

NLWJC- Kagan

Counsel - Box 006 - Folder 011

Debt ceiling document request

THE WHITE HOUSE

WASHINGTON

April 18, 1996

MEMORANDUM FOR ALL STAFF OF THE WHITE HOUSE, NATIONAL SECURITY COUNCIL, OFFICE OF MANAGEMENT AND BUDGET, OFFICE OF THE VICE PRESIDENT, UNITED STATES TRADE REPRESENTATIVE, AND OTHER UNITS WITHIN THE EXECUTIVE OFFICE OF THE PRESIDENT

FROM: JOHN M. QUINN
COUNSEL TO THE PRESIDENT

SUBJECT: Document Request from Joint Economic Committee

The White House has received a request from the Joint Economic Committee of the Congress for production of documents related to the federal debt ceiling and actions recently taken to avoid exceeding it.

In order that White House Counsel's Office may prepare an appropriate response, staff members should conduct a thorough search of their files and provide to the Counsel's Office any and all documents¹ regarding the November 15, 1995, disinvestment of \$61.3 billion from the Civil Service Retirement Trust Fund and the Thrift Savings Fund. This includes, but is not limited to, any documents regarding:

contacts between the White House and the Department of Treasury on debt limit strategy; options related to the disinvestment of retirement trust funds; discussions about other options for addressing the debt limit; and any proposed dates for implementing the various options for addressing the debt limit, including possible revisions of dates.

Each Assistant to the President and each Department head is responsible for ensuring that his or her staff members have conducted a thorough search for documents responsive to this request. Such documents should be provided to Wendy White, OEOB Room 148, by 5:00 p.m., Friday, April 26, 1996.

If you have any questions, please do not hesitate to contact Wendy White (6-7361) or Trey Schroeder (6-7900).

¹ The phrase "any and all documents" includes draft and final copies of correspondence, memoranda, reports, notes, and records of conversations, on paper or in computer files, and electronic mail, and any other material generated by or in the possession of the White House.

Memorandum



Subject Debt Ceiling Issues That OLC has Been Asked to Study	Date September 15, 1995
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To
Walter Dellinger
Assistant Attorney General
Office of Legal Counsel

From
Ari Fitzgerald

This memorandum is intended to briefly describe the statutory debt ceiling and inform you of the questions the Department of the Treasury ("Treasury") has asked this Office to consider as Treasury contemplates options to forestall or prevent default on obligations of the United States upon reaching the debt ceiling.

I. General Information About the Debt Ceiling

The Constitution grants Congress the authority to "borrow [m]oney on the credit of the United States." U.S. Const., art. I, § 8, cl. 2. In the Second Liberty Bond Act of 1917, ch. 56, 40 Stat. 288, Congress partially delegated this borrowing authority to the Treasury and subjected Treasury borrowing to a debt ceiling. The current statutory debt ceiling, section 3101(b) of title 31, United States Code, provides:

The face amount of obligations issued under this chapter and the face amount of obligations whose principal and interest are guaranteed by the United States Government (except guaranteed obligations held by the Secretary of the Treasury) may not be more than \$4,900,000,000,000, outstanding at one time, subject to changes periodically made in that amount as provided by law through the congressional budget process described in Rule XLIX of the Rules of the House of Representatives or otherwise.

The debt ceiling applies to all obligations of the United States issued by the Treasury, see 31 U.S.C. §§ 3102-3109, except obligations of the Federal Financing Bank issued to the public with the approval of the Secretary of the Treasury ("Secretary"), pursuant to 12 U.S.C. § 2288(a) (an amount which is limited to \$15 billion). It also includes debt issued by certain other agencies that is guaranteed as to principal and interest by the

United States.¹ By statute, Congress has required that surplus monies held in various trust funds managed by Treasury be invested in Treasury debt. This special debt (Government Account Series securities), which is issued directly to the trust funds, has also been made subject to the debt ceiling. See, e.g., 42 U.S.C. § 401(d) (Social Security trust funds); 5 U.S.C. § 8348(d) (Civil Service Retirement and Disability Fund). [In an unsigned memorandum, this Office described the debt ceiling as "a prohibition on raising money through the issuance of Treasury securities." Memorandum for the Attorney General, from -----
Re: Legal Authority to Take Action To Forestall a Default, at 2 (October 21, 1985).]

