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

*Neil H. Buchanan\** & *Michael C. Dorf\*\**

#### 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.<sup>1</sup> 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<sup>2</sup>—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.<sup>3</sup> 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*<sup>4</sup> (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.<sup>5</sup> President Obama did, indeed, propose such increases, which took effect when Congress failed to block them.<sup>6</sup>

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.<sup>7</sup> 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.”<sup>8</sup>

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”<sup>9</sup>: 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/](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-bartirolo/#.UM4tanPjkZg](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-bartirolo/#.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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

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."<sup>14</sup> 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.<sup>15</sup> 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

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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.<sup>16</sup>

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.<sup>17</sup>

### 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

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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,<sup>18</sup> because there is no statutory limit on the value of such coins that the government may mint.<sup>19</sup> We dismissed this “jumbo coins” proposal as “cartoonish and desperate,”<sup>20</sup> 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,<sup>21</sup> no longer advocates it.<sup>22</sup> 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,<sup>23</sup> notwithstanding the fact that, as codified, the current authorization states no such limit.<sup>24</sup>

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](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](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.<sup>25</sup>

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.<sup>26</sup> 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.<sup>27</sup>

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-principal-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.*<sup>28</sup> 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.<sup>29</sup>

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*

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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*<sup>30</sup> and *Clinton v. City of New York*.<sup>31</sup>

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.<sup>32</sup> 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.<sup>33</sup> 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-overrideable 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<sup>34</sup>—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.<sup>35</sup> 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.<sup>36</sup> 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

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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.<sup>37</sup>

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.<sup>38</sup> 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<sup>39</sup> with respect to possession of small quantities of marijuana for medical purposes in states where such possession is legal?<sup>40</sup> 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?<sup>41</sup> 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

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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 Exercising 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.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup> 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

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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](http://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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