequester is a balance between being undesirable, with costs born by the country broadly, and livable for at least some policymakers, which can translate into it being durable.

Thus, the core challenge with the sequester as compared to the other mechanisms described here is the possibility that policymakers controlling one of the veto gates end up preferring the sequester to other negotiated solutions. Essentially, there can be a failure at the time the sequester is legislated to understand how undesirable the tool is to some of the policymakers. As noted above, it is possible that this could simply be described as good negotiating by those policymakers who prefer it to other negotiated solutions and bad negotiating by their counterparts. So, the problem is certainly different than with the debt limit or shutdown, where an "accident" is likely just that—no side actually desires a government liquidity crisis or shutdown as a substantive end in itself.

This explains some of the durability of the sequester now in place. A device that previously was seen by all sides as assuring mutually assured destruction in the event it went off became something else. At least one of the veto gates—the House Republicans—no longer feared large defense cuts as much as Republicans had in the past (Green 2013). And, they preferred the sequester—at least initially—to the negotiated solutions that they could otherwise achieve. To be clear, after two years of largely being left in place, the sequester was substantially rolled back in 2016 and 2017, with the additional funding being largely paid for (Greenstein 2015). Still, we have been left with an unintended consequence, at least unintended by many of the negotiators.

3. Trade-Off

The 2011 sequester failed, at least to some degree. It failed by actually happening and then largely staying in place for the first two years. This could be seen as one set of policymakers simply doing better than others at the negotiating table. But, it does mean that the same mechanism probably cannot be used again at least in a bipartisan negotiation for the purposes to which the sequester has been put—allowing for contracts to be left incomplete, forcing deals, and enforcing deals. Policymakers fooled once are unlikely to be fooled again.

Still, it is possible that a sequester-like mechanism could be revived, probably with changed parameters that give negotiators some confidence that it truly is a mutually assured destruction device from the perspective of all of those controlling veto gates. For instance, automatic tax increases could be part of the mechanism. And, a revised version of the sequester could help attain some of the previous goals achieved by the sequester, before its failure. But, with a device

like this, there would always be the risk that we have seen now played out—that it becomes an acceptable option to some set of policymakers for some significant period of time.

D. Withholding Congressional Salary

1. Benefits

Like the sequester, withholding congressional salary is a flexible tool—assuming it actually is found to be constitutional if ever implemented (a rather significant assumption).

It can allow for a deal not to be fully specified, as policymakers could trigger this in the absence of further renegotiation. It can also be used to both enforce and force deals, with the penalty being applied if policymakers either fail to abide by a deal or to make one. Congress must simply set a trigger condition—some condition which, if not met, would cause withholding of salary until the condition is rectified.

There are some good reasons to question exactly how effective a device like this would be. The mechanism does not permanently withdraw salary (and probably couldn't given the constitutional restrictions). Rather, it simply puts the salary in escrow for release later (either when the condition is alleviated or that congress ends), with the hope that the liquidity crunch motivates policymakers. But, it is possible of course that members of Congress may be willing to live with getting their pay withheld for some period of time. In 2013, the median net worth of a member of Congress was $1 million (Choma 2015), meaning that liquidity may not be much of an issue. So, it is not all that clear how much incentive this would provide. Further, the device puts no pressure on the president—in contrast to all of the other crises discussed here.

And we have little evidence from our history to tell us how effective it would be. This particular device was only used once—in the No Budget, No Pay Act of 2013. Pay was to be withheld if both houses of Congress did not pass budget resolutions. They successfully did that, but it is unclear how well the device might work going forward.

Perhaps the greatest benefit of a device like this is actually captured by the next section—the broader social costs are minimal, certainly as compared to the other crisis forcing devices. The crisis is limited to Congress itself.

2. Costs

The costs of such a device are probably quite limited—that is, the cost is limited to members of Congress, even as the device could potentially have benefits for the legislative process like some of the other mechanisms. This is what makes a device like this so attractive.

Withholding pay is certainly not without its potential faults. If it were regularly employed, it could disproportionately pressure those members of Congress with access to less liquid assets to tide them over—certainly an undesirable consequence. So, if pay were withheld for any significant length of time, it could make being a member of Congress less attractive especially to those without substantial savings, or could quicken the revolving door to the private sector.

Still, even with those possible detriments, the device is notable for its lack of broader social costs. It imposes pressure on Congress not via the possible effects on interest groups or the effects on constituents broadly—but on members themselves and in a way that may not have all that deleterious effect on the institution.

3. Trade-Off

Devices like this seem relatively under-used compared to the others discussed here. As noted above, it is not clear that this particular device will actually withstand constitutional scrutiny if it ever came to that, and there is the possibility that the consequences may not be sufficiently severe to facilitate legislation. Still, this offers the potential of overcoming some of the coordination problems that can plague the legislative process, while doing so with a crisis that has limited costs. The hope would be that it could still create enough incentive to be an effective mechanism for overcoming other legislative failings, but without anywhere near as much total costs for society.

It is also worth considering whether there are other similar mechanisms that could be deployed—mechanisms that could serve as coordinating devices by imposing costs on policymakers themselves but not on society broadly. Perhaps it is withholding pay not just of members of Congress but of key staffers with compensation over certain thresholds. Or, maybe it is automatic cutbacks in the budgets for congressional offices and committees. The idea is that there may be other ways to generate the benefits by putting pressure on policymakers but with very limited costs to the country broadly.

Conclusion

Each time the country faces down a crisis created by policymakers themselves, it raises the question, which many have asked, whether there is any good justification for these to exist. The tentative answer of this chapter is "yes"—there are in fact justifications for such self-created crises. It is not a broad-sweeping defense of such crises generally, but rather an exploration as to how legislating crisis can help address other failings in the legislative process. There are trade-offs, and the trade-offs depend on the particular devices involved—and the underlying policy goals being facilitated.

Much can be decried about the ways the legislative process has worked in recent years, and there may be reasons to worry that Congress has incentives to use these devices too much and in ways that could benefit the politicians but not their constituents. Still, this family of tools should not be broadly condemned; in some cases, the threat of crisis may be better than the alternative of none.

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