In recent congressional testimony, John D. Hawke, Jr., Under Secretary for Domestic Finance, Treasury, warned that "[e]ven modest delay [in raising the debt ceiling] threatens market dislocations, which could generally hamper Treasury borrowing operations and increase the cost of financing." Testimony of John D. Hawke, Jr., Under Secretary for Domestic Finance, U.S. Department of the Treasury, before the Senate Finance Committee (July 28, 1995) at 2. "More extensive delay," said Hawke, "could precipitate a debt limit crisis that could significantly interrupt [g]overnment operations, delay millions of Federal payments, and spread fear and uncertainty about the [g]overnment's ability to pay its obligations." *Id.*

II. Advice Requested By Treasury

Thus far, Treasury has requested informal advice on the following:

- (1) the scope of the Secretary's authority to suspend investment of contributions to, and disinvest or redeem investment assets of, the Civil Service Retirement and Disability Fund ("CSRDF") in order to avoid exceeding the debt ceiling.

¹ Such debt includes obligations of the Commodity Credit Corporation, Federal Farm Mortgage Corporation, Federal Housing Administration, Federal Public Housing Authority, Home Owners' Loan Corporation, Reconstruction Finance Corporation, Tennessee Valley Authority, and United States Maritime Commission. These federal agencies and corporations were expressly identified in the legislative history of Act of April 3, 1945, ch. 51, 59 Stat. 47, the law that amended the debt ceiling statute for the purpose of providing for the inclusion of debt guaranteed by the United States. See H.Rep. No. 246, 79th Cong., 1st Sess. 1, 2-3 (1945); S. Rep. No. 106, 79th Cong., 1st Sess. 1, 2 (1945).

(2) whether any other trust fund statutes give the Secretary authority to take such actions.

(3) the types of obligations that are subject to the debt ceiling.

(4) given the debt ceiling, what other methods of raising cash for general government operations exist.

We also expect to field questions in the future on the scope of the President's authority, during a debt ceiling crisis, to defer government expenditures under the Impoundment Control Act, 2 U.S.C. § 684, and the Secretary's obligations to certain of the trust funds managed by Treasury (e.g., Social Security trust funds, Thrift Savings Plan) upon reaching the debt ceiling.



U. S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

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FACSIMILE TRANSMISSION SHEET

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

August 2, 1995

MEMORANDUM FOR BOB DAMUS

FROM: Roz Rettman *RR*

SUBJECT: Background Material on Prior Debt Ceiling Crises

This memorandum provides some background material on prior debt ceiling crises and the issues discussed in those instances, and focuses in particular on discussions of "managing" such a crisis through strategies. The crises discussed date from 1982.

What Debt Is Subject to Limit?

As a preliminary matter, it is important to emphasize that the "debt subject to limit" under 31 U.S.C. 3101 (currently \$4.9 trillion) is not equivalent to the debt held by the public. It includes U.S. obligations held by trust funds and other government accounts (currently \$1.3 billion), but excludes most debt issued by agencies (agency borrowing specifically authorized by statute) (\$27 billion), as well as that portion of Treasury debt issued by the Federal Financing Bank (capped at \$15 billion).

What Would Happen If the Debt Limit Is Reached?

When the limit is reached, all not new issuances of Treasury securities would cease. At that point, Treasury would need to balance the various issuances and redemptions on a daily basis in order not to exceed the limit. In some past crises, these actions have included instruction to agents to stop selling savings bonds, and the cessation of sales of non-marketable state and local government series Treasury securities. In addition, Treasury may be unable to invest fully trust and revolving funds.

Debt Management When Approaching the Limit.

The question of when the debt limit is reached is affected by a number of factors, ranging from seasonal cash flows (e.g., are tax deadlines approaching?) to policy decisions (e.g., limiting or changing the timing of Treasury auctions).

The order to stretch out the "drop dead" date, Treasury has taken or considered a number of actions, ranging from changing the timing of auctions to disinvestment of trust funds to selling

gold. Some of these actions have become routine and accepted mechanisms while others have been rejected as impractical because they may not generate much revenue in the short run and be costly in the long term, would disrupt or depress markets, and would require substantial lead time. Finally, some are believed to be so confrontational as to be beyond consideration.

1. Routine Actions.

In past crises, Treasury has routinely changed the size and timing of its auctions to accommodate the debt limit. It has also not invested currently received trust fund receipts in Treasury securities, or not done so fully. It has disinvested all or part of the Exchange Stabilization Fund (the current balance of which is only \$1 billion). It has substituted FFB debt for Treasury debt. Currently, however, the maximum FFB debt authorized, \$15 billion, is already borrowed.

2. More Aggressive Debt Management Measures.

Treasury used its authority to manage the public debt to disinvest Social Security and other trust funds to postpone a debt crisis in 1985. This involved changing the timing of redemption of funds used to pay the obligations of the funds (such as benefits and administrative expenses). In simplified terms, the change in timing works as follows. In normal times, Treasury initially pays out benefits on behalf of the funds from Treasury bank accounts. Based on a schedule of normal check cashing by trust fund recipients, Treasury disinvests from the funds in those amounts over a period of several days at the beginning of the month. Thus, in effect, the trust funds earn interest on the float.

The timing change done in 1985 permitted Treasury to disinvest from the funds in the amount that it anticipated it would have paid out on behalf of the funds over the next several days, losing the benefit of interest on the float. To ensure that all benefit checks would be honored, Treasury accelerated the redemption of some securities. With this early disinvestment, there was more cash in the Treasury on a particular day than was needed on that day, with the result that there would be sufficient cash on hand to honor checks which Treasury anticipated would be presented within the next few days as well.

This action was severely criticized by Senator Moynihan and others, but was supported by, among others, GAO as a reasonable

exercise of authority as long as it was not intended to permit the payment of general federal obligations.¹

The Office of Legal Counsel (OLC) at Justice offered a preliminary view on this practice in October 1985 that,

"... the Secretary of the Treasury has discretion as to the methods of disinvesting from the funds so long as the amount disinvested is used to pay the obligations of the fund. The change in timing of the disinvestment may be a reasonable cash management technique, particularly in light of the overriding need to avoid default."

With these funds disinvested, Treasury has more cash available, and may then issue new debt in an equal amount, still within the limit. Of course, the trust funds lose interest as a result.

Some have argued that Treasury could disinvest the trust funds and other government accounts entirely, with these redeemed amounts then to be used to permit payment of general U.S. obligations. The OLC opinion appears to contradict this view, arguing that disinvestment is appropriate only at the time and in the amount necessary to make beneficiary payments (or payment of other trust fund obligations). Treasury agrees with this position.

3. Not so Routine Debt Management.

When a debt ceiling/budget deal impasse was reached with the Hill in November 1983, two other possible actions to delay a debt ceiling crisis were considered and, for then at least, rejected: issuing instructions to the Federal Reserve Board as to which classes of checks to pay when the amount of checks presented exceeds Treasury's cash balance, and deferring outlays (i.e., the issuance of checks) under the authority of the Improvement Control Act and the President's inherent authority to execute the laws.

In his letter to the Secretary of the Treasury, dated November 9, 1983, Fed Chairman Volcker stated that:

-- Federal Reserve Banks may disburse funds upon order of the Treasury only against deposits in the Treasury account;

¹Beginning in 1985, Congress appropriated amounts to the trust funds for lost interest. Congress has also enacted amendments that provide for the automatic restoration of lost interest for the Civil Service Retirement Fund and the Thrift Savings Fund.

- if deposits are inadequate to cover the checks received, the Fed would have no alternative other than to refuse or delay payment in whole or in part;
- in the absence of instructions from Treasury, the Fed would delay all payments until sufficient balances are available to honor all payments orders reaching it on a particular day.

He then asked Treasury either to delay enough payment orders, with whatever priority determined by Treasury, to ensure that orders reaching the Fed banks would not exceed available deposit balances, or to provide the Fed banks with instructions or priorities of payment in a manner that the Fed banks could enforce operationally. In response, the Treasury view was that it has no authority nor expertise to provide such guidance on the priority of payment, and no authority to delay orders.

On the President's authority to defer outlays under the Impoundment Control Act (ICA), the Attorney General stated in a letter to the Senate Majority Leader on November 11, 1983 that he did not wish to test that power:

"This is not to say that no power exists under the Act to defer outlays; however, serious questions can be raised as to the existence of that power under the Act, and any assertion of that power will almost certainly result in extensive and complex litigation whose outcome could remain in doubt for extended periods of time."

He concluded that:

"Given ... the unresolved nature of the legal authority to withhold payment of obligations under these circumstances, I am authorized to advise you that the Administration has determined that it will continue to issue checks and will not seek to defer outlays should the Congress fail to act to avert this crisis."

In October 1985, the Office of Legal Counsel addressed a broad range of actions available to the executive branch to forestall default on U.S. obligations. In this memo, the Acting Assistant Attorney General quotes the Attorney General's November 1983 letter, and states that in light of the legal analysis in the OLC opinion,

"... we caution that the tone of the Attorney General Smith's letter may have somewhat understated both the President's power under the ICA and his inherent power in the event of a debt crisis. ... [W]e are concerned that any communication to Congress under the current circumstances not state or too

strongly suggest that such powers are legally unavailable to the President. The President, or some future President, may find it necessary to assert and utilize such powers in order to ameliorate a crisis into which the country would be plunged by a failure of Congress to raise the debt limit."

The Acting AAG's memo reviews the President's authority under the ICA to defer not just obligations but expenditure of budget authority for both discretionary and entitlement programs. He concludes that,

"... the withholding of expenditure (i.e., the withholding of authority to make an outlay to pay for a lawful obligation by failure to issue a check) would appear to be an impoundment under [the ICA] definition. ... We believe therefore that the deferral provisions of the ICA represent a grant of deferral authority to the President which he can exercise to defer expenditures to forestall a debt ceiling crisis."

The Acting AAG also suggested that such authority could be exercised through across-the-board percentage deferrals or more selective deferrals targeted at particular programs, particularly if done in a manner that furthers Congressional priorities.

The OLC opinion also addresses the President's inherent power to defer expenditures to avoid default. This is an exception to the general rule that the President does not possess inherent authority to impound:

"... because the President would be faced with conflicting statutory demands, to comply with the direction to spend yet not exceed the debt limit, he would be justified in refusing to spend obligated funds."

This strategy of deferral was considered more extensively in October 1985 than in prior debt ceiling crises. The President was advised of the deferral option in a memo from Director Miller, and a draft implementing "Memorandum to Heads of Agencies" was prepared but never sent.

cc: Barry Anderson
Robert Kilpatrick

Shutdown update

Telecon. Chris Shrader

Aggs. gen'l consults -
how to start planning for S.C. crisis
CS - not to worry.

DC business gets managed differently.
Are there constraints on obligs + outlays that
wt be imposed by pres directive -
as cash management strategy.

Decision is presidential.

No ag. has auth to make detailed decision.
No statute that must be complied w/.

→ how to get him this paycheck
to the next?

at what sort of constraints on his
auth? Talk tomorrow.

↳
Early 80s - DOT offered the view - DOT
didn't have/auth to honor some + disburse
others.

Now did Pres have auth to freeze.
OCC - to DOT - be cautious. NOT nec. true
that P's auth is ltd.

P faces conflicting obligs (to spend / to
stay within dc) - maybe auth really by -
to resolve conflict in way thought
appropriately.

Skyles bill - picks up on CW that Pres
doesn't have much auth to prioritize.
Proposes to give P. That authority.
No hearings yet.
→ Tactical option - put Pres on hold.

Judgment on P. Slucy -
behave as tho hands were tied on
as tho have some options, tho full.

Existing auth of
P under
impoundment control
← Ari Fitzgerald
Ann Teach.

On spec (no one asked to do)

Go over
w/ WD
tomorrow

CS Retirement Trust Fund - disinvestment.
legit interp.
Secy could declare debt issuance suspension
period - of 15 mos.

If facts are right - reas person must
conclude real poss of impasse of 15 mos.
auth disinv. of fund in and not to
exceed the amt nec to pay benefits
40h. in borrowing auth.

Zero leg. history.
Concocted in a conference - out of the blue.
Cory just trying to set up crisis mgmt tool/bk

how long
we can't go
into what he
another requires
obligations.

this fund? But that's not what they did.
Utterly silent on what prompts, DISP.

announcement of

Clear / per tentious decision.

- DOT Harris asked for opinion from DOT now.
- Maybe they'll ask + we'll provide.
Want to keep options open.

All breaking is Trust Fund as of the total
Political judgment.

Telecon Chris Schrader

More talk abt debt ceiling
than abt shutdown
↓

not much content re this.

only probing - Kasich -

trying to say that doesn't commit Admin
to close down what it says it has to.

WIC - why not health exception?

so p. should blame Pres if WIC funds not
delivered.

per services only /
also can't pay no mtr what.

Also - only a 1/4 of
govt - so much is
non-discretionary etc.
Rivlin - #s are wrong.

Treas. aunts from SS
1985 - disinvested trust funds
couple of months.

was going to anyway a few days
later

More often - not invested new receipts.

Aug 5 - Poi to
Darius

AR - yes, some div. inv.
one option -
everyone hopes
never have to
use. Need to direct
to Bob Rubin.

CALL

Barry Anderson -
received request
for plans on Friday.

Kasich

Ken definitely wants
contingency plans.

(Kasich / Dominici both
asked for actual plans.

→ Rivlin said not ready.
Assumption - see plans soon.
~~when ready, would be~~

~~sent copy~~

ask people to ask w/out
compensation
↑ (non-expected)

This is for volunteers ↓

De minimus exception

Expenses that are not metered + small

Util balls / base rate of teleph serv.

Not - taxi cab

- long distance calls.

Can't keep
on computers,
etc.

~~De minimus~~

True, way to avoid (don't come to work), but...

LOTS depends on This -

DOD military plan depends on This.

Samuel Najjar Wilson - 202-358-2046

Financial for
JOC?

Bruce Reed 46515

as Retirement Trust Fund
STAT works by so as
perhaps to allow dis-
investment

b7c b, or so.